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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 342

[Docket No. RM00–11–000]

Five-Year Review of Oil Pipeline Pricing Index

Issued December 14, 2000.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Order concluding initial five-year review of the oil pipeline pricing index.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is issuing this final order concluding its five-year review of the oil pricing index, established in Order No. 561, Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992, FERC Stats. & Regs. [Regs. Preambles, 1991–1996] ¶ 30,985 (1993). After consideration of all the initial and reply comments, the Commission has concluded that the PPI–1 index has reasonably approximated the actual cost changes in the oil pipeline industry during the preceding five year period, and that it should be continued for the subsequent five year period. At the end of this period, in July 2005, the Commission will once again review the index to determine whether it continues to measure adequately the cost changes in the oil pipeline industry.

FOR FURTHER INFORMATION CONTACT: Harris S. Wood, Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. (202) 208–0224.

SUPPLEMENTARY INFORMATION:

Order Concluding Initial Five-Year Review of the Oil Pipeline Pricing Index

Before Commissioners: James J. Hoecker, Chairman; William L. Massey, Linda Breathitt, and Curt Hebert, Jr.

Issued December 14, 2000.

On July 27, 2000, the Commission issued a notice of inquiry (NOI) in this proceeding on its five-year review of the oil pricing index.[1] The oil pricing index was established in Order No. 561, Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992.[2] The Commission invited comments regarding the results of its review of the Producer Price Index for Finished Goods minus one percent (PPI–1) as an index to measure actual cost changes in the oil pipeline industry.[3]

For the reasons appearing below, the Commission affirms that the PPI–1 index has closely approximated the actual cost changes in the oil pipeline industry as reported in FERC Form No. 6, and concludes that this index continues to satisfy the mandates of the Energy Policy Act of 1992.[4]

Background

This is the first of the Commission's five-year reviews of the effectiveness of the oil price index established in Order No. 561. As the Commission stated in Order No. 561, the selection of the PPI–1 was not necessarily a choice for all time. The Commission recognized that its responsibilities, to both shippers and pipelines, required it to monitor the relationship between the change in the PPI–1 index and the actual cost changes experienced by the industry. The Commission undertook to review the effectiveness of the index every five years.

In Order No. 561–A, the Commission reaffirmed its decision to use the annual change in the PPI–1 index to establish rate ceilings under the indexing system, and renewed its commitment to review this decision every five years, beginning with the year 2000.[5] The Commission's adoption of the PPI–1 was affirmed by the U.S. Court of Appeals for the District of Columbia Circuit on May 10, 1996.[6] Wide-ranging arguments were raised by both pipelines and shippers with respect to the Commission's determination to use the PPI–1 index as the proper index. For example, the Association of Oil Pipelines (AOPL) argued that the Gross Domestic Product—Implicit Price Deflator (GDP–IPD) should be used. The court determined that AOPL had failed to show why the Commission's rejection of the GDP–IPD in any way was arbitrary or capricious.[7] AOPL also challenged the Commission's decision to use the PPI–1 rather than simply the PPI. The court found that the Commission had ample evidence to support its determination.[8] Shippers, on the other hand, argued that the Commission erred in deciding to index all pipeline costs without adequately considering the option of selectively indexing only those costs driven by inflation. The court determined that the Commission had fully articulated reasoned grounds for its choice of a full rather than a selective indexing scheme.[9] As the Commission found in Order No. 561, application of the PPI–1 to the total rate was a better measure of pipelines' cost experience.[10] Moreover, the Commission found that selective indexing would be more complex and difficult to administer.[11] Finally, the Commission stated that selective indexing could create incentives for pipelines to reduce their capital investments in pipelines.[12] The court upheld the Commission in all respects on its choice of an index and the application of that index to the total rate of the pipelines, and cited with approval the Commission's determination to review the index formula after five years' experience.[13]

[1] FERC Stats. & Regs. [Notices] ¶ 35,536 (2000).

[2] Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act, FERC Stats. & Regs. [Regs. Preambles, 1991–1996] ¶ 30,985 (1993), 58 F.R. 58753 (Nov. 4, 1993); *order on reh'g*, Order No. 561–A, FERC Stats. & Regs. [Regs. Preambles, 1991–1996] ¶ 31,000 (1994), 59 F.R. 40243 (Aug. 8, 1994), *affirmed*, Association of Oil Pipelines v. FERC, 83 F.3d 1424 (D.C. Cir. 1996).

[3] Excluding the Trans-Alaska Pipeline System (TAPS).

[4] 42 U.S.C.A. 7172 note (West Supp. 1993).

[5] FERC Stats. & Regs. [Regs. Preambles, 1991–1996] ¶ 31,000 (1994) at 31,009.

[6] Association of Oil Pipelines v. FERC, 83 F.3d 1424 (1996).

[7] 83 F.3d at 1435.

[8] *Id.*

[9] 83 F.3d at 1436.

[10] Order No. 561 at 30,951–52.

[11] *Id.* at 30,952.

[12] *Id.*

[13] 83 F.3d at 1437, 1445.

Comments and Reply Comments

Comments on the NOI were filed by AOPL, an unincorporated trade association of 56 common carrier oil pipelines, whose member companies transport nearly 80 per cent of the crude oil and petroleum products that moves by pipeline in the United States; jointly by Sinclair Oil Corporation, Crown Central Petroleum Corporation, Lion Oil Company and Tesoro Petroleum Company, Inc. (Sinclair); the Canadian Association of Petroleum Producers, a trade association representing approximately 165 producers in Canada; Equilon Pipeline Company LLC (Equilon); Williams Pipeline Company (Williams); and Platte Pipe Line Company. Reply comments were filed by AOPL, Sinclair, the Canadian Association of Petroleum Producers and Alberta Department of Resource Development (jointly, CAPP), and by Colonial Pipeline Company (Colonial). The issues raised in these comments are discussed below.

Issues

Staff's study presented a review of the effectiveness of the change in the PPI–1 index [14] as an index to measure actual cost changes in the oil pipeline industry. The Commission stated in the NOI, it appeared that, based on Staff's review, the changes in the PPI–1 index have closely approximated the changes in the reported cost data for the oil pipeline industry during the five-year period covered by this review. In light of Staff's review, the Commission elicited comments from interested parties on this review.

AOPL presented comments and a study and testimonial declaration by Dr. Alfred E. Kahn, and recommended that the Commission utilize the PPI, rather than PPI–1, as the index to govern oil pipeline rate changes in the next five years.[15] Sinclair, on the other hand, presented comments and a study by Professor F.M. Sherer, and concluded that the appropriate index should be PPI–2.[16]

Several of the commenters raised miscellaneous issues which are not relevant to the inquiry in this proceeding. Such miscellaneous issues include the extent of exceptions to the indexing methodology, constraints proposed in considering cost-of-service and market-based ratemaking, revision and simplification of complaint procedures, and the effectiveness of the index to deal with anticipated but unknown future cost changes in the industry. These issues are for other proceedings and will not be discussed herein.

The primary issues raised by the commenters and replies to those comments are set forth in detail, followed by the Commission's discussion and conclusions. In summary, those issues are:

1. Study Methodology Using Year-to Year Changes in Annual Weighted Average Cost

2. Adequacy of the Number of Pipelines Included in the Study

3. Adequacy of Costs Considered in Staff's Study

4. The Index of Choice

Discussion

This discussion begins by reciting AOPL's initial comments, including the testimony of Dr. Alfred E. Kahn, and Sinclair's reply comments, including the testimony of Professor F.M. Sherer, regarding use of the PPI–1 as the oil pipeline index. All other parties who commented on the relevant issue made essentially the same points or made comments that were not relevant in our review of the adequacy of the index to reflect industry cost changes.[17] The initial comments of Sinclair are essentially the same as contained in its reply comments. Likewise, the reply comments of AOPL reflect its views expressed in its initial comments. Issues raised concerning the choice of the PPI–1 index and the timing of future review of the index in the initial and reply comments of CAPP, Colonial, Platte, Williams and Equilon are also discussed.

1. Study Methodology Using Year-to Year Changes in Annual Weighted Average Cost

In its review Staff examined the year-to-year percent changes in the annual weighted average cost of the oil pipeline industry, each pipeline firm's cost being weighted by its share of the total barrel-miles shipped during that year. Staff compared those changes with the year-to-year percent changes in the PPI–1 index. Staff made the comparison after adjusting the period during which the index changes occurred to match the period for which the cost data were available.[18] Staff then computed a simple average of those year-to-year percent changes and compared the two averages.

AOPL argues that Staff erred in focusing on the year-to-year changes in the annual weighted average cost of the entire pipeline industry. AOPL maintains this is the main error in Staff's analysis, accounting for most of the difference between AOPL's and Staff's results. AOPL asserts that the correct measure of costs to be examined is the (weighted or unweighted) average of the year-to-year changes in each pipeline firm's annual costs.[19] AOPL claims that the determination must be made between the two methods as to which provides the better measure of industry costs: change in the average of the entire industry, or the average of the cost changes of the individual members of the industry.[20] AOPL supports its position by presenting a hypothetical example in which each pipeline firm's costs increase from one year to the next but the industry weighted average cost goes down.[21]

AOPL further asserts that Staff should have used the geometric (also known as cumulative) average for calculating average annual rates of change rather than the arithmetic average. AOPL argues that what really matters is the change over the five-year period, represented by the geometric average, rather than the simple, or arithmetic, average of year-to-year changes. It supports this with a simple example showing how the two measures differ.[22]

In reply, Sinclair states that AOPL's study focuses mainly on individual company cost index changes that happened between two discrete years, from the 1994 base year to the 1999 terminal year, in effect ignoring everything that happened in the intervening years. Sinclair contends that by doing so, AOPL overlooks the multi-year averaging process that occurs under a price cap regulation scheme.[23] Sinclair claims that the AOPL study applies fixed original year (1994) barrel mileage for computing the barrel-mile-weighted averages for purposes or computing how

[14] The PPI represents the Producer Price Index for Finished Goods, also written PPI–FG. The PPI–FG is determined and issued by the Bureau of Labor Statistics, U.S. Department of Labor. Pursuant to 18 CFR Section 342.3(d)(2), ''The index will be calculated by dividing the PPI–FG for the calendar year immediately preceding the index year by the previous calendar year's PPI–FG, and then subtracting 0.01.'' Multiplying the rate ceiling on June 30 of the index year by the resulting number gives the rate ceiling for the year beginning the next day, July 1.

[15] AOPL Initial Comments, p.17. AOPL's recommendation was supported by Colonial, Equilon, Platte and Williams.

[16] Sinclair Reply Comments, p. 22.

[17] Some of these comments are discussed in connection with Issue No. 4 below.

[18] Converting the PPI to the twelve-month period from July1 to June 30.

[19] AOPL Comments, p. 6.

[20] Kahn Declaration, p. 8.

[21] Kahn Declaration, p. 7.

[22] AOPL Comments, p. 7.

[23] Sinclair Reply Comments, p. 7, Scherer Testimony, pp. 5 and 9–11.

costs have changed between 1994 and 1999. Sinclair states that as a result, AOPL ignores the cost savings that occur as volume moves away from high-cost pipelines and to lower-cost pipelines.[24] Further, Sinclair states that AOPL computes averages of the percentage changes of each individual company's costs from one time period to another, rather than computing the average changes in cost levels across the industry as the Commission Staff and Sinclair have done. Sinclair states that AOPL's approach places equal weight on the pipelines that experience large year-to-year cost changes as compared to pipelines with more modest cost changes and as a result AOPL accords relatively high weight to the pipelines that have been the least successful in controlling costs.[25] Sinclair claims that if it were to replicate AOPL's analysis of average changes in operating costs experienced by companies filing data in every year from 1994 to 1999, but exclude the extreme 5 percent of reporting companies and substitute 1999 weights in place of 1994 weights, the weighted average cost increase would be substantially closer to PPI–1 than to AOPL's suggested PPI.[26]

Discussion

AOPL argues that Staff's use of a weighted average of operating costs is not the appropriate measure of industry costs by which to evaluate the index's performance. The choice between Staff's method and AOPL's method depends on the meaning of ''actual cost changes experienced by the oil pipeline industry.'' [27] Staff has interpreted this phrase to mean actual year-to-year changes in the industry's average operating cost of transporting one barrel of oil or oil products one mile.[28] Comparing this with the index changes emphasizes the index's efficiency-promoting (*i.e.,* cost controlling) property, one of the characteristics the Commission cited as a benefit of using an indexing system.[29] In addition, an index that tracks reasonably well the industry's weighted average cost provides assurance that pipelines' prices to shippers are not rising faster or falling slower than the cost of shipping a substantial portion of all crude oil or products being transported. This protection of shippers from rate increases greater than a measure of the rate of inflation is another benefit of indexing cited by the Commission.[30]

AOPL has interpreted the objective of indexing to be choosing ''the indexation formula that appears, on the basis of past experience, best to reflect the changes in costs that *individual* pipeline companies might most reasonably be able to achieve.'' [31] Dr. Kahn also claims that the appropriate measure for indexing changes ''is not the change in industry costs'' despite the Commission's repeated use in Order No. 561 of the phrase ''actual cost changes experienced by the oil pipeline *industry*.'' [32] This interpretation provides the basis for AOPL's assertion that the correct measure of changes in the industry costs considers central tendencies in year-to-year changes in the costs of individual firms.[33]

AOPL also objects to Staff's use of the average of year-to-year changes in costs and the PPI–1 index to compare the index changes with the cost changes. AOPL argues that the change between the first and last years of the period being examined is better for comparing the index to industry costs than is the average used by Staff. As Sinclair has pointed out, however, AOPL has used 1994 barrel-miles weights in computing the weighted average costs for 1999 that it uses to measure the change between the two years. In addition, Sinclair notes that AOPL's method is a fixed-weight approach formerly used in the calculation of the Consumer Price Index but recently discarded. This change occurred because the fixed-weight approach ignored consumer substitution from high-priced goods to low-priced goods, consequently overestimating the amount of price inflation in the economy.[34]

Upon reviewing the initial and reply comments, the Commission concludes that the methodology used by Staff as reflected in the NOI is correct. Staff's approach gives more weight to the volumes and distances products are shipped by the pipeline industry, whereas AOPL gives equal weight to the year-to-year cost changes of each individual firm, regardless of the volume and distances products are shipped. Indeed, as Sinclair noted, AOPL's approach, when applied to a larger set of firms, yields results that more reasonably approximate the PPI–1 than the PPI as the proper index to use in determining the annual price ceiling.

AOPL attempts to support its use of pipeline-specific cost experience, as opposed to industry-wide, barrel-mile, weighted average costs, with a hypothetical example. In AOPL's hypothetical, a high cost pipeline, which inexplicably has much higher volumes than a less costly competitor, finds that its business naturally migrates to the lower cost competitor. Thus, even though both companies' costs may increase somewhat over time, the industry-wide, barrel-mile weighted costs will decrease as more business is now flowing to the more efficient firm. This is simply the natural working of the market forces at play, and does not show any distortion resulting from Staff's methodology for calculating the industry's cost experience in support of the PPI–1 index choice. In fact, such behavior is exactly the type that an appropriately chosen index would be expected to encourage.

The Commission finds that the barrel-mile, weighted average cost approach, is fully consistent with determining an industry-wide, generally applicable index mechanism that is fair to both transporters and shippers alike. In fact, to use AOPL's approach would inappropriately skew the index by giving unreasonable weight to higher cost, less efficient transporters that move only a fraction of the industry-wide volumes. It is natural that such less efficient, more costly individual firms may experience higher costs than the vast majority of companies for which the general index, supported by a weighted-average barrel-mile analysis, is appropriate.[35]

By emphasizing cost changes of individual firms rather than industry average cost changes, AOPL would raise the price ceiling and thereby enable more high-cost pipelines to become or remain profitable. In its comments on Order No. 561, AOPL supported a more generous index than the PPI–1 on the grounds that it would cover even the largest changes in costs and allow even the highest cost pipelines to cover their costs. In response to this argument we noted that ''[t]he role of an index is to accommodate normal cost changes. Its purpose is not to guarantee recovery of

[24] Sinclair Reply Comments, pp. 7–8, Scherer Testimony, pp. 5 and 11–12.

[25] Sinclair Reply Comments, p. 8, Scherer Testimony, pp. 5 & 13–14.

[26] Sinclair Reply Comments, p. 9.

[27] Order No. 561 at 30,941, 30,950.

[28] Staff actually scaled its analysis to report average cost per thousand barrel-miles rather than one barrel-mile.

[29] Order No. 561 at 30,948 and n. 37.

[30] Order No. 561 at 30,948–49.

[31] AOPL Initial Comments, p. 6; Kahn Declaration, p. 8. Emphasis added.

[32] See, *e.g.,* Order No. 561 at pages 30,941 and 30,950. Emphasis added.

[33] *Id.*

[34] Scherer Testimony, p. 12.

[35] Any outlier company, which experiences higher costs than the vast majority for whom the index is appropriate, always has the option, however, of filing for a cost of service increase to initiate a general rate proceeding, if it can demonstrate that there is a substantial divergence between the actual costs experienced by the pipeline and the indexed ceiling rate such that the indexed ceiling rate would preclude the pipeline from being able to charge a just and reasonable rate. *See* 18 CFR § 342.4 (2000).

all costs at any time and in full, regardless of other circumstances. Even competitive markets do not do this.'' [36]

Sinclair, on the other hand, argued that the Commission should adopt the PPI–2 or at most PPI–1.5 as the index for determining oil pipeline rates for the next five years.[37] Support for that assertion appears weak, however. In fact, Sinclair's own expert, Professor Scherer, is lukewarm on the idea. Professor Sherer in fact concludes his initial statement by saying,'' ''[A]lthough aggregate expense per barrel-mile fluctuated from year to year, in part because of changes in the volume of crude oil or product transported, the PPI(FG)–1 approach performed well in relating operators' costs to automatically authorized rate increases.''[38] He then states, ''From the industry's recent experience in raising pipeline throughput and labor productivity, an argument might be sustained for twisting the ratchet a bit tighter—*e.g.,* increasing the annual PPI offset from 1.0 to, *e.g.,* 1.5 percentage points.''[39] He provides no facts to support why the ratchet should be twisted tighter. In fact, in his reply comments, he repeats ''the conclusion of my previous statement—that the PPI–1 approach performed well in relating operators' costs to automatically authorized rate increases.''[40] Sinclair therefore does not have a sufficient basis for increasing the -1 factor to -1.5 or -2. Therefore, we conclude that the study methodology contained in the Staff's review is appropriate.

2. Adequacy of the Number of Pipelines Included in the Study

Staff's review uses as much information as possible from the available data based on FERC Form No. 6. Data were unavailable for some firms in some years. For example, a missing barrel-miles report for a particular firm in one year would drop that firm out of the data set for that year. However, Staff included that firm in its computations for each year containing valid data for the firm. As a result, Staff's data set contained a varying number of firms during the years 1994 through 1999.

AOPL argues that Staff, in its review, should not use pipeline firms for which data were available for some years and missing for others. AOPL limited its analysis to pipeline firms for which data were available for the entire period being examined.[41] AOPL asserts that Staff's review fails to account for the possibility of outliers, namely, pipeline firms whose costs or cost changes are much too low or much too high because of some anomaly, such as a reporting error, an extraordinary expense or a shift of costs from one year to the next. AOPL adjusts its data set (year-to-year changes in each individual firm's cost) to account for possible outliers by using both the middle 80 percent and the middle 50 percent of pipeline firms (excluding the 10 percent and 25 percent, respectively, of pipelines having the largest cost changes and the 10 percent and 25 percent, respectively, of pipelines having the smallest cost changes).[42]

Sinclair asserts in reply that because AOPL's study is based entirely on those companies that filed Form No. 6 data in every single year from 1994 to 1999, its data base is seriously flawed.[43] Sinclair states that AOPL's database does not include previously existing companies that merged into other companies or new companies that have come about as a result of mergers or sell-offs. Sinclair states that the companies that disappeared as a result of a merger were smaller higher cost operators that were not included in the database until after the merger as part of a pipeline that existed over the entire 1994–1999 period. As a result, Sinclair contends that this overstates the weighted average change experienced by post-merger pipelines when compared to the same pipelines before the merger. Sinclair states that pipelines carrying 97.8 percent of pre-merger barrel-mile traffic acquired pre-merger companies with costs 4.26 times of the acquiring pipeline companies, resulting in the acquiring companies' post-merger barrel-mile weighted costs increasing 7.2 percent.[44]

Sinclair contends that the AOPL study suffers from another major flaw in that AOPL's conclusions regarding changes in operating costs are based on companies that transported as little as 67 percent of the total miles transported by the industry in 1999. Sinclair states that this is the result of AOPL excluding 50 percent of the industry from its study.[45]

Sinclair states that it replicated AOPL's analysis with variations in sample size and barrel-mile coverage to show the sensitivity of the AOPL study to these variables and how with minor changes in these variables AOPL's methodology produces operating cost changes that are far closer to PPI–1 than to PPI. In the first of three computations, Sinclair states that it followed AOPL and used the average changes in operating costs experienced by companies filing data in every year from 1994 to 1999, but excluded only the extreme 5 percent of reporting companies and substituted 1999 weights in place of 1994 weights. As a result, 89.8 percent of the barrel miles transported by the industry in 1999 were included. The study resulted in a weighted average annual percentage change in operating costs of 0.28 percent. Sinclair contends this result is substantially closer to the PPI–1 (0.17 percent) than to the PPI (1.17 percent).[46]

In its second analysis, Sinclair used all companies that reported data in both 1994 and 1999, added Unocal Pipeline Company (Unocal) and Exxon Pipeline Company (Exxon) to its database because both companies conducted much of their business in the continental U.S. in addition to Alaska (and therefore were not subject to the TAPS exclusion), and used 100 percent of the companies rather than 95 percent. This analysis captures 94.2 percent of the barrel-miles and results in a weighted average annual percentage change in operating costs of 0.19 percent.[47] Sinclair's third analysis, was the same as its second except for omitting the 5 percent most extreme values. This included 93.7 percent of the barrel miles and resulted in a weighted average annual percentage change in operating costs of 0.22 percent.[48]

Discussion

In its review, Staff considered all firms having valid data for at least one year during 1994 through 1999. The resulting data set differs from that used by AOPL in two important ways. First, it uses much more of the information available from the entire Oil Pipeline Research Institute (OPRI)[49] data set than does AOPL's. Second, the number of firms whose costs are used varies from year to year. AOPL criticizes Staff for including firms that do not have cost-per-barrel-mile figures for every year from 1994 through 1999.

AOPL's concern with Staff's use of firms for whom cost data are not reported in all years between 1994 and 1999 inclusive is misplaced. Exclusion

[36] Order No. 561–A, p. 31,097. Footnote 25 on that page quotes Dr. Kahn saying essentially the same thing in his original testimony that case.

[37] *See* Sinclair Initial Comments, p. 37.

[38] Scherer Initial Testimony, p. 16.

[39] *Id.*

[40] Sherer Further Testimony, p. 25.

[41] AOPL Comments, p. 7.

[42] Kahn Declaration, pp. 11–12.

[43] Sinclair Reply Comments, pp. 5–6.

[44] Sinclair Reply Comments, p. 6, Scherer Testimony pp. 4–5 and 7.

[45] Sinclair Reply Comments, pp. 8–9.

[46] Sinclair Reply Comments, pp. 9–10.

[47] Sinclair Reply Comments, p. 10.

[48] Sinclair Reply Comments, pp.10–11.

[49] *See* NOI at 35,765, n. 16.

of a number of firms who are absent in one or more years is ignoring valuable information. As Sinclair has noted, AOPL has failed to account for mergers, spin-offs and new entrants during the period. This may lead, for example, to an existing firm's costs being ignored prior to its acquisition by another firm, the consequence being that industry average costs may appear to change when in fact they have not. Regardless, the exclusion of firms biases upward AOPL's reported cost changes.

AOPL has ignored information in a second way. So as to avoid being influenced by outliers (data that are extreme and thus may unduly affect the outcome), after AOPL has limited its data set as described above, it limits its review to the ''middle fifty percent'' and the ''middle eighty percent'' of its sample by excluding the ''upper and lower'' observations.[50] AOPL apparently did so symmetrically, removing as many firms from the upper side of the distribution as from the lower. As we describe below, narrowing the data set as AOPL has done and using its cost-change method dramatically increases the resultant cost changes from those determined by using a complete or nearly complete data set.

AOPL's own work suggests that as more and more of those omitted observations are included, the weighted-average change in operating cost declines.[51] Sinclair confirms that decline by expanding the set of observations to include ninety-five percent of the appropriate firms and finding cost changes much closer to the changes in PPI–1 than in PPI.[52]

Dropping outliers from a data distribution is a common technique to deal with the possible distortion they might impart to measures of its central tendency. The median of a data distribution is unchanged by dropping the same number of observations from the high end of the distribution as from the low end. Looking at the median, then, suggests that increasing or decreasing the number of outliers has little effect on the information available from the data set. In this case, however, the information available from the narrowed distribution varies substantially with the number of observations that are discarded as outliers.

In its analysis presented in the NOI, Staff excluded TAPS pipelines from its data set, including pipeline activity of Exxon and Unocal in the lower forty-eight states. To account for this omission, Staff included the operating costs and barrel-miles for those two companies in the contiguous forty-eight states and recalculated its results. The only resultant change appeared in the industry average cost per barrel-mile, which rose slightly from −0.47 percent to −0.43 percent.

Staff has redone its analysis using AOPL's method of excluding observations from the analysis on a data set enlarged to include every firm for which two consecutive years of cost data appeared at least once. Staff considered four cases: the entire distribution of changes for each of the five two-year periods, the middle 90 percent, the middle 80 percent and the middle 50 percent of the five distributions. These four cases provide two significant results regarding the effects of narrowing the data sets under consideration. First, reducing the initial data set to only those firms present in all years causes the weighted average of cumulative cost changes to increase. Second, as the number of observations dropped from the available distribution increases (*i.e.,* the number of observations remaining for analysis decreases), the weighted average of cumulative cost changes increases. This effect is particularly strong as the observations available for analysis decline from 90 percent to 80 percent of all observations, although AOPL's initial comments demonstrate this for the change from 80 percent to 50 percent.[53]

We are persuaded that taking full advantage of the available information is the proper path to take. Narrowing the set of observations may be appropriate if it is not possible to quantify the entire population in the analysis, so that a sample must be drawn to make the needed calculations. For example, the pollution levels in a contaminated landfill site are determined through sampling, not by analyzing every cubic yard of dirt in the landfill. In the present case, however, we are not required to sample. We can work with the complete data set without sampling. Using all available data is consistent with Order No. 561 to review the experience of the entire oil pipeline industry and not limit the review to some portion of it. In addition, the systematic changes that arise from narrowing the data set are troubling. We see no compelling reason to engage in a practice that is unnecessary and appears not to be neutral in its effect on our review.

3. Adequacy of Costs Considered in Staff's Review

In completing its review of historical changes in industry costs, the Staff used operating expenses as reported by pipelines in FERC Form No. 6.[54] Operating expenses consist of operations expenses (*i.e.,* salaries and wages, supplies and expenses, outside services, operating fuel and power, and oil losses and shortages); maintenance expenses (*i.e.,* salaries and wages, supplies and expenses, outside services, and maintenance materials); and general expenses (*i.e.,* salaries and wages, supplies and expenses, outside services, rentals, depreciation and amortization, pensions and benefits, insurance, casualty and other losses and pipeline taxes). Staff used these costs in its review because they include both operating expenses incurred during the relevant year and charges for amortization and depreciation for that year.[55]

AOPL points out that the data Staff uses are operating costs as reported in FERC Form No. 6, which includes depreciation but excludes other capital costs, especially return on investment and income taxes. AOPL argues that this is an important omission.[56]

Sinclair argues that the AOPL study computes a new index of costs that include not only operating expenses as defined in FERC Form No. 6, but also the current year's net additions to the depreciated book value of plant and equipment. Sinclair contends this approach violates generally accepted accounting principles.[57]

Discussion

AOPL contends that Staff should have recognized return on investment and income taxes. AOPL itself, however, did not include a cost component that was associated with return on investment and income taxes. Rather AOPL's witness Dr. Kahn used an alternate method to approximate the costs associated with return on investment and income taxes. To account for these two components of cost, Dr. Kahn calculated the change in the net plant account for petroleum pipelines (*i.e.,* computing the change in carrier property less accrued depreciation). This computation was used in addition to the change in operating costs to arrive at the change in costs from one year to another. Neither AOPL nor Dr. Kahn

[50] Kahn, Declaration, p. 12.

[51] Kahn, Declaration, Table 4.

[52] Sinclair Reply Comments, pp.10–11.

[53] Kahn Declaration, Table 4, rows (1) and (5), column (d).

[54] Operating expenses were taken from FERC Form No. 6, page 304, line 22, column m.

[55] NOI at 35,765.

[56] AOPL Comments, p. 8.

[57] Sinclair Reply Comments, p. 8, Scherer Testimony pp. 5 and 16–17.

support why using the change in net plant would approximate an oil pipeline's cost associated with return on investment and income taxes.

Order No. 561 required that the FERC Form No. 6 information be used to determine the cost changes experienced by the industry. However, FERC Form No. 6 does not include any cost figures associated with a pipeline's return on investment and income taxes. A pipeline's cost-of-service is made up of costs associated with operation, maintenance, depreciation and amortization, taxes, and return on rate base of which undepreciated value of carrier plant, or net plant, is the major component. However, only operation and maintenance and general expense (which includes depreciation and amortization) are included in FERC Form No. 6. AOPL proposes to approximate the other two cost-of-service items by measuring the change in net plant. Unlike the four cost-of-service items, net plant represents an asset account rather than an expense account item.

AOPL recognizes that depreciation and amortization is a measure of capital costs. The amortization and depreciation amounts listed in FERC Form No. 6 are based upon the carrier property used by Dr. Kahn in his calculation to approximate return on investment and taxes. As a result, an increase in net plant from one year to another should be matched by an increase in the depreciation expense and amortization associated on that plant. Likewise a decrease in net plant from one year to the next should be matched by a decrease in depreciation expense and amortization associated on that plant. Net plant is also the main component used to determine a pipeline's rate base that is used to compute return and taxes associated with return. As a result, an increase or decrease in a company's net plant would be reflected in the return on investment and associated taxes. Thus, depreciation expense and amortization, return, and taxes all measure a pipeline's capital investment. All three of these capital cost components differ from net plant in that: (1) they represent an expense amount rather than an asset amount, and (2) each represents only a fraction of the amounts represented by net plant. Depreciation and amortization expense represents the portion of depreciable assets allocated to expense each year. This allocation process is done over the estimated service lives of assets. Return is the cost associated with a pipeline's investment in rate base, of which net plant is the major component. Return is derived by multiplying rate base by a rate of return expressed as a percentage. Taxes are computed based upon the return.

The Commission is not persuaded by AOPL's arguments. The Commission finds that AOPL has not supported why a change in a pipeline's net plant can approximate a change in costs associated with return on investment and income taxes. Further, the Commission does not believe it appropriate to consider a pipeline's change in net plant from one year to another as a reasonable approximation of the change in costs associated with return on investment and income taxes. As discussed above the three capital cost components associated with net plant represent a small portion of this asset account. Thus, including net plant in an equation to determine a change in pipeline costs could unfairly weight any change in the capital portion of a pipeline's total costs. Therefore, the Commission finds that by using FERC Form No. 6 reported costs for operation and maintenance expenses (including depreciation expense), the majority of the dollars associated with a pipeline's cost-of-service components are being captured for the determination of the change in costs from year to year. This represents a more reasonable method than trying to approximate return and related income taxes based upon changes in net plant.

4. The Index of Choice

CAPP observes that the Energy Policy Act of 1992 required the Commission to establish a simplified and generally applicable ratemaking methodology for oil pipelines, consistent with the just and reasonable standards of the Interstate Commerce Act (ICA).[58] CAPP recognizes that to achieve this simplicity requires some tradeoff with accuracy. CAPP argues that a simple aggregate index would not be expected to be as accurate as a more detailed index that closely matched and tracked prices and costs on a component by component basis. CAPP concludes by stating that if a ''simple'' index is required, the PPI-based index is the most all-encompassing, simplest index available.[59]

CAPP states, however, that it has concerns regarding the ''general applicability'' of a PPI-based index. CAPP questions whether one simple index can be ''generally applicable'' when the pipeline industry does not have a normal distribution of companies in terms of size and performance, that is, the industry structure is very concentrated by its representation of a small number of very large firms.[60] CAPP suggests that the Commission review its constraint of having the same index for all pipelines. That is, the Commission could retain the same simple PPI-base index, but vary the reduction factor according to two or three broad industry groupings, to make the index more ''generally applicable.''[61]

CAPP asserts that any index-to-actual cost differences, or regulatory errors, should be borne by the party that also receives the biggest benefit—in this case, the pipeline companies. CAPP contends the index should err on the side that results in the pipelines undercharging, in order to ensure the users of the pipelines do not bear a disproportionate share of the regulatory cost burden.[62]

CAPP argues that since a pipeline's cost structure is not fully impacted by inflation, the cost base should not be fully indexed to inflation. CAPP also argues that an index approach can instill incentives to capture significant gains and costs reductions and these savings need to be reflected in rates. CAPP suggests that reducing the price index by a factor can be a mechanism to help keep rates in-line with underlying costs, without jeopardizing the underlying rationale or effect of the index methodology.[63]

CAPP asserts that a five-year period is too short to compute a trend analysis that is statistically sound and that provides conclusive findings. CAPP concludes by saying that any historical correlations or comparisons of pipeline costs and the PPI are as likely to reflect random coincidence as they are to reflect a statistically significant relationship. CAPP also expresses a concern that small differences can have significant absolute impacts since the value and volume of crude oil transported through oil pipelines is huge. CAPP suggests an alternative method for assessing the appropriateness of the PPI, *i.e.,* Commission review of the underlying components and definitions of various indexes available for comparison with the components of pipeline operating costs.[64]

CAPP claims pipeline companies have experienced significant cost

[58] 49 U.S.C. app. 1 (1988).

[59] CAPP Reply Comments, pp. 16–17.

[60] CAPP states it has not conducted an in-dept review of the numerous pipelines that file FERC Form No. 6. It states that it conducted a review of aggregated data reported annually in the Oil & Gas Journal. CAPP Reply Comments, pp. 12–13.

[61] CAPP Reply Comments, pp. 15–20.

[62] CAPP Reply Comments, p. 10.

[63] CAPP Initial Comments, p. 8.

[64] CAPP Initial Comments, pp. 6–7.

savings under deregulation but asserts the cost-savings have not been shared with the producer/shippers of these pipelines. CAPP suggests the Commission consider introducing a one-time adjustment to ensure that, over the next five years, rates will continue to reflect a pipeline's underlying cost structure and remain just and reasonable.[65]

Platte contends that the PPI–1 index has failed to track changes in its individual operating costs over the past five years. Because of future anticipated costs, Platte argues that the PPI alone would be better than PPI–1, which it asserts has failed to adequately track pipeline cost changes during the past five years. It therefore urges the Commission to adopt ''the PPI index proposed by AOPL.''[66]

Williams suggests that the Commission revisit the propriety of the index resulting from this five-year review after a period of three years because of the possibility that pipelines' cost will increase significantly in the next two or three years as measures are taken to mitigate health, safety and environmental risks and to comply with new laws and regulations.[67] Colonial also urges the Commission to consider the high probability ''that pipeline costs will increase more rapidly in the course of the next five years because of reliabililty and safety issues.''[68]

Equilon requests that an interim review of the index be performed prior to the 2005 review to determine whether the index has resulted in a revenue stream that has kept pace with increasing industry costs. In the absence of an interim review of the index, Equilon requests that a surcharge option be made available if the cost impact of pipeline safety legislation is both significant and pervasive.[69]

Discussion

We will not adopt the changes in the indexing methodology suggested by CAPP since similar issues were previously considered in the context of the proceeding which resulted in Order No. 561. Nor, as discussed above, will we adopt AOPL's and Platte's recommendation of substituting PPI for PPI–1. In Order No. 561, we recognized that it is inevitable that an indexing system will result in some divergence between the actual costs changes experienced by individual pipelines and the rate changes permitted by the index. This is because the indexing system utilizes average, economy-wide costs rather than pipeline specific costs to establish rate ceilings.[70]

In adopting the indexing methodology, the Commission established ''fail-safe'' procedures and exceptions to maintain a proper balance between the interests of pipelines and shippers under the just and reasonable standard of the ICA. The Commission adopted a comprehensive scheme which includes cost-of-service and settlement alternatives. A procedure was established for shippers to challenge rate changes that, while in compliance with applicable ceilings, are so substantially in excess of actual costs as to be unjust and unreasonable.[71] In addition, a shipper has the ability to file a complaint when it believes a pipeline's rates no longer meet the just and reasonable standard of the ICA.

The Commission in Order No. 561 rejected a suggestion that the index be applied to specific components of a rate because it could cause perverse and unintended consequences. The Commission concluded this would be complex and difficult to administer.[72] In this proceeding, CAPP raises the same issue by suggesting that the index be applied to selected cost components, those subject to inflation. For the reasons we stated in Order No. 561, we will not adopt CAPP's suggestion. CAPP suggests varying the reduction factor according to two or more industry groupings. This suggestion runs counter to the mandate of the Energy Policy Act of 1992 to establish a simplified and generally applicable ratemaking methodology for oil pipelines and we will not adopt it. Moreover, it would be complex and administratively burdensome. This would require selecting appropriate classification criteria for establishing groups, monitoring pipelines by category to determine into which group each pipeline falls each year, maintaining records on what reduction factor each pipeline is subject to in a given index year, and determining whether a pipeline's maximum ceiling rate comports with the requirements of the applicable index reduction factor. Use of different index reductions for different pipelines may provide an incentive for a pipeline to ensure that it would be placed in an industry group that produced the most favorable increase or smallest reduction in its rate ceiling.

Finally, we decline to adopt CAPP's suggestion that we require a one-time adjustment to ensure that rates over the next five years continue to reflect pipelines' costs. The purpose of our indexing methodology is to permit adjustment to ceiling rates based on historical not anticipated cost changes over some future period.

Similarly, we decline to adopt Equilon's suggestion that we implement a surcharge to cover anticipated environmental and safety costs. A pipeline company has the option of making a cost-of-service filing pursuant to 18 CFR §§ 342 and 346 upon showing that there is a substantial divergence between the actual costs experienced by the pipeline and the rate resulting from application of the index. The Commission's cost-of-service filing requirements provide an appropriate mechanism for pipelines to seek recovery in the event such costs are incurred. Conversely, a shipper has adequate protection during the five-year period because it can challenge a pipeline's indexed rate as excessive.

CAPP suggests that a review period of greater than five years is necessary to complete ''a trend analysis that is statistically sound that provides conclusive results.'' On the other hand, Williams and Equilon suggest that the next review of the index be done in less than five years. Based on the experience gained in completing this five-year review, the Commission concludes that five years is a reasonable period over which to complete an assessment of the performance of the index and achieves a reasonable balance between the interests of pipelines and shippers. A pipeline has the opportunity to make a cost-of-service filing within the five-year period if it believes its index rate is not sufficient.

Conclusion

After consideration of all the initial and reply comments, for the reasons set forth above, the Commission concludes that the PPI–1 index has reasonably approximated the actual cost changes in the oil pipeline industry during the preceding five year period, and that it should be continued for the subsequent five year period. At the end of this period, in July 2005, the Commission will once again review the index to determine whether it continues to measure adequately the cost changes in the oil pipeline industry.

[65] CAPP Reply Comments, p. 20.

[66] Platte Initial Comments, pp. 1–2.

[67] Williams Initial Comments, p. 3

[68] Colonial Reply Comments, p. 1.

[69] Equilon Initial Comments, p. 2.

[70] Order No. 561 at 30,949.

[71] Order No. 561–A at 31,101.

[72] Order No. 561 at 30,952. For example, the Commission stated it would likely require substantial revisions, and perhaps additions, to the Commission's regulations to identify and monitor those pipeline accounts that would be subject to the index, and those that would not. The additional work this would cause, to both the Commission and the industry, would undercut the policy of the Energy Policy Act of 1992, which is to reduce, not increase, regulatory burdens.

The Commission orders: The initial five-year review of the oil pipeline pricing index is concluded.

By the Commission.

David P. Boergers,

Secretary.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 172

[Docket No. 95F–0305]

Food Additives Permitted for Direct Addition to Food for Human Consumption; Polydextrose

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the safe use of polydextrose as a bulking agent, texturizer, or both in fruit and water ices. This action is in response to a petition filed by Pfizer, Inc.

DATES: This rule is effective December 20, 2000. Submit written objections and requests for a hearing by January 19, 2001.

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

FOR FURTHER INFORMATION CONTACT: Rosalie M. Angeles, Center for Food Safety and Applied Nutrition (HFS–206), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–418–3107.

SUPPLEMENTARY INFORMATION:

I. Introduction

In a notice published in the **Federal Register** of September 20, 1995 (60 FR 48716), FDA announced that a food additive petition (FAP 5A4478) had been filed by Pfizer, Inc., 235 East 42d St., New York, NY 10017–5755. Pfizer, Inc., subsequently announced the sale of the Pfizer Food Science Group and the transfer of the petition to Cultor Food Science, Inc., 430 Saw Mill River Rd., Ardsley, NY 10502. Recently, the petitioner announced a name change from Cultor Food Science, Inc., to Danisco Cultor America, Inc. (Danisco), to reflect the acquisition of the company by Danisco. The petition proposed to amend the food additive regulations in § 172.841 *Polydextrose* (21 CFR 172.841) to provide for the safe use of polydextrose as a bulking agent, texturizer, or both in fruit and water ices. Polydextrose is intended to replace all, or in part, fully-caloric ingredients to produce reduced- or lower-calorie and/or reduced- or lower-sugar fruit and water ices. The intent of this petitioned use is to enable manufacturers to formulate all types of frozen desserts, whether or not they contain dairy ingredients.

The proposed use level of polydextrose in fruit and water ices is 5 to 15 percent with the weighted mean use level estimated to be 10 percent. The petitioner claims that this use level makes possible the formulation of lower-calorie fruit and water ices that compare favorably with prototypes that contain no polydextrose. The petitioner claims that the 15 percent use level is technologically self-limiting because of less than optimum mouthfeel, increased iciness, unfavorable taste and reduced acceptability at higher levels. The petitioner submitted data from sensory studies to substantiate this claim.

II. Conclusions

FDA estimated that the mean chronic consumption of polydextrose from the proposed use in fruit and water ices is 0.1 gram per person per day (g/p/d). The agency considers this consumption insignificant compared to the estimated cumulative intake of polydextrose of 18 g/p/d from all currently regulated uses of the additive. Therefore, FDA concludes that there will be a negligible increase in dietary exposure to polydextrose from the issuance of this amendment to the regulation (Ref. 1).

FDA has evaluated data in the petition and other relevant material in its files. Based on this information, the agency concludes that: (1) The proposed food additive use is safe, (2) the additive will achieve its intended technical effect, and therefore, (3) the regulation in § 172.841 should be amended as set forth below.

In accordance with § 171.1(h) (21 CFR 171.1(h)), the petition and the documents that FDA considered and relied upon in reaching its decision to approve the petition are available for inspection at the Center for Food Safety and Applied Nutrition by appointment with the information contact person listed above. As provided in § 171.1(h), the agency will delete from the documents any materials that are not available for public disclosure before making the documents available for inspection.

An inadvertent error was made in the **Federal Register** of October 30, 2000 (65 FR 64604 at 64605) when ''dressings for salads'' was inadvertently combined with ''confections and frostings'' in § 172.841(c)(3). This document corrects that error in § 172.841 by designating ''dressings for salads'' as paragraph (c)(4) and redesignating paragraphs (c)(4) through (c)(11) as paragraphs (c)(5) through (c)(12).

III. Environmental Impact

In the notice of filing, FDA gave interested parties an opportunity to submit comments on the petitioner's environmental assessment. The agency received no comments in response to that notice.

The agency has carefully considered the potential environmental effects of this action. FDA has concluded that the action will not have a significant impact on the human environment, and that an environmental impact statement is not required. The agency's finding of no significant impact and the evidence supporting that finding, contained in an environmental assessment, may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday.

IV. Paperwork Reduction Act of 1995

This final rule contains no collection of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

V. Objections

Any person who will be adversely affected by this regulation may at any time file with the Dockets Management Branch (address above) written objections by January 19, 2001. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents are be submitted and are to be identified with the docket number found in

brackets in the heading of this document. Any objections received in response to the regulation may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

VI. References

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

1. Memorandum from Z. Olempska-Beer, Division of Product Manufacture and Use, FDA, to R. Angeles, Division of Product Policy, FDA, November 21, 1995.

List of Subjects in 21 CFR Part 172

Food additives, Reporting and recordkeeping requirements.

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

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

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

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

2. Section 172.841 is amended by revising paragraph (c) to read as follows:

§ 172.841 Polydextrose.

* * * * *

(c) Polydextrose is used in accordance with current good manufacturing practices as a bulking agent, formulation aid, humectant, and texturizer in the following foods when standards of identity established under section 401 of the act do not preclude such use:

(1) Baked goods and baking mixes (restricted to fruit, custard, and pudding-filled pies, cakes, cookies, and similar baked products);

(2) Chewing gum;

(3) Confections and frostings;

(4) Dressings for salads;

(5) Film coatings on single and multiple vitamin and mineral supplement tablets;

(6) Frozen dairy desserts and mixes;

(7) Fruit and water ices;

(8) Fruit spreads;

(9) Gelatins, puddings and fillings;

(10) Hard and soft candy;

(11) Peanut spread;

(12) Sweet sauces, toppings, and syrups;

(13) Tablespreads.

* * * * *

Dated: December 12, 2000.

Janice F. Oliver,

Deputy Director, Center for Food Safety and Nutrition.

[FR Doc. 00–32376 Filed 12–19–00; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 8913]

RIN 1545–AW71

Guidance Under Section 355(d); Recognition of Gain on Certain Distributions of Stock or Securities

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to recognition of gain on certain distributions of stock or securities of a controlled corporation. These final regulations affect corporations and their shareholders. These regulations reflect the enactment of section 355(d) of the Internal Revenue Code by the Omnibus Budget Reconciliation Act of 1990.

DATES: *Effective Date:* These regulations are effective December 20, 2000.

Applicability Date: These regulations apply to distributions occurring after December 20, 2000, except they do not apply to distributions occurring pursuant to a written agreement which is (subject to customary conditions) binding on December 20, 2000, and at all times thereafter.

FOR FURTHER INFORMATION CONTACT: Michael N. Kaibni, (202) 622–7550 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On May 3, 1999, the IRS and Treasury issued a notice of proposed rulemaking (REG–106004–98) in the **Federal Register** (64 FR 23554) setting forth rules under section 355(d) of the Internal Revenue Code relating to the recognition of gain on certain distributions of stock or securities of a controlled corporation. Generally, section 355(d) requires recognition of gain on a distribution of stock or securities of a controlled corporation (Controlled) (as though the Controlled stock or securities were sold to the distributee at its fair market value) if, immediately after the distribution, any person holds disqualified stock of the distributing corporation (Distributing) or of any distributed Controlled that constitutes a 50 percent or greater interest. Disqualified stock is stock in Distributing acquired by purchase after October 9, 1990, and during the five-year period (taking into account section 355(d)(6)) ending on the date of distribution (the five-year period), or Controlled stock either (1) acquired by purchase during the five-year period or (2) distributed with respect to either disqualified Distributing stock or on Distributing securities acquired by purchase during the five-year period. No public hearing regarding these proposed regulations was held. Written comments to the notice were received. After consideration of all the comments, the proposed regulations are adopted as revised by this Treasury decision. The principal revisions are discussed below.

Explanation of Revisions and Summary of Comments

1. Purposes of Section 355(d) Not Violated

Generally, Congress intended section 355(d) to prevent taxpayers from using section 355 to dispose of subsidiaries in sale-like transactions, or to obtain a fair market value stepped-up basis for future dispositions, without incurring a corporate level tax. See H.R. Rep 101–881, at 341 (1990). Under proposed § 1.355–6(b)(3), section 355(d) does not apply to a distribution that does not violate its purposes (the purpose exception). As proposed, the purpose exception applies if the effect of the distribution and any related transaction is that a disqualified person neither increases an interest in Distributing or Controlled nor obtains a purchased basis in Controlled stock. A *disqualified person* is any person that, immediately after a distribution, holds disqualified stock in Distributing or Controlled that constitutes a 50 percent or greater interest (under section 355(d)(4) and proposed § 1.355–6(c)). The proposed regulations define *purchased basis* as basis in Controlled stock that is disqualified stock, unless the Controlled stock and the Distributing stock on which the Controlled stock is distributed are treated as acquired by purchase solely under the attribution rules of section 355(d)(8) and proposed § 1.355–6(e)(1). Commentators have expressed concern that certain distributions of stock may technically constitute disqualified distributions under the proposed regulations, yet do not appear to violate the purposes of section 355(d). Section 1.355–6(b)(3) has

been expanded and clarified in the final regulations to prevent the application of section 355(d) in the case of certain transactions that do not violate its purposes. (Under the final regulations, certain references to stock include securities.) The revisions are explained below.

a. Technical Clarification of Disqualified Person

The definition of ''disqualified person'' in the proposed regulations could be read to include persons who hold disqualified stock in Distributing or Controlled but who did not directly or indirectly purchase that stock. This could result in certain distributions that should not violate the purposes of section 355(d) nevertheless being disqualified distributions. The final regulations clarify that the term ''disqualified person'' includes only a person that meets that definition because of its own purchase of ''disqualified stock'' (or who receives stock in Controlled with respect to stock that the person purchased).

b. Related Transactions

Commentators suggested that some ''related acquisitions'' of stock in Distributing or Controlled prior to or following a distribution should not be taken into account in determining if the purpose rule applies. The IRS and Treasury agree that in many cases a related acquisition that increases a disqualified person's interest in Distributing or Controlled should not be taken into account. In addition, the IRS and Treasury are concerned that the proposed regulations could be interpreted to allow taxpayers, by relying on certain other related transactions, to avoid section 355(d) inappropriately, where a distribution of stock, if viewed independently, would constitute a disqualified distribution. For example, where a distribution of Controlled stock to a Distributing shareholder constitutes a disqualified distribution, a subsequent but related distribution of that stock should not have the effect of ''cleansing'' the prior disqualified distribution. Based on these concerns, and a belief that other provisions of the final regulations will adequately address the effect of related transactions (*e.g.,* the anti-avoidance provision, § 1.355–6(b)(4)), the final regulations remove the reference to related transactions in the purpose rule.

c. Fractional Shares

Some commentators requested that de minimis increases in interest in the stock of Distributing or Controlled should be disregarded in determining whether the purpose rule applies. The final regulations provide that an issuance of cash in lieu of fractional shares is disregarded in applying the purpose exception.

2. Disqualified Stock

Generally, under the proposed regulations, disqualified stock is any stock in Distributing or Controlled acquired by purchase during the five-year period and any Controlled stock received in a distribution to the extent attributable to distributions on any stock in Distributing acquired by purchase during the five-year period. The definition of disqualified stock has been modified in the final regulations. The final regulations provide that stock of Distributing or Controlled that is acquired by a purchase within the five-year period (including such stock treated as indirectly acquired by purchase under section 355(d)(8) or § 1.355–6(e)(1), (2), (3) or (4) of the final regulations) ceases to be acquired by that purchase if the basis resulting from the purchase is eliminated. Basis in the stock of a corporation (or in an interest in another entity) is eliminated if (and when) it would no longer be taken into account by any person in determining gain or loss on a sale or exchange of any stock of such corporation (or an interest in the other entity). Basis is not eliminated, however, if it is allocated between stock of two corporations under § 1.358–2(a).

For example, under the proposed regulations, a direct purchase by Distributing of all of the stock in Controlled, followed by a distribution of the Controlled corporation stock is a disqualified distribution. Under the final regulations, because the distribution of Controlled will result in an elimination of the basis that resulted from Distributing's purchase of Controlled stock, the Controlled stock would no longer be treated as purchased. The Controlled stock is therefore not disqualified stock and the distribution of Controlled would not be a disqualified distribution. Further, any purchases of stock of lower tier subsidiaries of Controlled that arise under section 355(d)(8) as a result of Distributing's purchase of Controlled also would cease to be treated as purchased when Distributing's basis in Controlled is eliminated. Thus, in the example above, if Controlled has a subsidiary that would have been deemed purchased by Distributing when Distributing purchased the Controlled stock, the stock of that subsidiary would cease to be treated as purchased when Distributing's basis in Controlled is eliminated.

In general, basis of stock resulting from a purchase also is treated as eliminated if such stock is transferred to another person in an exchange or other transfer to which § 1.355–6(e)(2) or (3) (relating to carryover basis and exchange basis transactions) applies. The elimination of basis as a result of the transfer, however, does not affect the deemed purchase under § 1.355–6(e)(2) or (3) that arises as a result of the transfer. Thus, for example, if A purchases Controlled stock and subsequently transfers that stock to Distributing in a reorganization qualifying under section 368(a)(1)(B) in exchange for Distributing stock, A's basis in Controlled is eliminated. Under § 1.355-6(e)(3), A is deemed to purchase the Distributing stock on the date A purchased the Controlled stock. The elimination of A's basis in Controlled does not affect A's deemed purchase of its stock in Distributing (*i.e.,* A's exchanged basis in its Distributing stock resulting from its deemed purchase of that stock is not eliminated). Also, Distributing is deemed under § 1.355–6(e)(2) to have purchased the Controlled stock on the date A purchased the Controlled stock. The elimination of A's basis in Controlled does not affect the deemed purchase by Distributing of the Controlled stock (*i.e.,* Distributing's carryover basis in its Controlled stock resulting from its deemed purchase of that stock is not eliminated).

Under section 355(d)(3)(b)(ii) and § 1.355–6(b)(2)(i)(B)(*2*), disqualified stock includes Controlled stock received in exchange for Distributing stock acquired by purchase. In a split-off or split-up, the distributee shareholder will exchange its stock in Distributing for Controlled stock in an exchange described in § 1.355–6(e)(3). Technically, under the basis elimination rule, this would cause the Distributing stock held by such shareholder to no longer be treated as ''acquired by purchase'' at the time of the distribution. As a result, the distributed Controlled stock would not be received in exchange for Distributing stock ''acquired by purchase,'' and thus, would not be disqualified stock. In order to prevent this result, § 1.355–(6)(b)(2)(iii)(B)(*3*) provides that basis resulting from a purchase of Distributing stock that is exchanged for Controlled stock is not eliminated notwithstanding that § 1.355–6(e)(3) applies to the exchange.

The modified definition of disqualified stock eliminates the need for the ''purchased interest no longer held'' rule of § 1.355–6(b)(3)(iv) of the proposed regulations, since transactions that result in the purchased interest no

longer being held also will result in an elimination of basis. Accordingly, that paragraph has been deleted. Examples have been added illustrating the effect of the changes discussed.

3. Purchase

Section 355(d)(5) provides that, with certain exceptions, a purchase means any acquisition, but only if (1) the basis of the property acquired in the hands of the acquirer is not determined in whole or in part by reference to the adjusted basis of such property in the hands of the person from whom acquired, or under section 1014(a), and (2) the property is not acquired in an exchange to which section 351, 354, 355 or 356 applies. The proposed regulations follow the statutory definition of a purchase and provide examples of both purchase and non-purchase acquisitions. See § 1.355–6(d).

a. Section 338

An example in the proposed regulations illustrates that if a section 338 election is made pursuant to an acquisition of stock, the stock acquired is treated as purchased for purposes of section 355(d)(5)(A) (See § 1.355–6(d)(1)(iii) *Example 2*). The example further illustrates that any stock held by the acquired target (and deemed sold to new target) also is purchased stock. The final regulations provide that stock acquired in a qualified stock purchase with respect to which a section 338 election (or a section 338(h)(10) election) is made is not treated as purchased for purposes of section 355(d)(5)(A). However, the final regulations retain the rule that any stock held by old target that is treated as purchased by new target is treated as acquired by purchase for purposes of section 355(d)(5)(A) (unless a section 338 election or 338(h)(10) election also is made with respect to that purchase).

b. Partnerships

Section 1.355–6(d)(2)(v)(A) of the final regulations clarifies that an acquisition of stock (or an interest in another entity) by a partner pursuant to the liquidation of a partnership interest is a purchase of the stock (or other interest) acquired at the time of the liquidation of the partnership. Under § 1.355–6(d)(2)(v)(B) of the final regulations, if the adjusted basis of stock (or an interest in another entity) held by a partnership is increased under section 734(b), a proportionate amount of the stock (or other interest) will be treated as purchased at the time of the basis adjustment. The amount purchased is determined by reference to the amount of the basis adjustment over the fair market value of the stock (or other interest) at the time of the adjustment.

c. Transfers of Cash, Cash Items, Marketable Stock and Debt of the Transferor

i. *Transferred With Respect to an Active Trade or Business.* Under section 355(d)(5)(B), a purchase includes any acquisition of property in an exchange to which section 351 applies to the extent the property is acquired in exchange for any cash or cash item, any marketable stock or security, or any debt of the transferor. The proposed regulations provide certain exceptions to purchase treatment under section 355(d)(5)(B). An acquisition of stock in exchange for any cash or cash item, marketable stock or debt of the transferor in a section 351 transaction generally is not a purchase if the transferor transfers the items as part of an active trade or business and the transferred items do not exceed the reasonable needs of the trade or business (the active business exception). See § 1.355–6(d)(3)(iv). The proposed regulations require, in part, that the transferee continue the active conduct of the trade or business. Commentators have expressed concern that this requirement would prevent a retransfer of the assets to a lower tier corporation within the same affiliated group. In § 1.355–6(d)(3)(iv)(4)(E), the final regulations clarify that a transfer of assets does not fail to meet the active business exception solely because the transferee transfers the assets to another member of the transferee's affiliated group if the requirements for the active business exception in § 1.355–6(d)(3)(iv)(A)(1), (2), (3) and (4) would be met it the transferor had transferred the assets directly to the final transferee.

ii. *Transfers Between Members of the Same Affiliated Group.* Under the proposed regulations, an acquisition of stock in exchange for any cash or cash item, marketable stock or security, or debt of the transferor in a section 351 transaction is generally not a purchase if the transferor corporation or corporations, the transferee corporation (whether formed in the transaction or already existing), and any distributed controlled corporation of the transferee corporation are members of the same affiliated group as defined in section 1504(a) before the section 351 transaction (if the transferee corporation is in existence before the transaction). See § 1.355-6(d)(3)(v) for additional requirements. The final regulations clarify that the cash or cash item, marketable stock or security, or debt of the transferor that is transferred must not have been acquired from a nonmember in a related transaction in which section 362(a) or (b) applies to determine the basis in the acquired assets. Examples in the final regulations have been modified to reflect this clarification. See § 1.355–6(d)(4)(iii) and (d)(5)(iii) illustrating the effects of a forward and reverse triangular merger, respectively. The final regulations also eliminate the requirement that distributed controlled corporations be a member of the group before the section 351 transaction.

iii. *Certain Section 355 and Section 305 Distributions.* Under § 1.355–6(d)(1)(i)(B) of the proposed regulations, stock acquired in a distribution to which section 355 applies, whether in exchange for stock or pro rata, is not a purchase within the meaning of section 355(d). The final regulations in § 1.355–6(e)(4) modify this rule to provide that if a distributing corporation distributes any stock of a controlled corporation with respect to recently purchased distributing stock in a distribution that qualifies under section 355, the stock is deemed to be acquired by purchase by the distributee on the date the distributee acquired the recently purchased distributing stock. For this purpose, recently purchased distributing stock is stock in the distributing corporation acquired by purchase (determined without regard to the attribution rules of section 355(d)(8) and § 1.355–6(e)(1)) by the distributee during the five-year period with respect to that distribution. A similar rule is added with respect to distributions of stock under section 305(a) to the extent section 307(a) applies to determine the recipient's basis.

4. Whether a Person Holds a 50 Percent or Greater Interest

a. Exchanged Basis Rule and Plan or Arrangement

Section 1.355–6(c) of the proposed regulations provides rules for determining if a person holds a 50 percent or greater interest in Distributing or Controlled. Under section 355(d)(7)(B) and § 1.355–6(c)(4), if two or more persons act pursuant to a plan or arrangement with respect to acquisitions of stock or securities in Distributing or Controlled, those persons are treated as one person for purposes of section 355(d). A rule has been added to the final regulations clarifying the application of this rule in the context of an exchanged basis transaction with respect to purchased stock. If two or more persons do not act pursuant to a plan or arrangement with respect to an acquisition of stock in a corporation (the first corporation), a

subsequent exchange basis acquisition will not result in such persons being treated as one person, even if the acquisition of the second corporation's stock is pursuant to a plan or arrangement. An example has been added illustrating the effect of this rule.

b. Options

Section 1.355–6(c)(3) of the proposed and final regulations generally provides that options outstanding when the distribution occurs are treated as exercised when issued or last transferred if two criteria are met. First, the deemed exercise would cause a person to be a disqualified person. Second, immediately after the distribution, taking into account all the facts and circumstances, it is reasonably certain the option will be exercised. Commentators suggested that the ''reasonably certain to be exercised'' test be replaced with a ''principal purpose to avoid section 355(d)'' standard patterned on the regulations under section 382. The IRS and Treasury continue to believe, however, that the more objective standard of the proposed regulations is appropriate.

In response to a comment, the final regulations exclude from the definition of options cash settlement options, phantom stock, stock appreciation rights, and national principal contracts. However, to the extent that such instruments are exercisable into stock, they still would be subject to the deemed exercise rule of the final regulations under § 1.355–6(c)(3)(v) as an ''other instrument that provides for the right to purchase, issue, redeem, or transfer stock.'' The final regulations have also added a rule for substituted options treating the substituted option as issued on the date the original option was issued.

5. Statistical Sampling

Under § 1.355–6(f)(1) of the proposed regulations, a distributing corporation must determine whether a disqualified person holds its stock or the stock of any distributed controlled corporation. Under § 1.355–6(f)(4), a distributing corporation may, absent actual knowledge with regard to a particular shareholder, presume that no less-than-five-percent shareholder of a corporation acquired stock or securities by purchase during the five-year period. In § 1.355–6(f)(5) *Example 3,* the final regulations clarify that application of statistical sampling procedures to estimate the basis of shares acquired in certain reorganizations does not have the effect of giving actual knowledge of a purchase of stock beyond the sample group.

6. Administrative Remedies

A comment urged the adoption of various forms of administrative relief from the recognition of gain in a disqualified distribution. The suggested forms of relief included the issuance of private letter rulings granting tax free treatment in appropriate cases, gain recognition agreements, stock basis waivers, or some combination of the above. Section 355(d) applies at a specific time (at the time of the disqualified distribution) and requires Distributing to recognize gain as if it had sold Controlled at its fair market value at that time. Accordingly, the IRS and Treasury Department do not believe that it would be appropriate to adopt any of these administrative relief provisions. Basis reduction or gain recognition agreements could result in either a complete avoidance or a deferral of gain recognition. Moreover, the IRS and Treasury do not believe that granting exceptions to section 355(d) by private letter ruling is appropriate. However, the final regulations include a new provision stating that the Commissioner may provide by guidance published in the Internal Revenue Bulletin that other distributions are not disqualified distributions because they do not violate the purposes of section 355(d).

Special Analyses

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

Drafting Information

The principal author of these regulations is Michael N. Kaibni of the Office of the Associate Chief Counsel (Corporate). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

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

Section 1.355–6 also issued under 26 U.S.C. 355(d)(9). * * *

Par. 2. Section 1.355–0 is amended by revising the section heading, adding introductory text, removing the existing entry for § 1.355–6, and adding new entries for § 1.355–6 to read as follows:

§ 1.355–0 Table of contents.

To facilitate the use of §§ 1.355–1 through 1.355–6, this section lists the following major paragraphs in those sections:

* * * * *

§ 1.355–6 Recognition of gain on certain distributions of stock or securities in controlled corporation.

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(1) Examples.
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(3) Distributing securities.
(4) Marketable securities.
(b) General rules and purposes of section 355(d).
(1) Disqualified distributions in general.
(2) Disqualified stock.
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(iii) Exceptions.
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(B) Deemed purchase eliminated.
(C) Elimination of basis.
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(*2*) Special rule for transferred and exchanged basis property.
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(D) Special rule if basis allocated between two corporations.
(3) Certain distributions not disqualified distributions because purposes of section 355(d) not violated.
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(iii) Purchased basis.
(iv) Increase in interest because payment of cash in lieu of fractional shares.
(v) Other exceptions.
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(c) Whether a person holds a 50 percent or greater interest.
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(i) Application.
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(iii) Options deemed newly issued and substituted options.
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(iv) Effect of treating an option as exercised.
(A) In general.
(B) Stock purchase agreement or similar arrangement.
(v) Instruments treated as options.
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(C) Certain stock conversion features.
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(E) Rights of first refusal.
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(1) In general.
(i) Definition of purchase under section 355(d)(5)(A).
(ii) Section 355 distributions.
(iii) Example.
(2) Exceptions to definition of purchase under section 355(d)(5)(A).
(i) Acquisition of stock in a transaction which includes other property or money.
(A) Transferors and shareholders of transferor or distributing corporations.
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(*2*) Exception.
(B) Transferee corporations.
(*1*) In general.
(*2*) Exception.
(C) Examples.
(ii) Acquisition of stock in a distribution to which section 305(a) applies.
(iii) Section 1036(a) exchange.
(iv) Section 338 elections.
(A) In general.
(B) Example.
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Par. 3. Section 1.355–6 is revised to read as follows:

§ 1.355–6 Recognition of gain on certain distributions of stock or securities in controlled corporation.

(a) *Conventions*—(1) *Examples.* For purposes of the examples in this section, unless otherwise stated, assume that P, S, T, X, Y, N, HC, D, D1, D2, D3, and C are corporations, A and B are individuals, shareholders are not treated as one person under section 355(d)(7), stock has been owned for more than five years and section 355(d)(6) and paragraph (e)(4) of this section do not apply, no election under section 338 (if available) is made, and all transactions described are respected under general tax principles, including the step transaction doctrine. No inference should be drawn from any example as to whether any requirements of section 355 other than those of section 355(d), as specified, are satisfied.

(2) *Five-year period.* For purposes of this section, the term five-year period means the five-year period (determined after applying section 355(d)(6) and paragraph (e)(4) of this section) ending on the date of the distribution, but in no event beginning earlier than October 10, 1990.

(3) *Distributing securities.* For purposes of determining if stock of any controlled corporation received in the distribution is disqualified stock described in section 355(d)(3)(B)(ii)(II) (relating to a distribution of controlled corporation stock on any securities in the distributing corporation acquired by purchase during the five-year period), references in this section to stock of a corporation that is or becomes a distributing corporation includes securities of the corporation. Similarly, a reference to stock in paragraph (c)(4) of this section (relating to a plan or arrangement) includes securities.

(4) *Marketable securities.* Unless otherwise stated, any reference in this section to marketable stock includes marketable securities.

(b) *General rules and purposes of section 355(d)*—(1) *Disqualified distributions in general.* In the case of a disqualified distribution, any stock or securities in the controlled corporation shall not be treated as qualified property for purposes of section 355(c)(2) or 361(c)(2). In general, a disqualified distribution is any distribution to which section 355 (or so much of section 356 as relates thereto) applies if, immediately after the distribution—

(i) Any person holds disqualified stock in the distributing corporation that constitutes a 50 percent or greater interest in such corporation; or

(ii) Any person holds disqualified stock in the controlled corporation (or, if stock of more than one controlled corporation is distributed, in any controlled corporation) that constitutes a 50 percent or greater interest in such corporation.

(2) *Disqualified stock*—(i) *In general. Disqualified stock* is—

(A) Any stock in the distributing corporation acquired by purchase during the five-year period; and

(B) Any stock in any controlled corporation—

(*1*) Acquired by purchase during the five-year period; or

(*2*) Received in the distribution to the extent attributable to distributions on any stock in the distributing corporation acquired by purchase during the five-year period.

(ii) *Purchase.* For the definition of a purchase for purposes of section 355(d) and this section, see section 355(d)(5) and paragraph (d) of this section.

(iii) *Exceptions*—(A) *Purchase eliminated.* Stock (or an interest in another entity) that is acquired by purchase (including stock (or another interest) that is treated as acquired by purchase under paragraph (e)(2), (3), or (4) of this section) ceases to be acquired by that purchase if (and when) the basis resulting from the purchase is eliminated. For purposes of this paragraph (b)(2)(iii), basis resulting from the purchase is basis in the stock (or in an interest in another entity) that is directly purchased during the five-year period or that is treated as acquired by purchase during such period under paragraph (e)(2), (3), or (4) of this section.

(B) *Deemed purchase eliminated.* Stock (or an interest in another entity) that is deemed purchased under section 355(d)(8) or paragraph (e)(1) of this section shall cease to be treated as purchased if (and when) the basis resulting from the purchase that effects the deemed purchase is eliminated.

(C) *Elimination of basis*—(*1*) *General rule.* Basis in the stock of a corporation (or in an interest in another entity) is eliminated if (and when) it would no longer be taken into account by any person in determining gain or loss on a sale or exchange of any stock of such corporation (or an interest in the other entity). Basis is not eliminated, however, if it is allocated between stock of two corporations under § 1.358–2(a).

(*2*) *Special rule for transferred and exchanged basis property.* Basis of stock (or an interest in another entity) resulting from a purchase (the first purchase) is eliminated if (and when) such stock (or other interest) is subsequently transferred to another person in an exchange or other transfer to which paragraph (e)(2) or (3) of this section applies (the second purchase). The elimination of basis in stock (or in another interest) resulting from the first purchase, however, does not eliminate the basis resulting from the second purchase in the stock (or other interest) that is treated as acquired by purchase by the acquirer in a transaction to which paragraph (e)(2) of this section applies or by the person making the exchange in a transaction to which paragraph (e)(3) of this section applies.

(*3*) *Special rule for Split-offs and Split-ups.* Under section 355(d)(3)(B)(ii) and paragraph (b)(2)(i)(B)(*2*) of this section, disqualified stock includes controlled corporation stock received in exchange for distributing corporation stock acquired by purchase. Solely for purposes of determining whether controlled corporation stock received in a distribution in exchange for distributing corporation stock is disqualified stock described in that section and paragraph immediately after the distribution, paragraph (b)(2)(iii)(C)(*2*) of this section does not apply to the exchange to eliminate basis resulting from a purchase of that distributing corporation stock (notwithstanding that paragraph (e)(3) of this section applies to the exchange).

(D) *Special rule if basis allocated between two corporations.* If the shareholder of a distributing corporation, pursuant to § 1.358–2, allocates basis resulting from a purchase between the stock of two or more corporations then, following such allocation, the determination of whether such basis has been eliminated shall be made separately with respect to the stock of each such corporation.

(3) *Certain distributions not disqualified distributions because purposes of section 355(d) not violated*—(i) *In general.* Notwithstanding the provisions of section 355(d)(2) and this paragraph (b), a distribution is not a disqualified distribution if the distribution does not violate the purposes of section 355(d) as provided in this paragraph (b)(3). A distribution does not violate the purposes of section 355(d) if the effect of the distribution is neither—

(A) To increase ownership (combined direct and indirect) in the distributing corporation or any controlled corporation by a disqualified person; nor

(B) To provide a disqualified person with a purchased basis in the stock of any controlled corporation.

(ii) *Disqualified person.* A disqualified person is any person (taking into account section 355(d)(7) and paragraph (c)(4) of this section) that, immediately after a distribution, holds (directly or indirectly under section 355(d)(8) and paragraph (e)(1) of this section) disqualified stock in the distributing corporation or controlled corporation that—

(A) The person—

(*1*) Acquired by purchase under section 355(d)(5) or (8) and paragraphs (d) and (e) of this section during the five-year period, or

(*2*) Received in the distribution to the extent attributable to distributions on any stock in the distributing corporation acquired by purchase under section 355(d)(5) or (8) and paragraphs (d) and (e) of this section by that person during the five-year period; and

(B) Constitutes a 50 percent or greater interest in such corporation (under section 355(d)(4) and paragraph (c) of this section).

(iii) *Purchased basis.* In general, a purchased basis is basis in controlled corporation stock that is disqualified stock. However, basis in controlled corporation stock that is disqualified stock will not be treated as purchased basis if the controlled corporation stock and any distributing corporation stock with respect to which the controlled corporation stock is distributed are treated as acquired by purchase solely under the attribution rules of section 355(d)(8) and paragraph (e)(1) of this section. The prior sentence will not apply, however, if the distributing corporation stock is treated as acquired by purchase under the attribution rules as a result of the acquisition of an interest in a partnership (the purchased partnership), and following the distribution, the controlled corporation stock is directly held by the purchased partnership (or a chain of partnerships that includes the purchased partnership).

(iv) *Increase in interest because of payment of cash in lieu of fractional shares.* Any increase in direct or indirect ownership in the distributing corporation or any controlled corporation by a disqualified person because of a payment of cash in lieu of issuing fractional shares will be disregarded for purposes of paragraph (b)(3)(i)(A) of this section if the payment of the cash is solely to avoid the expense and inconvenience of issuing fractional share interests, and does not represent separately bargained for consideration.

(v) *Other exceptions.* The Commissioner may provide by guidance published in the Internal Revenue Bulletin that other distributions are not disqualified distributions because they do not violate the purposes of section 355(d).

(vi) *Examples.* The following examples illustrate this paragraph (b)(3):

Example 1. Stock distributed in spin-off; no purchased basis. D owns all of the stock of D1, and D1 owns all the stock of C. A purchases 60 percent of the D stock for cash. Within five years of A's purchase, D1 distributes the C stock to D. A is treated as having purchased 60 percent of the stock of both D1 and C on the date A purchases 60 percent of the D stock under the attribution rules of section 355(d)(8) and paragraph (e)(1) of this section. The C stock received by D is attributable to a distribution on purchased D1 stock under section 355(d)(3)(B)(ii). Accordingly, the D1 and C stock each is

disqualified stock under section 355(d)(3) and paragraph (b)(2) of this section, and A is a disqualified person under paragraph (b)(3)(ii) of this section. However, the purposes of section 355(d) under paragraph (b)(3)(i) of this section are not violated. A did not increase direct or indirect ownership in D1 or C. In addition, D's basis in the C stock is not a purchased basis under paragraph (b)(3)(iii) of this section because both the D1 and the C stock are treated as acquired by purchase solely under the attribution rules of section 355(d)(8) and paragraph (e)(1) of this section. Accordingly, D1's distribution of the C stock to D is not a disqualified distribution under section 355(d)(2) and paragraph (b)(1) of this section.

Example 2. Stock distributed in spin-off; purchased basis. The facts are the same as *Example 1,* except that D immediately further distributes the C stock to its shareholders (including A) pro rata. The D and C stock each is disqualified stock under section 355(d)(3) and paragraph (b)(2) of this section, and A is a disqualified person under paragraph (b)(3)(ii) of this section. The purposes of section 355(d) under paragraph (b)(3)(i) of this section are violated. A did not increase direct or indirect ownership in D or C. However, A's basis in the C stock is a purchased basis under paragraph (b)(3)(iii) of this section because the D stock is not treated as acquired by purchase solely under the attribution rules of section 355(d)(8) and paragraph (e)(1) of this section. Accordingly, the further distribution is a disqualified distribution under section 355(d)(2) and paragraph (b)(1) of this section.

Example 3. Stock distributed in split-off with ownership increase; purchased basis. The facts are the same as *Example 1,* except that D immediately further distributes the C stock to A in exchange for A's purchased stock in D. The C stock received by A is attributable to a distribution on purchased D stock under section 355(d)(3)(B)(ii), and A's basis in the C stock is determined by reference to the adjusted basis of A's purchased D stock under paragraph (e)(3) of this section. (Under paragraph (b)(2)(iii)(B)(*3*) of this section, the basis resulting from A's purchase of D stock is not eliminated solely for purposes of determining if the C stock acquired by A is disqualified stock immediately after the distribution, notwithstanding that paragraph (e)(3) of this section applies to the exchange.) Accordingly, the D stock and the C stock each is disqualified stock under section 355(d)(3) and paragraph (b)(2) of this section, and A is a disqualified person under paragraph (b)(3)(ii) of this section. The purposes of section 355(d) under paragraph (b)(3)(i) of this section are violated because A increased its ownership in C from a 60 percent indirect interest to a 100 percent direct interest, and because A's basis in the C stock is a purchased basis under paragraph (b)(3)(iii) of this section. Accordingly, the further distribution is a disqualified distribution under section 355(d)(2) and paragraph (b)(1) of this section.

Example 4. Stock distributed in spin-off; purchased basis. D1 owns all the stock of C. D purchases all of the stock of D1 for cash. Within five years of D's purchase of D1, P acquires all of the stock of D1 from D in a section 368(a)(1)(B) reorganization that is not a reorganization under section 368(a)(1)(A) by reason of section 368(a)(2)(E), and D1 distributes all of its C stock to P. P is treated as having acquired the D1 stock by purchase on the date D acquired it under the transferred basis rule of section 355(d)(5)(C) and paragraph (e)(2) of this section. P is treated as having purchased all of the C stock on the date D purchased the D1 stock under the attribution rules of section 355(d)(8) and paragraph (e)(1) of this section, and the C stock received by P is attributable to a distribution on purchased D1 stock under section 355(d)(3)(B)(ii). Accordingly, the D1 and C stock each is disqualified stock under section 355(d)(3) and paragraph (b)(2) of this section, and P is a disqualified person under paragraph (b)(3)(ii) of this section. The purposes of section 355(d) under paragraph (b)(3)(i) of this section are violated. P did not increase direct or indirect ownership in D1 or C. However, P's basis in the C stock is a purchased basis under paragraph (b)(3)(iii) of this section because the D1 stock is not treated as acquired by purchase solely under the attribution rules of section 355(d)(8) and paragraph (e)(1) of this section. Accordingly, D1's distribution of the C stock to P is a disqualified distribution under section 355(d)(2) and paragraph (b)(1) of this section.

Example 5. Stock distributed in split-off with ownership increase; no purchased basis. P owns 50 percent of the stock of D, the remaining D stock is owned by unrelated persons, D owns all the stock of C, and A purchases all of the P stock from the P shareholders. Within five years of A's purchase, D distributes all of the C stock to P in exchange for P's D stock. A is treated as having purchased 50 percent of the stock of both D and C on the date A purchases the P stock under the attribution rules of section 355(d)(8) and paragraph (e)(1) of this section. The C stock received by P is attributable to a distribution on purchased D stock under section 355(d)(3)(B)(ii). Accordingly, the D stock and the C stock each is disqualified stock under section 355(d)(3) and paragraph (b)(2) of this section, and A is a disqualified person under paragraph (b)(3)(ii) of this section. The purposes of section 355(d) under paragraph (b)(3)(i) of this section are violated because, even though P's basis in the C stock is not a purchased basis under paragraph (b)(3)(iii) of this section, A increased its direct or indirect ownership in C from a 50 percent indirect interest to a 100 percent indirect interest. Accordingly, D's distribution of the C stock to P is a disqualified distribution under section 355(d)(2) and paragraph (b)(1) of this section.

Example 6. Stock distributed in split-off with no ownership increase; no purchased basis. A purchases all of the stock of T. T later merges into D in a section 368(a)(1)(A) reorganization and A exchanges its purchased T stock for 60 percent of the stock of D. D owns all of the stock of D1 and D2, D1 and D2 each owns 50 percent of the stock of D3, and D3 owns all of the stock of C. Within five years of A's purchase of the T stock, D3 distributes the C stock to D1 in exchange for all of D1's D3 stock. A is treated as having acquired 60 percent of the D stock by purchase on the date A purchases the T stock under paragraph (e)(3) of this section. A is treated as having purchased 60 percent of the stock of D1, D2, D3, and C on the date A purchases the T stock under the attribution rules of section 355(d)(8) and paragraph (e)(1) of this section. The C stock received by D1 is attributable to a distribution on purchased D3 stock under section 355(d)(3)(B)(ii). Accordingly, the D3 stock and the C stock each is disqualified stock under section 355(d)(3) and paragraph (b)(2) of this section, and A is a disqualified person under paragraph (b)(3)(ii) of this section. However, the purposes of section 355(d) under paragraph (b)(3)(i) of this section are not violated. A did not increase direct or indirect ownership in D3 or C, and D1's basis in the C stock is not a purchased basis under paragraph (b)(3)(iii) of this section because the D3 stock is treated as acquired by purchase solely under the attribution rules of section 355(d)(8) and paragraph (e)(1) of this section. Accordingly, D3's distribution of the C stock to D1 is not a disqualified distribution under section 355(d)(2) and paragraph (b)(1) of this section.

Example 7. Purchased basis eliminated by liquidation; stock distributed in spin-off. P owns 30 percent of the stock of D, D owns all of the stock of D1, and D1 owns all of the stock of C. P purchases the remaining 70 percent of the D stock for cash. Within five years of P's purchase, P liquidates D in a transaction qualifying under sections 332 and 337(a), and D1 then distributes the stock of C to P. Prior to the liquidation, P is treated as having purchased 70 percent of the stock of D1 and C on the date P purchases the D stock under the attribution rules of section 355(d)(8)(B) and paragraph (e)(1) of this section. After the liquidation, however, under paragraph (b)(2)(iii) of this section, P is not treated as having acquired by purchase the D1 or the C stock under section 355(d)(8)(B) and paragraph (e)(1) of this section because P's basis in the D stock is eliminated in the liquidation of D. Under section 334(b)(1), P's basis in the D1 stock is determined by reference to D's basis in the D1 stock and not by reference to P's basis in D. Paragraph (d)(2)(i)(B) of this section does not treat the D1 stock as newly purchased in P's hands because no gain or loss was recognized by D in the liquidation. Accordingly, neither the D1 stock nor the C stock is disqualified stock under section 355(d)(3) and paragraph (b)(2) of this section in P's hands, and the distribution is not a disqualified distribution under section 355(d)(2) and paragraph (b)(1) of this section.

Example 8. Purchased basis eliminated by upstream merger; stock distributed in spin-off. D owns all of the stock of D1, and D1 owns all of the stock of C. P purchases 60 percent of the D stock for cash. Within five years of P's purchase, D merges into P in a section 368(a)(1)(A) reorganization, with the D shareholders other than P receiving solely P stock in exchange for their D stock, and D1 then distributes the stock of C to P. Prior to the merger, P is treated as having purchased 60 percent of the stock of D1 and C on the date P purchases the D stock under the attribution rules of section 355(d)(8) and paragraph (e)(1) of this section. After the

merger, however, under paragraph (b)(2)(iii) of this section, P is not treated as having acquired by purchase the D1 or the C stock under section 355(d)(8)(B) and paragraph (e)(1) of this section because P's basis in the D stock is eliminated in the merger. Under section 362(b), P's basis in the D1 stock is determined by reference to D's basis in the D1 stock and not by reference to P's basis in D. Paragraph (d)(2)(i)(B) of this section does not treat the D1 stock as newly purchased in P's hands because no gain or loss was recognized by D in the merger. Accordingly, neither the D1 stock nor the C stock is disqualified stock under section 355(d)(3) and paragraph (b)(2) of this section in P's hands, and the distribution is not a disqualified distribution under section 355(d)(2) and paragraph (b)(1) of this section.

Example 9. Purchased basis eliminated by distribution; stock distributed in spin-off. A purchases all the stock of C for cash on Date 1. D acquires all of the stock of C from A in a section 368(a)(1)(B) reorganization that is not a reorganization under section 368(a)(1)(A) by reason of section 368(A)(1)(E). A receives ten percent of the D stock in the transaction. The remaining D stock is owned by B. Within five years of A's purchase of the C stock, D distributes all the stock of C pro rata to A and B. Under the transferred basis rule of paragraph (e)(2) of this section, D is treated as having purchased all of the C stock on the date A acquired it. Under the exchanged basis rule of paragraph (e)(3) of this section, A is treated as having purchased its D stock on Date 1 and A is treated as having purchased ten percent of the C stock on Date 1 under the attribution rules of section 355(d)(8) and paragraph (e)(3) of this section. Moreover, under paragraph (b)(2)(iii)(C) of this section, A's basis in the C stock resulting from A's Date 1 purchase of C stock is eliminated. After the distribution, A's and B's bases in their C stock are determined by reference to the bases of their D stock under § 1.358–2(a)(2) (and not by reference to D's basis in the C stock). D's basis in the stock of C resulting from its deemed purchase of that stock under paragraph (e)(2) of this section is eliminated by the distribution of the C stock because it would no longer be taken into account by any person in determining gain or loss on the sale of C stock. Therefore, the C stock distributed to A and B is not disqualified stock as a result of D's purchase of C. However, A's basis in its D stock resulting from its deemed purchase of that stock under paragraph (e)(3) of this section is not eliminated. Therefore, A's ten percent interest in the stock of D is disqualified stock. Furthermore, A's ten percent interest in the stock of C is disqualified stock because the distribution of the C stock is attributable to A's D stock that was acquired by purchase. However, there has not been a disqualified distribution because no person, immediately after the distribution, holds disqualified stock in either D or C that constitutes a 50 percent or greater interest in such corporation.

Example 10. Allocation of purchased basis analyzed separately. —(i) P owns all the stock of D. D purchases all the stock of D1 for cash on Date 1. D1 owns all the stock of C (which owns all the stock of C1) and S. Within five years of Date 1, D1 distributes all the stock of C to D. The D1 and C stock each is disqualified stock under section 355(d)(3) and paragraph (b)(2) of this section, and D is a disqualified person under paragraph (b)(3)(ii) of this section. The purposes of section 355(d) under paragraph (b)(3)(i) of this section are violated. D did not increase direct or indirect ownership in D1 or C. However, D's basis in the C stock is a purchased basis under paragraph (b)(3)(iii) of this section because the D1 stock is not treated as acquired by purchase solely under the attribution rules of section 355(d)(8) and paragraph (e)(1) of this section. Accordingly, the distribution is a disqualified distribution under section 355(d) and paragraph (b)(1) of this section. D's basis in the D1 stock is allocated pursuant to § 1.358–2 between the D1 stock and the C stock. Therefore, under paragraph (e)(4) of this section, the C stock is deemed to be acquired by purchase on Date 1, the date D purchased all the stock of D1. If thereafter, and within five years of Date 1, C were to distribute all the stock of C1 to D, that distribution would also be a disqualified distribution because of D's deemed purchase of the stock of C.

(ii) Following the distribution of the stock of C by D1, and within five years of Date 1, D distributes all the stock of D1 to P. Under paragraph (b)(2)(iii)(D) of this section, the determination of whether D's basis in D1 has been eliminated shall be made without regard to D's allocated basis in C. After the distribution, P's basis in the D1 stock is determined by reference to its basis in its D stock under § 1.358–2(a)(2) (and not by reference to D's basis in the D1 stock). D's basis in the D1 stock resulting from the purchase of that stock is eliminated by the distribution of the D1 stock because it would no longer be taken into account by any person in determining gain or loss on the sale of D1 stock. Therefore, the D1 stock distributed to P is not disqualified stock as a result of D's purchase of D1. Moreover, a subsequent distribution of the S stock by D1 to P would not be a disqualified distribution because both the D1 and S stock would cease to be treated as purchased when D's basis in D1 has been eliminated.

(4) *Anti-avoidance rule*—(i) *In general.* Notwithstanding any provision of section 355(d) or this section, the Commissioner may treat any distribution as a disqualified distribution under section 355(d)(2) and paragraph (b)(1) of this section if the distribution or another transaction or transactions are engaged in or structured with a principal purpose to avoid the purposes of section 355(d) or this section with respect to the distribution. Without limiting the preceding sentence, the Commissioner may determine that the existence of a related person, intermediary, pass-through entity, or similar person (an intermediary) should be disregarded, in whole or in part, if the intermediary is formed or availed of with a principal purpose to avoid the purposes of section 355(d) or this section.

(ii) *Example.* The following example illustrates this paragraph (b)(4):

Example. Post-distribution redemption. B wholly owns D, which wholly owns C. With a principal purpose to avoid the purposes of section 355(d), A, B, D, and C engage in the following transactions. A purchases 45 of 100 shares of the only class of D stock. Within five years after A's purchase, D distributes all of its 100 shares in C to A and B pro rata. D then redeems 20 shares of B's D stock, and C redeems 20 shares of B's C stock. After the redemption, A owns 45 shares and B owns 35 shares in each of D and C. Under paragraph (b)(4)(i) of this section, the Commissioner may treat A as owning disqualified stock in D and C that constitutes a 50 percent or greater interest in D and C immediately after the distribution. Under that treatment, the distribution is a disqualified distribution under section 355(d)(2) and paragraph (b)(1) of this section.

(c) *Whether a person holds a 50 percent or greater interest*—(1) *In general.* Under section 355(d)(4), 50 percent or greater interest means stock possessing at least 50 percent of the total combined voting power of all classes of stock entitled to vote or at least 50 percent of the total value of shares of all classes of stock.

(2) *Valuation.* For purposes of section 355(d)(4) and this section, all shares of stock within a single class are considered to have the same value. But see paragraph (c)(3)(vii)(A) of this section (determination of whether it is reasonably certain that an option will be exercised).

(3) *Effect of options, warrants, convertible obligations, and other similar interests*—(i) *Application.* This paragraph (c)(3) provides rules to determine when an option is treated as exercised for purposes of section 355(d) (other than section 355(d)(6)). Except as provided in this paragraph (c)(3), an option is not treated as exercised for purposes of section 355(d). This paragraph (c)(3) does not affect the determination of whether an instrument is an option or stock under general principles of tax law (such as substance over form).

(ii) *General rule.* In determining whether a person has acquired by purchase a 50 percent or greater interest under section 355(d)(4), an option to acquire stock (as described in paragraphs (c)(3)(v) and (vi) of this section) that has not been exercised when a distribution occurs is treated as exercised on the date it was issued or most recently transferred if—

(A) Its exercise (whether by itself or in conjunction with the deemed exercise of one or more other options) would cause a person to become a disqualified person; and

(B) Immediately after the distribution, it is reasonably certain (as described in paragraph (c)(3)(vii) of this section) that the option will be exercised.

(iii) *Options deemed newly issued and substituted options*—(A) *Exchange, adjustment, or alteration of existing option.* For purposes of this paragraph (c)(3), each of the following is treated as a new issuance or transfer of an existing option only if it materially increases the likelihood that an option will be exercised—

(*1*) An exchange of an option for another option or options;

(*2*) An adjustment to the terms of an option (including an adjustment pursuant to the terms of the option);

(*3*) An adjustment to the terms of the underlying stock (including an adjustment pursuant to the terms of the stock);

(*4*) A change to the capital structure of the issuing corporation; and

(*5*) An alteration to the fair market value of issuing corporation stock through an asset transfer (other than regular, ordinary dividends) or through any other means.

(B) *Certain compensatory options.* An option described in paragraph (c)(3)(vi)(B)(*2*) of this section is treated as issued on the date it becomes transferable.

(C) *Substituted options.* If an option (existing option) is exchanged for another option or options (substituted option or options) and paragraph (c)(3)(iii)(A) of this section does not apply to treat such exchange as a new issuance or transfer of the existing option, the substituted option or options will be treated as issued or most recently transferred on the date that the existing option was issued or most recently transferred.

(iv) *Effect of treating an option as exercised*—(A) *In general.* For purposes of section 355(d), an option that is treated as exercised under this paragraph (c)(3) is treated as exercised both for purposes of determining the percentage of the voting power of stock owned by the holder and for purposes of determining the percentage of the value of stock owned by the holder.

(B) *Stock purchase agreement or similar arrangement.* If a stock purchase agreement or similar arrangement is deemed exercised, the purchaser is treated as having purchased the stock under the terms of the agreement or arrangement as though all covenants had been satisfied and all contingencies met. The agreement or arrangement is deemed to have been exercised as of the date it is entered into or most recently assigned.

(v) *Instruments treated as options.* For purposes of this paragraph (c)(3), except to the extent provided in paragraph (c)(3)(vi) of this section, the following are treated as options: A call option, warrant, convertible obligation, the conversion feature of convertible stock, put option, redemption agreement (including a right to cause the redemption of stock), notional principal contract (as defined in § 1.446–3(c)) that provides for the payment of amounts in stock, stock purchase agreement or similar arrangement, or any other instrument that provides for the right to purchase, issue, redeem, or transfer stock (including an option on an option).

(vi) *Instruments generally not treated as options.* For purposes of this paragraph (c)(3), the following are not treated as options, unless issued, transferred, or listed with a principal purpose to avoid the application of section 355(d) or this section:

(A) *Escrow, pledge, or other security agreements.* An option that is part of a security arrangement in a typical lending transaction (including a purchase money loan), if the arrangement is subject to customary commercial conditions. For this purpose, a security arrangement includes, for example, an agreement for holding stock in escrow or under a pledge or other security agreement, or an option to acquire stock contingent upon a default under a loan.

(B) *Compensatory options*—(1) *General rule.* An option to acquire stock in a corporation with customary terms and conditions, provided to an employee, director, or independent contractor in connection with the performance of services for the corporation or a person related to it under section 355(d)(7)(A) (and that is not excessive by reference to the services performed) and that—

(*i*) Is nontransferable within the meaning of § 1.83–3(d); and

(*ii*) Does not have a readily ascertainable fair market value as defined in § 1.83–7(b).

(*2*) *Exception.* Paragraph (c)(3)(vi)(B)(*1*) of this section ceases to apply to an option that becomes transferable.

(C) *Certain stock conversion features.* The conversion feature of convertible stock, provided that—

(*1*) The stock is not convertible for at least five years after issuance or transfer; and

(*2*) The terms of the conversion feature do not require the tender of any consideration other than the stock being converted.

(D) *Options exercisable only upon death, disability, mental incompetency, or separation from service.* Any option entered into between stockholders of a corporation (or a stockholder and the corporation) with respect to the stock of either stockholder that is exercisable only upon the death, disability, mental incompetency of the stockholder, or, in the case of stock acquired in connection with the performance of services for the corporation or a person related to it under section 355(d)(7)(A) (and that is not excessive by reference to the services performed), the stockholder's separation from service.

(E) *Rights of first refusal.* A bona fide right of first refusal regarding the corporation's stock with customary terms, entered into between stockholders of a corporation (or between the corporation and a stockholder).

(F) *Other enumerated instruments.* Any other instruments specified in regulations, a revenue ruling, or a revenue procedure. See § 601.601(d)(2) of this chapter.

(vii) *Reasonably certain that the option will be exercised*—(A) *In general.* The determination of whether, immediately after the distribution, an option is reasonably certain to be exercised is based on all the facts and circumstances. In applying the previous sentence, the fair market value of stock underlying an option is determined by taking into account control premiums and minority and blockage discounts.

(B) *Stock purchase agreement or similar arrangement.* A stock purchase agreement or similar arrangement is treated as reasonably certain to be exercised if the parties' obligations to complete the transaction are subject only to reasonable closing conditions.

(viii) *Examples.* The following examples illustrate this paragraph (c)(3):

Example 1. D owns all of the stock of C. A purchases 40 percent of D's only class of stock and an option to purchase D stock from D, that if deemed exercised, would result in A owning a total of 60 percent of the stock of D. Assume that no control premium or minority or blockage discount applies to the D stock underlying the option. The option permits A to acquire the D stock at $30 per share, and D's stock has a fair market value of $27 per share on the date the option is issued. The option is subject to no contingencies or restrictive covenants, may be exercised within five years after its issuance, and is not described in paragraph (c)(3)(vi) of this section (regarding instruments generally not treated as options). Within five years of A's purchase of the D stock and option, D distributes the stock of its subsidiary C pro rata and A receives 40 percent of the C stock in the distribution. Immediately after the distribution, D's stock

has a fair market value of $30 per share and C's stock has a fair market value of $15 per share. At the time of the distribution, A exchanges A's option for an option to purchase 20 percent of the D stock at $20 per share and an option to purchase 20 percent of the C stock at $10 per share. The exchange of the options in D for options in D and C did not materially increase the likelihood that the options would be exercised. Nonetheless, based on all the facts and circumstances, it is reasonably certain, immediately after the distribution, that A will exercise its options. Under paragraph (c)(3)(iii)(C) of this section, the substituted options are treated as issued on the date the original option was issued. Accordingly, the options are treated as exercised by A on the date that A purchased the original option. A is treated as owning 60 percent of the D stock and 60 percent of the C stock that is disqualified stock, and the distribution is a disqualified distribution under section 355(d)(2) and paragraph (b)(1) of this section.

Example 2. D owns all of the stock of C. A purchases 37 percent of D's only class of stock. B owns 38 percent of the D stock, and the remaining 25 percent is owned by 20 individuals, each of whom owns less than five percent of D's stock. A purchases an option to purchase an additional 14 percent of the D stock from shareholders other than B for $50 per share. The option is subject to no contingencies or restrictive covenants, may be exercised within five years after its issuance, and is not described in paragraph (c)(3)(vi) of this section. Within five years of A's purchase of the option and 37 percent interest in D, D distributes the stock of its subsidiary C pro rata and A receives 37 percent of the C stock in the distribution. At the time of the distribution, A exchanges its option for an option to purchase 14 percent of the D stock at $25 per share and an option to purchase 14 percent of the C stock at $25 per share. Assume that, although a shareholder that owned no D or C stock would pay only $20 per share for D or C stock immediately after the distribution, a shareholder in A's position would pay $30 per share for 14 percent of the stock of D or C because of the control premium which attaches to the shares. The control premium is taken into account under paragraph (c)(3)(vii)(A) of this section to determine whether A is reasonably certain to exercise the options. The exchange of the options in D for options in D and C did not materially increase the likelihood that the options would be exercised. Nonetheless, based on all the facts and circumstances, it is reasonably certain, immediately after the distribution, that A will exercise its options. Under paragraph (c)(3)(iii)(C) of this section, the substituted options are treated as issued on the date the original option was issued. Accordingly, the options are treated as exercised by A on the date that A purchased the original option. Under paragraph (c)(2) of this section, all shares of D and C are considered to have the same value to determine the amount of stock A is treated as purchasing under the options. A is treated as owning 51 percent of the D stock and 51 percent of the C stock that is disqualified stock, and the distribution is a disqualified distribution under section 355(d)(2).

(4) *Plan or arrangement*—(i) *In general.* Under section 355(d)(7)(B), if two or more persons act pursuant to a plan or arrangement with respect to acquisitions of stock in the distributing corporation or controlled corporation, those persons are treated as one person for purposes of section 355(d).

(ii) *Understanding.* For purposes of section 355(d)(7)(B), two or more persons who are (or will after an acquisition become) shareholders (or are treated as shareholders under paragraph (c)(3)(ii) of this section) act pursuant to a plan or arrangement with respect to an acquisition of stock only if they have a formal or informal understanding among themselves to make a coordinated acquisition of stock. A principal element in determining if such an understanding exists is whether the investment decision of each person is based on the investment decision of one or more other existing or prospective shareholders. However, the participation by creditors in formulating a plan for an insolvency workout or a reorganization in a title 11 or similar case (whether as members of a creditors' committee or otherwise) and the receipt of stock by creditors in satisfaction of indebtedness pursuant to the workout or reorganization do not cause the creditors to be considered as acting pursuant to a plan or arrangement.

(iii) *Examples.* The following examples illustrate paragraph (c)(4)(ii) of this section:

Example 1. D has 1,000 shares of common stock outstanding. A group of 20 unrelated individuals who previously owned no D stock (the Group) agree among themselves to acquire 50 percent or more of D's stock. The Group is not a person under section 7701(a)(1). Subsequently, pursuant to their understanding, the members of the Group purchase 600 shares of D common stock from the existing D shareholders (a total of 60 percent of the D stock), with each member purchasing 30 shares. Under paragraph (c)(4)(ii) of this section, the members of the Group have a formal or informal understanding among themselves to make a coordinated acquisition of stock. Their interests are therefore aggregated under section 355(d)(7)(B), and they are treated as one person that purchased 600 shares of D's stock for purposes of section 355(d).

Example 2. D has 1,000 shares of outstanding stock owned by unrelated individuals. D's management is concerned that D may become subject to a takeover bid. In separate meetings, D's management meets with potential investors who own no stock and are friendly to management to convince them to acquire D's stock based on an understanding that D will assemble a group that in the aggregate will acquire more than 50 percent of D's stock. Subsequently, 15 of these investors each purchases four percent of D's outstanding stock. Under paragraph (c)(4)(ii) of this section, the 15 investors have a formal or informal understanding among themselves to make a coordinated acquisition of stock. Their interests are therefore aggregated under section 355(d)(7)(B), and they are treated as one person that purchased 600 shares of D stock for purposes of section 355(d).

Example 3. (i) D has 1,000 shares of outstanding stock owned by unrelated individuals. An investment advisor advises its clients that it believes D's stock is undervalued and recommends that they acquire D stock. Acting on the investment advisor's recommendation, 20 unrelated individuals each purchases 30 shares of the outstanding D stock. Each client's decision was not based on the investment decisions made by one or more other clients. Because there is no formal or informal understanding among the clients to make a coordinated acquisition of D stock, their interests are not aggregated under section 355(d)(7)(B) and they are treated as making separate purchases.

(ii) The facts are the same as in paragraph (i) of this *Example 3*, except that the investment advisor is also the underwriter (without regard to whether it is a firm commitment or best efforts underwriting) for a primary or secondary offering of D stock. The result is the same.

(iii) The facts are the same as in paragraph (i) of this *Example 3*, except that, instead of an investment advisor recommending that clients purchase D stock, the trustee of several trusts qualified under section 401(a) sponsored by unrelated corporations causes each trust to purchase the D stock. The result is the same, provided that the trustee's investment decision made on behalf of each trust was not based on the investment decision made on behalf of one or more of the other trusts.

(iv) *Exception*—(A) *Subsequent disposition.* If two or more persons do not act pursuant to a plan or arrangement within the meaning of this paragraph (c)(4) with respect to an acquisition of stock in a corporation (the first corporation), a subsequent acquisition in which such persons exchange their stock in the first corporation for stock in another corporation (the second corporation) in a transaction in which the basis of the second corporation's stock in the hands of such persons is determined in whole or in part by reference to the basis of their stock in the first corporation, will not result in such persons being treated as one person, even if the acquisition of the second corporation's stock is pursuant to a plan or arrangement.

(B) *Example.* The following example illustrates this paragraph (c)(4)(iv):

Example. In an initial public offering of D stock on Date 1, 100 investors independently purchase one percent each of the D stock. Two years later, D merges into P (in a reorganization described in section 368(a)(1)(A)) and, pursuant to the plan of reorganization, the D shareholders exchange their D stock for 50 percent of the stock of

P. The D shareholders approve the plan by a two-thirds vote, as required by state law. Under section 358(a), each shareholder's basis in its P stock is determined by reference to the basis of the D stock it purchased. Under paragraph (e)(3) of this section, the former D shareholders are treated as purchasing their P stock on Date 1. The investors do not become a single person under paragraph (c)(4) of this section with respect to the deemed purchase of the P stock on Date 1 by virtue of their acquisition of the P stock pursuant to the merger on Date 2.

(d) *Purchase*—(1) *In general*—(i) *Definition of purchase under section 355(d)(5)(A).* Under section 355(d)(5)(A), except as otherwise provided in section 355(d)(5)(B) and (C), a *purchase* means any acquisition, but only if—

(A) The basis of the property acquired in the hands of the acquirer is not determined—

(*1*) In whole or in part by reference to the adjusted basis of such property in the hands of the person from whom acquired; or

(*2*) Under section 1014(a); and

(B) The property is not acquired in an exchange to which section 351, 354, 355, or 356 applies.

(ii) *Section 355 distributions.* Paragraph (d)(1)(i)(B) of this section includes all section 355 distributions, whether in exchange (in whole or in part) for stock or pro rata.

(iii) *Example.* The following example illustrates this paragraph (d)(1):

Example. Section 304(a)(1) acquisition. A, who owns all of the stock of P and T, sells the T stock to P for cash. The T stock is not marketable stock under section 355(d)(5)(B)(ii) and paragraph (d)(3)(ii) of this section. A is treated under section 304(a)(1) as receiving a distribution in redemption of the P stock. Under section 302(d), the deemed redemption is treated as a section 301 distribution. Assume that under sections 304(b)(2) and 301(c)(1), all of the distribution is a dividend. A and P are treated in the same manner as if A had transferred the T stock to P in exchange for stock of P in a transaction to which section 351(a) applies, and P had then redeemed the stock P was treated as issuing in the transaction. Under section 362(a), P's basis in the T stock is determined by reference to A's adjusted basis in the T stock, and there is no basis increase in the T stock because A recognizes no gain on the deemed transfer. Accordingly, P's acquisition of the T stock from A is not a purchase by P under section 355(d)(5)(A)(i)(I) and paragraphs (d)(1)(i)(A)(*1*) and (d)(2)(i)(B) of this section.

(2) *Exceptions to definition of purchase under section 355(d)(5)(A).* The following acquisitions are not treated as purchases under section 355(d)(5)(A):

(i) *Acquisition of stock in a transaction which includes other property or money*—(A) *Transferors and shareholders of transferor or distributing corporations*—(*1*) *In general.* An acquisition of stock permitted to be received by a transferor of property without the recognition of gain under section 351(a), or permitted to be received without the recognition of gain under section 354, 355, or 356 is not a purchase to the extent section 358(a)(1) applies to determine the recipient's basis in the stock received, whether or not the recipient recognizes gain under section 351(b) or 356. But see paragraph (e)(3) of this section (interest received in exchange for purchased interest in exchanged basis transaction treated as purchased).

(*2*) *Exception.* To the extent there is received in the exchange or distribution, in addition to stock described in paragraph (d)(2)(i)(A)(*1*) of this section, stock that is other property under section 351(b) or 356(a)(1), the stock is treated as purchased on the date of the exchange or distribution for purposes of section 355(d).

(B) *Transferee corporations*—(*1*) *In general.* An acquisition of stock by a corporation is not a purchase to the extent section 334(b) or 362(a) or (b) applies to determine the corporation's basis in the stock received. But see section 355(d)(5)(C) and paragraph (e)(2) of this section (purchased property transferred in transferred basis transaction is treated as purchased by transferee).

(*2*) *Exception.* If a corporation acquires stock, the stock is treated as purchased on the date of the stock acquisition for purposes of section 355(d)—

(*i*) If the liquidating corporation recognizes gain or loss with respect to the transferred stock as described in section 334(b)(1); or

(*ii*) To the extent the basis of the transferred stock is increased through the recognition of gain by the transferor under section 362(a) or (b).

(C) *Examples.* The following examples illustrate this paragraph (d)(2)(i):

Example 1. (i) A owns all the stock of T. T merges into D in a transaction qualifying under section 368(a)(1)(A), with A exchanging all of the T stock for D stock and $100 cash. Under section 356(a)(1), A recognizes $100 of the realized gain on the transaction. Under section 358(a)(1), A's basis in the D stock equals A's basis in the T stock, decreased by the $100 received and increased by the gain recognized, also $100. Under paragraph (d)(2)(i)(A) of this section, A is not treated as having purchased the D stock for purposes of section 355(d)(5).

(ii) The facts are the same as in paragraph (i) of this *Example 1,* except that rather than D stock and $100 cash, A receives D stock and stock in C, a corporation not a party to the reorganization, with a fair market value of $100. Under section 358(a)(2), A's basis in the C stock is its fair market value, or $100. Under paragraph (d)(2)(i)(A)(*2*) of this section, A is treated as having purchased the C stock, but not the D stock, for purposes of section 355(d)(5).

Example 2. A purchases all of the stock of D, which is not marketable stock, on Date 1 for $90. Within five years of A's purchase, on Date 2, A contributes the D stock to P in exchange for P stock worth $90 and $10 cash in a transaction qualifying under section 351. A recognizes a gain of $10 as a result of the transfer. Under section 362(a), P's basis in D is $100. P is treated as having purchased 90 percent ($90 worth) of the D stock on Date 1 under section 355(d)(5)(C) and paragraph (e)(2) of this section and as having purchased 10 percent ($10 worth) of the D stock on Date 2 under paragraph (d)(2)(i)(B)(2)(ii) of this section.

(ii) *Acquisition of stock in a distribution to which section 305(a) applies.* An acquisition of stock in a distribution qualifying under section 305(a) is not a purchase to the extent section 307(a) applies to determine the recipient's basis. However, to the extent the distribution is of rights to acquire stock, see paragraph (c)(3) of this section for rules regarding options, warrants, convertible obligations, and other similar interests.

(iii) *Section 1036(a) exchange.* An exchange of stock qualifying under section 1036(a) is not a purchase by either party to the exchange to the extent the basis of the property acquired equals that of the property exchanged under section 1031(d).

(iv) *Section 338 elections*—(A) *In general.* Stock acquired in a qualified stock purchase with respect to which a section 338 election (or a section 338(h)(10) election) is made is not treated as a purchase for purposes of section 355(d)(5)(A). However, any stock (or an interest in another entity) held by old target that is treated as purchased by new target is treated as acquired by purchase for purposes of section 355(d)(5)(A) unless a section 338 election or section 338(h)(10) election also is made for that stock. See § 1.338–2T(c) for the definitions of section 338 election, section 338(h)(10) election, old target, and new target.

(B) *Example.* The following example illustrates this paragraph (d)(2)(iv):

Example. T owns all of the stock of S and no other assets. X acquires all of the T stock from the T shareholders for cash and makes an election under section 338. Under section 338(a) and (b), T, as Old T, is treated as having sold all of its assets at fair market value and purchased the assets as a new corporation, New T, as of the beginning of the day after the acquisition date. Under paragraph (d)(2)(iv)(A) of this section, X is

not treated as having purchased the T stock. Absent a section 338 election or a section 338(h)(10) election with respect to S, New T is treated as having purchased all of the S stock under section 355(d)(5)(A).

(v) *Partnership distributions*—(A) *Section 732(b).* An acquisition of stock (or an interest in another entity) in a liquidation of a partner's interest in a partnership in which basis is determined pursuant to section 732(b) is a purchase at the time of the liquidation.

(B) *Section 734(b).* If the adjusted basis of stock (or an interest in another entity) held by a partnership is increased under section 734(b), a proportionate amount of the stock (or other interest) will be treated as purchased at the time of the basis adjustment, determined by reference to the amount of the basis adjustment (but not in excess of the fair market value of the stock (or other interest) at the time of the adjustment) over the fair market value of the stock (or other interest) at the time of the adjustment.

(3) *Certain section 351 exchanges treated as purchases*—(i) *In general*—(A) *Treatment of stock received by transferor.* Under section 355(d)(5)(B), a purchase includes any acquisition of property in an exchange to which section 351 applies to the extent the property is acquired in exchange for any cash or cash item, any marketable stock, or any debt of the transferor. The property treated as acquired by purchase is the property received by the transferor in the exchange.

(B) *Multiple classes of stock.* If the transferor in a transaction described in section 355(d)(5)(B) receives stock or securities of more than one class, or receives both stock and securities, then the amount of stock or securities purchased is determined in a manner that corresponds to the allocation of basis to the stock or securities under section 358. See § 1.358–2(b).

(ii) *Cash item, marketable stock.* For purposes of section 355(d)(5)(B) and this paragraph (d)(3), either or both of the terms cash item and marketable stock include personal property within the meaning of section 1092(d)(1) and § 1.1092(d)-1, without giving effect to section 1092(d)(3).

(iii) *Exception for certain acquisitions*—(A) *In general.* Except to the extent provided in paragraph (e)(3) of this section (interest received in exchange for purchased interest in exchanged basis transaction treated as purchased), an acquisition of stock in a corporation in a section 351 transaction by one or more persons in exchange for an amount of stock in another corporation (the transferred corporation) that meets the requirements of section 1504(a)(2) is not a purchase by the transferor or transferors, regardless of whether the stock of the transferred corporation is marketable stock under section 355(d)(5)(B)(ii) and paragraph (d)(3)(ii) of this section.

(B) *Example.* The following example illustrates this paragraph (d)(3)(iii):

Example. D's two classes of stock, voting common and nonvoting preferred, are both widely held and publicly traded. The nonvoting preferred stock is stock described in section 1504(a)(4). Assume that all of the D stock is marketable stock under section 355(d)(5)(B)(ii) and paragraph (d)(3)(ii) of this section. D's board of directors proposes that, for valid business purposes, D's common stock should be held by a holding company, HC, but its preferred stock should not be transferred to HC. As proposed, the D common shareholders exchange their D stock solely for HC common stock in a section 351(a) transaction. The D preferred shareholders retain their stock. HC acquires an amount of D stock that meets the requirements of section 1504(a)(2). Although the D common stock was marketable stock in the hands of the D shareholders immediately before the transfer, and the D nonvoting preferred stock is marketable stock after the transfer, the D shareholders are not treated as having acquired the HC stock by purchase (except to the extent the exchanged basis rule of paragraph (e)(3) of this section may apply to treat HC stock as purchased on the date the exchanged D stock was purchased).

(iv) *Exception for assets transferred as part of an active trade or business*—(A) *In general.* Except to the extent provided in paragraph (e)(3) of this section, an acquisition not described in paragraph (d)(3)(iii) of this section of stock in exchange for any cash or cash item, any marketable stock, or any debt of the transferor in a section 351 transaction is not a purchase if—

(*1*) The transferor is engaged in the active conduct of a trade or business under paragraph (d)(3)(iv)(B) of this section and the transferred items (including debt incurred in the ordinary course of the trade or business) are used in the trade or business;

(*2*) The transferred items do not exceed the reasonable needs of the trade or business under paragraph (d)(3)(iv)(C) of this section;

(*3*) The transferor transfers the items as part of the trade or business; and

(*4*) The transferee continues the active conduct of the trade or business.

(B) *Active conduct of a trade or business.* For purposes of this paragraph (d)(3)(iv), whether, with respect to the trade or business at issue, the transferor and transferee are engaged in the active conduct of a trade or business is determined under § 1.355–3(b)(2) and (3), except that—

(*1*) Conduct is tested before the transfer (with respect to the transferor) and after the transfer (with respect to the transferee) rather than immediately after a distribution; and

(*2*) The trade or business need not have been conducted for five years before its transfer, but it must have been conducted for a sufficient period of time to establish that it is a viable and ongoing trade or business.

(C) *Reasonable needs of the trade or business.* For purposes of this paragraph (d)(3)(iv), the reasonable needs of the trade or business include only the amount of cash or cash items, marketable stock, or debt of the transferor that a prudent business person apprised of all relevant facts would consider necessary for the present and reasonably anticipated future needs of the business. Transferred items may be considered necessary for reasonably anticipated future needs only if the transferor and transferee have specific, definite, and feasible plans for their use. Those plans must require that items intended for anticipated future needs rather than present needs be used as expeditiously as possible consistent with the business purpose for retention of the items. Future needs are not reasonably anticipated if they are uncertain or vague or where the execution of the plan for their use is substantially postponed. The reasonable needs of a trade or business are generally its needs at the time of the transfer of the business including the items. However, for purposes of applying section 355(d) to a distribution, events and conditions after the transfer and through the date immediately after the distribution (including whether plans for the use of transferred items have been consummated or substantially postponed) may be considered to determine whether at the time of the transfer the items were necessary for the present and reasonably anticipated future needs of the business.

(D) *Consideration of all facts and circumstances.* All facts and circumstances are considered in determining whether this paragraph (d)(3)(iv) applies.

(E) *Successive transfers.* A transfer of assets does not fail to meet the requirements of paragraph (d)(3)(iv)(A)(*4*) of this section solely because the transferee transfers the assets directly (or indirectly through other members) to another member of the transferee's affiliated group, as defined in § 1.355–3(b)(4)(iv) (the final transferee), if the requirements of paragraphs (d)(3)(iv)(A)(*1*), (*2*), (*3*) and (*4*) of this section would be met if the transferor had transferred the assets directly to the final transferee.

(v) *Exception for transfer between members of the same affiliated group*—(A) *In general.* Except to the extent provided in paragraph (e)(3) of this section, an acquisition of stock (whether actual or constructive) not described in paragraphs (d)(3)(iii) and (iv) of this section in exchange for any cash or cash item, marketable stock, or debt of the transferor in a section 351 transaction is not a purchase if—

(*1*) The transferor corporation or corporations and the transferee corporation (whether formed in the transaction or already existing) are members of the same affiliated group as defined in section 1504(a) before the section 351 transaction (if the transferee corporation is in existence before the transaction);

(*2*) The cash or cash item, marketable stock or debt of the transferor are not included in assets that are acquired (or treated as acquired) by the transferor (or another member of the transferor's affiliated group) from a nonmember in a related transaction in which section 362(a) or (b) applies to determine the basis in the acquired assets; and

(*3*) The transferor corporation or corporations, the transferee corporation, and any distributed controlled corporation of the transferee corporation do not cease to be members of such affiliated group in any transaction pursuant to a plan that includes the section 351 transaction (including any distribution of a controlled corporation by the transferee corporation). But see paragraph (b)(4) of this section where the transfer is made for a principal purpose to avoid the purposes of section 355(d).

(B) *Examples.* The following examples illustrate this paragraph (d)(3)(v):

Example 1. Publicly traded P has wholly owned S since 1990. S is engaged in the telecommunications business and the business of computer software development. S is developing new software for use in the managed health care industry. Over a period of four years beginning on January 31, 2000, P contributes a substantial amount of cash to S solely for the purpose of funding the software development. On completion of the software in January of 2004, 60 percent of the value of the S stock is attributable to the cash contributions made within the last four years. The P group's primary lender requires that S separately incorporate the software and related assets and distribute the new subsidiary to P as a condition of providing required funding to market the software. Accordingly, on February 1, 2004, S forms N, contributes the software and related assets to N, and distributes all of the N stock to P in a transaction intended to qualify under section 355(a). P, S, and N will not leave the affiliated group in any transaction related to the cash contributions. Under paragraph (d)(3)(v)(A) of this section, P's cash contributions to S are not treated as purchases of additional S stock, and the distribution of N from S to P is not a disqualified distribution under section 355(d)(2) and paragraph (b)(1) of this section.

Example 2. On Date 1, P contributes cash to its subsidiary S with a principal purpose to increase its stock basis in S. Sixty percent of the value of P's S stock is attributable to the cash contribution. Under paragraph (b)(4) of this section (anti-avoidance rule), 60 percent of the S stock is treated as purchased under section 355(d)(5)(B), notwithstanding paragraph (d)(3)(v)(A) of this section. Accordingly, any distribution of a subsidiary of S to P within the five-year period after Date 1 will be a disqualified distribution, regardless of whether P, S, and any distributed S subsidiary remain affiliated after the distribution and any transactions related to the cash contribution.

(4) *Triangular asset reorganizations*—(i) *Definition. A triangular asset reorganization* is a reorganization that qualifies under—

(A) Section 368(a)(1)(A) or (G) by reason of section 368(a)(2)(D);

(B) Section 368(a)(1)(A) by reason of section 368(a)(2)(E) (regardless of whether section 368(a)(3)(E) applies), unless the transaction also qualifies as either a section 351 transfer or a reorganization under section 368(a)(1)(B); or

(C) Section 368(a)(1)(C), and stock of the controlling corporation rather than the acquiring corporation is exchanged for the acquired corporation's properties.

(ii) *Treatment.* Notwithstanding section 355(d)(5)(A), for purposes of section 355(d), the controlling corporation in a triangular asset reorganization is treated as having—

(A) Acquired the assets of the acquired corporation (and as having assumed any liabilities assumed by the controlling corporation's subsidiary corporation or to which the acquired corporation's assets were subject (the acquired liabilities)) in a transaction in which the controlling corporation's basis in the acquired corporation's assets was determined under section 362(b); and

(B) Transferred the acquired assets and acquired liabilities to its subsidiary corporation in a section 351 transfer.

(iii) *Example.* The following example illustrates this paragraph (d)(4):

Example. Forward triangular reorganization. P forms S with $25 of cash and T merges into S in a reorganization qualifying under section 368(a)(1)(A) by reason of section 368(a)(2)(D) in which the T shareholders receive $70 of P stock and $15 of cash in exchange for their T stock. T is not a common parent of a consolidated group of corporations. The remaining $10 of cash with which P formed S will not be used in the acquired business. T's assets consist only of assets part of and used in its business with a value of $80, and $5 of cash that is not part of or used in T's business. T has no liabilities. S will use T's business assets in T's business (which will become S's business), but will invest the $5 of cash in an unrelated passive investment. Under paragraph (d)(4)(ii) of this section, P is treated as acquiring the T assets in a transaction in which P's basis in the T assets was determined under section 362(b) and contributing them to S in a section 351 transfer. Under paragraph (d)(3)(v) of this section, $10 (of the total $25) of cash contributed by P to S upon S's formation is not treated as a purchase of S stock. The $15 (of the total $25) of cash contributed by P to S upon S's formation that is paid to T's shareholders is not treated as a purchase of S stock. The exception in paragraph (d)(3)(v) of this section does not apply to the $5 of cash from T's business because P is treated as having acquired T's assets in a related transaction in which section 362(b) applies to determine P's basis in such assets. Accordingly, P is treated under section 355(d)(5)(B) and paragraph (d)(3)(iv) of this section as having purchased $5 of the S stock, but is not deemed to have purchased the remaining $80 of the S stock.

(5) *Reverse triangular reorganizations other than triangular asset reorganizations*—(i) *In general.* Except as provided in paragraph (d)(5)(ii) of this section, if a transaction qualifies as a reorganization under section 368(a)(1)(A) by reason of section 368(a)(2)(E) and also as either a reorganization under section 368(a)(1)(B) or a section 351 transfer, then either section 355(d)(5)(B) (and paragraphs (d)(3)(i) through (iv) of this section) or 355(d)(5)(C) (and paragraph (e)(2) of this section) applies. Regardless of which method the controlling corporation employs to determine its basis in the surviving corporation stock under § 1.358–6(c)(2)(ii) or § 1.1502–30(b), the total amount of surviving corporation stock treated as purchased by the controlling corporation will equal the higher of—

(A) The amount of surviving corporation stock that would be treated as purchased (on the date of the deemed section 351 transfer) by the controlling corporation if the controlling corporation acquired the surviving corporation's assets and assumed its liabilities in a transaction in which the controlling corporation's basis in the surviving corporation assets was determined under section 362(b), and then transferred the acquired assets and liabilities to the surviving corporation in a section 351 transfer (see §§ 1.358–6(c)(1) and (2)(ii)(A), and 1.1502–30(b)); or

(B) The amount of surviving corporation stock that would be treated

as purchased (on the date the surviving corporation shareholders purchased their surviving corporation stock) if the controlling corporation acquired the stock of the surviving corporation in a transaction in which the basis in the surviving corporation's stock was determined under section 362(b) (see §§ 1.358–6(c)(2)(ii)(B) and 1.1502–30(b)).

(ii) *Letter ruling and closing agreement.* If a controlling corporation obtains a letter ruling and enters into a closing agreement under section 7121 in which it agrees to determine its basis in surviving corporation stock under § 1.358–6(c)(2)(ii)(A), or under § 1.1502–30(b) by applying § 1.358–6(c)(2)(ii)(A) (deemed asset acquisition and transfer by controlling corporation), then section 355(d)(5)(B) and paragraphs (d)(3)(i) through (iv) of this section apply, and section 355(d)(5)(C) and paragraph (e)(2) of this section do not apply. If a controlling corporation obtains a letter ruling and enters into a closing agreement under section 7121 under which it agrees to determine its basis in surviving corporation stock under § 1.358–6(c)(2)(ii)(B), or under § 1.1502–30(b) by applying § 1.358–6(c)(2)(ii)(B) (deemed stock acquisition), then section 355(d)(5)(C) and paragraph (e)(2) of this section apply, and section 355(d)(5)(B) and paragraphs (d)(3)(i) through (iv) of this section do not apply.

(iii) *Example.* The following example illustrates this paragraph (d)(5):

Example. Reverse triangular reorganization; purchase. (i) A purchases 60 percent of the stock of D on Date 1. D owns no cash items, marketable stock, or transferor debt, but holds cash that is not part of or used in D's trade or business under paragraph (d)(3)(iv) of this section and that represents 20 percent of D's value. On Date 2, P forms S, and S merges into D in a reorganization qualifying under section 368(a)(1)(B) and under section 368(a)(1)(A) by reason of section 368(a)(2)(E). In the reorganization, P acquires all of the D stock in exchange solely for P stock. After Date 2, and within five years after Date 1, D distributes its wholly owned subsidiary C to P. P does not obtain a letter ruling and enter into a closing agreement under paragraph (d)(5)(ii) of this section. P would acquire 20 percent of the D stock by purchase on Date 2 under paragraph (d)(5)(i)(A) of this section by operation of section 355(d)(5)(B) and paragraph (d)(3)(iv) of this section. The exception in paragraph (d)(3)(v) of this section does not apply because D was not affiliated with P before the transaction in which the section 351 transfer is deemed to occur and D's assets are treated as acquired by P in a related transaction in which section 362(b) applies to determine P's basis in the D assets. P would acquire 60 percent of the D stock by purchase on Date 1 under paragraph (d)(5)(i)(B) of this section because, under the transferred basis rule of section 355(d)(5)(C) and paragraph (e)(2) of this section, P is treated as though P purchased the D stock on the date A purchased it. Accordingly, under paragraph (d)(5)(i) of this section, P is treated as acquiring the higher amount (60 percent) by purchase on Date 1. D's distribution of C to P is a disqualified distribution under section 355(d)(2) and paragraph (b)(1) of this section. In addition, A is treated as acquiring the P stock by purchase on Date 1 under paragraph (e)(3) of this section because A's basis in the P stock is determined by reference to A's basis in the D stock.

(ii) The facts are the same as in paragraph (i) of this *Example,* except that P obtains a letter ruling and enters into a closing agreement under which it agrees to determine its basis in the D stock under § 1.358–6(c)(2)(ii)(A). Under paragraph (d)(5)(ii) of this section, section 355(d)(5)(B) (and paragraphs (d)(3)(i) through (iv) of this section) applies, and section 355(d)(5)(C) (and paragraph (e)(2) of this section) does not apply. Accordingly, P is treated as acquiring only 20 percent of the D stock by purchase on Date 2. D's distribution of C to P is not a disqualified distribution under section 355(d)(2) and paragraph (b)(1) of this section.

(6) *Treatment of group structure changes*—(i) *In general.* Notwithstanding section 355(d)(5)(A), for purposes of section 355(d), if a corporation succeeds another corporation as the common parent of a consolidated group in a group structure change to which § 1.1502–31 applies, the new common parent is treated as having acquired the assets and assumed the liabilities of the former common parent in a transaction in which the new common parent's basis in the former common parent's assets was determined under section 362(b), and then transferred the acquired assets and liabilities to the former common parent (or, if the former common parent does not survive, to the new common parent's subsidiary) in a section 351 transfer, with the new common parent and former common parent being treated as not in the same affiliated group at the time of the transfer for purposes of applying paragraph (d)(3)(v) of this section (notwithstanding § 1.1502–31(c)(2)).

(ii) *Adjustments to basis of higher-tier members.* A higher-tier member that indirectly owns all or part of the former common parent's stock after a group structure change is treated as having purchased the stock of an immediate subsidiary to the extent that the higher-tier member's basis in the subsidiary is increased under § 1.1502-31(d)(4).

(iii) *Example.* The following example illustrates this paragraph (d)(6):

Example. P is the common parent of a consolidated group, and T is the common parent of another group. P has owned S for more than five years, and the fair market value of the S stock is $50. T's assets consist only of non-marketable stock of direct and indirect wholly owned subsidiaries with a value of $50, assets used in its business with a value of $50, and $50 of marketable stock that is not part of or used in T's business. T has no liabilities. T merges into S with the T shareholders receiving solely P stock with a value of $150 in exchange for their T stock in a section 368(a)(2)(D) reorganization. S will use T's business assets in T's business (which will become S's business), but will hold the $50 of marketable stock for investment purposes. Assume that the transaction is a reverse acquisition under § 1.1502–75(d)(3) because the T shareholders, as a result of owning T stock, own more than 50 percent of the value of P's stock immediately after the transaction. Thus, the transaction is a group structure change under § 1.1502–33(f)(1). Under paragraph (d)(6) of this section, P is treated as having acquired the assets of T in a transaction in which P's basis in the T assets was determined under section 362(b), and then transferred the acquired assets to S in a section 351 transfer, with P and T being treated as not in the same affiliated group at the time of the transfer solely for purposes of paragraph (d)(3)(v) of this section. The exception in paragraph (d)(3)(v) of this section (transfers within an affiliated group) does not apply. Accordingly, P is treated under section 355(d)(5)(B) and paragraph (d)(3)(iv) of this section as having purchased $50 of the S stock (attributable to the marketable stock), but is not deemed to have purchased the remaining $150 of the S stock.

(7) *Special rules for triangular asset reorganizations, other reverse triangular reorganizations, and group structure changes.* The amount of acquiring subsidiary, surviving corporation, or former common parent stock that is treated as purchased under paragraph (c)(4), (5)(i)(A), or (6) of this section (by operation of section 355(d)(5)(B) and paragraphs (d)(3)(i) through (iv) of this section) is adjusted to reflect any basis adjustment under—

(i) Section 1.358–6(c)(2)(i)(B) and (C) (reduction of basis adjustment in reverse triangular reorganization where controlling corporation acquires less than all of the surviving corporation stock), § 1.1502–30(b) (applying § 1.358–6(c)(2)(i)(B) and (C) to a consolidated group), and § 1.1502–31(d)(2)(ii) (reduction of basis adjustment in group structure change where new common parent acquires less than all of the former common parent stock); or

(ii) Section 1.358–6(d) (reduction of basis adjustment in any triangular reorganization to the extent controlling corporation does not provide consideration), § 1.1502–30(b) (applying § 1.358–6(d) (except § 1.358–6(d)(2)) to a consolidated group), and § 1.1502–31(d)(1) (reduction of basis adjustment in group structure change to the extent

new common parent does not provide consideration).

(e) *Deemed purchase and timing rules*—(1) *Attribution and aggregation*—(i) *In general.* Under section 355(d)(8)(B), if any person acquires by purchase an interest in any entity, and the person is treated under section 355(d)(8)(A) as holding any stock by reason of holding the interest, the stock shall be treated as acquired by purchase on the later of the date of the purchase of the interest in the entity or the date the stock is acquired by purchase by such entity.

(ii) *Purchase of additional interest.* If a person and an entity are treated as a single person under section 355(d)(7), and the person later purchases an additional interest in the entity, the person is treated as purchasing on the date of the later purchase the amount of stock attributed from the entity to the person under section 355(d)(8)(A) as a result of the additional interest.

(iii) *Purchase between persons treated as one person.* If two persons are treated as one person under section 355(d)(7), and one later purchases stock from the other, the date of the later purchase is used for purposes of determining when the five-year period commences.

(iv) *Purchase by a person already treated as holding stock under section 355(d)(8)(A).* If a person who is already treated as holding stock under section 355(d)(8)(A) later directly purchases such stock, the date of the later direct purchase is used for purposes of determining when the five-year period commences.

(v) *Examples.* The following examples illustrate this paragraph (e)(1):

Example 1. On Date 1, A purchases 10 percent of the stock of P, which has held 100 percent of the stock of T for more than five years at the time of A's purchase. A is deemed to have purchased 10 percent of P's T stock on Date 1. If A later purchases an additional 41 percent of the stock of P on Date 2, A is deemed to have purchased an additional 41 percent of P's T stock on Date 2. Because A and P are now related persons under section 267(b), they are treated as one person under section 355(d)(7)(A), and A is treated as owning all of P's T stock. A is treated as acquiring 51 percent of the T stock by purchase at the times of A's respective purchases of P stock on Date 1 and Date 2. The remaining 49 percent of T stock is treated as acquired when P acquired the T stock, more than five years before Date 1. If P distributes T after Date 2 and within five years after Date 1, the distribution will be a disqualified distribution under section 355(d)(2) and paragraph (b)(1) of this section.

Example 2. A has owned 60 percent of the stock of P for more than five years, and P has owned 40 percent of the stock of T for more than five years. A and P are treated as one person, and A is treated as owning 40 percent of the stock of T for more than five years. If P later purchases an additional 20 percent of the stock of T on Date 1, A is treated as acquiring by purchase the additional 20 percent of T stock on Date 1. If A then purchases an additional 10 percent of the stock of P on Date 2, under paragraph (e)(1)(i) of this section, A is deemed to have purchased on Date 2 an additional four percent of the T stock (10 percent of the 40 percent that P originally owned). In addition, even though A and P were already treated as one person under section 355(d)(7)(A), A also is deemed to have purchased two percent of the T stock on Date 2 (10 percent of the 20 percent of the T stock that it was treated as purchasing on Date 1). A is still treated as owning all 60 percent of the T stock owned by P. However, of the 60 percent, A is treated as having purchased 18 percent of the T stock on Date 1 and 6 percent of the T stock on Date 2, for a total of 24 percent purchased stock.

Example 3. A purchases a 20 percent interest in partnership M on Date 1. M has owned 30 percent of the stock and 25 percent of the securities of P for more than five years. P has owned 40 percent of the stock and 100 percent of the securities of T for more than five years. Under section 318(a)(2)(C) as modified by section 355(d)(8)(A), M is deemed to own 12 percent of the stock (30 percent of the 40 percent P owns) and 30 percent of the securities (30 percent of the 100 percent P owns) of T. Under sections 318(a)(2)(A) and 355(d)(8)(B), A is deemed to have purchased 2.4 percent of the stock (20 percent of the 12 percent M is deemed to own) and 6 percent of the securities (20 percent of the 30 percent M is deemed to own) of T on Date 1. Similarly, A is deemed to have purchased 6 percent of the stock (20 percent of the 30 percent M owns) and five percent of the securities (20 percent of the 25 percent M owns) of P on Date 1. If M later purchases an additional 10 percent of P stock on Date 2, M is deemed to have purchased four percent of the stock (10 percent of the 40 percent P owns) and 10 percent of the securities (10 percent of the 100 percent P owns) of T on Date 2. A is deemed to have purchased two percent of the stock of P on Date 2 (20 percent of the 10 percent M purchased). A is also deemed to have purchased 0.8 percent of the stock (20 percent of the four percent M is deemed to have purchased) and two percent of the securities (20 percent of the 10 percent M is deemed to have purchased) of T on Date 2.

Example 4. A and B are brother and sister. For more than five years, A has owned 75 percent of the stock of P, and B has owned 25 percent of the stock of P. A and B are treated as one person under section 267(b), and the stock of each is treated as purchased on the date it was purchased by A and B, respectively. If B later purchases 50 percent of the P stock from A on Date 1, A and B are still treated as one person. However, under paragraph (e)(3)(iii) of this section, the 50 percent of P stock that B purchased from A is treated as purchased on Date 1.

(2) *Transferred basis rule.* If any person acquires property from another person who acquired the property by purchase (determined with regard to section 355(d)(5) and paragraphs (d) and (e)(2), (3) and (4) of this section, but without regard to section 355(d)(8) and paragraph (e)(1) of this section), and the adjusted basis of the property in the hands of the acquirer is determined in whole or in part by reference to the adjusted basis of the property in the hands of the other person, the acquirer is treated as having acquired the property by purchase on the date it was so acquired by the other person. The rule in this paragraph (e)(2) applies, for example, where stock of a corporation acquired by purchase is subsequently acquired in a section 351 transfer or a reorganization qualifying under section 368(a)(1)(B), but does not apply if the stock of a former common parent is acquired in a group structure change to which § 1.1502–31 applies. But see paragraph (d)(2)(i)(B)(*2*) of this section for situations where the stock is treated as purchased on the date of a transfer.

(3) *Exchanged basis rule*—(i) *In general.* If any person acquires an interest in an entity (the first interest) by purchase (determined with regard to section 355(d)(5) and paragraphs (d) and (e)(2), (3) and (4) of this section, but without regard to section 355(d)(8) and paragraph (e)(1) of this section), and the first interest is exchanged for an interest in the same or another entity (the second interest) where the adjusted basis of the second interest is determined in whole or in part by reference to the adjusted basis of the first interest, then the second interest is treated as having been purchased on the date the first interest was purchased. The rule in this paragraph (e)(3) applies only to exchanges that are not treated otherwise treated as purchases under section 355(d)(5) and paragraph (d) of this section. The rule in this paragraph (e)(3) applies, for example, where stock of a corporation acquired by purchase is subsequently exchanged for other stock in a section 351, 354, or 1036(a) exchange. But see paragraph (d)(2)(i)(A)(*2*) of this section for situations where the stock is treated as purchased on the date of an exchange or distribution.

(ii) *Example.* The following example illustrates this paragraph (e)(3):

Example. A purchases 50 percent of the stock of T on Date 1. On Date 2, T merges into D in a section 368(a)(1)(A) reorganization, with A exchanging all of the T stock solely for stock of D. Under section 358(a), A's basis in the D stock is determined by reference to the basis of the T stock it purchased. Accordingly, A is treated as having purchased the D stock on Date 1, and has a purchased basis in the D stock under paragraph (b)(3)(iii) of this section.

(4) *Certain section 355 or section 305 distributions*—(i) *Section 355.* If a distributing corporation distributes any stock of a controlled corporation with respect to recently purchased distributing stock in a distribution that qualifies under section 355 (or so much of section 356 as relates to section 355), such controlled corporation stock is deemed to be acquired by purchase by the distributee on the date the distributee acquired the recently purchased distributing stock. Recently purchased distributing stock is stock in the distributing corporation acquired by purchase (determined with regard to section 355(d)(5) and paragraphs (d) and (e)(2), (3), and (4) of this section, but without regard to section 355(d)(8) and paragraph (e)(1) of this section) by the distributee during the five-year period with respect to that distribution.

(ii) *Section 305.* If a corporation distributes its stock in a distribution that qualifies under section 305(a), the stock received in the distribution (to the extent section 307(a) applies to determine the recipient's basis) is deemed to be acquired by purchase by the recipient on the date (if any) that the recipient acquired by purchase (determined with regard to section 355(d)(5) and paragraphs (d) and (e)(2), (3), and (4) of this section), the stock with respect to which the distribution is made.

(5) *Substantial diminution of risk*—(i) *In general.* If section 355(d)(6) applies to any stock for any period, the running of any five-year period set forth in section 355(d)(3) is suspended during such period.

(ii) *Property to which suspension applies.* Section 355(d)(6) applies to any stock for any period during which the holder's risk of loss with respect to such stock, or with respect to any portion of the activities of the corporation, is (directly or indirectly) substantially diminished by an option, a short sale, any special class of stock, or any other device or transaction.

(iii) *Risk of loss substantially diminished.* Whether a holder's risk of loss is substantially diminished under section 355(d)(6) and paragraph (e)(5)(ii) of this section will be determined based on all facts and circumstances relating to the stock, the corporate activities, and arrangements for holding the stock.

(iv) *Special class of stock.* For purposes of section 355(d)(6) and paragraph (e)(5)(ii) of this section, the term special class of stock includes a class of stock that grants particular rights to, or bears particular risks for, the holder or the issuer with respect to the earnings, assets, or attributes of less than all the assets or activities of a corporation or any of its subsidiaries. The term includes, for example, tracking stock and stock (or any related instruments or arrangements) the terms of which provide for the distribution (whether or not at the option of any party or in the event of any contingency) of any controlled corporation or other specified assets to the holder or to one or more persons other than the holder.

(f) *Duty to determine stockholders*—(1) *In general.* In determining whether section 355(d) applies to a distribution of controlled corporation stock, a distributing corporation must determine whether a disqualified person holds its stock or the stock of any distributed controlled corporation. This paragraph (f) provides rules regarding this determination and the extent to which a distributing corporation must investigate whether a disqualified person holds stock.

(2) *Deemed knowledge of contents of securities filings.* A distributing corporation is deemed to have knowledge of the existence and contents of all schedules, forms, and other documents filed with or under the rules of the Securities and Exchange Commission, including without limitation any Schedule 13D or 13G (or any similar schedules) and amendments, with respect to any relevant corporation.

(3) *Presumption as to securities filings.* Absent actual knowledge to the contrary, in determining whether section 355(d) applies to a distribution, a distributing corporation may presume, with respect to stock that is reporting stock (while such stock is reporting stock), that every shareholder or other person required to file a schedule, form, or other document with or under the rules of the Securities and Exchange Commission as of a given date has filed the schedule, form, or other document as of that date and that the contents of filed schedules, forms, or other documents are accurate and complete. Reporting stock is stock that is described in Rule 13d–1(i) of Regulation 13D (17 CFR 240.13d–1(i)) (or any rule or regulation to generally the same effect) promulgated by the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

(4) *Presumption as to less-than-five-percent shareholders.* Absent actual knowledge (or deemed knowledge under paragraph (f)(2) of this section) immediately after the distribution to the contrary with regard to a particular shareholder, a distributing corporation may presume that no less-than-five-percent shareholder of a corporation acquired stock or securities by purchase under section 355(d)(5) or (8) and paragraphs (d) and (e) of this section during the five-year period. For purposes of this paragraph (f), a less-than-five-percent shareholder is a person that, at no time during the five-year period, holds directly (or by application of paragraph (c)(3)(ii) of this section, but not by application of section 355(d)(7) or (8)) stock possessing five percent or more of the total combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation. However, this presumption does not apply to any less-than-five-percent shareholder that, at any time during the five-year period—

(i) Is related under section 355(d)(7)(A) to a shareholder in the corporation that is, at any time during the five-year period, not a less-than-five-percent shareholder;

(ii) Acted pursuant to a plan or arrangement, with respect to acquisitions of the corporation's stock or securities under section 355(d)(7)(B) and paragraph (c)(4) of this section, with a shareholder in the corporation that is, at any time during the five-year period, not a less-than-five-percent shareholder; or

(iii) Holds stock or securities that is attributed under section 355(d)(8)(A) to a shareholder in the corporation that is, at any time during the five-year period, not a less-than-five-percent shareholder.

(5) *Examples.* The following examples illustrate this paragraph (f):

Example 1. Publicly traded corporation; no schedules filed. D is a widely held and publicly traded corporation with a single class of reporting stock and no other class of stock. Assume that applicable federal law requires any person that directly holds five percent or more of the D stock to file a schedule with the Securities and Exchange Commission within 10 days after an acquisition. D distributes its wholly owned subsidiary C pro rata. D determines that no schedule, form, or other document has been filed with respect to its stock or the stock of any other relevant corporation during the five-year period or within 10 days after the distribution. Immediately after the distribution, D has no knowledge that any of its shareholders are (or were at any time during the five-year period) not less-than-five-percent shareholders, or that any particular shareholder acquired D stock by purchase under section 355(d)(5) or (8) and paragraphs (d) and (e) of this section during the five-year period. Under paragraph (f)(3) of this section, D may presume it has no shareholder that is or was not a less-than-five-percent shareholder during the five-year period due to the absence of any filed schedules, forms, or other documents. Under paragraph (f)(4) of this section, D may presume that none of its less-than-five-

percent shareholders acquired D's stock by purchase during the five-year period. Accordingly, D may presume that section 355(d) does not apply to the distribution of C.

Example 2. Publicly traded corporation; schedule filed. The facts are the same as those in *Example 1,* except that D determines that, as of 10 days after the distribution, only one schedule has been filed with respect to its stock. That schedule discloses that X acquired 15 percent of the D stock one year before the distribution. Absent contrary knowledge, D may rely on the presumptions in paragraph (f)(3) of this section and so may presume that X is its only shareholder that is or was not a less-than-five-percent shareholder during the five-year period. D may not rely on the presumption in paragraph (f)(4) of this section with respect to X. In addition, D may not rely on the presumption in paragraph (f)(4) of this section with respect to any less-than-five-percent shareholder that, at any time during the five-year period, is related to X under section 355(d)(7)(A), acted pursuant to a plan or arrangement with X under section 355(d)(7)(B) and paragraph (c)(4) of this section with respect to acquisitions of D stock, or holds stock that is attributed to X under section 355(d)(8)(A). Accordingly, under paragraph (f)(1) of this section, to determine whether section 355(d) applies, D must determine: whether X acquired its directly held D stock by purchase under section 355(d)(5) and paragraphs (d) and (e)(2) and (3) of this section during the five-year period; whether X is treated as having purchased any additional D stock under section 355(d)(8) and paragraph (e)(1) of this section during the five-year period; and whether X is related to, or acquired its D stock pursuant to a plan or arrangement with, one or more of D's other shareholders during the five-year period under section 355(d)(7)(A) or (B) and paragraph (c)(4) of this section, and if so, whether those shareholders acquired their D stock by purchase under section 355(d)(5) or (8) and paragraphs (d) and (e) of this section during the five-year period.

Example 3. Acquisition of publicly traded corporation. The facts are the same as those in *Example 1,* except that P acquires all of the D stock in a section 368(a)(1)(B) reorganization that is not also a reorganization under section 368(a)(1)(A) by reason of section 368(a)(2)(E), and D distributes C to P one year later. Because D was widely held, P applies statistical sampling procedures that involve less than 50% of D's outstanding shares, to estimate the basis of all shares acquired, instead of surveying each shareholder. Under the deemed purchase rule of section 355(d)(5)(C) and paragraph (e)(2) of this section, P is treated as having acquired the D stock by purchase on the date the D shareholders acquired the D stock by purchase. Even though D has no less-than-five-percent shareholder immediately after the distribution, D may rely on the presumptions in paragraphs (f)(3) and (4) of this section to determine whether and to what extent the D stock is treated as purchased during the five-year period in P's hands under the deemed purchase rule of section 355(d)(5)(C) and paragraph (e)(2) of this section. Accordingly, D may presume that section 355(d) does not apply to the distribution of C to P. This result would not change even if the statistical sampling that involves less than 50 percent of D's outstanding shares indicated that more than 50% of D's shares were acquired by purchase during the five-year period.

Example 4. Non-publicly traded corporation. D is owned by 20 shareholders and has a single class of stock that is not reporting stock. D knows that A owns 40 percent of the D stock, and D does not know that any other shareholder has owned as much as five percent of the D stock at any time during the five-year period. D may not rely on the presumption in paragraph (f)(3) of this section because its stock is not reporting stock. D may not rely on the presumption in paragraph (f)(4) of this section with respect to A. In addition, D may not rely on the presumption in paragraph (f)(4) of this section for any less-than-five-percent shareholder that, at any time during the five-year period, is related to A under section 355(d)(7)(A), acted pursuant to a plan or arrangement with A under section 355(d)(7)(B) and paragraph (c)(4) of this section with respect to acquisitions of D stock, or holds stock that is attributed to A under section 355(d)(8)(A). D may rely on the presumption in paragraph (f)(4) of this section for less-than-five-percent shareholders that during the five-year period are not related to A, did not act pursuant to a plan or arrangement with A, and do not hold stock attributed to A. Accordingly, under paragraph (f)(1) of this section, to determine whether section 355(d) applies, D must determine: that A is its only shareholder that is (or was at any time during the five-year period) not a less-than-five-percent shareholder; whether A acquired its directly held D stock by purchase under section 355(d)(5) and paragraphs (d) and (e)(2) and (3) of this section during the five-year period; whether A is treated as having purchased any additional D stock under section 355(d)(8) and paragraph (e)(1) of this section during the five-year period; and whether A is related to, or acquired its D stock pursuant to a plan or arrangement with, one or more of D's other shareholders during the five-year period under section 355(d)(7)(A) or (B) and paragraph (c)(4) of this section, and if so, whether those shareholders acquired their D stock by purchase under section 355(d)(5) or (8) and paragraphs (d) and (e) of this section during the five-year period.

(g) *Effective date.* This section applies to distributions occurring after December 20, 2000, except that they do not apply to any distributions occurring pursuant to a written agreement which is (subject to customary conditions) binding on December 20, 2000, and at all times thereafter.

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 26

[TD 8912]

RIN 1545–AX08

Generation-Skipping Transfer Issues

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the application of the effective date rules of the generation-skipping transfer (GST) tax imposed under chapter 13 of the Internal Revenue Code (Code). These regulations provide guidance with respect to the type of trust modifications that will not affect the exempt status of a trust. In addition, these regulations clarify the application of the effective date rules in the case of property transferred pursuant to the exercise of a general power of appointment. These regulations are necessary to provide guidance to taxpayers so that they may properly determine if chapter 13 of the Code is applicable to a particular trust.

DATES: These regulations are effective December 20, 2000.

SUPPLEMENTARY INFORMATION:

Background

On November 18, 1999, the Treasury Department and the IRS published in the **Federal Register** (64 FR 62997) a notice of proposed rulemaking (REG–103841–99) relating to the application of the GST tax provisions where the terms of a trust that was irrevocable before the effective date of the statute are changed or modified after that date. The IRS received comments on the notice of proposed rulemaking. In addition, a public hearing was held on March 15, 2000. This document adopts final regulations with respect to the notice of proposed rulemaking. A summary of the principle comments received is provided below.

1. The Regulatory Approach

In general, under the effective date rules accompanying the GST statutory provisions, a trust that was irrevocable on September 25, 1985, is not subject to the GST tax provisions, unless a GST transfer is made out of corpus added to the trust after that date. Section 1433(b)(2)(A) of the Tax Reform Act of 1986 (TRA), Public Law 99–514 (100 Stat. 2085, 2731), 1986–3 (Vol. 1) C.B. 1, 634. Such trusts are hereinafter referred to as exempt trusts for GST tax purposes. The proposed regulations provide a number of safe harbors with respect to changes that can be made to the terms of an exempt trust that will not result in the loss of exempt status.

Commentators argued that the approach set forth in the proposed regulations is inconsistent with the statutory effective date provisions. They contend that, under the TRA, with the exception of additions to principal, modifications or other actions with respect to a trust should not affect the trust's exempt status. Rather, any change should have GST tax consequences only if the change subjects the trust principal to a current gift tax. In that case, the individual making the gift will be treated, to the extent of the gift, as the transferor of the trust for GST tax purposes and the trust, to the extent of the gift, will be subject to the GST tax regime.

This approach was not adopted. The statutory effective date provision protects generation-skipping trusts that were irrevocable before the GST tax was enacted and presumably could not be changed to avoid the imposition of the tax. The Treasury Department and the IRS believe that the approach adopted in the regulations is consistent with Congressional intent to protect these trusts and that most of the modifications that will not affect the exempt status of a trust will be covered by the safe harbors in the final regulations.

2. Trustee Discretionary Actions

Under the proposed regulations, where there is a distribution of trust principal from an exempt trust to a new trust, the new trust will be an exempt trust if the terms of the governing instrument of the old trust authorize the trustee to make distributions to the new trust without the consent or approval of any beneficiary or court and the terms of the new trust do not extend the time for vesting of any beneficial interest in the trust beyond the applicable perpetuities period.

In response to comments, the final regulations clarify that the retention of property in a continuing trust, as well as the distribution of property to a new trust, will not cause loss of exempt status, assuming the requirements of the regulations are satisfied.

In response to comments, the final regulations provide that distribution to a new trust or retention in a continuing trust will not cause the loss of exempt status, even if the governing instrument does not specifically authorize the action, if state law, at the time the exempt trust became irrevocable, permitted such distribution or retention in a continuing trust.

One comment suggested that the final regulations provide that a discretionary distribution that otherwise satisfies the regulatory requirements should not cause the trust to lose exempt status if the trustee, although not required to do so, seeks approval of a court or the trust beneficiaries before taking action. This change was deemed unnecessary. An action that satisfies the requirements of the regulations will not cause loss of exempt status even if, for whatever reason, the trustee seeks a court's or a beneficiary's approval of such action.

Comments suggested that the period for measuring the appropriate perpetuities period for the new trust should be the date the original trust became irrevocable under local law. The comments noted that the perpetuities period is properly measured from the date the trust becomes irrevocable, which is not always the date the trust was created (the date referenced in the proposed regulations). The regulations have been revised accordingly.

3. Settlements and Judicial Constructions

Under the proposed regulations, a court-approved settlement of a bona fide issue regarding the administration of the trust or the construction of terms of the trust will not cause the trust to lose exempt status if the settlement is the product of arm's length negotiations, and the settlement is within the range of reasonable outcomes under the governing instrument and applicable state law. A judicial construction of a governing instrument resolving an ambiguity in the terms of the instrument or correcting a scrivener's error will not cause loss of exempt status if the judicial action involves a bona fide issue, and the construction is consistent with applicable state law that would be applied by the highest court of the state.

One comment suggested that the standard applicable for recognition of settlement agreements should also apply for court decrees, such that one standard would govern both actions. Thus, the commentator suggested that a settlement agreement or court decree should be binding on the Service (and not cause loss of exempt status) if the result is within the range of reasonable outcomes and the agreement or court decision is the product of adversarial proceedings. The suggestion was not adopted. The standard applied in the regulations for court decrees was enunciated by the Supreme Court in *Commissioner* v. *Estate of Bosch,* 387 U.S. 456 (1967), and has been continuously and repeatedly applied by the IRS and the courts. The adoption of a different standard at this time is not appropriate.

Another comment addressing the rule for settlements stated that the requirement that the settlement fall within the range of reasonable outcomes under the governing instrument and state law could be read to deny protection to a settlement that reaches a result that a court could not reach. However, the purpose of this rule is not to restrict safe harbor protection to only those settlements that reach the result a court could reach if the issue was litigated. Rather, the rule is intended to afford the parties a greater degree of latitude to settle a case than would be available if a court had to decide the issue. Thus, a settlement ''within the range of reasonable outcomes'' would include a compromise that reflects the parties' assessment of their relative rights and the strengths and weaknesses of their respective positions. The settlement need not (and it is anticipated that in most cases it would not) resolve the issue in the same manner as a court decision on the merits. Language has been added to the final regulations emphasizing this point. On the other hand, as illustrated in the preamble to the proposed regulations, a settlement that, for example, creates beneficial interests that did not exist under a reasonable interpretation of the instrument will not satisfy the regulations.

One comment suggested that the scope of the judicial construction rule should be expanded to cover not only ambiguities and scrivener's error, but any request for court instructions or any similar proceedings such as requests to modernize the trust instrument, or adapt the instrument to unforeseen changed circumstances. This suggestion was not adopted. The Treasury Department and the IRS believe that these and similar actions are properly addressed under the safe-harbor ''shift in beneficial interest'' rule provided in the regulations, and a separate category to address these items is not needed.

4. Other Changes

Under the proposed regulations, a modification that does not satisfy the

regulatory rules for trustee distributions, settlements, and constructions will not cause a trust to lose exempt status, if the modification does not shift a beneficial interest in the trust to any beneficiary who occupies a lower generation (as defined in section 2651) than the person or persons who held the beneficial interest prior to the modification, and the modification does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust.

Comments suggested that the regulations should provide additional guidance on when a modification shifts a beneficial interest in a trust. In response to these comments, the final regulations provide that a modification to an exempt trust will result in a shift in beneficial interest to a lower generation beneficiary if the modification can result in an increase in a GST transfer or create a new GST transfer. To determine whether a modification of an irrevocable trust will shift a beneficial interest in a trust to a beneficiary who occupies a lower generation, the effect of the instrument on the date of the modification is measured against the effect of the instrument in existence immediately before the modification. If the effect of the modification cannot be immediately determined, it is deemed to shift a beneficial interest in the trust to a beneficiary who occupies a lower generation (as defined in section 2651) than the person or persons who held the beneficial interest prior to the modification.

In conjunction with this change, the final regulations remove *Example 7* contained in § 26.2601–1(b)(2)(vii)(B). This example had illustrated the transition rule contained in § 26.2601–1(b)(2) for generation-skipping transfers under wills or revocable trusts executed before October 22, 1986. Under this rule, the GST tax does not apply to transfers made under a will or revocable trust executed before October 22, 1986, if the decedent dies before January 1, 1987, and the instrument is not amended after October 21, 1986, in any respect that results in the creation of, or increase in the amount of, a generation-skipping transfer. In *Example 7,* trust income is to be distributed equally, for life, to A, B, and C who are skip persons assigned to the same generation. The trust is amended to increase A's share of the income. The example concludes that the trust is subject to GST tax because the amendment increases the amount of the generation-skipping transfers to be made to A. The amendment to the trust, however, does not increase the amount of a generation-skipping transfer when viewed in the aggregate. The amendment merely shifts an interest from one beneficiary to another beneficiary assigned to the same generation. *Example 7* in § 26.2601–1(b)(4)(i)(E) considers a substantially similar fact pattern involving a trust that is irrevocable on or before September 25, 1985, and concludes that the modification will not result in an increase in a generation-skipping transfer.

The standard contained in § 26.2601–1(b)(2) (relating to wills and revocable trusts executed before October 22, 1986) is similar to the standard contained in § 26.2602–1(b)(4)(i)(D)(relating to a modification to a trust that was irrevocable on September 25, 1985). The Treasury Department and the IRS believe that the two provisions should be applied in a consistent manner. Therefore, *Example 7* in § 26.2601–1(b)(2)(vii)(B) has been eliminated.

In response to comments, the final regulations specify that changes that are administrative in nature (such as a change in the number of trustees) will not cause the trust to lose its exempt status. An example has been added illustrating this point.

Several comments indicated that many states have adopted, or are considering adopting, section 104 of the Revised Uniform Principal and Income Act. Unif. Principal and Income Act § 104, 7B U.L.A. 141 (1997) (Act). The Act allows a trustee to adjust between principal and income to the extent necessary to produce an equitable result, if the trustee invests and manages trust assets pursuant to the state's prudent investor statute and the trustee is unable to administer the trust fairly and reasonably under the general statutory rules governing the allocation of income and principal. In addition, the comments noted that some state legislatures are contemplating revising their state principal and income act to define trust *income* as a unitrust amount (a fixed percentage of the trust principal determined annually). The comments suggested that the regulations provide additional safe harbors to the effect that the administration of an exempt trust pursuant to a state statute adopting the Act, or the conversion of an income interest to a unitrust interest pursuant to a court order or a state statute redefining trust income, would not cause the trust to lose exempt status.

A guidance project considering the tax consequences of these state law changes in a broader context is currently under consideration. Accordingly, these regulations do not specifically address this issue. However, two examples have been added to the regulations illustrating circumstances under which a trust will not lose exempt status where an income interest is converted to an interest that pays the greater of trust income or a unitrust amount, and a trust is modified to allow allocation of capital gain to income.

In response to a comment, the facts presented in § 26.2601–1(b)(4)(i)(E) *Example 5,* have been changed to clarify that after the trusts are partitioned, if either beneficiary should die without descendants surviving, the principal of their partitioned trust will pass to the other partitioned trust.

5. Effective Dates and Other Matters

Comments requested clarification regarding the status of exempt trusts that were modified or subject to other actions (for example, judicial constructions or settlements) prior to the effective date of these regulations, December 20, 2000. The IRS will not challenge the exempt status of a trust that was, prior to December 20, 2000, subject to any trustee action, judicial construction, settlement agreement, modification, or other action, if the action satisfies the requirements of the regulations.

Finally, with respect to the deletion of § 26.2601–1(b)(2)(vii)(B) *Example 7,* discussed above, the IRS will not follow that example when applying the rule in § 26.2601–1(b)(2).

Special Analyses

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

Drafting Information

The principal author of these regulations is James F. Hogan, Office of the Chief Counsel, IRS. Other personnel from the IRS and the Treasury Department participated in their development.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 26 is amended as follows:

PART 26—GENERATION-SKIPPING TRANSFER TAX REGULATIONS UNDER THE TAX REFORM ACT OF 1986

Par. 1. The authority citation for part 26 continues to read in part as follows:

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

Par. 2. In § 26.2600–1, the table is amended under § 26.2601–1 by revising the entry for paragraph (b)(4) and adding an entry for paragraph (b)(5) to read as follows:

§ 26.2600–1 Table of contents.

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§ 26.2601–1. Effective dates.

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(b) * * *

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(4) Retention of trust's exempt status in the case of modifications, etc.

(5) Exceptions to additions rule.

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Par. 3. Section 26.2601–1 is amended as follows:

1. Adding four sentences to the end of paragraph (b)(1)(i).

2. Paragraph (b)(2)(vii)(B) is amended by revising the heading, removing *Example 7,* and redesignating *Examples 8* and *9* as *Examples 7* and *8,* respectively.

2. Redesignating paragraph (b)(4) as paragraph (b)(5).

3. Adding a new paragraph (b)(4).

4. Paragraph (c) is amended by adding a new sentence to the end of the paragraph.

The additions read as follows:

§ 26.2601–1 Effective dates.

* * * * *

(b) * * * (1) * * * (i) * * * Further, the rule in the first sentence of this paragraph (b)(1)(i) does not apply to a transfer of property pursuant to the exercise, release, or lapse of a general power of appointment that is treated as a taxable transfer under chapter 11 or chapter 12. The transfer is made by the person holding the power at the time the exercise, release, or lapse of the power becomes effective, and is not considered a transfer under a trust that was irrevocable on September 25, 1985. See paragraph (b)(1)(v)(B) of this section regarding the treatment of the release, exercise, or lapse of a power of appointment that will result in a constructive addition to a trust. See § 26.2652–1(a) for the definition of a transferor.

* * * * *

(2) * * *

(vii) * * *

(B) *Facts applicable to Examples 6 through 8.*

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(4) *Retention of trust's exempt status in the case of modifications, etc.*—(i) *In general.* This paragraph (b)(4) provides rules for determining when a modification, judicial construction, settlement agreement, or trustee action with respect to a trust that is exempt from the generation-skipping transfer tax under paragraph (b)(1), (2), or (3) of this section (hereinafter referred to as an exempt trust) will not cause the trust to lose its exempt status. The rules contained in this paragraph (b)(4) are applicable only for purposes of determining whether an exempt trust retains its exempt status for generation-skipping transfer tax purposes. The rules do not apply in determining, for example, whether the transaction results in a gift subject to gift tax, or may cause the trust to be included in the gross estate of a beneficiary, or may result in the realization of capital gain for purposes of section 1001.

(A) *Discretionary powers.* The distribution of trust principal from an exempt trust to a new trust or retention of trust principal in a continuing trust will not cause the new or continuing trust to be subject to the provisions of chapter 13, if—

(*1*) Either—

(*i*) The terms of the governing instrument of the exempt trust authorize distributions to the new trust or the retention of trust principal in a continuing trust, without the consent or approval of any beneficiary or court; or

(*ii*) at the time the exempt trust became irrevocable, state law authorized distributions to the new trust or retention of principal in the continuing trust, without the consent or approval of any beneficiary or court; and

(*2*) The terms of the governing instrument of the new or continuing trust do not extend the time for vesting of any beneficial interest in the trust in a manner that may postpone or suspend the vesting, absolute ownership, or power of alienation of an interest in property for a period, measured from the date the original trust became irrevocable, extending beyond any life in being at the date the original trust became irrevocable plus a period of 21 years, plus if necessary, a reasonable period of gestation. For purposes of this paragraph (b)(4)(i)(A), the exercise of a trustee's distributive power that validly postpones or suspends the vesting, absolute ownership, or power of alienation of an interest in property for a term of years that will not exceed 90 years (measured from the date the original trust became irrevocable) will not be considered an exercise that postpones or suspends vesting, absolute ownership, or the power of alienation beyond the perpetuities period. If a distributive power is exercised by creating another power, it is deemed to be exercised to whatever extent the second power may be exercised.

(B) *Settlement.* A court-approved settlement of a bona fide issue regarding the administration of the trust or the construction of terms of the governing instrument will not cause an exempt trust to be subject to the provisions of chapter 13, if—

(*1*) The settlement is the product of arm's length negotiations; and

(*2*) The settlement is within the range of reasonable outcomes under the governing instrument and applicable state law addressing the issues resolved by the settlement. A settlement that results in a compromise between the positions of the litigating parties and reflects the parties' assessments of the relative strengths of their positions is a settlement that is within the range of reasonable outcomes.

(C) *Judicial construction.* A judicial construction of a governing instrument to resolve an ambiguity in the terms of the instrument or to correct a scrivener's error will not cause an exempt trust to be subject to the provisions of chapter 13, if—

(*1*) The judicial action involves a bona fide issue; and

(*2*) The construction is consistent with applicable state law that would be applied by the highest court of the state.

(D) *Other changes.* (*1*) A modification of the governing instrument of an exempt trust (including a trustee distribution, settlement, or construction that does not satisfy paragraph (b)(4)(i)(A), (B), or (C) of this section) by judicial reformation, or nonjudicial reformation that is valid under applicable state law, will not cause an exempt trust to be subject to the provisions of chapter 13, if the modification does not shift a beneficial interest in the trust to any beneficiary who occupies a lower generation (as defined in section 2651) than the person or persons who held the beneficial interest prior to the modification, and the modification does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust.

(*2*) For purposes of this section, a modification of an exempt trust will result in a shift in beneficial interest to a lower generation beneficiary if the modification can result in either an increase in the amount of a GST transfer or the creation of a new GST transfer.

To determine whether a modification of an irrevocable trust will shift a beneficial interest in a trust to a beneficiary who occupies a lower generation, the effect of the instrument on the date of the modification is measured against the effect of the instrument in existence immediately before the modification. If the effect of the modification cannot be immediately determined, it is deemed to shift a beneficial interest in the trust to a beneficiary who occupies a lower generation (as defined in section 2651) than the person or persons who held the beneficial interest prior to the modification. A modification that is administrative in nature that only indirectly increases the amount transferred (for example, by lowering administrative costs or income taxes) will not be considered to shift a beneficial interest in the trust.

(E) *Examples.* The following examples illustrate the application of this paragraph (b)(4). In each example, assume that the trust established in 1980 was irrevocable for purposes of paragraph (b)(1)(ii) of this section and that there have been no additions to any trust after September 25, 1985. The examples are as follows:

Example 1. Trustee's power to distribute principal authorized under trust instrument. In 1980, Grantor established an irrevocable trust (Trust) for the benefit of Grantor's child, *A*, *A*'s spouse, and *A*'s issue. At the time Trust was established, *A* had two children, *B* and *C*. *A* corporate fiduciary was designated as trustee. Under the terms of Trust, the trustee has the discretion to distribute all or part of the trust income to one or more of the group consisting of *A*, *A*'s spouse or *A*'s issue. The trustee is also authorized to distribute all or part of the trust principal to one or more trusts for the benefit of *A*, *A*'s spouse, or *A*'s issue under terms specified by the trustee in the trustee's discretion. Any trust established under Trust, however, must terminate 21 years after the death of the last child of *A* to die who was alive at the time Trust was executed. Trust will terminate on the death of *A*, at which time the remaining principal will be distributed to *A*'s issue, per stirpes. In 2002, the trustee distributes part of Trust's principal to a new trust for the benefit of *B* and *C* and their issue. The new trust will terminate 21 years after the death of the survivor of *B* and *C*, at which time the trust principal will be distributed to the issue of *B* and *C*, per stirpes. The terms of the governing instrument of Trust authorize the trustee to make the distribution to a new trust without the consent or approval of any beneficiary or court. In addition, the terms of the governing instrument of the new trust do not extend the time for vesting of any beneficial interest in a manner that may postpone or suspend the vesting, absolute ownership or power of alienation of an interest in property for a period, measured from the date of creation of Trust, extending beyond any life in being at the date of creation of Trust plus a period of 21 years, plus if necessary, a reasonable period of gestation. Therefore, neither Trust nor the new trust will be subject to the provisions of chapter 13 of the Internal Revenue Code.

Example 2. Trustee's power to distribute principal pursuant to state statute. In 1980, Grantor established an irrevocable trust (Trust) for the benefit of Grantor's child, *A*, *A*'s spouse, and *A*'s issue. At the time Trust was established, *A* had two children, *B* and *C*. *A* corporate fiduciary was designated as trustee. Under the terms of Trust, the trustee has the discretion to distribute all or part of the trust income or principal to one or more of the group consisting of *A*, *A*'s spouse or *A*'s issue. Trust will terminate on the death of *A*, at which time, the trust principal will be distributed to *A*'s issue, per stirpes. Under a state statute enacted after 1980 that is applicable to Trust, a trustee who has the absolute discretion under the terms of a testamentary instrument or irrevocable inter vivos trust agreement to invade the principal of a trust for the benefit of the income beneficiaries of the trust, may exercise the discretion by appointing so much or all of the principal of the trust in favor of a trustee of a trust under an instrument other than that under which the power to invade is created, or under the same instrument. The trustee may take the action either with consent of all the persons interested in the trust but without prior court approval, or with court approval, upon notice to all of the parties. The exercise of the discretion, however, must not reduce any fixed income interest of any income beneficiary of the trust and must be in favor of the beneficiaries of the trust. Under state law prior to the enactment of the state statute, the trustee did not have the authority to make distributions in trust. In 2002, the trustee distributes one-half of Trust's principal to a new trust that provides for the payment of trust income to *A* for life and further provides that, at *A*'s death, one-half of the trust remainder will pass to *B* or *B*'s issue and one-half of the trust will pass to *C* or *C*'s issue. Because the state statute was enacted after Trust was created and requires the consent of all of the parties, the transaction constitutes a modification of Trust. However, the modification does not shift any beneficial interest in Trust to a beneficiary or beneficiaries who occupy a lower generation than the person or persons who held the beneficial interest prior to the modification. In addition, the modification does not extend the time for vesting of any beneficial interest in Trust beyond the period provided for in the original trust. The new trust will terminate at the same date provided under Trust. Therefore, neither Trust nor the new trust will be subject to the provisions of chapter 13 of the Internal Revenue Code.

Example 3. Construction of an ambiguous term in the instrument. In 1980, Grantor established an irrevocable trust for the benefit of Grantor's children, *A* and *B,* and their issue. The trust is to terminate on the death of the last to die of *A* and *B,* at which time the principal is to be distributed to their issue. However, the provision governing the termination of the trust is ambiguous regarding whether the trust principal is to be distributed per stirpes, only to the children of *A* and *B*, or per capita among the children, grandchildren, and more remote issue of *A* and *B.* In 2002, the trustee files a construction suit with the appropriate local court to resolve the ambiguity. The court issues an order construing the instrument to provide for per capita distributions to the children, grandchildren, and more remote issue of *A* and *B* living at the time the trust terminates. The court's construction resolves a bona fide issue regarding the proper interpretation of the instrument and is consistent with applicable state law as it would be interpreted by the highest court of the state. Therefore, the trust will not be subject to the provisions of chapter 13 of the Internal Revenue Code.

Example 4. Change in trust situs. In 1980, Grantor, who was domiciled in State *X,* executed an irrevocable trust for the benefit of Grantor's issue, naming a State *X* bank as trustee. Under the terms of the trust, the trust is to terminate, in all events, no later than 21 years after the death of the last to die of certain designated individuals living at the time the trust was executed. The provisions of the trust do not specify that any particular state law is to govern the administration and construction of the trust. In State *X,* the common law rule against perpetuities applies to trusts. In 2002, a State *Y* bank is named as sole trustee. The effect of changing trustees is that the situs of the trust changes to State *Y,* and the laws of State *Y* govern the administration and construction of the trust. State *Y* law contains no rule against perpetuities. In this case, however, in view of the terms of the trust instrument, the trust will terminate at the same time before and after the change in situs. Accordingly, the change in situs does not shift any beneficial interest in the trust to a beneficiary who occupies a lower generation (as defined in section 2651) than the person or persons who held the beneficial interest prior to the transfer. Furthermore, the change in situs does not extend the time for vesting of any beneficial interest in the trust beyond that provided for in the original trust. Therefore, the trust will not be subject to the provisions of chapter 13 of the Internal Revenue Code. If, in this example, as a result of the change in situs, State *Y* law governed such that the time for vesting was extended beyond the period prescribed under the terms of the original trust instrument, the trust would not retain exempt status.

Example 5. Division of a trust. In 1980, Grantor established an irrevocable trust for the benefit of his two children, *A* and *B,* and their issue. Under the terms of the trust, the trustee has the discretion to distribute income and principal to *A, B,* and their issue in such amounts as the trustee deems appropriate. On the death of the last to die of *A* and *B,* the trust principal is to be distributed to the living issue of *A* and *B,* per stirpes. In 2002, the appropriate local court approved the division of the trust into two equal trusts, one for the benefit of *A* and *A*'s issue and one for the benefit of *B* and *B*'s issue. The trust for *A* and *A*'s issue provides that the trustee has the discretion to distribute trust income and principal to *A* and *A*'s issue in such amounts as the trustee

deems appropriate. On *A*'s death, the trust principal is to be distributed equally to *A*'s issue, per stirpes. If *A* dies with no living descendants, the principal will be added to the trust for *B* and *B*'s issue. The trust for *B* and *B*'s issue is identical (except for the beneficiaries), and terminates at *B*'s death at which time the trust principal is to be distributed equally to *B*'s0 issue, per stirpes. If *B* dies with no living descendants, principal will be added to the trust for *A* and *A's* issue. The division of the trust into two trusts does not shift any beneficial interest in the trust to a beneficiary who occupies a lower generation (as defined in section 2651) than the person or persons who held the beneficial interest prior to the division. In addition, the division does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust. Therefore, the two partitioned trusts resulting from the division will not be subject to the provisions of chapter 13 of the Internal Revenue Code.

Example 6. Merger of two trusts. In 1980, Grantor established an irrevocable trust for Grantor's child and the child's issue. In 1983, Grantor's spouse also established a separate irrevocable trust for the benefit of the same child and issue. The terms of the spouse's trust and Grantor's trust are identical. In 2002, the appropriate local court approved the merger of the two trusts into one trust to save administrative costs and enhance the management of the investments. The merger of the two trusts does not shift any beneficial interest in the trust to a beneficiary who occupies a lower generation (as defined in section 2651) than the person or persons who held the beneficial interest prior to the merger. In addition, the merger does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust. Therefore, the trust that resulted from the merger will not be subject to the provisions of chapter 13 of the Internal Revenue Code.

Example 7. Modification that does not shift an interest to a lower generation. In 1980, Grantor established an irrevocable trust for the benefit of Grantor's grandchildren, *A*, *B*, and *C*. The trust provides that income is to be paid to *A*, *B*, and *C*, in equal shares for life. The trust further provides that, upon the death of the first grandchild to die, one-third of the principal is to be distributed to that grandchild's issue, per stirpes. Upon the death of the second grandchild to die, one-half of the remaining trust principal is to be distributed to that grandchild's issue, per stirpes, and upon the death of the last grandchild to die, the remaining principal is to be distributed to that grandchild's issue, per stirpes. In 2002, *A* became disabled. Subsequently, the trustee, with the consent of *B* and *C*, petitioned the appropriate local court and the court approved a modification of the trust that increased *A*'s share of trust income. The modification does not shift a beneficial interest to a lower generation beneficiary because the modification does not increase the amount of a GST transfer under the original trust or create the possibility that new GST transfers not contemplated in the original trust may be made. In this case, the modification will increase the amount payable to *A* who is a member of the same generation as *B* and *C*. In addition, the modification does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust. Therefore, the trust as modified will not be subject to the provisions of chapter 13 of the Internal Revenue Code. However, the modification increasing *A*'s share of trust income is a transfer by *B* and *C* to *A* for Federal gift tax purposes.

Example 8. Conversion of income interest into unitrust interest. In 1980, Grantor established an irrevocable trust under the terms of which trust income is payable to *A* for life and, upon *A*'s death, the remainder is to pass to *A*'s issue, per stirpes. In 2002, the appropriate local court approves a modification to the trust that converts *A*'s income interest into the right to receive the greater of the entire income of the trust or a fixed percentage of the trust assets valued annually (unitrust interest) to be paid each year to *A* for life. The modification does not result in a shift in beneficial interest to a beneficiary who occupies a lower generation (as defined in section 2651) than the person or persons who held the beneficial interest prior to the modification. In this case, the modification can only operate to increase the amount distributable to *A* and decrease the amount distributable to *A*'s issue. In addition, the modification does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust. Therefore, the trust will not be subject to the provisions of chapter 13 of the Internal Revenue Code.

Example 9. Allocation of capital gain to income. In 1980, Grantor established an irrevocable trust under the terms of which trust income is payable to Grantor's child, *A*, for life, and upon *A*'s death, the remainder is to pass to the *A*'s issue, per stirpes. Under applicable state law, unless the governing instrument provides otherwise, capital gain is allocated to principal. In 2002, the trust is modified to allow the trustee to allocate capital gain to the income. The modification does not shift any beneficial interest in the trust to a beneficiary who occupies a lower generation (as defined in section 2651) than the person or persons who held the beneficial interest prior to the modification. In this case, the modification can only have the effect of increasing the amount distributable to *A,* and decreasing the amount distributable to *A*'s issue. In addition, the modification does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust. Therefore, the trust will not be subject to the provisions of chapter 13 of the Internal Revenue Code.

Example 10. Administrative change to terms of a trust. In 1980, Grantor executed an irrevocable trust for the benefit of Grantor's issue, naming a bank and five other individuals as trustees. In 2002, the appropriate local court approves a modification of the trust that decreases the number of trustees which results in lower administrative costs. The modification pertains to the administration of the trust and does not shift a beneficial interest in the trust to any beneficiary who occupies a lower generation (as defined in section 2651) than the person or persons who held the beneficial interest prior to the modification. In addition, the modification does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust. Therefore, the trust will not be subject to the provisions of chapter 13 of the Internal Revenue Code.

(ii) *Effective date.* The rules in this paragraph (b)(4) are applicable on and after December 20, 2000.

* * * * *

(c) * * * The last four sentences in paragraph (b)(1)(i) of this section are applicable on and after November 18, 1999.

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

Approved: December 7, 2000.

Jonathan Talisman,

Acting Assistant Secretary of the Treasury.

[FR Doc. 00–31757 Filed 12–19–00; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF DEFENSE

Department of the Navy

32 CFR Part 706

Certifications and Exemptions Under the International Regulations for Preventing Collisions at Sea, 1972

AGENCY: Department of the Navy, DOD.

ACTION: Final rule.

SUMMARY: The Department of the Navy is amending its certifications and exemptions under the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), to reflect that the Deputy Assistant Judge Advocate General of the Navy (Admiralty and Maritime Law) has determined that certain prior entries in 32 CFR part 706 are no longer applicable or that administrative corrections are required. The intended effect of this rule is to warn mariners in waters where 72 COLREGS apply.

EFFECTIVE DATE: December 20, 2000.

FOR FURTHER INFORMATION CONTACT: Commander Gregg A. Cervi, JAGC, U.S. Navy, Deputy Assistant Judge Advocate General (Admiralty and Maritime Law), Office of the Judge Advocate General, (Code 11), 1322 Patterson Avenue SE., Suite 3000, Washington Navy Yard, DC 20374–5066, Telephone number: (202) 685–5040.

SUPPLEMENTARY INFORMATION: Pursuant to the authority granted in 33 U.S.C. 1605, the Department of the Navy amends 32 CFR part 706. This amendment provides notice that the

Deputy Assistant Judge Advocate General of the Navy (Admiralty and Maritime Law), under authority delegated by the Secretary of the Navy, had certified that certain vessels are vessels of the Navy which, due to their special construction and purpose, could not fully comply with certain specific provisions of 72 COLREGS without interfering with their special function as naval vessels. The Deputy Assistant Judge Advocate General of the Navy (Admiralty and Maritime Law) also had certified that the lights involved were located in closest possible compliance with the applicable 72 COLREGS requirements. The Deputy Assistant Judge Advocate General of the Navy (Admiralty and Maritime Law) has now determined that previous entries for certain of these vessels require administrative correction, or no longer apply based on removal of the vessel from navigation or alterations resulting in compliance with the provisions of 72 COLREGS.

Moreover, it has been determined, in accordance with 32 CFR parts 296 and 701, that publication of this amendment for public comment prior to adoption is impracticable, unnecessary, and contrary to public interest because it is based on administrative corrections, alterations resulting in compliance with the 72 COLREGS, or removal of vessels from navigation.

List of Subjects in 32 CFR Part 706

Marine safety, Navigation (water), Vessels.

Accordingly, 32 CFR part 706 is amended as follows:

PART 706—[AMENDED]

1. The authority citation for 32 CFR part 706 continues to read as follows:

Authority: 33 U.S.C. 1605.

2. Section 706.2 is amended:

a. In Table One by:

i. Removing the entries for the following vessels:

AALC JEFF (B)
USS OLIVER HAZARD PERRY
USS WADSWORTH
USS DUNCAN
USS CLIFTON SPRAGUE
USS ANTRIM
USS FLATLEY
USS FAHRION
USS LEWIS B. PULLER
USS JACK WILLIAMS
USS COPELAND
USS GALLERY
USS MAHLON S. TISDALE
USS REID
USS STARK
USS AUBREY FITCH
USS GUADALCANAL
USS GUAM
USS NEW ORLEANS
USS IMPLICIT
USS CONQUEST
USS GALLANT
USS PLEDGE
USS TACOMA
USS WELCH
USS GATO
USS WHALE
USS TAUTOG
USS GRAYLING
USS POGY
USS ASPRO
USS SUNFISH
USS PARGO
USS PUFFER
USS SANDLANCE
USS GURNARD
USS HAMMERHEAD
USS HAWKBILL
USS BERGALL
USS SPADEFISH
USS SEAHORSE
USS FINBACK
USS NARWHAL
USS PINTADO
USS FLYING FISH
USS TREPANG
USS BLUEFISH
USS BILLFISH
USS DRUM
USS ARCHERFISH
USS WILLIAM H BATES
USS BATFISH
USS TUNNY
USS CAVALLA
USS RICHARD B RUSSELL
USS OMAHA
USS CINCINNATI
USS GROTON
USS BIRMINGHAM
USS NEW YORK CITY
USS INDIANAPOLIS
USS PHOENIX
USS BOSTON
USS BALTIMORE
USS ATLANTA
USS DANIEL WEBSTER
USS STONEWALL JACKSON
USS SIMON BOLIVAR
USS JAMES K. POLK
USS MARIANO G VALLEJO

ii. Amending the entry for USS INCHON by revising ''LPH 12'' to read ''MCS 12'' and adding it immediately preceding the entry for NR–1; and

iii. Amending the entry for USS KAMEHAMEHA by revising ''SSBN 642'' to read ''SSN 642'' and adding it immediately preceding the entry for USS MENDEL RIVERS.

b. In Table Two by:

i. Removing the entries for the following vessels:

AALC JEFF (B)
USS FORRESTAL
USS SARATOGA
USS INDEPENDENCE
USS AMERICA
USS GUADALCANAL
USS GUAM
USS NEW ORLEANS

ii. Removing and reserving footnote 1; and

iii. Amending the entry for USS INCHON by revising ''LPH 12'' to read ''MCS 12'' and adding it immediately preceding the entry for SLWT (class).

c. In Table Three by:

i. Removing the entries for the following vessels:

USS GATO
USS WHALE
USS TAUTOG
USS GRAYLING
USS POGY
USS ASPRO
USS SUNFISH
USS PARGO
USS PUFFER
USS SANDLANCE
USS GURNARD
USS HAMMERHEAD
USS HAWKBILL
USS BERGALL
USS SPADEFISH
USS SEAHORSE
USS FINBACK
USS NARWHAL
USS PINTADO
USS FLYING FISH
USS TREPANG
USS BLUEFISH
USS BILLFISH
USS DRUM
USS ARCHERFISH
USS WILLIAM H. BATES
USS BATFISH
USS TUNNY
USS CAVALLA
USS RICHARD B. RUSSELL
USS OMAHA
USS CINCINNATI
USS GROTON
USS BIRMINGHAM
USS NEW YORK CITY
USS INDIANAPOLIS
USS PHOENIX
USS BOSTON
USS BALTIMORE
USS ATLANTA
USS DANIEL WEBSTER
USS STONEWALL JACKSON
USS SIMON BOLIVAR
USS JAMES K. POLK
USS MARIANO G. VALLEJO
YTB–752
OSHKOSH
YTB 758
SAUGUS
YTB 785
WAPATO
NATCHITOCHES
PALATKA

HOUMA
YTB 826

ii. Amending the entry for USS KAMEHAMEHA by revising ''SSBN 642'' to read ''SSN 642'' and adding it immediately preceding the entry for USS PARCHE.

d. In Table Four by:

i. Amending paragraph 4 by removing the following entries from the table:

USS IMPLICIT
USS CONQUEST
USS GALLANT
USS PLEDGE

ii. Removing and reserving paragraph 6;

iii. Removing the following entries from paragraph 7:

USS OLIVER HAZARD PERRY
USS WADSWORTH
USS DUNCAN
USS CLIFTON SPRAGUE
USS ANTRIM
USS FLATLEY
USS FAHRION
USS LEWIS B. PULLER
USS JACK WILLIAMS
USS COPELAND
USS GALLERY
USS MAHLON S. TISDALE
USS REID
USS STARK
USS AUBREY FITCH

iv. Removing the following entries from paragraph 8:

USS OLIVER HAZARD PERRY
USS WADSWORTH
USS DUNCAN
USS CLIFTON SPRAGUE
USS ANTRIM
USS FLATLEY
USS FAHRION
USS LEWIS B. PULLER
USS JACK WILLIAMS
USS COPELAND
USS GALLERY
USS MAHLON S. TISDALE
USS REID
USS STARK
USS AUBREY FITCH

v. Removing and reserving paragraph 10;

vi. Removing the following entries from paragraph 14:

YTB 752
YTB 757
YTB 758
YTB 780
YTB 785
YTB 788
YTB 799
YTB 801
YTB 811
YTB 826

vii. Removing the second entry for USS PORTER in paragraph 16; and

viii. Removing the entry for KINGFISHER in paragraph 18.

e. In Table Five by:

i. Removing the entries for the following vessels:

USS SURIBACHI
USS MAUNA KEA
USS NITRO
USS PYRO
USS MARS
USS SYLVANIA
USS WHITE PLAINS
USS SAN DIEGO
USS DALE
USS RICHMOND K. TURNER
USS BELKNAP
USS LONG BEACH
USS BAINBRIDGE
USS TRUXTUN
USS CALIFORNIA
USS SOUTH CAROLINA
USS MISSISSIPPI
USS ARKANSAS
USS FORRESTAL
USS SARATOGA
USS INDEPENDENCE
USS COMTE DE GRASSE
USS MERRILL
USS CONOLLY
USS JOHN RODGERS
USS LEFTWICH
USS HARRY W. HILL
USS INGERSOLL
USS KIDD

The second entry for USS PORTER

USS CALLAGHAN
USS SCOTT
USS CHANDLER
USS ELK RIVER
USS GUADALCANAL
USS GUAM
USS NEW ORLEANS
USS ALAMO
USS HERMITAGE
USS PENSACOLA
USS FORT FISHER
USS SAGINAW
USS SPARTANBURG COUNTY
USS FAIRFAX COUNTY
USS BRISTOL COUNTY

ii. Amending the entry for USS INCHON by revising ''LPH 12'' to read ''MCS 12'' and adding it immediately preceding the entry for USNS KILAUEA.

3. Table One of § 706.3 is amended by removing the following entries:

USNS RANGE SENTINEL (T–AGM–22)
T–AGS 33 Class
USNS ALBERT J. MYER (T–ARC 6)
ARS 6 Class
ARS 38 Class
ASR 7 Class
ASR 21 Class
ATF 148 Class
ATS 1 Class
FF 1037 Class
USS GLOVER (FF 1098)
FFG 1 Class
MSO 422 Class
MSO 508 Class
PG 92 Class
SSBN 616 Class
SSBN 627 Class
SSBN 640 Class

Dated: December 8, 2000.

J.L. Roth,

Commander, JAGC, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 00–32209 Filed 12–19–00; 8:45 am]

BILLING CODE 3810–FF–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[AZ 063–0020a; FRL–6839–9]

Approval and Promulgation of Implementation Plans; Arizona State Implementation Plan Revision, Pinal County Air Quality Control District and Pinal-Gila Counties Air Quality Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the Arizona State Implementation Plan (SIP). The revisions are rules from the Pinal County Air Quality Control District (PCAQCD). These rules were submitted by the State on behalf of the PCAQCD to provide support for general permitting requirements for stationary sources in the PCAQCD.

This action will clarify which PCAQCD rules were incorporated into the federally approved SIP on April 9, 1996 (61 FR 15717). This action will also remove inappropriate PCAQCD and Pinal-Gila Counties Air Quality Control District (PGCAQCD) rules from the SIP. Thus, EPA is approving this action on general permitting rules in the Arizona SIP under provisions of the CAA regarding EPA action on SIP submittals, SIPs for national primary and secondary ambient air quality standards, and plan requirements for maintenance attainment areas.

DATES: This rule is effective on February 20, 2001 without further notice, unless EPA receives adverse comments by January 19, 2001. If EPA receives such comment, it will publish a timely withdrawal in the **Federal Register** informing the public that EPA's approval of this rule will not take effect.

ADDRESSES: Comments must be submitted in writing to Andrew Steckel at the Region IX mailing address listed below. Copies of the rules and EPA's evaluation report are available for

public inspection at EPA's Region IX office during normal business hours. Copies of the submitted rules are available for inspection at the following locations:

Rulemaking Office, (AIR–4), Air Division, Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105.

Environmental Protection Agency, Air Docket (6102), Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

Arizona Department of Environmental Quality, 3033 North Central Avenue, Phoenix, AZ 85012.

Pinal County Air Quality Control District, Building F, 31 North Pinal Street, (P. O. Box 987), Florence, AZ 85232.

FOR FURTHER INFORMATION CONTACT: Al Petersen, Rulemaking Office, (AIR–4), Air Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105, Telephone: (415) 744–1135.

SUPPLEMENTARY INFORMATION:

I. Applicability

The rules that were previously approved into the PCAQCD [1] portion of the Arizona SIP are listed below in section III. The rules being removed from the SIP are PCAQCD Rules 1–1–050, 1–1–055, 1–1–105, and 3–1–080 and PGCAQCD Rules 7–1–2.2, 7–1–2.4, 7–1–2.7, 7–2–1.3, and 7–3–6.1. PCAQCD Rules 3–1–045 and 3–1–100 are clarified as not being in the SIP, because they did not have a valid SIP submittal.

II. Background

On August 16, 1994, May 31, 1995, and November 27, 1995, ADEQ submitted or resubmitted to EPA on behalf of PCAQCD various rules relating to general permitting and PSD requirements. Part of these rules were approved in a **Federal Register** (FR) document by EPA for incorporation into the PCAQCD portion of the Arizona SIP on April 9, 1996 (61 FR 15717). Part of the approved rules were submitted at earlier dates, but EPA can act only on the latest submittal date, November 27, 1995. The adoption date for all rules was incorrectly designated as October 12, 1995, because many of the individual rules had earlier adoption dates. Only approved chapters and articles were listed in the FR document, but this did not clarify which individual rules were approved. This present action will clarify and correct the deficiencies in the previous FR document of April 9, 1996.

III. EPA Evaluation and Action

In determining the approvability of a rule submittal, EPA must evaluate the rules for consistency with the requirements of the CAA, EPA regulations, as found in section 110 of the CAA and 40 CFR part 51 (Requirements for Preparation, Adoption, and Submittal of Implementation Plans), and EPA policy. The statutory requirements for nonattainment area permitting are found in Title I of the CAA. EPA must also ensure that rules are enforceable, appropriate for the SIP, and strengthen or maintain the SIP's control strategy.

EPA is clarifying that the individual rules approved on April 9, 1996 (61 FR 15717) along with their respective individual adoption dates, are as follows:

- PCAQCD Rules 1–1–020, 1–1–030, 1–1–040, [1–1–050], 1–1–060, 1–1–070, 1–1–080, 1–1–100, 1–2–110, 2–1–010, 2–1–020, 2–1–030, 2–1–040, 2–1–050, 2–1–060, 2–1–070, 2–2–080, 2–2–090, 2–3–100, 2–3–110, 2–4–120, 2–4–130, 2–4–140, 2–4–150, 2–5–170, 2–5–210, 2–6–220, 2–7–230, 2–7–240, 2–7–250, 2–7–260, 2–7–270, 3–1–020, 3–1–132, adopted on June 29, 1993.
- PCAQCD Rules 1–1–090, 1–2–120, 3–1–010, 3–1–030, 3–1–055, 3–1–065, 3–1–070, 3–1–082, 3–1–085, 3–1–087, 3–1–090, 3–1–102, 3–1–105, 3–1–110, 3–1–120, 3–1–140, 3–1–150, 3–1–160, 3–1–170, 3–1–173, 3–1–175, 3–1–177, 3–2–180, 3–2–185, 3–2–195, 3–2–190, 3–3–200, 3–3–203, 3–3–205, 3–3–260, 3–3–270, 3–3–275, 3–3–280, adopted on November 3, 1993.
- PCAQCD Rules 1–1–010, [1–1–055], 1–1–106, 2–5–180, 2–5–190, 2–5–200, 3–1–042, 3–1–060, [3–1–080], 3–1–081, 3–1–083, 3–1–084, 3–1–089, 3–1–103, 3–1–107, 3–1–109, 3–3–210, 3–3–250, adopted on February 22, 1995.
- PCAQCD Rules [1–1–105], 1–3–130, 1–3–140, 2–5–160, 3–1–040, 3–1–050, adopted on October 12, 1995.

The four rules below were erroneously approved by EPA as part of the previously approved Chapter 1, Article 1 (1–1–xxx series rules) and Chapter 3, Article 1 (3–1–xxx series rules). EPA is removing the four rules below from the PCAQCD portion of the Arizona SIP under section 110(k)(6) as inconsistent with the requirements of section 110(a) and part D of the CAA. The four rules are not appropriate for inclusion in the SIP for the reasons given below. Removal of these four rules from the SIP will have no effect on emissions to the ambient air:

- PCAQCD Rule 1–1–050, Authorization to Accept Funds or Grants, relates to management of local funds.
- PCAQCD Rule 1–1–055, Authorization to Collect Funds or Fees, relates to management of local funds and fees.
- PCAQCD Rule 1–1–105, SIP List, is a non-regulatory rule.
- PCAQCD Rule 3–1–080, Appeals to the Hearing Board, relates to procedures for the local hearing board.

The two rules below were apparently approved by EPA as part of the previously approved Chapter 3, Article 1 (3–1-xxx series rules). However, PCAQCD specifically excluded these rules from the November 27, 1995 submittal. Therefore, EPA is clarifying that these two rules are not approved into the SIP and have never been in the SIP, because there is not a valid SIP submittal:

- PCAQCD Rule 3–1–045, Transition from Installation and Operating Permit Program.
- PCAQCD Rule 3–1–100, Permit Posting.

Certain of the rules from the now-defunct PGCAQCD are determined by EPA to have been erroneously approved, because they are not appropriate for inclusion in the SIP. EPA is removing the following rules from the PGCAQCD portion of the Arizona SIP under section 110(k)(6) as inconsistent with the requirements of section 110(a) and part D of the CAA. A consequence of this action is that these rules are also removed from the PCAQCD portion of the Arizona SIP. The rules are not appropriate for inclusion in the SIP for the reasons given below. Removal of these rules from the SIP will have no effect on emissions to the ambient air:

- PGCAQCD Rule 7–1–2.2, Permit Unit Description and Fees, relates to assessment of local fees.
- PGCAQCD Rule 7–1–2.4, Appeals to Hearing Board, relates to procedures for the local hearing board.
- PGCAQCD Rule 7–1–2.7, Enforcement, relates to lacal enforcement of Arizona statutes.
- PGCAQCD Rule 7–2–1.3, Non-Methane Hydrocarbons, relates to a district non-methane hydrocarbon standard that does not have an equivalent in the NAAQS. This is consistent with the CAA, because there is no effect on attainment or any other applicable requirement of the CAA.
- PGCAQCD Rule 7–3–6.1, Policy and Legal Authority, relates to local

[1] The Gila County Board of Supervisors dissolved the PGCAQCD on the part of Gila County on April 4, 1988. The Pinal County Board of Supervisors dissolved the PGCAQCD on the part of Pinal County on November 23, 1992. The existing PGCAQCD SIP rules remain in the SIP applying to Pinal County and Gila County until rescinded, removed, or replaced by EPA action with respect to each county.

authority of the PGCAQCD and the local hearing board as authorized by Arizona statutes.

EPA approved into the SIP from the submittal of August 15, 1994 the following two rules, which are replaced by revised versions cited above:

- PCAQCD Rule 3–1–084, adopted on August 11, 1994.
- PCAQCD Rule 3–1–107, adopted on November 3, 1993.

EPA is publishing this direct final approval without prior proposal because the Agency views this SIP revision as a noncontroversial revision and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should adverse comments be filed. This direct final approval will be effective February 20, 2001 without further notice unless the Agency receives adverse comments by January 19, 2001.

If the EPA receives such comments, then EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period on this rule. Any parties interested in commenting on this rule should do so at this time. If no such comments are received, the public is advised that this direct final approval will be effective on February 20, 2001.

IV. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. This action merely approves state law as meeting federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). For the same reason, this rule also does not significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13084 (63 FR 27655, May 10, 1998). This rule 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, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely approves a state rule implementing a federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the executive order. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to 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**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February, 20, 2001. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Permitting, Reporting and recordkeeping requirements.

Dated: July 13, 2000.

Felicia Marcus,

Regional Administrator, Region IX.

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart D—Arizona

2. Section 52.120 is amended by adding paragraph (c)(18)(iv)(B), revising paragraph (c)(84)(i)(A), and adding paragraphs (c)(84)(i)(B), (c)(84)(i)(C), and (c)(84)(i)(D) to read as follows:

§ 52.120 Identification of plan.

* * * * *

(c) * * *

(18) * * *

(iv) * * *

(B) Previously approved on November 15, 1978 and now deleted without replacement Rules 7–1–2.2, 7–1–2.4, 7–1–2.7, 7–2–1.3, and 7–3–6.1.

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(84) * * *

(i) * * *

(A) Rules 1–1–020, 1–1–030, 1–1–040, 1–1–060, 1–1–070, 1–1–080, 1–1–100, 1–2–110, 2–1–010, 2–1–020, 2–1–030, 2–1–040, 2–1–050, 2–1–060, 2–1–070, 2–2–080, 2–2–090, 2–3–100, 2–3–110,

2–4–120, 2–4–130, 2–4–140, 2–4–150, 2–5–170, 2–5–210, 2–6–220, 2–7–230, 2–7–240, 2–7–250, 2–7–260, 2–7–270, 3–1–020, 3–1–132, adopted on June 29, 1993.

(B) Rules 1–1–090, 1–2–120, 3–1–010, 3–1–030, 3–1–055, 3–1–065, 3–1–070, 3–1–082, 3–1–085, 3–1–087, 3–1–090, 3–1–102, 3–1–105, 3–1–110, 3–1–120, 3–1–140, 3–1–150, 3–1–160, 3–1–170, 3–1–173, 3–1–175, 3–1–177, 3–2–180, 3–2–185, 3–2–190, 3–2–195, 3–3–200, 3–3–203, 3–3–205, 3–3–260, 3–3–270, 3–3–275, 3–3–280, adopted on November 3, 1993.

(C) Rules 1–1–010, 1–1–106, 2–5–190, 2–5–200, 3–1–042, 3–1–060, 3–1–081, 3–1–083, 3–1–084, 3–1–089, 3–1–103, 3–1–107, 3–1–109, 3–3–210, 3–3–250, adopted on February 22, 1995.

(D) Rules 1–3–130, 1–3–140, 2–5–160, 2–5–180, 3–1–040, 3–1–050, adopted on October 12, 1995.

* * * * *

[FR Doc. 00–31465 Filed 12–19–00; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TX–121–1–7450a; FRL–6913–4]

Approval and Promulgation of Implementation Plans; Texas; Control of Emissions of Volatile Organic Compounds from Batch Processes, Industrial Wastewater and Service Stations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The EPA is taking direct final action to approve revisions to the Texas State Implementation Plan (SIP). The revisions incorporate regulations to control Volatile Organic Compound (VOC) emissions from batch processes, industrial wastewater, and during the filling of underground storage tanks at gasoline service stations. The intended effect is to approve the regulations into the Texas SIP. This action is being taken in accordance with the Federal Clean Air Act (Act).

DATES: This rule is effective on February 20, 2001 without further notice, unless EPA receives adverse comment by January 19, 2001. If EPA receives such adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public the rule will not take effect.

ADDRESSES: Written comments on this action should be addressed to Mr. Thomas Diggs, Chief, Air Planning Section (6PD–L), at the EPA Region 6 Office listed below.

Copies of the documents relevant to this action, including the Technical Support Document (TSD), are available for public inspection during normal business hours at the following locations. Interested persons wanting to examine these documents should make an appointment with the appropriate office at least two working days in advance.

Environmental Protection Agency, Region 6, Air Planning Section (6PD–L), Multimedia Planning and Permitting Division, Region 6, Dallas, 1445 Ross Avenue, Texas 75202–2733, telephone: (214) 665–7214.

Texas Natural Resource Conservation Commission, 12100 Park 35 Circle, Austin, Texas 78711–3087.

FOR FURTHER INFORMATION CONTACT: Mr. Guy R. Donaldson, Air Planning Section (6PD–L), Multimedia Planning and Permitting Division, Environmental Protection Agency, Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, telephone: (214) 665–7242.

SUPPLEMENTARY INFORMATION:

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Throughout this document ''we,'' ''us,'' and ''our'' means EPA. Please note that if we receive adverse comment(s) on an amendment, paragraph, or section of this rule and if that provision is independent of the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of adverse comment.

1. What Action Is EPA Taking?

We are approving three provisions as part of the Texas State Implementation Plan. We believe these revisions will help Texas meet certain requirements of the Clean Air Act and they will contribute to attainment of the one-hour ozone standard in the Houston/Galveston, Beaumont/Port Arthur and Dallas/Fort Worth nonattainment areas. The three provisions are:

- We are approving rules to control emissions from industrial wastewater sources in the Synthetic Organic Chemical Industry (SOCMI) in the Houston/Galveston and Beaumont/Port Arthur ozone nonattainment areas (30 Texas Administrative Code(TAC)115.140–149) as meeting the section 182(b)(2) and section 183 Reasonably Available Control Technology (RACT) requirements. These rules were initially submitted for the Houston/Galveston, Dallas/Fort Worth, and El Paso areas in a letter from the Governor of Texas dated May 9, 1994 and given limited approval. See 64 FR 3841 (January 26, 1999) and 62 FR 27964 (May 22, 1997). The rules were revised as they relate to the Beaumont/Port Arthur and Houston/Galveston areas and submitted in a letter from the Governor of Texas dated November 12, 1999. We are approving the 1999 regulations as revised for the Beaumont/Port Arthur and Houston/Galveston areas as meeting RACT. Furthermore, we are converting the limited approval to a full approval because we now believe that RACT is being implemented for major sources in this source category in all four 1-hour ozone nonattainment areas in Texas. (We previously approved negative declarations for this source category in the El Paso and Dallas/Fort Worth areas. See 61 FR 55897 (October 30, 1996).)
- We are approving as RACT, rules to control emissions from batch processes in the Beaumont/Port Arthur ozone nonattainment area (30 TAC 115.160–115.169). The rules to control Batch Processes were submitted in a letter dated November 12, 1999.
- We are approving rules to require recovery of vapors displaced when tanker trucks unload gasoline at service stations in the eastern half of Texas (30 TAC 115.213–115.229 and 115.234–115.239). These rules were submitted in a letter dated August 9, 1999. We are approving these rules under part D of the Act because the State of Texas is relying upon these VOC reductions to demonstrate attainment of the 1-hour ozone standard in the Beaumont/Port Arthur, Dallas/Fort Worth, and Houston/Galveston areas. We are also approving these rules under sections 110 and 116 because the State is relying upon these rules for the continued maintenance of the standard in the eastern half of the State of Texas and as a strengthening of the existing Texas SIP.

In addition, when we approved the Texas VOC rules for the capture and control of the vapors at bulk gasoline

plants and terminals on September 5, 2000 (65 FR 53595), the sections 115.213–115.217 that we approved were inadvertently not codified. Today, we are codifying those sections.

2. What Is a Reasonably Available Control Technology (RACT)?

Section 172(c)(1) of the Act contains general requirements for States to implement RACT in areas that do not meet the NAAQS. Section 182(b)(2) of the Act contains more specific requirements for moderate and above ozone nonattainment areas. The EPA has defined RACT as the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available, considering technological and economic feasibility. See 44 FR 53761 (September 17, 1979). RACT is required for major sources in ozone nonattainment areas and for minor sources where EPA has issued a Control Technique Guideline.

3. Why Do We Regulate Volatile Organic Compounds (VOCs)?

Oxygen in the atmosphere reacts with VOCs and Oxides of Nitrogen to form ozone, a key component of urban smog. Inhaling even low levels of ozone can trigger a variety of health problems including chest pains, coughing, nausea, throat irritation, and congestion. It also can worsen bronchitis and asthma. Exposure to ozone can also reduce lung capacity in healthy adults.

4. What Is a Volatile Organic Compound (VOC)?

Volatile Organic Compound is a term used to describe a class of chemicals that react in the atmosphere in the presence of sunlight to form ozone. Sources include vehicle exhaust, gasoline vapors, oil-based paints and industrial operations. A regulatory definition of Volatile Organic Compounds can be found at 40 CFR 51.100(s). The definition in Texas can be found in 30 TAC 115.10.

5. What Do the Industrial Wastewater Rules Require?

The wastewater from SOCMI facilities can contain significant quantities of VOC. These VOCs can enter the air when wastewater comes in contact with the atmosphere in junction boxes, holding ponds or open tanks. The Texas rules for the Houston/Galveston and Beaumont/Port Arthur areas require that 90 percent of the VOCs be removed from a wastewater stream before the wastewater is exposed to the air. Streams that contain more than 1000 ppm VOC are subject to the 90% removal requirement. The wastewater rules apply in Hardin, Jefferson and Orange counties in the Beaumont/Port Arthur area; Harris, Brazoria, Galveston, Liberty, Chambers, Waller, Montgomery, and Fort Bend Counties in the Houston/Galveston area.

In Dallas, Tarrant, Collin and Denton counties in the Dallas/Fort Worth area and El Paso County in the El Paso area, less stringent requirements that we had previously given limited approval continue in place. The EPA is converting the limited approval of the rules for Dallas/Fort Worth and El Paso to full approval because there are no major sources of VOCs from wastewater in those areas. Therefore, RACT is not required for this source category in those areas. We approved the determination by Texas that there are no major sources of VOCs from wastewater in the Dallas/Fort Worth and El Paso areas (a negative declaration) on October 30, 1996 (61 FR 55897). The negative declaration is still acceptable for the Dallas/Fort Worth area although the definition of a ''major source'' changed from 100 tons per year to 50 tons per year when we reclassified the area from moderate to serious. For a complete description of our review of the industrial wastewater rules see the TSD for this document.

6. What Do the Batch Processing Rules Require?

Batch Processes are those processes characterized by non-steady state conditions. Products are used to make pharmaceuticals and specialty chemicals. The products are made in batches rather than continuously. They generate emissions from vents from reactors and process vessels.

The rules require that the emissions from the vents be reduced by 90%. Vents can be exempted from control based on the volumetric flow rate of the gas stream and the mass flow rate of the VOCs. The rules include equations that allow vent streams to be considered separately and in combination to determine whether it is cost effective to control the vents. The rule envisions that several vent streams could be routed together to a common control device if in combination the streams are cost effective to control. If based on the equations, control of a stream is not found to be cost effective, either individually or combined with other streams in the batch process the stream is exempted from control.

The rules apply in the Hardin, Jefferson and Orange Counties in the Beaumont/Port Arthur nonattainment area. For a complete description of our review of the batch processing rules see the Technical Support Document for this action.

7. What Is Required by the Revisions to the Vapor Recovery Rules for Gasoline Service Stations?

The rules would require capturing the vapors from the gasoline station storage tanks as tank-trucks fill these tanks, returning the vapors to the tank-truck. This is commonly known as Stage I vapor recovery. The tank-truck then carries the vapors back to the bulk gasoline plant or terminal. To insure the vapors are not lost in transit, the Texas rules also include requirements that the gasoline tank-trucks be tested for vapor tightness. We are approving the vapor recovery requirements and the vapor tightness requirements.

Separate rules call for the capture and control of the vapors at bulk gasoline plants and terminals. We have reviewed the requirements for bulk gasoline plants and terminals and approved them in a separate **Federal Register** (see 65 FR 53595). In the previous approval action, however, we inadvertently omitted several sections from the codification table identifying the approved rules. We are codifying these sections to clarify which sections are approved. These sections are 30 TAC 115.213–115.217.

The Stage I rules have been in place for many years in the Dallas/Fort Worth, El Paso, Houston/Galveston and Beaumont/Port Arthur areas. The Texas rules expand the requirement to the larger gas stations in 95 additional counties in the eastern half of the State. The rules apply to service stations with a throughput greater than 125,000 gallons/month.

These counties are: Anderson, Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, Ellis, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, Johnson, Karnes, Kaufman, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, Parker, Polk, Rains, Red River, Refugio, Robertson, Rockwall, Rusk, Sabine, San Jacinto, San Patricio, San Augustine, Shelby, Smith, Somervell, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood.

These rules are designed to reduce overall background levels of ozone in

the eastern portion of Texas. TNRCC has included these reductions in its attainment plans for Houston/Galveston, Beaumont/Port Arthur and Dallas/Fort Worth. In addition, the rules will help other areas such as Austin and San Antonio maintain attainment of the one-hour ozone standard.

Our Regional office developed a Federal Implementation Plan (FIP) (40 CFR 52.2285) for Bexar County, and certain counties in central and east Texas, in the mid-1970s. The FIP applied to service stations with a storage capacity greater than or equal to 1000 gallons. The Texas rules that we are approving as a revision to the Texas SIP set exemption levels based on throughput, not storage capacity. Upon the effective date of our approval of sections 115.222–115.229, affected sources will only need to comply with the State's SIP-approved VOC rules and not our FIP VOC rule. The affected sources are service stations with a throughput greater than 125,000 gallons per month.

The FIP requirements will remain in place for service stations with a storage capacity greater than or equal to 1000 gallons and a throughput less than 125,000 gallons per month. The affected counties are: Bexar, Comal, Ellis, Guadalupe, Hood, Johnson, Kaufman, Matagorda, Parker, Rockwall, and Wise.

8. What Is a State Implementation Plan (SIP)?

Section 110 of the Act requires States to develop air pollution regulations and control strategies to ensure that State air quality meets the NAAQS that EPA has established. Under section 109 of the Act, EPA established the NAAQS to protect public health. The NAAQS address six criteria pollutants. These criteria pollutants are: carbon monoxide, nitrogen dioxide, ozone, lead, particulate matter, and sulfur dioxide.

Each State must submit these regulations and control strategies to us for approval and incorporation into the federally enforceable SIP. Each State has a SIP designed to protect air quality. These SIPs can be extensive, containing State regulations or other enforceable documents and supporting information such as emission inventories, monitoring networks, and modeling demonstrations.

9. What Is the Federal Approval Process for a SIP?

When a State wants to incorporate its regulations into the federally enforceable SIP, the State must formally adopt the regulations and control strategies consistent with State and Federal requirements. This process includes a public notice, a public hearing, a public comment period, and a formal adoption by a state-authorized rulemaking body.

Once a State adopts a rule, regulation, or control strategy, the State may submit the adopted provisions to us and request that we include these provisions in the federally enforceable SIP. We must then decide on an appropriate Federal action, provide public notice on this action, and seek additional public comment regarding this action. If we receive adverse comments, we must address them prior to a final action.

Under section 110 of the Act, when we approve a State's regulation(s) and supporting information, those State regulation(s) and supporting information become a part of the federally approved SIP. You can find records of these SIP actions in the Code of Federal Regulations at title 40, part 52, entitled ''Approval and Promulgation of Implementation Plans.'' The actual State regulations that we approved are not reproduced in their entirety in the CFR but are ''incorporated by reference,'' which means that we have approved a given State regulation with a specific effective date.

10. What Does Federal Approval of a SIP Mean to Me?

A State may enforce State regulations before and after we incorporate those regulations into a federally approved SIP. After we incorporate those regulations into a federally approved SIP, both EPA and the public may also take enforcement action against violators of these regulations.

The EPA is publishing this rule without prior proposal because we view this as a noncontroversial amendment and anticipate no adverse comments. However, in the ''Proposed Rules'' section of today's **Federal Register** publication, we are publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are received. This rule will be effective on February 20, 2001 without further notice unless we receive adverse comment by January 19, 2001. If EPA receives adverse comments, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. We will address all public comments in a subsequent final rule based on the proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. This action merely approves State law as meeting Federal requirements and imposes no additional requirements beyond those imposed by State law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under State law and does not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). For the same reason, this rule also does not significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13084 (63 FR 27655, May 10, 1998). This rule 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, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely approves a State rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Act. This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. The rule does not involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16,1994). As required by section 3 of Executive Order 12988 (61 FR 4729,

February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. The EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the executive order. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The 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**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective February 20, 2001 unless EPA receives adverse written comments by January 19, 2001.

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 20, 2001. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2) of the Act.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Nitrogen dioxide, Nitrogen oxides, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: November 3, 2000.

Myron O. Knudson,

Acting Regional Administrator, Region 6.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart SS—Texas

2. In § 52.2270 the table in paragraph (c) is amended under Chapter 115 as follows:

a. By removing the entries for ''Section 115.010'' and ''Section 115.010 Table I'' and adding in their place a new entry for Section 115.10;

b. By removing the entry for ''Section 115.140 to 115.149'' and adding in its place ''Division 4: Industrial Wastewater'' and individual entries for Sections 115.140 and Sections 115.142 through 115.149;

c. By adding new ''Division 6: Batch Processes'' and individual entries for Sections 115.160 through 115.167 and 115.169 under Subchapter B;

d. By adding individual entries for Section 115.213 through 115.217;

e. By removing the entry for ''Section 115.221 to 115 .229'' and adding in its place ''Division 2: Filling of Gasoline Storage Vessels (Stage I) for Motor Vehicle Fuel Dispensing Facilities'' and individual entries for Sections 115.222 through 115.227 and 115.229;

f. By removing the entry for ''Section 115.234 to 115.239'' and adding in its place ''Division 3: Control of Volatile Organic Leaks from Transport Vessels'' and individual entries for Sections 115.234 through 115.237 and 115.239.

§ 52.2270 Identification of plan.

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(c) * * *

EPA APPROVED REGULATIONS IN THE TEXAS SIP

State citation	Title/Subject	State submittal/adoption date	EPA approval date	Explanation
*	*	*	*	*
Chapter 115 (Reg 5)—Control of Air Pollution From Volatile Organic Compounds				
Subchapter A—Definitions				
Section 115.10	Definitions	June 30, 1999	12/20/00	
Subchapter B—General Volatile Organic Compound Sources				
*	*	*	*	*
Division 4: Industrial Wastewater				
Section 115.140	Industrial Wastewater Definitions.	October 27, 1999	12/20/00	
Section 115.142	Control Requirements	October 27, 1999	12/20/00	
Section 115.143	Alternate Control Requirements.	October 27, 1999	12/20/00	
Section 115.144	Inspection and Monitoring Requirements.	October 27, 1999	12/20/00	
Section 115.145	Approved Test Methods	October 27, 1999	12/20/00	
Section 115.146	Recordkeeping Requirements	October 27, 1999	12/20/00	
Section 115.147	Exemptions	October 27, 1999	12/20/00	
Section 115.148	Determination of Wastewater Characteristics.	October 27, 1999	12/20/00	
Section 115.149	Counties and Compliance Schedule.	October 27, 1999	12/20/00	
*	*	*	*	*
Division 6: Batch Processes				
Section 115.160	Batch Process Definitions	October 27, 1999	12/20/00	
Section 115.161	Applicability	October 27, 1999	12/20/00	
Section 115.162	Applicability	October 27, 1999	12/20/00	
Section 115.163	Alternate Control Requirements.	October 27, 1999	12/20/00	
Section 115.164	Determination of Emission and Flow Rates.	October 27, 1999	12/20/00	
Section 115.165	Approved Test Methods and Testing Requirements.	October 27, 1999	12/20/00	
Section 115.166	Monitoring and Recordkeeping Requirements.	October 27, 1999	12/20/00	
Section 115.167	Exemptions	October 27, 1999	12/20/00	
Section 115.169	Counties and Compliance Schedules.	October 27, 1999	12/20/00	
Subchapter C—Volatile Organic Compound Transfer Operations				
*	*	*	*	*
Section 115.213	Alternate Control Requirements.	June 30, 1999	12/20/00	
Section 115.214	Inspection Requirements	June 30, 1999	12/20/00	
Section 115.215	Approved Test Methods	June 30, 1999	12/20/00	
Section 115.216	Monitoring and Recordkeeping Requirements.	June 30, 1999	12/20/00	
Section 115.217	Exemptions	June 30, 1999	12/20/00	
*	*	*	*	*
Division 2: Filling of Gasoline Storage Vessels (Stage I) for Motor Vehicle Fuel Dispensing Facilities				
Section 115.222	Control Requirements	June 30, 1999	12/20/00	
Section 115.223	Alternative Control Requirements.	June 30, 1999	12/20/00	
Section 115.224	Inspection Requirements	June 30, 1999	12/20/00	
Section 115.225	Testing Requirements	June 30, 1999	12/20/00	
Section 115.226	Recordkeeping Requirements	June 30, 1999	12/20/00	
Section 115.227	Exemptions	June 30, 1999	12/00/00	

EPA APPROVED REGULATIONS IN THE TEXAS SIP—Continued

State citation	Title/Subject	State submittal/adoption date	EPA approval date	Explanation
Section 115.229	Counties and Compliance Schedule.	June 30, 1999	12/20/00	
* *	*	*	*	*
Division 3: Control of Volatile Organic Leaks from Transport Vessels				
Section 115.234	Inspection Requirements	June 30, 1999	12/20/00	
Section 115.235	Approved Test Methods	June 30, 1999	12/20/00	
Section 115.236	Recordkeeping Requirements	June 30, 1999	12/20/00	
Section 115.237	Exemptions.	June 30, 1999	12/20/00	
Section 115.239	Counties and Compliance Schedules.	June 30, 1999	12/20/00	
* *	*	*	*	*

[FR Doc. 00–31189 Filed 12–19–00; 8:45 am]
BILLING CODE 6560–50–U

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CO–001–0043a; FRL–6875–6]

Approval of Air Quality Implementation Plan Revisions and Section 112(l) Program; Colorado; Issuance of Permits To Limit Potential To Emit Criteria and Hazardous Air Pollutants

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The EPA is approving revisions to Colorado's construction permit requirements in Regulation No. 3 and hazardous air pollutant requirements in Regulation No. 8 of the State Air Quality Control Commission (AQCC) regulations, regarding permits to limit potential to emit criteria and hazardous air pollutants (HAPs). These revisions were submitted to EPA on April 26, 1996. Colorado submitted these revisions to create federally enforceable limits on criteria pollutants and HAPs, for both new and existing sources, through the State's construction permit program. EPA is approving the revisions to Regulation No. 3 regarding criteria pollutants as part of Colorado's state implementation plan (SIP) under section 110 of the Clean Air Act (CAA).

SIP approval under section 110 of the CAA, however, only extends to the control of HAPs that are criteria pollutants, such as volatile organic compounds or particulate matter, whereas section 112 of the CAA provides the underlying authority for controlling all HAPs listed in section 112(b) of the CAA. Therefore, the EPA is also approving the revisions to Regulation No. 3 and Regulation No. 8 under section 112(l) of the CAA.

DATES: This direct final rule is effective on February 20, 2001 without further notice, unless EPA receives adverse comments by January 19, 2001. If adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Written comments may be mailed to Richard R. Long, Director, Air and Radiation Program, Mailcode 8P–AR, Environmental Protection Agency (EPA), Region VIII, 999 18th Street, Suite 300, Denver, Colorado 80202. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air and Radiation Program, Environmental Protection Agency, Region VIII, 999 18th Street, Suite 300, Denver, Colorado, 80202. Copies of the State documents relevant to this action are also available for public inspection at the Colorado Department of Public Health and Environment, Air Pollution Control Division, 4300 Cherry Creek Drive South, Denver, Colorado 80246–1530.

FOR FURTHER INFORMATION CONTACT: Megan Williams, EPA, Region VIII, (303) 312–6431.

SUPPLEMENTARY INFORMATION: Throughout this document wherever ''we,'' ''us,'' or ''our'' are used, we mean the Environmental Protection Agency.

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III. Administrative Requirements

I. Background Information

A. What Action Is EPA Taking?

In this action, we are approving Colorado's revisions to AQCC Regulations No. 3 and 8 regarding permits to limit potential to emit criteria and hazardous air pollutants. We are approving, under section 112(l) of the CAA, the provisions in Regulations No. 3 and 8 that pertain to limiting potential to emit HAPs. We are also approving, under section 110 of the CAA, the revisions to Colorado's construction permit rules in Regulation No. 3 that provide for limiting potential to emit criteria pollutants.

B. What Are the Procedural Requirements Colorado Must Follow for EPA Approval?

Section 110(k) of the CAA authorizes our action on a submission of SIP revisions. The CAA also requires that States observe certain procedural requirements in developing SIP revisions for submittal to EPA. Section 110(a)(2) of the CAA requires that the State adopt each SIP revision after reasonable notice and public hearing.

Colorado held a public hearing on the proposed rule changes on March 16, 1995, continued on May 18, 1995. The changes were adopted by the AQCC directly after the May 18, 1995 hearing and were formally submitted to EPA by the Governor on April 26, 1996. We reviewed the submission against our completeness criteria in 40 CFR part 51, appendix V. We determined the submission was complete and notified the State in a letter dated July 3, 1996.

C. What Was Included in Colorado's Submittal?

On April 26, 1996, Colorado submitted revisions to Regulations No. 3 and 8 to EPA for approval. Specifically, the State requested approval of provisions to limit the potential to emit criteria and hazardous air pollutants. The provisions apply to new and modified stationary sources, and also allow existing sources (through the addition of section III.A.7 of Regulation No. 3, part B) to voluntarily request a construction permit to limit their potential to emit. These limits on potential to emit will potentially enable the source to avoid classification as a major source.

The revisions to Regulations No. 3 and 8 include several provisions to ensure that permits containing limits on potential to emit will meet all applicable requirements and will be practically enforceable. For example, Regulation No. 8, part E, section IV.B.3 requires that all permit conditions for sources requesting voluntary limits on potential to emit HAPs must be at least as stringent as any applicable requirement in the Colorado SIP or that is otherwise federally enforceable (*e.g.,* any section 112 or other CAA requirement). In addition, Regulation No. 8, part E, sections IV.G and IV.B.2 require continuous compliance with emission limits and practically enforceable permit conditions for all permits issued to sources requesting limits on potential to emit HAPs. Furthermore, pursuant to the provisions in Regulation No. 3, part B, section IV.C, all permits to limit potential to emit criteria or hazardous air pollutants are subject to public participation requirements and will be sent to the EPA for comment.

Thus, Colorado's revisions to Regulations No. 3 and 8 to create limits on potential to emit criteria and hazardous air pollutants were made to ensure that such permits would meet all applicable requirements and be both practically and federally enforceable.

D. Why is EPA Approving These Revisions to Regulation No. 3 and Regulation No. 8?

We are approving these revisions to Regulations No. 3 and 8 because the revisions are consistent with all requirements of the CAA and with EPA guidance. Specifically, we are approving the revisions to Regulation No. 3 that pertain to criteria pollutants as part of the SIP under section 110 of the CAA. Because we don't have authority under section 110 to approve provisions relating to HAPs, except for HAPs that are constituents of criteria pollutants, we are approving the provisions in Regulation No. 3 and Regulation No. 8 pertaining to creating limits on potential to emit HAPs under section 112(l) of the CAA.

In the July 10, 1996 **Federal Register** (61 FR 36295–36298) EPA revised 40 CFR part 63, subpart E, to provide for approval of programs designed to limit sources' potential to emit hazardous air pollutants under section 112(l) of the CAA. We previously found that Colorado met all requirements for approval of a State program under section 112(l) for implementing and enforcing emission standards for HAPs, when we granted interim approval of Colorado's operating permit program under Title V of the CAA on January 24, 1995 (60 FR 4568). We found, in our review of the State's program, that it contained adequate authorities, adequate resources for implementation, and an expeditious compliance schedule and therefore met the requirements in section 112(l)(5) and 40 CFR 63.91.

The effect of this approval under sections 110 and 112(l) of the CAA will be that the relevant provisions of AQCC Regulations No. 3 and 8 and the permits issued under these provisions will be federally enforceable. We reserve the right to deem permit conditions not federally enforceable. Such a determination will be based upon the permit, permit approval procedures, or permit requirements which do not conform with the permit program requirements or the requirements of our underlying regulations.

II. Final Action

We are approving Colorado's provisions in Regulations No. 3 and 8 to limit potential to emit HAPs (submitted on April 26, 1996) under section 112(l) of the CAA. Our approval under section 112(l) of the CAA includes the new section in Colorado's Regulation No. 8 titled ''Air Pollution Permits to Limit the Potential to Emit Hazardous Air Pollutants'' (Regulation No. 8, part E, section IV), and the associated provisions for issuing such permits in Colorado's Regulation No. 3.

In addition, we are approving the revisions to Regulation No. 3 that were included as part of Colorado's submittal and that pertain to criteria pollutants as part of the SIP under section 110 of the CAA. These revisions to Regulation No. 3, specifically, part B, sections III.A.4, III.A.7 and IV.C.4, allow sources to voluntarily request a permit to limit potential to emit criteria pollutants. We are not taking action under section 110 of the CAA on the revisions to Regulation No. 3, specifically, part B, section IV.C.1.c, that pertain only to hazardous air pollutants.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any state implementation plan. Each request for revision to the state implementation plan shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should adverse comments be filed. This rule will be effective February 20, 2001 without further notice unless the Agency receives adverse comments by January 19, 2001.

If the EPA receives such comments, then EPA will publish a document withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period. Any parties interested in commenting should do so at this time. If no such comments are received, the public is advised that this rule will be effective on February 20, 2001 and no further action will be taken on the proposed rule.

III. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. This action merely approves state law as meeting federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). For the same reason, this rule also does not

significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13084 (63 FR 27655, May 10, 1998). This rule 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, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely approves a state rule implementing a federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the executive order. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to 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**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective February 20, 2001 unless EPA receives adverse written comments by January 19, 2001.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 20, 2001. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: September 8, 2000.

Jack W. McGraw,

Acting Regional Administrator, Region VIII.

40 CFR Part 52 is amended as follows:

PART 52—[AMENDED]

1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart G—Colorado

2. Section 52.320 is amended by adding paragraph (c)(88) to read as follows:

§ 52.320 Identification of plan.

* * * * *

(c) * * *

(88) On April 26, 1996, the Governor of Colorado submitted revisions to Regulation No. 3 to allow a source to voluntarily request a permit to limit potential to emit and to require that such permits be subject to public participation.

(i) Incorporation by reference.

(A) Regulation No. 3, ''Air Contaminant Emissions Notices,'' 5 CCR 1001–5, revisions adopted 5/18/95, effective 7/30/95, as follows: part B, sections III.A.4, III.A.7, and IV.C.4.

[FR Doc. 00–32021 Filed 12–19–00; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA 238–0256a; FRL–6895–7]

Revisions to the California State Implementation Plan, Santa Barbara and Ventura County Air Pollution Control Districts

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the Santa Barbara County Air Pollution Control District (SBCAPCD) and Ventura County Air Pollution Control District (VCAPCD) portion of the California State Implementation Plan (SIP). These revisions concern Oxides of Nitrogen (NO_X) emissions from Natural-Gas Fired Fan-Type Central Furnaces and Residential Water Heaters, Large Water Heaters and Small Boilers. We are approving local rules that regulate these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: This rule is effective on February 20, 2001 without further notice, unless EPA receives adverse comments by January 19, 2001. If we receive such comment, we will publish a timely withdrawal in the **Federal Register** to notify the public that this rule will not take effect.

ADDRESSES: Mail comments to Andy Steckel, Rulemaking Office Chief (AIR–4), U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

You can inspect copies of the submitted SIP revisions and EPA's technical support documents (TSDs) at our Region IX office during normal business hours. You may also see copies of the submitted SIP revisions at the following locations:

Environmental Protection Agency, Air Docket (6102), Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Washington, DC 20460

California Air Resources Board, Stationary Source Division, Rule Evaluation Section, 2020 ''L'' Street, Sacramento, CA 95812

Santa Barbara County, Air Pollution Control District, 26 Castillian Drive, Suite B–23, Goleta, CA 93117
Ventura County APCD, 669 County Square Dr., 2nd Fl., Ventura, CA 93003–5417

FOR FURTHER INFORMATION CONTACT: Ed Addison, Rulemaking Office (AIR–4), U.S. Environmental Protection Agency, Region IX, (415) 744–1160.

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to EPA.

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I. The State's Submittal

A. What Rules Did the State Submit?

Table 1 lists the rules we are approving with the dates that they were adopted by the local air agencies and submitted by the California Air Resources Board (CARB).

TABLE 1.—SUBMITTED RULES

Local agency	Rule no.	Rule title	Adopted	Submitted
SBCAPCD	352	Natural-Gas Fired Fan-Type Central Furnaces and Residential Water Heaters	09/16/99	01/21/00
VCAPCD	74.11.1	Large Water Heaters and Small Boilers	09/14/99	01/21/00

On March 1, 2000, these rule submittals were found to meet the completeness criteria in 40 CFR part 51, appendix V, which must be met before formal EPA review.

B. Are There Other Versions of These Rules?

There are no previous versions of SBCAPCD Rule 352, Natural-Gas Fired Fan-Type Central Furnaces and Residential Water Heaters, or VCAPCD Rule 74.11.1, Large Water Heaters and Small Boilers.

C. What Is the Purpose of the Submitted Rules?

In the VCAPCD, after December 31, 2000, for any water heater, boiler, steam generator or process heater offered for sale, sold or installed of between 175,000 and 400,000 Btu/hour heat input capacity; and for SBCAPCD natural-gas fired fan-type central furnaces and residential water heaters, for units of less than 175,000 Btu/hour, and combination heating and cooling units of less than 65,000 Btu/hour cooling capacity, both rules limit total emissions to not exceed 40 nanograms of NO_X per joule of heat *output* (0.093 pounds of oxides of nitrogen per million Btu) or 55 ppmv NO_X. The TSD has more information about these rules.

II. EPA's Evaluation and Action

A. How Is EPA Evaluating the Rules?

Generally, SIP rules must be enforceable (see section 110(a) of the Act), must require Reasonably Available Control Technology (RACT) for major sources in nonattainment areas (see sections 182(a)(2)(A) and 182(f)), and must not relax existing requirements (see sections 110(l) and 193). Rule 74.11.1 potentially regulates major sources in an ozone nonattainment area (see 40 CFR part 81), so the Rule must fulfill RACT.

Guidance and policy documents that we used to define specific enforceability and RACT requirements include the following:

1. ''State Implementation Plans; Nitrogen Oxides Supplement to the General Preamble; Clean Air Act Amendments of 1990 Implementation of Title I; Proposed Rule,'' (the NO_X Supplement), 57 FR 55620, November 25, 1992.

2. ''Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations; Clarification to Appendix D of November 24, 1987 **Federal Register** document,'' (Blue Book), notice of availability published in the May 25, 1988 **Federal Register**.

3. South Coast Air Quality Management Control District Protocol, ''Nitrogen Oxides Emissions Compliance Testing for Natural Gas Fired Water Heaters and Small Boilers, Source Testing and Engineering Branch, Applied Science and Technology, March 1995,'' was developed jointly with the industry, and replaces the ANSI requirements currently used by manufacturers.

B. Do the Rules Meet the Evaluation Criteria?

We believe these rules are consistent with the relevant policy and guidance regarding enforceability, and SIP relaxations. The TSD has more information on our evaluation.

C. EPA Recommendations to Further Improve the Rules.

The TSD describes additional rule revisions that do not affect EPA's current action but are recommended for the next time the local agency modifies the rules.

D. Public Comment and Final Action.

As authorized in section 110(k)(3) of the Act, EPA is fully approving the submitted rules because we believe they fulfill all relevant requirements. We do not think anyone will object to this approval, so we are finalizing it without proposing it in advance. However, in the Proposed Rules section of this **Federal Register**, we are simultaneously proposing approval of the same submitted rules. If we receive adverse comments by January 19, 2001, we will publish a timely withdrawal in the **Federal Register** to notify the public that the direct final approval will not take effect and we will address the comments in a subsequent final action based on the proposal. If we do not receive timely adverse comments, the direct final approval will be effective without further notice on February 20, 2001. This will incorporate these rules into the federally enforceable SIP.

III. Background Information

Why Were These Rules Submitted?

NO_X helps produce ground-level ozone, smog and particulate matter, which harm human health and the environment. Section 110(a) of the CAA requires states to submit regulations that control NO_X emissions. Table 2 lists some of the national milestones leading to the submittal of these local agency NO_X rules.

TABLE 2.—OZONE NONATTAINMENT MILESTONES

Date	Event
March 3, 1978	EPA promulgated a list of ozone nonattainment areas under the Clean Air Act as amended in 1977. 43 FR 8964; 40 CFR 81.305.
May 26, 1988	EPA notified Governors that parts of their SIPs were inadequate to attain and maintain the ozone standard and requested that they correct the deficiencies (EPA's SIP-Call). See section 110(a)(2)(H) of the pre-amended Act.
November 15, 1990	Clean Air Act Amendments of 1990 were enacted. Pub. L. 101–549, 104 Stat. 2399, codified at 42 U.S.C. 7401–7671q.
May 15, 1991	Section 182(a)(2)(A) requires that ozone nonattainment areas correct deficient RACT rules by this date.

IV. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. This action merely approves state law as meeting federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). For the same reason, this rule also does not significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13084 (63 FR 27655, May 10, 1998). This rule 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, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely approves a state rule implementing a federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the executive order. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to 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**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 20, 2001. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

Dated: October 10, 2000.

Laura Yoshii,

Acting Regional Administrator, Region IX.

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart F—California

2. Section 52.220 is amended by adding paragraph (c)(278)(i) (B) and (C) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(278) * * *

(i) * * *

(B) Santa Barbara County Air Pollution Control District.

(*1*) Rule 352 adopted on September 16, 1999.

(C) Ventura County Air Pollution Control District.

(*1*) Rule 74.11.1 adopted on September 14, 1999.

* * * * *

[FR Doc. 00–32019 Filed 12–19–00; 8:45 am]

BILLING CODE 6560–50–U

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–301080; FRL–6755–8]

RIN 2070–AB78

Thiamethoxam; Pesticide Tolerances for Emergency Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes time-limited tolerances for combined residues of thiamethoxam and its CGA–322704 metabolite in or on cotton, milk, and meat and meat byproducts of cattle, goats, horses and sheep. This action is in response to EPA's granting of an emergency exemption under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act authorizing use of the pesticide on cotton. This regulation establishes maximum permissible levels for residues of thiamethoxam in this food commodity. These tolerances will expire and are revoked on December 31, 2002.

DATES: This regulation is effective December 20, 2000.Objections and requests for hearings, identified by docket control number OPP–301080, must be received by EPA on or before February 20, 2001.

ADDRESSES: Written objections and hearing requests may be submitted by mail, in person, or by courier. Please follow the detailed instructions for each method as provided in Unit VII. of the **SUPPLEMENTARY INFORMATION.** To ensure proper receipt by EPA, your objections and hearing requests must identify docket control number OPP–301080 in the subject line on the first page of your response.

FOR FURTHER INFORMATION CONTACT: By mail: Stephen Schaible, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number:703–308–9362; and e-mail address: schaible.stephen@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected categories and entities may include, but are not limited to:

Categories	NAICS	Examples of Potentially Affected Entities
Industry	111	Crop production
	112	Animal production
	311	Food manufacturing
	32532	Pesticide manufacturing

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in the table could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether or not this action might apply to certain entities. If you have questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Additional Information, Including Copies of This Document and Other Related Documents?

1. *Electronically.*You may obtain electronic copies of this document, and certain other related documents that might be available electronically, from the EPA Internet Home Page at http://www.epa.gov/. To access this document, on the Home Page select ''Laws and Regulations,'' ''Regulations and Proposed Rules,'' 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/. To access the OPPTS Harmonized Guidelines referenced in this document, go directly to the guidelines at http://www.epa.gov/opptsfrs/home/guidelin.htm.

2. *In person.* The Agency has established an official record for this action under docket control number OPP–301080. The official record consists of the documents specifically referenced in this action, and other information related to this action, including any information claimed as Confidential Business Information (CBI). This official record includes the documents that are physically located in the docket, as well as the documents that are referenced in those documents. The public version of the official record does not include any information claimed as CBI. The public version of the official record, which includes printed, paper versions of any electronic comments submitted during an applicable comment period is available for inspection in the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The PIRIB telephone number is (703) 305–5805.

II. Background and Statutory Findings

EPA, on its own initiative, in accordance with sections 408(e) and 408(l)(6) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, is establishing tolerances for combined residues of the insecticide thiamethoxam, 3-[(2-chloro-5-thiazolyl)methyl]tetrahydro-5-methyl-*N*-nitro-4H-1,3,5-oxadiazin-4-imine, and its CGA–322704 metabolite in or on cotton, undelinted seed at 0.1 part per million (ppm); cotton, gin byproducts at 1.5 ppm; milk at 0.02 ppm; meat of cattle, goats, horses and sheep at 0.02 ppm; and meat byproducts of cattle, goats, horses and sheep at 0.02 ppm. These tolerances will expire and are revoked on December 31, 2002. EPA will publish a document in the **Federal Register** to remove the revoked tolerances from the Code of Federal Regulations.

Section 408(l)(6) of the FFDCA requires EPA to establish a time-limited tolerance or exemption from the requirement for a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA under section 18 of FIFRA. Such tolerances can be established without providing notice or period for public comment. EPA does not intend for its actions on section 18 related tolerances to set binding precedents for the application of section 408 and the new safety standard to other tolerances and exemptions. Section 408(e) of the FFDCA allows EPA to establish a tolerance or an exemption from the requirement of a tolerance on its own initiative, i.e., without having received any petition from an outside party.

Section 408(b)(2)(A)(i) of the FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) requires EPA to give special consideration to exposure of infants and children to the pesticide chemical

residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

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

III. Emergency Exemption for Thiamethoxam on Cotton and FFDCA Tolerances

According to the Applicant, cotton aphid infestations have begun to develop earlier in the production season and consistent control of this pest has become difficult to achieve with currently available materials. It is claimed that cotton aphid has developed resistance to most currently labeled and recommended insecticides in Mississippi, and laboratory assays, field experiments and field experience indicate that insecticides currently recommended for aphid control are variable in effectiveness. EPA has authorized under FIFRA section 18 the use of thiamethoxam on cotton for control of cotton aphids in Mississippi. After having reviewed this submission, EPA concurs that an emergency condition exists for this State.

As part of its assessment of this emergency exemption, EPA assessed the potential risks presented by residues of thiamethoxam and its metabolite in or on cotton, as well as the potential risk presented by secondary residues of thiamethoxam and its metabolite in milk, meat, and meat byproducts of cattle, goats, horses and sheep. In doing so, EPA considered the safety standard in FFDCA section 408(b)(2), and EPA decided that the necessary tolerances under FFDCA section 408(l)(6) would be consistent with the safety standard and with FIFRA section 18. Consistent with the need to move quickly on the emergency exemption in order to address urgent non-routine situations and to ensure that the resulting food is safe and lawful, EPA is issuing these tolerances without notice and opportunity for public comment as provided in section 408(l)(6). Although these tolerances will expire and are revoked on December 31, 2002, under FFDCA section 408(l)(5), residues of the pesticide not in excess of the amounts specified in the tolerances remaining in or on cotton, undelinted seed; cotton, gin byproducts; milk; meat of cattle, goats, horses and sheep; and meat byproducts of cattle, goat, horses and sheep after that date will not be unlawful, provided the pesticide is applied in a manner that was lawful under FIFRA, and the residues do not exceed levels that were authorized by these tolerances at the time of that application. EPA will take action to revoke these tolerances earlier if any experience with, scientific data on, or other relevant information on this pesticide indicate that the residues are not safe.

Because these tolerances are being approved under emergency conditions, EPA has not made any decisions about whether thiamethoxam meets EPA's registration requirements for use on cotton or whether permanent tolerances for this use would be appropriate. Under these circumstances, EPA does not believe that these tolerances serve as a basis for registration of thiamethoxam by a State for special local needs under FIFRA section 24(c). Nor do these tolerances serve as the basis for any State other than Mississippi to use this pesticide under section 18 of FIFRA without following all provisions of EPA's regulations implementing section 18 as identified in 40 CFR part 166. For additional information regarding the emergency exemption for thiamethoxam, contact the Agency's Registration Division at the address provided under **FOR FURTHER INFORMATION CONTACT**.

IV. Aggregate Risk Assessment and Determination of Safety

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. For further discussion of the regulatory requirements of section 408 and a complete description of the risk assessment process, see the final rule on Bifenthrin Pesticide Tolerances (62 FR 62961, November 26, 1997) (FRL–5754–7).

Consistent with section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of thiamethoxam and to make a determination on aggregate exposure, consistent with section 408(b)(2), for time-limited tolerances for combined residues of thiamethoxam and its metabolite in or on cotton, undelinted seed at 0.1 ppm; cotton, gin byproducts at 1.5 ppm; milk at 0.02 ppm; meat of cattle, goats, horses and sheep at 0.02 ppm; and meat byproducts of cattle, goats, horses and sheep at 0.02 ppm. EPA's assessment of the dietary exposures and risks associated with establishing these tolerances follows.

A. Toxicological Endpoints

The dose at which no adverse effects are observed (the NOAEL) from the toxicology study identified as appropriate for use in risk assessment is used to estimate the toxicological endpoint. However, the lowest dose at which adverse effects of concern are identified (the LOAEL) is sometimes used for risk assessent if no NOAEL was achieved in the toxicology study selected. An uncertainty factor (UF) is applied to reflect uncertainties inherent in the extrapolation from laboratory animal data to humans and in the variations in sensitivity among members of the human population as well as other unknowns. An UF of 100 is routinely used, 10X to account for interspecies differences and 10X for intraspecies differences.

For dietary risk assessment (other than cancer) the Agency uses the UF to calculate an acute or chronic reference dose (acute RfD or chronic RfD) where the RfD is equal to the NOAEL divided by the appropriate UF (RfD = NOAEL/UF). Where an additional safety factor is retained due to concerns unique to the FQPA, this additional factor is applied to the RfD by dividing the RfD by such additional factor. The acute or chronic Population Adjusted Dose (aPAD or cPAD) is a modification of the RfD to accommodate this type of FQPA Safety Factor.

For non-dietary risk assessments (other than cancer) the UF is used to determine the level of concern (LOC). For example, when 100 is the appropriate UF (10X to account for interspecies differences and 10X for intraspecies differences) the LOC is 100. To estimate risk, a ratio of the NOAEL to exposures (margin of exposure (MOE) = NOAEL/exposure) is calculated and compared to the LOC.

The linear default risk methodology (Q^*) is the primary method currently used by the Agency to quantify carcinogenic risk. The Q^* approach assumes that any amount of exposure will lead to some degree of cancer risk. A Q^* is calculated and used to estimate risk which represents a probability of occurrence of additional cancer cases (e.g., risk is expressed as 1×10^{-6} or one in a million). Under certain specific circumstances, MOE calculations will be used for the carcinogenic risk assessment. In this non-linear approach, a ''point of departure'' is identified below which carcinogenic effects are not expected. The point of departure is

typically a NOAEL based on an endpoint related to cancer effects though it may be a different value derived from the dose response curve. To estimate risk, a ratio of the point of departure to exposure (MOE_{cancer} = point of departure/exposures) is calculated. A summary of the toxicological endpoints for thiamethoxam used for human risk assessment is shown in the following Table 1:

TABLE 1.—SUMMARY OF TOXICOLOGICAL DOSE AND ENDPOINTS FOR THIAMETHOXAM FOR USE IN HUMAN RISK ASSESSMENT

Exposure Scenario	Dose Used in Risk Assessment, UF	FQPA SF* and Level of Concern for Risk Assessment	Study and Toxicological Effects
Acute Dietary general population including infants and children	NOAEL = 100 mg/kg/day; UF = 100; Acute RfD = 1 mg/kg/day	FQPA SF = 10; aPAD = acute RfD/FQPA SF = 0.1 mg/kg/day	Acute mammalian neurotoxicity study in the rat LOAEL = 500 mg/kg/day based on treatment-related neurobehavioral effects observed in the FOB and LMA testing (drooped palpebral closure, decreased rectal temperature and locomotor activity, increased forelimb grip strength)
Chronic Dietary all populations	NOAEL= 0.6 mg/kg/day; UF = 100; Chronic RfD = 0.006 mg/kg/day	FQPA SF = 10; cPAD = chronic RfD/FQPA SF = 0.0006 mg/kg/day	2-Generation reproduction study LOAEL = 1.8 mg/kg/day based on increased incidence and severity of tubular atrophy in testes of F_1 generation males.
Cancer (oral, dermal, inhalation)	Likely carcinogen for humans based on increased incidence of hepatocellular adenomas and carcinomas in male and female mice. Quantification of risk based on most potent unit risk: male mouse liver adenoma and/or carcinoma combined tumor rate. The upper bound estimate of unit risk, Q_{1*} $(mg/kg/day)^{-1}$ is 3.77×10^{-2} in human equivalents.		

* The reference to the FQPA Safety Factor refers to any additional safety factor retained due to concerns unique to the FQPA.

B. Exposure Assessment

1. *Dietary exposure from food and feed uses.* Thiamethoxam is a new chemical with tolerance petitions pending at the Agency for a variety of raw agricultural commodities, but no tolerances established at this time. Risk assessments were conducted by EPA to assess dietary exposures from residues of thiamethoxam and its metabolite in cotton as well as secondary residues in milk, meat and meat byproducts resulting from potential use of treated cotton as a feed item; descriptions of these risk assessments are as follows:

i. *Acute exposure.* Acute dietary risk assessments are performed for a food-use pesticide if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1 day or single exposure. The Dietary Exposure Evaluation Model (DEEM®) analysis evaluated the individual food consumption as reported by respondents in the USDA 1989–1992 nationwide Continuing Surveys of Food Intake by Individuals (CSFII) and accumulated exposure to the chemical for each commodity. The following assumptions were made for the acute exposure assessments: tolerance level residues and 100% of crop treated were assumed for all commodities evaluated. These assumptions are highly conservative and result in overestimation of exposure.

ii. *Chronic exposure.* In conducting this chronic dietary risk assessment the Dietary Exposure Evaluation Model (DEEM®) analysis evaluated the individual food consumption as reported by respondents in the USDA 1989–1992 nationwide Continuing Surveys of Food Intake by Individuals (CSFII) and accumulated exposure to the chemical for each commodity. The following assumptions were made for the chronic exposure assessments: a Tier 3 risk assessment was conducted in which refined residues and percent of crop treated information were incorporated.

iii. *Cancer.* In conducting this chronic dietary risk assessment for a cancer endpoint the Dietary Exposure Evaluation Model (DEEM®) analysis evaluated the individual food consumption as reported by respondents in the USDA 1989–1992 nationwide Continuing Surveys of Food Intake by Individuals (CSFII) and accumulated exposure to the chemical for each commodity. The following assumptions were made for the chronic exposure assessments: a Tier 3 risk assessment was conducted in which refined residues and percent of crop treated information were incorporated.

iv. *Anticipated residue and percent crop treated information.* Section 408(b)(2)(E) authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide chemicals that have been measured in food. If EPA relies on such information, EPA must require that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. Following the initial data submission, EPA is authorized to require similar data on a time frame it deems appropriate. As required by section 408(b)(2)(E), EPA will issue a data call-in for information relating to anticipated residues to be submitted no later than 5 years from the date of issuance of this tolerance.

Section 408(b)(2)(F) states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if the Agency can make the following findings: Condition 1, that the data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain such pesticide residue; Condition 2, that the exposure estimate does not underestimate exposure for any significant subpopulation group; and

Condition 3, if data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such area. In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by section 408(b)(2)(F), EPA may require registrants to submit data on PCT.

The Agency used percent crop treated (PCT) information as follows:

A Tier 3 chronic dietary exposure analysis for the insecticide thiamethoxam was based on 21% of the cotton crop being treated. The estimate of 21% was calculated by comparing the projected base acres of cotton to be treated annually to the total acres of cotton grown in the United States according to market survey data. Base acres were calculated by multiplying the percentage projected replacement of an alternative by thiamethoxam to control a specific cotton pest by the acres treated once by this alternative, summing across pests.

Anticipated residue values (ARs) for cotton commodities which were used in the chronic and cancer dietary risk assessments were calculated from field trial data. Refined concentration/dilution factors derived from a cottonseed processing study were also used. ARs for livestock commodities used projected market share estimates and average residues from field trials for feed items, in addition to residue data derived from feeding and metabolism studies.

The Agency believes that the three conditions previously discussed have been met. With respect to Condition 1, EPA finds that the PCT information described above for thiamethoxam used on cotton is reliable and has a valid basis. The PCT estimate is derived from market survey data relating to insecticide use on cotton. As the time-limited tolerances being established for cotton commodities are in conjunction with the section 18 use of thiamethoxam on cotton in Mississippi and not use nationwide, this percent of crop treated value is considered an overestimate for the purposes of this risk assessment. As to Conditions 2 and 3, regional consumption information and consumption information for significant subpopulations is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available information on the regional consumption of food to which thiamethoxam may be applied in a particular area.

2. *Dietary exposure from drinking water*. The Agency lacks sufficient monitoring exposure data to complete a comprehensive dietary exposure analysis and risk assessment for thiamethoxam in drinking water. Because the Agency does not have comprehensive monitoring data, drinking water concentration estimates are made by reliance on simulation or modeling taking into account data on the physical characteristics of thiamethoxam.

The Agency uses the Generic Estimated Environmental Concentration (GENEEC) or the Pesticide Root Zone/Exposure Analysis Modeling System (PRZM/EXAMS) to estimate pesticide concentrations in surface water and SCI-GROW, which predicts pesticide concentrations in groundwater. In general, EPA will use GENEEC (a tier 1 model) before using PRZM/EXAMS (a tier 2 model) for a screening-level assessment for surface water. The GENEEC model is a subset of the PRZM/EXAMS model that uses a specific high-end runoff scenario for pesticides. GENEEC incorporates a farm pond scenario, while PRZM/EXAMS incorporate an index reservoir environment in place of the previous pond scenario. The PRZM/EXAMS model includes a percent crop area factor as an adjustment to account for the maximum percent crop coverage within a watershed or drainage basin.

None of these models include consideration of the impact processing (mixing, dilution, or treatment) of raw water for distribution as drinking water would likely have on the removal of pesticides from the source water. The primary use of these models by the Agency at this stage is to provide a coarse screen for sorting out pesticides for which it is highly unlikely that drinking water concentrations would ever exceed human health levels of concern.

Since the models used are considered to be screening tools in the risk assessment process, the Agency does not use estimated environmental concentrations (EECs) from these models to quantify drinking water exposure and risk as a %RfD or %PAD. Instead, drinking water levels of comparison (DWLOCs) are calculated and used as a point of comparison against the model estimates of a pesticide's concentration in water. DWLOCs are theoretical upper limits on a pesticide's concentration in drinking water in light of total aggregate exposure to a pesticide in food, and from residential uses. Since DWLOCs address total aggregate exposure to thiamethoxam they are further discussed in the aggregate risk sections below.

Based on the PRZM/EXAMS and SCI-GROW models the estimated environmental concentrations (EECs) of thiamethoxam for acute exposures are estimated to be 8.0 parts per billion (ppb) for surface water and 1.55 ppb for ground water. The EECs for chronic exposures are estimated to be 0.6 ppb for surface water and 1.55 ppb for ground water.

3. *From non-dietary exposure*. The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

Thiamethoxam is not registered for use on any sites that would result in residential exposure.

4. *Cumulative exposure to substances with a common mechanism of toxicity*. Section 408(b)(2)(D)(v) requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA does not have, at this time, available data to determine whether thiamethoxam has a common mechanism of toxicity with other substances or how to include this pesticide in a cumulative risk assessment. Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, thiamethoxam does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that thiamethoxam has a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see the final rule for Bifenthrin Pesticide Tolerances (62 FR 62961, November 26, 1997).

C. Safety Factor for Infants and Children

1. *Safety factor for infants and children*—i. *In general*. FFDCA section 408 provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the data base on toxicity and exposure unless EPA determines that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA risk assessments either directly through use of a margin of exposure (MOE) analysis or through using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk to humans.

ii. *Developmental toxicity studies*. There is no quantitative or qualitative evidence of increased susceptibility of rats or rabbit fetuses to *in utero* exposure to thiamethoxam in the rat or rabbit developmental toxicity studies. The developmental NOAELs are either higher than or equal to the maternal NOAELs. The toxicological effects in fetuses do not appear to be any more severe than those in the dams or does.

iii. *Reproductive toxicity study*. In the two-generation reproduction study, there is evidence of increased quantitative susceptibility for male pups. Reproductive effects in males appear in the F_1 generation in the form of increased incidence and severity of testicular tubular atrophy at the LOAEL of 1.8 mg/kg/day (NOAEL: 0.6 mg/kg/day). The increase in severity is based on an increased incidence of grade 2 minute focal tubular changes. These animals were exposed to the test material *in utero* whereas the F_0 males, which did not have these effects, were not exposed to the test material *in utero*. For parents, the NOAEL is 1.8 mg/kg/day for hyaline changes in renal tubules at the LOAEL of 61 mg/kg/day.

iv. *Prenatal and postnatal sensitivity.* Since no data are available to indicate how the testicular effects occur, whether or not they can be considered an endocrine effect (effects are observed in other endocrine organs in three species), or whether or not they can definitively be considered adverse, the Agency has determined that there is evidence of increased quantitative susceptibility for male pups when compared to the parents.

v. *Conclusion*. The toxicity data base for thiamethoxam is incomplete. Based on effects on endocrine organs observed across species, the significant decrease in alanine amino transferase levels in the companion animal studies and in the dog studies, transient clinical signs of neurotoxicity in several studies, and the fact that the mode of action of this insecticide on insects is through a neurologic mechanism, a developmental neurotoxicity study is being required. Exposure data are complete or are estimated based on data that reasonably accounts for potential exposures. The FQPA safety factor was retained at 10x in assessing the acute and chronic risk posed by this chemical for all populations based on increased susceptibility of male pups in the reproduction study, lack of key measurements in the reproduction study and the need for a developmental neurotoxicity study.

D. Aggregate Risks and Determination of Safety

To estimate total aggregate exposure to a pesticide from food, drinking water, and residential uses, the Agency calculates DWLOCs which are used as a point of comparison against the model estimates of a pesticide's concentration in water (EECs). DWLOC values are not regulatory standards for drinking water. DWLOCs are theoretical upper limits on a pesticide's concentration in drinking water in light of total aggregate exposure to a pesticide in food and residential uses. In calculating a DWLOC, the Agency determines how much of the acceptable exposure (i.e., the PAD) is available for exposure through drinking water e.g., allowable chronic water exposure (mg/kg/day) = cPAD - (average food + chronic non-dietary, non-occupational exposure). This allowable exposure through drinking water is used to calculate a DWLOC.

A DWLOC will vary depending on the toxic endpoint, drinking water consumption, and body weights. Default body weights and consumption values as used by the USEPA Office of Water are used to calculate DWLOCs: 2L/70 kg (adult male), 2L/60 kg (adult female), and 1L/10 kg (child). Default body weights and drinking water consumption values vary on an individual basis. This variation will be taken into account in more refined screening-level and quantitative drinking water exposure assessments. Different populations will have different DWLOCs. Generally, a DWLOC is calculated for each type of risk assessment used: acute, short-term, intermediate-term, chronic, and cancer.

When EECs for surface water and groundwater are less than the calculated DWLOCs, OPP concludes with reasonable certainty that exposures to thiamethoxam in drinking water (when considered along with other sources of exposure for which OPP has reliable data) would not result in unacceptable levels of aggregate human health risk at this time. Because OPP considers the aggregate risk resulting from multiple exposure pathways associated with a pesticide's uses, levels of comparison in drinking water may vary as those uses change. If new uses are added in the future, OPP will reassess the potential impacts of thiamethoxam on drinking water as a part of the aggregate risk assessment process.

1. *Acute risk*. Using the Tier 1 exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food to thiamethoxam and its metabolite will occupy less than 1% of the aPAD for the U.S. population, 2% of the aPAD for non-nursing infants less than 1 year old and 1% of the aPAD for children 1–6 years old at the 95th percentile of exposure. In addition, despite the potential for acute dietary exposure to thiamethoxam in drinking water, after calculating DWLOCs and comparing them to conservative model estimated environmental concentrations of thiamethoxam in surface and ground water, EPA does not expect the aggregate exposure to exceed 100% of the aPAD, as shown in the following Table 2:

TABLE 2.—AGGREGATE RISK ASSESSMENT FOR ACUTE EXPOSURE TO THIAMETHOXAM

Population Subgroup	aPAD (mg/kg)	% aPAD (Food)	Surface Water EEC (ppb)	Ground Water EEC (ppb)	Acute DWLOC (ppb)
U.S. population	0.1	<1	8.0	1.55	3,479
All infants < 1 yr.	0.1	2	8.0	1.55	986
Children 1–6 yrs.	0.1	1	8.0	1.55	987

2. *Chronic risk*. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that exposure to thiamethoxam from food will utilize less than 1% of the cPAD for the U.S. population and all sensitive subpopulations of concern, including infants and children. There are no residential uses for thiamethoxam that result in chronic residential exposure to thiamethoxam. In addition, despite the potential for chronic dietary exposure to thiamethoxam in drinking water, after calculating DWLOCs and comparing them to conservative model estimated environmental concentrations of thiamethoxam in surface and ground water, EPA does not expect the aggregate exposure to exceed 100% of the cPAD, as shown in the following Table 3:

TABLE 3.—AGGREGATE RISK ASSESSMENT FOR CHRONIC (NON- CANCER) EXPOSURE TO THIAMETHOXAM

Population Subgroup	cPAD mg/kg/day	% cPAD (Food)	Surface Water EEC (ppb)	Ground Water EEC (ppb)	Chronic DWLOC (ppb)
U.S. Population	0.0006	<1	0.06	1.55	21
All infants < 1 yr.	0.0006	<1	0.06	1.55	6
Children 1–6 yrs.	0.0006	<1	0.06	1.55	6

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

Thiamethoxam is not registered for use on any sites that would result in residential exposure. Therefore, the aggregate risk is the sum of the risks from food and water, which were previously addressed.

4. *Intermediate-term risk*. Intermediate-term aggregate exposure takes into account non-dietary, non-occupational exposure plus chronic exposure to food and water (considered to be a background exposure level).

Thiamethoxam is not registered for use on any sites that would result in residential exposure. Therefore, the aggregate risk is the sum of the risks from food and water, which were previously addressed.

5. *Aggregate cancer risk for U.S. population*. Using the exposure assumptions described in this unit for cancer risk assessment and applying the upper-bound potency factor (Q_1^*) value of 0.0377 $(mg/kg/day)^{-1}$, the dietary (food only) cancer risk associated with thiamethoxam use on cotton and secondary residues in milk, meat and meat byproducts is 2.9×10^{-8}. This risk estimate is fairly refined, incorporating both anticipated residues (from field trial data) and percent of market share data into the analysis. There are no residential uses for thiamethoxam that result in chronic residential exposure to thiamethoxam and would be considered in an aggregate cancer risk assessment. In addition, despite the potential for chronic dietary exposure to thiamethoxam in drinking water, after calculating a DWLOC and comparing it to conservative models estimated environmental concentrations of thiamethoxam in surface and ground water, EPA does not expect the aggregate exposure to exceed the negligible risk. The calculated DWLOC for chronic, cancer effects of 2.75 ppb is not exceeded by estimated environmental concentrations of thiamethoxam in surface water and groundwater of 0.06 ppb and 1.55 ppb, respectively. Therefore, EPA concludes with reasonable certainty that exposures to thiamethoxam in drinking water (when considered along with other sources of exposure for which OPP has reliable data) would not result in unacceptable levels of aggregate human health risk at this time.

6. *Determination of safety*. Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, and to infants and children from aggregate exposure to thiamethoxam residues.

V. Other Considerations

A. Analytical Enforcement Methodology

An adequate enforcement methodology for both plants and animals is available to enforce the tolerance expression. Method AG–675 (HPLC/UV) for residues of thiamethoxam and CGA–322704 has undergone a successful independent laboratory validation (ILV) trial. The method may be requested from: Calvin Furlow, PIRIB, IRSD (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, DC 20460; telephone number: (703) 305–5229; e-mail address: furlow.calvin@epa.gov.

B. International Residue Limits

As there are no Codex, Canadian, or Mexican MRLs/tolerances established for residues of thiamethoxam in plant or animal commodities, a discussion of compatibility with U.S. tolerances is not relevant at this time.

C. Conditions

No conditions are required in conjunction with the establishment of these time-limited tolerances.

VI. Conclusion

Therefore, the tolerances are established for combined residues of thiamethoxam, 3-[(2-chloro-5-thiazolyl)methyl]tetrahydro-5-methyl-*N*-nitro-4H-1,3,5-oxadiazin-4-imine and its metabolite CGA–322704, in or on cotton, undelinted seed at 0.1 ppm; cotton, gin byproducts at 1.5 ppm; milk at 0.02 ppm; meat of cattle, goats, horses and sheep at 0.02 ppm; and meat byproducts of cattle, goats, horses and sheep at 0.02 ppm.

VII. Objections and Hearing Requests

Under section 408(g) of the FFDCA, as amended by the FQPA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. Although the procedures in those regulations require some modification to reflect the amendments made to the FFDCA by the FQPA of 1996, EPA will continue to use those procedures, with appropriate adjustments, until the necessary modifications can be made. The new section 408(g) provides essentially the same process for persons to ''object'' to a regulation for an exemption from the requirement of a tolerance issued by EPA under new section 408(d), as was provided in the old FFDCA sections 408 and 409. However, the period for filing objections is now 60 days, rather than 30 days.

A. What Do I Need to Do to File an Objection or Request a Hearing?

You must file your objection or request a hearing on this regulation in accordance with the instructions provided in this unit and in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket control number OPP–301080 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before February 20, 2001.

1. *Filing the request*. Your objection must specify the specific provisions in the regulation that you object to, and the grounds for the objections (40 CFR 178.25). If a hearing is requested, the objections must include a statement of the factual issues(s) on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the objector (40 CFR 178.27). 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.

Mail your written request to: Office of the Hearing Clerk (1900), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. You may also deliver your request to the Office of the Hearing Clerk in Rm. C400, Waterside Mall, 401 M St., SW., Washington, DC 20460. The Office of the Hearing Clerk is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Office of the Hearing Clerk is (202) 260–4865.

2. *Tolerance fee payment*. If you file an objection or request a hearing, you must also pay the fee prescribed by 40 CFR 180.33(i) or request a waiver of that fee pursuant to 40 CFR 180.33(m). You must mail the fee to: EPA Headquarters Accounting Operations Branch, Office of Pesticide Programs, P.O. Box 360277M, Pittsburgh, PA 15251. Please identify the fee submission by labeling it ''Tolerance Petition Fees.''

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 the waiver of these fees, you may contact James Tompkins by phone at (703) 305–5697, by e-mail at tompkins.jim@epa.gov, or by mailing a request for information to Mr. Tompkins at Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

If you would like to request a waiver of the tolerance objection fees, you must mail your request for such a waiver to: James Hollins, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

3. *Copies for the Docket*. In addition to filing an objection or hearing request with the Hearing Clerk as described in Unit VII.A., you should also send a copy of your request to the PIRIB for its inclusion in the official record that is described in Unit I.B.2. Mail your copies, identified by the docket control number OPP–301080, to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. In person or by courier, bring a copy to the location of the PIRIB described in Unit I.B.2. You may also send an electronic copy of your request via e-mail to: opp-docket@epa.gov. Please use an ASCII file format and avoid the use of special characters and any form of encryption. Copies of electronic objections and hearing requests will also be accepted on disks in WordPerfect 6.1/8.0 file format or ASCII file format. Do not include any CBI in your electronic copy. You may also submit an electronic copy of your request at many Federal Depository Libraries.

B. When Will the Agency Grant a Request for a Hearing?

A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is a 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(s) in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32).

VIII. Regulatory Assessment Requirements

This final rule establishes time-limited tolerances under FFDCA section 408. 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) (Public Law 104–4). Nor does it require any prior consultation as specified by Executive Order 13084, entitled *Consultation and Coordination with Indian Tribal Governments* (63 FR 27655, May 19, 1998); 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 or any Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note). Since tolerances and exemptions that are established on the basis of a FIFRA section 18 exemption under FFDCA section 408, such as the tolerances in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. In addition, the Agency has determined that this action will not have a substantial direct effect on 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, as specified in Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that 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.'' This final rule directly regulates growers, food processors, food handlers and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4).

IX. 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 to 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 this final rule in the **Federal Register**. This final 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: December 6, 2000.

Joseph J. Merenda,

Acting Director, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

2. Section 180.565 is added to read as follows:

§ 180.565 Thiamethoxam; tolerances for residues.

(a) *General.* [Reserved]

(b) *Section 18 emergency exemptions.* Time-limited tolerances are established for combined residues of the insecticide thiamethoxam 3-[(2-chloro-5-thiazolyl)methyl]tetrahydro-5-methyl-*N*-nitro-4H-1,3,5-oxadiazin-4-imine and its CGA–322704 metabolite in connection with use of the pesticide under section 18 emergency exemptions granted by EPA. These tolerances will expire and are revoked on the dates specified in the following table.

Commodity	Parts per million	Expiration/revocation date
Cattle, meat	0.02	12/31/02
Cattle, meat byproducts	0.02	12/31/02
Cotton, undelinted seed	0.1	12/31/02
Cotton, gin byproducts	1.5	12/31/02
Goat, meat	0.02	12/31/02
Goat, meat byproducts	0.02	12/31/02
Horse, meat	0.02	12/31/02
Horse, meat byproducts	0.02	12/31/02
Milk	0.02	12/31/02
Sheep, meat	0.02	12/31/02
Sheep, meat byproducts	0.02	12/31/02

(c) *Tolerances with regional registrations.* [Reserved]

(d) *Indirect or inadvertent residues.* [Reserved]

[FR Doc. 00–32400 Filed 12–19–00; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–301084; FRL–6756–1]

RIN 2070–AB78

Clomazone; Pesticide Tolerances for Emergency Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a time-limited tolerance for residues of clomazone in or on sugarcane. This action is in response to a crisis exemption declared by the state of Louisiana under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizing use of the pesticide on sugarcane. This regulation establishes a maximum permissible level for residues of clomazone in this food commodity. The tolerance will expire and is revoked on December 31, 2002.

DATES: This regulation is effective December 20, 2000. Objections and requests for hearings, identified by docket control number OPP–301084, must be received by EPA on or before February 20, 2001.

ADDRESSES: Written objections and hearing requests may be submitted by mail, in person, or by courier. Please follow the detailed instructions for each method as provided in Unit VII. of the **SUPPLEMENTARY INFORMATION.** To ensure proper receipt by EPA, your objections and hearing requests must identify docket control number OPP–301084 in the subject line on the first page of your response.

FOR FURTHER INFORMATION CONTACT: By mail: Libby Pemberton, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 308–9364; and e-mail address: pemberton.libby@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected categories and entities may include, but are not limited to:

Categories	NAICS codes	Examples of Potentially Affected Entities
Industry	111	Crop production
	112	Animal production
	311	Food manufacturing

Categories	NAICS codes	Examples of Potentially Affected Entities
	32532	Pesticide manufacturing

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in the table could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether or not this action might apply to certain entities. If you have questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

B. How Can I Get Additional Information, Including Copies of This Document and Other Related Documents?

1. *Electronically.*You may obtain electronic copies of this document, and certain other related documents that might be available electronically, from the EPA Internet Home Page at http://www.epa.gov/. To access this document, on the Home Page select ''Laws and Regulations,'' ''Regulations and Proposed Rules,'' 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/. To access the OPPTS Harmonized Guidelines referenced in this document, go directly to the guidelines at http://www.epa.gov/opptsfrs/home/guidelin.htm.

2. *In person.* The Agency has established an official record for this action under docket control number OPP–301084. The official record consists of the documents specifically referenced in this action, and other information related to this action, including any information claimed as Confidential Business Information (CBI). This official record includes the documents that are physically located in the docket, as well as the documents that are referenced in those documents. The public version of the official record does not include any information claimed as CBI. The public version of the official record, which includes printed, paper versions of any electronic comments submitted during an applicable comment period is available for inspection in the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The PIRIB telephone number is (703) 305–5805.

II. Background and Statutory Findings

EPA, on its own initiative, in accordance with sections 408(e) and 408(l)(6) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, is establishing a tolerance for residues of the herbicide clomazone, in or on sugarcane at 0.05 ppm part per million (ppm). This tolerance will expire and is revoked on December 31, 2002. EPA will publish a document in the **Federal Register** to remove the revoked tolerance from the Code of Federal Regulations.

Section 408(l)(6) of the FFDCA requires EPA to establish a time-limited tolerance or exemption from the requirement for a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA under section 18 of FIFRA. Such tolerances can be established without providing notice or period for public comment. EPA does not intend for its actions on section 18 related tolerances to set binding precedents for the application of section 408 and the new safety standard to other tolerances and exemptions. Section 408(e) of the FFDCA allows EPA to establish a tolerance or an exemption from the requirement of a tolerance on its own initiative, i.e., without having received any petition from an outside party.

Section 408(b)(2)(A)(i) of the FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .'' EPA has established regulations governing emergency exemptions in 40 CFR part 166.

III. Emergency Exemption for Clomazone on Sugarcane and FFDCA Tolerances

Louisiana availed itself of a crisis exemption under FIFRA section 18 for the use of clomazone on sugarcane for control of bermudagrass. After having reviewed the submission, EPA did not concur that emergency conditions existed for this State and use under the crisis exemption ceased.

As part of its assessment of this emergency exemption, EPA assessed the potential risks presented by residues of clomazone in or on sugarcane. In doing so, EPA considered the safety standard in FFDCA section 408(b)(2), and EPA decided that the necessary tolerance under FFDCA section 408(l)(6) would be consistent with the safety standard and with FIFRA section 18. Consistent with the need to move quickly on the emergency exemption in order to ensure that the resulting food is safe and lawful, EPA is issuing this tolerance without notice and opportunity for public comment as provided in section 408(l)(6). Although this tolerance will expire and is revoked on December 31, 2002, under FFDCA section 408(l)(5), residues of the pesticide not in excess of the amounts specified in the tolerance remaining in or on sugarcane after that date will not be unlawful, provided the pesticide is applied in a manner that was lawful under FIFRA, and the residues do not exceed a level that was authorized by this tolerance at the time of that application. EPA will take action to revoke this tolerance earlier if any experience with, scientific data on, or other relevant information on this pesticide indicate that the residues are not safe.

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

IV. Aggregate Risk Assessment and Determination of Safety

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. For further discussion of the regulatory requirements of section 408 and a complete description of the risk assessment process, see the final rule on Bifenthrin Pesticide Tolerances (62 FR 62961, November 26, 1997) (FRL–5754–7) .

Consistent with section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of clomazone and to make a determination on aggregate exposure, consistent with section 408(b)(2), for a time-limited tolerance for residues of clomazone in or on sugarcane at 0.05 ppm. EPA's assessment of the dietary exposures and risks associated with establishing the tolerance follows.

A. Toxicological Endpoints

The dose at which no adverse effects are observed (the NOAEL) from the toxicology study identified as appropriate for use in risk assessment is used to estimate the toxicological endpoint. However, the lowest dose at which adverse effects of concern are identified (the LOAEL) is sometimes used for risk assessment if no NOAEL was achieved in the toxicology study selected. An uncertainty factor (UF) is applied to reflect uncertainties inherent in the extrapolation from laboratory animal data to humans and in the variations in sensitivity among members of the human population as well as other unknowns. An UF of 100 is routinely used, 10X to account for interspecies differences and 10X for intraspecies differences.

For dietary risk assessment (other than cancer) the Agency uses the UF to calculate an acute or chronic reference dose (RfD) where the RfD is equal to the NOAEL divided by the appropriate UF (RfD = NOAEL/UF). Where an additional safety factor is retained due to concerns unique to the FQPA, this additional factor is applied to the RfD by dividing the RfD by such additional factor. The acute or chronic Population Adjusted Dose (aPAD or cPAD) is a modification of the RfD to accommodate this type of FQPA Safety Factor.

For non-dietary risk assessments (other than cancer) the UF is used to determine the level of concern (LOC). For example, when 100 is the appropriate UF (10X to account for interspecies differences and 10X for intraspecies differences) the LOC is 100. To estimate risk, a ratio of the NOAEL to exposures (margin of exposure (MOE) = NOAEL/exposure) is calculated and compared to the LOC.

The linear default risk methodology (Q*) is the primary method currently used by the Agency to quantify carcinogenic risk. The Q* approach assumes that any amount of exposure will lead to some degree of cancer risk. A Q* is calculated and used to estimate risk which represents a probability of occurrence of additional cancer cases (e.g., risk is expressed as $1x10^{-6}$ or one in a million). Under certain specific circumstances, MOE calculations will be used for the carcinogenic risk assessment. In this non-linear approach, a ''point of departure'' is identified below which carcinogenic effects are not expected. The point of departure is typically a NOAEL based on an endpoint related to cancer effects though it may be a different value derived from the dose response curve. To estimate risk, a ratio of the point of departure to exposure (MOE_{cancer} = point of departure/exposures) is calculated. A summary of the toxicological endpoints for clomazone used for human risk assessment is shown in the following Table 1:

TABLE 1.—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR USE IN HUMAN RISK ASSESSMENT FOR CLOMAZONE

Exposure Scenario	Dose Used in Risk Assessment, UF	FQPA SF and LOC for Risk Assessment	Study and Toxicological Effects
Acute Dietary females 13–50 years of age	Developmental NOAEL = 100 mg/kg/day UF = 100 Acute RfD = 1.0 mg/kg/day	FQPA SF = 1x aPAD = acute RfD FQPA SF = 1.0 mg/kg/day	Developmental rat Developmental LOAEL = 300 mg/kg/day, based on delayed ossification
Acute Dietary general population including infants and children	A dose and endpoint were not selected for this population group because there were no effects observed in oral toxicology studies including maternal toxicity in the developmental toxicity studies in rats and rabbits that are attributable to a single exposure (dose). A risk assessment is not required for this population subgroup.		
Chronic Dietary all populations	NOAEL = 84.4 mg/kg/day UF = 100 Chronic RfD = 0.84 mg/kg/day	FQPA SF = 1X cPAD = cRfD/ FQPA SF =0.84 mg/kg/day	2 year rat feeding study LOAEL > 84.4 mg/kg/day (highest dose tested)
			90–Day oral rat LOAEL = 319.3 mg/kg/day based on decreased body weight, body weight gains, food consumption and increased absolute and relative liver weights in females and increased absolute liver weights in males

TABLE 1.—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR USE IN HUMAN RISK ASSESSMENT FOR CLOMAZONE—Continued

Exposure Scenario	Dose Used in Risk Assessment, UF	FQPA SF and LOC for Risk Assessment	Study and Toxicological Effects
			2–Generation reproduction rat LOAEL = 100 mg/kg/day based on statistically significantly decreased body wt. and body wt. gain during pre-mating, and decreased body wt. during gestation and lactation male and female. In addition decreased food consumption in females and hydro-nephritic kidneys in males.
Oral, Short-term (1–7 days) (Residential)	No residential uses. An endpoint was not proposed/selected.		
Oral, Intermediate-term (1 week - several months) (Residential)	No residential uses. An endpoint was not proposed/selected.		
Dermal[1] and Inhalation[2], Short-Term (1–7 days) (Occupational/Residential)	Maternal NOAEL=100 mg/kg/day	LOC for MOE = 100	Developmental rat study Maternal LOAEL = 300 mg/kg/day, based on chromorhinorrhea and abdominogenital staining
Dermal[1] and Inhalation[2], Intermediate-term (1 week—several months) and Long-Term (several months - lifetime) (Occupational/Residential)	Oral NOAEL= 84.4 mg/kg/day	LOC for MOE = 100	2 year rat feeding study LOAEL > 84.4 mg/kg/day (highest dose tested)
			90–day oral rat LOAEL = 319.3 mg/kg/day based on based on decreased body weight, body weight gains, food consumption and increased absolute and relative liver weights in females and increased absolute liver weights in males
			2-Generation reproduction rat LOAEL = 100 mg/kg/day based on statistically significantly decreased body wt. and body wt. gain during pre-mating, and decreased body wt. during gestation and lactation male and female. In addition decreased food consumption in females and hydro-nephritic kidneys in males.

UF = uncertainty factor, FQPA SF = FQPA safety factor, NOAEL = no observed adverse effect level, LOAEL = lowest observed adverse effect level, PAD = population adjusted dose (a = acute, c = chronic), RfD = reference dose, MOE = margin of exposure, LOC = level of concern, mg/kg/day = milligrams/kilograms/day.

1 Since an oral NOAEL was selected, a dermal absorption factor of 100% (default value) should be used in route-to-route extrapolation.

2 Since an oral NOAEL was selected, an inhalation absorption factor of 100% (default value) should be used in route-to-route extrapolation.

B. Exposure Assessment

1. *Dietary exposure from food and feed uses.* Tolerances have been established (40 CFR 180.425) for the residues of clomazone, in or on a variety of raw agricultural commodities. Risk assessments were conducted by EPA to assess dietary exposures from clomazone in food as follows:

i. *Acute exposure.* Acute dietary risk assessments are performed for a food-use pesticide if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a one day or single exposure. Toxicity observed in oral toxicity studies were not attributable to a single dose or one day exposure. Therefore, no toxicological endpoint was identified for acute toxicity and no acute dietary risk assessment is required.

ii. *Chronic exposure.* In conducting this chronic dietary risk assessment the Dietary Exposure Evaluation Model (DEEM^{tm}) analysis evaluated the individual food consumption as reported by respondents in the USDA 1989–1992 nationwide Continuing Surveys of Food Intake by Individuals (CSFII) and accumulated exposure to the chemical for each commodity. The following assumptions were made for the chronic exposure assessments: Tolerance level residues and 100 percent crop treated (%CT) assumptions were made for the proposed commodity

of this emergency exemption, and all other commodities with tolerances for residues of clomazone, in order to estimate the Theoretical Maximum Residue Contribution (TMRC) for the general population and subgroups of interest.

2. *Dietary exposure from drinking water.* The Agency lacks sufficient monitoring exposure data to complete a comprehensive dietary exposure analysis and risk assessment for clomazone in drinking water. Because the Agency does not have comprehensive monitoring data, drinking water concentration estimates are made by reliance on simulation or modeling taking into account data on the physical characteristics of clomazone.

The Agency uses the Generic Estimated Environmental Concentration (GENEEC) or the Pesticide Root Zone/ Exposure Analysis Modeling System (PRZM/EXAMS) to estimate pesticide concentrations in surface water and SCI-GROW, which predicts pesticide concentrations in groundwater. In general, EPA will use GENEEC (a tier 1 model) before using PRZM/EXAMS (a tier 2 model) for a screening-level assessment for surface water. The GENEEC model is a subset of the PRZM/ EXAMS model that uses a specific high-end runoff scenario for pesticides. GENEEC incorporates a farm pond scenario, while PRZM/EXAMS incorporate an index reservoir environment in place of the previous pond scenario. The PRZM/EXAMS model includes a percent crop area factor as an adjustment to account for the maximum percent crop coverage within a watershed or drainage basin.

None of these models include consideration of the impact processing (mixing, dilution, or treatment) of raw water for distribution as drinking water would likely have on the removal of pesticides from the source water. The primary use of these models by the Agency at this stage is to provide a coarse screen for sorting out pesticides for which it is highly unlikely that drinking water concentrations would ever exceed human health levels of concern.

Since the models used are considered to be screening tools in the risk assessment process, the Agency does not use estimated environmental concentrations (EECs) from these models to quantify drinking water exposure and risk as a %RfD or %PAD. Instead drinking water levels of comparison (DWLOCs) are calculated and used as a point of comparison against the model estimates of a pesticide's concentration in water. DWLOCs are theoretical upper limits on a pesticide's concentration in drinking water in light of total aggregate exposure to a pesticide in food, and from residential uses. Since DWLOCs address total aggregate exposure to clomazone they are further discussed in the aggregate risk sections below.

Based on the GENEEC and SCI-GROW models the estimated environmental concentrations (EECs) of clomazone for acute exposures are estimated to be 95 parts per billion (ppb) for surface water and 2.4 ppb for ground water. The EECs for chronic exposures are estimated to be 68 ppb for surface water and 2.4 ppb for ground water.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). Clomazone is not registered for use on any sites that would result in residential exposure.

4. *Cumulative exposure to substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA does not have, at this time, available data to determine whether clomazone has a common mechanism of toxicity with other substances or how to include this pesticide in a cumulative risk assessment. Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, clomazone does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that clomazone has a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see the final rule for Bifenthrin Pesticide Tolerances (62 FR 62961, November 26, 1997).

C. Safety Factor for Infants and Children

1. *Safety factor for infants and children*—i. *In general.* FFDCA section 408 provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the data base on toxicity and exposure unless EPA determines that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA risk assessments either directly through use of a margin of exposure (MOE) analysis or through using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk to humans.

ii. *Developmental toxicity studies —a. Rat.* From the rat developmental toxicity study, the maternal (systemic) NOAEL was 100 milligrams/kilograms/day (mg/ kg/day), based on decreased locomotion and abdominal staining at the LOAEL of 300 mg/kg/day. The developmental (pup) NOAEL was 100 mg/kg/day, based on delayed ossification at the LOAEL of 300 mg/kg/day.

b. Rabbit. From the rabbit developmental toxicity study, the maternal (systemic) NOAEL was 240 mg/kg/day, based on decreased body weight gain at the LOAEL of 700 mg/kg/ day. The developmental (pup) NOAEL was 700 mg/kg/day at the highest dose tested.

iii. *Reproductive toxicity study—Rat.* From the rat reproductive toxicity study, the maternal (systemic) NOAEL was 50 mg/kg/day, based on decreased body weight, food consumption, clinical signs, and organ weight changes at the LOAEL of 100 mg/kg/day. The reproductive (pup) NOAEL was 5 mg/ kg/ day, based on decreased pup viability, reduced survival, and decreased body weight at the LOAEL of 50 mg/kg/day.

iv. *Prenatal and postnatal sensitivity.* The prenatal and postnatal toxicology data base for clomazone is complete with respect to FQPA considerations. There is no quantitative or qualitative evidence of increased susceptibility of rats or rabbit fetuses to in utero exposure in developmental studies. Although there was a suggestion of susceptibility in the rat developmental study based on the presence of delayed ossification in the fetuses, the HIARC concluded that the fetal effects were no more severe than the maternal effects because:

- There is no dose response relationship for delayed ossification (i.e., absence of increased incidence with increase in dose);
- Low fetal/litter incidences;
- Delayed ossifications were not considered to be severe; and no visceral or skeletal malformations were seen.
- A developmental neurotoxicity (DNT) study is not required at this time.

Neurotoxicity data is not available nor is it required as the chemical is not a cholinesterase inhibitor and has shown

no indications of central or peripheral nervous system effects in any other studies and does not appear to be structurally related to any other chemical that causes adverse nervous system effects.

v. *Conclusion*. There is a complete toxicity data base for clomazone and exposure data are complete or are estimated based on data that reasonably accounts for potential exposures. The additional 10X safety factor to account for increased sensitivity of infants and children was reduced to 1X. EPA concluded that the safety factor could be removed for clomazone because:

- There is no indication of quantitative or qualitative increased susceptibility of rats or rabbits to in utero and/or postnatal exposure;
- A developmental neurotoxicity study is not required; and
- The dietary (food and drinking water) exposure assessments will not underestimate the potential exposures for infants and children (there are currently no registered residential uses).

D. Aggregate Risks and Determination of Safety

To estimate total aggregate exposure to a pesticide from food, drinking water, and residential uses, the Agency calculates DWLOCs which are used as a point of comparison against the model estimates of a pesticide's concentration in water (EECs). DWLOC values are not regulatory standards for drinking water. DWLOCs are theoretical upper limits on a pesticide's concentration in drinking water in light of total aggregate exposure to a pesticide in food and residential uses. In calculating a DWLOC, the Agency determines how much of the acceptable exposure (i.e., the PAD) is available for exposure through drinking water e.g., allowable chronic water exposure (mg/kg/day) = cPAD - (average food + chronic non-dietary, non-occupational exposure). This allowable exposure through drinking water is used to calculate a DWLOC.

A DWLOC will vary depending on the toxic endpoint, drinking water consumption, and body weights. Default body weights and consumption values as used by the USEPA Office of Water are used to calculate DWLOCs: 2 Liters (L)/70 kg (adult male), 2L/60 kg (adult female), and 1L/10 kg (child). Default body weights and drinking water consumption values vary on an individual basis. This variation will be taken into account in more refined screening-level and quantitative drinking water exposure assessments. Different populations will have different DWLOCs. Generally, a DWLOC is calculated for each type of risk assessment used: Acute, short-term, intermediate-term, chronic, and cancer.

When EECs for surface water and groundwater are less than the calculated DWLOCs, OPP concludes with reasonable certainty that exposures to clomazone in drinking water (when considered along with other sources of exposure for which OPP has reliable data) would not result in unacceptable levels of aggregate human health risk at this time. Because OPP considers the aggregate risk resulting from multiple exposure pathways associated with a pesticide's uses, levels of comparison in drinking water may vary as those uses change. If new uses are added in the future, OPP will reassess the potential impacts of clomazone on drinking water as a part of the aggregate risk assessment process.

1. *Acute risk.* Acute aggregate risk estimates are below EPA's level of concern. A Tier 1 acute dietary exposure analysis for clomazone was performed using existing and proposed tolerance level residues, 100% CT for all commodities, and DEEM^{tm} default processing factors. The acute analysis was performed for females 13–50 years old. The acute dietary exposure estimate (food only) for this population subgroup was <1% of the aPAD at the 95th percentile. Thus, the acute dietary risk associated with the existing and proposed uses of clomazone does not exceed EPA's level of concern (>100% aPAD). The surface and ground water EECs were used to compare against the back-calculated DWLOC for aggregate risk assessment. For ground and surface water, the EECs for clomazone are less than EPA's DWLOC for clomazone in drinking water as a contribution to acute aggregate exposure (Table 2). Therefore, EPA concludes with reasonable certainty that residues of clomazone in drinking water do not contribute significantly to the acute aggregate human health risk at the present time.

TABLE 2.—AGGREGATE RISK ASSESSMENT FOR ACUTE EXPOSURE TO CLOMAZONE

Population Subgroup	aPAD (mg/kg)	<% aPAD (Food)	Surface Water EEC (ppb)	Ground Water EEC (ppb)	Acute DWLOC (ppb)
Females 13–50 yrs old	1	<1	95	2.4	30,000

2. *Chronic risk*. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that exposure to clomazone from food will utilize <1% of the cPAD for the U.S. population and all subpopulations. There are no residential uses for clomazone that result in chronic residential exposure to clomazone. In addition, despite the potential for chronic dietary exposure to clomazone in drinking water, after calculating DWLOCs and comparing them to conservative model estimated environmental concentrations of clomazone in surface and ground water, EPA does not expect the aggregate exposure to exceed 100% of the cPAD, as shown in the following Table 3:

TABLE 3.— AGGREGATE RISK ASSESSMENT FOR CHRONIC (NON-CANCER) EXPOSURE TO CLOMAZONE

Population Subgroup	cPAD mg/kg/day	% cPAD (Food)	Surface Water EEC (ppb)	Ground Water EEC (ppb)	Chronic DWLOC (ppb)
U.S. Population	0.84	<1	23	2.4	29,000
All infants <1 yr old	0.84	<1	23	2.4	8,400

3. *Short-term risk*. Short-term aggregate exposure takes into account residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Clomazone is not registered for use on any sites that would result in residential exposure. Therefore, the aggregate risk is the sum of the risk from food and water, which were previously addressed.

4. *Intermediate-term risk*. Intermediate-term aggregate exposure takes into account non-dietary, non-occupational exposure plus chronic exposure to food and water (considered to be a background exposure level). Clomazone is not registered for use on any sites that would result in residential exposure. Therefore, the aggregate risk is the sum of the riskfrom food and water, which were previously addressed.

5. *Aggregate cancer risk for U.S. population*. Clomazone has been classified as a ''not likely human carcinogen'' based on the lack of carcinogenic response in rats and mice and the lack of mutagenic concern. Further, there is no data in the literature or structure activity relationship (SAR) information to indicate carcinogenic potential. Therefore, a cancer risk assessment is not required.

6. *Determination of safety*. Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, and to infants and children from aggregate exposure to clomazone residues.

V. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology (GLC/NPD or GLC/MS) are available (PAM II) for enforcement of clomazone residues. Additionally, clomazone is adequately recovered (>80%) via the FDA Multiresidue Methods of PAM I (Pestrak, 1990).

B. International Residue Limits

There is neither a Codex proposal nor Canadian limits for residues of clomazone in/on sugarcane. A Mexican limit of 0.05 ppm is established for clomazone *per se* in/on sugarcane. Therefore, a compatibility issue is not relevant to the proposed tolerance.

VI. Conclusion

Therefore, the time limited tolerance is established for residues of clomazone, in or on sugarcane at 0.05 ppm.

VII. Objections and Hearing Requests

Under section 408(g) of the FFDCA, as amended by the FQPA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. Although the procedures in those regulations require some modification to reflect the amendments made to the FFDCA by the FQPA of 1996, EPA will continue to use those procedures, with appropriate adjustments, until the necessary modifications can be made. The new section 408(g) provides essentially the same process for persons to ''object'' to a regulation for an exemption from the requirement of a tolerance issued by EPA under new section 408(d), as was provided in the old FFDCA sections 408 and 409. However, the period for filing objections is now 60 days, rather than 30 days.

A. What Do I Need to Do to File an Objection or Request a Hearing?

You must file your objection or request a hearing on this regulation in accordance with the instructions provided in this unit and in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket control number OPP–301084 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before February 20, 2001.

1. *Filing the request*. Your objection must specify the specific provisions in the regulation that you object to, and the grounds for the objections (40 CFR 178.25). If a hearing is requested, the objections must include a statement of the factual issues(s) on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the objector (40 CFR 178.27). 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.

Mail your written request to: Office of the Hearing Clerk (1900), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. You may also deliver your request to the Office of the Hearing Clerk in Rm. C400, Waterside Mall, 401 M St., SW., Washington, DC 20460. The Office of the Hearing Clerk is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Office of the Hearing Clerk is (202) 260–4865.

2. *Tolerance fee payment*. If you file an objection or request a hearing, you must also pay the fee prescribed by 40 CFR 180.33(i) or request a waiver of that fee pursuant to 40 CFR 180.33(m). You must mail the fee to: EPA Headquarters Accounting Operations Branch, Office of Pesticide Programs, P.O. Box 360277M, Pittsburgh, PA 15251. Please identify the fee submission by labeling it ''Tolerance Petition Fees.''

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 the waiver of these fees, you may contact James Tompkins by phone at (703) 305–5697, by e-mail at tompkins.jim@epa.gov, or by mailing a request for information to Mr. Tompkins at Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

If you would like to request a waiver of the tolerance objection fees, you must mail your request for such a waiver to: James Hollins, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

3. *Copies for the Docket*. In addition to filing an objection or hearing request with the Hearing Clerk as described in Unit VII.A., you should also send a copy of your request to the PIRIB for its inclusion in the official record that is described in Unit I.B.2. Mail your copies, identified by the docket control number OPP–301084, to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. In person or by courier, bring a copy to the location of the PIRIB described in Unit I.B.2. You may also send an electronic copy of your request via e-mail to: opp-docket@epa.gov. Please use an ASCII file format and avoid the use of special characters and any form of encryption. Copies of electronic objections and hearing requests will also be accepted on disks in WordPerfect 6.1/8.0 file format or ASCII file format. Do not include any CBI in your electronic copy. You may also submit an electronic copy of your request at many Federal Depository Libraries.

B. When Will the Agency Grant a Request for a Hearing?

A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is a 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(s) in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32).

VIII. Regulatory Assessment Requirements

This final rule establishes a time limited tolerance under FFDCA section 408. 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) (Public Law 104–4). Nor does it require any prior consultation as specified by Executive Order 13084, entitled *Consultation and Coordination with Indian Tribal Governments* (63 FR 27655, May 19, 1998); 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 or any Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note). Since tolerances and exemptions that are established on the basis of a FIFRA section 18 exemption under FFDCA section 408, such as the tolerance 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. In addition, the Agency has determined that this action will not have a substantial direct effect on 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, as specified in Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that 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.'' This final rule directly regulates growers, food processors, food handlers and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4).

IX. 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 to 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 this final rule in the **Federal Register**. This final 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: December 7, 2000.

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.

2. Section 180.425 is amended by alphabetically adding the commodity Sugarcane to the table in paragraph (b) to read as follows:

§ 180.425 Clomazone; tolerances for residues.

* * * * *

(b)* * *

Commodity	Parts per million	Expiration/ revocation date
* * * * *		
Sugarcane	0.05	12/31/02
* * * * *		

* * * * *

[FR Doc. 00–32399 Filed 12–19–00; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[FRL–6915–8]

Alabama: Final Authorization of State Hazardous Waste Management Program Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Immediate final rule.

SUMMARY: Alabama has applied to EPA for Final authorization of the changes to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). EPA has determined that these changes satisfy all requirements needed to qualify for Final authorization, and is authorizing the State's changes through this immediate final action. EPA is publishing this rule to authorize the changes without a prior proposal because we believe this action is not controversial and do not expect comments that oppose it. Unless we get written comments which oppose this authorization during the comment period, the decision to authorize Alabama's changes to their hazardous waste program will take effect . If we get comments that oppose this action, we will publish a document in the **Federal Register** withdrawing this rule before it takes effect and a separate document in the proposed rules section of this

Federal Register will serve as a proposal to authorize the changes.

DATES: This Final authorization will become effective on February 20, 2001 unless EPA receives adverse written comment by January 19, 2001. If EPA receives such comment, it will publish a timely withdrawal of this immediate final rule in the **Federal Register** and inform the public that this authorization will not take effect.

ADDRESSES: Send written comments to Narindar Kumar, Chief RCRA Programs Branch, Waste Management Division, Environmental Protection Agency, The Sam Nunn Atlanta Federal Center, 61 Forsyth Street, SW, Atlanta, Georgia 30303–8960; (404) 562–8440. You can view and copy Alabama's application from 8 a.m. to 5 p.m. at the following addresses: 1400 Coliseum Blvd., Montgomery, Alabama 36130–1463, Phone number: (334) 271–7700 and EPA Region 4, Library, The Sam Nunn Atlanta Federal Center, 61 Forsyth Street, SW, Atlanta, Georgia 30303–8960, Phone number: (404) 562–8190.

FOR FURTHER INFORMATION CONTACT: Narindar Kumar, Chief, RCRA Programs Branch, Waste Management Division, Environmental Protection Agency at the above address and phone number.

SUPPLEMENTARY INFORMATION:

A. Why Are Revisions to State Programs Necessary?

States which have received final authorization from EPA under RCRA section 3006(b), 42 U.S.C. 6926(b), must maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the Federal program. As the Federal program changes, States must change their programs and ask EPA to authorize the changes. Changes to State programs may be necessary when Federal or State statutory or regulatory authority is modified or when certain other changes occur. Most commonly, States must change their programs because of changes to EPA's regulations in 40 Code of Federal Regulations (CFR) parts 124, 260 through 266, 268, 270, 273 and 279.

B. What Decisions Have We Made in This Rule?

We conclude that Alabama's application to revise its authorized program meets all of the statutory and regulatory requirements established by RCRA. Therefore, we grant Alabama Final authorization to operate its hazardous waste program with the changes described in the authorization application. Alabama has responsibility for permitting Treatment, Storage, and Disposal Facilities (TSDFs) within its borders (except in Indian Country) and for carrying out the aspects of the RCRA program described in its revised program application, subject to the limitations of the Hazardous and Solid Waste Amendments of 1984 (HSWA). New Federal requirements and prohibitions imposed by Federal regulations that EPA promulgates under the authority of HSWA take effect in authorized States before they are authorized for the requirements. Thus, EPA will implement those requirements and prohibitions in Alabama, including issuing permits, until the State is granted authorization to do so.

C. What Is the Effect of Today's Authorization Decision?

The effect of this decision is that a facility in Alabama subject to RCRA will now have to comply with the authorized State requirements instead of the equivalent Federal requirements in order to comply with RCRA. Alabama has enforcement responsibilities under its state hazardous waste program for violations of such program, but EPA retains its authority under RCRA sections 3007, 3008, 3013, and 7003, which include, among others, authority to:

- Do inspections, and require monitoring, tests, analyses or reports.
- Enforce RCRA requirements and suspend or revoke permits.
- Take enforcement actions regardless of whether the State has taken its own actions.

This action does not impose additional requirements on the regulated community because the regulations for which Alabama is being authorized by today's action are already effective, and are not changed by today's action.

D. Why Wasn't There a Proposed Rule Before Today's Rule?

EPA did not publish a proposal before today's rule because we view this as a routine program change and do not expect comments that oppose this approval. We are providing an opportunity for public comment now. In addition to this rule, in the proposed rules section of today's **Federal Register** we are publishing a separate document that proposes to authorize the state program changes.

E. What Happens if EPA Receives Comments That Oppose This Action?

If EPA receives comments that oppose this authorization, we will withdraw this rule by publishing a document in the **Federal Register** before the rule becomes effective. EPA will base any further decision on the authorization of the state program changes on the proposal mentioned in the previous paragraph. We will then address all public comments in a later final rule. You may not have another opportunity to comment. If you want to comment on this authorization, you must do so at this time.

If we receive comments that oppose only the authorization of a particular change to the State hazardous waste program, we will withdraw that part of this rule but the authorization of the program changes that the comments do not oppose will become effective on the date specified above. The **Federal Register** withdrawal document will specify which part of the authorization will become effective, and which part is being withdrawn.

F. What Has Alabama Previously Been Authorized for?

Alabama initially received Final authorization on December 8, 1987, effective December 22, 1987, (52 FR 46466) to implement the RCRA hazardous waste management program. We granted authorization for changes to their program on November 29, 1991, effective January 28, 1992 (56 FR 60926), May 13, 1992, effective July 12, 1992 (57 FR 20422), October 21, 1992, effective December 21, 1992 (57 FR 47996), March 17, 1993, effective May 17, 1993 (58 FR 20422), September 24, 1993, effective November 23, 1993 (58 FR 49932), February 1, 1994, effective April 4, 1994 (59 FR 4594), November 14, 1994, effective January 13, 1995 (59 FR 56407), August 14, 1995, effective October 13, 1995 (60 FR 41818), February 14, 1996, effective April 15, 1996 (61 FR 5718), April 25, 1996, effective June 24, 1996 (61 FR 5718), November 21, 1997 effective February 10, 1998 (62 FR 62262).

G. What Changes Are We Authorizing With Today's Action?

On October 28, 1999, and on March 19, 2000, Alabama submitted final complete program revision applications, seeking authorization of their changes in accordance with 40 CFR 271.21. We now make an immediate final decision, subject to receipt of written comments that oppose this action, that Alabama's hazardous waste program revision satisfies all of the requirements necessary to qualify for Final authorization. Therefore, we grant Alabama Final authorization for the following program changes which were promulgated on July 1, 1995–June 30, 1996 and on July 1, 1996–June 30, 1997:

Description of Federal requirement	FEDERAL REGISTER date and page	Analogous state authority[1]
Checklist 145 Liquids in Landfills III	7/11/95 60 FR 35703–35706	335–14–5.14(15)(e)2.(ii),(iii), 335–14–6–.14(15)(f)2.(ii),(iii). *Alabama Code* §§ 22– 30–4,22–30–6,22–30–10,22–30–11,22–3–14,22–30–15, 22–3–16.
Checklist 148 RCRA Expanded Public Participation.	12/11/95 60 FR 63417–63434	335–14–8–.08(1)(a)1–(1)(a)4, 335–14–9–.08(1)(b)1– (1)(b)3, 335–14–8–.08(1)(c)1–(1)(c)6, 335–14–8–.01(2)(g), 335–14–8–.02(5)(b)22, 335–14–8–.03(1)(m), 335–14–8–.06(3)(b)6,7,8–11, 335–14–8–.06(7)(d)3–(d)6, 335–14–8–.06(7)(g). *Alabama Code* §§ 22–30–4,22–30–6,22–30–10,22–30–11,22–30–14,22–30–15,22–30–16.
Checklist 150 Amendments to the definition of Solid Waste; Amendment II.	3/26/96 61 FR 13103–13106	335–14–2–.01(4)(a)12. *Alabama Code* §§ 22–30–4,22–3–6,22–30–10,22–30–11,22–30–14,22–30–15,22–30–16.
Checklist 151 Land Disposal Restrictions Phase III— Decharacterized Wastewaters, Carbamate Wastes, and Spent Potliners.	4/8/96 61 FR 5566–15660, Amended by 4/8/96 FR15660–15668, 4/30/96 61 FR 19117, 6/28/96 61 FR 3680–33690, 7/10/96 61 FR 36419–36421, 8/26/96 61 FR 43924–43931, 2/19/97 62 FR 7502–7600	335–14–9–.01(1)–.01(9), 335–14–9–.03(10), 335–14–.04(1),.04(3)–04(5), 335–14–9–.04(8), 335–14–9–Appendix XI. *Alabama Code,* §§ 22–30–4,22–30–6,22–30–10,22–30–14,22–30–15,22–30–16.
Checklist 153 Conditionally Exempt Small Quantity Generator Disposal Options under Subtitle D.	7/1/96 61 FR 34252–34278	335–14–2–.01(5)(f)3, 335–14–2–.01(5)(f)3.(i)–(vi), 335–14–2–.01(5)(g)3, 335–14–2–.01(5)(g)3(i)–(vi). *Alabama Code* §§ 22–30–10,22–30–11,22–30–14,22–30–15,22–30–16.
Checklist 154 Consolidated Organic Air Emission Standards for Tanks, Surface Impoundments, and Containers.	12/6/94 59 FR 52896–62953, Amended by, 5/19/95 60 FR 25828–26829, 9/29/95 60 FR 50426–50430, 11/13/95 60 FR 56952–56954, 2/9/96 60 FR 4903–4916, 6/5/96 60 FR 28508–28510, 11/25/96 60 FR 59932–59997	335–14–1–.02(2), 335–14–3–.03(5)(a)1.(i)–(ii), 335–14–3–.03(5)(d)2, 335–14–5–.02(4)(b)6, 335–14–5–.02(6)(b)4, 335–14–5–.05(4)(b)3, 335–14–5–.05(4)(b)6, 335–14–5–.05(8)(c), 335–14–5–.09(10), 335–14–5–.10(11), 335–14–5–.11(13), 335–14–5–.24(2), 335–14–5.27–.29, 335–14–6–.01(b), 335–14–6–.02(4)(b)6, 335–14–6–.02(6)(b)4, 335–14–6–.05(4)(b)3,(b)6, 335–14–6–.05(8)(d), 335–14–6–.09(10), 335–14–6.10(13), 335–14–6–.11(12), 335–14–6–.27–.29, 335–14–6–Appendix VI 335–14–8–.01(4)(a)2–(a)4, 335–14–8–.02(5)(b)5, 335–14–8–.02(6)(e), 335–14–8–.02(7)(k), 335–14–8–.02(8)(j), 335–14–8– .02(18)(a),(a)1–7. *Alabama Code* §§ 22–30–3,22–30–9,22–30–10,22–30–11,22–30–12,22–30–13,22–30–14, 22–30–15,22–30–16,22–30–17,22–30–18,22–30–19,22–30–20(9),22–22A–5.
Checklist 155 Land Disposal Restrictions Phase III-Emergency extension of the K088 Capacity Variance.	1/14/97 62 FR 1992–1997	335–14–9–.03. *Alabama Code* §§ 22–30–4,22–30–6,22–30–11,22–30–16.
Checklist 156 Military Munitions Rule: Waste Identification and Management; Explosives Emergencies; Manifest Exemption for Transport of Hazardous Waste on Right-of-Ways on Contiguous Properties.	2/12/97 62 FR 6622–6657	335–14–1–.02(1), 335–14–2–.01(2)(A)2.(iii),(iv), 335–14–3–.01(1)(i), 335–14–3–.02(1)(f), 335–14–4–.01(1)(e)(1)(f), 335–14–5–.01(1)(g)8.(i)(IV), 335–14–5–.01(1)(g)8.(iv), 335–14–5–.01(1)(i), 335–14–5–.05(1), 335–14–5–.31(1), 335–14–5.31(2)(a)(2)(a)1–5, 335–14–.31(2)(b), 335–14–5–.31(2)(b)1.(i–iii), 335–14–5–.31(2)(b)2,(b)3, 224–14–5–.31(2)(c)–(f), 335–14–5–31(3)(b), 335–14–6–.01(1)(c)11.(i)(IV), 335–14–6–.01(1)(c)11.(iv), 335–14–6–.01(1)(f), 335–14–6–.05(1), 335–14–6–.31(1),(2)(a),2(b)–(f), 335–14–6–.31(3)(a)(b), 335–14–7–.13(1)(a)(b), 335–14–7–.13(2), 335–14–1–.02(1), 335–24–7–.13(3)(a)–(d), 335–14–7–.13(4)(a)–(c), 335–14–7–.13(5), 335–14–7–.13(6)(a)–(e), 335–14–7–.13(7), 335–14–8–.01(1)(c)3.(i)(IV), 335–14–8–.01(1)(c)3.(iii), 335–14–8–.04(3)(e)1, 335–14–8–.04. *Alabama Code* §§ 22–30–9,22–30–10,22–30–11,22–30–12,22–30–15,22–30–16,22–30–18,22–30–19,22–30–20,22–30–21,22–30–22A–5.

Description of Federal requirement	FEDERAL REGISTER date and page	Analogous state authority[1]
Checklist 157 Land disposal Restrictions Phase IV-Treatment Standards for Wood Preserving Wastes, Paperwork Reduction and Streamlining, Exemptions from RCRA for Certain Processed Materials; and Miscellaneous Hazardous Waste Provisions.	5/12/97 62 FR25998–26040	335–14–2–.01(1)(c)9, 335–14–2–.01(2)/Table 1, 335–14–2.01(4)(a)13–14, 335–14–2–.01(4)(a)14(ii), 335–14–2–.01(6)(a)3.(ii), 335–14–9–.01, 335–14–9–.03, 335–14–9–.04, 335–14–9–Appendices I, II, III, and X, 335–14–9–appendix VI–VIII, 335–14–9–Appendix X. *Alabama Code* §§ 22–30–4,22–30–6,22–30–11,22–30–16.
Checklist 158 Testing and Monitoring Activities Amendment III.	6/13/97 62 FR 32452–32463	335–14–1–.02(2), 335–14–5–.27(5)(d)1.(iii), 335–14–5–.27(5)(f), 335–14–5–.28(14)(d)2, 335–14–5–Appendix IX, footnote 5, 335–14–6–.27(5)(d)1.(iii), 335–14–6–.27(5)(f), 335–14–6–.28(14)(d)2, 335–14–7–.08, 335–14–7–Appendix IX. *Alabama Code* §§ 22–30–3,22–30–4,22–30–6,22–30–10,22–30–11,22–30–16.
Checklist 159 Conformance with the Carbamate Vacatur.	6/17/97 62 FR 32974–32980	335–14–2–.04(3)/Table, 335–14–2–.04(4), 335–14–2–Appendix VII, 335–14–2–Appendix VIII, 3335–14–9–.03. *Alabama Code* §§ 22–30–4,22–30–6,22–30–10.22–30–11,22–30–16.

[1]Alabama Department of Environmental Management Administrative Code, Division 335–14, Hazardous Waste Program Regulations effective March 28, 1997, for checklists numbers 145, 148, 150 and 151, and regulations effective March 27, 1998, for checklists numbers 153, 154, 155, 156, 157, 158, and 159.

H. Where Are the Revised State Rules Different From the Federal Rules?

We consider the following State requirement to be more stringent than the Federal requirements:

• 335–14–9–.03, Alabama has adopted 40 CFR 268 by reference exclusive of 268.1(c)(3). The State is more stringent by excluding disposal of waste into nonhazardous or hazardous injection wells.

This requirement is part of Alabama's authorized program and is federally enforceable.

EPA cannot delegate the Federal requirements at 61 FR 16290–16316, ''Imports and Exports of Hazardous'' (checklist 152). Although Alabama has adopted these requirements verbatim from the Federal regulations at 335–14–2–.01(6)(a)5, 335–14–3–.01(1)(d), 335–14–3–.01(1)(e)–(h), 335–14–3–.05(4)(b), 335–14–3–.05(7)(b), 335–14–3–.05(9)(a)(9)(b), 335–14–3–.090(1)(a), 335–14–3–.09(1)(b), 335–14–3–.09(2)(2)(a–l), 335–14–.09(3)(a), 335–14–3–.09(3)(a)1, 335–14–3–.09(3)(a)1.(i)–(iii), 335–14–3–.09(3)(a)2, 335–14–3–.09(3)(a)2(i–ii), 335–14–3–.09(3)(a)3–4, 335–14–3–.09(3)(b), 335–14–3–.09(4)(b–e), 335–14–3–.09(5)(a)–(e), 335–14–3–.09(6)(a–g), 335–14–3–.09(7)(a)(b), 335–14–3–.0(8)(a–c), 335–14–3–.09(8)(c)1.(iii)2, 335–14–3–.09(9)(10)(a–e), 335–14–5–.02(3)(a)1, 2(e)335–14–6–.02(3)(a)1, 2, (2)(e), 335–14–7–.06(1)(b)2, 3, 335–14–11–.02(11), 335–14–11–.03(11), 335–14–11–.04(7), 335–14–11–.06(1), 335–14–11–.06(1)(d), EPA will continue to implement those requirements.

I. Who Handles Permits After the Authorization Takes Effect?

Alabama will issue permits for all the provisions for which it is authorized and will administer the permits it issues. EPA will continue to administer any RCRA hazardous waste permits or portions of permits which we issued prior to the effective date of this authorization until the permits expire or are terminated. We will not issue any more new permits or new portions of permits for the provisions listed in the Table above after the effective date of this authorization. EPA will continue to implement and issue permits for HSWA requirements for which Alabama is not yet authorized.

J. How Does Today's Action Affect Indian Country (18 U.S.C. 115) in Alabama?

Alabama is not authorized to carry out its hazardous waste program in Indian country within the State, which includes the Poarch Band of Creek Indians. Therefore, this action has no effect on Indian country. EPA will continue to implement and administer the RCRA program in these lands.

K. What Is Codification and Is EPA Codifying Alabama's Hazardous Waste Program as Authorized in This Rule?

Codification is the process of placing the State's statutes and regulations that comprise the State's authorized hazardous waste program into the Code of Federal Regulations. We do this by referencing the authorized State rules in 40 CFR part 272. We reserve the amendment of 40 CFR part 272, subpart B for this authorization of Alabama's program until a later date.

L. Administrative Requirements

The Office of Management and Budget has exempted this action from the requirements of Executive Order 12866 (58 FR 51735, October 4, 1993), and therefore this action is not subject to review by OMB. This action authorizes state requirements for the purpose of RCRA 3006 and imposes no additional requirements beyond those imposed by state law. Accordingly, I certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this action authorizes pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). For the same reason, this action also does not significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13084 (63 FR 27655, May 10, 1998). This action 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, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely authorizes state requirements as

part of the State RCRA hazardous waste program without altering the relationship or the distribution of power and responsibilities established by RCRA. This action also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant and it does not make decisions based on environmental health or safety risks.

Under RCRA 3006(b), EPA grants a State's application for authorization as long as the State meets the criteria required by RCRA. It would thus be inconsistent with applicable law for EPA, when it reviews a State authorization application, to require the use of any particular voluntary consensus standard in place of another standard that otherwise satisfies the requirements of RCRA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the executive order. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this document 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 in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This action will be effective February 20, 2001.

List of Subjects in 40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Hazardous waste transportation, Indian lands, Intergovernmental relations, Penalties, Reporting and record keeping requirements.

Authority: This action is issued under the authority of sections 2002(a), 3006 and 7004(b) of the Solid Waste Disposal Act as amended 42 U.S.C. 6912(a), 6926, 6974(b).

Dated: November 28, 2000.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

[FR Doc. 00–31723 Filed 12–19–00; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION.

47 CFR Parts 1, 73, and 74

[MM Docket No. 98–93; FCC 00–368]

1998 Biennial Regulatory Review—Streamlining of Radio Technical Rules

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document continues the Commission's wide-ranging reform of the Mass Media Bureau's radio technical rules. These rule modifications were proposed as part of a broad-based initiative, undertaken in conjunction with the Commission's 1998 biennial regulatory review, to streamline the Mass Media Bureau radio technical rules, and are intended to speed the introduction of new and improved broadcast services to the public, provide greater flexibility to broadcasters to improve existing services, and reduce regulatory burdens on applicants.

DATES: Effective January 19, 2001.

FOR FURTHER INFORMATION CONTACT: Peter H. Doyle, Audio Services Division, Mass Media Bureau (202) 418–2700.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Second Report and Order* in MM Docket No. 98–93, adopted October 12, 2000, and released November 1, 2000. The complete text of this *Second Report and Order* is available for inspection and copying during normal business hours in the FCC Reference Center, on the Internet at *http://www.fcc.gov/mmb/asd/welcome2.html#NEWSBOX* or using the Commission's Electronic Document Management System (EDOCS) at *http://www.fcc.gov/searchtools.html,* and may be purchased from the Commission's copy contractor, International Transcription Service (ITS), 1231 20th Street, NW., Washington, DC 20036, (202) 857–3800 telephone, (202) 857–3805 facsimile.

Summary of Second Report and Order

I. Introduction

In this *Second Report and Order,* the Commission modifies the minimum distance separation requirements for short-spaced FM stations to allow short spacings of at least six kilometers for all classes of FM stations; permits short-spaced FM stations in Puerto Rico and the U.S. Virgin Islands additional site location flexibility by adopting the use of contour protection to determine station compliance with Commission rules; creates a new class of FM station, Class C0, with maximum permissible facilities of 100 kilowatts effective radiated power (ERP) and 450 meters antenna radiation center height above average terrain (HAAT), and specifies minimum distance separation requirements for this new FM class; specifies a new minimum antenna radiation center HAAT of 451 meters for Class C FM stations; creates a demand-driven procedure for reclassification to Class C0 of existing Class C FM stations with facilities less than 100 kilowatts ERP and 451 meters antenna radiation center HAAT; permits certain broadcast stations to correct licensed transmitter site geographic coordinates and allows certain FM translator and FM booster stations to request a decrease in ERP by filing only a license application; modifies the second adjacent channel interference ratios for noncommercial educational (NCE) FM and FM translator stations; and requires NCE FM facilities to provide 1 mV/m (60 dBμ) or greater signal strength to at least 50 percent of the population or area within the station's community of license.

II. Discussion

A. FM Technical Requirements

1. Modification of Minimum Distance Separation Requirements for Short-Spaced FM Stations

To be considered fully spaced and to be able to use maximum permissible facilities for their station class, the transmitter sites for all non-reserved band FM stations and certain reserved band FM stations are required to meet the minimum distance separation requirements of 47 CFR 73.207. However, in order to allow site location flexibility, some of these FM stations are permitted to utilize short-spaced transmitter sites, provided that the short-spaced station meets the less

restrictive minimum distance separation requirements for short-spaced stations contained in 47 CFR 73.215(e), and does not cause prohibited contour overlap to nearby co-channel or first, second, or third adjacent channel FM stations. In 47 CFR 73.215(e), co-channel and first-adjacent channel FM stations are permitted considerable short spacing (between 4 and 35 kilometers), while second and third-adjacent channel FM stations are permitted little or no short spacing (between 0 and 10 kilometers). To allow all eligible FM stations maximum site location flexibility, 47 CFR 73.215(e) is modified to provide a minimum of six kilometers relief from the fully-spaced minimum distance separation requirements of 47 CFR 73.207.

2. Adoption of Contour Protection Methodology for Short-Spaced FM Stations in Puerto Rico and the U.S. Virgin Islands

FM stations in Puerto Rico and the U.S. Virgin Islands may use short-spaced transmitter sites so long as the facilities proposed at the short-spaced site do not extend the predicted 1 mV/m contour of the station toward the 1 mV/m contour of any short-spaced station. Due to the varying terrain on the islands, this requirement unnecessarily restricts site location for many FM stations in Puerto Rico and the U.S. Virgin Islands. In order to allow FM stations in Puerto Rico and the U.S. Virgin Islands the same site location flexibility as mainland U.S. FM stations, 47 CFR 73.215 is modified to eliminate the provision prohibiting extension of the short-spaced FM station's predicted 1 mV/m contour toward the 1 mV/m contour of any short-spaced FM station, and to use the contour protection method to show that proposed facilities at a short-spaced site do not cause prohibited contour overlap to an affected short-spaced station.

3. Creation of New Class C0 FM Station Class, Modification of Minimum Class C FM Station Antenna Radiation Center HAAT, and Creation of a Procedure for Reclassification to Class C0 of Existing Substandard Class C FM Stations

Class C FM stations are permitted maximum facilities of 100 kilowatts ERP and 600 meters antenna radiation center HAAT (or the equivalent thereof), and are required to operate using minimum facilities of 100 kilowatts ERP and 300 meters antenna radiation center HAAT (or the equivalent thereof). The Class C FM station minimum distance separation requirements of 47 CFR 73.207 were derived on the basis of maximum permissible Class C facilities. Recent studies show that greater than one-half of the existing Class C FM stations operate with antenna radiation center HAATs between 300 meters and 450 meters, far less than the maximum 600 meters that is permitted for the class. Thus, the minimum distance separation requirements of 47 CFR 73.207 overprotect the actual service areas of most Class C FM stations, and this overprotection may preclude the introduction of new and/or improved FM service to the public. In order to remedy this overprotection of existing FM Class C assignments and to allow the public to fully utilize scarce spectrum resources, the Commission has modified 47 CFR 73.211 and created a new FM station class, Class C0, with required minimum ERP of 100 kilowatts and allowable antenna radiation center HAAT of between 300 and 450 meters; and has modified 47 CFR 73.207 to specify minimum distance separation requirements for the new FM station class that are less than those required for a Class C FM station. In concert with the creation of the new FM Class C0, the Commission has modified 47 CFR 73.211 and increased the minimum required antenna radiation center HAAT for FM Class C to 451 meters.

Existing substandard Class C FM stations, *i.e.* those with antenna radiation center HAATs between 300 and 450 meters, will not automatically be reclassified to FM Class C0. Instead, as specified in amended 47 CFR 1.420 and 47 CFR 73.3573, reclassification of an existing substandard Class C FM station will be triggered only when a facility modification application or a petition for rule making that expresses a competing demand for the underutilized spectrum, and which demonstrates that no other FM channel is available for the proposed service, is filed with the Commission. Proponents of the proposed reclassification of the substandard Class C FM station must provide copies of the application or petition for rule making to the licensee of the affected Class C station. In addition, the Commission will notify the existing Class C FM station of the filing of the application or the petition for rule making that proposes reclassification of the station. The existing Class C station proposed for reclassification will be afforded an opportunity to retain its existing Class C status by notifying the Commission of its intention to file a facility modification application to increase its facilities to comport with the modified Class C requirements within 30 days of the Commission's notification of the proposed reclassification, and by filing the facility modification application within 180 days thereafter. In addition, the existing Class C station proposed for reclassification may challenge the proposed reclassification on the grounds that the triggering application or petition for rule making violates the Commission's technical rules or that there is another frequency available for the proposed new or improved service within 30 days of the Commission's notification of the proposed reclassification. If the licensee of the affected existing Class C station does not file a facility improvement application or oppose its proposed reclassification in the time periods allowed, the existing substandard Class C FM station will be reclassified to FM Class C0.

B. Streamlined Application Processing Changes

1. Correction of Transmitter Site Location Geographic Coordinates for Certain Licensed Stations by License Application Only

The correction of geographic coordinates for the transmitter site of a licensed broadcast station currently requires the filing of a construction permit application and a subsequent license application to cover the construction permit regardless of the magnitude of the correction. Licensed stations proposing transmitter site geographic coordinate corrections of three or fewer seconds in latitude and/or longitude may now, pursuant to amended 47 CFR 73.1690, file only a license application, provided that the transmitter site location correction does not create a new short spacing or worsen an existing short spacing, and that the licensee has obtained the required Federal Aviation Administration clearance and Commission antenna structure registration for the corrected transmitter site location.

2. FM Translator Stations and FM Booster Station ERP Reductions by License Application Only

A request for reduction of ERP for FM translator stations and FM booster stations currently requires the filing of a construction permit application and a subsequent license application to cover the construction permit. A reduction in ERP would not increase the potential for interference caused by an FM translator or booster station, and there are no principal community coverage requirements for FM translator and booster stations. As a result, the Commission modified 47 CFR 74.1204 to permit a decrease in the ERP of an FM translator or booster station by the

filing of a license application specifying the reduced ERP, provided that exhibits demonstrating that the following requirements are met are submitted with the application:

a. The license application may not propose elimination of authorized horizontally polarized ERP;

b. The height of the station's antenna radiation center is not increased by more than two meters nor decreased by more than four meters from its authorized value; and

c. The station is not currently authorized to operate with separate horizontal and vertical antennas mounted at different heights on the supporting structure.

C. NCE FM and FM Translator Technical Requirements

1. Modification of Second-Adjacent Channel Interference Ratios for NCE FM and FM Translator Stations

Currently, the second-adjacent channel interference ratio for short-spaced FM stations specified in 47 CFR 73.215 is 40 decibel (dB) higher than the protected signal strength, while the second-adjacent channel interference ratio for NCE FM stations, specified in 47 CFR 73.509, and FM translator stations, specified in 47 CFR 74.1204, is 20 dB higher than the protected signal strength. Since experience has proven that the 40 dB interference ratio more accurately predicts the areas where second-adjacent channel interference might occur within a station's protected contour, a 40 dB second-adjacent channel interference ratio is adopted for both NCE FM stations and FM translator stations, and 47 CFR 73.509 and 47 CFR 74.1204 are modified accordingly.

2. Specification of Required Principal Community Coverage for NCE FM Stations

At the current time, there are no principal community coverage requirements for NCE FM stations. Absent such requirements, an NCE FM station may be licensed or relocated without any assurance that it would provide service to its principal community. In order to avoid such loss of service to the public, the Commission has adopted 47 CFR 73.515 which requires NCE FM stations to provide a predicted 1 mV/m (60 dBμ) or greater signal strength to at least 50 percent of the population or area within the station's principal community. This new NCE FM principal community coverage requirement applies not only to all new NCE FM applications, but also to all NCE FM applications pending at the Commission on the release date of this Order. NCE FM applicants will be permitted to file minor curative amendments to pending NCE FM applications to bring them into compliance with the new NCE FM principal community coverage requirement.

Administrative Matters

Paperwork Reduction Act of 1995 Analysis

The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose new or modified reporting and recordkeeping requirements or burdens on the public. Implementation of these new or modified reporting and recordkeeping requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act.

Final Regulatory Flexibility Certification

The Regulatory Flexibility Act of 1980, as amended (RFA), requires that a regulatory flexibility analysis be prepared for rulemaking proceedings, unless the agency certifies that ''the rule will not have a significant economic impact on a substantial number of small entities.'' The RFA generally defines ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

In this *Second Report and Order,* the Commission continues its wide-ranging radio technical streamlining initiative. The *Order* amends the commercial FM station spacing table for short-spaced assignments, 47 CFR 73.215(e), to provide all stations with minimum relief of six kilometers from basic spacing requirements, 47 CFR 73.207, with respect to second and third adjacent channel stations. The *Order* also provides special spacing relief for FM commercial stations in Puerto Rico and the Virgin Islands that operate at greater than class maximums. These changes will give certain existing stations, including small entities, additional flexibility in the siting of their technical facilities and may facilitate station relocations to preferred sites. These rule changes impose no costs or reporting burdens on existing stations. Although impossible to predict, the Commission anticipates approximately 20–30 stations per year of the more than 5,000 existing commercial FM stations will take advantage of these changes and file applications to improve their technical facilities.

The *Order* divides the current FM Class C into two separate classes based on antenna height. The Commission rejected an across-the-board downgrading of existing Class C stations that do not meet the new minimum antenna height. Instead, it adopted a procedure for limited downgrading only where there is a competing demand for the radio spectrum and the Class C station fails to modify its facilities to the new Class C minimum antenna height. This modification of the rule imposes no cost or reporting burden on existing stations. Although impossible to predict, the Commission anticipates that not more than 10 stations per year will seek facility changes that require the downgrading of one of the approximately 500 Class C stations operating with antenna heights below the new class minimum.

The *Order* expands the types of facility changes covered by the Mass Media Bureau's expedited one-step licensing procedure to include radio tower coordinate corrections of three or fewer seconds and FM translator and booster power reduction proposals. These rule changes impose no cost or reporting burdens on existing stations. Although impossible to predict, the Commission anticipates that approximately 40 radio broadcast stations, out of approximately 12,600 radio stations and 4,000 FM translator stations, will benefit from the expansion of the one-step licensing procedure.

Finally, the *Order* gives additional facility siting flexibility to noncommercial educational (NCE) FM stations by modifying the second-adjacent channel interference standard to more closely conform to the less restrictive commercial FM standard. It also establishes, on a going forward basis, an NCE principal community coverage standard. These rule changes impose no cost or reporting burdens on existing stations. The change in the second adjacent channel interference protection standard will give certain NCE stations additional flexibility in locating their technical facilities. Although impossible to predict, the Commission anticipates that it will receive approximately 10–20 facility modification applications, from a total of over 2,500 NCE FM stations that take advantage of this increased technical flexibility. The establishment of an NCE FM community of license signal

coverage requirement may restrict siting options for certain stations. Although impossible to predict, the Commission anticipates that this new requirement will impact fewer than five stations per year.

In sum, the changes we are adopting are small and will generally have minor, but positive, effects on radio licensees, including small entities that can take advantage of these streamlining rule changes. In addition, the number of small entities affected by these modifications is not substantial. As noted above, there is no economic effect on the vast majority of radio stations as a result of most of the rule changes adopted by the Commission in this Order. Only two changes could have an adverse economic effect on radio stations: The costs associated with a facility modification to preserve full Class C status; and the potential costs associated with restricting the location of NCE FM station technical facilities to those sites that would ensure adequate signal coverage of the station's community of license. As stated above, however, none of these potential economic impacts are expected to be significant.

Therefore, we certify that the requirements of this *Second Report and Order* will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the *Second Report and Order*, including a copy of this final certification, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. In addition, the *Second Report and Order* and this certification will be sent to the Chief Counsel for Advocacy of the SBA.

Authority for issuance of the *Second Report and Order* is contained in sections 4(i), 4(j), 303, 308 and 309 of the Communications Act of 1934, as amended, 47 U.S.C. 4(i), 4(j), 303, 308 and 309.

List of Subjects

47 CFR Part 1

Administrative practice and procedure, Radio.

47 CFR Parts 73 and 74

Radio.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

Rules Changes

For the reasons discussed in the preamble, the Federal Communications Commission amends Parts 1, 73, and 74 of Chapter 1 of title 47 of the Code of Federal Regulations as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303(r), 309.

2. Amend § 1.420 as follows:

a. Redesignate Note 1 following paragraph (g)(3) *as Note 1 to Paragraph (g).*

b. Add *Note 2 To Paragraph (g).*

c. Redesignate Note 2 following paragraph (h) to read *Note 1 to Paragraph (h).*

The addition and revisions to § 1.420 read as follows:

§ 1.420 Additional procedures in proceedings for amendment of the FM or TV Tables of Allotments.

* * * * *

Note 2 to Paragraph (g): The reclassification of a Class C station in accordance with the procedure set forth in Note 4 to § 73.3573 may be initiated through the filing of an original petition for amendment of the FM Table of Allotments. The Commission will notify the affected Class C station licensee of the proposed reclassification by issuing a notice of proposed rule making, except that where a triggering petition proposes an amendment or amendments to the FM Table of Allotments in addition to the proposed reclassification, the Commission will issue an order to show cause as set forth in Note 4 to § 73.3573, and a notice of proposed rule making will be issued only after the reclassification issue is resolved. Triggering petitions will be dismissed upon the filing, rather than the grant, of an acceptable construction permit application to increase antenna height to at least 451 meters HAAT by a subject Class C station.

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

2. Amend § 73.207 by revising Table A of paragraph (b)(1) to read as follows:

§ 73.207 Minimum distance separation between stations.

* * * * *

(b) * * *

(1) * * *

TABLE A—MINIMUM DISTANCE SEPARATION REQUIREMENTS IN KILOMETERS (MILES)

Relation	Co-channel	200 kHz	400/600 kHz	10.6/10.8 MHz
A to A	115 (71)	72 (45)	31 (19)	10 (6)
A to B1	143 (89)	96 (60)	48 (30)	12 (7)
A to B	178 (111)	113 (70)	69 (43)	15 (9)
A to C3	142 (88)	89 (55)	42 (26)	12 (7)
A to C2	166 (103)	106 (66)	55 (34)	15 (9)
A to C1	200 (124)	133 (83)	75 (47)	22 (14)
A to C0	215 (134)	152 (94)	86 (53)	25 (16)
A to C	226 (140)	165 (103)	95 (59)	29 (18)
B1 to B1	175 (109)	114 (71)	50 (31)	14 (9)
B1 to B	211 (131)	145 (90)	71 (44)	17 (11)
B1 to C3	175 (109)	114 (71)	50 (31)	14 (9)
B1 to C2	200 (124)	134 (83)	56 (35)	17 (11)
B1 to C1	233 (145)	161 (100)	77 (48)	24 (15)
B1 to C0	248 (154)	180 (112)	87 (54)	27 (17)
B1 to C	259 (161)	193 (120)	105 (65)	31 (19)
B to B	241 (150)	169 (105)	74 (46)	20 (12)
B to C3	211 (131)	145 (90)	71 (44)	17 (11)
B to C2	241 (150)	169 (105)	74 (46)	20 (12)
B to C1	270 (168)	195 (121)	79 (49)	27 (17)
B to C0	272 (169)	214 (133)	89 (55)	31 (19)
B to C	274 (170)	217 (135)	105 (65)	35 (22)
C3 to C3	153 (95)	99 (62)	43 (27)	14 (9)

TABLE A—MINIMUM DISTANCE SEPARATION REQUIREMENTS IN KILOMETERS (MILES)—Continued

Relation	Co-channel	200 kHz	400/600 kHz	10.6/10.8 MHz
C3 to C2	177 (110)	117 (73)	56 (35)	17 (11)
C3 to C1	211 (131)	144 (90)	76 (47)	24 (15)
C3 to C0	226 (140)	163 (101)	87 (54)	27 (17)
C3 to C	237 (147)	176 (109)	96 (60)	31 (19)
C2 to C2	190 (118)	130 (81)	58 (36)	20 (12)
C2 to C1	224 (139)	158 (98)	79 (49)	27 (17)
C2 to C0	239 (148)	176 (109)	89 (55)	31 (19)
C2 to C	249 (155)	188 (117)	105 (65)	35 (22)
C1 to C1	245 (152)	177 (110)	82 (51)	34 (21)
C1 to C0	259 (161)	196 (122)	94 (58)	37 (23)
C1 to C	270 (168)	209 (130)	105 (65)	41 (25)
C0 to C0	270 (168)	207 (129)	96 (60)	41 (25)
C0 to C	281 (175)	220 (137)	105 (65)	45 (28)
C to C	290 (180)	241 (150)	105 (65)	48 (30)

* * * * *

5. Amend § 73.210 by revising paragraphs (a), (b)(3)(iv), and by adding paragraph (b)(3)(v) to read as follows:

§ 73.210 Station classes.

(a) The rules applicable to a particular station, including minimum and maximum facilities requirements, are determined by its class. Possible class designations depend upon the zone in which the station's transmitter is located, or proposed to be located. The zones are defined in § 73.205. Allotted station classes are indicated in the Table of Allotments, § 73.202. Class A, B1 and B stations may be authorized in Zones I and I-A. Class A, C3, C2, C1, C0 and C stations may be authorized in Zone II.

(b) * * *

(3) * * *

(iv) If this distance is greater than 72 km and less than or equal to 83 km, the station is Class C0.

(v) If this distance is greater than 83 km and less than or equal to 92 km, the station is Class C.

* * * * *

6. Amend § 73.211 by revising paragraphs (a)(1)(vii), (a)(2), the table to (b)(1), and by adding paragraph (d) to read as follows:

§ 73.211 Power and antenna height requirements.

(a) * * *

(1) * * *

(vii) The minimum ERP for Class C and C0 stations is 100 kW.

(2) Class C0 stations must have an antenna height above average terrain (HAAT) of at least 300 meters (984 feet). Class C stations must have an antenna height above average terrain (HAAT) of at least 451 meters (1480 feet).

* * * * *

(b) * * *

(1) * * *

Station class	Maximum ERP	Reference HAAT in meters (ft.)	Class contour distance in kilometers
A	6 kW (7.8 dBk)	100 (328)	28
B1	25 kW (14.0 dBk)	100 (328)	39
B	50 kW (17.0 dBk)	150 (492)	52
C3	25 kW (14.0 dBk)	100 (328)	39
C2	50 kW (17.0 dBk)	150 (492)	52
C1	100 kW (20.0 dBk)	299 (981)	72
C0	100 kW (20.0 dBk)	450 (1476)	83
C	100 kW (20.0 dBk)	600 (1968)	92

* * * * *

(d) *Existing Class C stations below minimum antenna HAAT.* Class C stations authorized prior to January 19, 2001 that do not meet the minimum antenna HAAT specified in paragraph (a)(2) of this section for Class C stations may continue to operate as authorized subject to the reclassification procedures set forth in Note 4 to § 73.3573.

7. Amend § 73.215 by revising paragraphs (a)(4) and the table to paragraph (e) to read as follows:

§ 73.215 Contour protection for short-spaced assignments.

(a) * * *

(4) Protected and interfering contours (in dBu) for stations in Puerto Rico and the U.S. Virgin Islands are as follows:

Station with interfering contour	Station with protected contour					
	Class A		Class B1		Class B	
	Interfering	Protected	Interfering	Protected	Interfering	Protected
Co-Channel:						
Class A	46	66	41	61	40	60
Class B1	43	63	39	59	38	58
Class B	45	65	41	61	41	61
1st Adj. Channel:						
Class A	61	67	56	62	59	65
Class B1	57	63	54	60	54	60
Class B	62	68	56	62	57	63
2nd-3rd Adj. Channel:						
Class A	107	67	100	60	104	64
Class B1	99	59	100	60	104	64
Class B	94	54	94	54	104	64

Maximum permitted facilities assumed for each station pursuant to 47 CFR 73.211(b)(3):
6 kW ERP/240 meters HAAT—Class A
25 kW ERP/150 meters HAAT—Class B1
50 kW ERP/472 meters HAAT—Class B

* * * * *

(e) * * *

Relation	Co-Channel	200 kHz	400/600 kHz
A to A	92 (57)	49 (30)	25 (16)
A to B1	119 (74)	72 (45)	42 (26)
A to B	143 (89)	96 (60)	63 (39)
A to C3	119 (74)	72 (45)	36 (22)
A to C2	143 (89)	89 (55)	49 (30)
A to C1	178 (111)	111 (69)	69 (43)
A to C0	193 (120)	130 (81)	80 (50)
A to C	203 (126)	142 (88)	89 (55)
B1 to B1	143 (89)	96 (60)	44 (27)
B1 to B	178 (111)	114 (71)	65 (40)
B1 to C3	143 (89)	96 (60)	44 (27)
B1 to C2	175 (109)	114 (71)	50 (31)
B1 to C1	200 (124)	134 (83)	71 (44)
B1 to C0	0215 (134)	153 (95)	81 (50)
B1 to C	233 (145)	165 (103)	99 (61)
B to B	211 (131)	145 (90)	68 (42)
B to C3	178 (111)	114 (70)	65 (40)
B to C2	211 (131)	145 (90)	68 (42)
B to C1	241 (150)	169 (105)	73 (45)
B to C0	266 (165)	195 (121)	83 (52)
B to C	268 (163)	195 (121)	99 (61)
C3 to C3	142 (88)	89 (55)	37 (23)
C3 to C2	166 (103)	106 (66)	50 (31)
C3 to C1	200 (124)	133 (83)	70 (43)
C3to C0	215 (134)	152 (94)	81 (50)
C3 to C	226 (140)	165 (103)	90 (56)
C2 to C2	177 (110)	117 (73)	52 (32)
C2 to C1	211 (131)	144 (90)	73 (45)
C2 to C	227 (141)	163 (101)	83 (52)
C2 to C	237 (147)	176 (109)	96 (61)
C1 to C1	224 (139)	158 (98)	76 (47)
C1 to C0	239 (148)	176 (109)	88 (55)
C1 to C	249 (155)	188 (117)	99 (61)
C0 to C0	259 (161)	196 (122)	90 (56)
C0 to C	270 (168)	207 (129	99 (61)
C to C	270 (168)	209 (130)	99 (61)

§ 73.315 [Amended]

8. Amend § 73.315 by removing the note following paragraph (a).

9. Amend § 73.509 by revising the table to paragraph (a) to read as follows:

§ 73.509 Prohibited overlap.

(a) * * *

Frequency separation	Contour of proposed station	Contour of other station
Co-channel	0.1mV/m (40 dBu) 1 mV/m (60 dBu)	1 mV/m (60 dBu) 0.1 mV/m (40 dBu)
200 kHz	0.5 mV/m (54 dBu) 1 mV/m (60 dBu)1	1 mV/m (60 dBu) 0.5 mV/m (54 dBu)
400 kHz/600 kHz	100 mV/m (100 dBu) 1 mV/m (60 dBu)	1 mV/m (60 dBu) 100 mV/m (100 dBu)

* * * * *

10. Add a new § 73.515 to read as follows:

§ 73.515 NCE FM transmitter location.

The transmitter location shall be chosen so that, on the basis of effective radiated power and antenna height above average terrain employed, a minimum field strength of l mV/m (60 dBu) will be provided over at least 50 percent of its community of license or reach 50 percent of the population within the community.

11. Amend § 73.807 by revising the tables to paragraphs (a)(1) and (b)(1) to read as follows:

§ 73.807 Minimum distance separation between stations.

(a) * * *

(1) * * *

Station class protected by LP100	Co-channel minimum separation (km)		First-adjacent channel minimum separation (km)		Second-adjacent channel minimum separation (km)	I.F. channel minimum separations
	Required	For no interference received from max. class facility	Required	For no interference received from max. class facility	Required	10.6 or 10.8 MHz
LP100	24	24	14	14	None	None
D	24	24	13	13	6	3
A	67	92	56	56	29	6
B1	87	119	74	74	46	9
B	112	143	97	97	67	12
C3	78	119	67	67	40	9
C2	91	143	80	84	53	12
C1	111	178	100	111	73	20
C0	122	193	111	130	84	22
C	130	203	120	142	93	28

* * * * *

(b) * * *

(1) * * *

Station class protected by LP10	Co-channel minimum separation (km)		First-adjacent channel minimum separation (km)		Second-adjacent channel minimum separation (km)	I.F. Channel minimum separations
	Required	For no interference received from max. class facility	Required	For no interference received from max. class facility	Required	10.6 or 10.8 MHz
LP100	16	22	10	11	None	None
LP10	13	13	8	8	None	None
D	16	21	10	11	6	2
A	59	90	53	53	29	5
B1	77	117	70	70	45	8
B	99	141	91	91	66	11
C3	69	117	64	64	39	8
C2	82	141	77	81	52	11
C1	103	175	97	108	73	18
C0	114	190	99	127	84	21
C	122	201	116	140	92	26

* * * * *

12. Amend § 73.1690 by revising paragraph (b)(2) and by adding paragraph (c)(11) to read as follows:

§ 73.1690 Modification of transmission systems.

* * * * *

(b) * * *

(2) Any change in station geographic coordinates, including coordinate corrections of more than 3 seconds latitude and/or 3 seconds longitude. FM and TV directional stations must also file a construction permit application for any move of the antenna to another tower structure located at the same coordinates.

* * * * *

(c) * * *

(11) Correction of geographic coordinates where the change is 3

seconds or fewer in latitude and/or 3 seconds or fewer in longitude, provided there is no physical change in location and no other licensed parameters are changed. The correction of coordinates may not result in any new short spacings or increases in existing short spacings.

* * * * *

13. Amend § 73.3573 by adding Note 4 to read as follows:

§ 73.3573 Processing FM broadcast station applications.

* * * * *

Note 4 To § 73.3573: A Class C station operating with antenna height above average terrain (''HAAT'') of less than 451 meters is subject to reclassification as a Class C0 station upon the filing of a triggering application for construction permit that is short-spaced to such a Class C station under § 73.207 but would be fully spaced to such a station considered as a Class C0 assignment. Triggering applications may utilize § 73.215. Triggering applications must certify that no alternative channel is available for the proposed service. Available alternative frequencies are limited to frequencies that the proposed service could use at the specified antenna location in full compliance with the distance separation requirements of § 73.207, without any other changes to the FM Table of Allotments. Copies of a triggering application and related pleadings must be served on the licensee of the affected Class C station. If the staff concludes that a triggering application is acceptable for filing, it will issue an order to show cause why the affected station should not be reclassified as a Class C0 station The order to show cause will provide the licensee 30 days to express in writing an intention to seek authority to modify the subject station's technical facilities to minimum Class C HAAT or to otherwise challenge the triggering application. If no such intention is expressed and the triggering application is not challenged, the subject station will be reclassified as a Class C0 station, and processing of the triggering application will be completed. If an intention to modify is expressed, an additional 180-day period will be provided during which the Class C station licensee must file an acceptable construction permit application to increase antenna height to at least 451 meters HAAT. Upon grant of such a construction permit application, the triggering application will be dismissed. Class C station licensees must serve on triggering applicants copies of any FAA submissions related to the application grant process. If the construction is not completed as authorized, the subject Class C station will be reclassified automatically as a Class C0 station. The reclassification procedure also may be initiated through the filing of an original petition for rule making to amend the FM Table of Allotments as set forth in Note 2 to § 1.420(g).

14. Amend § 73.3584 by redesignating paragraph (d) as paragraph (e) and by adding a new paragraph (d) to read as follows:

§ 73.3584 Procedure for filing petitions to deny.

* * * * *

(d) A party in interest may file a Petition to Deny any application that proposes reclassification of a Class C authorization to Class C0 not later than 30 days after issuance of an order to show cause by the Commission notifying the affected licensee of the proposed reclassification.

* * * * *

PART 74—EXPERIMENTAL RADIO, AUXILIARY, SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTION SERVICES

15. The authority citation for Part 74 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 307, and 554.

16. Amend § 74.1204 by revising paragraph (a)(1) to read as follows:

§ 74.1204 Protection of FM broadcast stations and FM translators.

(a) * * *

(1) Commercial Class B FM Stations (Protected Contour: 0.5 mV/m)

Frequency separation	Interference contour of proposed translator station	Protected contour of commercial Class B station
Co-channel	0.05 mV/m (34 dBu)	0.5 mV/m (54 dBu)
200 kHz	0.25 mV/m (48 dBu)	0.5 mV/m (54 dBu)
400 kHz/ 600 kHz	50.0 mV/m (94 dBu)	0.5 mV/m (54 dBu)

(2) Commercial Class B1 FM Stations (Protected Contour: 0.7 mV/m)

Frequency separation	Interference contour of proposed translator station	Protected contour of commercial Class B1 station
Co-channel	0.07 mV/m (37 dBu)	0.7 mV/m (57 dBu)
200 kHz	0.35 mV/m (51 dBu)	0.5 mV/m (57 dBu)
400 kHz/ 600 kHz	70.0 mV/m (97 dBu)	0.7 mV/m (57 dBu)

(3) All Other Classes of FM Stations (Protected Contour: 1 mV/m)

Frequency separation	Interference contour of proposed translator	Protected contour of any other station
Co-channel	0.1 mV/m (40 dBu)	1 mV/m (60 dBu)
200 kHz	0.5 mV/m (54 dBu)	1 mV/m (60 dBu)
400 kHz/ 600 kHz	100 mV/m (100 dBu)	1 mV/m (60 dBu)

* * * * *

17. Amend § 74.1251 by revising paragraph (b)(7) to read as follows:

§ 74.1251 Technical and equipment modifications.

* * * * *

(b) * * *

(7) Any increase of authorized effective radiated power. FM translator and booster stations may decrease ERP on a modification of license application provided that exhibits are included to

demonstrate that the following requirements are met:

(i) The license application may not propose to eliminate the authorized horizontally polarized ERP, if a horizontally polarized ERP is currently authorized;

(ii) The installed height of the antenna radiation center is not increased by more than two meters nor decreased by more than four meters from the authorized height for the antenna radiation center; and

(iii) The station is not presently authorized with separate horizontal and vertical antennas mounted at different heights. Use of separate horizontal and vertical antennas requires a construction permit before implementation or changes.

* * * * *

[FR Doc. 00–32201 Filed 12–19–00; 8:45 am]

BILLING CODE 6712–01–U

ENVIRONMENTAL PROTECTION AGENCY

48 CFR Parts 1546 and 1552

[FRL–6917–2]

Acquisition Regulation: Remove Contract Quality Requirements; Miscellaneous Technical Amendment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action on amending the EPA Acquisition Regulation (EPAAR) to remove contract quality requirements which have been superseded by requirements in the Federal Acquisition Regulation (FAR) and to incorporate a minor miscellaneous technical amendment.

EFFECTIVE DATE: This rule is effective on March 20, 2001 without further notice, unless EPA receives adverse comments by January 19, 2001. If we receive adverse comments, we will, before the rule's effective date, publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect.

ADDRESSES: Written comments should be submitted to the contact listed below at the following address: U.S. Environmental Protection Agency, Office of Acquisition Management (3802R), 1200 Pennsylvania Avenue, NW, Washington, DC 20460. Comments and data may also be submitted electronically by sending electronic mail (e-mail) to: *avellar.linda@epa.gov.* Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comments and data will also be accepted on disks in Corel WordPerfect format or ASCII file format. No confidential business information (CBI) should be submitted through e-mail. Electronic comments on this rule may be filed on-line at many Federal Depository Libraries.

FOR FURTHER INFORMATION CONTACT: Linda Avellar, U.S. EPA, Office of Acquisition Management, (3802R), 1200 Pennsylvania Avenue, NW, Washington, D.C. 20460, Telephone: (202) 564–4356.

SUPPLEMENTARY INFORMATION:

A. Background

Why is EPA utilizing a direct final rule to remove its contract quality requirements from the EPAAR? This direct final rule is being published without prior proposal because we view this as a non-controversial removal of EPA contract quality requirements in the EPAAR. These EPAAR requirements have been superseded by regulations in the FAR. We do not anticipate any adverse comments. This rule will be effective on March 20, 2001 without further notice unless we receive adverse comments by January 19, 2001. If EPA receives adverse comments, we will, before the rule's effective date, publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. We also will publish a notice of proposed rulemaking in a future edition of the **Federal Register**. We will address the comments on the direct final rule as part of that proposed rulemaking.

Why is EPA removing its contract quality requirements from the EPAAR? Effective February 16, 1999, the FAR was amended to reflect a preference for voluntary consensus standards, rather than Federal or military specifications, in the specification of higher-level contract quality requirements. The new FAR clause at 52.246–11, Higher-Level Quality Requirement, allows Federal agencies to select a voluntary consensus standard as the basis for its higher-level quality requirements for contracts and allows tailoring of the standard to more effectively address specific needs or purposes. The final rule (published in the **Federal Register** at 63 FR 70289, December 18, 1998) revised FAR 46.202–4, 46.311, and 52.246–11. As a result of this rule, the EPAAR contract quality requirements described at 48 CFR 1546.2 are no longer needed, nor are the clauses at 1552.246–70, 1552.246–71, and 1552.246–72.

How is EPA changing its contract quality requirements? This direct final rule is being issued to remove the current contents of 48 CFR 1546.2 and the corresponding clauses in 1552.246–70, 1552.246–71, and 1552.246–72.

When a contract requires compliance with higher-level quality standards, EPA will use the FAR clause at 52.246–11 and normally select ANSI/ASQC E4, Specifications and Guidelines for Environmental Data Collection and Environmental Technology Programs, as its contract quality standard. EPA may tailor the standard, as authorized by FAR 52.246–11, to ensure that contracts conform to appropriate contract quality standards. In addition, the EPA contracting officer, in consultation with quality assurance personnel, may determine that other voluntary consensus standards (e.g., ISO 9001:2000, Quality Management Systems—Requirements) apply to a specific contract.

Will EPA hold itself and others to the same standard as it holds contractors? Yes. The use of ANSI/ASQC E4 is consistent with internal EPA policy as defined in EPA Order 5360.1 CHG 1 (July 1998), Policy and Program Requirements for the Mandatory Agency-wide Quality System, which requires EPA organizations to develop, implement, and maintain a quality system that conforms to the minimum specifications of ANSI/ASQC E4. It is also consistent with EPA quality requirements for grantees and other recipients of financial assistance, which require these organizations to develop, implement and maintain a quality system that conforms to the minimum specifications of ANSI/ASQC E4.

What is ANSI/ASQC E4 and what are its requirements? ANSI/ASQC E4 is an American National Standard that describes the necessary management and technical elements for developing and implementing a quality system for environmental data operations and environmental technology. This standard is authorized by the American National Standards Institute (ANSI) and was developed under ANSI rules and procedures by the American Society for Quality. The standard is identified in the FAR at 46.202–4(b) as an acceptable higher-level contract quality standard, and FAR 52.246–11 authorizes the ''tailoring'' of the standard to adapt to particular situations and purposes. Copies of ANSI/ASQC E4 may be purchased from: ASQ Quality Press, P.O. Box 3005, Milwaukee, WI 53201–3005, Phone: (800) 248–1946, www.asq.org

This standard recommends using a tiered approach to a quality system. It recommends first documenting each organization-wide quality system in a

Quality Management Plan or Quality Manual (to address requirements of Part A: Management Systems of the standard) and then documenting the applicability of the quality system to technical activity-specific efforts in a Quality Assurance Project Plan or similar document (to address the requirements of Part B: Collection and Evaluation of Environmental Data of the standard). EPA has adopted this tiered approach for its mandatory Agency-wide Quality System.

How will EPA ensure that contractors conform to the Standard? To demonstrate conformance with the standard, contractors, as required by the terms of a solicitation and contract, will generally provide two forms of documentation:

1. Documentation of the organization quality system (usually called a Quality Management Plan) which should be approved prior to the contractor initiating environmental work, and

2. Documentation of the application of quality assurance and quality control activities to technical activity-specific efforts (usually called a Quality Assurance Project Plan) which should be approved prior to the contractor initiating environmental data collection. Quality Assurance Project Plans may be generic (for contracts covering multiple projects with similar activities) or project/contract-specific.

What work will be covered by the ANSI/ASQC E4 standard? This standard may be tailored to apply to all work involving the generation and use of environmental data in environmental programs. Environmental data are any measurements or information that describe environmental processes, location, or conditions; ecological or health effects and consequences; or the performance of environmental technology. Environmental data also include information collected directly from measurements, produced from models, or compiled from other sources such as data bases or the literature, and used for decision making purposes.

This standard as tailored will also apply to the design, construction, and operation of environmental technology used for pollution or effluent control and abatement, waste treatment and remediation, the collection of environmental research data, and other related applications.

How does the use of this contract quality standard differ from the current EPA contract quality requirements in the EPAAR? This standard is not a significant change to the contract quality requirements currently contained in the EPAAR at 48 CFR 1546.2. The changes can be summarized as follows:

- The EPAAR requirement for a Quality Assurance Program Plan will be replaced by the requirement for a Quality Management Plan (or equivalent) as described in a solicitation and contract. Both document an organization's quality system.
- The EPAAR requirement for a Quality Assurance Project Plan will remain the same but its application (whether generic, project-specific, or contract-wide) will be defined in a solicitation and contract.

The content requirements for these plans, which were previously defined in 48 CFR 1552.246–70 and 48 CFR 1552.246–71, have been revised to be consistent with ANSI/ASQC E4.

Where are the content requirements for Quality Management Plans and Quality Assurance Project Plans defined? EPA identifies the elements of a Quality Management Plan to demonstrate conformance to ANSI/ASQC E4 in the document, EPA Requirements for Quality Management Plans (EPA QA/R–2). EPA defines the elements of a Quality Assurance Project Plan to demonstrate conformance to ANSI/ASQC E4 in the document, EPA Requirements for Quality Assurance Project Plans (EPA QA/R–5). Both of these documents tailor, as permitted by the FAR clause at 52.246–11, the ANSI/ASQC E4 standard to conform to EPA-specific needs and purposes. The use of these documents is consistent with the tiered approach recommended by the ANSI/ASQC E4 standard.

Both of the above documents were released for peer review in October 1998 and are now available in a ''Interim Final'' version from the Quality Staff of the EPA Office of Environmental Information. These documents will be finalized on the effective date of this rule.

Copies of these documents can be obtained by calling (202) 564–6830, by requesting via E-mail to *quality@epa.gov,* or by downloading them from the Quality Staff website es.epa.gov/ncerqa/qa/qa_docs.html.

What clause will be contained in EPA solicitations and contracts? The FAR clause at 52.246–11, and any specific tailoring, will be included in all applicable solicitations and contracts. This clause will be incorporated into applicable solicitations and contracts by the EPA contracting officer, after consultation with quality assurance personnel, based on the prescriptions at FAR 42.202–4 and FAR 46.311.

B. Executive Order 12866

This direct final rule is not a significant regulatory action for the purposes of Executive Order 12866; therefore, no review is required by the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB).

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because this direct final rule does not contain information collection requirements that require the approval of OMB under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

D. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et. seq.

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impact of today's rule on small entities, small entity is defined as: (1) A small business that meets the definition of a small business found in the Small Business Act and codified at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's direct final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant *adverse* economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the proposed rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or

otherwise has a positive economic effect on all of the small entities subject to the rule. This direct final rule removes EPA quality assurance regulations and therefore will have no adverse impact on small entities.

Although this direct final rule will not have a significant economic impact on small entities, EPA has still tried to reduce the impact of its quality requirements on small entities by applying a graded approach to the implementation of these quality requirements. This means that managerial quality controls are applied according to the scope of the contract and/or the intended use of the outputs from the contract. While large contracts may require a contractor to develop comprehensive quality system documentation, smaller contracts with relatively less significant impacts generally only require limited documentation. Thus, small entities will normally only provide limited quality-related documentation to EPA. We have therefore concluded that this direct final rule and EPA's quality contract requirements will not have a significant economic impact on small entities.

E. Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess their regulatory actions on State, local, and Tribal governments, and the private sector. This direct final rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in one year. Any private sector costs for this action relate to paperwork requirements and associated expenditures that are far below the level established for UMRA applicability. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

F. Executive Order 13045

Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be economically significant as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to Executive Order 13045 because it is not an economically significant rule as defined by Executive Order 12866, and because it does not involve decisions on environmental health or safety risks.

G. Executive Order 13132

Executive Order 13132 entitled ''Federalism'' (64 FR 43255, August 10, 1999) requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that 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.''

Under section 6 of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law, unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This direct final rule does not have federalism implications. It 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, as specified in Executive Order 13132. This direct final rule removes contract quality requirements and clauses from the EPAAR. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

H. Executive Order 13084

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute that significantly or uniquely affects the communities of Indian Tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by Tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the 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 and other representatives of Indian Tribal government ''to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.''

Today's rule does not significantly or uniquely affect the communities of Indian Tribal governments. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

I. National Technology Transfer and Advancement Act of 1995

EPA will use voluntary consensus standards, as directed by section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note), in its procurement activities when it specifies higher-level contract quality requirements. The specification of contract quality requirements involves technical standards. As permitted by FAR 46.202–4, 46.311, and 52.246–11, EPA generally plans to use the most current version of ANSI/ASQC E4, a voluntary consensus standard, for this purpose. (See instructions above about how to obtain copies of ANSI/ASQC E4). However, as also authorized by the relevant FAR sections, EPA may decide that other voluntary consensus standards apply to specific contracts. Either way, EPA will be complying with the NTTAA. The NTTAA directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

J. Submission to Congress and the General Accounting Office

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 rules report, which includes a copy of the rule, to each House of the Congress and to 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**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Authority: The provisions of this regulation are issued under 5 U.S.C. 301; Sec. 205(c), 63 Stat. 390, as amended, 40 U.S.C. 486(c); and 41 U.S.C. 418b.

List of Subjects in 48 CFR Parts 1546 and 1552

Government procurement.

Therefore, 48 CFR Chapter 15 is amended as set forth below:

PARTS 1546 AND 1552—[AMENDED]

1. The authority citations for part 1546 and for part 1552 will read as follows:

Authority: Sec. 205(c), 63 Stat. 390, as amended, 40 U.S.C. 486(c); and 41 U.S.C. 418b.

1546.2 [Removed].

2. Subpart 1546.2 is removed.

1552.203–70 [Amended].

3. Section 1552.203–70 is amended by removing the text ''As prescribed in 1503.603'' and adding in its place the text ''As prescribed in 1503.670.''

1552.246–70 [Removed].

4. Section 1552.246–70 is removed.

1552.246–71 [Removed].

5. Section 1552.246–71 is removed.

1552.246.72 [Removed].

6. Section 1552.246–72 is removed.

Dated: November 30, 2000.

Judy S. Davis,

Acting Director, Office of Acquisition Management.

[FR Doc. 00–32030 Filed 12–19–00; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 001213348-0348-01; I.D. 121100A]

RIN 0648-AO44

Fisheries of the Exclusive Economic Zone Off Alaska; Removal of Groundfish Closure

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

ACTION: Final rule.

SUMMARY: NMFS removes an existing closure to commercial groundfish fishing with trawl gear within critical habitat designated for Steller sea lions in the exclusive economic zone (EEZ) off Alaska west of 144° W. long. and closes this area to commercial fishing for Pacific cod through December 31, 2000. The removal of the existing closure is consistent with the December 5, 2000, Order of the United States District Court for the Western District of Washington. The new closure is intended to ensure that Steller sea lions are adequately protected based on conclusions in a biological opinion issued November 30, 2000.

DATES: Effective December 14, 2000 except that § 679.22(k) is effective December 14, 2000 through December 31, 2000.

ADDRESSES: Copies of the Endangered Species Act–Section 7 Consultation Biological Opinion and Incidental Take Statement on Authorization of the Bering Sea and Aleutian Islands groundfish fisheries based on the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area and Authorization of the Gulf of Alaska groundfish fisheries based on the Fishery Management Plan for Groundfish of the Gulf of Alaska, including the reasonable and prudent alternative (BiOp), may be obtained by contacting the Alaska Region, NMFS, P.O. Box 21668, Juneau, AK, 99802, or Room 401 of the Federal Building, 709 West 9th Street, Juneau, AK. The 2000 BiOp is also available on the Alaska Region home page at http://www.fakr.noaa.gov.

FOR FURTHER INFORMATION CONTACT: John Lepore, 907-586-7228 or john.lepore@noaa.gov.

SUPPLEMENTARY INFORMATION: NMFS manages the U.S. groundfish fisheries in the EEZ of the Bering Sea and Aleutian Islands Management Area (BSAI) and Gulf of Alaska (GOA) under the fishery management plans (FMPs) for groundfish in the respective areas. The North Pacific Fishery Management Council (Council) prepared, and NMFS approved, the FMPs under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1801 *et seq*. Regulations implementing the FMPs appear at 50 CFR part 679. General regulations governing U.S. fisheries appear at 50 CFR part 600.

NMFS also has statutory authority to promulgate regulations governing the groundfish fisheries under the Endangered Species Act (ESA), 16 U.S.C. 1531 *et seq.* The ESA requires that each Federal agency ensure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered or threatened species or to result in the destruction or adverse modification of critical habitat of such species.

On August 7, 2000, the United States District Court for the Western District of Washington issued an order that granted a motion for a partial injunction on the North Pacific groundfish fisheries. *Greenpeace* v. *NMFS*, No. C98–4922 (W.D. Wash.). This motion, filed by Greenpeace, American Oceans Campaign, and the Sierra Club requested injunctive relief until NMFS issues a legally adequate BiOp addressing the combined, overall effects of the North Pacific groundfish fisheries on Steller sea lions and their critical habitat pursuant to the ESA. The population of Steller sea lions west of 144° W. long. (hereafter western population) is listed under the ESA as endangered, while the population of Steller sea lions east of 144° W. long. is listed as threatened.

To comply with the Court's August 7, 2000, Order, NMFS, pursuant to the ESA, issued an interim rule prohibiting fishing for groundfish with trawl gear in Steller sea lion critical habitat (65 FR 49766, August 15, 2000). The critical habitat areas closed by the interim rule were defined in regulations codified at 50 CFR 226.202, and in Tables 1 and 2 to 50 CFR part 226.

On November 30, 2000, NMFS issued a BiOp that is comprehensive in scope and considers the fisheries and the overall management framework established by the BSAI and GOA FMPs. After analyzing the cumulative, direct and indirect effects of the groundfish fisheries authorized by the BSAI and GOA FMPs on listed species, NMFS concluded in the BiOp that the fisheries

for pollock, Pacific cod, and Atka mackerel fisheries, as currently prosecuted, jeopardize the continued existence of the western population of Steller sea lions and adversely modify their critical habitat. NMFS reached this conclusion based on information that the pollock, Pacific cod, and Atka mackerel fisheries and the Steller sea lions compete for the same species, that this competition causes reduced availability of prey for the Steller sea lions, that reduced availability of prey leads to nutritional stress, and that nutritional stress, especially of juveniles and to a lesser extent adult females, is the leading hypothesis to explain the continued decline of the western population of Steller sea lions.

On December 5, 2000, the United States District Court for the Western District of Washington issued an order dissolving the injunction issued on August 7, 2000. Based on that Order, NMFS revokes the current closure of all groundfish trawl fishing in designated critical habitat that was published on August 15, 2000 (65 FR 49766). However, because the BiOp concluded that the fisheries for Pacific cod, along with pollock and Atka mackerel, as currently prosecuted, jeopardize the continued existence of the western population of Steller sea lions and adversely modify their critical habitat, NMFS is prohibiting commercial fishing for Pacific cod in designated critical habitat through December 31, 2000. Commercial fisheries for pollock and Atka mackerel are not included in this closure because fisheries for those species already are prohibited through December 31, 2000, pursuant to other regulatory requirements.

The new closure, promulgated under the authority of section 11(f) of the ESA, prohibits all Pacific cod fishing through December 31, 2000, as the term fishing is defined at 16 U.S.C. 1802(15), authorized pursuant to the FMPs, within Steller sea lion critical habitat listed in Tables 1 and 2 to 50 CFR part 226 in federally regulated waters west of 144° W. long. and the three special aquatic foraging areas defined as critical habitat at 50 CFR 226.202(c).

Classification

The Assistant Administrator for Fisheries, NOAA (AA), has determined that this rule is consistent with the Court's Order and is authorized by the ESA.

Because prior notice and opportunity for public comment are not required for this rule by 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, do not apply to this action.

This final rule has been determined to be not significant under section 3(f)(1) of E.O. 12866.

The AA, under 5 U.S.C. 553(b)(B), finds that there is good cause to waive providing prior notice and an opportunity for public comment for the removal of the existing closure. This removal stems from a United States District Court Order dissolving, as of December 5, 2000, the injunction requiring the closure. Delaying this action to provide prior notice and opportunity for comment would cause unnecessary economic harm to the affected fishermen and thus would be contrary to the public interest. Because this action relieves a restriction, under 5 U.S.C. 553(d)(1), it is not subject to a delay in effective date.

The AA, under 5 U.S.C. 553(b)(B), finds there is good cause to waive providing prior notice and an opportunity for public comment for the portion of this action that implements a new closure. An immediate new closure is necessary to protect endangered Steller sea lions and it would be contrary to the public interest to delay this action to provide prior notice and an opportunity for comment. For this same reason, the AA, under 5 U.S.C. 553(d)(3), finds there is good cause to waive the 30-day delay in the effective date otherwise required for the new closure.

List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Recordkeeping and reporting requirements.

Dated: December 14, 2000.

William T. Hogarth,

Deputy, Assistant Administrator for Fisheries, National Marine Fisheries Service.

For reasons set forth in the preamble, 50 CFR part 679 is amended as follows:

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

1. The authority citation for 50 CFR part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq.*, 1801 *et seq.*, and 3631 *et seq.*; Title II of Division C, Pub. L. 105-277; Sec. 3027, Pub. L. 106-31, 113 Stat. 57; 16 U.S.C. 1540(f).

2. In § 679.22, paragraph (j) is removed, and a new paragraph (k) is added to read as follows:

§ 679.22 Closures.

* * * * *

(k) Closure of critical habitat. (Applicable through December 31, 2000.) All Pacific cod fishing, as the term fishing is defined at 16 U.S.C. 1802(15) and authorized pursuant to the Fishery Management Plans for the Bering Sea/Aleutian Islands and the Gulf of Alaska, within Steller sea lion critical habitat within the EEZ and west of 144° W. long., as such critical habitat is defined by regulations codified at 50 CFR 226.202 and Tables 1 and 2 to 50 CFR part 226, is prohibited.

[FR Doc. 00–32323 Filed 12–14–00; 4:26 pm]

BILLING CODE: 3510–22–S

Proposed Rules

Federal Register
Vol. 65, No. 245
Wednesday, December 20, 2000

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 27

[Docket No. SW009; Special Condition No. 27–009–SC]

Special Conditions: Eurocopter France Model EC–130 Helicopters, High-Intensity Radiated Fields

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special condition; request for comments.

SUMMARY: This special condition is issued for Eurocopter France (Eurocopter) Model EC–130 helicopters. These helicopters will have novel or unusual design features associated with the installation of electronic systems that perform critical functions. The applicable airworthiness regulations do not contain adequate or appropriate safety standards to protect systems that perform critical control functions or provide critical displays from the effects of high-intensity radiated fields (HIRF). This special condition contains the additional safety standards that the Administrator considers necessary to ensure that critical functions of systems will be maintained when exposed to HIRF.

DATES: The effective date of this special condition is December 7, 2000. Comments must be received on or before February 5, 2001.

ADDRESSES: Comments on this special condition may be mailed in duplicate to: Federal Aviation Administration, Office of the Regional Counsel, Attention: Rules Docket No. SW009, Fort Worth, Texas 76193–0007, or delivered in duplicate to the Office of the Regional Counsel at 2601 Meacham Blvd., Fort Worth, Texas 76137. Comments must be marked: Rules Docket No. SW009. Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 8:30 a.m. and 4:00 p.m.

FOR FURTHER INFORMATION CONTACT: Jorge Castillo, FAA, Rotorcraft Directorate, Rotorcraft Standards, Fort Worth, Texas 76193–0110; telephone (817) 222–5127, fax (817) 222–5961.

SUPPLEMENTARY INFORMATION: The FAA has determined that notice and opportunity for prior public comment hereon are impracticable because these procedures would significantly delay issuance of the approval design and thus delivery of the affected aircraft. In addition, notice and opportunity for prior public comment are unnecessary since the substance of this special condition has been subject to the public comment process in several prior instances with no substantive comments received. The FAA therefore finds that good cause exists for making this special condition effective upon issuance.

Comments Invited

Interested persons are invited to submit such written data, views, or arguments as they may desire. Communications should identify the regulatory docket or special condition number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments will be considered. The special condition may be changed in light of the comments received. All comments received will be available in the Rules Docket for examination by interested persons. A report summarizing each substantive public contact with FAA personnel concerning this rulemaking will be filed in the docket. Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this special condition must include a self-addressed, stamped postcard on which the following statement is made: ''Comments to Rules Docket No. SW009.'' The postcard will be date stamped and returned to the commenter.

Background

Eurocopter France submitted an application for Type Validation of Eurocopter Model EC–130 helicopters through the French Direction Generale de l'Aviation Civile (DGAC) on December 22, 1999. The Eurocopter Model EC–130 helicopters are single engine, Normal Category helicopters that are a derivative of Eurocopter Model AS–350B3 helicopters, which achieved FAA Type Certification on May 7, 1998 (reference Type Certificate Data Sheet H9EU). The main difference between Eurocopter Model EC–130 helicopters and Eurocopter Model AS–350B3 helicopters include:

- A gross weight increase from 2250 kg to 2300 kg;
- Enlarged fuselage structure utilizing standard Eurocopter Model EC–120B helicopter components;
- A Eurocopter Model EC–120B helicopter-type landing gear;
- A Eurocopter Model EC–135 helicopter-type fenestron anti-torque system; and
- An increase in the standard seating capacity from six to seven (1 pilot plus 6 passengers).

Type Certification Basis

Under the provisions of 14 CFR 21.17, Eurocopter must show that Model EC–130 helicopters meet the applicable provisions of the regulations as listed below:

- 14 CFR 21.29;
- 14 CFR part 27, Amendment 27–1 through Amendment 27–32, except 14 CFR part 27.952 is not adopted;
- 14 CFR part 36, Appendix H through the latest amendment in effect at the time of type certification; and
- Any special conditions, exemptions, and equivalent safety findings deemed necessary.

In addition, the certification basis includes certain special conditions and equivalent safety findings that are not relevant to this special condition.

If the Administrator finds that the applicable airworthiness regulations do not contain adequate or appropriate safety standards for these helicopters because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

In addition to the applicable airworthiness regulations and special conditions, Eurocopter Model EC–130 helicopters must comply with the noise certification requirements of 14 CFR part 36; and the FAA must issue a finding of regulatory adequacy pursuant to § 611 of Public Law 92–574, the ''Noise Control Act of 1972.''

As appropriate, special conditions, as defined in § 11.19, are issued in accordance with § 11.38 and become part of the type certification basis in accordance with § 21.17(a)(2).

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design feature, the special conditions would also apply to the other model under the provisions of § 21.101(a)(1).

Novel or Unusual Design Features

Eurocopter Model EC–130 helicopters will incorporate the following novel or unusual design features: electrical, electronic, or a combination of electrical electronic (electrical/electronic) systems that will perform critical control functions or display critical information, such as electronic flight instruments that display critical information required for the continued safe flight and landing of the helicopter during operation in Instrument Meteorological Conditions (IMC); and Full Authority Digital Engine Control (FADEC) that will perform engine control functions that are critical to the continued safe flight and landing of the helicopter during Visual Flight Rules (VFR) and Instrument Flight Rules (IFR) operations.

Discussion

Eurocopter Model EC–130 helicopters, at the time of application, were identified as incorporating one and possibly more electrical/electronic systems, such as electronic flight instruments and FADEC. After the design is finalized, Eurocopter will provide the FAA with a preliminary hazard analysis that will identify any other critical functions required for safe flight and landing that are performed by the electrical/electronic systems.

Recent advances in technology have given rise to the application in aircraft designs of advanced electrical/electronic systems that perform critical control functions or provide critical displays. These advanced systems respond to the transient effects of induced electrical current and voltage caused by HIRF incident on the external surface of the helicopter. These induced transient currents and voltages can degrade the performance of the electrical/electronic systems by damaging the components or by upsetting the systems' functions.

Furthermore, the electromagnetic environment has undergone a transformation not envisioned by the current application of § 27.1309(a). Higher energy levels radiate from operational transmitters currently used for radar, radio, and television. Also, the number of transmitters has increased significantly.

Existing aircraft certification requirements are inappropriate in view of these technological advances. In addition, the FAA has received reports of some significant safety incidents and accidents involving military aircraft equipped with advanced electrical/electronic systems when they were exposed to electromagnetic radiation.

The combined effects of the technological advances in helicopter design and the changing environment have resulted in an increased level of vulnerability of the electrical/electronic systems required for the continued safe flight and landing of the helicopter. Effective measures to protect these helicopters against the adverse effects of exposure to HIRF will be provided by the design and installation of these systems. The following primary factors contributed to the current conditions: (1) Increased use of sensitive electronics that perform critical functions; (2) reduced electromagnetic shielding afforded helicopter systems by advanced technology airframe materials; (3) adverse service experience of military aircraft using these technologies; and (4) an increase in the number and power of radio frequency emitters and the expected increase in the future.

The FAA recognizes the need for aircraft certification standards to keep pace with the developments in technology and environment and, in 1986, initiated a high priority program to (1) determine and define electromagnetic energy levels; (2) develop and describe guidance material for design, test, and analysis; and (3) prescribe and promulgate regulatory standards.

The FAA participated with industry and airworthiness authorities of other countries to develop internationally recognized standards for certification.

The FAA and airworthiness authorities of other countries have identified two levels of the HIRF environment that a helicopter could be exposed to—one environment for VFR operations and a different environment for IFR operations. While the HIRF rulemaking requirements are being finalized, the FAA is adopting a special condition for the certification of aircraft that employ electrical/electronic systems that perform critical control functions or provide critical displays. The accepted maximum energy levels that civilian helicopter system installations must withstand for safe operation are based on surveys and analysis of existing radio frequency emitters. This special condition will require the helicopters' electrical/electronic systems and associated wiring to be protected from these energy levels. These external threat levels are believed to represent the exposure for a helicopter operating under VFR or IFR.

Compliance with HIRF requirements will be demonstrated by tests, analysis, models, similarity with existing systems, or a combination of these methods. Service experience alone will not be acceptable since such experience in normal flight operations may not include an exposure to HIRF. Reliance on a system with similar design features for redundancy as a means of protection against the effects of external HIRF is generally insufficient because all elements of a redundant system are likely to be concurrently exposed to the radiated fields.

This special condition will require the aircraft-installed systems that perform critical control functions or provide critical displays to meet certain standards based on either a defined HIRF environment or a fixed value using laboratory tests. Control system failures and malfunctions can more directly and abruptly contribute to a catastrophic event than display system failures and malfunctions. Therefore, it is considered appropriate to require more rigorous HIRF verification methods for critical control systems than for critical display systems.

The applicant may demonstrate that the operation and operational capabilities of the installed electrical/electronic systems that perform critical functions are not adversely affected when the aircraft is exposed to the defined HIRF test environment. The FAA has determined that the test environment defined in Table 1 is acceptable for critical control functions in helicopters. The test environment defined in Table 2 is acceptable for critical display systems in helicopters.

The applicant may also demonstrate, using a laboratory test, that the electrical/electronic systems that perform critical control functions or provide critical displays can withstand a peak electromagnetic field strength in a frequency range of 10 KHz to 18 GHz. If a laboratory test is used to show compliance with the defined HIRF environment, no credit will be given for signal attenuation due to installation. A level of 100 volts per meter (v/m) is appropriate for critical display systems. A level of 200 v/m is appropriate for critical control functions. Laboratory test levels are defined according to RTCA/DO–160D Section 20 Category W (100 v/m and 150 mA) and Category Y (200 v/m and 300 mA). As stated in DO–160D Section 20, the test levels are defined as the peak of the root means squared (rms) envelope. As a minimum,

the modulations required for RTCA/DO–160D Section 20 Categories W and Y will be used. Other modulations should be selected as the signal most likely to disrupt the operation of the system under test, based on its design characteristics. For example, flight control systems may be susceptible to 3 Hz square wave modulation while the video signals for electronic display systems may be susceptible to 400 Hz sinusoidal modulation. If the worst-case modulation is unknown or cannot be determined, default modulations may be used. Suggested default values are a 1 KHz sine wave with 80 percent depth of modulation in the frequency range from 10 KHz to 400 MHz and 1 KHz square wave with greater than 90 percent depth of modulation from 400 MHz to 18 GHz. For frequencies where the unmodulated signal would cause deviations from normal operation, several different modulating signals with various waveforms and frequencies should be applied.

Applicants must perform a preliminary hazard analysis to identify electrical/electronic systems that perform critical functions. The term ''critical'' means those functions whose failure would contribute to or cause an unsafe condition that would prevent the continued safe flight and landing of the helicopters. The systems identified by the hazard analysis as performing critical functions are required to have HIRF protection. A system may perform both critical and non-critical functions. Primary electronic flight display systems and their associated components perform critical functions such as attitude, altitude, and airspeed indications. HIRF requirements would apply only to the systems that perform critical functions, including control and display.

Acceptable system performance would be attained by demonstrating that the critical function components of the system under consideration continue to perform their intended function during and after exposure to required electromagnetic fields. Deviations from system specifications may be acceptable but must be independently assessed by the FAA on a case-by-case basis.

TABLE 1.—VFR ROTORCRAFT FIELD STRENGTH VOLTS/METER

Frequency	Peak	Average
10 kHz–100 kHz	150	150
100 kHz–500 kHz	200	200
500 kHz–2 MHz	200	200
2 MHz–30 MHz	200	200
30 MHz–70 MHz	200	200
70 MHz–100 MHz	200	200

TABLE 1.—VFR ROTORCRAFT FIELD STRENGTH VOLTS/METER—Continued

Frequency	Peak	Average
100 MHz–200 MHz	200	200
200 MHz–400 MHz	200	200
400 MHz–700 MHz	730	200
700 MHz–1 GHz	1400	240
1 GHz–2 GHz	5000	250
2 GHz–4 GHz	6000	490
4 GHz–6 GHz	7200	400
6 GHz–8 GHz	1100	170
8 GHz–12 GHz	5000	330
12 GHz–18 GHz	2000	330
18 GHz–40 GHz	1000	420

TABLE 2.—IFR ROTORCRAFT FIELD STRENGTH VOLTS/METER

Frequency	Peak	Average
10 kHz–100 kHz	50	50
100 kHz–500 kHz	50	50
500 kHz–2 MHz	50	50
2 MHz–30 MHz	100	100
30 MHz–70 MHz	50	50
70 MHz–100 MHz	50	50
100 MHz–200 MHz	100	100
200 MHz–400 MHz	100	100
400 MHz–700 MHz	700	50
700 MHz–1 GHz	700	100
1 GHz–2 GHz	2000	200
2 GHz–4 GHz	3000	200
4 GHz–6 GHz	3000	200
6 GHz–8 GHz	1000	200
8 GHz–12 GHz	3000	300
12 GHz–18 GHz	2000	200
18 GHz–40 GHz	600	200

Applicability

As previously discussed, this special condition is applicable to Eurocopter Model EC–130 helicopters. Should Eurocopter apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, the special condition would apply to that model as well under the provisions of § 21.101(a)(1).

Conclusion

This action affects only certain novel or unusual design features on one model series of helicopters. It is not a rule of general applicability and affects only the applicant who applied to the FAA for approval of these features on the helicopter.

The substance of this special condition has been subjected to the notice and comment period in several prior instances and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. For this reason and because a delay would significantly affect the certification of the helicopter, which is imminent, the FAA has determined that prior public notice and comment are unnecessary and impracticable, and good cause exists for adopting this special condition upon issuance. The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

List of Subjects in 14 CFR Part 27

Aircraft, Air transportation, Aviation safety, Rotorcraft, Safety.

The authority citation for these special conditions is as follows: 42 U.S.C. 7572; 49 U.S.C. 106(g), 40105, 40113, 44701–44702, 44704, 44709, 44711, 44713, 44715, 45303.

The Special Condition

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special condition is issued as part of the type certification basis for Eurocopter Model EC–130 helicopters.

Protection for Electrical and Electronic Systems from High-Intensity Radiated Fields

Each system that performs critical functions must be designed and installed to ensure that the operation and operational capabilities of these critical functions are not adversely affected when the helicopter is exposed to high-intensity radiated fields external to the helicopter.

Issued in Fort Worth, Texas, on December 7, 2000.

Henry A. Armstrong,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 00–32416 Filed 12–19–00; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 301

[REG–105316–98]

RIN 1545–AW67

Information Reporting for Payments of Qualified Tuition and Payments of Interest on Qualified Education Loans; Magnetic Media Filing Requirements for Information Returns; Hearing

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of public hearing on proposed rulemaking.

SUMMARY: This document contains a notice of public hearing on proposed regulations relating to reporting for payments of qualified tuition and payments of interest on qualified education loans and magnetic filing requirements for information returns.

DATES: The public hearing is being held on Tuesday, February 13, 2001, at 10 a.m. The IRS must receive outlines of the topics to be discussed at the hearing by January 23, 2001.

ADDRESSES: The public hearing is being held in the auditorium, Room 7218, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC. Due to building security procedures, visitors must enter at the 10th Street entrance, located between Constitution and Pennsylvania Avenues, NW. In addition, all visitors must present photo identification to enter the building.

Mail outlines to: Regulations Unit CC (REG–105316–98), Room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Hand deliver outlines Monday through Friday between the hours of 8 a.m. and 5 p.m. to: Regulations Unit CC (REG–105316–98), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC. Submit electronic outlines of oral comments directly to the IRS Internet site at: *http://www.irs.gov/tax_regs/regslist.html*.

FOR FURTHER INFORMATION CONTACT: Concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Guy Traynor, (202) 622–7180 (not a toll-free number).

SUPPLEMENTARY INFORMATION: The subject of the public hearing is proposed regulations (REG–105316–98), that were published in the **Federal Register** on Friday, June 16, 2000 (65 FR 37728).

The rules of § 601.601(a)(3) apply to the hearing.

Persons who have submitted written comments and wish to present oral comments at the hearing, msut submit an outline of the topics to be discussed and the amount of time to be devoted to each topic (signed original and eight (8) copies) by January 23, 2001.

A period of 10 minutes is allotted to each person for presenting oral comments.

After the deadline for receiving outlines has passed, the IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available, free of charge, at the hearing.

Because of access restrictions, the IRS will not admit visitors beyond the immediate entrance area more than 15 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this document.

Cynthia E. Grigsby,

Chief, Regulations Unit, Office of Special Counsel (Modernization & Strategic Planning).

[FR Doc. 00–32332 Filed 12–19–00; 8:45 am]

BILLING CODE 4830–01–U

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[AZ 063–0020b; FRL–6840–1]

Approval and Promulgation of Implementation Plans; Arizona State Implementation Plan Revision, Pinal County Air Quality Control District and Pinal-Gila Counties Air Quality Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve revisions to the Arizona State Implementation Plan (SIP) which concern rules from the Pinal County Air Quality Control District (PCAQCD) and Pinal-Gila Counties Air Quality Control District (PGCAQCD).

The intended effect of this action is to provide support for general permitting requirements for stationary sources in the PCAQCD in accordance with the requirements of the Clean Air Act, as amended in 1990 (CAA or the Act). In the Final Rules section of this **Federal Register**, EPA is approving the state's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial revision and anticipates no adverse comments. A detailed rationale for this approval is set forth in the direct final rule. If no adverse comments are received, no further action is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. The EPA will not institute a second comment period. Any parties interested in commenting should do so at this time.

DATES: Written comments must be received by January 19, 2001.

ADDRESSES: Mail comments to: Andrew Steckel, Chief, Rulemaking Office, (AIR–4), Air Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105.

You can inspect copies of the submitted rule revisions and our technical support documents (TSDs) at our Region IX office from 8 am to 4:30 pm, Monday through Friday. To see copies of the submitted rule revisions, you may also go to the following locations:

Environmental Protection Agency, Air Docket (6102), Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

Arizona Department of Environmental Quality, 3033 North Central Avenue, Phoenix, AZ 85012.

Pinal County Air Quality Control District, Building F, 31 North Pinal Street (P. O. Box 987), Florence, AZ 85232.

FOR FURTHER INFORMATION CONTACT: Al Petersen, Rulemaking Office, (Air-4), Air Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105, Telephone: (415) 744–1135.

SUPPLEMENTARY INFORMATION: This document concerns the clarification of which rules were previously approved into the PCAQCD portion of the Arizona SIP on April 9, 1996 (61 FR 15717). In addition, The PCAQCD Rules 1–1–050, 1–1–055, 1–1–105, and 3–1–080 and PGCAQCD Rules 7–1–2.2, 7–1–2.4, 7–1–2.7, 7–2–1.3, and 7–3–6.1 are being removed from the SIP. PCAQCD Rules 3–1–045 and 3–1–100 are clarified as not being in the SIP, because there was not a valid SIP submittal. For further information, please see the information provided in the direct final action that is located in the rules section of this **Federal Register**.

Dated: July 13, 2000.

Felicia Marcus,

Regional Administrator, Region IX.

[FR Doc. 00–31466 Filed 12–19–00; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TX–119–1–7450b; FRL–6913–3]

Approval and Promulgation of Air Quality Implementation Plans; Texas; Control of Emissions of Volatile Organic Compounds from Batch Processes, Industrial Wastewater and Service Stations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to take direct final action on revisions to the Texas State Implementation Plan provisions for the control of volatile organic compounds (VOCs). This rule covers three separate actions. First, we are approving revisions to the rules for controlling emissions from industrial wastewater for the Houston/Galveston, Beaumont/Port Arthur, Dallas/Fort Worth and El Paso areas. Second, we are approving new rules for the control of emissions from batch processes in the Beaumont/Port Arthur area. Third, we are approving rules that added requirements for vapor recovery at service stations in the 95 counties in the eastern half of Texas.

The EPA is approving these revisions to regulate emissions of Volatile Organic Compounds in accordance with the requirements of the Federal Clean Air Act.

In the ''Rules and Regulations'' section of this **Federal Register**, EPA is approving the State's SIP revision as a direct final rule without prior proposal because the EPA views this as a noncontroversial revision and anticipates no adverse comment. The EPA has explained its reasons for this approval in the preamble to the direct final rule. If EPA receives no relevant adverse comments, the EPA will not take further action on this proposed rule. If EPA receives relevant adverse comment, EPA will withdraw the direct final rule and it will not take effect. The EPA will address all public comments in a subsequent final rule based on this proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

DATES: Written comments must be received by January 19, 2001.

ADDRESSES: Written comments should be addressed to Mr. Thomas H. Diggs, Chief, Air Planning Section (6PD–L), at the EPA Region 6 Office listed below. Copies of documents relevant to this action are available for public inspection during normal business hours at the following locations. Anyone wanting to examine these documents should make an appointment with the appropriate office at least two working days in advance.

Environmental Protection Agency, Region 6, Air Planning Section (6PD–L), 1445 Ross Avenue, Dallas, Texas 75202–2733.

Texas Natural Resource Conservation Commission, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: Mr. Guy R. Donaldson, Air Planning Section (6PD–L), EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, telephone (214) 665–6691.

SUPPLEMENTARY INFORMATION: This document concerns revisions to the Texas State Implementation Plan provisions for the control of VOCs. The revisions strengthen the requirements for the control of emissions from industrial wastewater, add requirements for the control of emissions from batch processes and add requirements for the control of emissions during the filling of storage tanks at gasoline service stations in 95 counties in the eastern half of Texas. For further information, please see the information provided in the direct final action that is located in the ''Rules and Regulations'' section of this **Federal Register** publication.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: November 3, 2000.

Myron O. Knudson,

Acting Regional Administrator, Region 6.

[FR Doc. 00–31190 Filed 12–19–00; 8:45 am]

BILLING CODE 6560–50–U

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CO–001–0043b; FRL–6875–7]

Approval of Air Quality Implementation Plan Revisions and Section 112(l) Program; Colorado; Issuance of Permits To Limit Potential to Emit Criteria and Hazardous Air Pollutants

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to approve revisions to Colorado's construction permit requirements in Regulation No. 3 and hazardous air pollutant requirements in Regulation No. 8 of the State Air Quality Control Commission (AQCC) regulations, regarding permits to limit potential to emit criteria and hazardous air pollutants (HAPs). These revisions were submitted to EPA on April 26, 1996. Colorado submitted these revisions to create federally enforceable limits on criteria pollutants and HAPs, for both new and existing sources, through the State's construction permit program. EPA is approving the revisions to Regulation No. 3 regarding criteria pollutants as part of Colorado's state implementation plan (SIP) under section 110 of the Clean Air Act (CAA).

SIP approval under section 110 of the CAA, however, only extends to the control of HAPs that are criteria pollutants, such as volatile organic compounds or particulate matter, whereas section 112 of the CAA provides the underlying authority for controlling all HAPs listed in section 112(b) of the CAA. Therefore, the EPA is also approving the revisions to Regulation No. 3 and Regulation No. 8 under section 112(l) of the CAA.

In the Final Rules Section of this **Federal Register**, EPA is approving the States' revisions to Regulations No. 3 and 8 as a direct final rule without prior proposal because the Agency views these as noncontroversial revisions and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this proposed rule, no further activity is contemplated in relation to this rule. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing on or before January 19, 2001.

ADDRESSES: Written comments may be mailed to Richard R. Long, Director, Air and Radiation Program, Mailcode 8P–AR, Environmental Protection Agency (EPA), Region VIII, 999 18th Street, Suite 300, Denver, Colorado, 80202. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air and Radiation Program, Environmental Protection Agency, Region VIII, 999 18th Street, Suite 300, Denver, Colorado, 80202. Copies of the State documents relevant to this action are also available for public inspection at the Colorado Department of Public Health and Environment, Air Pollution Control Division, 4300 Cherry Creek Drive South, Denver, Colorado 80246–1530.

FOR FURTHER INFORMATION CONTACT: Megan Williams, EPA, Region VIII, (303) 312–6431.

SUPPLEMENTARY INFORMATION: See the information provided in the Direct Final action of the same title which is located in the Rules and Regulations section of this **Federal Register**.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: September 8, 2000.

Jack W. McGraw,

Acting Regional Administrator, Region VIII.

[FR Doc. 00–32022 Filed 12–19–00; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA 238–0256b; FRL–6895–8]

Revisions to the California State Implementation Plan, Santa Barbara and Ventura County Air Pollution Control Districts

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the Santa Barbara County Air Pollution Control District (SBCAPCD) and Ventura County Air Pollution Control District (VCAPCD) portion of the California State Implementation Plan (SIP). These revisions concern Oxides of Nitrogen (NO_X) emissions from Natural-Gas Fired Fan-Type Central Furnaces and Residential Water Heaters, Large Water Heaters and Small Boilers. We are proposing to approve local rules to regulate these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: Any comments on this proposal must arrive by January 19, 2001.

ADDRESSES: Mail comments to Andy Steckel, Rulemaking Office Chief (AIR–4), U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

You can inspect copies of the submitted SIP revisions and EPA's technical support documents (TSDs) at our Region IX office during normal business hours. You may also see copies of the submitted SIP revisions at the following locations:

California Air Resources Board, Stationary Source Division, Rule Evaluation Section, 2020 ''L'' Street, Sacramento, CA 95812.

Santa Barbara County, Air Pollution Control District, 26 Castillian Drive, Suite B–23, Goleta, CA 93117

Ventura County APCD, 669 County Square Dr., 2nd Fl., Ventura, CA 93003–5417

FOR FURTHER INFORMATION CONTACT: Ed Addison, Rulemaking Office (AIR–4), U.S. Environmental Protection Agency, Region IX, (415) 744–1160.

SUPPLEMENTARY INFORMATION: This proposal addresses the following local rules: SBCAPCD 352 and VCAPCD 74.11.1. In the Rules and Regulations section of this **Federal Register**, we are approving these local rules in a direct final action without prior proposal because we believe these SIP revisions are not controversial. If we receive adverse comments, however, we will publish a timely withdrawal of the direct final rule and address the comments in subsequent action based on this proposed rule. We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, please see the direct final action.

Dated: October 10, 2000.

Laura Yoshii,

Regional Administrator,, Region IX.

[FR Doc. 00–32020 Filed 12–19–00; 8:45 am]

BILLING CODE 6560–50–U

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[FRL–6918–9]

State Operating Permit Programs; Revision to Interim Approval Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This action would amend EPA's regulations governing the interim approval of State and local operating permits programs. Currently, the regulations allow the Agency to extend expiration dates of interim approvals beyond 2 years from the date the interim approval is originally granted. This action removes that provision.

DATES: Submit comments on or before January 19, 2001.

ADDRESSES: Comments should be submitted (in duplicate, if possible) to: Air and Radiation Docket and Information Center (6102), Attention Docket Number A–93–50, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. The EPA requests that a separate copy also be sent to the contact person listed below.

Supporting material used in developing the proposal and final regulatory revisions is contained in Docket Number A–93–50. This docket is available for public inspection and copying between 8:30 a.m. and 5:30 p.m., Monday through Friday, at the address listed above, or by calling (202) 260–7548. The Docket is located at the above address in Room M–1500, Waterside Mall (ground floor). A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Roger Powell, Mail Drop 12, United States Environmental Protection Agency, Research Triangle Park, North Carolina 27711 (telephone 919–541–5331, e-mail: powell.roger@epa.gov).

SUPPLEMENTARY INFORMATION:

I. Background

If an operating permits program administered by a State or local permitting authority under title V of the Clean Air Act (Act) does not fully meet, but does ''substantially [meet],'' the requirements of part 70, EPA may grant that program ''interim approval.'' (See § 70.4(d)(1).) Permits issued under an interim approval are fully effective and expire at the end of their fixed term, unless renewed under a part 70 program. (See § 70.4(d)(2).) To obtain full approval, a permitting authority must submit to EPA program revisions correcting all deficiencies that caused the operating permits program to receive interim instead of full approval. Such submittal must be made no later than 6 months prior to the expiration of the interim approval. (See § 70.4(f)(2).) Originally 99 State and local permitting programs were granted interim approval. For 14 of the original interim approved programs, permitting authorities have corrected the deficiencies identified in their interim approvals, and we have granted all of these programs full approval. (See part 70, Appendix A.)

On August 29, 1994 (59 FR 44460), and August 31, 1995 (60 FR 45530), we proposed revisions to our part 70 operating permits program regulations. Primarily, the proposals addressed changes to the system for revising permits, but a number of other proposed changes were also included. The preamble to the August 31, 1995, proposal noted the concern of many permitting authorities over having to revise their operating permits programs twice; once to correct interim approval deficiencies, and again to address the revisions to part 70. In the August 1995 preamble, we proposed that States with interim approval ''* * * should be allowed to delay the submittal of any program revisions to address program deficiencies previously listed in their notice of interim approval until the deadline to submit other changes required by the proposed revisions to part 70'' (60 FR 45552).

II. Extension of Interim Approval Expiration Dates

On October 31, 1996 (61 FR 56368), we amended § 70.4(d)(2) to permit the Administrator to grant extensions to interim approval expiration dates to allow permitting authorities the opportunity to combine their program revisions correcting interim approval deficiencies with their program revisions that will conform to the part 70 revisions. In this rulemaking, we granted a 10-month extension to all interim approved programs for which the interim approval was granted prior to the date of issuance of a memorandum announcing our position on this issue (memorandum from Lydia N. Wegman to Regional Division Directors, ''Extension of Interim Approvals of Operating Permits Programs,'' June 13, 1996).

We then extended the interim approval expiration dates for certain State and local permitting programs a second time, on August 29, 1997 (62 FR 45732). On July 27, 1998, we published a direct final rulemaking extending interim approval expiration dates a third time, this time covering all interim approved programs, until June 1, 2000. In each of these instances, delays in the expected promulgation of the final part 70 revisions beyond the previous interim approval expiration dates led us to grant the further extensions of the expiration deadlines. We intended these extensions to provide the time needed for State and local agencies to combine their program revisions for both the interim approval deficiencies and the part 70 revisions.

On February 14, 2000 (65 FR 7333), we published a direct final rulemaking to extend interim approvals a fourth time. In this action, we would have set an interim approval expiration date of June 1, 2002, for all programs. We received an adverse comment on that action and withdrew the direct final action on March 29, 2000 (65 FR 16523).

The commenter asserted that our proposed action was contrary to the express terms of the Act and must be withdrawn. The commenter referred to section 502(g) of the Act which provides that ''[a]n interim approval under [Section 502(g)] shall expire on a date set by the Administrator not later than 2 years after such approval, and may not be renewed.''

This commenter further argued that our existing regulations (§ 70.4(d)(2)) do not justify an extension of interim approval deadlines until June 1, 2002. The commenter stated that to the extent that § 70.4(d)(2) allowed an extension of interim approvals by up to 10 months on an individual basis, we had already granted this 10-month extension in the October 31, 1996, rulemaking.

This commenter also asserted that to the extent § 70.4(d)(2) allowed longer interim approval periods for States to combine program changes, this provision did not justify the proposed extension to June 1, 2002, because § 70.4(d)(2) contemplated such extensions only after the promulgation of part 70 revisions, which had not occurred. Moreover, the commenter noted that this provision authorized additional time ''only once per State'' and that we had already granted multiple extensions in the past.

We considered these comments, as well as the further delays in promulgating the revisions to part 70 and the recently determined need for a supplemental part 70 proposal before the part 70 revisions can be promulgated. In light of those considerations and the need to provide State and local agencies with sufficient time to correct their interim approval deficiencies, on May 22, 2000, we published a final action extending interim approvals until December 1, 2001, and indicated that we will not extend interim approvals further. Consequently, a Federal permitting program will apply by operation of law in any area without a fully approved program as of December 1, 2001.

III. Litigation on Extension

The Sierra Club and New York Public Interest Research Group (NYPIRG) challenged our final action in the Court of Appeals for the District of Columbia Circuit [*Sierra Club et al.* v. *EPA* (D.C. Cir. No. 00–1262)]. As a result of that litigation, we have entered into a settlement agreement with the litigants that will hold that case in abeyance, pending implementation of the settlement agreement.

IV. Regulatory Revision

One of the terms of the settlement agreement is that we will remove from § 70.4(d)(2) the language added on October 31, 1996, to allow granting extensions to interim approval expiration dates. The language of § 70.4(d)(2) is proposed to be amended to restore it to the original language that was in that section when part 70 was promulgated. The revision to this provision is consistent with our intent not to extend further the interim approval of the current operating permits programs. This action, if finalized, will have no effect on the current expiration date of December 1, 2001, for programs that received an extension of their interim approvals in the May 22, 2000, action.

V. Administrative Requirements

A. Docket

The docket for this regulatory action is A–93–50. The docket is an organized and complete file of all the information submitted to, or otherwise considered by, EPA in the development of this rulemaking. The principal purposes of the docket are: (1) to allow interested parties a means to identify and locate documents so that the parties can effectively participate in the rulemaking process, and (2) to serve as the record in case of judicial review (except for interagency review materials). The docket is available for public inspection at EPA's Air Docket, which is listed under the **ADDRESSES** section of this notice.

B. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether each regulatory action is ''significant,'' and therefore subject to the Office of Management and Budget (OMB) review and the requirements of the Order. The Order defines ''significant'' regulatory action as one that is likely to lead to a rule that may:

1. Have an annual effect on the economy of $100 million or more, adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.
2. Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.
3. Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligation of recipients thereof.
4. Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866.

This action is not a ''significant'' regulatory action pursuant to Executive Order 12866 because it does not substantially change the existing part 70 requirements for States or sources; requirements which have already undergone OMB review. As such, this action is exempted from OMB review.

C. Regulatory Flexibility Act Compliance

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), I certify that this action will not have a significant economic impact on a substantial number of small entities.

In developing the original part 70 regulations, the Agency determined that they would not have a significant economic impact on a substantial number of small entities. Similarly, the same conclusion was reached in an initial regulatory flexibility analysis performed in support of the proposed part 70 revisions (a subset of which constitutes the action in this rulemaking). This action does not substantially alter the part 70 regulations as they pertain to small entities and accordingly will not have a significant economic impact on a substantial number of small entities.

D. Paperwork Reduction Act

The OMB has approved the information collection requirements contained in part 70 under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0243. The Information Collection Request (ICR) prepared for part 70 is not affected by the action in this rulemaking notice because the part 70 ICR determined burden on a nationwide basis, assuming all part 70 sources were included without regard to the approval status of individual programs. The action in this rulemaking notice does not alter the assumptions of the approved part 70 ICR used in determining the burden estimate. Furthermore, this action does not impose any additional requirements which would add to the information collection requirements for sources or permitting authorities.

E. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with Federal mandates that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

The EPA has determined that the action in this rulemaking does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector, in any one year. Although the part 70 regulations governing State operating permit programs impose significant Federal mandates, this action does not amend the part 70 regulations in a way that significantly alters the expenditures resulting from these mandates. Therefore, the Agency concludes that it is not required by section 202 of the UMRA of 1995 to provide a written statement to accompany this regulatory action.

F. Applicability of Executive Order 13045

Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1977), applies to any rule that EPA determines (1) is ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to Executive Order 13045 because it is not an economically significant regulatory action as defined by Executive Order 12866, and it does not address an environmental health or safety risk that would have a disproportionate effect on children.

G. Executive Order 13132 (Federalism)

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Order to include regulations that 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.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. The EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

If EPA complies by consulting, Executive Order 13132 requires EPA to provide to OMB, in a separately identified section of the preamble to the rule, a federalism summary impact statement (FSIS). The FSIS must include a description of the extent of EPA's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met. Also, when EPA transmits a draft final rule with federalism implications to OMB for review pursuant to Executive Order 12866, EPA must include a certification from the agency's Federalism Official stating that EPA has met the requirements of Executive Order 13132 in a meaningful and timely manner.

This rule change 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, as specified in Executive Order 13132. Thus, the requirements of section 6 of the

Executive Order do not apply to this rule.

H. Executive Order 13084: Consultation and Coordination With Indian Tribal Governments

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to 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.''

This rule does not significantly or uniquely affect the communities of Indian tribal governments because it applies only to State and local permitting programs. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by one or more voluntary consensus standard bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This rule does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

List of Subjects in 40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: December 12, 2000.

Robert Perciasepe,

Assistant Administrator, Office of Air and Radiation.

For the reasons set out in the preamble, title 40, chapter I, of the Code of Federal Regulations is proposed to be amended as follows:

PART 70—[AMENDED]

1. The authority citation for part 70 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

2. Section 70.4 is amended by revising paragraph (d)(2) to read as follows:

§ 70.4 State program submittals and transition.

* * * * *

(d) * * *

(2) Interim approval shall expire on a date set by the Administrator (but not later than 2 years after such approval), and may not be renewed. Sources shall become subject to the program according to the schedule approved in the State program. Permits granted under an interim approval shall expire at the end of their fixed term, unless renewed under a part 70 program.

* * * * *

[FR Doc. 00–32243 Filed 12–19–00; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[FRL–6912–6]

Alabama; Final Authorization of State Hazardous Waste Management Program Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Alabama has applied to EPA for Final authorization of the changes to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). EPA proposes to grant final authorization to Alabama. In the ''Rules and Regulations'' section of this **Federal Register**, EPA is authorizing the changes by an immediate final rule. EPA did not make a proposal prior to the immediate final rule because we believe this action is not controversial and do not expect comments that oppose it. We have explained the reasons for this authorization in the preamble to the immediate final rule. Unless we get written comments which oppose this authorization during the comment period, the immediate final rule will become effective on the date it establishes, and we will not take further action on this proposal. If we get comments that oppose this action, we will withdraw the immediate final rule and it will not take effect. We will then respond to public comments in a later final rule based on this proposal. You may not have another opportunity for comment. If you want to comment on this action, you must do so at this time.

DATES: Send your written comments by January 19, 2001.

ADDRESSES: Send written comments to Narindar Kumar, Chief, RCRA Programs Branch, Waste Management Division, Environmental Protection Agency, The Sam Nunn Atlanta Federal Center, 61 Forsyth Street, SW, Atlanta, Georgia 30303–8960, phone number: (404) 562–8440. You can examine copies of the materials submitted by Alabama during normal business hours at the following locations: EPA Region 4 Library, The Sam Nunn Atlanta Federal Center, 61 Forsyth Street, SW, Atlanta, Georgia 30303–8960, phone number: (404) 562–8190: or Alabama Department of Environmental Management, 1400 Coliseum Blvd., Montgomery, Alabama 36130–1463, phone number (334) 271–7700.

FOR FURTHER INFORMATION CONTACT: Narindar Kumar, Chief, RCRA Programs Branch, Waste Management Division, Environmental Protection Agency at the above address and phone number.

SUPPLEMENTARY INFORMATION: For additional information, please see the immediate final rule published in the ''Rules and Regulations'' section of this **Federal Register**.

Dated: November 28, 2000.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

[FR Doc. 00–31724 Filed 12–19–00; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 43 and 63

[IB Docket No. 00–231, FCC 00–407]

2000 Biennial Regulatory Review, Amendment of Parts 43 and 63 of the Commission's Rules

AGENCY: Federal Communications Commission.

ACTION: Notice of proposed rule making.

SUMMARY: This document solicits comments on proposed changes to several of the rules relating to international telecommunications services. The Commission initiated this proceeding to determine what rules could be modified or eliminated in light of competition in international telecommunications services. This proceeding is part of the Commission's year 2000 biennial regulatory review. The Commission believes that these proposals will remove unnecessary burdens on the public and the agency.

DATES: Comments are due on or before January 24, 2001, and reply comments are due on or before February 27, 2001.

ADDRESSES: Federal Communications Commission, Secretary, 445 12th Street, SW., Room TW–B204F, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: David Krech, International Bureau, (202) 418–1460.

SUPPLEMENTARY INFORMATION:

1. This is a summary of the Commission's Notice of Proposed Rule Making (NPRM), FCC 00–407, adopted on November 13, 2000, and released on November 30, 2000. The full text of this document is available for inspection and copying during normal business hours in the Office of Media Relations, Reference Operations Division, (Room CY–A257) of the Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. The document is also available for download over the Internet at *http://www.fcc.gov/Bureaus/International/Notices/2000//fccI00407.doc.* The complete text of this document also may be purchased from the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, NW., Washington, DC 20036, (202) 857–3800.

2. This NPRM contains proposed information collections subject to the Paperwork Reduction Act of 1995 (PRA). It will be submitted to the Office of Management and Budget (OMB) for review under the PRA. OMB, the general public, and other Federal agencies will be invited to comment on the proposed information collections contained in this proceeding.

Summary of Notice of Proposed Rulemaking

3. On November 13, 2000, the Commission adopted a Notice of Proposed Rulemaking (NPRM) to determine whether it should amend and clarify several of its rules relating to international telecommunications services. The Commission initiated this proceeding in response to the Telecommunications Act of 1996, which requires the Commission to review all regulations that apply to operations or activities of any provider of telecommunications service and to repeal or modify any regulation it determines to be no longer necessary in the pubic interest. The Commission solicits comments on all of the proposals and tentative conclusions contained in the NPRM.

4. Section 63.24 sets out the procedures for review of *pro forma* assignments and transfers of control of authorizations to provide international telecommunications service. The Commission has found that § 63.24 does not explicitly address many of the types of transactions that should be treated as *pro forma.* Thus, the Commission proposes to amend the procedures for review of assignments and transfers of control of international service authorizations to match more closely those procedures used for other service authorizations, particularly Commercial Mobile Radio Services (CMRS).

5. Currently there are two rules addressing assignments and transfers of control of international Section 214 authorizations. The Commission believes that the current regulatory structure may not be sufficiently flexible for corporate transactions that do not fall into one of the existing categories but should be treated as *pro forma.* The NPRM solicits comment on the proposals to amend the rules to allow more flexibility to applicants in structuring transactions and provide greater clarity to authorized international carriers regarding assignments and transfers of control.

6. There has been a steady increase in the number of transactions involving authorizations for different services and requiring intra-agency approval, many of which involve both international Section 214 authorizations and wireless authorizations. Thus, the Commission proposes to modify and consolidate its current rules on assignments and transfers of control of international Section 214 authorizations so that the new rule more closely tracks the procedures applicable to CMRS. The NPRM seeks comment on this proposal.

7. Currently, § 1.948 governs CMRS's assignments and transfers of control of authorization and provides that a change from less than 50 percent ownership to 50 percent or more ownership shall always be considered a transfer of control. In other situations, whether a controlling interest in transferring is determined on a case-by-case basis considering the distribution of ownership, and the relationships of the owners, including family relationships. The Commission proposes to adopt both of these provisions as part of a consolidated rule that would govern all international Section 214 assignments and transfers, whether substantial or *pro forma.* The Commission proposes to move the provisions of § 63.18(e)(3), which specify the procedures for seeking prior approval of an assignment or substantial transfer of control, to § 63.24. The NPRM seeks comment on these proposals.

8. The NPRM seeks comment on the proposal to allow a case-by-case determination of whether an assignment or transfer of control is substantial or *pro forma.* The Commission tentatively concludes that it should adopt the same case-by-case approach in the *FCBA Forbearance Order* (63 FR 10338, March 3, 1998) for determining whether transfers of control of international § 214 authorizations are substantial or *pro forma.* The Commission proposes that the transaction types currently listed in the rules as *pro forma* should be considered illustrative, not comprehensive. The NPRM seeks comment on these proposals.

9. The NPRM seeks comment on other proposals to amend § 63.24 so that it more closely tracks the procedures used for CMRS. The NPRM proposes that within 30 days after consummation of a *pro forma* transaction, the licensee must file an application with the Commission. The NPRM seeks comment on this proposal and the specific filing requirements for such an application. The NPRM seeks comment on the proposal that the rules clearly state that both *pro forma* and transferees and *pro forma* assignees are required to notify the Commission of either a *pro forma* transfer of control or assignment, which may be done by letter 30 days after the transaction. The NPRM also seeks comment on proposals to add definitions and explanatory language on assignments and transfers of control as well as procedures to be followed in the event of an involuntary assignment or transfer of control.

10. The NPRM seeks comment on the Commission's tentative conclusion that the proposed rules, as revised to more closely track the rule used for CMRS, will reduce the regulatory burden on Section 214 authorization holders. The NPRM also seeks comment on whether the proposals will provide greater flexibility to Section 214 authorization holders and expanding the possible range of transactions that qualify for filing on a *pro forma* basis.

11. The Commission proposes to discontinue the application of the benchmark rates to services provided over facilities-based private lines. The Commission believes that this proposal will relieve an unnecessary burden without adversely affecting competitive safeguards. The NPRM seeks comment on the proposal and conclusion. Comments should address the likelihood that a carrier could successfully evade application of the condition by sending facilities-based switched traffic over facilities-based private lines.

12. The Commission proposes to modify its rules for discontinuances of service by U.S. international common carriers. The Commission proposes to require prior approval for discontinuances by a U.S. international carrier only for those routes and services for which the carrier is classified as dominant due to its having market power in the provision of that international service on the U.S. end of the route. The NPRM seeks comment on this proposal and the tentative conclusion that the discontinuance requirement should apply only to U.S. carriers regulated as dominant due to market power in the U.S. Comments should address under what circumstances, if any, prior Commission approval should be required before a U.S. carrier regulated as dominant under § 63.10 can discontinue service.

13. The NPRM seeks comment on the proposals to amend the explanatory notes regarding attribution of indirect ownership interests in U.S. and foreign carriers to clarify that whenever an ownership percentage exceeds 50 percent or represents actual control it shall be treated as a 100 percent interest for purposes of applying the multiplier.

14. The NPRM seeks comment on a number of proposals to amend or eliminate rules that are no longer applicable. The NPRM proposes to eliminate § 63.21(h) because there are no U.S. carriers to which the rule applies. The NPRM proposes to eliminate § 43.81 because the requirement that foreign-owned carriers file certain reports has expired. The NPRM proposes to amend § 63.22 to clarify that a facilities-based carrier may provide service over U.S. facilities, which are not subject to authorization by the Commission, as long as those facilities are not on the Exclusion List. The NPRM also proposes to eliminate confusion over the inconsistency of § 63.22 by removing the general reference to a list of countries in the Exclusion List. The NPRM proposes to eliminate unnecessary duplication of the contents required for international Section 214 applications contained in § 63.09 and § 63.18. The NPRM addresses the duplicative notes that are unnecessary and the proposal to eliminate the first three explanatory notes to § 62.18(h) while retaining the forth note. The NPRM proposes to delete the provision in § 63.20 that specifies the number of copies required to be filed for applications to supplement already authorized facilities.

15. In addition, the NPRM proposes to eliminate the requirement that a Section 214 application be submitted on computer diskette. The Commission believes that the International Bureau Filing System (IBFS) supercedes the computer diskette method for filing applications. Similarly, the NPRM proposes to amend § 63.10(d) to remove the requirement that reports filed by dominant carriers be filed on diskettes. Comments are sought on these tentative conclusions and whether there is any reason to continue to require international Section 214 applications and dominant carrier reports to be filed on computer diskettes.

Procedural Matters

16. *Ex Parte Presentations.* This proceeding is a ''permit-but-disclose'' proceeding. *Ex Parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules.

17. *Initial Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act (RFA), 5 U.S.C. 603 the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies proposed in this Notice of Proposed Rulemaking (NPRM). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, the NPRM and IRFA (or summaries thereof) will be published in the **Federal Register**.

18. *Need for, and Objectives of, the Proposed Rules:* The Telecommunications Act of 1996 (1996 Act), Public Law 104–104, 110 Stat. 56, directs the Commission to undertake, in every even-numbered year beginning in 1998, a review of all regulations issued under the Communications Act of 1934, as amended (Communications Act), 47 U.S.C. 151 *et seq.*, that apply to operations or activities of any provider of telecommunications service and to repeal or modify any regulation it determines to be ''no longer necessary in the public interest.'' In particular, the 1996 Act directs the Commission to determine whether any such regulation is no longer necessary ''as the result of meaningful economic competition between providers of such service.''

19. As part of the year 2000 biennial regulatory review, the Commission reviewed all of its rules relating to international telecommunications services to identify those rules that could be revised or eliminated. In this proceeding, we propose changes to several of our rules relating to international telecommunications services. Specifically, we propose to amend our rule concerning *pro forma* assignments and transfers of control of international Section 214 authorizations to more closely match those used for the assignment and transfer of control of Commercial Mobile Radio Service (CMRS) licenses. We also tentatively conclude that it is no longer necessary to apply the settlement rate benchmarks condition to Section 214 authorizations to provide facilities-based international private line services. We also propose to modify our rules to relieve dominant international carriers of the requirement to seek prior approval to discontinue service, except where such carriers possess market power in the provision of international service on the U.S. end of the route. Finally, we also propose to amend several rules to clarify the intent of those rules and to eliminate certain rules that no longer have any application. We believe that these proposed changes are in the public interest and will remove unnecessary burdens on the public and the Commission.

20. *Legal basis:* The NPRM is adopted pursuant to §§ 1, 4, 11, 214, 218, 219, 220, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154, 161, 214, 218, 219, 220, 403.

21. *Description and estimate of the number of small entities to which the proposals will apply:* RFA directs agencies to provide a description of, and, where feasible, estimate of the

number of small entities that may be affected by the proposals, if adopted. The Regulatory Flexibility Act defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small business concern'' under Section 3 of the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

22. The SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. The Census Bureau reports that there were 2,321 such companies that had been operating for at least one year at the end of 1992. According to the SBA's definition, a wireline telephone company is a small business if it employs no more than 1,500 persons, 13 CFR 121.201, Standard Industrial Classification (SIC) Code 4812. All but 26 of the 2,321 wireline companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 wireline companies that might qualify as small entities or small incumbent LECs. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 2,295 of these wireline companies are small entities that might be affected by these proposals.

23. Specifically, we propose to amend our rule concerning *pro forma* assignments and transfers of control of international Section 214 authorizations to more closely match those used for the assignment and transfer of control of Commercial Mobile Radio Service (CMRS) licenses. We also tentatively conclude that it is no longer necessary to apply the settlement rate benchmarks condition to Section 214 authorizations to provide facilities-based international private line services. We also propose to modify our rules to relieve dominant international carriers of the requirement to seek prior approval to discontinue service, except where such carriers possess market power in the provision of international service on the U.S. end of the route. We also propose to amend several rules to clarify the intent of those rules and to eliminate certain rules that no longer have any application. At this time, we are not certain as to the number of small entities that will be affected by the proposals. We seek comment on the number of small entities that will be affected by the proposals set forth in the NPRM.

24. *Description of projected reporting, recordkeeping, and other compliance requirements:* The proposals made in the NPRM will reduce the recordkeeping and compliance requirements of all companies providing international telecommunications services, including small entities.

25. In the NPRM, the Commission proposes to provide greater flexibility and clarity regarding assignments and transfers of control. Many of the transactions that carriers are entering into involve multiple services. In the NPRM the Commission proposes procedures regarding *pro forma* assignments and transfers of control of international Section 214 authorizations that more closely follow those used for the assignment and transfer of control of Commercial Mobile Radio Service (CMRS) licenses. This should reduce the burdens placed on carriers filing transfers of control or assignments by having similar requirements for both Section 214 authorizations and CMRS licenses. Under the proposed rule carriers will continue to be required to file an application, which can be in the form of a letter, with the Commission no later that thirty days after the assignment or transfer is completed. The application must contain a certification that the transfer of control or assignment was *pro forma,* and, together with all other previous *pro forma* transactions, this transfer of control or assignment does not result in a change in the actual controlling party. The letter must also contain the name, address of the transferee/assignee, contact points, and updated ownership information.

26. The Commission also proposes to remove the settlement rate benchmarks condition to Section 214 authorizations to provide facilities-based international private line services. The Commission also proposes to modify its rules to relieve dominant international carriers of the requirement to seek prior approval to discontinue service, except where such carriers possess market power in the provision of international service on the U.S. end of the route. Only one carrier—Comsat—is currently regulated as dominant on particular routes in its provision of particular services due to the existence of market power on the U.S. end of those routes. Other carriers that are classified dominant solely due to affiliations with foreign carriers will no longer be required to seek prior approval before discontinuing service.

27. The other proposals in the NPRM will clarify the intent of certain rules and to eliminate other rules that no longer have any application. We believe that these proposed changes are in the public interest and will remove unnecessary burdens on the public and the Commission.

28. *Steps taken to minimize significant economic impact on small entities, and significant alternatives considered:* The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

29. The Telecommunications Act of 1996 (1996 Act) directs the Commission to undertake, in every even-numbered year beginning in 1998, a review of all regulations issued under the Communications Act of 1934, as amended (Communications Act), that apply to operations or activities of any provider of telecommunications service and to repeal or modify any regulation it determines to be ''no longer necessary in the public interest.'' In particular, the 1996 Act directs the Commission to determine whether any such regulation is no longer necessary ''as the result of meaningful economic competition between providers of such service.'' As part of the 2000 biennial regulatory review, the Commission reviewed all of its rules relating to international telecommunications services to identify those rules that could be revised or eliminated. In this proceeding the Commission proposes changes to several of its rules relating to international telecommunications services. The Commission believes that the proposals in the NPRM will reduce the economic burdens placed on all companies providing international telecommunications services, including small entities.

30. Federal rules that may duplicate, overlap, or conflict with the proposed rules: None.

31. *Paperwork Reduction Act.* The NPRM contains either new or modified information collections subject to the Paperwork Reduction Act of 1995

(PRA). The Commission will submit the proposed information collections to the Office of Management and Budget (OMB) for review under the PRA. Upon submission to OMB, comments from OMB, the general public, and other federal agencies will be invited on the proposed information collections contained in the proceeding.

Ordering Clauses

32. Pursuant to Sections 1, 4, 11, 214, 218, 219, 220 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154, 161, 214, 218, 219, 220, 403, the Notice of Proposed Rulemaking is hereby adopted and comments are requested.

33. The Commission's Consumer Information Bureau, Reference Information Center, shall send a copy of this Notice of Proposed Rulemaking, including the regulatory flexibility certification, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Public Law 96–354, 94 Stat. 1164, 5 U.S.C. 601, *et seq.*

List of Subjects in 47 CFR Parts 43 and 63

Communications common carriers, Reporting and recordkeeping requirements.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

Rule Changes

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR parts 43 and 63 as follows:

PART 43—REPORTS OF COMMUNICATION COMMON CARRIERS AND CERTAIN AFFILIATES

1. The authority citation for part 43 continues to read as follows:

Authority: 47 U.S.C. 154; Telecommunications Act of 1996, Public Law 104–104, sec. 402(b)(2)(B), (c), 110 Stat. 56 (1996) as amended unless otherwise noted. 47 U.S.C. 211, 219, 220 as amended.

§ 43.81 [Removed]

2. Remove § 43.81.

PART 63—EXTENSION OF LINES, NEW LINES AND DISCONTINUANCE, REDUCTION, OUTAGE AND IMPAIRMENT OF SERVICE BY COMMON CARRIERS; AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY STATUS

3. The authority citation for part 63 continues to read as follows:

Authority: section 1, 4(i), 4(j), 10, 11, 201–205, 214, 218, 403 and 651 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 160, 201–205, 214, 218, 403, and 571, unless otherwise noted.

4. Section 63.09 is amended by revising Note 2 to § 63.09 to read as follows:

§ 63.09 Definitions applicable to international Section 214 authorizations.

* * * * *

Note 2 to § 63.09: Ownership and other interests in U.S. and foreign carriers will be attributed to their holders and deemed cognizable pursuant to the following criteria: Attribution of ownership interests in a carrier that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest. For example, if A owns 30 percent of company X, which owns 60 percent of company Y, which owns 26 percent of ''carrier,'' then X's interest in ''carrier'' would be 26 percent (the same as Y's interest because X's interest in Y exceeds 50 percent), and A's interest in ''carrier'' would be 7.8 percent (0.30×0.26). Under the 25 percent attribution benchmark, X's interest in ''carrier'' would be cognizable, while A's interest would not be cognizable.

5. Section 63.10 is amended by revising paragraph (d) to read as follows:

§ 63.10 Regulatory classification of U.S. international carriers.

* * * * *

(d) A carrier classified as dominant under this section shall file an original and two copies of each report required by paragraphs (c)(3), (c)(4), and (c)(5) of this section with the Chief, International Bureau. The carrier shall also file one copy of these reports with the Commission's copy contractor. The transmittal letter accompanying each report shall clearly identify the report as responsive to the appropriate paragraph of § 63.10(c).

* * * * *

§ 63.18 [Amended]

6. Section 63.18 is amended by removing paragraph (e)(3) and Notes 1 through 4 to paragraph (h) and redesignating paragraph (e)(4) as (e)(3) and adding Note to paragraph (h) to read as follows.

* * * * *

Note to paragraph (h): Ownership and other interests in U.S. and foreign carriers will be attributed to their holders and deemed cognizable pursuant to the following criteria: Attribution of ownership interests in a carrier that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest. For example, if A owns 30 percent of company X, which owns 60 percent of company Y, which owns 26 percent of ''carrier,'' then X's interest in ''carrier'' would be 26 percent (the same as Y's interest because X's interest in Y exceeds 50 percent), and A's interest in ''carrier'' would be 7.8 percent (0.30 x 0.26). Under the 25 percent attribution benchmark, X's interest in ''carrier'' would be cognizable, while A's interest would not be cognizable.

* * * * *

7. Section 63.19 is revised to read as follows:

§ 63.19 Special procedures for discontinuances of international services.

(a) With the exception of those international carriers described in paragraph (b) of this section, any international carrier that seeks to discontinue, reduce or impair service, including the retiring of international facilities, dismantling or removing of international trunk lines, shall be subject to the following procedures in lieu of those specified in §§ 63.61 through 63.601:

(1) The carrier shall notify all affected customers of the planned discontinuance, reduction or impairment at least 60 days prior to its planned action. Notice shall be in writing to each affected customer unless the Commission authorizes in advance, for good cause shown, another form of notice.

(2) The carrier shall file with this Commission a copy of the notification on or after the date on which notice has been given to all affected customers.

(b) The following procedures shall apply to any international carrier that the Commission has classified as dominant in the provision of a particular international service because the carrier possesses market power in the provision of that service on the U.S. end of the route. Any such carrier that seeks to retire international facilities, dismantle or remove international trunk lines, and the dominant services being provided through these facilities is not being discontinued, reduced or impaired, shall only be subject to the notification requirements of paragraph (a) of this section. If such carrier discontinues, reduces or impairs the dominant service or retires facilities that

impair or reduce the service, the carrier shall file an application pursuant to §§ 63.62 and 63.500.

8. Section 63.20 is amended by revising paragraph (a) to read as follows:

§ 63.20 Copies required; fees; and filing periods for international service providers.

(a) Unless otherwise specified the Commission shall be furnished with an original and five copies of applications filed for international facilities and services under section 214 of the Communications Act of 1934, as amended. Upon request by the Commission, additional copies of the application shall be furnished. Each application shall be accompanied by the fee prescribed in subpart G of part 1 of this chapter.

* * * * *

§ 63.21 [Amended]

9. Section 63.21 is amended by removing paragraph (h) and redesignating paragraphs (i) and (j) as paragraphs (h) and (i).

10. Section 63.22 is amended by revising paragraph (b) to read as follows:

§ 63.22 Facilities-based international common carriers.

* * * * *

(b) The carrier may provide service using half-circuits on any U.S. common carrier and non-common carrier facilities that do not appear on an exclusion list published by the Commission. Carriers may also use any necessary non-U.S.-licensed facilities, including any submarine cable systems, that do not appear on the exclusion list. Carriers may not use U.S. earth stations to access non-U.S.-licensed satellite systems unless the Commission has specifically approved the use of those satellites and so indicates on the exclusion list. The exclusion list is available from the International Bureau's World Wide Web site at http://www.fcc.gov/ib.

* * * * *

11. Section 63.24 is amended by revising the subject heading and paragraph (a) and paragraph (b) and by adding new paragraphs (c) through (g) to read as follows.

§ 63.24 Assignments and transfers of control.

(a) *General.* Except as otherwise provided in this section, an international Section 214 authorization may be assigned, or control of such authorization may be transferred by the transfer of control of any entity holding such authorization, to another party, whether voluntarily or involuntarily, directly or indirectly, only upon application to and prior approval by the Commission.

(b) *Assignments.* For purposes of this section, an assignment of an authorization is a transaction in which the authorization is assigned from one entity to another entity. Following an assignment, the authorization is held by an entity other than the one to which it was originally granted.

(c) *Transfers of control.* For purposes of this section, a transfer of control is a transaction in which the authorization remains held by the same entity, but there is a change in the entity or entities that control the authorization holder. A change from less than 50% ownership to 50% or more ownership shall always be considered a transfer of control. In all other situations, whether the interest being transferred is controlling must be determined on a case-by-case basis.

(d) *Pro forma assignments and transfers of control.* Transfers of control or assignments that do not result in a change in the actual controlling party are considered non-substantial or *pro forma.* Whether there has been a change in the actual controlling party must be determined on a case-by-case basis with reference to the factors listed in Note 1 to paragraph (d). The types of transactions listed in Note 1 to paragraph (d) shall be considered presumptively *pro forma* and prior approval from the Commission need not be sought.

Note 1 to paragraph (d): If a transaction is one of the types listed below, the transaction is presumptively *pro forma* and prior approval need not be sought. In all other cases, the relevant determination shall be made on a case-by-case basis. (1) Assignment from an individual or individuals (including partnerships) to a corporation owned and controlled by such individuals or partnerships without any substantial change in their relative interests; (2) Assignment from a corporation to its individual stockholders without effecting any substantial change in the disposition of their interests; (3) Assignment or transfer by which certain stockholders retire and the interest transferred is not a controlling one; (4) Corporate reorganization that involves no substantial change in the beneficial ownership of the corporation (including re-incorporation in a different jurisdiction or change in form of the business entity); (5) Assignment or transfer from a corporation to a wholly owned direct or indirect subsidiary thereof or vice versa, or where there is an assignment from a corporation to a corporation owned or controlled by the assignor stockholders without substantial change in their interests; or (6) Assignment of less than a controlling interest in a partnership.

(e) *Applications for substantial transactions.* (1) In the case of an assignment or transfer of control of an international Section 214 authorization that is not *pro forma*, the proposed assignee or transferee must apply to the Commission for authority prior to consummation of the proposed assignment or transfer of control.

(2) The application shall include the information requested in paragraphs (a) through (d) of § 63.18 for both the transferor/assignor and the transferee/assignee. The information requested in paragraphs (h) through (p) of § 63.18 is required only for the transferee/assignee. At the beginning of the application, the applicant shall include a narrative of the means by which the proposed transfer or assignment will take place.

(3) The Commission reserves the right to request additional information as to the particulars of the transaction to aid it in making its public interest determination.

(4) An assignee or transferee shall notify the Commission no later than 30 days after either consummation of the proposed assignment or transfer of control, or a decision not to consummate the proposed assignment or transfer of control. The notification may be made by letter (sending one copy to the Office of the Secretary and one copy to the Telecommunications Division of the International Bureau) and shall identify the file numbers under which the initial authorization and the authorization of the assignment or transfer of control were granted.

(f) *Applications for non-substantial or pro forma transactions.* (1) In the case of a *pro forma* assignment or transfer of control, the applicant is not required to seek prior Commission approval.

(2) A *pro forma* assignee or transferee shall file an application with the Commission no later than 30 days after the assignment or transfer is completed. The application may be made by letter (sending one copy to the Office of the Secretary and one copy to the Chief of the Telecommunications Division of the International Bureau). A single letter may be filed for an assignment of more than one authorization if each authorization is identified by the file number under which it was granted. The applications must contain the following:

(i) The information requested in paragraphs (a) through (d) and (h) of § 63.18 for the transferee/assignee,

(ii) A certification that the transfer of control or assignment was *pro forma* and that, together with all previous *pro forma* transactions, does not result in a change in the actual controlling party.

(3) Upon release of a public notice granting a *pro forma* assignment or transfer of control, petitions for

reconsideration under § 1.106 of this chapter or applications for review under § 1.115 of this chapter of the Commission's rules may be filed within 30 days. Petitioner should address why the assignment or transfer of control in question should have been filed under paragraph (e) of this section rather than under paragraph (f) of this section.

(g) *Involuntary assignments or transfers of control.* An involuntary assignment or transfer of control is one that occurs by operation of law. In the case of an involuntary assignment or transfer of control, the applicant must make the appropriate filing no later than 30 days after the event causing the involuntary assignment or transfer of control.

§ 63.53 [Amended]

12. Section 63.53 is amended by removing paragraph (b) and redesignating paragraph (c) as (b).

[FR Doc. 00–32202 Filed 12–19–00; 8:45 am]

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Notices

Federal Register

Vol. 65, No. 245

Wednesday, December 20, 2000

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Rural Business-Cooperative Service

Rural Utilities Service

Farm Service Agency

Notice of Public Information Collection Requirements Submitted to OMB for Review

AGENCIES: Rural Housing Service, Rural Business-Cooperative Service, and Rural Utilities Service, USDA.

ACTION: Proposed collection; comments requested.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces Rural Development's intention to seek Office of Management and Budget (OMB) approval of new information collection requirements in support of new electronic loan collection methods.

DATES: Comments on this notice must be received by February 20, 2001 to be assured consideration.

FOR FURTHER INFORMATION CONTACT: Mark Huntley, Accountant, Office of the Deputy Chief Financial Officer, Policy and Internal Review Division, U.S. Department of Agriculture, STOP 33, P.O. Box 200011, St. Louis, MO 63120, telephone: (314) 539–6063.

SUPPLEMENTARY INFORMATION:

Title(s): Form RD 1951–65, Customer Initiated Payments (CIP); Form RD 1951–66, FedWire Worksheet; and Form RD 3550–28, Authorization Agreement for Preauthorized Payments.

Type of Request: New Information Collection.

Purpose: Rural Development is currently using new electronic loan collection methods (Preauthorized Debits [PAD], FedWire, and Customer Initiated Payments [CIP]). These electronic collection methods provide a means for Rural Development borrowers to electronically transmit loan payments from their financial institution (FI) accounts to Rural Development's Treasury Account and receive credit for their payment. Accordingly, Rural Development is revising its internal management loan collection procedures to incorporate PAD, FedWire, and CIP electronic collection methods. These internal regulations are to ensure Rural Development field offices have current guidance on the payment and collection methods available and how to use them.

To administer these electronic loan collection methods, Rural Development must collect the borrower's FI routing information (routing information includes the FI routing number and the borrower's account number). Rural Development is proposing to use Agency approved forms for collecting bank routing information for PAD, FedWire, and CIP methods.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average .5 hour per response. Each Rural Development borrower who elects to participate in electronic loan payments will only prepare one response for the life of their loan unless they change financial institutions or accounts.

Respondents: Business or other for-profit; Not-for-profit institutions; and State, Local, or Tribal Government.

Estimated Number of Respondents: 600.

Estimated Number of Responses per Respondent: 1.

Estimated Number of Responses: 600.

Estimated Total Annual Burden on Respondents: 300 manhours.

Copies of this information collection can be obtained from Barbara Williams, Regulations and Paperwork Management Branch, Support Services Division, Rural Development, telephone (202) 692–0045.

Comments: Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the function of the Agencies, including whether the information will have practical utility; (b) the accuracy of the Agencies' estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments should be submitted to Barbara Williams, Regulations and Paperwork Management Branch, Support Services Division, Rural Development, U.S. Department of Agriculture, STOP 0742, 1400 Independence Avenue, SW., Washington, DC 20250–0742. All responses to this notice will be summarized, included in the request for OMB approval, and will become a matter of public record. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this rule.

Dated: November 14, 2000.

James C. Kearney,

Administrator, Rural Housing Service.

Dated: December 3, 2000.

Wilbur Peer,

Acting Administrator, Rural Business Cooperative Service.

Dated: December 7, 2000.

Christopher A. McLean,

Administrator, Rural Utilities Service.

[FR Doc. 00–32331 Filed 12–19–00; 8:45 am]

BILLING CODE 3410–XT–P

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

Meeting

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Notice of meeting.

SUMMARY: The Architectural and Transportation Barriers Compliance Board (Access Board) has scheduled its regular business meetings to take place in Washington, DC on Monday, Tuesday, and Wednesday, January 8–10, 2001, at the times and location noted below.

DATES: The schedule of events is as follows:

Monday, January 8, 2001

1:00 p.m.–5:00 p.m.

Committee of the Whole—Americans with Disabilities Act / Architectural Barriers Act Final Rule (Closed Meeting)

Tuesday, January 9, 2001

9:00 a.m.–Noon
Committee of the Whole—Americans with Disabilities Act / Architectural Barriers Act Final Rule (Closed Meeting)
1:30 p.m.–2:30 p.m.
Technical Programs Committee
2:30 p.m.–4:00 p.m.
Committee of the Whole—Briefing on Recreation Facilities Final Rule (Closed Meeting)
4:00 p.m.–5:00 p.m.
Planning and Budget Committee

Wednesday, January 10, 2001

9:00 a.m.–10:30 a.m.
Executive Committee
10:30 a.m.–Noon
Board Meeting
4:45 p.m.–6:30 p.m.
Public Rights-of-Way Access Advisory Committee Presentation
6:30 p.m.–7:30 p.m.
Public Rights-of-Way Access Advisory Committee Awards Presentation and Reception

ADDRESSES: The meetings will be held at the Washington Renaissance Hotel, 999 9th Street, NW, Washington, DC. The Public Rights of Way Access Advisory Committee Presentation and Awards Reception will be held at the Marriott Wardman Park Hotel, 2660 Woodley Road, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: For further information regarding the meetings, please contact Lawrence W. Roffee, Executive Director, (202) 272–5434, extension 113 (voice) and (202) 272–5449 (TTY).

SUPPLEMENTARY INFORMATION: At the Board meeting, the Access Board will consider the following agenda items.

Open Meeting

- Executive Director's Report
- Approval of the Minutes of the September 13, 2000 Board Meeting
- Executive Committee Report—Public Rights-of-Way Access Advisory Committee Charter Amendment and Nominating Committee.
- Planning and Budget Committee Report—Status Report on Fiscal Year 2001 Budget and Report on 2002 Budget
- Technical Programs Committee Report—Report on Fiscal Years 1998 to 2001 Research and Technical Assistance Projects

Closed Meeting

- Committee of the Whole Report on the Americans with Disabilities Act / Architectural Barriers Act Final Rule
- Committee of the Whole Report on Recreation Facilities Final Rule

All meetings are accessible to persons with disabilities. Sign language interpreters and an assistive listening system are available at all meetings. Persons attending Board meetings are requested to refrain from using perfume, cologne, and other fragrances for the comfort of other participants.

Lawrence W. Roffee,

Executive Director.

[FR Doc. 00–32413 Filed 12–19–00; 8:45 am]

BILLING CODE 8150–01–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1133]

Expansion of Foreign-Trade Zone 29, Louisville, KY

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Louisville and Jefferson County Riverport Authority, grantee of Foreign-Trade Zone 29, submitted an application to the Board for authority to expand FTZ 29–Site 1 at the Riverport Industrial Park complex in Louisville, Kentucky, within the Louisville Customs port of entry (FTZ Docket 28–2000; filed 6/9/00);

Whereas, notice inviting public comment was given in the **Federal Register** (65 FR 37959, 6/19/00) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby orders:

The application to expand FTZ 29–Site 1 is approved, subject to the Act and the Board's regulations, including Section 400.28, and further to the Board's standard 2,000-acre activation limit for the overall zone project.

Signed at Washington, DC, this 11th day of December 2000.

Troy H. Cribb,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

[FR Doc. 00–32329 Filed 12–19–00; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of opportunity to request administrative review of antidumping or countervailing duty order, finding, or suspended investigation.

Background

Each year during the anniversary month of the publication of an antidumping or countervailing duty order, finding, or suspension of investigation, an interested party, as defined in section 771(9) of the Tariff Act of 1930, as amended, may request, in accordance with section 351.213 (1999) of the Department of Commerce (the Department) Regulations, that the Department conduct an administrative review of that antidumping or countervailing duty order, finding, or suspended investigation.

Opportunity To Request a Review

Not later than the last day of December 2000, interested parties may request administrative review of the following orders, findings, or suspended investigations, with anniversary dates in December for the following periods:

	Period
Antidumping Duty Proceedings	
Brazil:	
Certain Carbon Steel Butt-Weld Pipe Fittings, A–351–602	12/1/99–11/30/00
Silicomanganese, A–351–824	12/1/99–11/30/00
Canada: Elemental Sulphur*, A–122–047	12/1/99–12/31/99
Chile: Certain Preserved Mushrooms, A–337–804	8/5/98–11/30/00
Germany: Animal Glue and Inedible Gelatin*, A–428–062	12/1/99–12/31/99

	Period
India: Stainless Steel Wire Rod, A–533–808	12/1/99–11/30/00
Japan:	
Business Telephone Systems & Subassemblies Thereof* A–588–809	12/1/99–12/31/99
Cellular Mobile Telephones and Subassemblies*, A–588–405	12/1/99–12/31/99
Drafting Machines and Parts Thereof, A–588–811	12/1/99–11/30/00
Polychloroprene Rubber, A–588–046	12/1/99–11/30/00
P.C. Steel Wire Strand, A–588–068	12/1/99–11/30/00
Mexico: Porcelain-on-Steel Cooking Ware, A–201–504	12/1/99–11/30/00
New Zealand: Low-Fuming Brazing Copper Wire & Rod*, A–614–502	12/1/99–12/31/99
Republic of Korea: Welded ASTM A–312 Stainless Steel Pipe, A–580–810	12/1/99–11/30/00
Sweden: Welded Hollow Products, A–401–603	12/1/99–11/30/00
Taiwan:	
Business Telephone Systems & Subassemblies Thereof*, A–583–806	12/1/99–12/31/99
Carbon Steel Butt-Weld Pipe Fittings, A–583–605	12/1/99–11/30/00
Porcelain-On-Steel Cooking Ware, A–583–508	12/1/99–11/30/00
Welded ASTM A–312 Stainless Steel Pipe, A–583–815	12/1/99–11/30/00
The People's Republic of China:	
Cased Pencils, A–570–827	12/1/99—11/30/00
Porcelain-on-Steel Cooking Ware, A–570–506	12/1/99–11/30/00
Silicomanganese, A–570–828	12/1/99–11/30/00
Countervailing Duty Proceedings	
Mexico: Porcelain-on-Steel Cooking Ware*, C–201–505	1/1/99–12/31/99
Suspension Agreements	
None.	

*Order revoked effective 01/01/2000, as a result of sunset review.

In accordance with section 351.213(b) of the regulations, an interested party as defined by section 771(9) of the Act may request in writing that the Secretary conduct an administrative review. For both antidumping and countervailing duty reviews, the interested party must specify the individual producers or exporters covered by an antidumping finding or an antidumping or countervailing duty order or suspension agreement for which it is requesting a review, and the requesting party must state why it desires the Secretary to review those particular producers or exporters. If the interested party intends for the Secretary to review sales of merchandise by an exporter (or a producer if that producer also exports merchandise from other suppliers) which were produced in more than one country of origin and each country of origin is subject to a separate order, then the interested party must state specifically, on an order-by-order basis, which exporter(s) the request is intended to cover.

Six copies of the request should be submitted to the Assistant Secretary for Import Administration, International Trade Administration, Room 1870, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW., Washington, DC 20230. The Department also asks parties to serve a copy of their requests to the Office of Antidumping/Countervailing Duty Enforcement, Attention: Sheila Forbes, in room 3065 of the main Commerce Building. Further, in accordance with section 351.303(f)(l)(i) of the regulations, a copy of each request must be served on every party on the Department's service list.

The Department will publish in the **Federal Register** a notice of ''Initiation of Administrative Review of Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation'' for requests received by the last day of December 2000. If the Department does not receive, by the last day of December 2000, a request for review of entries covered by an order, finding, or suspended investigation listed in this notice and for the period identified above, the Department will instruct the Customs Service to assess antidumping or countervailing duties on those entries at a rate equal to the cash deposit of (or bond for) estimated antidumping or countervailing duties required on those entries at the time of entry, or withdrawal from warehouse, for consumption and to continue to collect the cash deposit previously ordered.

This notice is not required by statute but is published as a service to the international trading community.

Dated: December 13, 2000.

Holly A. Kuga,

Acting Deputy Assistant Secretary, Group II for Import Administration.

[FR Doc. 00–32328 Filed 12–19–00; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Export Trade Certificate of Review

ACTION: Notice of Application to Amend an Export Trade Certificate of Review.

SUMMARY: The Office of Export Trading Company Affairs (''OETCA''), International Trade Administration, Department of Commerce, has received an application to amend an Export Trade Certificate of Review (''Certificate''). This notice summarizes the proposed amendment and requests comments relevant to whether the Certificate should be issued.

FOR FURTHER INFORMATION CONTACT: Morton Schnabel, Director, Office of Export Trading Company Affairs, International Trade Administration, (202) 482–5131. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 (15 U.S.C. 4001–21) authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. An Export Trade Certificate of Review protects the holder and the members identified in the Certificate from state and federal government antitrust actions and from private treble damage antitrust actions for the export conduct specified in the Certificate and carried out in compliance with its terms and conditions. Section 302(b)(1) of the Export Trading Company Act of 1982 and 15 CFR 325.6(a) require the

Secretary to publish a notice in the **Federal Register** identifying the applicant and summarizing its proposed export conduct.

Request for Public Comments

Interested parties may submit written comments relevant to the determination whether an amended Certificate should be issued. If the comments include any privileged or confidential business information, it must be clearly marked and a nonconfidential version of the comments (identified as such) should be included. Any comments not marked privileged or confidential business information will be deemed to be nonconfidential. An original and five (5) copies, plus two (2) copies of the nonconfidential version, should be submitted no later than 20 days after the date of this notice by email to oetca@ita.doc.gov, or by mail to: Office of Export Trading Company Affairs, International Trade Administration, Department of Commerce, Room 1104, Washington, DC 20230. Information submitted by any person is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552). However, nonconfidential versions of the comments will be made available to the applicant if necessary for determining whether or not to issue the Certificate. Comments should refer to this application as ''Export Trade Certificate of Review, application number 88–3A012.''

The National Tooling and Machining Association (''NTMA'') original Certificate was issued on October 18, 1988 (53 FR 43140, October 25, 1988), and was last amended on May 5, 2000 (65 FR 30073, May 10, 2000). A summary of the application for an amendment follows.

Summary of the Application

NTMA wishes to amend its certificate to:

(1) Add the attached List 1 of firms as ''Members'' of the Certificate within the meaning of section 325.2(1) of the Regulations (15 CFR 325.2(1)).

(2) Remove the attached List 2 of firms as ''Members'' of the Certificate within the meaning of section 325.2(1) of the Regulations (15 CFR 325.2(1)).

Dated: December 14, 2000.

Morton Schnabel,

Director, Office of Export Trading Company Affairs.

Attachment List 1: Firms To Be Added as Members

A. C. Grinding & Supply Co. Inc.—Levittown, PA
A C Mfg. Co. Inc.—Malden, MA
AMS Production Machining Inc.—Plainfield, IN
A Mfg.—Grand Terrace, CA
ARG Manufacturing Corp.—Arlington, TX
AR Industries Inc.—Cincinnati, OH
A–1 Precision Metal Products—Phoenix, AZ
Absolute Turning & Machine—Tucson, AZ
Harrison Enterprise, Inc.—Phoenix, AZ
Accurate Machine Co. Inc.—Indianapolis, IN
Acklin Stamping—Toledo, OH
Action Mold & Tool Co.—Anaheim, CA
Advanced Tooling Specialists—Menasha, WI
Aggressive Tool & Die, Inc.—Coopersville, MI
Akro Tool Co., Inc.—Cincinnati, OH
All Precision Mfg., LLC—Nokomis, IL
American Precision Hydraulics—Huntington Beach, CA
Andrew Tool Company, Inc.—Plymouth, MN
Applied Technology Manufacturing—Owego, NY
Aram Precision Tool & Die, Inc.—Chatsworth, CA
Aremco, Inc.—Grand Rapids, MN
Armstrong Technology, Inc.—Sunnyvale, CA
Arnette Pattern Company—Granite City, IL
Artisan Associates—Detroit, MI
Assistant Buyer, Inc.—Beverly, MA
Atec Engineering—Phoenix, AZ
Automation Technology, Inc.—Fenton, MO
Axis Mfg. Inc.—Tempe, AZ
B & M Machine Corporation of Racine—Racine, WI
BSB Products Corporation—Buffalo, NY
B2BXchange, Inc.—Eden Prairie, MN
Bardons & Oliver, Inc.—Solon, OH
The Baughman Group—Louisville, KY
Beckett Gas, Inc.—North Ridgeville, OH
Benning Inc.—Blame, MN
Black Creek, Inc.—Gadsden, AL
Blow Mold Solutions, Inc.—Grandview, MO
Bob's Tool & Cutter Grinding,—Indianapolis, IN
Bopp-Busch Manufacturing Company—Au Gres, MI
Boss Tool and Manufacturing, Inc—Fremont, CA
Bourdelais Grinding Co., Inc.—Chatsworth, CA
Bradford Machine Company Inc.—Brattleboro, VT
Bratt Machine Company Inc.—No. Andover, MA
Brij Systems—Wichita, KS
Brittain Machine, Inc.—Wichita, KS
C & G Machine & Tool Co.,Inc.—Granby, MA
C & W Machine—Indianapolis, IN
CNC Precision Manufacturing—Farmers Branch, TX
CPC Tooling Technologies—Columbus, OH
Campbell Machinery, Inc.—Stow, OH
Campro Manufacturing, Inc.—Phoenix, AZ
Capacity Web.com Inc.—Chicago, IL
Carlin Machine Company, Inc.—Southborough, MA
Castle Precision Products—Stockton, CA
Cavalry Precision Machine Inc.—Largo, FL
Central Industrial Supply—Grand Prairie, TX
Clark Automation Manufacturing—Pleasanton, CA
Colbrit Manufacturing Co., Inc.—Chatsworth, CA
Complete Tool & Die, Inc.—St. James, MO
Coosa Machine Company, LLC—Rainbow City, AL
Creative Machining & Mfg., Inc.—Largo, FL
Crosrol, Inc.—Greenville, SC
Cutting Edge Manufacturing—Scottsdale, AZ
D & S Mold & Tool Company, Inc.—Marinette, WI
D. F. O'Brien Precision Machining—Santa Fe Springs, CA
DJM Mfg.—Sunnyvale, CA
DT Scheu & Kniss—Louisville, KY
Daca Machine & Tool, Inc.—Dutzow, MO
Die-Namic Tool & Mfg., Inc.—Rockford, IL
Distefano Tool & Mfg. Company—Omaha, NE
Diversified Tooling Innovations,—Racine, WI
Dukowitz Machine Inc.—Nikiski, AK
E & S Precision Machine, LLC—Modesto, CA
E K L Machine Company, Inc.—Andalusia, PA
Elkhart Machine Group—Elkhart, IN
Ellis Tool & Machine, Inc.—Tom Bean, TX
Engineered Machine Tool, Inc.—Wichita, KS
Entela, Inc.—Grand Rapids, MI
EROWA Technology Inc.—Arlington Hts., IL
Extreme Machine LLC—Phoenix, AZ
F P Pla Tool & Manufacturing Co.—Buffalo, NY
Famco Machine Company—Clarksville, TN
Farrar Corporation—Norwich, KS
Foresight Technologies—Tempe, AZ
Four Pro Machine—Wichita, KS
Free-MaDie Company—Kittanning, PA
FreeMarkets—Pittsburgh, PA
Fries Machine & Tool, Inc.—Christiansburg, OH
Gasaway Manufacturing LLC—Beasley, TX
Gillilan Machine Co., Inc.—Mt. Juliet, TN

Glidden Machine & Tool, Inc.—North Tonawanda, NY
Godwin-SBO, L.P.—Houston, TX
Grand Valley Manufacturing—Titusville, PA
Gustav's Tool & Die, Inc.—Seguin, TX
H & H Machine Company—Whittier, CA
H Brauning Company, Inc.—Manassas, VA
Hewitt Machine & Tool, Inc.—Hewitt, TX
Howard Tool Co. Inc.—Hampden, ME
Hurricane Machine Company, LLC—Dallas, TX
Hyde Special Tools—Saegertown, PA
IMS, Inc.—Decatur, AL
IndTool, Inc.—Burlington, NC
Independent Forge Company—Orange, CA
Integrated Fabrication and Machine—Sharpsville, PA
Integrity Manufacturing—Colorado Springs, CO
International Tooling & Stamping—Mt.Juliet, TN
J & L Development, Inc.—Keithville, LA
J & W Manufacturing—Phoenix, AZ
J R Custom Metal Products, Inc.—Wichita, KS
JRM Machine Company—St. Paul, MN
J2 Precision CNC, Inc.—Phoenix, AZ
Jasco Tools, Inc.—Rochester, NY
K. D. K. Inc.—Prescott, AZ
Kalman Machining—Richmond, CA
Karlee—Garland, TX
Karsten Precision—Phoenix, AZ
Kelly & Thome—Pomona, CA
Kennebec Tool & Die Co., Inc.—Augusta, ME
Knight Industries Precision—Corona, CA
L & L Tool & Die—Gardena, CA
L. P. Engineering Co.—Carson, CA
L R G Corporation—Jeannette, PA
L S Technologies, Inc.—Fort Mill, SC
Lange Precision, Inc.—Fullerton, CA
Las Cruces Machine—Las Cruces, NM
Laser Fabrication & Machine—Alexandria, AL
Lavelle Machine—Westford, MA
Leech Industries, Inc.—Meadville, PA
Lemco-Miller Corporation—Danvers, MA
Machine Works, Inc.—Phoenix, AZ
Mack Tool & Engineering—South Bend, IN
Madden Machine Works—Torrance, CA
Mfgconnect Inc.—Missoula, MT
ManufacturingQuote.com, Inc.—Smyrna, GA
Marion Tool and Die, Inc.—Terre Haute, IN
Master Craft Precision—Milpitas, CA
Master Precision Mold Technology—Greenville, MI
Matrix Tool Company—Fraser, MI
Mecca Machine and Tool, Inc.—Erie, MI
Mechanical Drive Components, Inc—Chicopee, MA
Metal-Tek Machining Inc.—Phoenix, AZ
Metalcraft, Inc.—Tempe, AZ
Miami Tool & Die, Inc.—Huntington, IN
Moldesign, Inc.—Knoxville, TN
Morris Machine Co., Inc.—Indianapolis, IN
Neutronics, Inc.—Phoenix, AZ
New England Precision Grinding—Holliston, MA
Noremac Manufacturing Corp.—Westboro, MA
Northeast Industrial—Hyde Park, MA
Norton Advanced Ceramics—White House, TN
Numerical Concepts, Inc.—Terre Haute, IN
Omni Machine Works, Inc.—Conyers, GA
Optimized EDM—Santa Clara, CA
Orchard Machine, Inc.—Byron Center, MI
Performance Machining Inc.—Irwin, PA
Perlos, Inc.—Fort Worth, TX
Phoenix Metallics—Phoenix, AZ
Pinnacle Precision Co.—Glassport, PA
Piper Plastics, Inc.—Chandler, AZ
Pleasant Precision, Inc.—Kenton, OH
Polaris Machining, Inc.—Marysville, WA
Post Enterprises, Inc.—Wichita, KS
Precise Engineering—Lowell, MI
Precision Deburring Enterprises—Sun Valley, CA
Precision Machine Technologies—Rochester, NY
Precision Machine Works—Aiken, SC
Precision Matters, Inc.—San Francisco, CA
Prince Machine—Holland, MI
Profab Industries L.L.C.—Phoenix, AZ
Progressive Tool & Die, Inc.—Meadville, PA
Prototype & Plastic Mold Co.,—Middletown, CT
Quality Grinding & Machining,—Bridgeport, CT
Quality Grinding and Machine—Rainbow City, AL
Quantum Manufacturing, Inc.—Burbank, CA
R & R Precision Machine, Inc.—Wichita, KS
R Davis EDM—Anaheim, CA
R. T. Callahan Machine Products—Dublin, PA
Radiant Technologies—Phoenix, AZ
Reata Engineering & Machine—Englewood, CO
RedSpark, Inc.—San Francisco, CA
Reed Precision Microstructures—Santa Rosa, CA
Rickman Machine Company—Wichita, KS
Rid-Lom Precision Tool Corp.—Rochester, NY
Roberts Tool & Die Company—Chillicothe, MO
Rogers Enterprises—Rochester, NY
Roll-Kraft—Mentor, OH
S & P Machine & Tool Co., L.L.C.—Toledo, OH
S.M.G. LLC—Buffalo, NY
STM Manufacturing—Holland, MI
Salamon Manufacturing Inc.—Middletown, CT
Saliba Industries, Inc.—Highwood, IL
Salomon Smith Barney—Washington, DC
Satran Technical Enterprises—Mayer, AZ
Savco Manufacturing Co. Inc.—Union, MO
Schwartz Industries, Inc.—Warren, MI
The Sherman Corporation—Inglewood, CA
Sibley Machine & Foundry Corp.—South Bend, IN
Sirois Tool Co. Inc.—Berlin, CT
Southwest Manufacturing, Inc.—Wichita, KS
Spirex Southwest—Gainesville, TX
Springfield Manufacturing, LLC—Clover, SC
Stedcraft Inc.—Torrington, CT
Stone Machine & Tool, Inc.—North Royalton, OH
Stonewall Jackson Mold Inc.—Annville, KY
Streamline Tooling Systems—Muskegon, MI
Sturman Industries—Woodland Park, CO
Superbolt, Inc.—Carnegie, PA
Superior Programming LLC—Clearwater, KS
Swiss Wire E D M—Costa Mesa, CA
Target Precision—Meadville, PA
Thayer Aerospace—Wichita, KS
Toledo Molding & Die Inc.—Toledo, OH
Tran Engineering—Garden Grove, CA
Transmatic Manufacturing—Tempe, AZ
Triumph Manufacturing, Inc.—East Hartford, CT
Tropic Tool & Mold, Inc.—Albertville, AL
Tru-Stop, Inc.—Prescott Valley, AZ
21st Century Tool & Die, Inc.—Waynesboro, TN
USBX, Inc.—Santa Monica, CA
Ultra Tool Company—Grantsburg, WI
Universal Brixius Inc.—Milwaukee, WI
Valley Tool & Mfg. Inc.—Grayslake, IL
Value Tool & Engineering, Inc.—South Bend, IN
Varco Systems—Orange, CA
Vico Louisville—Louisville, KY
W.A.C. Consulting/Coss Systems—Northboro, MA
Waiteco Machine—Acton, MA
Westfield Manufacturing Corp.—Westfield, IN
Wiesen EDM, Inc.—Belding, MI
Wintech Industries Inc.—Tempe, AZ

Attachment List 2: Firms To Be Deleted as Members

AAA Machine Inc.—Rochester, NY
ANT Inc.—Tullahoma, TN

A T G, Inc.—Houston, TX
A-W Engineering Company, Inc.—Santa Fe Springs, CA
A–1 Machining Company—New Britain, CT
Abrasive Machining Inc.—Rockford, IL
Accu-Fab, Inc.—Richardson, TX
Accu-Right Laser Corporation—Villa Ridge, MO
Accurate Machineworks, Inc.—Newport Beach, CA
AccuRounds—Avon, MA
Acra Aerospace, Inc.—Anaheim, CA
Action Tool & Manufacturing Inc.—Dallas, TX
Aerofast Ltd.—Scottsdale, AZ
Aerospec, Inc.—Chandler, AZ
Aircraft Hinge, Inc.—Valencia, CA
Alkron Manufacturing Corporation—Rochester, NY
Allied Die & Tool Works of—Rockford, IL
Alloy Tool Steel, Inc.—Santa Fe Springs, CA
Alpa Precision Machine Works—Houston, TX
Alta Engineering, Inc.—Sun Valley, CA
Aluminum Precision Products, Inc.—Santa Ana, CA
Amcraft Corporation—Oceanside, CA
Ames Engineering Corp.—Wilmington, DE
Anchor Lamina Inc.—Cheshire, CT
Apex Machine Tool Company, Inc.—Farmington, CT
Arc Weld Inc./A.W.I.—West Newton, PA
Arrow Tool & Gage Company, Inc.—Tulsa, OK
Atlantis Tool Corporation—Rochester, NY
Atols Tool & Mold Corporation—Schiller Park, IL
Automation Technologies Corp.—Cranston, RI
Axis Machining Inc.—Slatersville, RI
B & B Machine Products—Hayward, CA
B & W Tool & Die, Inc.—Dallas, TX
BNB Manufacturing Company, Inc.—Winsted, CT
Baker Valve & Machine Service—Zachary, LA
Beck Tool Incorporated—Edinboro, PA
Behrens & Peatman LLC—Bristol, CT
Beja Precision Manufacturing—Rochester, NY
Bell Tool, Inc.—Germantown, WI
Best Carbide Cutting Tools, Inc.—Gardena, CA
Blankinship Industries, Ltd.—Kent, WA
Boehnen Tool Company—Cleveland, OH
Bollinger Tool & Die, Inc.—Toledo, OH
Brimfield Precision—Brimfield, MA
Brink's Machine Company, Inc.—Alma, MI
Bromac, Inc.—Mountain View, CA
Brown Production, Inc.—Kent, WA
Burtree, Inc.—Van Nuys, CA
C & A Machine Co., Inc.—Newington, CT
C Q Machining, Inc.—Phoenix, AZ
California Composite Design, Inc.—Santa Ana, CA
California Reamer Company Inc.—Santa Fe Springs, CA
Cambridge Tool & Manufacturing—North Billerica, MA
CDL Manufacturing, Inc.—Rochester, NY
Cedar CNC Machining, Inc.—Cedar Springs, MI
Cer Mac Inc.—Horsham, PA
Chapman Machine Company, Inc.—Bristol, CT
Chip-Makers Tooling Supply—Whittier, CA
Classic Wire Cut Company, Inc.—Valencia, CA
Clifton Technical Company—Lincolnton, NC
Coleman-Fabro, Inc.—Morgan Hill, CA
Commercial Aircraft Products,—Wichita, KS
Companion Industries, Inc.—Southington, CT
Coventry Carbide Tool—Coventry, RI
Crowe Manufacturing Services Inc.—Dayton, OH
D & M Precision Manufacturing—Vandergrift, PA
Davis Technologies, Inc.—Poway, CA
Delta Systems, Inc.—Streetsboro, OH
Desselle Maggard Corporation—Baton Rouge, LA
Diamond Mold & Die, Inc.—Talimadge, OH
Droitcour Company—Warwick, RI
Dytran Instruments, Inc.—Chatsworth, CA
Eagle Metaicraft, Inc.—East Syracuse, NY
Eagle Tool & Die Company Inc.—Malvern, PA
Eastern Tool & Die, Inc.—Newington, CT
Edwards Enterprises—Newark, CA
Egbert Precision, Inc.—Woodland Park, CO
Electropolishing shop, Inc.—Santa Clara, CA
Encore Manufacturing Corporation—Cleveland, OH
Engbrecht Tool, Inc.—San Jose, CA
Enterprise Die & Mold, Inc.—Grandville, MI
Excel Tool & Mfg.—Lenexa, KS
Fidelity Tool & Machine Company,—Fort Lauderdale, FL
First Precision Machine, LLC—Blame, MN
Forrest Manufacturing Company—Houston, TX
Foundry Service & Supplies, Inc.—Torrance, CA
Four-D Tool Company West—Hartford, CT
Frederick's Machine Shop—New Iberia, LA
Fremont Plastic Molds—Fremont, OH
Fulton Tool Company, Inc.—Fulton, NY
Future Tool, Inc.—Rockford, IL
G. C. Stephens Tool & Machine—St. Peters, MO
G F S, Inc.—Cleveland, OH
General Weldments Inc.—Irwin, PA
Gerlach Machine & Tool, Inc.—St. Henry, OH
Giddings & Lewis—Dayton, OH
Goebel Machine Service, Inc.—Kansas City, MO
Granger Machine & Tool, Inc.—Granger, IN
H & H Machine & Tool Company—Woonsocket, RI
H & J Tool and Die Co., Inc.—Bohemia, NY
Harding Machine—East Liberty, OH
Hayden Precision Industries—Orchard Park, NY
Hi-Speed Machine Products—Kensington, CT
High Tech West, Inc.—Signal Hill, CA
Huntington Beach Machining—Huntington Beach, CA
I M I, Incorporated—Beaumont, TX
Ideality Inc.—Stanwood, WA
Industrial Engravers, Inc.—Claremont, NH
Inshield Die & Stamping Co.—Toledo, OH
J & S Centerless Grinding—New Britain, CT
J D C Manufacturing, Inc.—Redwood City, CA
Jackson's Precision Machine Co.—Nashville, TN
Jaques Diamond Tool, Inc.—Indianapolis, IN
Jasco Tools, Inc.—Rochester, NY
Jaycraft Corporation—Spring Valley, CA
Jeropa Swiss Precision, Inc.—Escondido, CA
Jetstream Water Cutting, Inc.—Hayward, CA
Johnstone Engineering & Machine—Parkesburg, PA
KG Tool Company—Madison Township, OH
Kamet—Santa Clara, CA
Keystone Electric Co., Inc.—Baltimore, MD
Kleen Cut Tool, Inc.—Addison, IL
Knight Machine & Tool—South Hadley, MA
Krato Products Corporation—St. Louis, MO
Lancaster Tool & Machine, Inc.—Lancaster, PA
LAR–VEL Engineering—Rialto, CA
LeFiell Manufacturing Company—Santa Fe Springs, CA
Liberty Machine Inc.—Fremont, CA
M & B Tool—Baldwinsville, NY
M P T America Corporation—Valencia, CA
M W Industries, Inc.—Houston, TX
Macnab Manufacturing, Inc.—Kent, WA

Magnolia Ironworks, Inc.—Lafayette, LA
Manufacturers Tool & Die—Spencerport, NY
Marena Industries, Inc.—East Hartford, CT
Mark Mold—Sanford, MI
Marton Tool & Die Company, Inc.—Grand Rapids, MI
Mason Electric Company—San Fernando, CA
Mastercraft Precision, Inc.—Milpitas, CA
Matrix Machine, Inc.—Tempe, AZ
Maxcor Manufacturing, Inc.—Colorado Springs, CO
McDanniels Machinery Company—Erie, PA
MechTronics of Arizona Corp.—Phoenix, AZ
R Meschkat Precision Machining—Valencia, CA
Metal Tronics, Inc.—Haverhill, MA
Metalsa—Perfek—Novi, MI
Milturn Corporation—Indianapolis, IN
Mo-Tech Corporation—Oakdale, MN
Mullen Industries Inc.—St. Clair, MO
Nicholson Precision Instruments,—Gaithersburg, MD
Norfil Manufacturing, Inc.—Pacific, WA
O A R Moldworks—Providence, RI
Orange County Grinding—Anaheim, CA
Orix Credit Alliance, Inc.—Charlotte, NC
Ott Brothers Machine Company—Wichita, KS
Pace Precision Products, Inc.—Dubois, PA
Pacific Tool Corporation—Englewood, CO
Part-Rite, Inc.—Cleveland, OH
Perry Technology Corporation—New Hartford, CT
Phoenix Precision Pattern Corp.—Mesa, AZ
Pinnacle Tool & Engineering—Cleveland, OH
Pioneer Motor Bearing Company—South San Francisco, CA
Precise Technology, Inc.—N. Versailles, PA
Precision CNC Products—Canyon Country, CA
Precision Lasers—Rochester, NY
Precision Valve, Inc.—Reno, NV
Production Tool & Die Co., Inc.—Charlotte, NC
Professional Machine Works, Inc.—Houston, TX
Progressive Machine & Design, LLC—Victor, NY
Prospect Mold Inc.—Cuyahoga Falls, OH
Puget Plastics Corporation—Tualatin, OR
Pursuit Incorporated—Buffalo, NY
Pyramid Tool—Dayton, OH
Quality Machine Inc.—Plaistow, NH
Quality Tool & Mfg.—San Leandro, CA
Quantum Grinding—Lyons, IL
Quartztek Incorporated—Phoenix, AZ
Quick Turn Machine Co. Inc.—Windsor Locks, CT
Radax Industries Inc.—Webster, NY
Revtek—Portland, OR
Rhode Island Precision Co., Inc.—Providence, RI
Ripley Machine Company, Inc.—Akron, OH
Rivera Industrial Precision—Bellflower, CA
Ron Mills and Company—Walnut, CA
Ronal Tool Company, Inc.—York, PA
Rovi Products Incorporated—Simi Valley, CA
S & B Jig Grinding, Inc.—Loves Park, IL
SKS Die Casting and Machining,—Alameda, CA
S R P M, Inc.—Solon, OH
Safety Components International—Costa Mesa, CA
Safety Line—Oakland, CA
Samaniego Enterprises, Inc.—Tucson, AZ
San Val Grinding Company—Burbank, CA
SEPCO–ERIE—Erie, PA
Serco—Covina, CA
Siam Precision, Inc.—Phoenix, AZ
Sisson Engineering Corp.—Northfield, MA
The Soares Company, Inc.—Danvers, MA
Southbridge Tool & Manufacturing—Dudley, MA
Southwest Precision Machining, Inc.—North Royalton, OH
Special Tool & Engineering Corp.—Indianapolis, IN
Specialty Machines, Inc.—Dayton, OH
Spectra-Physics Lasers Inc.—Oroville, CA
Square Deal Engineered Tooling—Elkhart, IN
Standard Metals, Inc.—Hartford, CT
Star Route Tool—Townville, PA
Stott Tool & Machine Company—Amityville, NY
Summit Tool & Mold Inc.—Dayton, OH
Sun E.D.M., Inc.—Tempe, AZ
Superior Tool & Manufacturing—Branchburg, NJ
Swenton Tool & Die Company—Phoenix, NY
Swiss Specialties, Inc.—Bohemia, NY
Swissline Precision Mfg. Inc.—Cumberland, RI
TC Precision Machine Inc.—Dayton, OH
TAB Manufacturing Corporation—Plainville, CT
Tenneco Automotive/Monroe Auto—Hartwell, GA
Tidewater Machine Company—White Plains, MD
Tool & Die Productions—Erie, PA
Trico Industries, Inc.—Lexington, TN
Trim Systems, Inc.—Seattle, WA
Trio Manufacturing, Inc.—El Segundo, CA
Triplex Industries, Inc.—Rochester, NY
Tura Machine Company—Foicroft, PA
Tydan Machining, Inc.—Denton, TX
Unitech Enterprises, Inc.—Rowland Heights, CA
United Stars Aerospace, Inc.—Kent, WA
UT Technologies, Inc.—Los Angeles, CA
Vals Tool & Die Corp.—Mount Vernon, NY
Vantage Mold & Tool Company—Akron, OH
Versa-Tool, Inc.—Meadville, PA
Vogform Tool & Die Company, Inc.—West Springfield, MA
W M C Grinding, Inc.—Santa Fe Springs, CA
Walco Tool & Engineering Corp.—Lockport, IL
Weldex, Inc.—Warren, MI
West Milton Precision Machine—Vandalia, OH
Western Machining, Inc.—Fullerton, CA
Williams Controls Industries,—Portland, OR
Wilson Engineering—Arleta, CA
Wire Tech, LLC—Watertown, CT
Yorktown Precision Technologies,—Yorktown, IN
Zakar Inc.—Brockport, NY

[FR Doc. 00–32373 Filed 12–19–00; 8:45 am]
BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 121300B]

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council will convene a public meeting of the Shrimp Advisory Panel (AP).

DATES: The Shrimp AP meeting is scheduled to begin at 8:30 a.m. on Monday, January 8, 2001.

ADDRESSES: The meeting will be held at the at the Imperial Palace Hotel 850 Bayview, Biloxi, MS 39530; telephone: 228-436-3000.

Council address: Gulf of Mexico Fishery Management Council, 3018 U.S. Highway 301 North, Suite 1000, Tampa, FL 33619.

FOR FURTHER INFORMATION CONTACT: Dr. Richard Leard, Senior Fishery Biologist, Gulf of Mexico Fishery Management Council, 3018 U.S. Highway 301 North, Suite 1000, Tampa, FL 33619; telephone: 813-228-2815.

SUPPLEMENTARY INFORMATION: The Shrimp AP will convene to review a revision to Draft Amendment 11 to the Shrimp Fishery Management Plan (FMP) that provides revised alternatives for registrations of shrimp craft and additional analyses of impacts of permitting and registration alternatives. The Shrimp AP will also review an Options Paper for Amendment 10 to the Shrimp FMP that includes alternatives for additional bycatch measures in the Gulf. Finally, the Shrimp AP will receive reports from NMFS on the status and health of shrimp stocks in the Gulf and the effects of the 2000 Cooperative Shrimp Closure with the state of Texas. The Shrimp AP may make recommendations for a cooperative closure with Texas for 2001.

The Shrimp AP consists principally of commercial shrimp fishermen, dealers, and association representatives.

Although other non-emergency issues not on the agendas may come before the AP for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during these meetings. Actions of the AP will be restricted to those issues specifically identified in the agendas and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take action to address the emergency.

Copies of the agenda can be obtained by calling 813-228-2815.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Anne Alford at the Council (see **ADDRESSES**) by January 2, 2001.

Dated: December 14, 2000.

Richard W. Surdi,

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

[FR Doc. 00–32423 Filed 12–19–00; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 121500A]

Western Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Western Pacific Fishery Management Council will convene a public meeting of its precious corals plan team to discuss Council issues in relation to precious coral quotas in the Hawaiian Exploratory Area.

DATES: The meeting will be held January 5, 2001, from 9–11 a.m.

ADDRESSES: The meeting will be held at the Western Pacific Fishery Management Council office conference room, telephone (808) 522–8220.

Council Address: Western Pacific Fishery Management Council, 1164 Bishop Street, Suite 1400, Honolulu, HI 96813.

FOR FURTHER INFORMATION CONTACT: Kitty M. Simonds, Executive Director; telephone (808) 522–8220.

SUPPLEMENTARY INFORMATION: The Plan Team will discuss and may make recommendations to the Council on the agenda items below. The order in which the agenda items will be addressed is tentative. The agenda will be as follows:

A. Introduction

B. Review of the 107th Council Meeting

C. Estimation of gold coral growth rates

D. Adjustment of the Hawaiian Exploratory Area quota

E. Other Business

F. Summary of Recommendations

Although non-emergency 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. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kitty M. Simonds, (808) 522–8220 (voice) or (808) 522–8226 (fax), at least 5 days prior to the meeting date.

Dated: December 15, 2000.

Richard W. Surdi,

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

[FR Doc. 00–32425 Filed 12–19–00; 8:45 am]

BILLING CODE: 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 121200I]

Endangered Species; Permits

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

ACTION: Issuance of incidental take permit No.1269.

SUMMARY: Notice is hereby given that NMFS has issued a permit to Central Hudson Gas & Electric Corporation (CHGE) / Dynegy Danskammer, L.L.C. and Dynegy Roseton, L.L.C. that authorizes, subject to certain conditions set forth therein, take of the Endangered Species Act-listed shortnose sturgeon, incidental to the operation of the Roseton and Danskammer Point power plants on the Hudson River, New York.

ADDRESSES: The application and related documents are available for review in the following office by appointment:

Endangered Species Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910 or Protected Resources Division, F/NER3, One Blackburn Dr., Gloucester, MA 01930 (phone: 978-281-9328, fax: 978-281-9394).

FOR FURTHER INFORMATION CONTACT: Donna Brewer, Silver Spring, MD, phone: 301-713-1401; fax: 301-173-0376; e-mail: Donna.Brewer@noaa.gov or Mary Colligan, Gloucester, MA, phone: 978-281-9116; fax: 978-281-9394; e-mail: Mary.A.Colligan@noaa.gov.

SUPPLEMENTARY INFORMATION: The permit was issued under the authority of section 10(a)(1)(B) of the Endangered Species Act of 1973 (ESA)(16 U.S.C. 1531-1543) and the NMFS regulations governing ESA-listed fish and wildlife Permits (50 CFR parts 222-227). Issuance is based on a finding that such permits: (1) are applied for in good faith; (2) would not operate to the disadvantage of the listed species which are the subject of the permit; and (3) are consistent with the purposes and policies set forth in section 2 of the ESA. Authority to take listed species is subject to conditions set forth in the permit.

The covered activities include the operation of the two power plants on the Hudson River as described in the ''Conservation Plan for the Incidental Take of Shortnose Sturgeon at the Roseton and Danskammer Point Generating Stations'' and in the Environmental Assessment.

The publication on August 9, 2000 (65 FR 48677), notified that an application had been filed by CHGE for a permit to incidentally take endangered shortnose sturgeon from the Hudson River distinct population segment of shortnose sturgeon at the Roseton and Danskammer Point power plants on the Hudson River. CHGE submitted an application including a Conservation Plan (CP) on April 20, 2000. The CP describes measures designed to avoid, minimize, mitigate, and monitor the incidental take of shortnose sturgeon associated with operation of the Roseton and Danskammer Point power plants. The decision to issue a permit for the activities as described in the CP is based on a thorough review of the alternatives and of their environmental consequences. The terms and conditions of this permit ensure that the incidental take of shortnose sturgeon through the operation of Roseton and Danskammer Point power plants will not appreciably reduce the likelihood of the survival and recovery of shortnose sturgeon in the Hudson River.

NMFS staff worked with CHGE during the development of the application. During these discussions, CHGE said that the plants would likely be sold to a new owner. Following submission of the application materials, CHGE notified NMFS that it had entered into an agreement to sell Danskammer and Roseton Power Plants to Dynegy. The only commenter on the draft Conservation Plan (CP), Implementing Agreement (IA) and Environmental Assessment (EA) also was aware of the sale and attached a copy of a press release from CHGE announcing the pending sale to Dynegy. The parties plan to complete the sale by the end of the year. NMFS has now been officially informed by CHGE that the buyer will be Dynegy Danskammer, L.L.C. and Dynegy Roseton, L.L.C. Both CHGE and Dynegy have requested that Dynegy be added as a co-applicant and co-permittee in this permit issuance process, as provided for in NMFS' regulations. As explained in correspondence from CHGE and Dynegy; Dynegy Danskammer, L.L.C. and Dynegy Roseton, L.L.C. are willing to agree to all of the terms and conditions included in the Conservation Plan submitted by CHGE, the IA, and the permit.

Issuance of the permit was based on a finding that CHGE and Dynegy Danskammer, L.L.C. and Dynegy Roseton, L.L.C. had met the permit issuance criteria of 50 CFR 222.307(c). Permit 1269, issued on November 29, 2000, expires on December 31, 2015.

Dated: December 14, 2000.

Wanda L. Cain,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 00–32422 Filed 12–19–00; 8:45 am]

BILLING CODE: 3510–22–S

DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

RIN 0651–AB29

Standard for Declaring a Patent Interference

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Notice and request for comments.

SUMMARY: The Director of the United States Patent and Trademark Office has discretion to declare an interference involving a patent application. The current standard requires a two-way patentability analysis for the Director to be of the opinion that an interference-in-fact exists. In view of public commentary suggesting that, at least in some cases, a one-way patentability analysis should be sufficient, USPTO provides reasons for the current standard and solicits comments on the propriety of that standard.

DATE: Submit comments on or before January 31, 2001.

ADDRESSES: Send all comments:

1. Electronically to ''*Interference.Rules@uspto.gov*'', Subject: ''Interference-in-fact'';
2. By mail to Director of the United States Patent and Trademark Office, BOX INTERFERENCE, Washington, D.C. 20231, ATTN: ''Interference-in-Fact''; or
3. By facsimile to 703–305–0942, ATTN: ''Interference-in-fact''.

FOR FURTHER INFORMATION CONTACT: Fred E. McKelvey or Richard Torczon at 703–308–9797.

SUPPLEMENTARY INFORMATION: The patent statute provides that ''[w]henever an application is made for a patent which, in the opinion of the Director, would interfere with any pending application, or with any unexpired patent, an interference may be declared * * *'' 35 U.S.C. 135(a). ''It is * * * [the Director] who is to judge (be of opinion) whether an application will interfere with a pending one * * *'' *Ewing* v. *United States ex rel. Fowler Car Co.,* 244 U.S. 1, 11 (1917). The duty imposed upon the Director to declare an interference involves the exercise of judgment upon the facts presented and cannot be controlled by mandamus. *United States ex rel. International Money Machine Co.* v. *Newton,* 47 App. D.C. 449, 450 (1918). A party does not have a right to have the Director declare an interference. *United States ex rel. Troy Laundry Machinery Co.* v. *Robertson,* 6 F.2d 714, 715 (D.C. Cir. 1925). Likewise, a third-party has no right to intervene in the prosecution of a particular patent application to prevent issuance of a patent. *Animal Legal Defense Fund* v. *Quigg,* 932 F.2d 920, 930, 18 USPQ2d 1677, 1685 (Fed. Cir. 1991).

An interference is declared when two parties are claiming the ''same patentable invention.'' 37 CFR 1.601(i). An ''interference-in-fact,'' a term of art in patent law, exists when at least one claim of a first party and at least one claim of a second party define the same patentable invention. 37 CFR 1.601(j). The phrase ''same patentable invention'' is defined as follows at 37 CFR 1.601(n) (emphasis in original):

> Invention ''A'' is *the same patentable invention* as an invention ''B'' when invention ''A'' is the same as (35 U.S.C. 102) or is obvious (35 U.S.C. 103) in view of invention ''B'' assuming invention ''B'' is prior art with respect to invention ''A''. Invention ''A'' is a *separate patentable invention* with respect to invention ''B'' when invention ''A'' is new (35 U.S.C. 102) and non-obvious (35 U.S.C. 103) in view of invention ''B'' assuming invention ''B'' is prior art with respect to invention ''A''.

Recent precedent of the Trial Section of the Interference Division of the Board of Patent Appeals and Interferences confirms that resolution of whether an interference-in-fact exists involves a two-way patentability analysis. *Winter* v. *Fujita,* 53 USPQ2d 1234, 1243 (BPAI 1999), *reh'g denied,* 53 USPQ2d 1478 (BPAI 2000):

> The claimed invention of Party A is presumed to be prior art vis-a-vis Party B and vice versa. The claimed invention of Party A must anticipate or render obvious the claimed invention of Party B *and* the claimed invention of Party B must anticipate or render obvious the claimed invention of Party A. When the two-way analysis is applied, then regardless of who ultimately prevails on the issue of priority, * * * [USPTO] assures itself that it will not issue two patents to the same patentable invention.

The *Winter* v. *Fujita* rationale is consistent with examples set out in the supplemental information accompanying the final rule, Patent

Interference Proceedings, published at 49 FR 48416 on December 12, 1984. In this respect, attention is directed to Examples 3, 4 and 5 of that notice, 49 FR at 48420:

Example 3: Application E contains patentable claims 1 (engine), 2 (6-cylinder engine), and 3 (engine with a platinum piston). Application F contains patentable claims 11 (engine) and 12 (8-cylinder engine). Claims 1 and 2 of application E and claims 11 and 12 of application F define the same patentable invention. Claim 3 of application E defines a separate patentable invention from claims 1 and 2 of application E and claims 11 and 12 of application F. If an interference is declared, there would be one count (engine). Claims 1 and 2 of application E and claims 11 and 12 of application F would be designated to correspond to the count. Claim 3 of application E would not be designated to correspond to the count.

Example 4: Application G contains patentable claims 1 (engine), 2 (6-cylinder engine), and 3 (engine with a platinum piston). Application H contains patentable claims 11 (engine) and 15 (engine with a platinum piston). Claims 1 and 2 of application G and claim 11 of application H define the same patentable invention. Claim 3 of application G and claim 15 of application H define a separate patentable invention from claims 1 and 2 of application G and claim 11 of application H. If an interference is declared, there would be two counts: Count 1 (engine) and Count 2 (engine with a platinum piston). Claims 1 and 2 of application G and claim 11 of application H would be designated to correspond to Count 1. Claim 3 of application G and claim 15 of application H would be designated to correspond to Count 2.

Example 5: Application J contains patentable claims 1 (engine), 2 (combination of an engine and a carburetor) and 3 (combination of an engine, a carburetor, and a catalytic converter). Application K contains patentable claims 31 (engine), 32 (combination of an engine and a carburetor), and 33 (combination of an engine, a carburetor, and an air filter). The engine, combination of an engine and carburetor, and combination of an engine, carburetor, and air filter define the same patentable invention. The combination of an engine, carburetor, and catalytic converter define a separate patentable invention from engine. If an interference is declared, there would be one count (engine). Claims 1 and 2 of application J and claims 31, 32, and 33 of application K would be designated to correspond to the count. Claim 3 of application J would not be designated as corresponding to the count.

If the facts of Example 3 are changed so that Application E contained only claim 3 (engine with a platinum piston), no interference would be declared because there is no interference-in-fact between claim 3 of Application E and claims 1–2 of Application F. The engine or 8-cylinder engine of Application F would not anticipate or render obvious an engine with a platinum piston of Application E. Likewise, and based on similar rationale, if the facts of Example 5 are changed so that Application J contained only claim 3 (combination of an engine, a carburetor, and a catalytic converter), no interference would be declared because there is no interference-in-fact between claim 3 of Application J and claims 31–33 of Application K.

At recent public events, it has been suggested that there may be a need to expand the situations where an interference should be declared or maintained. Any decision to expand the nature of interference proceedings will have a resource consequence for USPTO and for applicants and patentees involved in interferences. Approximately one-quarter of the resources of the Board of Patent Appeals and Interferences are used to resolve interferences, notwithstanding the fact that there are many more appeals than interferences. USPTO has received many reports that interferences involve considerable costs for applicants and patentees. Additionally, there is no desire on the part of USPTO, and no authority under the law, to turn interference proceedings under 35 U.S.C. 135(a) into pre-grant oppositions or post-grant cancellations. Accordingly, USPTO is reluctant, at this time, to expand the circumstances under which an interference might be declared or maintained absent a compelling reason.

This notice provides interested parties with an opportunity to comment and make out a case that the nature of interferences should be expanded beyond the current practice. If a one-way patentability analysis is sufficient to establish an interference-in-fact, would it be possible to have an interference with two counts as set out in Example 4, reproduced above? How would having an interference between claim 1 of application G and claim 15 of application H of Example 4 square with the holding of *Nitz* v. *Ehrenreich,* 537 F.2d 539, 543, 190 USPQ 413, 416–17 (CCPA 1976)? If a one-way patentability analysis is sufficient, what would it take to establish that there is no interference-in-fact in a given case?

Comment Format

Comments should be submitted in electronic form if possible, either via the Internet or on a 3¼-inch diskette. Comments submitted in electronic form should be submitted as ASCII text. Special characters, proprietary formats, and encryption should not be used.

Authority: 35 U.S.C. 2(b)(2)(A), 3(a)(2), 135(a).

Dated: December 14, 2000.

Q. Todd Dickinson,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 00–32374 Filed 12–19–00; 8:45 am]

BILLING CODE 3510–16–P

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Adjustment of Import Limits for Certain Cotton, Wool, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textiles and Textile Products Produced or Manufactured in Taiwan

December 15, 2000.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs adjusting limits.

EFFECTIVE DATE: December 20, 2000.

FOR FURTHER INFORMATION CONTACT: Roy Unger, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port, call (202) 927–5850, or refer to the U.S. Customs website at http://www.customs.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 limits for certain categories are being increased for carryforward.

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 64 FR 71982, published on December 22, 1999). Also see 64 FR 60796, published on November 8, 1999.

Richard B. Steinkamp,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

December 15, 2000.

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 2, 1999, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton, wool, man-made fiber, silk blend and other vegetable fiber textiles and textile products, produced or manufactured in Taiwan and exported during the twelve-month period which began on January 1, 2000 and extends through December 31, 2000.

Effective on December 20, 2000, you are directed to adjust the current limits for the following categories, as provided for under the terms of the current bilateral textile agreement:

Category	Adjusted twelve-month limit [1]
Group I	
200–224, 225/317/326, 226, 227, 229, 300/301/607, 313–315, 360–363, 369–L/670–L/870 [2], 369–S [3], 369–O [4], 400–414, 464–469, 600–606, 611, 613/614/615/617, 618, 619/620, 621–624, 625/626/627/628/629, 665, 666, 669–P [5], 669–T [6], 669–O [7], 670–H [8] and 670–O [9], as a group.	631,333,955 square meters equivalent.
Sublevels in Group I	
300/301/607	1,897,485 kilograms of which not more than 1,581,238 kilograms shall be in Category 300; not more than 1,581,238 kilograms shall be in Category 301; and not more than 1,581,238 kilograms shall be in Category 607.
Group II	
237, 239, 330–332, 333/334/335, 336, 338/339, 340–345, 347/348, 349, 350/650, 351, 352/652, 353, 354, 359–C/659–C [10], 359–H/659–H [11], 359–O [12], 431–444, 445/446, 447/448, 459, 630–632, 633/634/635, 636, 638/639, 640, 641–644, 645/646, 647/648, 649, 651, 653, 654, 659–S [13], 659–O [14], 831–844 and 846–859, as a group.	748,421,576 square meters equivalent.
Sublevels in Group II	
336	150,365 dozen.
338/339	986,335 dozen.
340	1,369,485 dozen.
345	136,004 dozen.
347/348	1,427,272 dozen of which not more than 1,221,653 dozen shall be in Categories 347–W/348–W [15].
445/446	146,353 dozen.
631	5,638,481 dozen pairs.
633/634/635	1,783,990 dozen of which not more than 1,047,094 dozen shall be in Categories 633/634 and not more than 927,860 dozen shall be in Category 635.
638/639	6,793,736 dozen.
647/648	5,552,933 dozen of which not more than 5,281,988 dozen shall be in Categories 647–W/648–W [16].
Within Group II Subgroup	
350/650	150,507 dozen.
351	346,023 dozen.
651	526,302 dozen.

[1] The limits have not been adjusted to account for any imports exported after December 31, 1999.

[2] Category 870; Category 369–L: only HTS numbers 4202.12.4000, 4202.12.8020, 4202.12.8060, 4202.92.1500, 4202.92.3016, 4202.92.6091 and 6307.90.9905; Category 670–L: only HTS numbers 4202.12.8030, 4202.12.8070, 4202.92.3020, 4202.92.3031, 4202.92.9026 and 6307.90.9907.

[3] Category 369–S: only HTS number 6307.10.2005.

[4] Category 369–O: all HTS numbers except 4202.12.4000, 4202.12.8020, 4202.12.8060, 4202.92.1500, 4202.92.3016, 4202.92.6091, 6307.90.9905 (Category 369–L); and 6307.10.2005 (Category 369–S).

[5] Category 669–P: only HTS numbers 6305.32.0010, 6305.32.0020, 6305.33.0010, 6305.33.0020 and 6305.39.0000.

[6] Category 669–T: only HTS numbers 6306.12.0000, 6306.19.0010 and 6306.22.9030.

[7] Category 669–O: all HTS numbers except 6305.32.0010, 6305.32.0020, 6305.33.0010, 6305.33.0020, 6305.39.0000 (Category 669–P); 6306.12.0000, 6306.19.0010 and 6306.22.9030 (Category 669–T).

[8] Category 670–H: only HTS numbers 4202.22.4030 and 4202.22.8050.

[9] Category 670–O: all HTS numbers except 4202.22.4030, 4202.22.8050 (Category 670–H); 4202.12.8030, 4202.12.8070, 4202.92.3020, 4202.92.3031, 4202.92.9026 and 6307.90.9907 (Category 670–L).

[10] Category 359–C: only HTS numbers 6103.42.2025, 6103.49.8034, 6104.62.1020, 6104.69.8010, 6114.20.0048, 6114.20.0052, 6203.42.2010, 6203.42.2090, 6204.62.2010, 6211.32.0010, 6211.32.0025 and 6211.42.0010; Category 659–C: only HTS numbers 6103.23.0055, 6103.43.2020, 6103.43.2025, 6103.49.2000, 6103.49.8038, 6104.63.1020, 6104.63.1030, 6104.69.1000, 6104.69.8014, 6114.30.3044, 6114.30.3054, 6203.43.2010, 6203.43.2090, 6203.49.1010, 6203.49.1090, 6204.63.1510, 6204.69.1010, 6210.10.9010, 6211.33.0010, 6211.33.0017 and 6211.43.0010.

[11] Category 359–H: only HTS numbers 6505.90.1540 and 6505.90.2060; Category 659–H: only HTS numbers 6502.00.9030, 6504.00.9015, 6504.00.9060, 6505.90.5090, 6505.90.6090, 6505.90.7090 and 6505.90.8090.

[12] Category 359–O: all HTS numbers except 6103.42.2025, 6103.49.8034, 6104.62.1020, 6104.69.8010, 6114.20.0048, 6114.20.0052, 6203.42.2010, 6203.42.2090, 6204.62.2010, 6211.32.0010, 6211.32.0025, 6211.42.0010 (Category 359–C); 6505.90.1540 and 6505.90.2060 (Category 359–H).

[13] Category 659–S: only HTS numbers 6112.31.0010, 6112.31.0020, 6112.41.0010, 6112.41.0020, 6112.41.0030, 6112.41.0040, 6211.11.1010, 6211.11.1020, 6211.12.1010 and 6211.12.1020.

[14] Category 659–O: all HTS numbers except 6103.23.0055, 6103.43.2020, 6103.43.2025, 6103.49.2000, 6103.49.8038, 6104.63.1020, 6104.63.1030, 6104.69.1000, 6104.69.8014, 6114.30.3044, 6114.30.3054, 6203.43.2010, 6203.43.2090, 6203.49.1010, 6203.49.1090, 6204.63.1510, 6204.69.1010, 6210.10.9010, 6211.33.0010, 6211.33.0017, 6211.43.0010 (Category 659–C); 6502.00.9030, 6504.00.9015, 6504.00.9060, 6505.90.5090, 6505.90.6090, 6505.90.7090, 6505.90.8090 (Category 659–H); 6112.31.0010, 6112.31.0020, 6112.41.0010, 6112.41.0020, 6112.41.0030, 6112.41.0040, 6211.11.1010, 6211.11.1020, 6211.12.1010 and 6211.12.1020 (Category 659–S).

[15] Category 347–W: only HTS numbers 6203.19.1020, 6203.19.9020, 6203.22.3020, 6203.22.3030, 6203.42.4005, 6203.42.4010, 6203.42.4015, 6203.42.4025, 6203.42.4035, 6203.42.4045, 6203.42.4050, 6203.42.4060, 6203.49.8020, 6210.40.9033, 6211.20.1520, 6211.20.3810 and 6211.32.0040; Category 348–W: only HTS numbers 6204.12.0030, 6204.19.8030, 6204.22.3040, 6204.22.3050, 6204.29.4034, 6204.62.3000, 6204.62.4005, 6204.62.4010, 6204.62.4020, 6204.62.4030, 6204.62.4040, 6204.62.4050, 6204.62.4055, 6204.62.4065, 6204.69.6010, 6204.69.9010, 6210.50.9060, 6211.20.1550, 6211.20.6810, 6211.42.0030 and 6217.90.9050.

[16] Category 647–W: only HTS numbers 6203.23.0060, 6203.23.0070, 6203.29.2030, 6203.29.2035, 6203.43.2500, 6203.43.3500, 6203.43.4010, 6203.43.4020, 6203.43.4030, 6203.43.4040, 6203.49.1500, 6203.49.2015, 6203.49.2030, 6203.49.2045, 6203.49.2060, 6203.49.8030, 6210.40.5030, 6211.20.1525, 6211.20.3820 and 6211.33.0030; Category 648–W: only HTS numbers 6204.23.0040, 6204.23.0045, 6204.29.2020, 6204.29.2025, 6204.29.4038, 6204.63.2000, 6204.63.3000, 6204.63.3510, 6204.63.3530, 6204.63.3532, 6204.63.3540, 6204.69.2510, 6204.69.2530, 6204.69.2540, 6204.69.2560, 6204.69.6030, 6204.69.9030, 6210.50.5035, 6211.20.1555, 6211.20.6820, 6211.43.0040 and 6217.90.9060.

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,

Richard B. Steinkamp,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 00–32509 Filed 12–19–00; 8:45 am]

BILLING CODE 3510–DR–F

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory 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 January 19, 2001.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Lauren Wittenberg, Acting Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10235, New Executive Office Building, Washington, DC 20503 or should be electronically mailed to the internet address Lauren_Wittenberg@omb.eop.gov.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory 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.

Dated: December 14, 2000.

John Tressler,

Leader, Regulatory Information Management, Office of the Chief Information Officer.

Office of Elementary and Secondary Education

Type of Review: New.

Title: Reading Excellence Act (REA) State-District-School Study.

Frequency: Semi-Annually; Annually.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 1,623.

Burden Hours: 8,592.

Abstract: REA provides competitive reading and literacy grants to state education agencies (SEA) to help high-proverty schools and those in Title I improvement status to: (1) Teach every child to read by the end of the third grade; (2) provide children in early childhood with the readiness skills and support they need to learn to read once they enter school; (3) expand the number of high-quality family literacy programs; (4) provide early intervention to children who are at risk of being identified for special education inappropriately; and (5) base instruction, including tutoring, on scientifically-based reading research. The first cohort of 17 states was funded in the summer of 1999. The REA State-District-School Study fulfills the states' performance reporting requirements. In addition, the study will (1) collect and analyze demographic and descriptive information on REA states, districts and schools in order to provide a contextual backdrop and sampling for two national evaluations—the School and Classroom Implementation and Impact (SCII) study and the Children's Reading Gains (Gains) study; (2) compare eligible but not funded with funded districts and schools; (3) augment the agency's REA monitoring within each SEA, local education agencies (LEA), and school; (4) track performance over time; (5) inform the states' development of indicators of program quality; and (6) provide data for the National Institute for Literacy's effort to disseminate information on effective subgrantee projects.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov*, or should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW, Room 4050, Regional Office Building 3, Washington, D.C. 20202–4651. Requests may also be electronically mailed to the internet address OCIO_IMG_Issues@ed.gov or faxed to 202–708–9346. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Kathy Axt at her internet address Kathy_Axt@ed.gov. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 00–32356 Filed 12–19–00; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Determination To Establish the Commission on Fire Safety and Preparedness

Pursuant to the Federal Advisory Committee Act (Pub. L. 92–463, and title 41, Code of Federal Regulations, subpart 101–6, Final Rule on Federal Advisory Committee Management), I hereby certify that the Commission on Fire Safety and Preparedness is necessary and in the public interest in connection with the performance of duties imposed on the Department of Energy by law. This determination follows consultation with the Committee Management Secretariat of the General Services Administration, pursuant to 41 CFR subpart 101–6.10.

The purpose of the Commission is to provide the Secretary of Energy and the Assistant Secretary of Environment, Safety and Health, with advice, information, and recommendations on the readiness of the Department of Energy complex for the threat of wildland and facility fires. The Commission will provide an organized forum to evaluate the nature of the risk of fire and concomitant risk of loss, the state of the Department's fire protection programs, and emergency response systems. The Commission will also

review and provide recommendations on a comprehensive fire policy for the Department of Energy complex.

Commission members will be chosen to ensure an appropriately balanced representation of various points of view and functions of interested stakeholders and professionals, including fire safety engineering, fire science, firefighter safety, risk/benefit analysis, and emergency response systems. Particular attention will be given to obtaining diversity, a balance of subdisciplines, a balance of interests, experiences, and points of view. All meetings of the Commission will be noticed ahead of time in the **Federal Register**.

Further information regarding this Advisory Committee may be obtained from Amina Khan, Senior Policy Advisor, Office of Defense Programs, DP–1, 1000 Independence Avenue, SW., Washington, DC 20585, phone (202) 586–6982.

Issued in Washington, DC, on December 15, 2000.

James N. Solit,

Advisory Committee Management Officer.

[FR Doc. 00–32414 Filed 12–19–00; 8:45 am]

BILLING CODE 6450–01–M

DEPARTMENT OF ENERGY

Savannah River Operations Office; Savannah River Site, High-Level Waste Tank Closure Draft Environmental Impact Statement (DOE/EIS–0303D) Aiken, SC

AGENCY: Savannah River Operations Office, Department of Energy.

ACTION: Notice of public meetings.

SUMMARY: The Department of Energy (DOE) will hold public meetings to discuss issues and gather information related to the Draft Environmental Impact Statement (EIS) on the proposed closing of additional high-level waste (HLW) tanks at the Savannah River Site (SRS). All persons are hereby given notice of the opportunity to attend and participate in these public meetings and to submit comments.

DATES: The Department will hold two public meetings—each with two sessions—to discuss the Draft EIS and receive comments. Dates and locations of those public meetings are listed below:

January 9, 2001,
North Augusta Community Center,
101 Brookside Drive,
North Augusta, South Carolina,
1–3 p.m. and 5–7 p.m. (repeat sessions).
January 11, 2001,
Holiday Inn Coliseum,
630 Assembly Street,
Columbia, South Carolina,
1–3 p.m. and 5–7 p.m. (repeat sessions).

ADDRESSES: Comments on the Draft EIS may be submitted orally or in writing to DOE at the January 2001 public meetings; sent by facsimile or voice mail to 1–800–881–7292; sent by electronic mail to nepa@srs.gov; or mailed to Mr. Andrew Grainger, NEPA Compliance Officer, DOE-Savannah River Operations Office (SR), Building 742–A, Room 185, Aiken, SC 29802 (ATTN: *Tank Closure Draft EIS*). In preparing the Final EIS, DOE will consider all comments transmitted or postmarked by January 23, 2001. Comments submitted after this date will be considered to the extent practicable.

FOR FURTHER INFORMATION CONTACT: To request information about this Draft EIS and the public meetings, or to be placed on the EIS distribution list, use any of the methods listed in **ADDRESSES** above. For general information about the DOE NEPA process, contact: Carol Borgstrom, Director, Office of NEPA Policy and Compliance (EH–42), U. S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585–0119, Phone: 202–586–4600, Voice mail: 800–472–2756, Fax: 202–586–7031.

SUPPLEMENTARY INFORMATION: The publication of the Notice of Availability of the Draft EIS in the **Federal Register** on November 24, 2000, (65 FR 70567) began the public comment period, which extends through January 23, 2001. DOE–SR proposes to close the tank systems to protect human health and the environment. These proposed closures would be in accordance with applicable laws, regulations, DOE Orders, and the previously published document, *Industrial Wastewater Closure Plan for F- and H-Area High-Level Waste Tanks Systems,* prepared by DOE and approved by the South Carolina Department of Health and Environmental Control.

The Draft EIS evaluates three alternatives regarding closure of the HLW tanks: (1) Clean and Stabilize Tanks, (2) Clean and Remove Tanks, and (3) No Action Alternative. Under the Clean and Stabilize Tanks alternative, DOE is considering three options for tank stabilization: fill with grout (preferred alternative), fill with sand, or fill with saltstone.

Dated: December 12, 2000.

Angelia D. Adams,

Acting Director, Environment, Health, and Safety Evaluation and Performance Division.

[FR Doc. 00–32412 Filed 12–19–00; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–301–011]

ANR Pipeline Company; Notice of Proposed Change in FERC Gas Tariff

December 14, 2000.

Take notice that on December 8, 2000, ANR Pipeline Company (ANR) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following revised tariff sheet to be effective November 1, 2000:

Substitute Original Sheet No. 14R

ANR states that this filing is made to correct a clerical error incorrectly identifying the receipt point on contract 105502 as the Will County Interconnect instead of the Alliance/ANR Interconnect on the tariff sheet previously submitted on November 2, 2000 in Docket No. RP99–301–010.

ANR states that copies of the filing have been mailed to all affected customers and state regulatory commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. 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 web at *http://www.ferc.fed.us/online/rims.htm* (call 202–208–2222 for assistance).

Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at *http://www.ferc.fed.us/efi/doorbell.htm.*

David P. Boergers,

Secretary.

[FR Doc. 00–32349 Filed 12–19–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00–354–003]

Columbia Gas Transmission Corporation; Notice of Proposed Changes in FERC Gas Tariff

December 14, 2000.

Take notice that on December 8, 2000, Columbia Gas Transmission Corporation (Columbia) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following revised tariff sheet, with a proposed effective date of August 1, 2000:

Substitute Original Sheet No. 486

Columbia states that on June 23, 2000, Columbia filed tariff sheets in Docket No. RP00–354 to update its tariff consistent with Commission policy and decisions on tariff filings made by other interstate pipelines concerning permissible discounting arrangements and negotiated-rate authority related changes. On July 27, 2000, the Commission accepted the filed tariff sheets to be effective August 1, 2000, subject to Columbia making a compliance filing within 15 days. On November 24, 2000, the Commission issued an order accepting Columbia's August 9, 2000 compliance filing subject to the conditions therein, and granted and denied Columbia's request for rehearing. The instant filing is being made to comply with the November 24, 2000 Order.

Columbia states that copies of its filing have been mailed to all firm customers, interruptible customers, affected state commissions and parties on the official service list in this proceeding.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. 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 web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance.) Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at http://www.ferc.fed.us/efi/doorbell.htm.

David P. Boergers,

Secretary.

[FR Doc. 00–32350 Filed 12–19–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER01–237–000]

Entergy Services, Inc.; Notice of Filing

December 14, 2000.

Take notice that on December 7, 2000, Entergy Services, Inc., tendered for filing its request to withdraw the Seventh Amendment to the Power Coordination, Interchange and Transmission Service Agreement filed with the Commission on October 26, 2000 in the above-referenced docket.

Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions and protests should be filed on or before December 21, 2000. Protests will be considered by the Commission to determine the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the Internet at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance). Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at http://www.ferc.fed.us/efi./doorbell.htm.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 00–32343 Filed 12–19–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Granite State Gas Transmission, Inc.; Notice of Compliance Filing

December 14, 2000.

Take notice that on December 8, 2000, Granite State Gas Transmission, Inc. (Granite State) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, Original Tariff Sheet No. 340 and Fourth Revised Sheet Nos. 341–399, to be effective November 1, 2000.

Granite State states that the purpose of the filing is to comply with the requirements of the order issued on November 9, 2000, in Docket No. RP01–58–000 and Order No. 587–L with respect ot the netting and trading of imbalances by shippers.

Granite State states that copies of this filing have been sent to Granite State's shippers and interested state regulatory commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. 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 web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance). Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at http://www.ferc.fed.us/efi/doorbell.htm.

David P. Boergers,

Secretary.

[FR Doc. 00–32355 Filed 12–19–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00–606–001]

Great Lakes Gas Transmission Limited Partnership; Notice of Compliance Filing

December 14, 2000

Take notice that on November 27, 2000, Great Lakes Gas Transmission Limited Partnership (Great Lakes) tendered its compliance filing with the Commission's Order on Filings to Establish Imbalance Netting and Trading Pursuant to order Nos. 587–G and 587–L [93 FERC ¶61,093 (2000)] issued on October 27, 2000 (October 27 Order).

Great Lakes states that the purpose of this filing is to comply with the requirements of the October 27 Order.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed on or before December 21, 2000. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance). Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.200(a)(1)(iii) and the instructions on the Commission's web site at http://www.ferc.fed.us/efi/doorbell.htm.

David P. Boergers,

Secretary.

[FR Doc. 00–32352 Filed 12–19–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP01–44–001]

Iroquois Gas Transmission System, L.P.; Notice of Compliance Filing

December 14, 2000.

Take notice that on December 11, 2000, Iroquois Gas Transmission System, L.P. (Iroquois) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the following revised tariff sheets, with an effective date of November 1, 2000:

Second Revised Sheet No. 66
First Revised Sheet No. 66A

Iroquois states that it is making this filing to revise its tariff to comply with the order issued by the Commission on November 9, 2000 entitled Order on Filing to Establish Imbalance Netting and Trading Pursuant to Order Nos. 587–G and 587–L. A Request for Rehearing on the captioned proceeding is being made contemporaneously with this filing.

Iroquois states that copies of its filing have been mailed to all firm customers, interruptible customers, state regulatory commissions and other interested parties.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. 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 web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at http:www.ferc.fed.us/efi/doorbell.htm.

David P. Boergers,

Secretary.

[FR Doc. 00–32353 Filed 12–19–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP96–272–020]

Northern Natural Gas Company; Notice of Proposed Changes in FERC Gas Tariff

December 14, 2000.

Take notice that on December 11, 2000, Northern Natural Gas Company (Northern) tendered for filing to become part of Northern's FERC Gas Tariff, Fifth Revised Volume No. 1, the following tariff sheets, proposed to become effective on December 12, 2000:

Twelfth Revised Sheet No. 66
Second Revised Sheet No. 66A

Northern states that the above sheets are being filed to implement a specific negotiated rate transaction with OGE Energy Resources, Inc. in accordance with the Commission's Policy Statement on Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines.

Northern further states that copies of the filing have been mailed to each of its customers and interested State Commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. 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 web at *http://www.ferc.fed.us/online/rims.htm* (call 202–208–2222 for assistance).

Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at *http://www.ferc.fed.us/efi/doorbell.htm.*

David P. Boergers,

Secretary.

[FR Doc. 00–32347 Filed 12–19–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP01–50–001]

Portland Natural Gas Transmission System; Notice of Compliance Filing

December 14, 2000.

Take notice that on December 11, 2000, Portland Natural Gas Transmission System (PNGTS) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the following revised tariff sheet to become effective as indicated:

To Be Effective on November 1, 2000

Original Sheet No. 337A
Original Sheet No. 337B

PNGTS states that the purpose of this filing is to comply with the requirements of the Commission's November 9, 2000 order addressing PNGTS's Order No. 587–L filing regarding the implementation of netting and trading of imbalances.

PNGTS states that copies of the filing were mailed to all affected customers and interested state commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests mut be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. 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 web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance). Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at http://www.ferc.fed.us/efi/doorbell.htm.

David P. Boergers,
Secretary.
[FR Doc. 00–32354 Filed 12–19–00; 8:45 am]
BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. RP00–397–000, RP01–33–000 and RP01–33–001; RP00–398–000, RP01–34–000 and RP01–34–001; (Not Consolidated)]

Questar Pipeline Company and Overthrust Pipeline Company; Notice of Technical Conference

December 14, 2000.

On July 17, 2000, Questar Pipeline Company (Questar) and Overthrust Pipeline Company (Overthrust) submitted filings to comply with Order No. 637. Several parties have protested various aspects of Questar's and Overthrust's filings. Subsequently, on October 10, 2000, Questar and Overthrust submitted filings to comply with Order Nos. 587–G and 587–L. The Commission accepted the 587–L filings subject to further consideration in Questar's and Overthrust's Order No. 637 filings.

Take notice that back-to-back technical conferences to discuss the various issues raised by Questar's and Overthrust's filings will be held on Thursday, January 11, 2001, at 9:00 A.M., in a room to be designated at the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. The conferences will begin with a discussion of Questar's filings. These technical conferences may extend to Friday, January 12, 2001.

Among the major areas to be addressed is Questar's and Overthrust's segmentation proposals. Therefore, Questar and Overthrust should provide current maps of their systems and be prepared to discuss their systems operations. Parties protesting aspects of Questar's and Overthrust's filings should be prepared to discuss alternatives.

All interested persons and Staff are permitted to attend.

David P. Boergers,
Secretary.
[FR Doc. 00–32351 Filed 12–19–00; 8:45 am]
BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2016–044]

City of Tacoma, WA; Notice of a Technical Conference

December 14, 2000.

Take notice that Commission staff will hold a technical conference with Tacoma Power, the applicant for the Cowlitz River Project No. 2016; parties to the August 2000 Settlement Agreement; and other interested parties in the relicensing proceeding for the project. The conference will be held on January 4, 2001, from 9 a.m. to 4 p.m. at the U.S. Fish and Wildlife Service Office, 510 Desmond Drive, Sawyer Hall, Lacey, Washington.

The purpose of the conference is to discuss issues concerning the Ecosystem Diagnosis and Treatment (EDT) analysis and water temperature modeling information requested by the Commission on October 24, 2000, for preparation of its Environmental Impact Statement on the relicensing of the project. All interested individuals, organizations, and agencies are invited to attend the meeting.

For further information, please contact David Turner at (202) 219–2844.

David P. Boergers,
Secretary.
[FR Doc. 00–32345 Filed 12–19–00; 8:45 am]
BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP96–312–036]

Tennessee Gas Pipeline Company; Notice of Negotiated Rate Filing

December 14, 2000.

Take notice that on December 12, 2000, Tennessee Gas Pipeline Company (Tennessee), tendered for filing and approval a Gas Transportation Agreement between Tennessee and Unocal Energy Trading, Inc. (Unocal) pursuant to Tennessee's Rate Schedule FT–A (FT–A Service Agreement) and a copy of a November 29, 2000 Firm Transportation Negotiated Rate Agreement entered into between Tennessee and Unocal (Negotiated Rate Agreement). The filed FT–A Service Agreement and the Negotiated Agreement reflect a negotiated rate arrangement between Tennessee and Unocal to be effective January 1, 2001 through September 30, 2003.

Any person desiring to be heard or to protest said filing should a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at *http://www.ferc.fed.us/online/rims.htm* (call 202–208–2222 for assistance). Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions

on the Commission's web site at *http://www.ferc.fed.us/efi/doorbell.htm.*

David P. Boergers,

Secretary.

[FR Doc. 00–32348 Filed 12–19–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP01–47–001]

Viking Gas Transmission Company; Notice of Compliance Filing

December 14, 2000.

Take notice that on December 11, 2000, Viking Gas Transmission Company (Viking) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets to be effective March 1, 2001:

Original Sheet No. 33A
Original Sheet No. 33B
Third Revised Sheet No. 35
Seventh Revised Sheet No. 36

Viking states that the purpose of this filing is to comply with the Commission's Order on Filings to Establish Imbalance Netting and Trading Pursuant to Order Nos. 587–G and 587–L, issued November 9, 2000 in Docket No. RP01–47–000 *et al.*

Viking states that copies of the filing have been mailed to all of its jurisdictional customers and to affected state regulatory commission.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. 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 web at *http://www.ferc.fed.us/online/rims.htm* (call 202–208–2222 for assistance).

Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at *http://www.ferc.fed.us/efi/doorbell.htm.*

David P. Boergers,

Secretary.

[FR Doc. 00–32344 Filed 12–19–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER00–3542–001]

Wisconsin Electric Power Company; Notice of Filing

December 14, 2000.

Take notice that on November 30, 2000, Wisconsin Electric Power Company (Wisconsin Electric), tendered for filing a request to extend the termination date of the power sales agreement filed with the Commission on August 28, 2000 in the above-referenced docket.

Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions and protests should be filed on or December 22, 2000. Protests will be considered by the Commission to determine the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the Internet at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance). Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at *http://www.ferc.fed.us/efi/doorbell.htm.*

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 00–32342 Filed 12–19–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC01–38–000, et al.]

American Ref-fuel Company of Hempstead, et al.; Electric Rate and Corporate Regulation Filings

December 12, 2000.

Take notice that the following filings have been made with the Commission:

1. American Ref-fuel Company of Hempstead, BFI Energy Systems of Hempstead, Inc. Allied Waste Industries, Inc. Duke/UAE Ref-fuel LLC, Duke/UAE Hempstead LLC, Duke/UAE Hempstead II, Inc., United American Energy Corp., Duke Energy Corporation

[Docket No. EC01–38–000]

Take notice that on December 5, 2000, American Ref-fuel Company of Hempstead, BFI Energy Systems of Hempstead, Inc., Allied Waste Industries, Inc., Duke/UAE Ref-Fuel LLC, Duke/UAE Hempstead LLC, Duke/UAE Hempstead II, Inc., United American Energy Corp. and Duke Energy Corporation tendered for filing a request that the Commission approve a disposition of facilities under Section 203 of the Federal Power Act in connection with a change in control over American Ref-Fuel Company of Hempstead and a change in the upstream ownership of United American Energy Corp. ARC-Hempstead leases and operates a biomass-fueled qualifying small power production facility with a capacity greater than 30 MW.

Comment date: December 26, 2000, in accordance with Standard Paragraph E at the end of this notice.

2. Redbud Energy LP

[Docket No. EG01–46–000]

Take notice that on December 11, 2000, Redbud Energy LP (Redbud), a limited partnership with its principal place of business at 909 Fannin, Suite 2222, Houston, Texas 77010, filed with the Federal Energy Regulatory Commission (Commission) an application for determination of exempt wholesale generator status pursuant to Part 365 of the Commission's regulations.

Redbud states that it will be engaged directly and exclusively in the business of owning a 1200 MW natural gas fired, combined cycle electric generating facility and related assets to be located on an approximately 160 acre site located about 25 miles north east of Oklahoma City near the town of Luther,

Oklahoma. Redbud will sell its capacity exclusively at wholesale.

Comment date: January 2, 2001, in accordance with Standard Paragraph E at the end of this notice. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application.

3. Potomac Power Resources, Inc.

[Docket No. EG01–47–000]

Take notice that on December 8, 2000, Potomac Power Resources, Inc. (PPR), with its address at 1801 K Street, NW., Washington, DC 20068–0001, filed with the Federal Energy Regulatory Commission (FERC or the Commission) an application for determination of exempt wholesale generator status pursuant to part 365 of the Commission's regulations.

PPR is a Delaware corporation that will be engaged directly and exclusively in the business of owning and operating eligible facilities located in the District of Columbia. The eligible facilities consists of two generation plants. One plant is comprised of two oil-fired cycling units totaling approximately 550 MW and related interconnection facilities. The other plant is comprised of 18 oil-fired combustion turbines, totaling approximately 256 MW and related interconnection facilities. The output of the plants will be sold at wholesale in the United States.

Comment date: January 2, 2001, in accordance with Standard Paragraph E at the end of this notice. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application.

4. California Independent System Operator Corporation

[Docket No. TX01–1–000]

Take notice that on December 8, 2000, the California Independent System Operator Corporation (the ISO) filed, pursuant to Rule 216 of the Commission's Rules of Practice and Procedure, 18 CFR 385.216, a notice of withdrawal of its Application for Transmission Order submitted in the above-referenced docket on December 1, 2000, and for which a Notice of Filing was issued by the Commission on December 6, 2000. The concurrence of San Diego Gas & Electric Company concerning the notice of withdrawal is attached.

The ISO states that this filing has been served upon SDG&E, the Public Utilities Commission of the State of California, and the California Electricity Oversight Board.

Comment date: January 2, 2001, in accordance with Standard Paragraph E at the end of this notice.

5. Cinergy Services, Inc.

[Docket No. ER01–102–001]

Take notice that on December 6, 2000, Cinergy Services Inc., on behalf of Cincinnati Gas & Electric Company and its public utility subsidiaries and PSI Energy Inc. (collectively Cinergy), tendered for filing their compliance filing in the above-captioned docket.

This filing has been served on all parties on the official service list in this proceeding.

Comment date: December 27, 2000, in accordance with Standard Paragraph E at the end of this notice.

6. Duke Energy Oakland, LLC

[Docket No. ER01–270–001]

Take notice that on December 8, 2000, Duke Energy Oakland, LLC tendered for filing an errata containing substitute revised tariff sheets in the above-referenced docket to correct schedules to its Must-Run Schedule.

Comment date: December 29, 2000, in accordance with Standard Paragraph E at the end of this notice.

7. West Georgia Generating Company, L.L.C.

[Docket No. ER97–1686–008]

Take notice that on December 8, 2000, West Georgia Generating Company, L.L.C. (West Georgia), tendered for filing an updated market power analysis in compliance with the Commission's order issued in this Docket on May 29, 1997.

Comment date: December 29, 2000, in accordance with Standard Paragraph E at the end of this notice.

8. Midwest Electric Power, Inc.

[Docket No. ER00–3353–001]

Take notice that on December 6, 2000, Midwest Electric Power, Inc. (MEP) tendered for filing a Power Supply Agreement dated July 19, 2000 between MEP as Seller and Ameren Energy Marketing Company (Marketing Co.), Illinova Generating Company (Illinova), and LG&E Energy Marketing (LGE) as Purchasing Parties (the Agreement). MEP states that the Power Supply Agreement is identical to a Power Supply Agreement previously submitted on August 2, 2000, except that designations conforming to Order No. 614 have been added.

Comment date: December 27, 2000, in accordance with Standard Paragraph E at the end of this notice.

9. Koch Energy Trading, Inc.

[Docket No. ER95–218–022]

Take notice that on December 6, 2000, Koch Energy Trading, Inc. (KET) tendered for filing a notice of change in status, informing the Commission that Entergy Corporation, which intends to form a partnership with KET's parent, has announced an agreement to merge with FPL Group, Inc. KET also filed a revised code of conduct in accordance with the Commission's policies regarding transactions between power marketers and their public utility affiliates.

Comment date: December 27, 2000, in accordance with Standard Paragraph E at the end of this notice.

10. Pacific Gas and Electric Company

[Docket Nos. ER99–4323–000 and ER99–4323–001]

Take notice that on December 7, 2000, Pacific Gas and Electric Company (PG&E), tendered for filing a wholesale transmission refund report in compliance with an Order of the Federal Energy Regulatory Commission, Docket Nos. ER99–4323–000 and ER99–4323–001, dated September 15, 2000.

Copies of this filing have been served upon the California Independent System Operator Corporation, California Independent System Operator-registered Scheduling Coordinators, Southern California Edison Company, Sam Diego Gas and Electric Company, and the California Public Utilities Commission.

Comment date: December 28, 2000, in accordance with Standard Paragraph E at the end of this notice.

11. Commonwealth Edison Company

[Docket No. ER00–3668–001]

Take notice that on December 8, 2000, Commonwealth Edison Company tendered for filing a revised unexecuted Interconnection Agreement with University Park, LLC, and related supporting materials in compliance with the Commission's Order of November 8, 2000 in this docket.

Comment date: December 29, 2000, in accordance with Standard Paragraph E at the end of this notice.

12. LSP Energy Limited Partnership, LSP-Nelson Energy, LLC, LSP-Kendall Energy, LLC

[Docket Nos. ER01–609–000, ER98–2259–001, ER00–2448–001, ER99–2602–001]

Take notice that on December 8, 2000, LSP Energy Limited Partnership, LSP-Nelson Energy, LLC, and LSP-Kendall Energy, LLC (together, the LSP Project Companies), tendered for filing a Notification of Change in Status and Application for Acceptance of Pro Forma Revised FERC electric tariffs and related Codes of Conduct, in which the LSP Project Companies provide notice of their anticipated affiliation with electric utilities having franchised service territories, pursuant to a pending

sale to NRG Energy, Inc. and NRG Granite Acquisition, LLC of partnership interests that indirectly own the LSP Project Companies. As a result of this anticipated affiliation with such electric utilities following the closing of the pending sale of applicable partnership interests, the LSP Project Companies are submitting for filing *pro forma* revised electric tariffs and related Codes of Conduct.

Comment date: December 29, 2000, in accordance with Standard Paragraph E at the end of this notice.

13. Exelon Generation Company, L.L.C.

[Docket No. ER00–3251–002]

Take notice that on December 8, 2000, PECO Energy Company, on behalf of Exelon Generation Company, L.L.C., tendered for filing revised service agreements in accordance with the Commission's order in Exelon Generation Company, L.L.C., *et al.,* 93 FERC ¶ 61,140 (2000).

Comment date: December 29, 2000, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of these filings are on file with the Commission and are available for public inspection. This filing may also be viewed on the Internet at *http://www.ferc.fed.us/online/rims.htm* (call 202–208–2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 00–32341 Filed 12–19–00; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC01–43–000, et al.]

Enron North America Corp., et al.; Electric Rate and Corporate Regulation Filings

December 13, 2000.

Take notice that the following filings have been made with the Commission:

1. Enron North America Corp., Allegheny Energy Supply Company, LLC, Des Plaines Green Land Development, L.L.C., Gleason Power I, L.L.C. and West Fork Land Development Company, L.L.C.

[Docket No. EC01–43–000]

Take notice that on December 7, 2000, Enron North America Corp. (ENA), Allegheny Energy Supply Company, LLC (AE Supply), Des Plaines Green Land Development, L.L.C. (Des Plaines), Gleason Power I, L.L.C. (Gleason) and West Fork Land Development Company, L.L.C. (West Fork) filed a joint application under Section 203 of the Federal Power Act for the disposition of jurisdictional facilities. Under the proposed transaction, ENA will sell 100 percent of its equity ownership interests in its wholly-owned subsidiaries Des Plaines, Gleason and West Fork to AE Supply. Des Plaines, Gleason and West Fork are generation-owning public utilities with market-based rate schedules on file with the Commission.

Comment date: January 5, 2001, in accordance with Standard Paragraph E at the end of this notice.

2. Cinergy Services, Inc.

[Docket No. ER01–586–000]

Take notice that on December 5, 2000, Cinergy Services, Inc. (Cinergy) and Montaup Electric Company filed a Notice of Cancellation of Service Agreement No. 44, under Cinergy Operating Companies, Cost-Based Power Sales Tariff—CB, FERC Electric Tariff Original Volume No. 6.

Cinergy requests an effective date of October 13, 2000.

Comment date: December 26, 2000, in accordance with Standard Paragraph E at the end of this notice.

3. American Transmission Company LLC

[Docket No. ER01–610–000]

Take notice that on December 7, 2000, American Transmission Company LLC (ATCLLC) tendered for filing a Distribution-Transmission Agreement between ATCLLC and Wisconsin Public Service Corporation.

ATCLLC requests an effective date of January 1, 2001.

Comment date: December 28, 2000, in accordance with Standard Paragraph E at the end of this notice.

4. Entergy Services, Inc.

[Docket No. ER01–611–000]

Take notice that on December 7, 2000, Entergy Services, Inc., on behalf of Entergy Arkansas, Inc., tendered for filing the Seventh Amendment to the Power Coordination, Interchange and Transmission Service Agreement between Entergy Arkansas, Inc. and the City of Conway, dated October 12, 2000. The Seventh Amendment modifies Exhibit A to Appendix A of Rate Schedule No. 98 by establishing a new point of delivery.

Comment date: December 28, 2000, in accordance with Standard Paragraph E at the end of this notice.

5. Allegheny Energy Service Corporation on Behalf of Allegheny Energy Supply Company, LLC

[Docket No. ER01–612–000]

Take notice that on December 7, 2000, Allegheny Energy Service Corporation on behalf of Allegheny Energy Supply Company, LLC (Allegheny Energy Supply) filed Service Agreement No. 103 to add one (1) new Customer to the Market Rate Tariff under which Allegheny Energy Supply offers generation services.

Allegheny Energy Supply proposes to make service available as of November 13, 2000 to Borough of Park Ridge.

Copies of the filing have been provided to the Public Utilities Commission of Ohio, the Pennsylvania Public Utility Commission, the Maryland Public Service Commission, the Virginia State Corporation Commission, the West Virginia Public Service Commission, and all parties of record.

Comment date: December 28, 2000, in accordance with Standard Paragraph E at the end of this notice.

6. Allegheny Energy Service Corporation, on Behalf of Allegheny Energy Supply Company LLC

[Docket No. ER01–613–000]

Take notice that on December 7, 2000, Allegheny Energy Service Corporation on behalf of Allegheny Energy Supply Company, LLC (Allegheny Energy Supply Company) filed First Revised Service Agreement No. 80 to complete the filing requirement for one (1) new Customer of the Market Rate Tariff

under which Allegheny Energy Supply offers generation services.

Allegheny Energy Supply maintains the effective date of Service Agreement No. 80 of December 8, 1999 for service to Reliant Energy Services, Inc.

Copies of the filing have been provided to the Public Utilities Commission of Ohio, the Pennsylvania Public Utility Commission, the Maryland Public Service Commission, the Virginia State Corporation Commission, the West Virginia Public Service Commission, and all parties of record.

Comment date: December 28, 2000, in accordance with Standard Paragraph E at the end of this notice.

7. Allegheny Energy Service Corporation, on Behalf of Monongahela Power Company, the Potomac Edison Company and West Penn Power Company (Allegheny Power)

[Docket No. ER01–614–000]

Take notice that on December 7, 2000, Allegheny Energy Service Corporation on behalf of Monongahela Power Company, The Potomac Edison Company and West Penn Power Company (Allegheny Power) filed Service Agreement No. 73 to add one (1) new Customer to the Market Rate Tariff under which Allegheny Power offers generation services.

Allegheny Power requests a waiver of notice requirements to make service available as of December 1, 2000 to PG&E Energy Trading—Power, L.P.

Copies of the filing have been provided to the Public Utilities Commission of Ohio, the Pennsylvania Public Utility Commission, the Maryland Public Service Commission, the Virginia State Corporation Commission, the West Virginia Public Service Commission, and all parties of record.

Comment date: December 28, 2000, in accordance with Standard Paragraph E at the end of this notice.

8. Public Service Company of New Mexico

[Docket No. ER01–615–000]

Take notice that on December 7, 2000, Public Service Company of New Mexico (PNM) tendered for filing, pursuant to section 205 of the Federal Power Act, 16 U.S.C. § 824d (1994), proposed revisions to its FERC Electric Tariff, Original Volume No. 3. PNM also submits a Statement of Policy and Code of Conduct to govern the relationship between PNM and wholesale power marketing affiliates, and notifies the Commission of a change in status relating to PNM's authorization to sell power at market-based rates.

Comment date: December 28, 2000, in accordance with Standard Paragraph E at the end of this notice.

9. Arizona Public Service Company

[Docket No. ER01–616–000]

Take notice that on December 7, 2000, Arizona Public Service Company (APS) tendered for filing Service Agreements to provide Long-Term Firm Point-to-Point Transmission Service to Idaho Power Company dba IDACORP Energy under APS' Open Access Transmission Tariff.

A copy of this filing has been served on Idaho Power Company dba IDACORP Energy, and the Arizona Corporation Commission.

Comment date: December 28, 2000, in accordance with Standard Paragraph E at the end of this notice.

10. UGI Utilities, Inc.

[Docket No. ER01–617–000]

Take notice that on December 7, 2000, UGI Utilities, Inc. tendered for filing an Interconnection Agreement with Allegheny Energy Supply Company, L.L.C, designated as Service Agreement No. 535 under PJM Interconnection L.L.C.''s FERC Electric Tariff Third Revised Volume No. 1.

UGI Utilities, Inc. requests an effective date of November 10, 2000.

Comment date: December 28, 2000, in accordance with Standard Paragraph E at the end of this notice.

11. Cinergy Services, Inc.

[Docket No. ER01–618–000]

Take notice that on December 7, 2000, Cinergy Services, Inc. (Cinergy) tendered for filing a Market-Based Service Agreement under Cinergy's Market-Based Power Sales Standard Tariff-MB (the Tariff) entered into between Cinergy and Wisconsin Public Service Corporation (WPSC).

Cinergy and WPSC are requesting an effective date of November 13, 2000.

Comment date: December 28, 2000, in accordance with Standard Paragraph E at the end of this notice.

12. California Independent System Operator Corporation

[Docket No. ER01–619–000]

Take notice that on December 7, 2000, the California Independent System Operator Corporation tendered for filing an Amendment to Schedule 1 of the Participating Generator Agreement between the ISO and Sierra Pacific Industries (Sierra Pacific) for acceptance by the Commission.

The ISO states that this filing has been served on Sierra Pacific and the California Public Utilities Commission.

The ISO is requesting waiver of the 60-day notice requirement to allow the Participating Generator Agreement to be made effective October 9, 2000.

Comment date: December 28, 2000, in accordance with Standard Paragraph E at the end of this notice.

13. Wisconsin Public Service Corporation

[Docket No. ER01–620–000]

Take notice that on December 7, 2000, Wisconsin Public Service Corporation tendered for filing an executed service agreement with Split Rock Energy LLC under its Market-Based Rate Tariff, FERC Electric Tariff Volume No. 10.

Comment date: December 28, 2000, in accordance with Standard Paragraph E at the end of this notice.

14. The Detroit Edison Company

[Docket No. ER01–621–000]

Take notice that on December 7, 2000, The Detroit Edison Company (Detroit Edison) tendered for filing Service Agreements (Service Agreements) for Short-term Firm and Non-Firm Point-to-Point Transmission Service under the Joint Open Access Transmission Tariff of Consumers Energy Company and Detroit Edison, FERC Electric Tariff No. 1. These Service Agreements are between Detroit Edison and H. Q. Energy Services (US), Inc., dated as of November 20, 2000. The parties have not engaged in any transactions under the Service Agreements prior to thirty days to this filing.

Detroit Edison requests that the Service Agreements be made effective as rate schedules as of December 20, 2000.

Comment date: December 28, 2000, in accordance with Standard Paragraph E at the end of this notice.

15. The Detroit Edison Company

[Docket No. ER01–622–000]

Take notice that on December 7, 2000, The Detroit Edison Company (Detroit Edison) tendered for filing a Service Agreement (Service Agreement) for Network Integration Transmission Service under the Joint Open Access Transmission Tariff of Consumers Energy Company and Detroit Edison, FERC Electric Tariff No. 1. The Service Agreement is between Detroit Edison and Nordic Marketing, L.L.C., dated as of November 7, 2000. The parties have not engaged in any transactions under the Service Agreement prior to thirty days to this filing.

Detroit Edison requests that the Service Agreement be made effective as rate schedules as of December 8, 2000.

Comment date: December 28, 2000, in accordance with Standard Paragraph E at the end of this notice.

16. Des Plaines Green Land Development, L.L.C., Gleason Power I, L.L.C., and West Fork Land Development Company, L.L.C.

[Docket No. ER01–623–000, ER01–624–000, and ER01–625–000]

Take notice that on December 7, 2000, Des Plaines Green Land Development, L.L.C. (Des Plaines), Gleason Power I, L.L.C. (Gleason), and West Fork Land Development Company, L.L.C. (West Fork) filed a Notification of Change in Status and Petition for Acceptance of Pro Forma Revised Rate Schedules in anticipation of Enron North America Corp.'s sale of its equity ownership interests in Des Plaines, Gleason and West Fork to Allegheny Energy Supply Company, LLC, all as more fully described in the Application.

Comment date: December 28, 2000, in accordance with Standard Paragraph E at the end of this notice.

17. American Electric Power Service Corporation

[Docket No. ER01–626–000]

Take notice that on December 8, 2000, the American Electric Power Service Corporation (AEPSC) tendered for filing executed Interconnection and Operation Agreement between Indiana Michigan Power Company and Duke Energy Berrien, LLC. The agreement is pursuant to the AEP Companies' Open Access Transmission Service Tariff (OATT) that has been designated as the Operating Companies of the American Electric Power System FERC Electric Tariff Revised Volume No. 6, effective June 15, 2000.

AEP requests an effective date of February 1, 2001.

A copy of the filing was served upon the Indiana Utility Regulatory Commission and the Michigan Public Service Commission.

Comment date: December 29, 2000, in accordance with Standard Paragraph E at the end of this notice.

18. Commonwealth Edison Company

[Docket No. ER01–627–000]

Take notice that on December 8, 2000, Commonwealth Edison Company (ComEd) submitted for filing a ''form of'' agreement entitled Ancillary and Other Control Area Services Resources Purchase Agreement (hereafter Agreement) between ComEd and to be named company, described in the Agreement as ''Genco, Inc.''. Exelon Corporation, the recently formed holding company which owns the ComEd system, intends to establish Genco, Inc., as a subsidiary which will own all of the generating assets of the Exelon system. This will include the assets which ComEd currently holds in Northern Illinois and from which ComEd currently obtains the generation related support necessary to provide ancillary services under its Open Access Transmission Tariff (OATT). The Agreement specifies the terms on which ComEd will receive and purchase, and Genco, Inc. will deliver and sell, the generating resources necessary to meet ComEd's obligation to supply energy imbalance and other ancillary service under its OATT, and other control area services and imbalance service to generators under specific interconnection agreements with various generators.

ComEd requests an effective date as of the actual date that its generating assets are transferred to Genco, Inc., currently anticipated to be on or about January 1, 2001. Accordingly, ComEd seeks waiver of the Commission's notice requirements.

Copies of the filing were served upon ComEd's jurisdictional customers and interested state commissions.

Comment date: December 29, 2000, in accordance with Standard Paragraph E at the end of this notice.

19. American Transmission Systems, Inc. and Ohio Edison Company, and the Cleveland Electric Illuminating Company, and the Toledo Edison Company

[Docket No. ER01–629–000]

Take notice that on December 8, 2000, American Transmission Systems, Inc.. tendered for filing on behalf of itself and Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, Service Agreements for Network Integration Service and Operating Agreements for the Network Integration Transmission Service under the Ohio Retail Electric Program with Strategic Energy, L.L.C. and Allegheny Energy Supply, LLC pursuant to the American Transmission Systems, Inc. Open Access Tariff. These agreements will enable the parties to obtain Network Integration Service under the Ohio Retail Electric Program in accordance with the terms of the Tariff.

The proposed effective date under these agreements is January 1, 2001.

Comment date: December 29, 2000, in accordance with Standard Paragraph E at the end of this notice.

20. Arizona Public Service Company

[Docket No. ER01–630–000]

Take notice that on December 8, 2000, Arizona Public Service Company (APS) tendered for filing Service Agreement to provide Long-Term Firm Point-to-Point Transmission Service to Public Service Company of New Mexico, Wholesale Power Marketing under APS' Open Access transmission Tariff.

A copy of this filing has been served on the Public Service Company of New Mexico, Wholesale Power Marketing and the Arizona Corporation Commission.

Comment date: December 29, 2000, in accordance with Standard Paragraph E at the end of this notice.

21. Arizona Public Service Company

[Docket No. ER01–631–000]

Take notice that on December 8, 2000, Arizona Public Service Company (APS) tendered for filing umbrella Service Agreements to provide Short-term Firm and Non-Firm Point-to-Point Transmission Service to Legacy Energy Group, LLC under APS' Open Access Transmission Tariff.

A copy of this filing has been served on Legacy Energy Group, LLC and the Arizona Corporation Commission.

Comment date: December 29, 2000, in accordance with Standard Paragraph E at the end of this notice.

22. Commonwealth Edison Company

[Docket No. ER01–628–000]

Take notice that on December 8, 2000, Commonwealth Edison Company and Commonwealth Edison Company of Indiana, Inc. (collectively ComEd) filed to amend Schedules 4, 4A and 4G to ComEd's Open Access Transmission Tariff (OATT).

ComEd requests an effective date of January 1, 2001.

Copies of the filing were served upon ComEd's jurisdictional customers and interested state commissions.

Comment date: December 29, 2000, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211

and 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of these filings are on file with the Commission and are available for public inspection. This filing may also be viewed on the Internet at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 00–32384 Filed 12–19–00; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP01–35–000]

Southern Natural Gas Company; Notice of Intent To Prepare an Environmental Assessment for the Proposed Holy Trinity Looping Project and Request for Comments on Environmental Issues

December 14, 2000.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the Holy Trinity Looping Project involving construction and operation of facilities by Southern Natural Gas Company (Southern) in Russell County, Alabama and Stewart County, Georgia.[1] These facilities would consist of 7 miles of 16-inch-diameter pipeline looping. No new aboveground facilities would be built. This EA will be used by the Commission in its decision-making process to determine whether the project is in the public convenience and necessity.

If you are a landowner receiving this notice, you may be contacted by a pipeline company representative about the acquisition of an easement to construct, operate, and maintain the proposed facilities. The pipeline company would seek to negotiate a mutually acceptable agreement. However, if the project is approved by the Commission, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, the pipeline company could initiate condemnation proceedings in accordance with state law.

A fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?'' was attached to the project notice Southern provided to landowners. This fact sheet addresses a number of typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. It is available for viewing on the FERC Internet website (www.ferc.fed.us).

Summary of the Proposed Project

Southern wants to expand its transmission system's capacity to transport natural gas by constructing 7 miles of 16-inch-diameter looping alongside the right-of-way (ROW) of its existing 16-inch diameter pipeline. The required ROW width would include 50 feet of existing ROW and 35 feet of additional temporary ROW for a total construction ROW width of 85 feet. The total after-construction ROW width would be 70 feet. Temporary 25-foot by 100-foot workspaces would be required at wetland, directional drills of waterbodies, and turnaround areas. A 3.87-acre temporary warehouse/pipe storage yard (Warehouse 1) located about 3 miles south of the proposed pipeline on the outskirts of Omaha, Georgia at County Roads 34 and 39 would be required. Another 3.06-acre temporary warehouse/pipe storage yard (Warehouse 2) at milepost 34.0 would be required. The Chattahoochee River at milepost 29.67, a tributary/wetland associated with Hannahatchee Creek at milepost 33.6, and Hannahatchee Creek at milepost 34.6 would all be directionally drilled. Approximately 10 access roads would be required and some of them would be widened.

The locations of the project facilities, warehouse/pipe storage yards, and access roads are shown in appendix 1, figures 1 and 2.[2]

Land Requirements for Construction

Construction of the proposed facilities would require the use of 85 acres of land. This includes 43 acres of previously disturbed existing ROW, 25 acres of previously undisturbed temporary ROW, and 17 acres of previously undisturbed permanent ROW.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us[3] to discover and address concerns the public may have about proposals. We call this ''scoping''. The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this Notice of Intent, the Commission requests public comments on the scope of the issues it will address in the EA. All comments received are considered during the preparation of the EA. State and local government representatives are encouraged to notify their constituents of this proposed action and encourage them to comment on their areas of concern.

The EA will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

- geology and soils
- water resources, fisheries, and wetlands
- vegetation and wildlife
- land use.
- cultural resources.
- public safety.

We will also evaluate possible alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

Our independent analysis of the issues will be in the EA. Depending on the comments received during the scoping process, the EA may be published and mailed to Federal, state, and local agencies, public interest groups, interested individuals, affected landowners, newspapers, libraries, and the Commission's official service list for this proceeding. A comment period will be allotted for review if the EA is published. We will consider all comments on the EA before we make our recommendations to the Commission.

To ensure your comments are considered, please carefully follow the instructions in the public participation section below.

[1] Southern's application was filed with the Commission under section 7 of the Natural Gas Act and part 157 of the Commission's regulations.

[2] The appendices referenced in this notice are not being printed in the **Federal Register**. Copies are available on the Commission's website at the ''RIMS'' link or from the Commission's Public Reference and Files Maintenance Branch, 888 First Street, NE., Washington, DC 20426, or call (202) 208–1371. For instructions on connecting to RIMS refer page 5 of this notice. Copies of the appendices were sent to all those receiving this notice in the mail.

[3] ''We'', ''us'', and ''our'' refer to the environmental staff of the Office of Energy Projects (OEP).

Currently Identified Environmental Issues

We have already identified several issues that we think deserve attention based on a preliminary review of the proposed facilities and the environmental information provided by Southern. This preliminary list of issues may be changed based on your comments and our analysis.

- Construction within 300 feet of the Blessed Trinity Mission and nearby sewage treatment pond.
- Construction for approximately 1 mile across the Chattahoochee River floodplain and for approximately 1 mile across the Hannahatchee Creek floodplain.
- Use of a 3.87-acre temporary warehouse/pipe storage yard (Warehouse 1) located on the outskirts of Omaha, Georgia, at County Roads 34 and 39, and use of a 3.06-acre temporary warehouse/pipe storage yard (Warehouse 2) at milepost 34.0 in Stewart County, Georgia.
- The widening of 10 logging roads up to 25 feet wide for use as temporary access roads.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the project. By becoming a commentor, your concerns will be addressed in the EA and considered by the Commission. You should focus on the potential environmental effects of the proposal, alternatives to the proposal (including alternative routes), and measures to avoid or lessen environmental impact. The more specific your comments, the more useful they will be. Please carefully follow these instructions to ensure that your comments are received in time and properly recorded:

- Send an original and two copies of your letter to: David P. Boergers, Secretary, Federal Energy Regulatory Commission, 888 First Street, St., NE., Room 1A, Washington, DC 20426.
- Label one copy of the comments for the attention of Gas 2.
- Reference Docket No. CP01–035–000.
- Mail your comments so that they will be received in Washington, DC on or before January 16, 2001.

Comments may also be filed electronically via the Internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at *http://www.ferc.fed.us/efi/doorbell.htm* under the link to the User's Guide. Before you can file comments you will need to create an account which can be created by clicking on ''Login to File'' and then ''New User Account.''

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an official party to the proceeding known as an ''intervenor''. Intervenors play a more formal role in the process. Among other things, intervenors have the right to receive copies of case-related Commission documents and filings by other intervenors. Likewise, each intervenor must provide 14 copies of its filings to the Secretary of the Commission and must send a copy of its filings to all other parties on the Commission's service list for this proceeding. If you want to become an intervenor you must file a motion to intervene according to Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.214) (see appendix 2). Only intervenors have the right to seek rehearing of the Commission's decision.

Affected landowners and parties with environmental concerns may be granted intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which would not be adequately represented by any other parties. You do not need intervenor status to have your environmental comments considered.

Additional information about the proposed project is available from the Commission's Office of External Affairs at (202) 208–0004 or on the FERC website (www.ferc.fed.us) using the ''RIMS'' link to information in this docket number. Click on the ''RIMS'' link, select ''Docket #'' from the RIMS Menu, and follow the instructions. For assistance with access to RIMS, the RIMS helpline can be reached at (202) 208–2222.

Similarly, the ''CIPS'' link on the FERC Internet website provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings. From the FERC Internet website, click on the ''CIPS'' link, select ''Docket #'' from the CIPS menu, and follow the instructions. For assistance with access to CIPS, the CIPS helpline can be reached at (202) 208–2474.

David P. Boergers,

Secretary.

[FR Doc. 00–32385 Filed 12–19–00; 8:00 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Sunshine Act Meeting

AGENCY HOLDING MEETING: Federal Energy Regulatory Commission.

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: 12/11/2000, 65 FR 77365.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: December 13, 2000, 10 a.m.

CHANGE IN THE MEETING: The following Docket Nos. and Company have been added to Item CAE–2 on the December 13, 2000 Commission meeting.

Item No., Docket No. and Company

CAE–2 ER00–2998–001, ER00–2999–001, ER00–3000–001 and ER00–3001–001, Southern Company Services, Inc.

David P. Boergers,

Secretary.

[FR Doc. 00–32433 Filed 12–15–00; 4:57 pm]

BILLING CODE 6717–01–M

ENVIRONMENTAL PROTECTION AGENCY

[OPP–00691; FRL–6759–3]

Application and Summary Report for an Emergency Exemption for Pesticides; Renewal of Pesticide Information Collection Activities and Request for Comments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This Information Collection Request (ICR) is a renewal of an existing ICR that is currently approved by the Office of Management and Budget (OMB) and is due to expire September 30, 2001. This data collection program is designed to provide EPA with necessary data to evaluate an application for a permit for the temporary shipment and use of a pesticide product for an unregistered use to mitigate an emergency situation, and to evaluate the effectiveness of that product in allaying the emergency. Requests for Section 18 emergency exemptions, thus submission of the application, are at the discretion of a State, U.S. Territory, or Federal agency. Should one of these entities apply for the emergency, then the information and data herein are requested by EPA.

DATES: Written comments, identified by the docket control number OPP–00691, must be received on or before February 20, 2001.

ADDRESSES: Comments may be submitted by mail, electronically, or in person. Please follow the detailed instructions for each method as provided in Unit III. of the **SUPPLEMENTARY INFORMATION.** To ensure proper receipt by EPA, it is imperative that you identify docket control number OPP–00691 in the subject line on the first page of your response.

FOR FURTHER INFORMATION CONTACT: By mail: Nancy Vogel, Field and External Affairs Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 305–6475; fax number: (703) 305–5884; e-mail address: vogel.nancy@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Does this Action Apply to Me?

You may be potentially affected by this action if you are a Federal, U.S. Territory, or State agency responsible for the regulation of pesticides. Potentially affected categories and entities may include, but are not limited to:

Category	NAICS code	SIC code	Examples of potentially affected entities
Regulation of agricultural marketing and commodities	92614	9641	Federal and State (including tribal) agencies responsible for regulating pesticides

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this table could also be affected. The North American Industrial Classification System (NAICS) code and the Standard Industrial Classification (SIC) code are provided to assist you and others in determining whether or not this action might apply to certain entities. If you have questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

II. How Can I Get Additional Information, Including Copies of this Document and Other Related Documents?

A. Electronically

You may obtain electronic copies of this document, and certain other related documents that might be available electronically, from the EPA Internet Home Page at http://www.epa.gov/. On the Home Page select ''Laws and Regulations,'' ''Regulations and Proposed Rules,'' 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/.

B. Fax-on-Demand

Using a faxphone call (202) 401–0527 and select item 6085 for a copy of the ICR.

C. In Person

The Agency has established an official record for this action under docket control number OPP–00691. The official record consists of the documents specifically referenced in this action, any public comments received during an applicable comment period, and other information related to this action, including any information claimed as Confidential Business Information (CBI). This official record includes the documents that are physically located in the docket, as well as the documents that are referenced in those documents. The public version of the official record does not include any information claimed as CBI. The public version of the official record, which includes printed, paper versions of any electronic comments submitted during an applicable comment period, is available for inspection in the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The PIRIB telephone number is (703) 305–5805.

III. How Can I Respond to this Action?

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

You may submit comments through the mail, in person, or electronically. To ensure proper receipt by EPA, it is imperative that you identify docket control number OPP–00691 in the subject line on the first page of your response.

1. *By mail.* Submit your comments to: Public Information and Records Integrity Branch (PIRIB), Information Resources and Services Division (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

2. *In person or by courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Information Resources and Services Division (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. The PIRIB is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The PIRIB telephone number is (703) 305–5805.

3. *Electronically.* You may submit your comments and/or data electronically by e-mail to: opp-docket@epa.gov, or you can submit a computer disk as described in Units III.A.1. and III.A.2. Do not submit any information electronically that you consider to be CBI. Avoid the use of special characters and any form of encryption. Electronic submissions will be accepted in WordPerfect 6.1/8.0 or ASCII file format. All comments in electronic form must be identified by docket control number OPP–00691. Electronic comments may also be filed online at many Federal Depository Libraries.

B. How Should I Handle CBI that I Want to Submit to the Agency?

Do not submit any information electronically that you consider to be CBI. You may claim information that you submit to EPA 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. In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public version of the official record. Information not marked confidential will be included in the public version of the official record without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

C. What Should I Consider When I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Provide specific examples to illustrate your concerns.
6. Offer alternative ways to improve the collection activity.
7. Make sure to submit your comments by the deadline in this notice.
8. To ensure proper receipt by EPA, be sure to identify the docket control number and administrative record number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

D. What Information is EPA Particularly Interested in?

Pursuant to section 3506(c)(2)(A) of the Paperwork Reduction Act (PRA), EPA specifically solicits comments and information to enable it to:

1. Evaluate whether the proposed collections of information are 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 estimates of the burdens of the proposed collections of information.
3. Enhance the quality, utility, and clarity of the information to be collected.
4. Minimize the burden of the collections of information on those who are to respond, including through the use of appropriate automated or electronic collection technologies or other forms of information technology, e.g., permitting electronic submission of responses.

IV. What Information Collection Activity or ICR Does this Action Apply to?

EPA is seeking comments on the following ICR:

Title: Application and Summary Report for An Emergency Exemption for Pesticides; Renewal of Pesticide Information Collection Activities and Request for Comments.

ICR numbers: EPA ICR No. 0596.07, OMB No. 2070–0032.

ICR status: This ICR is a renewal of an existing ICR that is currently approved by OMB and is due to expire September 30, 2001.

Abstract: This data collection program is designed to provide EPA with necessary data to evaluate an application for a permit for the temporary shipment and use of a pesticide product for an unregistered use to mitigate an emergency situation, and to evaluate the effectiveness of that product in allaying the emergency. Requests for Section 18 emergency exemptions, thus submission of the application, are at the discretion of a State, U.S. Territory, or Federal agency. Should one of these entities apply for the emergency, then the information and data herein are requested by the EPA.

V. What are EPA's Burden and Cost Estimates for this ICR?

Under the PRA, ''burden'' means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For this collection it includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of this estimate, which is only briefly summarized in this notice. The annual public burden for collection of information associated with the rule is estimated to average 99 hours per application, including time for reading the regulations, processing, compiling and reviewing the requested data, generating application correspondence or summary reports, and storing, filing, and maintaining the data. The following is a summary of the estimates taken from the ICR:

Respondents/affected entities: 600.

Estimated total number of potential respondents: 600.

Frequency of response: As needed.

Estimated total/average number of responses for each respondent: 5–10 annually.

Estimated total annual burden hours: 59,400.

Estimated total annual burden costs: $2,980,800.

VI. Are There Changes in the Estimates from the Last Approval?

The total burden associated with this ICR has increased 15,934 hours, from 43,466 hours in the previous ICR to 59,400 hours for this ICR. This change reflects several adjustments to the ICR calculations which are described in detail in the ICR.

VII. What is the Next Step in the Process for this ICR?

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: December 14, 2000.

Susan H. Wayland,

Acting Assistant Administrator for Prevention, Pesticides and Toxic Substances.

[FR Doc. 00–32401 Filed 12–19–00; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[AD–FRL–6919–6]

2060–ZA10

Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of regulatory finding.

SUMMARY: This notice presents EPA's finding required by section 112(n)(1)(A) of the Clean Air Act (CAA) as to whether regulation of emissions of hazardous air pollutants (HAP) from fossil fuel-fired electric utility steam generating units (as defined in section 112(a)(8) of the CAA) is appropriate and necessary. This finding is based on the results of EPA's February 1998 ''Study

of Hazardous Air Pollutant Emissions from Electric Utility Steam Generating Units—Final Report to Congress' (utility RTC), and on information obtained subsequent to the utility RTC concerning HAP emissions to the atmosphere from electric utility steam generating units. In the utility RTC, the EPA indicated that coal- and oil-fired electric utility steam generating units are significant emitters of HAP, including mercury which is emitted from coal-fired units, and which EPA identified as the HAP of greatest concern to public health from the industry. Based on the available information, the Administrator finds that regulation of HAP emissions from coal- and oil-fired electric utility steam generating units under section 112 of the CAA is appropriate and necessary. As a result, this notice adds coal-and oil-fired electric utility steam generating units to the list of source categories under section 112(c) of the CAA. Also in the utility RTC, the EPA indicated that the impacts due to HAP emissions from natural gas-fired electric utility steam generating units were negligible based on the results of the study. The Administrator finds that regulation of HAP emissions from natural gas-fired electric utility steam generating units is not appropriate or necessary. The EPA does not believe that the definition of electric utility steam generating unit found in section 112(a)(8) of the CAA encompasses stationary combustion turbines. Therefore, the finding concerning natural-gas fired electric utility steam generating units does not apply to stationary combustion turbines.

ADDRESSES: Docket No. A–92–55, containing information used in development of this notice, is available for public inspection and copying between 8:00 a.m. and 5:30 p.m., Monday through Friday, excluding legal holidays. The docket is located in EPA's Air and Radiation Docket and Information Center, Waterside Mall, Room M–1500, 401 M Street, SW, Washington, DC 20460, or by calling (202) 260–7548. A reasonable fee may be charged for copying docket materials.

FOR FURTHER INFORMATION CONTACT: Mr. William Maxwell, Emission Standards Division (MD–13), U.S. EPA, Research Triangle Park, North Carolina 27711, telephone number (919) 541–5430, facsimile number (919) 541–5450, electronic mail address <maxwell.bill@epa.gov>.

SUPPLEMENTARY INFORMATION: *Docket.* The docket is an organized file of all the information submitted to or otherwise relied upon by EPA in the development of this regulatory finding. The principal purpose of the docket is to allow interested parties to identify and locate documents that serve as a record of the process engaged in by EPA which resulted in the publication of today's finding.

World Wide Web. In addition to being available in the docket, an electronic copy of today's notice will be posted on the Technology Transfer Network's (TTN) policy and guidance information page <*http://www.epa.gov/ttn/oarpg*> under ''Recent Actions.'' The TTN provides information and technology exchange in various areas of air pollution control. If more information regarding the TTN is needed, call the TTN HELP line at (919) 541–5384.

I. What Is the Statutory Authority and Background of This Finding?

Today's finding is issued under the authority of section 112(n)(1)(A) and 112(c) of the CAA. Section 112(n)(1)(A) requires that, after considering the results of the study mandated by the same section and reported in the utility RTC, the Administrator determine whether regulation of HAP emissions from electric utility steam generating units is appropriate and necessary. The study was initiated following enactment of the 1990 Amendments to the CAA, which included section 112(n)(1)(A). Data were gathered, and the utility RTC was prepared. Section 112(c) provides that the Administrator shall list categories of sources of the air pollutants contained in the section 112(b) list. The listing of source categories under section 112(c) is a dynamic process. (See ''Initial List of Categories of sources under Section 112(c)(1) of the Clean Air Act Amendments of 1990,'' 57 FR 31576.) Decisions as to the description and scope of source categories listed will be perfected during the course of the rulemaking process for each listed category and will take account of improvements in available information and analysis during the rulemaking. A draft utility RTC was submitted for scientific peer review in July 1995, and, concurrently, was made available for public review (60 FR 35393). A public meeting to obtain comments from the scientific peer review panel was held on July 11–12, 1995 in Research Triangle Park, North Carolina. In addition, a public outreach meeting was held on July 13, 1995 in Durham, North Carolina, at which time the public was invited to present oral comments on its interpretation of the ''results of the study.'' The utility RTC was finalized in February 1998 and released to Congress and the public. In the final utility RTC, the EPA stated that, for the utility industry, mercury from coal-fired electric utility steam generating units was the HAP of greatest concern for public health.

To further inform the regulatory finding, the EPA issued an information collection request under the authority of section 114 of the CAA to all coal-fired electric utility steam generating units requesting coal data from such units for calendar year 1999. Certain units were also required to conduct stack tests to evaluate their HAP emissions. In addition, the EPA solicited data from the public through a February 29, 2000 notice (65 FR 10783). Another public meeting was held on June 13, 2000 in Chicago, Illinois, where the public was invited to provide EPA with their views on what the regulatory finding should be (65 FR 18992).

Further, the EPA undertook an evaluation of the mercury control performance of various emission control technologies that are either currently in use on electric utility steam generating units for pollutants other than mercury or that could be applied to such units for mercury control. The evaluation was conducted along with other parties, including the Department of Energy (DOE).

In addition, at the direction of Congress, the EPA funded the National Academy of Sciences (NAS) to perform an independent evaluation of the available data related to the health impacts of methylmercury and provide recommendations for EPA's reference dose (RfD—the amount of a chemical which, when ingested daily over a lifetime, is anticipated to be without adverse health effects to humans, including sensitive subpopulations). The NAS conducted an 18-month study of the available data on the health effects of methylmercury and provided EPA a report of its findings in July 2000.

II. What Has EPA Learned From the Utility RTC and the Subsequent Data-Gathering Activities?

The following four sections present a summary of the information and conclusions presented in the utility RTC along with the information obtained subsequent to publishing the utility RTC.

A. Health Hazard Assessment

The EPA evaluated exposures, hazards, and risks due to HAP emissions from coal-, oil-, and natural gas-fired electric utility steam generating units. Much of the assessment focused on inhalation exposure. However, multipathway exposures (*e.g.,* inhalation plus ingestion) were considered for six HAP

(mercury, radionuclides, arsenic, cadmium, lead, and dioxins). The assessment for radionuclides was relatively extensive and included multipathway modeling for all facilities identified in the utility RTC. The analysis for mercury was primarily based on information obtained from EPA's December 1997 ''Mercury Study Report to Congress'' (mercury RTC) and included a multipathway modeling assessment of mercury from four model electric utility plants. Screening level multipathway exposure modeling analyses were also conducted for arsenic and dioxins. For the other two HAP (cadmium and lead), a qualitative assessment of potential concerns for multipathway exposure was presented; multipathway modeling was not conducted for those two HAP. The methods and results of the analyses are presented in the utility RTC.

Based on the assessment of hazards and risks due to emissions of HAP from electric utility steam generating units, mercury is the HAP of greatest concern. Mercury is highly toxic, persistent, and bioaccumulates in food chains. Mercury emitted from electric utility steam generating units (and other sources), primarily in the elemental or divalent forms, is transported through the atmosphere and eventually deposits onto land or water bodies (with the divalent form depositing nearer the source than the elemental form). Once deposited, the chemical form of mercury can change (through a methylation process) into methylmercury which is a highly toxic, more bioavailable, form that biomagnifies in the aquatic food chain (*e.g.,* fish). Nearly all the mercury that accumulates in fish is methylmercury. Fish consumption dominates the pathway for human and wildlife exposure to mercury. As of July 2000, 40 States and American Samoa have issued fish advisories for mercury. Thirteen of those States have issued advisories for all water bodies in their State, and the other 27 States have issued advisories for over 1,900 specific water bodies.

Because the developing fetus is the most sensitive to the effects of methylmercury, the greatest concern is the consumption of mercury contaminated fish by women of childbearing age. Also of particular concern are subsistence fish-eating populations that may be consuming fish from contaminated waterbodies. The EPA estimates that about 7 percent of women of childbearing age (*i.e.*, between the ages of 15 and 44 years) are exposed to methylmercury at levels exceeding its RfD of 0.1 microgram per kilogram body weight per day (0.1 ug/kg/day). The risk following exposures above the RfD is uncertain, but risk increases with increasing exposure. About 1 percent of women have methylmercury exposures 3 to 4 times the methylmercury RfD. The NAS, in its July 2000 report ''Toxicological Effects of Methylmercury,'' affirmed EPA's assessment of methylmercury toxicity and the level of its RfD.

Most of the mercury currently entering U.S. water bodies and contaminating fish is the result of air emissions which, following atmospheric transport, deposit onto watersheds or directly to water bodies. Wastewater discharges also contribute to environmental loadings, but to a much lesser degree than air emissions. Based on modeling conducted for the mercury RTC, the EPA estimates that roughly 60 percent of the total mercury deposited in the U.S. comes from U.S. anthropogenic air emission sources; the percentage is estimated to be even higher in certain regions (*e.g.*, northeast U.S.). The remainder of the mercury deposited from the air comes from natural emission sources, reemissions of historic global anthropogenic mercury releases, and from anthropogenic sources outside the U.S. In the mercury RTC, the EPA concluded that, given the total mass of mercury estimated to be emitted from all anthropogenic sources and EPA's modeling of the atmospheric transport of emitted mercury, coal combustion and waste incineration most likely bear the greatest responsibility for direct anthropogenic mercury deposition to the continental U.S. Mercury emissions from waste incineration (including municipal waste combustors and hospital/medical/infectious waste incinerators) have been declining substantially over the last decade largely due to regulations issued by EPA. Electric utility steam generating units (which are not currently regulated for mercury emissions) are the largest source of mercury emissions in the U.S., estimated to emit about 30 percent of current U.S. anthropogenic emissions. There is a plausible link between emissions of mercury from anthropogenic sources (including coal-fired electric utility steam generating units) and methylmercury in fish. Therefore, mercury emissions from electric utility steam generating units are considered a threat to public health and the environment. It is acknowledged that there are uncertainties regarding the extent of the risks due to electric utility mercury emissions. For example, there is no quantification of how much of the methylmercury in fish consumed by the U.S. population is due to electric utility emissions relative to other mercury sources (*e.g.*, natural and other anthropogenic sources). Nonetheless, the available information indicates that mercury emissions from electric utility steam generating units comprise a substantial portion of the environmental loadings and are a threat to public health and the environment. The EPA believes that it is not necessary to quantify the amount of mercury in fish due to electric utility steam generating unit emissions relative to other sources for the purposes of this finding.

With regard to the other HAP, arsenic and a few other metals (*e.g.*, chromium, nickel, cadmium) are of potential concern for carcinogenic effects. Although the results of the risk assessment indicate that cancer risks are not high, they are not low enough to eliminate those metals as a potential concern for public health. Dioxins, hydrogen chloride, and hydrogen fluoride are three additional HAP that are of potential concern and may be evaluated further during the regulatory development process.

The other HAP studied in the risk assessment do not appear to be a concern for public health based on the available information. However, because of data gaps and uncertainties, it is possible that future data collection efforts or analyses may identify other HAP of potential concern.

B. Emissions

In developing the utility RTC, the EPA examined HAP emissions test data acquired by the DOE, electric utility companies and organizations, and EPA itself. Further, using section 114 authority, the EPA obtained data from each coal-fired electric utility unit to update and refine the information on mercury emissions from such units. After evaluating various methods to estimate the emissions, the EPA estimates that the industry emitted 43 tons of mercury in 1999 from 1,149 units at 464 coal-fired plants.

The analyses of the data obtained are explained in the utility RTC and in subsequent documentation. Table 1 of this notice presents estimated 1990 and 2010 nationwide HAP emissions from electric utility steam generating units as presented in the utility RTC. The estimates account for projected changes in the population of units, fuel consumption, and control device configurations. Coal- and oil-fired electric utility steam generating units are major sources (as defined in section 112(a)(1) of the CAA) of hydrogen chloride and hydrogen fluoride emissions, emit a significant number of

the 188 HAP on the section 112(b) list, and are the leading anthropogenic sources of mercury emissions in the U.S.

TABLE 1.—SELECTED NATIONWIDE ESTIMATED HAP EMISSIONS

HAP	Selected nationwide HAP emissions estimates (tons/year)					
	Coal		Oil		Natural gas	
	1990	2010	1990	2010	1990	2010
Arsenic	61	71	5	3	0.15	0.25
Beryllium	7.1	8.2	0.5	0.4		
Cadmium	3.3	3.8	1.7	0.9		
Chromium	73	87	4.7	2.4		
Dioxins	0.000097	0.000108	2×10^{-5}	3×10^{-6}		
Formaldehyde	.....	.....	.....	.....	36	57
Hydrogen chloride	143,000	155,000	2,860	1,450		
Hydrogen fluoride	19,500	27,500				
Lead	75	87	10.6	5.4		
Manganese	164	219	9.3	4.7		
Mercury	46	60	0.25	0.13		
Nickel	.....	.....	393	198	2.2	3.5

For mercury, it was estimated in the utility RTC that the industry emitted approximately 46 tons in 1990 (51 tons in 1994) and was projected to emit approximately 60 tons in 2010 from 1,026 units at 426 coal-fired plants. The new information obtained under section 114 authority corroborates the emissions estimates. The increase in the number of units over that of the utility RTC results primarily from the identification of additional co-generation facilities meeting the section 112(a)(8) definition. The quality of the 1999 data is considered to be significantly better than that of the data reported in the utility RTC. Specific coal data, including the mercury content, were obtained for each coal-fired unit in the U.S. over the entire year; previously, State-average data were used. In addition, the control performance of existing control devices for each of the three major species of mercury (divalent, elemental, and particulate) were available; for the utility RTC, only total mercury values were available. The new data allowed EPA to significantly refine and improve its analyses and evaluate various methodologies in estimating nationwide mercury emissions from coal-fired electric utility steam generating units.

C. Alternative Control Strategies

Recent data show the technologies used to control criteria pollutants (particulate matter (PM), nitrogen oxides (NO_X) and sulfur dioxide (SO_2)) are effective in controlling emissions of nearly all HAP except mercury. In addition, combinations of controls for criteria pollutants can lead to varying levels of control, and in some cases full control, of mercury emissions. The application of technologies used to control mercury emissions in conjunction with technologies used to control other pollutants, an approach called multipollutant control, can substantially reduce or offset the costs of HAP control.

Potential strategies for controlling mercury and other HAP emissions include the use of: precombustion controls (*e.g.*, fuel switching, coal switching, coal cleaning); combustion modification methods used to control NO_X emissions; flue gas cleaning technologies that can be used to control emissions of criteria pollutants and HAP; and nontraditional controls such as demand side management and energy conservation.

Conversion of coal- and oil-fired units to natural gas firing effectively eliminates HAP emissions. Although conversion of coal-fired units to oil combustion will decrease emissions of some HAP, including mercury, it could increase emissions of others (especially nickel). Because of the wide variability in the trace metal contents of coals, switching coals generally may not result in consistently reduced HAP emissions. Current methods of coal cleaning remove portions of the trace metals contained within the coal; the average emissions reductions range from approximately 30 percent for mercury to approximately 50 percent for lead.

Nontraditional control methods (*e.g.*, demand side management, energy conservation, pollution prevention) have the potential to result in reduced HAP emissions, but the extent to which that is possible is currently uncertain. The nontraditional controls reduce HAP emissions through the avoided generation of HAP rather than by their removal from the exhaust gas stream.

Mercury in the flue gas from coal combustion may be present in three different forms. The forms, called species, include elemental mercury, divalent oxidized forms, and mercury adsorbed onto the surface of fly ash or other particles. The capture of mercury is highly dependent on the relative amount of mercury species that are present in the flue gas. Particulate bound mercury can easily be removed in conventional PM emission control devices such as electrostatic precipitators (ESP) and fabric filters (FF). Divalent forms of mercury are generally soluble in water and can be captured in wet scrubbers. Wet flue gas desulfurization (FGD) systems generally capture more than 90 percent of the divalent mercury, which may represent a 20 to 80 percent removal of the total mercury. Elemental mercury is insoluble in water, does not react with alkaline reagents used in FGD systems, and cannot be captured in wet scrubbers. Both the elemental and divalent forms of mercury can be adsorbed onto porous solids (*e.g.*, fly ash, powdered activated carbon, calcium-based acid gas sorbents) for subsequent removal in a PM control device, although elemental mercury is more difficult to adsorb onto solid surfaces than are the divalent forms of mercury. Bituminous coals contain higher concentrations of chlorine and other constituents that promote the oxidation and capture of mercury in conventional air pollution control devices. In contrast, flue gas from the combustion of subbituminous and lignite coals typically have higher amounts of the more difficult to control elemental form of mercury.

The available data indicate that installation of low-NO_X burners and

other combustion modification methods in pulverized coal-fired units may increase the carbon content of the fly ash. Mercury emissions may then be reduced through adsorption onto the fly ash carbon and subsequent capture in the PM control device. The improved mercury capture may come at the expense of slightly higher emissions of organic HAP. Cyclone-fired units emit low amounts of fly ash and reduce the chances of mercury adsorption and capture as particle-bound mercury. Fluidized bed combustion systems typically have high flue gas concentrations of high carbon-content fly ash and high levels of mercury capture in PM emission control devices.

Electrostatic precipitators and FF generally remove greater than 90 percent of all trace metallic HAP, with the exception of mercury. They are not effective in reducing emissions of gas-phase HAP, which include trace organic HAP and HAP such as hydrogen chloride and hydrogen fluoride.

Mechanical collectors and wet PM scrubbers are not generally effective in reducing HAP emissions. Mechanical collectors capture only HAP that are associated with large particles; fine-particle HAP and gas-phase HAP pass through and are emitted to the atmosphere. Wet PM scrubbers are moderately effective in reducing water-soluble HAP but do not effectively reduce HAP emissions associated with fine particulate or hydrophobic volatile organic HAP.

Dry scrubbers which employ a spray dryer adsorber (SDA) in conjunction with an ESP or FF are typically very effective in reducing HAP emissions. In SDA systems, water containing an acid gas sorbent is sprayed into a reaction vessel where the acid gases and other pollutants are reacted to form solid particles that can be collected in a downstream PM control device. Some coal-fired utilities that use bituminous coal in pulverized coal-fired units have shown mercury capture in excess of 90 percent in SDA/FF systems.

Wet FGD systems are capable of capturing nearly all HAP other than mercury and more than 90 percent of the divalent and particle bound mercury. Mercury removal in wet FGD systems may range from less than 20 to more then 80 percent, depending on the type of coal and combustion system used. Mercury capture in such units can be improved by the use of catalysts or reagents to increase the conversion of elemental mercury to soluble divalent forms of mercury.

Recent research indicates that mercury removal may be enhanced through the use of oxidizing agents (that convert elemental mercury to the ionized form) or through the use of sorbents (that adsorb the mercury onto solid particles). Enhanced mercury removal may also be achieved through greater use of multipollutant control options. Recent data indicate that the use of selective catalytic or noncatalytic reduction for NO_X control may also oxidize mercury and, therefore, enhance mercury control.

Thus, EPA's analysis of potential HAP control strategies allows EPA to conclude that, during the regulatory development process, effective controls for mercury and other HAP can be shown to be feasible.

D. Conclusions

The following conclusions summarize those presented in the utility RTC and those based on the information subsequently obtained and are based on the currently available scientific data. The conclusions, as a whole, support a finding that regulation of coal-and oil-fired electric utility steam generating units for HAP is appropriate and necessary.

1. Fossil fuel-fired electric utility steam generating units (coal-and oil-fired units in particular) emit a significant number of the 188 HAP included on the section 112(b) list. Estimated growth in the number of, and fuel use by, electric utility steam generating units (particularly coal-fired units) during the period 1990 to 2010 will result in an overall increase in HAP emissions. The new data gathered to date corroborate the previous nationwide mercury emissions estimate and confirm that electric utility steam generating units are the largest anthropogenic source of mercury in the U.S.

2. Mercury is highly toxic, persistent, and bioaccumulates in the food chain. Mercury emissions are transported through the atmosphere and eventually deposit onto land or water bodies. The deposition can occur locally near the source or at long distances (*e.g.*, hundreds or thousands of miles away). The air transport and deposition patterns of mercury emissions depend on various factors, including: The form of mercury released (divalent mercury deposits nearer to the source whereas elemental mercury enters the global pool and deposits farther from the source); the stack height and meteorology; and chemical transformations during transport in the atmosphere. Once deposited, the chemical form of mercury can change into methylmercury (through a methylation process), which is a more toxic form that biomagnifies up the aquatic food chain. Fish consumption dominates the pathway for human and wildlife exposure to mercury. There is a plausible link between emissions of mercury from anthropogenic sources (including coal-fired electric utility units) and methylmercury in fish.

3. Neurotoxicity is the health effect of greatest concern with methylmercury exposure. Methylmercury has a relatively long half-life in the human body (averaging about 70 to 80 days). Dietary methylmercury is almost completely absorbed into the blood and distributed to all tissues including the brain; it also readily passes through the placenta to the fetus and fetal brain. The developing fetus is considered most sensitive to the effects from methylmercury; therefore, women of childbearing age are the population of greatest concern. Offspring born of women exposed to relatively high levels of methylmercury during pregnancy have exhibited a variety of developmental neurological abnormalities, including delayed developmental milestones, cerebral palsy, and reduced neurological test scores. Studies suggest that far lower levels of in utero exposures have resulted in delays and deficits in learning abilities. It is also possible that children exposed after birth are also potentially more sensitive to the toxic effects of methylmercury than adults because their nervous systems are still developing.

4. Extrapolating from high-dose exposure incidents, the EPA derived an RfD for methylmercury of 0.1 ug/kg/day based on developmental neurological effects observed in children born to mothers exposed to methylmercury during their pregnancy. The NAS study determined that EPA's RfD is a scientifically justifiable level for the protection of public health. At the RfD or below, exposures are expected to be safe. The risks following exposures above the RfD are uncertain, but risk increases as exposures to methylmercury increase.

5. The results of recent dietary surveys indicate that most of the U.S. population consumes fish and is exposed to methylmercury as a result. Based on the surveys, about 85 percent of adults in the U.S. consume fish at least once a month, about 40 percent of adults consume fish once a week, and 1 to 2 percent of adults consume fish almost daily.

6. The EPA estimates that about 7 percent of women of childbearing age (i.e., between the ages of 15 and 44 years) are exposed to methylmercury at levels exceeding the RfD and about 1

percent of women have methylmercury exposures 3 to 4 times that level.

7. Exposure to methylmercury can have serious toxicologic effects on wildlife as well as on humans. Adverse effects to avian species and wildlife have been observed in laboratory studies at levels corresponding to fish tissue methylmercury concentrations that are exceeded by a significant percentage of fish sampled in lake surveys. Generally, wildlife consume fish from a much more limited geographic area than do humans which can result in elevated levels of mercury in certain fish-eating species in localized geographic areas. Those species can include kingfisher, river otter, racoon, loon, as well as some endangered species such as the Florida panther.

8. The EPA predicts that increased mercury deposition will lead to increased levels of methylmercury in fish, and that increased levels in fish will lead to toxicity in fish-eating birds and mammals, including humans. The NAS, in its July 2000 report, stated that ''because of the beneficial effects of fish consumption, the long-term goal needs to be a reduction in the concentrations of methylmercury in fish.'' The EPA agrees with that goal and believes that reducing emissions of mercury from electric utility steam generating units is an important step toward achieving the goal.

9. There are a number of alternative control strategies that are effective in controlling some of the HAP emitted from electric utility steam generating units. Recent data indicate that mercury, perhaps the hardest HAP to remove from the exhaust gas stream, can be effectively removed by using oxidizing agents or sorbents injected into the gas stream. Recent data also indicate the possibility for multipollutant control with other pollutants (*e.g.,* NO_X, SO_2, and PM), greatly reducing mercury control costs.

III. What Is EPA's Regulatory Finding?

Based on the results of the study documented in the utility RTC, as well as subsequent analyses and other available information, the Administrator has concluded that mercury is both a public health concern and a concern in the environment. The Administrator has concluded that there is a plausible link between methylmercury concentrations in fish and mercury emissions from coal-fired electric utility steam generating units. Although the degree to which that linkage occurs cannot be estimated quantitatively now, the facts are that: There is a linkage between coal consumption and mercury emissions; electric utility steam generating units are the largest domestic source of mercury emissions; and certain segments of the U.S. population (*i.e.,* the developing fetus, subsistence fish-eating populations) are believed to be at potential risk of adverse health effects due to mercury exposures resulting from consumption of contaminated fish. Further, there remain uncertainties regarding the extent of the public health impact from HAP emissions from oil-fired electric utility steam generating units. Those facts and uncertainties lead the Administrator to find that regulation of HAP emissions from coal- and oil-fired electric utility steam generating units under section 112 is appropriate and necessary. It is appropriate to regulate HAP emissions from coal- and oil-fired electric utility steam generating units under section 112 of the CAA because, as documented in the utility RTC and stated above, electric utility steam generating units are the largest domestic source of mercury emissions, and mercury in the environment presents significant hazards to public health and the environment. The NAS study confirms that mercury in the environment presents significant hazards to public health. Further, it is appropriate to regulate HAP emissions from such units because EPA has identified a number of control options which EPA anticipates will effectively reduce HAP emissions from such units. It is necessary to regulate HAP emissions from coal- and oil-fired electric utility steam generating units under section 112 of the CAA because the implementation of other requirements under the CAA will not adequately address the serious public health and environmental hazards arising from such emissions identified in the utility RTC and confirmed by the NAS study, and which section 112 is intended to address. Therefore, the EPA is adding coal- and oil-fired electric utility steam generating units to the list of source categories under section 112(c) of the CAA. As a part of developing a regulation, the effectiveness and costs of controls will be examined along with the level(s) of control that may be technically feasible.

In developing a regulation under section 112(d), the statute authorizes EPA to consider subcategorization of a source category. The emissions standard for existing sources cannot be less stringent than the average emissions limitation achieved by the best performing 12 percent of existing sources in the category or subcategory (the ''floor''). However, the EPA intends to develop a record to facilitate consideration of subcategorization of the source category in setting the ''floor.'' Based on the information that EPA has to date, the EPA anticipates that a factual record will allow EPA to propose appropriate subcategories for this source category. In developing standards under section 112(d) to date, the EPA has based subcategorization on considerations such as: the size of a facility; the type of fuel used at the facility; and the plant type. The EPA also may consider other relevant factors such as geographic conditions in establishing subcategories. Once the source category is divided into subcategories, the EPA determines the ''floor'' for each subcategory and, in turn, the emissions standard independently for each subcategory. This approach has helped build flexibility in meeting environmental objectives in the past.

Once the floor is determined, the EPA can set an emissions standard that is more stringent than the floor if a tighter level of control is technically achievable and is justified. Factors that must be considered in deciding whether a more stringent standard than the floor is justified include: the cost of a more stringent standard; the energy requirements; and any non-air quality health and environmental factors.

Every source has to meet the level of a standard set under section 112(d), but not necessarily every individual unit at a source. Most electric generating plants have several units and so in meeting the standard there may be opportunity for lower cost solutions because the law allows for differences in reductions among units as long as the source as a whole is in compliance.

There is considerable interest in an approach to mercury regulation for power plants that would incorporate economic incentives such as emissions trading. Such an approach can reduce the cost of pollution controls by allowing for least-cost solutions among a universe of facilities that face different control costs. Trading also can allow for a greater level of control overall because it offers the opportunity for greater efficiency in achieving control. The EPA, however, recognizes and shares concerns about the local impacts of mercury emissions and any regulatory scheme for mercury that incorporates trading or other approaches that involve economic incentives must be constructed in a way that assures that communities near the sources of emissions are adequately protected. Thus, in developing a standard for utilities, the EPA should consider the legal potential for, and the economic effects of, incorporating a trading regime

under section 112 in a manner that protects local populations.

The Administrator finds that regulation of HAP emissions from natural gas-fired electric utility steam generating units is not appropriate or necessary because the impacts due to HAP emissions from such units are negligible based on the results of the study documented in the utility RTC.

The EPA has previously indicated that it construes the term ''electric utility steam generating unit,'' as defined in section 112(a)(8) of the CAA and 40 CFR 63.41, to exclude all stationary combustion turbines, regardless of whether such turbines are used to generate electricity or used by an electric utility, and regardless of whether such turbines are used in conjunction with waste heat recovery units (65 FR 34010). Therefore, the finding concerning natural-gas fired electric utility steam generating units does not apply to stationary combustion turbines.

IV. Is This Action Subject to Judicial Review?

Today's finding that it is appropriate and necessary to regulate coal-and oil-fired electric utility steam generating units adds these units to the list of source categories under section 112(c). Section 112(e)(4) of the CAA states that, notwithstanding section 307 of the CAA, no action of the Administrator listing a source category or subcategory under section 112(c) shall be a final EPA action subject to judicial review, except that any such action may be reviewed under section 307 when the Administrator issues emissions standards for such pollutant or category. Therefore, today's finding is not subject to judicial review. As specified by section 112(e)(4), judicial review would be available on both the listing decision and the subsequent regulation at the time that such final regulation is promulgated. At such time, the exact dimensions of the source category and the nature of the control required would be sufficiently clear to allow for judicial review.

V. Is EPA Asking for Public Comment?

The EPA has held several public meetings wherein oral and written public input were solicited and obtained regarding the regulatory finding. In addition, numerous opportunities for written comment relating to both the study and the regulatory finding have been provided. The EPA has decided that it is unnecessary to solicit additional public comment on today's finding. The regulation developed subsequent to the finding will be subject to public review and comment.

VI. Administrative Requirements

Today's notice does not impose regulatory requirements or costs. Therefore, the requirements of Executive Order 13045 (Protection of Children from Environmental Health Risks and Safety Risks), Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments), Executive Order 13132 (Federalism), the Regulatory Flexibility Act, the National Technology Transfer and Advancement Act, and the Unfunded Mandates Reform Act do not apply to today's notice. Also, this notice does not contain any information collection requirements and, therefore, is not subject to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* This notice was reviewed by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993).

Dated: December 14, 2000.

Carol M. Browner,

Administrator.

[FR Doc. 00–32395 Filed 12–19–00; 8:45 am]

BILLING CODE 6560–50–U

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6919–2]

Science Advisory Board; Notification of Public Advisory Committee Meetings

Pursuant to the Federal Advisory Committee Act, Public Law 92–463, notice is hereby given of two meetings of the Drinking Water Committee (DWC) of the US EPA Science Advisory Board on the dates and times noted below. All times noted are Eastern Daylight Time. All meetings are open to the public, however, seating is limited and available on a first come basis. *Important Notice:* Documents that are the subject of SAB reviews are normally available from the originating EPA office and are not available from the SAB Office—information concerning availability of documents from the relevant Program Office is included below.

Drinking Water Committee (DWC) Meetings—January 11–12, 2001 and February 28, 2001

The Drinking Water Committee of the US EPA Science Advisory Board (SAB), will meet on January 11 and 12, 2001 in Room 120/126 of the Andrew W. Breidenbach Environmental Research Center, 26 West Martin Luther King Drive, Cincinnati, OH 45268; telephone (513) 569–7772. The meeting will begin at 9:00 a.m. on January 11 and adjourn no later than 3:00 p.m. on January 12, 2001.

A followup meeting is scheduled for February 28, 2001 to address any remaining issues that might arise as a result of the January 11–12, 2001 discussions. This meeting will be coordinated through a conference call connection in room 6013 Ariel Rios North (6th Floor), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC. The public is strongly encouraged to attend the meeting through a telephonic link, but may attend physically if arrangements are made with the SAB staff by noon Friday, February 23. Additional instructions about how to participate in the conference call can be obtained by calling Ms. Dorothy Clark at (202) 564–4537, or via e-mail at: clark.dorothy@epa.gov by noon Friday, February 23.

Purpose of the Meeting—The Drinking Water Committee will continue its review of EPA's draft research plan in support of the Safe Drinking Water Act's Contaminant Candidate Listing (CCL) program.

Background

Research Plan for Candidate Contaminant Listing (CCL)—The Safe Drinking Water Act (SDWA), as amended in 1996, requires the EPA to establish a list of unregulated microbiological and chemical contaminants to aid in priority setting for the Agency's drinking water program. A new list must be published every five years. The first Contaminant Candidate List (CCL1) was first proposed by EPA in 1997 and was then finalized in 1998, following extensive consultation with stakeholders.

The Agency must select five or more contaminants from the CCL1 and determine, by August 2001, whether they should be regulated. To support these decisions, the Agency will have to evaluate when and where these contaminants occur, the extent of exposure and risk to public health, and determine if cost effective control methods are available.

EPA has sorted CCL1 contaminants into categories depending upon whether they need additional research (Research or Occurrence Priorities categories) or have sufficient data for the evaluation of exposure and risk to public health, and therefore enough data to support a drinking water standard (Regulatory Determination Priorities category). The contaminants considered for selection and regulatory determination by August

2001 will be drawn from the Regulatory Determination category and are not duplicated under the Research or Occurrence Priorities categories.

A Research Plan has been prepared to describe the nature, timing and priority of research needed in order to meet the CCL research information needs of the Agency. The plan focuses on contaminants that are on CCL1. Nevertheless, it is important for some research to be conducted on emerging pathogens and chemicals to ensure that any future CCL includes contaminants that are of potential public health concern. The SAB has been asked to review this plan.

The DWC began its discussion of the CCL Research Plan at its meeting on August 8–9, 2000 (for further information, see 65 **Federal Register** 44051–44053). The charge questions were discussed by panelists and as a result of the discussions the Committee decided to prepare an Advisory to EPA noting its preliminary advice and the need for additional information [An SAB Advisory on EPA's Draft Contaminant Candidate List (CCL) Research Plan; EPA–SAB–DWC–ADV–00–007—copies are available at *www.epa.gov/sab* under the REPORTS heading]. The discussion at the January 11–12, 2001 DWC meeting will focus on the revised Research Plan and begin its drafting of the final report to the Administrator.

Charge to the Committee—EPA asks whether: (i) it considered the appropriate existing information about CCL contaminants in formulating the Plan; (ii) it identified the key science questions; (iii) they identified appropriate research by subject and scope to address the identified science questions; (iv) the relative priorities and timetable proposed for the planned research are appropriate; and (v) the process used to identify data gaps and prioritize research needs is sound.

Availability of Review Materials—Additional information on the materials provided to the Committee for its CCL Research Plan review can be obtained by contacting Dr. Robert Clark, US EPA, National Risk Management Research Laboratory, Cincinnati, OH by telephone at (513) 569–7201 or by e-mail at *clark.robertm@epa.gov*.

For Further Information—Any member of the public wishing further information concerning this meeting or wishing to submit brief oral comments (10 minutes or less) must contact Thomas O. Miller, Designated Federal Officer, Science Advisory Board (1400A), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC 20460; telephone (202) 564–4558; FAX (202) 501–0582; or via e-mail at *miller.tom@epa.gov*. Requests for oral comments must be *in writing* (e-mail, fax or mail) and received by Mr. Miller no later than noon Eastern Time on August 2, 2000.

Providing Oral or Written Comments at SAB Meetings

It is the policy of the Science Advisory Board to accept written public comments of any length, and to accommodate oral public comments whenever possible. The Science Advisory Board expects that public statements presented at its meetings will not be repetitive of previously submitted oral or written statements. *Oral Comments:* In general, each individual or group requesting an oral presentation at a face-to-face meeting will be limited to a total time of ten minutes. For teleconference meetings, opportunities for oral comment will usually be limited to no more than three minutes per speaker and no more than fifteen minutes total. Deadlines for getting on the public speaker list for a meeting are given above. Speakers should bring at least 35 copies of their comments and presentation slides for distribution to the reviewers and public at the meeting. *Written Comments:* Although the SAB accepts written comments until the date of the meeting (unless otherwise stated), written comments should be received in the SAB Staff Office at least one week prior to the meeting date so that the comments may be made available to the committee for their consideration. Comments should be supplied to the appropriate DFO at the address/contact information noted above in the following formats: one hard copy with original signature, and one electronic copy via e-mail (acceptable file format: WordPerfect, Word, or Rich Text files (in IBM–PC/Windows 95/98 format). Those providing written comments and who attend the meeting are also asked to bring 25 copies of their comments for public distribution.

General Information— Additional information concerning the Science Advisory Board, its structure, function, and composition, may be found on the SAB Website (*http://www.epa.gov/sab*) and in The FY1999 Annual Report of the Staff Director which is available from the SAB Publications Staff at (202) 564–4533 or via fax at (202) 501–0256. Committee rosters, draft Agendas and meeting calendars are also located on our website.

Meeting Access—Individuals requiring special accommodation at this meeting, including wheelchair access to the conference room, should contact Mr. Miller at least five business days prior to the meeting so that appropriate arrangements can be made.

Dated: December 8, 2000.

Donald Barnes,

Staff Director, Science Advisory Board.

[FR Doc. 00–32398 Filed 12–19–00; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OPP–34235; FRL–6759–2]

Availability of Reregistration Eligibility Decision Documents for Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces availability and starts a 60–day public comment period on the Reregistration Eligibility Decision (RED) documents for the pesticide active ingredients diclofop-methyl, etridiazole (Terrazole®), and vinclozolin. The REDs represent EPA's formal regulatory assessments of the health and environmental data bases of the subject chemicals and present the Agency's determination regarding which pesticidal uses are eligible for reregistration.

DATES: Comments, identified by docket control number OPP–34235, must be received on or before February 20, 2001.

ADDRESSES: Comments may be submitted by mail, electronically, or in person. Please follow the detailed instructions for each method as provided in Unit I.C. of the **SUPPLEMENTARY INFORMATION**. To ensure proper receipt by EPA, it is imperative that you identify docket control number OPP–34235 in the subject line on the first page of your response.

FOR FURTHER INFORMATION CONTACT: By mail: Carol Stangel, Special Review and Reregistration Division (7508C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 308–8007; and e-mail address: stangel.carol@epa.gov.

For technical questions on a RED listed, contact the appropriate Chemical Review Manager:

Chemical Name	Case No.	Chemical Review Manager	Telephone No.	e-mail Address
Diclofop-methyl	2160	Anne Overstreet	(703) 308–8068	overstreet.anne@ epa.gov
Etridiazole (Terrazole)	0009	Roberta Farrell	(703) 308–8065	farrell.roberta@ epa.gov
Vinclozolin	2740	Deanna Scher	(703) 308–7043	scher.deanna@ epa.gov

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. This action may, however, be of interest to those persons who are or may be required to conduct testing of chemical substances under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) or the Federal Food, Drug, and Cosmetic Act (FFDCA); environmental, human health, and agricultural advocates; pesticide users; and members of the public interested in the use of pesticides. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Additional Information, Including Copies of this Document and Other Related Documents?

1. *Electronically*. You may obtain electronic copies of this document, and certain other related documents that might be available electronically, from the EPA Internet Home Page at http://www.epa.gov/. To access this document, on the Home Page select ''Laws and Regulations,'' ''Regulations and Proposed Rules,'' 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/.

To access RED documents and RED fact sheets electronically, visit the REDs table on the EPA Office of Pesticide Programs Home Page, http://www.epa.gov/REDs. For related information, see http://www.epa.gov/pesticides.

2. *In person*. The Agency has established an official record for this action under docket control number OPP–34235. The official record consists of the documents specifically referenced in this action, and other information related to this action, including any information claimed as Confidential Business Information (CBI). This official record includes the documents that are physically located in the docket, as well as the documents that are referenced in those documents. The public version of the official record does not include any information claimed as CBI. The public version of the official record, which includes printed, paper versions of any electronic comments submitted during an applicable comment period is available for inspection in the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The PIRIB telephone number is (703) 305–5805.

C. How and to Whom Do I Submit Comments?

You may submit comments through the mail, in person, or electronically. To ensure proper receipt by EPA, it is imperative that you identify docket control number OPP–34235 in the subject line on the first page of your response.

1. *By mail*. Submit your comments to: Public Information and Records Integrity Branch (PIRIB), Information Resources and Services Division (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

2. *In person or by courier*. Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Information Resources and Services Division (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA. The PIRIB is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The PIRIB telephone number is (703) 305–5805.

3. *Electronically*. You may submit your comments electronically by e-mail to: opp–docket@ epa.gov, or you can submit a computer disk as described above. Do not submit any information electronically that you consider to be CBI. Avoid the use of special characters and any form of encryption. Electronic submissions will be accepted in Wordperfect 6.1/8.0/9.0 or ASCII file format. All comments in electronic form must be identified by docket control number OPP–34235. Electronic comments may also be filed online at many Federal Depository Libraries.

D. How Should I Handle CBI That I Want to Submit to the Agency?

Do not submit any information electronically that you consider to be CBI. You may claim information that you submit to EPA 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. In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public version of the official record. Information not marked confidential will be included in the public version of the official record without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified under **FOR FURTHER INFORMATION CONTACT**.

E. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Provide specific examples to illustrate your concerns.
6. Offer alternative ways to improve the notice or collection activity.
7. Make sure to submit your comments by the deadline in this document.
8. To ensure proper receipt by EPA, be sure to identify the docket control number assigned to this action in the subject line on the first page of your response. You may also provide the

name, date, and **Federal Register** citation.

II. Background

A. What Action is the Agency Taking?

The Agency has issued REDs for the pesticide active ingredients listed in this document. Under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended in 1988, EPA is conducting an accelerated reregistration program to reevaluate existing pesticides to make sure they meet current scientific and regulatory standards. The data base to support the reregistration of each of the chemicals listed in this document is substantially complete, and each pesticide's risks have been mitigated so that it will not pose unreasonable risks to people or the environment when used according to its approved labeling. In addition, EPA is reevaluating existing pesticides and reassessing tolerances under the Food Quality Protection Act (FQPA) of 1996. The pesticides included in this notice also have been found to meet the FQPA safety standard.

All registrants of pesticide products containing one or more of the active ingredients, listed in this document, have been sent the appropriate REDs, and must respond to labeling requirements and product–specific data requirements (if applicable) within 8 months of receipt. Products also containing other pesticide active ingredients will not be reregistered until those other active ingredients are determined to be eligible for reregistration.

The reregistration program is being conducted under Congressionally-mandated time frames, and EPA recognizes both the need to make timely reregistration decisions and to involve the public. Therefore, EPA is issuing these REDs as final documents with a 60–day comment period. Although the 60–day public comment period does not affect the registrant's response due date, it is intended to provide an opportunity for public input and a mechanism for initiating any necessary amendments to the REDs. All comments will be carefully considered by the Agency. If any comment significantly affects a RED, EPA will amend the RED by publishing the amendment in the **Federal Register**.

B. What is the Agency's Authority for Taking this Action?

The legal authority for these reregistration eligibility decisions falls under FIFRA, as amended in 1988 and 1996. FIFRA section 4(g)(2)(A) directs that, after submission of all data concerning a pesticide active ingredient, ''the Administrator shall determine whether pesticides containing such active ingredient are eligible for reregistration,'' before calling in product–specific data on individual end–use products, and either reregistering products or taking ''other appropriate regulatory action.''

List of Subjects

Environmental protection, pesticides.

Dated: December 8, 2000.

Lois Rossi,

Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. 00–32037 Filed 12–19–00; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[PF–981; FRL–6751–9]

Notice of Filing Pesticide Petitions to Establish Tolerances for Certain Pesticide Chemicals in or on Food

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of pesticide petitions proposing the establishment of regulations for residues of certain pesticide chemicals in or on various food commodities.

DATES: Comments, identified by docket control number PF–981, must be received on or before January 19, 2001.

ADDRESSES: Comments may be submitted by mail, electronically, or in person. Please follow the detailed instructions for each method as provided in Unit I.C. of the **SUPPLEMENTARY INFORMATION**. To ensure proper receipt by EPA, it is imperative that you identify docket control number PF–981 in the subject line on the first page of your response.

FOR FURTHER INFORMATION CONTACT: By mail: Bipin C. Gandhi, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 308–8380; e-mail address: gandhi.bipin@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be affected by this action if you are an agricultural producer, food manufacturer or pesticide manufacturer. Potentially affected categories and entities may include, but are not limited to:

Categories	NAICS codes	Examples of potentially affected entities
Industry	111 112 311 32532	Crop production Animal production Food manufacturing Pesticide manufacturing

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in the table could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether or not this action might apply to certain entities. If you have questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Additional Information, Including Copies of this Document and Other Related Documents?

1. *Electronically*. You may obtain electronic copies of this document, and certain other related documents that might be available electronically, from the EPA Internet Home Page at http://www.epa.gov/. To access this document, on the Home Page select ''Laws and Regulations,'' ''Regulations and Proposed Rules,'' 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/.

2. *In person*. The Agency has established an official record for this action under docket control number PF–981. The official record consists of the documents specifically referenced in this action, any public comments received during an applicable comment period, and other information related to this action, including any information claimed as confidential business information (CBI). This official record includes the documents that are physically located in the docket, as well as the documents that are referenced in those documents. The public version of the official record does not include any information claimed as CBI. The public version of the official record, which includes printed, paper versions of any electronic comments submitted during an applicable comment period, is

available for inspection in the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The PIRIB telephone number is (703) 305–5805.

C. How and to Whom Do I Submit Comments?

You may submit comments through the mail, in person, or electronically. To ensure proper receipt by EPA, it is imperative that you identify docket control number PF–981 in the subject line on the first page of your response.

1. *By mail*. Submit your comments to: Public Information and Records Integrity Branch (PIRIB), Information Resources and Services Division (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

2. *In person or by courier*. Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Information Resources and Services Division (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. The PIRIB is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The PIRIB telephone number is (703) 305–5805.

3. *Electronically*. You may submit your comments electronically by e-mail to: opp-docket@epa.gov, or you can submit a computer disk as described above. Do not submit any information electronically that you consider to be CBI. Avoid the use of special characters and any form of encryption. Electronic submissions will be accepted in WordPerfect 6.1/8.0 or ASCII file format. All comments in electronic form must be identified by docket control number PF–981. Electronic comments may also be filed online at many Federal Depository Libraries.

D. How Should I Handle CBI That I Want to Submit to the Agency?

Do not submit any information electronically that you consider to be CBI. You may claim information that you submit to EPA 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. In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public version of the official record. Information not marked confidential will be included in the public version of the official record without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified under **FOR FURTHER INFORMATION CONTACT**.

E. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Provide specific examples to illustrate your concerns.

6. Make sure to submit your comments by the deadline in this notice.

7. To ensure proper receipt by EPA, be sure to identify the docket control number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. What Action is the Agency Taking?

EPA has received pesticide petitions as follows proposing the establishment and/or amendment of regulations for residues of certain pesticide chemicals in or on various food commodities under section 408 of the Federal Food, Drug, and Comestic Act (FFDCA), 21 U.S.C. 346a. EPA has determined that these petitions contain data or information regarding the elements set forth in section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of these petitions. Additional data may be needed before EPA rules on the petitions.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 8, 2000.

James Jones,

Director, Registration Division, Office of Pesticide Programs.

Summaries of Petitions

The petitioner summary of the pesticide petitions are printed below as required by section 408(d)(3) of the FFDCA. The summaries of the petitions were prepared by the petitioner and represents the view of the petitioner. EPA is publishing the petitioner's summaries verbatim without editing it in any way. The petitioner's summaries announces the availability of a description of the analytical methods available to EPA for the detection and measurement of the pesticide chemicals residues or an explanation of why no such method is needed.

Firmenich Incorporated

1. PP 6E4757

EPA has received a pesticide petition (PP 6E4757) from Firmenich Incorporated, P.O. 5880, Princeton, NJ 08543 proposing, pursuant to section 408(d) of the FFDCA, 21 U.S.C. 346a(d), to amend 40 CFR part 180, to establish an exemption from the requirement of a tolerance for octanal when used as an inert ingredient in the pesticide formulations applied to growing crops or to raw agricultural commodities (RACs) after harvest under 40 CFR 180.1001(c) and applied to animals under 40 CFR 180.1001(e). EPA has determined that the petition contains data or information regarding the elements set forth in section 408(d)(2) of the FFDCA; however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition.

A. Residue Chemistry

Since this petition is for an exemption from the requirement of a tolerance, an analytical method is not required.

B. Toxicological Profile

As part of the EPA policy statement on inert ingredients published in the **Federal Register** of April 22, 1987 (52 FR 13305) (FRL –3190–1), the Agency set forth a list of studies which generally are used to evaluate the risks posed by the presence of an inert ingredient in a pesticide formulation. However, where it can be determined without that data that the inert ingredient will present minimal or no risk, the Agency generally does not require some or all of the listed studies to rule on the proposed tolerance or exemption from

the requirement of a tolerance for an inert ingredient.

The data that Firmenich believes supports establishing an exemption from tolerance is summarized below. More detailed information has been provided to the Agency.

Octanal has been used in foodstuffs as a flavoring agent since the 1900's and is approved by the Food and Drug Administration (FDA) as generally recognized as safe (GRAS) (21 CFR 172.515) and by the Council of Europe as in the list of substances granted ''A status''— may be used in foodstuffs (COE No. 97). It is recognized by the flavor and extract manufacturer's association as GRAS (GRAS 3 (2797)).

1. *Acute toxicity*. The LD_{50} of octanal has been determined to be 5.63 grams/kilogram (g/kg) for the rat. In an acute inhalation toxicity study with rats, no mortality was found after 8 hours of exposure to a concentrated vapor of octanal. The dermal LD_{50} in rabbits was found to be 6.35 milligram/Liter/kilogram (mg/L/kg) using a 24 hour occluded patch.

The LC_{50} of octanal was found to be 7.9 mg/L in fish (*Poecilia reticulata*) and >111 mg/kg in the bird (redwing blackbird). These values are in agreement with the ECOSAR calculated values of 6.1 mg/L for fish, 2.3 mg/L for *Daphnia*, and 13.0 mg/L for green algae.

2. *Genotoxicty*. An Ames test with and without S–9 using strains TA 98, TA 100, TA 1535, and TA 1537 at 3 µmol/plate produced no adverse effects.

3. *Reproductive and developmental toxicity*. Toxicity and teratogenicity of octanal was evaluated in chickens by injecting 50 chick embryos suprablastodermally at 72 hours of incubation with 0.05M octanal in olive oil. The teratogenicity reproductive effect for octanal was 4.16% versus 7.9% for the solvent alone.

4. *Subchronic toxicity*. In a 12–week subchronic study with 12 rats per sex per dose using a mixture of aldehydes from C–8 to C–12, there were no adverse effects at 12.4 mg/kg.

5. *Endocrine disruption*. Octanal is not structurally similar to any substances known to be an endocrine disrupter.

C. Aggregate Exposure

Consistent with section 408(c)(2)(B) of FFDCA, Firmenich believes that, based on this submission, the Agency has sufficient information to assess the hazards of octanal and make a determination on aggregate exposure, consistent with section 408(b)(2) for tolerance exemption for the residues of octanal on growing crops, RACS after harvest, and animals.

Dietary exposure. For the purpose of assessing the potential dietary exposure under these exemptions, Firmenich Incorporated considers that octanal could be present in all raw and processed agricultural commodities.

1. *Food*. Octanal is a GRAS substance 21 CFR 172.515 and is included by the Council of Europe in the list of substances granted ''A status''—may be used in foodstuffs (COE No. 97). The flavors and extract manufacturer's association states: Generally recognized as safe as a flavor ingredient—GRAS 3, (2797). The Joint Expert Committee on food additives has established an allowable daily intake (ADI) of 0.1 mg/kg (with nonanal) (1984). Therefore, no concerns for risk associated with any potential exposure scenarios are reasonably foreseeable.

2. *Drinking water*. Due to the low water solubility (estimated 91 mg/L by ECOSAR), only very low drinking water exposure is expected and would not contribute significantly to the ADI. Therefore, no concerns for risk associated with any potential exposure scenarios are reasonably foreseeable.

D. Cumulative Effects

Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance or tolerance exemption, the Agency consider ''available information'' concerning the cumulative effects of particular chemical's residues and ''other substances that have a common mechanism of toxicity''. Octanal has been in public use since the 1900's and the lack of observed toxicity after acute and chronic exposure would suggest that a cumulative risk assessment is therefore not necessary.

E. Safety Determination

1. *U.S. population*. Octanal has been granted self-affirmed GRAS status in the United States, is approved for food use in Europe, and by the World Health Organization (WHO) Joint Expert Committee on food additives, with an ADI of 0.1 mg/kg (based on nonanal). Based on this material's low-risk profile, there is reasonable certainty that no harm to the U.S. population will result from aggregate exposure to octanal.

2. *Infants and children*. FFDCA section 408 provides that EPA shall apply a 10–fold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the data base unless EPA concludes that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA risk assessment either directly through the margin of exposure (MOE) analysis or through using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk to humans.

Due to the extensive available toxicological data base including sub-chronic toxicity studies and the expected low toxicity of this compound, Firmenich Incorporated does not believe a safety factor analysis is necessary in assessing the risk of these compounds. For the same reasons, Firmenich believes the additional safety factor is unnecessary.

F. International Tolerances

There are no known international tolerances for octanol.

2. PP 6E4758

EPA has received a pesticide petition (PP 6E4758) to establish an exemption from the requirement of a tolerance for ethyl maltol when used as an inert ingredient in the pesticide formulations applied to growing crops or to RAC after harvest under 40 CFR 180.1001(c) and applied to animals under 40 CFR 180.1001 (e). EPA has determined that the petition contains data or information regarding the elements set forth in section 408(d)(2) of the FFDCA; however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition.

A. Residue Chemistry

Since this petition is for an exemption from the requirement of a tolerance an analytical method is not required.

B. Toxicological Profile

As a part of the EPA policy statement on inert ingredients published in the **Federal Register** of April 22, 1987 (52 FR 13305) (FRL –3190–1), the Agency set forth a list of studies which generally are used to evaluate the risks posed by the presence of an inert ingredient in a pesticide formulation. However, where it can be determined without that data that the inert ingredient will present minimal or no risk, the Agency generally does not require some or all of the listed studies to rule on the proposed tolerance or exemption from the requirement of a tolerance for an inert ingredient.

The data that Firmenich believes supports establishing an exemption from tolerance is summarized below. More detailed information has been provided to the Agency.

Ethyl maltol has been used in foodstuffs as a flavoring agent since the

1950's and is approved by the FDA as GRAS (21 CFR 172.515) and by the Council of Europe as in the list of substances granted ''A status''—may be used in foodstuffs (COE No. 692). It is recognized by the flavor and extract manufacturer's association as GRAS (GRAS 10 (3487)).

1. *Acute toxicity*. The LD_{50} of ethyl maltol has been determined to be 1.15 g/kg for the rat, 0.78 g/kg in the mouse, and 1.27 g/kg in the chicken. While there is no known aquatic testing, the ECOSAR program predicts that ethyl maltol would be practically non toxic to fish (LC_{50}= 2.3 g/L), *Daphnia* (LC_{50}= 1.1 to 3 g/L) and green algae (EC_{50}= 0.6 to 1.4 g/L).

2. *Genotoxicty*. An Ames test with and without S–9 using strains TA 1535, TA 1537, TA 1538, TA 1539 and TA 100 at up to 3.6 mg/plate in DMSO or water produced no adverse effects.

In a micronucleus test with male and female NMRI mice, no adverse effects were observed at 24, 48, or 72 hours at 980 mg/kg.

In a study with *Drosophila melangaster* the number of sex-linked lethal (SRL) chromosomes was counted. The no effect level was 14 millimolar ethyl maltol.

3. *Reproductive and developmental toxicity*. Toxicity and teratogenicity of ethyl maltol was evaluated in chickens by injecting 50 chick embryos suprablastodermally at 72 hours of incubation with 0.05M ethyl maltol in olive oil. The teratogenicity reproductive effect for ethyl maltol was 4.16% versus 7.9% for the solvent alone.

4. *Subchronic toxicity*. In a 90–day study with male and female Beagle dogs, no effects were observed when the animals were fed 500 mg/kg ethyl maltol orally. In a study with weanling Albino rats feed concentrations of ethyl maltol for 90 days, effects were noted in the kidney at 1,000 mg/kg. No mortality occurred.

5. *Chronic toxicity*. A 2–year rat reproduction study with ethyl maltol involving two separate litters of offspring was conducted at levels up to 200 mg/kg. No adverse effects on the parents or offspring were observed. Similarly in a 2–year study with Beagle dogs, no adverse effects were seen in the parents or offspring at up to 200 mg/kg.

6. *Animal metabolism*. The excretion rate of ethyl maltol was measured in the dog by both oral and intravenous routes of administration. Beagle dogs were fed 200 mg/kg of ethyl maltol daily for 99 days and the urine and feces collected for 24 hours after day 98, and 99. Urinary excretion of the test substance averaged 0.13% of the daily dose, while excretion of the sulfate and glucuronide conjugates averaged 64.0%. Similarly, 64.5% of a single intravenous 10 mg/kg dose of ethyl maltol was excreted as the conjugates in 24 hours and 66.3% in 72 hours.

7. *Endocrine disruption*. Ethyl maltol is not structurally similar to any substances known to be an endocrine disrupter.

C. Aggregate Exposure

Consistent with section 408(c)(2)(B) of FFDCA, Firmenich Incorporated believes that, based on this submission, the Agency has sufficient information to assess the hazards of ethyl maltol and make a determination on aggregate exposure, consistent with section 408(b)(2) for tolerance exemption for the residues of ethyl maltol on growing crops, RACs after harvest, and animals.

Dietary exposure. For the purpose of assessing the potential dietary exposure under these exemptions, Firmenich Incorporated considers that ethyl maltol could be present in all raw and processed agricultural commodities.

1. *Food*. Ethyl maltol is a GRAS substance 21 CFR 172.515 and is included by the Council of Europe in the list of substances granted ''A status''—may be used in foodstuffs (COE No. 692). The flavors and extract manufacturer's association states: Generally recognized as safe as a flavor ingredient—GRAS 3, (3487). The Joint Expert Committee on food additives has established an ADI of 0.2 mg/kg) (1974). Therefore, no concerns for risk associated with any potential exposure scenarios are reasonably foreseeable.

2. *Drinking water*. While ethyl maltol is soluble in water, it has been used since the 1950's in beverages, candies, and other food items. The lack of observed toxicity after acute and chronic exposure would indicate that the presence of trace amounts of ethyl maltol in drinking water would pose no appreciable risk to humans.

D. Cumulative Effects

Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance or tolerance exemption, the Agency consider ''available information'' concerning the cumulative effects of particular chemical's residues and ''other substances that have a common mechanism of toxicity''. Ethyl maltol has been in public use since the 1950's and the lack of observed toxicity after acute and chronic exposure would suggest that a cumulative risk assessment is therefore not necessary.

E. Safety Determination

1. *U.S. population*. Ethyl maltol has been granted self-affirmed GRAS status in the United States, is approved for food use in Europe, and by the WHO Joint Expert Committee on food additives, with an ADI of 0.2 mg/kg. Based on this material's low-risk profile, there is reasonable certainty that no harm to the U. S. population will result from aggregate exposure to ethyl maltol.

2. *Infants and children*. FFDCA section 408 provides that EPA shall apply a 10–fold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the data base unless EPA concludes that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA's risk assessment either directly through the MOE analysis or through using uncertainty (safety) factors in calculating a dose level that pose no appreciable risk to humans.

Due to the extensive available toxicological data base including sub-chronic toxicity studies and the expected low toxicity of this compound, Firmenich Incorporated does not believe a safety factor analysis is necessary in assessing the risk of these compounds.

F. International Tolerances

There are no known international tolerances for ethyl maltol.

3. PP 6E4759

EPA has received a pesticide petition (6E4759), to amend 40 CFR part 180, to establish an exemption from the requirement of a tolerance for ethyl methylphenylglycidate when used as an inert ingredient in the pesticide formulations applied to growing crops or to raw agricultural commodities after harvest under 40 CFR 180.1001(c) and applied to animals under 40 CFR 180.1001 (e). EPA has determined that the petition contains data or information regarding the elements set forth in section 408(d)(2) of the FFDCA; however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition.

A. Residue Chemistry

Since the petition is for an exemption from the requirement of a tolerance, an analytical method is not required.

B. Toxicological Profile

As a part of the EPA policy statement on inert ingredients published in the

Federal Register of April 22, 1987 (52 FR 13305) (FRL –3190–1), the Agency set forth a list of studies which can generally be used to evaluate the risks posed by the presence of an inert ingredient in a pesticide formulation. However, where it can be determined without that data that the inert ingredient will present minimal or no risk, the Agency generally does not require some or all of the listed studies to rule on the proposed tolerance or exemption from the requirement of a tolerance for an inert ingredient.

The date that Firmenich believes supports establishing an exemption from tolerance is summarized below. More detailed information has been provided to the Agency.

Ethyl methylphenylglycidate has been used in foodstuffs as a flavoring agent since the 1930's and is approved by the FDA as GRAS (21 CFR 182.60) and by the Council of Europe as in the list of substances granted ''A status''— may be used in foodstuffs (COE No. 6002). It is recognized by the flavor and extract manufacturer's association as GRAS (GRAS 3 (2444)).

1. *Acute toxicity*. The LD_{50} of ethyl methylphenylglycidate has been determined to be 5.47 g/kg for the rat, 5.6 mL/kg for the mouse, and 4.05 g/kg for the guinea pig.

Due to the very low water solubility of ethyl methylphenylglycidate and the octanol/water coefficient (estimated Kow 3.0), acute aquatic toxicity testing is thereby precluded.

2. *Genotoxicty*. An Ames tests with S–9 fractions from Aroclor-pretreated rats at doses up to 3.6 mg/plate with and without S–9 gave no adverse effect. Similarly, an Ames test, with strains TA98, TA 100, TA1535, TA1537 and TA97, also gave no adverse effects. A *Drosophila melagaster* and micronucleus test on mouse bone marrow appeared weakly mutagenic in the *Drosophila* only.

A chinese hamster ovary (CHO) cell study with ethyl methylphenylglycidate treated 8–12 hours without rat S–9 and 2 hours with S–9, gave positive sister chromatid exchange effects without S–9 over the full range of doses tested, 16 – 160 µg/mL, and no effect with S–9 over the whole range. Similarly, there were significant increases in chromosome aberrations over the range 50–500 µg/mL with and without S–9.

3. *Reproductive and developmental toxicity*. Toxicity and teratogenicity of ethyl methylphenylglycidate was evaluated in chickens with mortality and structural & functional defects being evaluated. The teratogenicity NOEC was 25 mg/egg and the LD_{50} was 8.16 mg/egg.

A mouse carcinogenicity and mutagenesis study was conducted in 15/sex/dose male and female mice by intraperitoneal injection 3X per weeks for 8 weeks at the maximum tolerance dose (MTD) and 0.20X MTD of ethyl methylphenylglycidate. There were 10 deaths at 0.45 g/kg and 4 deaths at 2.15 g/kg. Similarly, an intraperitonile ethyl methylphenylglycidate study with male and female mice showed no effects at the highest dose treated, 1,856 mg/kg.

4. *Subchronic toxicity*. In a 16–week rat study with male and female Osborne-Mendel rats at 10,000 parts per million (ppm) ethyl methylphenylglycidate weight changes, reproductive effects, growth retardation in males, and marked testicular atrophy was observed. In a 1–year study with male and female Osborne-Mendel rats, no effects were observed at 2,500 ppm of ethyl methylphenylglycidate on growth, haematology or macroscopic/microscopic tissue examination. In a second study, ethyl methylphenylglycidate, was fed to male and female rats for 15 weeks at 0.0, 0.02, 0.1, and 0.5% in the diet. No effect was observed on the growth rate, food consumption, or water consumption of the animals. The only effect attributable to the test substance were increased organ weight changes in the animals fed at the 0.5% level. The no observed adverse effect level was 0.1% ethyl methylphenylglycidate, corresponding to 150 and 60 mg/kg/day respectively at the beginning and end of the study.

5. *Chronic toxicity*. In a rat study, male and female rats were fed for 1.5 to 2 years at 0.1% and 0.5% ethyl methylphenylglycidate in their diet. No effects were observed at the 0.1% level. At 0.5% in the diet, neurotoxic effects, body weight (bwt) changes, pareses of the rear extremities with histological degeneration of the ischia nerve, and growth inhibition were observed. In a second study with 48 Wistar rats/sex at 0, 0.02, 0.1, and 0.5 EMPG in the diet for 2 years, no effects were observed at 0.1% (EMPG intake of approximately 35 mg/kg/day ethyl methylphenylglycidate for the males and 60 mg/kg/day ethyl methylphenylglycidate for the females). At 0.5%, weight changes, liver, micropathology in other organs, significant decrease in body weight in females, increased incidents of histopathology changes in lymph nodes, pancreas, adrenal glands, and liver were noted. No differences in mortality, hematology, serum chemistry, renal function, organ weights, or motor coordination were observed at any dose.

6. *Endocrine disruption*. Ethyl methylphenylglycidate is not structurally similar to any substances know to be an endocrine disrupter.

C. Aggregate Exposure

Consistent with section 408(c)(2)(B) of FFDCA, Firmenich Incorporated believes that, based on this submission, the Agency has sufficient information to assess the hazards of ethyl methylphenylglycidate and make a determination on aggregate exposure, consistent with section 408(b)(2) for tolerance exemption for the residues of ethyl methylphenylglycidate on growing crops, RACs after harvest, and animals.

Dietary exposure. For the purpose of assessing the potential dietary exposure under these exemptions, Firmenich Incorporated considers that ethyl methylphenylglycidate could be present in all raw and processed agricultural commodities.

1. *Food*. Ethyl methylphenylglycidate is a GRAS substance 21 CFR 182.60 and is included by the Council of Europe in the list of substances granted''A status''—may be used in foodstuffs (COE No. 6002). The flavors and extract manufacturer's association states: Generally recognized as safe as a flavor ingredient—GRAS 3, (2444). The Joint Expert Committee on food additives has established an ADI of 0.5 mg/kg (1984). Therefore, no concerns for risk associated with any potential exposure scenarios are reasonably foreseeable.

2. *Drinking water*. Due to the low water solubility (estimated 87 mg/L by ECOSAR), only very low drinking water exposure is expected and would not contribute significantly to the ADI. Therefore, no concerns for risk associated with any potential exposure scenarios are reasonably foreseeable.

D. Cumulative Effects

Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance or tolerance exemption, the Agency consider ''available information'' concerning the cumulative effects of particular chemical's residues and ''other substances that have a common mechanism of toxicity''. Ethyl methylphenylglycidate has been in public use since the 1930's and the lack of observed toxicity after acute and chronic exposure would suggest that a cumulative risk assessment is therefore not necessary.

E. Safety Determination

1. *U.S. population*. Ethyl methylphenylglycidate has been granted self-affirmed GRAS status in the United States, is approved for food use in Europe, and by the WHO Joint Expert Committee on food additives, with an

ADI of 0.5 mg/kg. Based on this material's low-risk profile, there is reasonable certainty that no harm to the U. S. population will result from aggregate exposure to ethyl methylphenylglycidate.

2. *Infants and children*. FFDCA section 408 provides that EPA shall apply a ten–fold MOE for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the data base unless EPA concludes that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA's risk assessment either directly through the MOE analysis or through using uncertainty (safety) factors in calculating a dose level that pose no appreciable risk to humans.

Due to the extensive available toxicological data base including chronic toxicity studies and the expected low toxicity of this compound, Firmenich Incorporated does not believe a safety factor analysis is necessary in assessing the risk of these compounds. For the same reasons, Firmenich believes the additional safety factor is unnecessary.

F. International Tolerances

There are no known international tolerances for ethyl methyl-phenylglycidate

[FR Doc. 00–32152 Filed 12–19–00; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[PF–987; FRL–6760–6]

Notice of Filing a Pesticide Petition to Establish a Tolerance for a Certain Pesticide Chemical in or on Food

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of a pesticide petition proposing the establishment of regulations for residues of a certain pesticide chemical in or on various food commodities.

DATES: Comments, identified by docket control number PF–987, must be received on or before January 19, 2001.

ADDRESSES: Comments may be submitted by mail, electronically, or in person. Please follow the detailed instructions for each method as provided in Unit I.C. of the **SUPPLEMENTARY INFORMATION**. To ensure proper receipt by EPA, it is imperative that you identify docket control number PF–987 in the subject line on the first page of your response.

FOR FURTHER INFORMATION CONTACT: By mail: Indira Gairola, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 308–6379; e-mail address: gairola.indira@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be affected by this action if you are an agricultural producer, food manufacturer or pesticide manufacturer. Potentially affected categories and entities may include, but are not limited to:

Categories	NAICS codes	Examples of potentially affected entities
Industry	111 112 311 32532	Crop production Animal production Food manufacturing Pesticide manufacturing

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in the table could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether or not this action might apply to certain entities. If you have questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Additional Information, Including Copies of this Document and Other Related Documents?

1. *Electronically*. You may obtain electronic copies of this document, and certain other related documents that might be available electronically, from the EPA Internet Home Page at http://www.epa.gov/. To access this document, on the Home Page select ''Laws and Regulations,'' ''Regulations and Proposed Rules,'' 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/.

2. *In person*. The Agency has established an official record for this action under docket control number PF–987. The official record consists of the documents specifically referenced in this action, any public comments received during an applicable comment period, and other information related to this action, including any information claimed as confidential business information (CBI). This official record includes the documents that are physically located in the docket, as well as the documents that are referenced in those documents. The public version of the official record does not include any information claimed as CBI. The public version of the official record, which includes printed, paper versions of any electronic comments submitted during an applicable comment period, is available for inspection in the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The PIRIB telephone number is (703) 305–5805.

C. How and to Whom Do I Submit Comments?

You may submit comments through the mail, in person, or electronically. To ensure proper receipt by EPA, it is imperative that you identify docket control number PF–987 in the subject line on the first page of your response.

1. *By mail*. Submit your comments to: Public Information and Records Integrity Branch (PIRIB), Information Resources and Services Division (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

2. *In person or by courier*. Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Information Resources and Services Division (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA. The PIRIB is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The PIRIB telephone number is (703) 305–5805.

3. *Electronically*. You may submit your comments electronically by e-mail to: opp-docket@epa.gov, or you can submit a computer disk as described above. Do not submit any information electronically that you consider to be CBI. Avoid the use of special characters and any form of encryption. Electronic submissions will be accepted in Wordperfect 6.1/8.0 or ASCII file

format. All comments in electronic form must be identified by docket control number PF–987. Electronic comments may also be filed online at many Federal Depository Libraries.

D. How Should I Handle CBI That I Want to Submit to the Agency?

Do not submit any information electronically that you consider to be CBI. You may claim information that you submit to EPA 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. In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public version of the official record. Information not marked confidential will be included in the public version of the official record without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified under **FOR FURTHER INFORMATION CONTACT**.

E. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Provide specific examples to illustrate your concerns.
6. Make sure to submit your comments by the deadline in this notice.
7. To ensure proper receipt by EPA, be sure to identify the docket control number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. What Action is the Agency Taking?

EPA has received a pesticide petition as follows proposing the establishment and/or amendment of regulations for residues of a certain pesticide chemical in or on various food commodities under section 408 of the Federal Food, Drug, and Comestic Act (FFDCA), 21 U.S.C. 346a. EPA has determined that this petition contains data or information regarding the elements set forth in section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 8, 2000.

James Jones,

Director, Registration Division, Office of Pesticide Programs.

Summary of Petition

The petitioner summary of the pesticide petition is printed below as required by section 408(d)(3) of the FFDCA. The summary of the petition was prepared by the petitioner and represents the view of the petitioner. EPA is publishing the petition summary verbatim without editing it in any way. The petition summary announces the availability of a description of the analytical methods available to EPA for the detection and measurement of the pesticide chemical residues or an explanation of why no such method is needed.

Miller Chemical and Fertilizer Corporation

PP 1E6239

EPA has received a pesticide petition (1E6239) from Miller Chemical and Fertilizer Corporation, P.O. Box 333, Radio Road, Hanover, PA 17331 proposing, pursuant to section 408(d) of the (FFDCA), 21 U.S.C. 346a(d), to amend 40 CFR 180.1001(c) and (e), to establish an exemption from the requirement of a tolerance for polybutylene as an inert ingredient in or on growing crops or when applied to the raw agricultural commodity (RAC) after harvest or when applied to animals. EPA has determined that the petition contains data or information regarding the elements set forth in section 408(d)(2) of the FFDCA; however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition.

A. Toxicological Profile

As part of the EPA policy statement on inert ingredients published in the **Federal Register** (52 FR 13305, April 22, 1987), the Agency set forth a list of studies which would generally be used to evaluate the risks posed by the presence of an inert ingredient in a pesticide formulation. However, where it can be determined without the data that the inert ingredient will present minimal or no risk, the Agency generally does not require some or all of the listed studies to rule on the proposed tolerance or exemption from the requirement of a tolerance for an inert ingredient. Miller Chemical and Fertilizer Corporation believes that the data and the information described below are adequate to ascertain the toxicology and characterize the risk associated with the use of polybutylene (CAS Reg. No.9003–29–6) as an inert ingredient in pesticide formulations applied to growing crops, RACs after harvest, and to animals.

In the case of certain chemical substances that are defined as ''polymers'' EPA has established a set of criteria which identify categories of polymers that present low risk. These criteria (codified in 40 CFR 723.250) identify polymers that are relatively unreactive and stable compared to other chemical substances as well as polymers that are not readily absorbed. These properties generally limit a polymer's ability to cause adverse effects. In addition, these criteria exclude polymers about which little is known. EPA believes that polymers meeting the criteria noted below will present minimal or no risk.

Polybutylene conforms to the definition of a polymer given in 40 CFR 723. 250(b) and meets the following criteria that are used to identify low risk polymers.

1. Polybutylene is not a cationic polymer, nor is it reasonably anticipated to become a cationic polymer in a natural aquatic environment.
2. Polybutylene contains as an integral part of its composition the atomic elements carbon and hydrogen.
3. Polybutylene does not contain as an integral part of its composition any elements other those listed in 40 CFR 723.250(d)(2)(ii).
4. Polybutylene is not designed, nor is it reasonably anticipated to substantially degrade, decompose, or depolymerize.
5. Polybutylene is not manufactured or imported from monomers and/or other reactants that are not already included on the Toxic Substances Control Act (TSCA) Chemical Substance Inventory or manufactured under an applicable TSCA section 5 exemption.

6. Polybutylene is not a water absorbing polymer.

7. Polybutylene does not contain any group as reactive functional groups.

8. The minimum number-average molecular weight of polybutylene is listed as 1,330 daltons. Substances with molecular weights greater than 400 generally are not absorbed through the intact skin, and substances with molecular weights greater than 1,000 generally are not absorbed through the intact gastrointestincal (GI) tract. Chemicals not absorbed through the skin or GI tract generally are incapable of eliciting a toxic response.

9. Polybutylene has a number-average molecular weight of 1,330 and contains less than 10% oligomeric material below molecular weight of 500 and less than 25% oligomeric material below 1,000 molecular weight.

In addition, polybutylene is approved by the Food and Drug Administration (FDA) under 21 CFR for following food contact applications:

a. Polybutylene is cleared for use in contact with food under 21 CFR 177.1430. The specifications set forth in this regulation for isobutylene-butene copolymers include molecular weight range (150–5,000), viscosity range and maximum bromine values.

b. Polybutylene is approved under 21 CFR 175.125 for use as a component of release coatings on backings or linings for pressure sensitive adhesive labels for food contact applications.

c. Polybutylene is approved under 21 CFR 175.300 for use as a component of resinous and polymeric coatings for food contact surfaces.

d. Polybutylene is approved under 21 CFR 176.170 for use as a component of paper and paperboard in contact with aqueous and fatty foods.

e. Polybutylene is approved under 21 CFR 176.180 for use as a component of paper and paperboard in contact with dry foods.

f. Polybutylene is approved under 21 CFR 176.210 for use as a defoaming agent in the manufacture of paper and paperboard that come in contact with food.

g. Polybutylene is approved under 21 CFR 177.1520 for use as a plasticizer in polyethylene used in the manufacture of articles for food contact applications.

h. Polybutylene is approved under 21 CFR 177.1640 for use as a plasticizer in polystyrene used in the manufacture of articles for food contact applications.

i. Polybutylene is approved under 21 CFR 177.2800 for use as a component of textiles and textile fibers used in the manufacture of articles for food contact applications.

j. Polybutylene is approved for use in lubricants with incidental food contact under 21 CFR 178.3570.

k. Polybutylene is approved under 21 CFR 178.3710 for use as a component of articles that come in contact with food.

l. Polybutylene is approved under 21 CFR 178.3740 for use as a component of articles that come in contact with food.

The above regulations are applicable to polybutylenes manufactured from stisobutylene and n-butene as monomers (complying with 21 CFR 177.1430). The Food and Drug Administration (FDA) has also approved polybutylene for other food contact applications under 21 CFR 175.105, 21 CFR 177.1420, 177.1520, 177.2260, and 178.3910. In other words, the FDA has determined that polybutylenes are safe to use in articles that come in contact with food.

Polybutylene is widely used as a cosmetic ingredient in personal care products. The Cosmetic Toiletry and Fragrance Association (CTFA) evaluated the safety of polybutene for use in personal care products and found that it is safe to use in cosmetic products.

Polybutylene (CAS Reg. No.9003–29–6) and all components of polybutylene are listed on the TSCA Chemical Substances Inventory.

Polybutenes are exempt from the requirement of a tolerance under 40 CFR 180.1037 for residues in or on the RAC:

a. Cottonseed when used as a sticker agent for formulations of the attractant gossyplure [1:1 mixture of (Z,Z)— and (Z,E)–7,11-hexadecadien-1-ol acetate] to disrupt the mating of the pink bollworm.

b. Artichokes when used as a sticker agent in multi-layered laminated controlled-release dispensers of (Z)–11-hexadecenal to disrupt the mating of the artichoke plume moth.

B. Aggregate Exposure:

Polybutylene and its formulations have been in commerce for more than 30 years. The copolymer is ubiquitous in our every day environment and it is commonly used in cosmetic formulations (concentrations ranging from 1 to >50%), adhesives, caulks, sealants, glazing compounds, coatings, lubricants, stretch wrap film, and electrical cable insulation.

Although exposure to polybutylene may occur through dietary (e.g., adhesives, lubricants, and food wrappings), and non-occupational (e.g., electrical cable insulation) sources, the chemical characteristics of polybutylene lead to the conclusion that there is a reasonable certainty of no harm from aggregate exposure to this polymer.

The Agency has maintained that polymers meeting the polymer exemption criteria (as described previously for polybutylene) will present minimal risk to human health when used as inert ingredients in pesticide products applied to food crops. EPA has also established exemptions from tolerance for polymeric materials used as pesticide inert ingredients that it considers to be intrinsically safe based on the fact that they are listed on the TSCA Inventory or meet the requirements of the amended TSCA polymer exemption and are thereby not subject to the requirements of the pre-manufacturing notification.

Given the existing widespread and historic use of polybutylene, any additional exposure resulting from the approval of polybutylene as an inert ingredient in pesticide formulations for use on growing crops or to RACs after harvest is not warranted.

C. Cumulative Effects

At this time there is no information to indicate that any toxic effects produced by polybutylene having a number average molecular weight of 1,330 would be cumulative with those of any other chemical substance(s). Given the categorization of polybutylene as a ''low risk polymer''(40 CFR 723.250) and its proposed use as an inert ingredient in pesticide formulations, there is no reasonable expectation of increased risk due to cumulative exposure.

D. Safety Determination

1. *U.S. population*. As a matter of policy, EPA has in the past established exemptions from tolerance for polymeric substances used as pesticide inert ingredients that it considers to be intrinsically safe based on the fact that they are listed on the TSCA Inventory or meet the requirements of the amended TSCA polymer exemption and are thereby not subject to the requirements of premanufacture notice (PMN). The Agency has maintained that polymers meeting the polymer exemption criteria will present minimal risk to human health when used as inert ingredients in pesticide formulations applied to RACs.

2. *Infants and children*. FFDCA section 408 provides that EPA shall supply an additional 10–fold margin of safety for infants and children in the case of threshold effects where prenatal and/or postnataltoxicity are found or there is incompleteness of the data base, unless EPA concludes that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA risk assessments

either directly through the use of margin of exposure (MOE) analysis or through using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk to humans. Due to the low expected toxicity of polybutylene, a safety factor analysis is not required for assessing the risk. For the same reasons the additional safety factor is unnecessary.

F. International Tolerances

Miller Chemical and Fertilizer Corporation is not aware of any country requiring a tolerance for polybutylene having a number average molecular weight of 1,330. Nor have there been any CODEX maximum residue levels (MRLs) established for any food crops at this time.

[FR Doc. 00–32153 Filed 12–19–00; 8:45 a.m.]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–181078; FRL–6757–7]

Pesticide Emergency Exemptions; Agency Decisions and State and Federal Agency Crisis Declarations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has granted or denied emergency exemptions under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) for use of pesticides as listed in this notice. The exemptions or denials were granted during the period December 1999 to November 2000 to control unforseen pest outbreaks.

FOR FURTHER INFORMATION CONTACT: See each emergency exemption or denial for the name of a contact person. The following information applies to all contact persons: Team Leader, Emergency Response Team, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, Ariel Rios Bldg., 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 308–9366.

SUPPLEMENTARY INFORMATION: EPA has granted or denied emergency exemptions to the following State and Federal agencies. The emergency exemptions may take the following form: Crisis, public health, quarantine, or specific. EPA has also listed denied emergency exemption requests in this notice.

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you petition EPA for authorization under section 18 of FIFRA to use pesticide products which are otherwise unavailable for a given use. Potentially affected categories and entities may include, but are not limited to:

Categories	NAICS codes	Examples of potentially affected entities
Federal Government	9241	Federal agencies that petition EPA for section 18 pesticide use authorization
State and Territorial government agencies charged with pesticide authority		State agencies that petition EPA for section 18 pesticide use authorization

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. Other types of entities not listed in the table in this unit could also be regulated. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether or not this action applies to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

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

1. *Electronically*. You may obtain electronic copies of this document, and certain other related documents that might be available electronically, from the EPA Internet Home Page at http://www.epa.gov/. To access this document, 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/.

2. *In person*. The Agency has established an official record for this action under docket control number OPP–181078. The official record consists of the documents specifically referenced in this action, and other information related to this action, including any information claimed as Confidential Business Information (CBI). This official record includes the documents that are physically located in the docket, as well as the documents that are referenced in those documents. The public version of the official record does not include any information claimed as CBI. The public version of the official record, which includes printed, paper versions of any electronic comments submitted during an applicable comment period is available for inspection in the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The PIRIB telephone number is (703) 305–5805.

II. Background

Under FIFRA section 18, EPA can authorize the use of a pesticide when emergency conditions exist. Authorizations (commonly called emergency exemptions) are granted to State and Federal agencies and are of four types:

1. A ''specific exemption'' authorizes use of a pesticide against specific pests on a limited acreage in a particular State. Most emergency exemptions are specific exemptions.

2. ''Quarantine'' and ''public health'' exemptions are a particular form of specific exemption issued for quarantine or public health purposes. These are rarely requested.

3. A ''crisis exemption'' is initiated by a State or Federal agency (and is confirmed by EPA) when there is insufficient time to request and obtain EPA permission for use of a pesticide in an emergency.

EPA may deny an emergency exemption: If the State or Federal agency cannot demonstrate that an emergency exists, if the use poses unacceptable risks to the environment, or if EPA cannot reach a conclusion that the proposed pesticide use is likely to result in ''a reasonable certainty of no harm'' to human health, including exposure of residues of the pesticide to infants and children.

If the emergency use of the pesticide on a food or feed commodity would result in pesticide chemical residues, EPA establishes a time-limited tolerance meeting the ''reasonable certainty of no harm standard'' of the Federal Food, Drug, and Cosmetic Act (FFDCA).

In this document: EPA identifies the State or Federal agency granted the exemption or denial, the type of

exemption, the pesticide authorized and the pests, the crop or use for which authorized, number of acres (if applicable), and the duration of the exemption. EPA also gives the **Federal Register** citation for the time-limited tolerance, if any.

III. Emergency Exemptions and Denials

A. U. S. States and Territories

Alabama

Department of Agriculture and Industries

Specific. EPA authorized the use of norflurazon on bermudagrass to control annual grassy weeds; 2/24/00 to 7/31/00. Contact: (Libby Pemberton)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 3/17/00 to 2/1/01. Contact: (Barbara Madden)

EPA authorized the use of diuron in/on catfish ponds to control blue-green algae; 05/22/00 to 11/30/00. Contact: (David Deegan)

EPA authorized the use of emamectin benzoate on cotton to control beet armyworms and tobacco budworms; 7/13/00 to 9/30/00. Contact: (Andrea Conrath)

EPA authorized the use of tebufenozide on pastures to control fall armyworms; 7/17/00 to 10/31/00. Contact: Barbara Madden

Arizona

Department of Agriculture

Crisis. On 1/21/00, for the use of imidacloprid on turnip greens to control aphids. This program is expected to end on 1/20/01. Contact: (Andrew Ertman)

Specific. EPA authorized the use of imidacloprid on turnip greens to control aphids; 1/21/00 to 1/20/01. Contact: (Andrew Ertman)

EPA authorized the use of buprofezin on cotton to control whiteflies; 6/14/00 to 9/30/00. Contact: (Andrea Conrath)

EPA authorized the use of buprofezin on cucurbits to control whiteflies; 7/15/00 to 7/14/01. Contact: (Andrea Conrath)

EPA authorized the use of metolachlor on spinach to control weeds; 9/8/00 to 5/15/01. Contact: (Andrew Ertman)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 9/22/00 to 2/1/01. Contact: (Barbara Madden)

Arkansas

State Plant Board

Crisis. On 3/1/00, for the use of norflurazon on bermudagrass pastures to control annual grassy weeds. This program ended on 9/15/00. Contact: (Libby Pemberton)

On 5/26/00, for the use of sodium chlorate on wheat to control weeds. This program ended on 6/15/00. Contact: (Libby Pemberton)

Denial. On 3/30/00 EPA denied the use of fenoxyprop-*p*-ethyl on rice to control Barnyardgrass and other annual weeds. This request was denied based upon the Agency's inability, at this time, to reach a ''reasonable certainty of no harm'' finding regarding health effects which may result if this use were to occur, an inability to assess ecological effects of the proposed use, and finally that the Agency did not conclude that this emergency situation required use of multiple products to attain adequate control of the pest situation. EPA did allow emergency use of an alternative chemical under provisions of section 18. Contact: (David Deegan).

On 3/30/00 EPA denied the use of bispyribac-sodium on rice to control Barnyardgrass and other annual weeds. This request was denied based upon the Agency's inability, at this time, to reach a ''reasonable certainty of no harm'' finding regarding health effects which may result if this use were to occur, an inability to assess ecological effects of the proposed use, and finally that the Agency did not conclude that this emergency situation required use of multiple products to attain adequate control of the pest situation. EPA did allow emergency use of an alternative chemical under provisions of section 18. Contact: (David Deegan).

Specific. EPA authorized the use of clomazone on rice to control Barnyardgrass and other annual weeds; 3/07/00 to 6/01/00. Contact: (David Deegan)

EPA authorized the use of norflurazon on bermudagrass to control annual grassy weeds; 3/9/00 to 9/15/00. Contact: (Libby Pemberton)

EPA authorized the use of fomesafen on snapbeans to control broadleaf weeds; 4/4/00 to 9/15/00. Contact: (Andrea Conrath)

EPA authorized the use of diuron in/on catfish ponds to control blue-green algae; 05/22/00 to 11/30/00. Contact: (David Deegan)

EPA authorized the use of carbofuran on cotton to control aphids; 6/02/00 to 9/30/00. Contact: (David Deegan)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 6/4/00 to Febraury 1/01. Contact: (Barbara Madden)

EPA authorized the use of methoxyfenozide in/on cotton to control beet armyworm; 6/5/00 to 10/1/00. Contact: (Dan Rosenblatt)

EPA authorized the use of indoxacarb in/on cotton to control beet armyworm and tobacco budworm; 6/15/00 to 10/31/00. Contact: (Dan Rosenblatt)

EPA authorized the use of emamectin benzoate on cotton to control beet armyworm and tobacco budworm; 7/13/00 to 9/30/00. Contact: (Andrea Conrath)

EPA authorized the use of spinosad on pastureland and rangeland to control armyworms; 11/8/00 to 12/31/00. Contact: (Andrew Ertman)

California

Environmental Protection Agency, Department of Pesticide Regulation

Crisis. On 6/29/00, for the use of methoprene on figs, grapes, pistachios, and prunes to control red imported fire ants. This program is expected to end on 12/26/00. Contact: (Libby Pemberton)

On 9/21/00, for the postharvest use of fenhexamid on pears to control gray mold. This program ended on 10/1/00. Contact: (Steve Schaible)

Quarantine. EPA authorized the use of spinosad in state-wide suppression and eradication programs to control the olive fruit fly; 12/22/99 to 12/22/02. Contact: (Dan Rosenblatt)

Specific. EPA authorized the use of zinc phosphide on alfalfa, not exceeding new growth of 2 inches to control California and montane voles; 1/19/00 to 1/19/01. Contact: (Libby Pemberton)

EPA authorized the use of imidacloprid on citrus to control the glassy-winged sharpshooter; 2/23/00 to 4/30/00. Contact: (Andrew Ertman)

EPA authorized the use of fludioxonil on peaches, nectarines, apricots and plums to control brown rot, gray mold rot, and Rhizopus rot; 5/1/00 to 11/1/00. Contact: (Andrew Ertman)

EPA authorized the use of tebufenozide on wine grapes to control Omnivorous leafroller and Grape leaffolder; 5/1/00 to 9/1/00. Contact: (Barbara Madden)

EPA authorized the use of hexythiazox on dates to control Banks grass mites; 5/15/00 to 6/30/00. Contact: (David Deegan)

EPA authorized the use of hexythiazox on cotton to control spider mites; 5/15/00 to 8/01/00. Contact: (David Deegan)

EPA authorized the use of carbofuran on cotton to control aphids; 6/02/00 to 10/15/00. Contact: (David Deegan)

EPA authorized the use of propamocarb hydrochloride on tomatoes to control late blight; 6/5/00 to 6/5/01. Contact: (Libby Pemberton)

EPA authorized the use of buprofezin on cotton to control whiteflies; 6/14/00 to 10/15/00. Contact: (Andrea Conrath)

EPA authorized the use of indoxacarb on cotton to control beet armyworm; 6/15/00 to 10/31/00. Contact: (Dan Rosenblatt)

EPA authorized the use of buprofezin on cucurbits to control whiteflies; 6/15/

00 to 11/01/00. Contact: (Andrea Conrath)

EPA authorized the use of avermectin on basil to control leafminer; 6/30/00 to 10/31/00. Contact: (Dan Rosenblatt)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 7/20/00 to 2/1/01. Contact: (Barbara Madden)

EPA authorized the use of myclobutanil on peppers (bell and non-bell) to control powdery mildew; 8/16/00 to 8/17/01. Contact: (David Deegan)

EPA authorized the use of myclobutanil on artichokes to control powdery mildew; 8/17/00 to 8/17/01. Contact: (David Deegan)

EPA authorized the use of hexythiazox on strawberry to control two-spotted spider mites; 8/17/00 to 5/30/01. Contact: (David Deegan)

EPA authorized the use of paraquat dichloride on artichokes to control weeds and grasses; 9/1/00 to 8/31/01. Contact: (Libby Pemberton)

EPA authorized the use of imidacloprid on strawberries to control whiteflies; 9/08/00 to 9/08/01. Contact: (Andrea Conrath)

EPA authorized the use of imidacloprid on garden beets and turnip greens to control aphids; 10/19/00 to 9/11/01. Contact: (Andrew Ertman)

EPA authorized the use of avermectin on celeriac to control two-spotted spider mite; 10/18/00 to 10/18/01. Contact: (Dan Rosenblatt)

EPA authorized the use of tebufenozide on table beets to control armyworms; 10/27/00 to 8/28/01. Contact: (Andrew Ertman)

EPA authorized the use of spinosad on sugarbeets to control armyworms; 10/31/00 to 8/7/01. Contact: (Andrew Ertman)

Colorado

Department of Agriculture

Specific. EPA authorized the use of imidacloprid on sweet corn seed to control flea beetles; 2/16/00 to 12/10/00. Contact: (Andrew Ertman)

EPA authorized the use of metolachlor on spinach to control weeds; 3/28/00 to 8/31/00. Contact: (Andrew Ertman)

EPA authorized the use of lambda-cyhalothrin on barley to control the Russian wheat aphid; 4/18/00 to 7/15/00. Contact: (Andrew Ertman)

EPA authorized the use of imazamox on dry bean to control various nightshade species and velvetleaf; 6/1/00 to 7/15/00. Contact: (Barbara Madden)

EPA authorized the use of tetraconazole on sugarbeets to control Cercospora leafspot; 6/7/00 to 9/30/00. Contact: (David Deegan)

EPA authorized the use of tebuconazole on sunflowers to control rust; 7/1/00 to 8/31/00. Contact: (Steve Schaible)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 9/1/00 to 2/1/01. Contact: (Barbara Madden)

Connecticut

Department of Environmental Protection

Specific. EPA authorized the use of propiconazole on blueberries to control mummy berry disease; 3/15/00 to 6/1/00. Contact: (Steve Schaible)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 7/27/00 to 2/1/01. Contact: (Barbara Madden)

Delaware

Department of Agriculture

Specific. EPA authorized the use of fomesafen on snap beans to control broad leaf weeds; 3/01/00 to 9/30/00. Contact: (Andrea Conrath)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 3/8/00 to 2/1/01. Contact: (Barbara Madden)

EPA authorized the use of terbacil on watermelon to control morning glory and other annual broadleaf weeds; 4/3/00 to 6/15/00. Contact: (David Deegan)

EPA authorized the use of clomazone on watermelon to control broadleaf weeds; 4/6/00 to 6/30/00. Contact: (David Deegan)

EPA authorized the use of imidacloprid on stone fruit to control aphids; 6/14/00 to 10/15/00. Contact: (Andrew Ertman)

EPA authorized the use of clopyralid on peaches and nectarine to control weeds that serve as alternate hosts for plum pox virus or are refugia for the green peach aphid, the vector of this virus; 7/26/00 to 12/1/00. Contact: (Barbara Madden)

EPA authorized the use of metolachlor on spinach to control weeds; 9/25/00 to 5/1/01. Contact: (Andrew Ertman)

Florida

Department of Agriculture and Consumer Services

Denial. On 9/30/00 EPA denied the use of fenbuconazole on citrus (except grapefruit) to control greasy spot disease. This request was denied because the information submitted by the Applicant did not support the claims of an urgent and non-routine (emergency) condition. Nor did the available information show that significant economic losses would occur. In contrast to grapefruit, the other citrus crops are not as susceptible to greasy spot disease, their prices are stable, and only 4-10% of the total production is marketed as fresh produce. Additionally, the information given does not demonstrate that losses of the magnitude estimated for grapefruit are likely to occur in the other citrus crops. Contact: (Andrea Conrath)

Specific. EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 1/20/00 to 1/18/01. Contact: (Barbara Madden)

EPA authorized the use of tebufenozide on lychee and longan to control Lychee webworms; 3/2/00 to 3/1/01. Contact: (Barbara Madden)

EPA authorized the use of bifenthrin on citrus to control Diaprepes root weevil; 3/02/00 to 3/01/01. Contact: (Andrea Conrath)

EPA authorized the use of hexythiazox on strawberry to control two-spotted mites; 3/24/00 to 3/24/01. Contact: (David Deegan)

EPA authorized the use of fenbuconazole on grapefruit to control greasy spot disease; 5/5/00 to 5/4/01. Contact: (Andrea Conrath)

EPA authorized the use of buprofezin on tomatoes to control the Silverleaf Whitefly; 6/2/00 to 6/1/01. Contact: (Andrew Ertman)

EPA authorized the use of imidacloprid on citrus to control brown citrus aphid and citrus leafminer; 6/30/00 to 6/30/01. Contact: (Andrew Ertman)

EPA authorized the use of azoxystobin on strawberries to control anthranose; 9/29/00 to 5/31/01. Contact: (Libby Pemberton)

Georgia

Department of Agriculture

Specific. EPA authorized the use of fenbuconazole on blueberries to control mummy berry disease; 1/7/00 to 7/1/00. Contact: (Dan Rosenblatt)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 1/20/00 to 1/18/01. Contact: (Barbara Madden)

Hawaii

Department of Agriculture

Crisis. On 5/05/00, for the use of myclobutanil on watermelon to control powdery mildew. The emergency exemption provision of this program will end when newly-labeled product is available, reflecting the fact that this chemical now has permanent tolerances for residues on this commodity. Contact: (David Deegan)

Specific. EPA authorized the use of hydramethylnon on pineapples to control ants; 2/14/2000 to 2/14/2001. Contact: (Libby Pemberton)

Idaho

Department of Agriculture

Crisis. On 12/10/99, for the use of imidacloprid on sweet corn seed to control corn flea beetles. This program is expected to end on 12/10/00. Contact: (Andrew Ertman)

On 5/19/00, for the use of fluroxypyr on sweet corn to control volunteer potatoes. This program ended on 6/2/00. Contact: (Andrew Ertman)

On 6/9/00, for the use of fluroxypyr on field corn to control volunteer potatoes. This program ended on 8/1/00. Contact: (Andrew Ertman)

Denial. On 7/28/00 EPA denied the use of cyhexatin on hops to control the two-spotted spider mite. This request was denied because the Agency had inadequate data to conclude that the use would not pose an unreasonable adverse effect to persons occupationally exposed to the chemical. Contact: (Dan Rosenblatt).

Specific. EPA authorized the use of imidacloprid on sweet corn seed to control corn flea beetles; 12/10/99 to 12/10/00. Contact: (Andrew Ertman)

EPA authorized the use of pendimethalin on mint to control kochia and redroot pigweed; 2/1/00 to 12/31/00. Contact: (Steve Schaible)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 2/2/00 to 2/1/01. Contact: (Barbara Madden)

EPA authorized the seed treatment use of fosetyl-Al on peas to control downy mildew; 2/10/00 to 4/30/00. Contact: (Steve Schaible)

EPA authorized the use of cymoxanil on hops to control downy mildew; 3/6/2000 to 9/15/2000. Contact: (Libby Pemberton)

EPA authorized the use of thiabendazole on lentil seeds to control Ascochyta Blight; 3/17/00 to 6/1/00. Contact: (Andrea Conrath)

EPA authorized the use of tebuconazole on barley to control barley stripe rust; 3/30/00 to 8/15/00. Contact: (Steve Schaible)

EPA authorized the use of zinc phosphide on barley, wheat, sugarbeets, and potatoes to control meadow voles and field mice; 4/11/00 to 10/1/00. Contact: (Libby Pemberton)

EPA authorized the use of oxytetracycline on apples to control fire blight; 4/11/00 to 8/1/00. Contact: (Andrea Conrath)

EPA authorized the use of myclobutanil on hops to control powdery mildew; 4/13/00 to 9/22/00. Contact: (David Deegan)

EPA authorized the use of tebuconazole on hops to control powdery mildew; 4/13/00 to 9/22/00. Contact: (David Deegan)

EPA authorized the use of trifloxystrobin on hops to control powdery mildew; 4/13/00 to 9/22/00. Contact: (David Deegan)

EPA authorized the use of pyridate on mint to control redroot pigweed and kochia; 4/15/00 to 12/31/00. Contact: (Barbara Madden)

EPA authorized the use of myclobutanil on mint to control powdery mildew; 4/26/00 to 12/31/00. Contact: (David Deegan)

EPA authorized the use of lambda-cyhalothrin on barley to control the Russian wheat aphid; 5/1/00 to 7/30/00. Contact: (Andrew Ertman)

EPA authorized the use of imazamox on canola to control mustard; 5/1/00 to 7/15/00. Contact: (Barbara Madden)

EPA authorized the use of imazamox on dry beans to control various nightshade species; 5/1/00 to 7/31/00. Contact: (Barbara Madden)

EPA authorized the use of clopyralid on canola to control Canada thistle; 5/5/00 to 7/31/00. Contact: (Libby Pemberton)

EPA authorized the use of paraquat dichloride on green and dried peas grown for seed to control weeds; 5/30/00 to 11/30/00. Contact: (Libby Pemberton)

EPA authorized the use of fluroxypyr on field corn to control volunteer potatoes; 6/9/00 to 8/1/00. Contact: (Andrew Ertman)

EPA authorized the use of propamocarb hydrochloride on potatoes to control late blight; 7/13/00 to 7/13/01. Contact: (Libby Pemberton)

EPA authorized the use of difenoconazole on sweet corn seed to control fungal pathogens; 8/31/00 to 9/01/01. Contact: (Andrea Conrath)

EPA authorized the use of chlorine dioxide on stored potatoes to control late blight; 8/31/00 to 8/31/01. Contact: (Andrew Ertman)

EPA authorized the use of flufenacet on wheat to control annual ryegrass; 10/5/00 to 6/30/01. Contact: (Barbara Madden)

EPA authorized the use of imidacloprid on sweet corn seed to control the corn flea beetle; 12/11/00 to 12/10/01. Contact: (Andrew Ertman)

Illinois

Department of Agriculture

Specific. EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 4/4/00 to 2/1/01. Contact: (Barbara Madden)

EPA authorized the use of fomesafen on snap beans to control various weed species; 6/16/00 to 9/18/00. Contact: (Andrea Conrath)

Indiana

Office of Indiana State Chemist

Crisis. On 5/16/00, for the use of fomesafen on snap beans to control various weed species. This program ended on 8/30/00. Contact: (Andrea Conrath)

Specific. EPA authorized the use of fenbuconazole on blueberries to control mummy berry disease; 3/17/00 to 9/1/00. Contact: (Dan Rosenblatt)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 4/4/00 to 2/1/01. Contact: (Barbara Madden)

EPA authorized the use of metolachlor on tomatoes to control eastern black nightshade; 4/13/00 to 7/1/00. Contact: (Andrew Ertman)

EPA authorized the use of pyridate on mint to control redroot pigweed and kochia; 4/15/00 to 12/31/00. Contact: (Barbara Madden)

EPA authorized the use of fomesafen on snap beans to control various weed species; 6/16/00 to 8/30/00. Contact: (Andrea Conrath). Indiana had declared a crisis for this use on 5/16/00.

Iowa

Department of Agriculture and Land Stewardship

Specific. EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 3/8/00 to 2/1/01. Contact: (Barbara Madden)

Kansas

Department of Agriculture

Crisis. On 9/8/00, for the use of spinosad on alfalfa to control armyworms. This program ended on 10/10/00. Contact: (Andrew Ertman)

Specific. EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 2/7/00 to 2/1/01. Contact: (Barbara Madden)

EPA authorized the use of propiconazole on sorghum to control sorghum ergot; 5/10/00 to 12/31/00. Contact: (Steve Schaible)

EPA authorized the use of metsulfuron-methyl on sorghum to control weeds; 5/22/00 to 8/15/00. Contact: (Andrew Ertman)

EPA authorized the use of tebuconazole on sunflowers to control rust; 6/16/00 to 9/15/00. Contact: (Steve Schaible)

EPA authorized the use of propiconazole on dry beans to control rust; 6/16/00 to 8/15/00. Contact: (Steve Schaible)

EPA authorized the use of bifenthrin on seed sorghum to control spider mites; 7/06/00 to 9/30/00. Contact: (Andrea Conrath)

EPA authorized the use of spinosad on alfalfa to control armyworms; 9/8/00 to 10/10/00. Contact: (Andrew Ertman)

Kentucky

Department of Agriculture

Specific. EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 11/03/00 to 2/1/01. Contact: (Barbara Madden)

Louisiana

Department of Agriculture and Forestry

Denial. On 3/30/00 EPA denied the use of fenoxyprop-*p*-ethyl on rice to

control Barnyardgrass and other annual weeds. This request was denied based upon the Agency's inability, at this time, to reach a ''reasonable certainty of no harm'' finding regarding health effects which may result if this use were to occur, an inability to assess ecological effects of the proposed use, and finally that the Agency did not conclude that this emergency situation required use of multiple products to attain adequate control of the pest situation. EPA did allow emergency use of an alternative chemical under provisions of section 18. Contact: (David Deegan).

On 3/30/00 EPA denied the use of bispyribac-sodium on rice to control Barnyardgrass and other annual weeds. This request was denied based upon the Agency's inability, at this time, to reach a ''reasonable certainty of no harm'' finding regarding health effects which may result if this use were to occur, an inability to assess ecological effects of the proposed use, and finally that the Agency did not conclude that this emergency situation required use of multiple products to attain adequate control of the pest situation. EPA did allow emergency use of an alternative chemical under provisions of section 18. Contact: (David Deegan).

On 4/20/00 EPA denied the use of tebufenozide on rice to control fall armyworms. This request was denied because the situation is routine, not urgent, and growers are not likely to suffer from significant economic losses. The State provided no data that demonstrate that currently registered alternatives do not effectively control fall armyworms on rice. Contact: (Barbara Madden).

On 5/12/00 EPA denied the use of anthraquinone on rice to control red-winged blackbirds. This request was denied because the current data base is insufficient to support any food uses of this chemical and the situation does not meet Agency criteria for an emergency exemption Contact: (Libby Pemberton).

On 9/20/00 EPA denied the use of chlorfenapyr on cotton to control beet armyworm. This request was denied based upon the Agency's inability, at this time, to make the required finding that the use would not cause unreasonable adverse effects on the environment. Additionally, since EPA cannot register this use and the Registrant has withdrawn its application for registration of chlorfenapyr on cotton, adequate progress toward registration is not being made. Contact: (Andrea Conrath).

On 10/27/00 EPA denied the use of clomazone on sugarcane to control bermudagrass. This request was denied because an urgent and non-routine situation was not demonstrated. Contact: (David Deegan).

Specific. EPA authorized the use of 3-chloro-*p*-touidine hydrochloride on fallow fields to control various birds; 2/15/00 to 4/15/00. Contact: (Libby Pemberton)

EPA authorized the use of clomazone on rice to control Barnyardgrass and other annual weeds; 3/07/00 to 6/01/00. Contact: (David Deegan)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 3/21/00 to 2/1/01. Contact: (Barbara Madden)

EPA authorized the use of imazapic-ammonium on bermudagrass to control vaseygrass; 4/10/00 to 5/30/00. Contact: (Libby Pemberton)

EPA authorized the use of tebufenozide on sweet potatoes to control beet armyworms and fall armyworms; 4/17/00 to 10/31/00. Contact: (Andrew Ertman)

EPA authorized the use of emamectin benzoate on cotton to control beet armyworms and resistant tobacco budworms; 5/4/00 to 9/30/00. Contact: (Andrea Conrath)

EPA authorized the use of carbofuran on cotton to control aphids; 6/02/00 to 9/30/00. Contact: (David Deegan)

EPA authorized the use of methoxyfenozide on cotton to control beet armyworms; 6/5/00 to 10/1/00. Contact: (Dan Rosenblatt)

EPA authorized the use of indoxacarb on cotton to control beet armyworms and tobacco budworms; 6/15/00 to 10/31/00. Contact: (Dan Rosenblatt)

EPA authorized the use of lambda-cyhalothrin on sugarcane to control the sugarcane borer; 7/5/00 to 9/15/00. Contact: (Andrew Ertman)

Maine

Department of Agriculture, Food, and Rural Resources

Specific. EPA authorized the use of fomesafen on dry beans to control broad leaf weeds; 03/01/00 to 7/15/00. Contact: (Andrea Conrath)

EPA authorized the use of propiconazole on blueberries to control mummy berry disease; 4/15/00 to 6/15/00. Contact: (Steve Schaible)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 9/1/00 to 2/1/01. Contact: (Barbara Madden)

Maryland

Department of Agriculture

Specific. EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 3/8/00 to 2/1/01. Contact: (Barbara Madden)

EPA authorized the use of terbacil on watermelon to control morning glory and other annual broadleaf weeds; 4/3/00 to 6/15/00. Contact: (David Deegan)

EPA authorized the use of fomesafen on snapbeans to control broadleaf weeds; 4/4/00 to 9/15/00. Contact: (Andrea Conrath)

EPA authorized the use of clomazone on watermelon to control broadleaf weeds; 4/6/00 to 6/30/00. Contact: (David Deegan)

EPA authorized the use of metolachlor on tomatoes to control eastern black nightshade and yellow nutsedge; 4/13/00 to 7/31/00. Contact: (Andrew Ertman)

EPA authorized the use of propamocarb hydrochloride on tomatoes to control late blight; 6/5/00 to 9/30/00. Contact: (Libby Pemberton)

EPA authorized the use of metolachlor on spinach to control weeds; 9/8/00 to 4/30/01. Contact: (Andrew Ertman)

Massachusetts

Massachusetts Department of Food and Agriculture

Specific. EPA authorized the use of pronamide on cranberries to control dodder; 1/19/00 to 6/1/00. Contact: (Andrew Ertman)

EPA authorized the use of clopyralid on cranberries to control various weeds; 1/4/00 to 12/31/00. Contact: (Libby Pemberton)

EPA authorized the use of propiconazole on blueberries to control mummy berry disease; 3/30/00 to 6/15/00. Contact: (Steve Schaible)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 4/17/00 to 2/1/01. Contact: (Barbara Madden)

EPA authorized the use of oxyfluorfen on strawberries to control broadleaf weeds; 11/9/00 to 12/15/00. Contact: (Barbara Madden)

Michigan

Michigan Department of Agriculture

Crisis. On 5/5/00, for the use of mancozeb on ginseng to control leaf and stem blight. This program ended on 6/30/00. Contact: (Dan Rosenblatt)

On 5/25/00, for the use of azoxystrobin on ginseng to control leaf and stem blight. This program ended on 6/30/00. Contact: (Dan Rosenblatt)

Specific. EPA authorized the use of fenbuconazole on blueberries to control mummy berry disease; 3/17/00 to 9/1/00. Contact: (Dan Rosenblatt)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 3/17/00 to 2/1/01. Contact: (Barbara Madden)

EPA authorized the use of dimethomorph on squash (summer, winter, and pumpkins), cantaloupes, watermelons, and cucumbers to control crown rot; 3/30/00 to 11/1/00. Contact: (Libby Pemberton)

EPA authorized the use of fomesafen on dry beans to control broadleaf weeds;

4/4/00 to 9/15/00. Contact: (Andrea Conrath)

EPA authorized the use of oxytetracycline on apples to control fire blight; 4/11/00 to 6/30/00. Contact: (Andrea Conrath)

EPA authorized the use of metolachlor on tomatoes to control eastern black nightshade; 4/13/00 to 7/1/00. Contact: (Andrew Ertman)

EPA authorized the use of clopyralid on cranberries to control selected broadleaf weeds; 4/28/00 to 12/31/00. Contact: (Libby Pemberton)

EPA authorized the use of fomesafen on snap beans to control weeds; 5/4/00 to 8/30/00. Contact: (Andrea Conrath)

EPA authorized the use of chlorothalonil on asparagus to control purple spot; 5/15/00 to 11/1/00. Contact: (Steve Schaible)

EPA authorized the use of tebuconazole on wheat to control Fusarium head blight; 5/15/00 to 6/30/00. Contact: (Steve Schaible)

EPA authorized the use of tetraconazole on sugarbeets to control Cercospora leafspot; 6/7/00 to 9/30/00. Contact: (David Deegan)

EPA authorized the use of mancozeb on ginseng to control leaf and stem blight; 6/30/00 to 10/15/00. Contact: (Dan Rosenblatt)

EPA authorized the use of azoxystrobin on ginseng to control leaf and stem blight; 6/30/00 to 10/15/00. Contact: (Dan Rosenblatt)

EPA authorized the use of tebufenozide on grapes to control grape berry moth; 7/1/00 to 9/30/00. Contact: (Barbara Madden)

EPA authorized the use of propamocarb hydrochloride on potatoes to control late blight; 7/13/00 to 7/13/01. Contact: (Libby Pemberton)

EPA authorized the use of oxyfluorfen on strawberries to control broadleaf weeds; 11/9/00 to 1/1/01. Contact: (Barbara Madden)

Minnesota

Department of Agriculture

Crisis. On 1/5/00, for the use of imidacloprid on sweet corn seed to control corn flea beetles. This program is expected to end on 12/10/00. Contact: (Andrew Ertman)

Specific. EPA authorized the use of imidacloprid on sweet corn seed to control corn flea beetles; 1/5/00 to 12/10/00. Contact: (Andrew Ertman)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 1/20/00 to 1/18/01. Contact: (Barbara Madden)

EPA authorized the use of clopyralid on canola to control thistles; 2/3/2000 to 7/31/2000. Contact: (Libby Pemberton)

EPA authorized the use of ethalfluralin on canola to control kochia; 4/7/00 to 4/7/01. Contact: (David Deegan)

EPA authorized the use of ethametsulfuron on seed canola to control wild mustard; 4/7/00 to 7/1/00. Contact: (Dan Rosenblatt)

EPA authorized the use of imazamox on canola to control mustard; 5/1/00 to 7/15/00. Contact: (Barbara Madden)

EPA authorized the use of imazamox on dry beans to control various nightshade species and velvetleaf; 5/1/00 to 6/30/00. Contact: Barbara Madden

EPA authorized the use of tetraconazole on sugarbeets to control Cercospora leafspot; 6/15/00 to 9/30/00. Contact: (David Deegan)

EPA authorized the use of propiconazole on dry beans to control rust; 6/15/00 to 8/31/00. Contact: (Steve Schaible)

EPA authorized the use of tebuconazole on wheat and barley to control Fusarium head blight; 6/15/00 to 8/25/00. Contact: (Steve Schaible)

EPA authorized the use of fomesafen on dry beans to control various weed species; 6/16/00 to 8/15/00. Contact: (Andrea Conrath)

EPA authorized the use of chlorine dioxide on stored potatoes to control late blight; 8/31/00 to 8/31/01. Contact: (Andrew Ertman)

Mississippi

Department of Agriculture and Commerce

Crisis. On 7/27/00, for the use of tebufenozide on sweet potatoes to control armyworms. This program ended on 10/15/00. Contact: (Andrew Ertman)

Denial. On 3/30/00 EPA denied the use of bispyribac-sodium on rice to control Barnyardgrass and other annual weeds. This request was denied based upon the Agency's inability, at this time, to reach a ''reasonable certainty of no harm'' finding regarding health effects which may result if this use were to occur, an inability to assess ecological effects of the proposed use, and finally, that the Agency did not conclude that this emergency situation required use of multiple products to attain adequate control of the pest situation. EPA did allow emergency use of an alternative chemical under provisions of section 18. Contact: (David Deegan)

Specific. EPA authorized the use of clomazone on rice to control Barnyardgrass and other annual weeds; 1/25/00 to 6/30/00. Contact: (David Deegan)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 2/10/00 to 2/1/01. Contact: (Barbara Madden)

EPA authorized the use of norflurazon on bermudagrass to control annual grassy weeds; 2/24/00 to 7/31/00. Contact: (Libby Pemberton)

EPA authorized the use of fenbuconazole on blueberries to control mummy berry disease; 2/24/00 to 7/1/00. Contact: (Dan Rosenblatt)

EPA authorized the use of emamectin benzoate on cotton to control beet armyworms and resistant tobacco budworms; 5/4/00 to 9/30/00. Contact: (Andrea Conrath)

EPA authorized the use of diuron in/on catfish ponds to control blue-green algae; 05/12/00 to 11/30/00. Contact: (David Deegan)

EPA authorized the use of carbofuran on cotton to control aphids; 6/02/00 to 9/15/00. Contact: (David Deegan)

EPA authorized the use of methoxyfenozide on cotton to control beet armyworms and resistant tobacco budworms; 6/5/00 to 10/1/00. Contact: (Dan Rosenblatt)

EPA authorized the use of indoxacarb on cotton to control beet armyworms and resistant tobacco budworms; 6/15/00 to 10/31/00. Contact: (Dan Rosenblatt)

EPA authorized the use of tebufenozide on pasture land to control armyworms; 7/11/00 to 10/15/00. Contact: (Barbara Madden)

EPA authorized the use of thiamethoxam on cotton to control cotton aphids and whiteflies; 7/11/00 to 9/15/00. Contact: (Steve Schaible)

EPA authorized the use of tebufenozide on sweet potatoes to control armyworms; 7/27/00 to 10/15/00. Contact: (Andrew Ertman)

EPA authorized the use of niclosamide in commercially operated, man-made levee containment ponds for catfish production to control ram's horn snail, an intermediate host to the yellow grub trematode (*Bolbophorus confusus*); 11/8/00 to 11/8/01. Contact: (Barbara Madden)

Missouri

Department of Agriculture

Specific. EPA authorized the use of clomazone on rice to control Barnyardgrass and other annual weeds; 3/07/00 to 6/15/00. Contact: (David Deegan)

EPA authorized the use of fomesafen on snapbeans to control broadleaf weeds; 4/4/00 to 9/15/00. Contact: (Andrea Conrath)

EPA authorized the use of carbofuran on cotton to control aphids; 6/02/00 to 9/30/00. Contact: (David Deegan)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 9/22/00 to 2/1/01. Contact: (Barbara Madden)

Montana

Department of Agriculture

Crisis. On 5/11/00, for the use of lambda-cyhalothrin on barley to control

the Russian wheat aphid. This program ended on 7/30/00. Contact: (Andrew Ertman)

Denial. On 8/11/00 EPA denied the use of tebuconazole on barley to control barley stripe rust. This request was denied because an emergency condition which would result in significant economic losses was not shown to exist. Additionally, the state did not this year experience the wet and cool weather conditions which would be conducive to disease outbreak should inoculum enter the state. Contact: (Steve Schaible).

Specific. EPA authorized the use of ethametsulfuron-methyl on canola produced for seed to control wild mustard; 1/28/00 to 7/1/00. Contact: (Dan Rosenblatt)

EPA authorized the use of clopyralid on canola to control thistles; 2/3/2000 to 7/31/2000. Contact: (Libby Pemberton)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 2/7/00 to 2/1/01. Contact: (Barbara Madden)

EPA authorized the use of lambda-cyhalothrin on barley to control cutworms; 3/7/00 to 7/1/00. Contact: (Andrew Ertman)

EPA authorized the use of thiabendazole on lentil seed to control Ascochyta Blight; 3/17/00 to 6/1/00. Contact: (Andrea Conrath)

EPA authorized the use of pyridate on mint to control redroot pigweed and kochia; 4/1/00 to 12/31/00. Contact: (Barbara Madden)

EPA authorized the use of ethalfluralin on canola to control kochia; 4/7/00 to 4/7/01. Contact: (David Deegan)

EPA authorized the use of myclobutanil on mint to control peppermint rust; 4/26/00 to 12/31/00. Contact: (David Deegan)

EPA authorized the use of imazamox on dry beans to control various nightshade species and velvetleaf; 5/1/00 to 6/30/00. Contact: Barbara Madden

EPA authorized the use of lambda-cyhalothrin on barley to control the Russian wheat aphid; 5/11/00 to 7/30/00. Contact: (Andrew Ertman)

EPA authorized the use of tetraconazole on sugarbeets to control Cercospora leafspot; 6/7/00 to 9/30/00. Contact: (David Deegan)

EPA authorized the use of imazapic-ammonium on pasture/rangeland (including land in the Conservation Reserve Program) to control leafy spurge; 8/1/00 to 12/31/00. Contact: (Libby Pemberton)

EPA authorized the use of chlorine dioxide on stored potatoes to control late blight; 8/31/00 to 8/31/01. Contact: (Andrew Ertman)

Nebraska

Department of Agriculture

Crisis. On 7/19/00, for the use of tetraconazole on sugarbeets to control cercospora leafspot. This program ended on 9/30/00. Contact: (David Deegan)

Specific. EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 4/4/00 to 2/1/01. Contact: (Barbara Madden)

EPA authorized the use of metsulfuron-methyl on sorghum to control weeds; 5/24/00 to 7/31/00. Contact: (Andrew Ertman)

EPA authorized the use of imazamox on dry bean to control various nightshade species and velvetleaf; 6/1/00 to 7/15/00. Contact: (Barbara Madden)

EPA authorized the use of tebuconazole on sunflowers to control rust; 6/16/00 to 9/15/00. Contact: (Steve Schaible)

EPA authorized the use of propiconazole on sorghum to control sorghum ergot; 7/1/00 to 8/31/00. Contact: (Steve Schaible)

EPA authorized the use of tetraconazole on sugarbeets to control Cercospora leafspot; 7/20/00 to 9/30/00. Contact: (David Deegan)

EPA authorized the use of imazapic-ammonium on pasture/rangeland (including land in the Conservation Reserve Program) to control leafy spurge; 8/31/00 to 12/31/00. Contact: (Libby Pemberton)

Nevada

Department of Agriculture

Specific. EPA authorized the use of chlorine dioxide on stored potatoes to control late blight; 9/17/00 to 8/31/01. Contact: (Andrew Ertman)

New Hampshire

Department of Agriculture

Specific. EPA authorized the use of propiconazole on blueberries to control mummy berry disease; 4/1/00 to 8/1/00. Contact: (Steve Schaible)

New Jersey

Department of Environmental Protection

Specific. EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 3/8/00 to Febraury 1/01. Contact: (Barbara Madden)

EPA authorized the use of fenbuconazole on blueberries to control mummy berry disease; 3/17/00 to 6/30/00. Contact: (Dan Rosenblatt)

EPA authorized the use of propyzamide on cranberries to control dodder; 3/17/00 to 12/15/00. Contact: (Andrew Ertman)

EPA authorized the use of metolachlor on spinach to control weeds; 3/28/00 to 11/1/00. Contact: (Andrew Ertman)

EPA authorized the use of metolachlor on tomatoes to control weeds; 3/28/00 to 12/1/00. Contact: (Andrew Ertman)

EPA authorized the use of clopyralid on cranberries to control wild bean; 4/28/00 to 12/31/00. Contact: (Libby Pemberton)

EPA authorized the use of imidacloprid on blueberries to control blueberry aphids; 5/10/00 to 8/10/00. Contact: (Andrew Ertman)

EPA authorized the use of fludioxonil on peaches and nectarines to control brown rot, gray mold, and Rhizopus rot; 5/31/00 to 9/30/00. Contact: (Andrew Ertman)

EPA authorized the use of imidacloprid on blueberries to control the oriental beetle; 6/1/00 to 8/10/00. Contact: (Andrew Ertman)

EPA authorized the use of clopyralid on peaches and nectarine to control weeds that serve as alternate hosts for plum pox virus or are refugia for the green peach aphid, the vector of this virus; 7/26/00 to 12/1/00. Contact: (Barbara Madden)

New Mexico

Department of Agriculture

Crisis. On 8/24/00, for the use of spinosad on alfalfa to control armyworms. This program ended on 11/1/00. Contact: (Andrew Ertman)

On 7/27/00, for the use of spinosad on peanuts to control armyworms. This program ended on 10/31/00. Contact: (Andrew Ertman)

Denial. On 8/23/00, EPA denied the use of oxyfluorfen on chili peppers to control Wright groundcherry. This request was denied based upon the Agency's inability, at this time, to reach a ''reasonable certainty of no harm'' finding regarding health effects which may result if this use were to occur. Contact: (Barbara Madden).

Specific. EPA authorized the use of emamectin benzoate on cotton to control the beet armyworm; 5/25/00 to 10/31/00. Contact: (Andrea Conrath)

EPA authorized the use of propiconazole on sorghum to control sorghum ergot; 6/1/00 to 9/30/00. Contact: (Steve Schaible)

EPA authorized the use of myclobutanil on peppers (bell and non-bell) to control powdery mildew; 6/14/00 to 10/15/00. Contact: (David Deegan)

EPA authorized the use of metsulfuron-methyl on sorghum to control triazine resistant pigweed; 6/16/00 to 9/30/00. Contact: (Andrew Ertman)

EPA authorized the use of spinosad on peanuts to control armyworms; 7/27/00 to 10/31/00. Contact: (Andrew Ertman)

EPA authorized the use of spinosad on alfalfa to control armyworms; 8/24/

00 to 11/1/00. Contact: (Andrew Ertman)

New York

Department of Environmental Conservation

Specific. EPA authorized the use of fomesafen on snap and dry beans to control broad leaf weeds; 3/01/00 to 8/15/00. Contact: (Andrea Conrath)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 3/21/00 to 2/1/01. Contact: (Barbara Madden)

EPA authorized the use of imidacloprid on peaches, nectarines, plums and apricots to control aphids; 4/17/00 to 10/15/00. Contact: (Andrew Ertman)

EPA authorized the use of desmedipham on red beets to control broadleaf weeds; 5/15/00 to 7/31/00. Contact: (Steve Schaible)

EPA authorized the use of dimethenamid on dry bulb onion to control weeds; 6/9/00 to 6/15/00. Contact: (Barbara Madden)

EPA authorized the use of propamocarb hydrochloride on potatoes to control late blight; 7/13/00 to 7/13/01. Contact: (Libby Pemberton)

North Carolina

Department of Agriculture

Crisis. On 11/23/99, for the use of metaldehyde on cargo holds in military vessels to control snails. The state exercised its crisis authority on behalf of the Department of Defense, which discovered snails that had entered its vessels and had infested machinery in the cargo holds. The crisis situation was declared in order to avoid contamination of foreign ports with what would be non-indiginous organisms. While the state first declared crisis on 11/23/99, the use of metaldehyde did not commence until 12/20/99, due to the need of the armed forces to jointly approve the action and to contract with personnel to accomplish the pesticide application(s). Therefore, on 12/17/99, North Carolina amended its crisis declaration to allow the pesticide use to occur between the dates of 12/20/99 and 1/3/00. This program ended on 1/3/00. Contact: (David Deegan)

Denial. On 5/1/00 EPA denied the use of fluazinam on peanuts to control Sclerotinia blight. This request was denied based upon the Agency's inability, at this time, to reach a ''reasonable certainty of no harm'' finding regarding health effects which may result if this use were to occur. Contact: (Barbara Madden)

Specific. EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 2/10/00 to 2/1/01. Contact: (Barbara Madden)

EPA authorized the use of fenbuconazole on blueberries to control mummy berry disease; 3/17/00 to 8/31/00. Contact: (Dan Rosenblatt)

North Dakota

Department of Agriculture

Crisis. On 7/24/00, for the use of paraquat dichloride on peas grown for seed to control weeds. This program ended on 8/4/00. Contact: (Libby Pemberton)

On 8/1/00, for the use of glyphosate on flax to control Canadian and perennial sowthistle. This program ended on 10/1/00. Contact: (Libby Pemberton)

Specific. EPA authorized the use of clopyralid on canola to control thistles; 2/3/00 to 7/31/00. Contact: (Libby Pemberton)

EPA authorized the use of clopyralid on flax to control Canada thistle and perennial sowthistle; 3/7/00 to 7/31/00. Contact: (Libby Pemberton)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 3/8/00 to 2/1/01. Contact: (Barbara Madden)

EPA authorized the use of thiabendazole on lentil seed to control Ascochyta blight; 3/17/00, to 6/1/00. Contact: (Andrea Conrath)

EPA authorized the use of ethametsulfuron on seed canola to control wild mustard; 3/30/00 to 7/1/00. Contact: (Dan Rosenblatt)

EPA authorized the use of ethalfluralin on canola to control kochia; 4/7/00 to 4/7/01. Contact: (David Deegan)

EPA authorized the use of imazamox on canola to control mustard; 5/1/00 to 7/15/00. Contact: (Barbara Madden)

EPA authorized the use of imazamox on dry beans to control various nightshade species and velvetleaf; 5/1/00 to 6/30/00. Contact: Barbara Madden

EPA authorized the use of tetraconazole on sugarbeets to control Cercospora leafspot; 6/15/00 to 9/30/00. Contact: (David Deegan)

EPA authorized the use of propiconazole on dry beans to control rust; 6/15/00 to 8/31/00. Contact: (Steve Schaible)

EPA authorized the use of tebuconazole on wheat and barley to control Fusarium head blight; 6/15/00 to 8/25/00. Contact: (Steve Schaible)

EPA authorized the use of fomesafen on dry beans to control various weed species; 6/16/00 to 8/15/00. Contact: (Andrea Conrath)

EPA authorized the use of tebuconazole on sunflowers to control rust; 7/5/00 to 9/5/00. Contact: (Steve Schaible)

EPA authorized the use of imazapic-ammonium on pasture/rangeland (including land in the Conservation Reserve Program) to control leafy spurge; 8/1/00 to 12/31/00. Contact: (Libby Pemberton)

EPA authorized the use of glyphosate on flax to control Canada thistle and perennial sowthistle; 9/7/00 to 10/15/00. Contact: (Libby Pemberton)

EPA authorized the use of chlorine dioxide on stored potatoes to control late blight; 9/25/00 to 8/31/01. Contact: (Andrew Ertman)

Ohio

Department of Agriculture

Specific. EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 2/7/00 to 2/1/01. Contact: (Barbara Madden)

EPA authorized the use of oxyfluorfen on strawberries to control weeds; 6/20/00 to 12/15/00. Contact: (Barbara Madden)

Oklahoma

Department of Agriculture

Crisis. On 5/30/00, for the use of diflubenzuron on rangeland to control grasshoppers. This program became effective 6/1/00 and ended on 6/15/00. Contact: (Steve Schaible)

On 9/19/00, for the use of spinosad on alfalfa to control armyworms. This program ended on 10/3/00. Contact: (Andrew Ertman)

Denial. On 5/1/00 EPA denied the use of fluazinam on peanuts to control Sclerotinia blight. This request was denied based upon the Agency's inability, at this time, to reach a ''reasonable certainty of no harm'' finding regarding health effects which may result if this use were to occur. Contact: (Barbara Madden).

Specific. EPA authorized the use of fomesafen on snapbeans to control broadleaf weeds; 4/4/00 to 9/15/00. Contact: (Andrea Conrath)

EPA authorized the use of emamectin benzoate on cotton to control beet armyworms; 5/4/00 to 10/31/00. Contact: (Andrea Conrath)

EPA authorized the use of metsulfuron-methyl on sorghum to control weeds; 5/24/00 to 8/15/00. Contact: (Andrew Ertman)

EPA authorized the use of carbofuran on cotton to control aphids; 6/02/00 to 10/15/00. Contact: (David Deegan)

EPA authorized the use of indoxacarb on cotton to control beet armyworms; 6/15/00 to 10/31/00. Contact: (Dan Rosenblatt)

EPA authorized the use of propiconazole on sorghum to control sorghum ergot; 6/15/00 to 9/30/00. Contact: (Steve Schaible)

EPA authorized the use of dicloran on peanuts to control Sclerotinia blight; 7/15/00 to 10/15/00. Contact: (Barbara Madden)

EPA authorized the use of tebufenozide on peanuts to control beet armyworm; 7/15/00 to 10/15/00. Contact: (Barbara Madden)

EPA authorized the use of bifenthrin on peanuts to control spider mites; 7/21/00 to 10/30/00. Contact: (Andrea Conrath)

EPA authorized the use of metolachlor on spinach to control weeds; 9/8/00 to 3/31/01. Contact: (Andrew Ertman)

EPA authorized the use of fluazinam on peanuts to control Sclerotinia blight; 9/11/00 to 10/15/00. Contact: (Barbara Madden)

Oregon

Department of Agriculture

Crisis. On 8/9/00, for the use of bifenthrin on potatoes to control spider mites. This program ended on 10/15/00. Contact: (Andrea Conrath)

Denial. On 1/12/00 EPA denied the use of oxyfluorfen on rhubarb to control broadleaf weeds. This request was denied because no supporting data were submitted to support the claim that an emergency exists however, based on the information the state submitted, the Agency concluded the situation may be serious but is most likely a chronic pest problem. Contact: (Barbara Madden).

On 7/28/00, EPA denied the use of procarbazone on wheat to control goatgrass. This request was denied because EPA does not have adequate data previously reviewed for this chemical for which to reach a conclusion that there is a ''reasonable certainty of no harm'' to human health resulting from exposure to chemical residues, nor can EPA reach any conclusions about ecological effects resulting from this use, should it occur. Contact: (David Deegan).

Specific. EPA authorized the use of oxyfluorfen on strawberries to control broadleaf weeds; 12/15/99 to 8/15/00. Contact: (Barbara Madden)

EPA authorized the use of pendimethalin on mint to control kochia and redroot pigweed; 2/1/00 to 12/31/00. Contact: (Steve Schaible)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 2/2/00 to 2/1/01. Contact: (Barbara Madden)

EPA authorized the use of fenbuconazole on blueberries to control mummy berry disease; 2/9/00 to 5/31/00. Contact: (Dan Rosenblatt)

EPA authorized the use of ethoprop on baby hops and idle hops to control garden symphylans; 2/10/00 to 5/31/00. Contact: (Steve Schaible)

EPA authorized the use of cymoxanil on hops to control downy mildew; 3/6/00 to 9/15/00. Contact: (Libby Pemberton)

EPA authorized the use of tebuconazole on barley to control barley stripe rust; 3/30/00 to 8/15/00. Contact: (Steve Schaible)

EPA authorized the use of oxytetracycline on apples to control fire blight; 4/11/00 to 8/1/00. Contact: (Andrea Conrath)

EPA authorized the use of myclobutanil on hops to control powdery mildew; 4/13/00 to 9/22/00. Contact: (David Deegan)

EPA authorized the use of tebuconazole on hops to control powdery mildew; 4/13/00 to 9/22/00. Contact: (David Deegan)

EPA authorized the use of trifloxystrobin on hops to control powdery mildew; 4/13/00 to 9/22/00. Contact: (David Deegan)

EPA authorized the use of pyridate on mint to control redroot pigweed and kochia; 4/15/00 to 12/31/00. Contact: (Barbara Madden)

EPA authorized the use of fluroxypyr on field corn to control volunteer potatoes; 4/15/00 to 8/1/00. Contact: (Andrew Ertman)

EPA authorized the use of fluroxypyr on sweet corn to control volunteer potatoes; 4/15/00 to 8/1/00. Contact: (Andrew Ertman)

EPA authorized the use of propiconazole on raspberries to control yellow rust; 5/1/00 to 11/1/00. Contact: (Steve Schaible)

EPA authorized the use of Switch 62.5 WG (containing the active ingredients fludioxonil and cyprodinil) on caneberries to control gray mold; 5/9/00 to 9/10/00. Contact: (Steve Schaible)

EPA authorized the use of triazamate on true fir Christmas trees to control root aphids; 5/24/00 to 10/31/00. Contact: (Steve Schaible)

EPA authorized the use of tebuconazole on wheat to control stripe rust and leaf rust; 5/22/00 to 7/15/00. Contact: (Steve Schaible)

EPA authorized the use of paraquat dichloride on green and dried peas grown for seed to control weeds; 5/30/00 to 11/30/00. Contact: (Libby Pemberton)

EPA authorized the use of fludioxonil on peaches to control brown rot, gray mold, and Rhizopus rot; 5/31/00 to 9/30/00. Contact: (Andrew Ertman)

EPA authorized the use of bifenthrin on raspberries to control weevils; 6/13/00 to 8/15/00. Contact: (Andrea Conrath)

EPA authorized the use of propamocarb hydrochloride on potatoes to control late blight; 6/14/00 to 10/31/00. Contact: (Libby Pemberton)

EPA authorized the use of ethoprop on baby mint to control garden symphylans; 7/26/00 to 9/15/00. Contact: (Steve Schaible)

EPA authorized the use of chlorine dioxide on stored potatoes to control late blight; 8/31/00 to 8/31/01. Contact: (Andrew Ertman)

EPA authorized the use of bifenthrin on potatoes to control spider mites; 9/07/00 to 10/15/00. Contact: (Andrea Conrath). Oregon had declared a crisis for this use on 8/09/00.

EPA authorized the use of flufenacet on wheat to control annual ryegrass; 10/5/00 to 6/30/01. Contact: (Barbara Madden)

Pennsylvania

Department of Agriculture

Specific. EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 1/20/00 to 1/18/01. Contact: (Barbara Madden)

EPA authorized the use of fomesafen on snap beans to control weeds; 5/4/00 to 8/30/00. Contact: (Andrea Conrath)

EPA authorized the use of metolachlor on spinach to control weeds; 6/1/00 to 8/30/00. Contact: (Andrew Ertman)

EPA authorized the use of oxyfluorfen on strawberries to control broadleaf weeds; 10/15/00 to 12/15/00. Contact: (Barbara Madden)

Rhode Island

Department of Environmental Management

Specific. EPA authorized the use of propiconazole on blueberries to control mummy berry disease; 4/20/00 to 6/1/00. Contact: (Steve Schaible)

South Carolina

Clemson University

Specific. EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 1/20/00 to 1/18/01. Contact: (Barbara Madden)

EPA authorized the use of Switch 62.5 WG (containing the active ingredients fludioxonil and cyprodinil) on strawberries to control flower blight and fruit rot; 5/12/00 to 6/15/00. Contact: (Steve Schaible)

EPA authorized the use of fludioxonil on peaches and nectarines to control brown rot; 5/15/00 to 9/15/00. Contact: (Andrew Ertman)

EPA authorized the use of indoxacarb on cotton to control beet armyworm and tobacco budworm; 7/27/00 to 10/31/00. Contact: (Dan Rosenblatt)

EPA authorized the use of diuron in/on catfish ponds to control blue-green algae; 8/04/00 to 11/30/00. Contact: (David Deegan)

South Dakota

Department of Agriculture

Specific. EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 3/8/00 to 2/1/01. Contact: (Barbara Madden)

EPA authorized the use of pendimethalin on mint to control

kochia and redroot pigweed; 4/1/00 to 11/1/00. Contact: (Steve Schaible)

EPA authorized the use of tebuconazole on wheat and barley to control Fusarium head blight; 5/15/00 to 8/25/00. Contact: (Steve Schaible)

Tennessee

Department of Agriculture

Crisis. On 9/18/00, for the use of imidacloprid on legumes to control whiteflies. This program ended on 10/3/00. Contact: (Andrea Conrath)

Specific. EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 3/8/00 to 2/1/01. Contact: (Barbara Madden)

EPA authorized the use of carbofuran on cotton to control aphids; 7/21/00 to 9/30/00. Contact: (David Deegan)

EPA authorized the use of tebufenozide on pasture land to control armyworm; 7/25/00 to 12/15/00. Contact: (Barbara Madden)

Texas

Department of Agriculture

Crisis. On 2/9/00, for the use of myclobutanil on mayhaws to control cedar quince rust. This program ended on 6/01/00. Contact: (David Deegan)

On 4/16/00, for the use of myclobutanil on cucurbit vegetables to control powdery mildew. This program ended on 5/16/00. Contact: (Dan Rosenblatt)

On 6/23/00, for the use of tebufenozide on pasture land to control armyworms. This program ended on 10/31/00. Contact: (Barbara Madden)

On 8/18/00, for the use of spinosad on alfalfa to control armyworms. This program ended on 11/1/00. Contact: (Andrew Ertman)

On 7/27/00, for the use of spinosad on peanuts to control armyworms. This program ended on 10/31/00. Contact: (Andrew Ertman)

Denial. On 1/31/00 EPA denied the use of maleic hydrazide on rice to control red rice. This request was denied because both the pest problem and the partial efficacy of currently registered alternatives are chronic, existing situations and an emergency condition was not found to exist. Contact: (Steve Schaible)

On 5/1/00 EPA denied the use of fluazinam on peanuts to control Sclerotinia blight. This request was denied based upon the Agency's inability, at this time, to reach a ''reasonable certainty of no harm'' finding regarding health effects which may result if this use were to occur. Contact: (Barbara Madden)

On 9/20/00 EPA denied the use of chlorfenapyr on cotton to control beet armyworm. This request was denied based upon the Agency's inability, at this time, to make the required finding that the use would not cause unreasonable adverse effects on the environment. Additionally, since EPA cannot register this use and the Registrant has withdrawn its application for registration of chlorfenapyr on cotton, adequate progress toward registration is not being made. Contact: (Andrea Conrath)

Quarantine. EPA authorized the use of spinosad on all host commodities to control exotic fruit fly species, particularly the Mexican fruit fly; 4/25/00 to 4/25/03. Contact: (Dan Rosenblatt)

Specific. EPA authorized the use of propiconazole on sorghum to control sorghum ergot; 1/7/00 to 12/31/00. Contact: (Steve Schaible)

EPA authorized the use of clomazone on rice to control Barnyardgrass and other annual weeds; 1/25/00 to 6/01/00. Contact: (David Deegan)

EPA authorized the use of metsulfuron-methyl on sorghum to control triazine-resistant pigweed; 2/3/00 to 8/15/00. Contact: (Andrew Ertman)

EPA authorized the use of propamocarb hydrochloride on potatoes to control late blight; 3/2/00 to 10/31/00. Contact: (Libby Pemberton)

EPA authorized the use of carbofuran on cotton to control aphids; 4/21/00 to 10/31/00. Contact: (David Deegan)

EPA authorized the use of emamectin benzoate on cotton to control beet armyworms; 5/4/00 to 10/1/00. Contact: (Andrea Conrath)

EPA authorized the use of myclobutanil on cucurbit vegetables to control powdery mildew; 5/16/00 to 5/1/01. Contact: (Dan Rosenblatt)

EPA authorized the use of methoxyfenozide on cotton to control beet armyworms; 6/5/00 to 10/1/00. Contact: (Dan Rosenblatt)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 6/29/00 to 2/1/01. Contact: (Barbara Madden)

EPA authorized the use of indoxacarb on cotton to control beet armyworms; 6/15/00 to 10/31/00. Contact: (Dan Rosenblatt)

EPA authorized the use of metolachlor on spinach to control weeds; 6/29/00 to 6/28/01. Contact: (Andrew Ertman)

EPA authorized the use of dicloran on peanuts to control Sclerotinia blight; 7/1/00 to 10/31/00. Contact: (Barbara Madden)

EPA authorized the use of tebufenozide on pasture land to control armyworm; 7/25/00 to 12/15/00. Contact: (Barbara Madden)

EPA authorized the use of spinosad on peanuts to control armyworms; 7/27/00 to 10/31/00. Contact: (Andrew Ertman)

EPA authorized the use of spinosad on alfalfa to control armyworms; 8/18/00 to 11/1/00. Contact: (Andrew Ertman)

EPA authorized the use of bifenthrin on seed sorghum to control spider mites; 8/23/00 to 8/23/01. Contact: (Andrea Conrath)

EPA authorized the use of fluazinam on peanuts to control Sclerotinia blight; 9/11/00 to 10/1/00. Contact: (Barbara Madden)

EPA authorized the use of chlorine dioxide on stored potatoes to control late blight; 9/28/00 to 8/31/01. Contact: (Andrew Ertman)

Utah

Department of Agriculture

Specific. EPA authorized the use of pendimethalin on mint to control kochia and redroot pigweed; 2/8/00 to 12/31/00. Contact: (Steve Schaible)

EPA authorized the use of oxytetracycline on apples to control fire blight; 7/27/00 to 9/30/00. Contact: (Andrea Conrath)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 9/8/00 to 2/1/01. Contact: (Barbara Madden)

Vermont

Department of Agriculture

Specific. EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 3/8/00 to 2/1/01. Contact: (Barbara Madden)

Virginia

Department of Agriculture and Consumer Services

Denial. On 5/1/00 EPA denied the use of fluazinam on peanuts to control Sclerotinia blight. This request was denied based upon the Agency's inability, at this time, to reach a ''reasonable certainty of no harm'' finding regarding health effects which may result if this use were to occur. Contact: (Barbara Madden).

On 3/24/00 EPA denied the use of acibenzolar on tomatoes to control bacterial diseases. This request was denied because the data that was submitted did not support the claim that an emergency exists. Rather, the available information indicated that the registered alternatives should provide adequate control of these diseases. Additionally, the claims that significant economic losses would occur were not supported by the submitted information. Since this request proposed the use of a new chemical, a notice of receipt published in the **Federal Register** on 3/03/00 with the public comment period closing on 3/18/00. No comments were received. Contact: (Andrea Conrath).

Specific. EPA authorized the use of metolachlor on tomatoes to control

eastern black nightshade and yellow nutsedge; 1/24/00 to 8/1/00. Contact: (Andrew Ertman)

EPA authorized the use of fomesafen on snap beans to control broad leaf weeds; 3/01/00 to 9/20/00. Contact: (Andrea Conrath)

EPA authorized the use of terbacil on watermelon to control morning glory and other annual broadleaf weeds; 4/3/00 to 6/15/00. Contact: (David Deegan)

EPA authorized the use of clomazone on watermelon to control broadleaf weeds; 4/6/00 to 6/30/00. Contact: (David Deegan)

EPA authorized the use of imidacloprid on peaches and nectarines to control aphids; 6/1/00 to 10/1/00. Contact: (Andrew Ertman)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 7/27/00 to 2/1/01. Contact: (Barbara Madden)

EPA authorized the use of metolachlor on spinach to control weeds; 9/8/00 to 12/31/01. Contact: (Andrew Ertman)

EPA authorized the use of flufenacet on wheat to control annual ryegrass; 10/18/00 to 12/31/00. Contact: (Barbara Madden)

Washington

Department of Agriculture

Crisis. On 6/2/00, for the use of dimethenamid on sugar beets to control weeds. This program ended on 7/10/00. Contact: (Barbara Madden)

On 8/9/00, for the use of bifenthrin on potatoes to control spider mites. This program ended on 10/15/00. Contact: (Andrea Conrath)

Denial. On 7/28/00 EPA denied the use of cyhexatin on hops to control the two-spotted spider mite. This request was denied because the Agency had inadequate data to conclude that the use would not pose an unreasonable adverse effect to persons occupationally exposed to the chemical. Contact: (Dan Rosenblatt).

Specific. EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 1/20/00 to 1/18/01. Contact: (Barbara Madden)

EPA authorized the use of pendimethalin on mint to control kochia and redroot pigweed; 2/1/00 to 12/31/00. Contact: (Steve Schaible)

EPA authorized the seed treatment use of fosetyl-Al on peas to control downy mildew; 2/10/00 to 4/30/00. Contact: (Steve Schaible)

EPA authorized the use of propiconazole on blueberries to control mummy berry disease; 3/15/00 to 6/10/00. Contact: (Steve Schaible)

EPA authorized the use of thiabendazole on lentil seed to control Ascochyta blight; 3/17/00 to 6/1/00. Contact: (Andrea Conrath)

EPA authorized the use of fluroxypyr on field corn to control volunteer potatoes; 3/24/00 to 8/1/00. Contact: (Andrew Ertman)

EPA authorized the use of fluroxypyr on sweet corn to control volunteer potatoes; 3/24/00 to 8/1/00. Contact: (Andrew Ertman)

EPA authorized the use of tebuconazole on barley to control barley stripe rust; 3/30/00 to 8/15/00. Contact: (Steve Schaible)

EPA authorized the use of bifenthrin on raspberries to control weevils; 3/30/00 to 8/10/00. Contact: (Andrea Conrath)

EPA authorized the use of oxytetracycline on apples to control fire blight; 4/11/00 to 8/1/00. Contact: (Andrea Conrath)

EPA authorized the use of myclobutanil on hops to control powdery mildew; 4/13/00 to 9/22/00. Contact: (David Deegan)

EPA authorized the use of tebuconazole on hops to control powdery mildew; 4/13/00 to 9/22/00. Contact: (David Deegan)

EPA authorized the use of trifloxystrobin on hops to control powdery mildew; 4/13/00 to 9/22/00. Contact: (David Deegan)

EPA authorized the use of myclobutanil on mint to control powdery mildew; 4/26/00 to 12/31/00. Contact: (David Deegan)

EPA authorized the use of pyridate on mint to control redroot pigweed and kochia; 5/l/00 to 12/31/00. Contact: (Barbara Madden)

EPA authorized the use of propiconazole on raspberries to control yellow rust; 5/1/00 to 7/1/00. Contact: (Steve Schaible)

EPA authorized the use of pirimicarb on vegetable seed crops to control aphids; 5/4/00 to 9/15/00. Contact: (Steve Schaible)

EPA authorized the use of clopyralid on canola to control Canada thistle; 5/5/00 to 7/31/00. Contact: (Libby Pemberton)

EPA authorized the use of Switch 62.5 WG (containing the active ingredients fludioxonil and cyprodinil) on caneberries to control gray mold; 5/9/00 to 9/10/00. Contact: (Steve Schaible)

EPA authorized the use of propiconazole on cranberries to control cotton ball disease; 5/15/00 to 7/31/00. Contact: (Steve Schaible)

EPA authorized the use of triazamate on true fir Christmas trees to control root aphids; 5/24/00 to 10/31/00. Contact: (Steve Schaible)

EPA authorized the use of paraquat dichloride on green and dried peas grown for seed to control weeds; 5/30/00 to 11/30/00. Contact: (Libby Pemberton)

EPA authorized the use of dimethenamid on sugar beets to control weeds; 6/9/00 to 7/10/00. Contact: (Barbara Madden)

EPA authorized the use of propamocarb hydrochloride on potatoes to control late blight; 6/14/00 to 10/31/00. Contact: (Libby Pemberton)

EPA authorized the use of chlorine dioxide on stored potatoes to control late blight; 8/31/00 to 8/31/01. Contact: (Andrew Ertman)

EPA authorized the use of bifenthrin on potatoes to control spider mites; 9/07/00 to 10/15/00. Contact: (Andrea Conrath). Washington had declared a crisis exemption for this use on 8/09/00.

EPA authorized the use of zinc phosphide on timothy, clover and alfalfa to control meadow vole; 9/19/00 to 5/1/01. Contact: (Libby Pemberton)

EPA authorized the use of flufenacet on wheat to control annual ryegrass; 10/5/00 to 6/30/01. Contact: (Barbara Madden)

West Virginia

Department of Agriculture

Specific. EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 4/17/00 to 2/1/01. Contact: (Barbara Madden)

Wisconsin

Department of Agriculture, Trade, and Consumer Protection

Crisis. On 6/22/00, for the use of glyphosate on horseradish to control giant ragweed. This program ended on 7/22/00. Contact: (Libby Pemberton)

On 5/1/00, for the use of mancozeb on ginseng to control leaf and stem blight. This program ended on 6/30/00. Contact: (Dan Rosenblatt)

On 5/26/00, for the use of azoxystrobin on ginseng to control leaf and stem blight. This program ended on 6/30/00. Contact: (Dan Rosenblatt)

Specific. EPA authorized the use of clopyralid on cranberries to control various weeds; 1/4/00 to 12/31/00. Contact: (Libby Pemberton)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 1/20/00 to 1/18/01. Contact: (Barbara Madden)

EPA authorized the use of metolachlor on spinach to control weeds; 2/17/00 to 8/31/00. Contact: (Andrew Ertman)

EPA authorized the use of propiconazole on cranberries to control cottonball disease; 4/15/00 to 7/31/00. Contact: (Steve Schaible)

EPA authorized the use of pyridate on mint to control redroot pigweed and kochia; 4/15/00 to 12/31/00. Contact: (Barbara Madden)

EPA authorized the use of imazamox on dry bean to control various nightshade species and velvetleaf; 5/1/

00 to 7/31/00. Contact: (Barbara Madden)

EPA authorized the use of dimethomorph on cucumbers and pumpkins to control Phytophthora fruit blight/rot; 5/10/00 to 10/1/00. Contact: (Libby Pemberton)

EPA authorized the use of fluroxypyr on field corn to control volunteer potatoes; 6/1/00 to 7/15/00. Contact: (Andrew Ertman)

EPA authorized the use of carfentrazone-ethyl on sweet corn to control broadleaf weeds; 6/2/00 to 6/30/00. Contact: (Steve Schaible)

EPA authorized the use of mancozeb on ginseng to control leaf and stem blight; 6/30/00 to 10/15/00. Contact: (Dan Rosenblatt)

EPA authorized the use of azoxystrobin on ginseng to control leaf and stem blight; 6/30/00 to 10/15/00. Contact: (Dan Rosenblatt)

EPA authorized the use of propamocarb hydrochloride on potatoes to control late blight; 7/13/00 to 7/13/01. Contact: (Libby Pemberton)

EPA authorized the use of chlorine dioxide on stored potatoes to control late blight; 8/31/00 to 8/31/01. Contact: (Andrew Ertman)

Wyoming

Department of Agriculture

Crisis. On 5/10/00, for the use of lambda-cyhalothrin on barley to control the Russian wheat aphid. This program ended on 7/31/00. Contact: (Andrew Ertman)

Specific. EPA authorized the use of lambda-cyhalothrin on barley to control the Russian wheat aphid; 5/10/00 to 7/31/00. Contact: (Andrew Ertman)

EPA authorized the use of imazamox on dry beans to control various nightshade species and velvetleaf; 6/1/00 to 7/15/00. Contact: Barbara Madden

EPA authorized the use of tetraconazole on sugarbeets to control Cercospora leafspot; 6/7/00 to 9/30/00. Contact: (David Deegan)

EPA authorized the use of imazapic-ammonium on pasture/rangeland (including land in the Conservation Reserve Program) to control leafy spurge and Dalmation toadflax; 8/1/00 to 12/31/00. Contact: (Libby Pemberton)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; 11/03/00 to 2/1/01. Contact: (Barbara Madden)

B. Federal Departments and Agencies

Agriculture Department

Animal and Plant Health Inspection Service

Crisis. On 8/29/00, for the use of methyl bromide on various imported commodities to control exotic plant pests. This program is expected to end on 2/28/01. Contact: (Libby Pemberton)

Quarantine. EPA authorized the use of sodium hypochlorite on grain elevators, silos, equipment, and surfaces to control Karnal bunt; 3/24/00 to 3/24/03. Contact: (David Deegan)

EPA authorized the use of carbaryl on flightless birds to control exotic ectoparasites; 4/18/00 to 4/18/03. Contact: (Andrew Ertman)

EPA authorized the use of quaternary ammonium compounds on field equipment to control witchweed and broomrape; 8/21/00 to 8/21/03. Contact: (Libby Pemberton)

List of Subjects

Environmental protection, Pesticides and pests.

Dated: December 8, 2000.

James Jones,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 00–32154 Filed 12–19–00; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–50874; FRL–6754–2]

Experimental Use Permit; Receipt of Application of a Transgenic Plant-Pesticide

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of an application524–EUP–OU from Monsanto Company requesting an experimental usepermit (EUP) for the plant-pesticide Cry2Ab protein and the genetic material necessary for its production in corn (Vector ZMBK28L). The Agency has determined that the application may be of regional and national significance. Therefore, in accordance with 40 CFR 172.11(a), the Agency is soliciting comments on this application.

DATES: Comments, identified by docket control number OPP–50874, must be received on or before January 19, 2001.

ADDRESSES: Comments and data may be submitted by mail,electronically, or in person. Please follow the detailed instructions for each method as provided in Unit I. of the **SUPPLEMENTARY INFORMATION**. To ensure proper receipt by EPA, it is imperative that you identify docket control number OPP–50874 in the subject line on the first page of your response.

FOR FURTHER INFORMATION CONTACT: By mail: MikeMendelsohn, Biopesticides and Pollution Prevention Division (7511C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 308–8715; e-mail address: mendelsohn.mike@ epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. This action may, however, be of interest to those persons interested in plant-pesticides or those persons who are or may be required to conduct testing of chemical substances under the Federal Food, Drug and Cosmetic Act (FFDCA), or the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

B. How Can I Get Additional Information, Including Copies of this Document and Other Related Documents?

1. *Electronically*. You may obtain electronic copies of this document, and certain other related documents that might be available electronically, from the EPA Internet Home Page at http://www.epa.gov/. To access this document, on the Home Page select ''Laws and Regulations,'' ''Regulations and Proposed Rules,'' 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/.

2. *In person*. The Agency has established an official record for this action under docket control number OPP–50874. The official record consists of the documents specifically referenced in this action, and other information related to this action, including any information claimed as Confidential Business Information (CBI). This official record includes the documents that are physically located in the docket, as well as the documents that are referenced in those documents. The public version of the official record does not include any information claimed as CBI. The public version of the official record, which includes printed, paper versions of any electronic comments submitted during an applicable comment period is available for inspection in the Public

Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The PIRIB telephone number is (703) 305–5805.

C. How and to Whom Do I Submit Comments?

1. *By mail*. Submit your comments to: Public Information and Records Integrity Branch (PIRIB), Information Resources and Services Division (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

2. *In person or by courier*. Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Information Resources and Services Division (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. The PIRIB is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The PIRIB telephone number is (703) 305–5805.

3. *Electronically*. You may submit your comments electronically by e-mail to: opp-docket@ epa.gov, or you can submit a computer disk as described above. Do not submit any information electronically that you consider to be CBI. Avoid the use of special characters and any form of encryption. Electronic submissions will be accepted in WordPerfect 6.1/8.0 or ASCII file format. All comments in electronic form must be identified by docket control number OPP–50874. Electronic comments may also be filed online at many Federal Depository Libraries.

D. How Should I Handle CBI That I Want to Submit to the Agency?

Do not submit any information electronically that you consider to be CBI. You may claim information that you submit to EPA 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. In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public version of the official record. Information not marked confidential will be included in the public version of the official record without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

E. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that supportyour views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Provide specific examples to illustrate your concerns.
6. Offer alternative ways to improve the notice.
7. Make sure to submit your comments by the deadline in this document.
8. To ensure proper receipt by EPA, be sure to identify the docket control number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. Background

EPA has received an application from Monsanto Company, 700 Chesterfield Parkway North, St. Louis, MO 63198 for an experimental use permit for Cry2Ab protein and the genetic material necessary for its production (Vector ZMBK28L) in corn. The program proposes genetically contained non-food-use testing from October 15, 2000 to November 15, 2001 on a total of 11,394 acres in the States of Alabama, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Iowa, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Mississippi, North Carolina, North Dakota, Nebraska, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, Wisconsin, and the Commonwealth of Puerto Rico. Experimental trials are to (1) breeding and observation nursery, (2) agronomic and efficacy trials, and (3) seed increase for further regulatory testing.

III. What Action is the Agency Taking?

Following the review of the Monsanto Company application and any comments and data received in response to this notice, EPA will decide whether to issue or deny the EUP request for this EUP program, and if issued, the conditions under which it is to be conducted. Any issuance of an EUP will be announced in the **Federal Register**.

IV. What is the Agency's Authority for Taking this Action?

The Agency's authority for taking this action is under FIFRA section 5.

List of Subjects

Environmental protection, Experimental use permits.

Dated: December 7, 2000.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. 00–32403 Filed 12–19–00]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6917–9]

Regulatory Reinvention (XL) Pilot Projects

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability of the Project XL draft final project agreement and draft addenda for New Jersey Gold Task Program.

SUMMARY: EPA is requesting comments on a Draft Project XL Final Project Agreement (FPA) and Draft Addenda for the New Jersey Gold Track Program. The Draft FPA and Addenda are a voluntary agreement developed collaboratively by the New Jersey Department of Environmental Protection (NJDEP), stakeholders, and EPA. Project XL, announced in the **Federal Register** on May 23, 1995 (60 FR 27282), gives regulated entities, communities and states the flexibility to develop alternative strategies that will replace or modify specific regulatory or procedural requirements on the condition that they produce greater environmental benefits.

The Gold Track Project XL project embodies the final and highest tier of NJDEP's Silver and Gold Track Programs. NJDEP has led detailed stakeholder discussions to frame the Silver and Gold Track Program for Environmental Performance (Silver and Gold) since the summer of 1999. New Jersey's Silver and Gold Tracks are designed as a tiered system, requiring an increased level of commitment to environmental performance in return for concomitant regulatory flexibility.

The first or baseline tier, Silver Track, requires participating entities to meet certain core criteria in return for baseline incentives such as recognition

as a top-performing company, a single point of contact in the department to expedite and coordinate permitting needs, and consolidated reporting (among others). The incentives offered under Silver Track are within the rubric of existing regulations, and, as such, do not require rule changes. The Silver Track portion of the program was implemented in September of 1999.

Silver Track II, the second tier of the program, maintains the original core requirements of the baseline tier, as well as some additional commitments. Participants must commit to attaining agreed-upon emission reductions of CO_2 or Greenhouse Gas equivalents. In turn, participants will not have to seek certain pre-construction air permits for sources that emit less than prescribed de minimus emission levels.

The third and highest tier, Gold Track, which is covered by this Agreement, represents the highest degree of commitment by participating entities and additional incentives offered by the NJDEP. Gold Track is envisioned to be multi-media in scope, with this Agreement serving as an ''umbrella'' document to define basic criteria and processes for participation in Gold Track. Core requirements for participating in Gold Track include (among others): Certifying current compliance with all applicable environmental rules and regulations, demonstrating a historically acceptable compliance record, conducting advanced community outreach, having an Environmental Management System (EMS) with an independent third party review component, and entering into a covenant with NJDEP to memorialize commitments and incentives as well as accountability milestones for the duration of the project. Media-specific requirements for participation are presented in the draft media-specific addenda.

Implementing the negotiated incentives under Gold Track may require both federal and state rule changes, which NJDEP plans to pursue through EPA's Project XL Program. Current federal rule change requests from NJDEP are described in the draft media-specific addenda.

DATES: The period for submission of comments ends on January 19, 2001.

ADDRESSES: All comments on the proposed Final Project Agreement should be sent to: Aleksandra Dobkowski-Joy, USEPA, 290 Broadway, New York, NY 10007, or Chad Carbone, U.S. EPA, Room 1027WT (1802), 1200 Pennsylvania Ave., NW., Washington, DC 20460. Comments may also be faxed to Ms. Dobkowski-Joy (212) 637–5045, or Mr. Carbone (202) 260–1812. Comments may also be received via electronic mail sent to: *dobkowski.aleksandra@epa.gov* or *carbone.chad@epa.gov.*

FOR FURTHER INFORMATION CONTACT: To obtain a copy of the proposed Final Project Agreement or Fact Sheet, contact: Aleksandra Dobkowski-Joy, USEPA, 290 Broadway, New York, NY 10007, or Chad Carbone, U.S. EPA, Room 1027WT (1802), 1200 Pennsylvania Ave., NW., Washington, DC 20460. The FPA and related documents are also available via the Internet at the following location: *http://www.epa.gov/ProjectXL.* Questions to EPA regarding the documents can be directed to Aleksandra Dobkowski-Joy at (212) 637–3676 or Chad Carbone at (202) 260–4296. For information on all other aspects of the XL Program contact Christopher Knopes at the following address: Office of Policy, Economics and Innovation, United States Environmental Projection Agency, 1200 Pennsylvania Ave., NW., Room 1029WT (Mail Code 1802), Washington, DC 20460. Additional information on Project XL, including documents referenced in this notice, other EPA policy documents related to Project XL, regional XL contacts, application information, and descriptions of existing XL projects and proposals, is available via the Internet at *http://www.epa.gov/ProjectXL.*

Dated: December 15, 2000.

Elizabeth A. Shaw,

Director, Office of Environmental Policy Innovation.

[FR Doc. 00–32530 Filed 12–19–00; 8:45 am]

BILLING CODE 6560–50–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6919–8]

Guidelines on Awarding Section 319 Grants to Indian Tribes in FY 2001

AGENCY: Environmental Protection Agency.

ACTION: Notice of availability.

SUMMARY: EPA has developed guidelines on awarding Section 319 nonpoint source grants to Indian Tribes in FY 2001. As was the case in FY 2000, Congress has authorized EPA to award nonpoint source pollution control grants to Indian Tribes under section 319 of the Clean Water Act in FY 2001 in an amount that exceeds the statutory cap (in section 518(f) of the Clean Water Act) of ⅓% of the total 319 appropriation. The guidelines are intended to assist all Tribes that have approved nonpoint source assessments and management programs and also have ''treatment-as-a-State'' status to receive Section 319 funding to help implement those programs. The guidelines describe the process for awarding base funding in FY 2001, including submissions of proposed work plans. The guidelines also describe the competitive process and schedule to select watershed projects for FY 2001 funding, including submissions of watershed project summaries and the selection criteria for funding watershed projects. The guidelines clarify issues relating to the eligibility of intertribal consortia to receive Section 319 grants, and questions relating to the extent to which Section 319(h) grants may be awarded to Tribes for use outside the reservation.

DATES: The guidelines are effective December 20, 2000.

ADDRESSES: Persons requesting additional information or a complete copy of the document should contact Ed Drabkowski at (202) 260–7009; drabkowski.ed@epa.gov; or U.S. Environmental Protection Agency (4503–F), 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Persons requesting additional information or a complete copy of the document should contact Ed Drabkowski at (202) 260–7009; drabkowski.ed@epa.gov; or U.S. Environmental Protection Agency (4503–F), 1200 Pennsylvania Avenue, NW., Washington, DC 20460. The complete text of today's guidelines is also available on EPA's Internet site on the Nonpoint Source Control Branch homepage *http://www.epa.gov/owow/nps.*

SUPPLEMENTARY INFORMATION: The full text of the Guidelines on Awarding Section 319 Nonpoint Source Grants to Indian Tribes in FY 2001 is published below.

Dated: December 13, 2000.

Robert H. Wayland III,

Director, Office of Wetlands, Oceans, and Watersheds.

Memorandum

Subject: Guidelines on Awarding Section 319 Grants to Indian Tribes in FY 2001

From: Robert H. Wayland III, Director, Office of Wetlands, Oceans and Watersheds

To: EPA Regional Water Division Directors, Regional Tribal Coordinators/Program Managers,

Tribal Caucus, EPA Tribal Operations Committee

I am very pleased to report that Congress has, for the second year in a row, authorized EPA to award nonpoint source pollution control grants to Indian Tribes under Section 319 of the Clean Water Act (''CWA'') in FY 2001 in an amount that exceeds the statutory cap (in Section 518(f) of the CWA) of ⅓% of the total 319 appropriation. This will enable all of the Tribes that have approved nonpoint source assessments and management programs and ''treatment-as-a-State'' (''TAS'') status (hereinafter referred to as ''approved Tribes'') to receive Section 319 funding to help implement those programs.

The allowance of an increased funding for Tribal nonpoint source (''NPS'') programs in FY 2001 reflects Congress' continuing recognition that Indian Tribes need and deserve increased financial support to implement nonpoint source programs that address critical water quality concerns on Tribal lands. EPA shares this view and will continue to work closely with Tribes to assist them in implementing effective Tribal nonpoint source pollution programs.

As was the case last year, the new authorization to exceed ⅓% applies only to the current year (FY 2001). EPA's long-term goal is that the ⅓% cap on Tribal nonpoint source grants should be permanently eliminated. To date, EPA has already approved over 50 Tribal nonpoint source management programs, covering more than 30 million acres of land (representing more than 65% of all Indian country), and we expect to approve additional programs in FY 2001. Clearly, there needs to be a permanent increase in the amount of Section 319 funds available to Tribes to help them implement approved programs that address nonpoint source pollution across their extensive Tribal lands.

To help achieve this goal, EPA will work with the Tribes to continue to demonstrate that increased 319 funds for Tribes can be used effectively to achieve water quality improvement. We were pleased by the high quality of the Tribes' work plans that formed the basis of the grants awarded to Tribes in FY 2000, which included both base grants for all approved Tribes as well as grants for specific watershed projects awarded to nine of these Tribes through a competitive process. We believe that the Tribes and EPA succeeded in directing the FY 2000 grants towards high-priority activities that will produce on-the-ground results that provide improved water quality. We believe that this success warrants an increase in Tribal 319 grant dollars in FY 2001 to address the extensive NPS control needs throughout Indian country, as discussed below.

As in FY 2000, the grants issuance process for FY 2001 is designed to balance the needs to (1) provide at least some minimum ''base'' funding to all approved Tribes to help them implement their NPS programs, and (2) provide sufficient funding to support a significant number of watershed projects that can make a substantial additional improvement to water quality.

Summary of Process for FY 2001 Grants to Tribes

In FY 2001, we will increase the total Tribal nonpoint source grants amount (from $2,500,000 in FY 2000) to $6,000,000. This increase reflects three factors:

1. The number of Tribes eligible to receive nonpoint source grants has increased since the time that EPA awarded grants to 47 Tribes in FY 2000.

2. We have increased the amount of base funding for Tribes whose land area exceeds 5,000 square kilometers (1,930 square miles) from $30,000 to $50,000.

3. We wish to ensure that there is sufficient funding available to support a significantly larger number of additional nonpoint source watershed projects than the nine that were funded in FY 2000.

EPA will divide the $6,000,000 into two portions: base funding for all approved Tribes, and additional watershed project funding for Tribes selected through a competitive process.

Detailed Discussion of Process for FY 2001 Grants to Tribes

1. Base Funding

Each Tribe that has an approved nonpoint source assessment and management program (and TAS status) as of January 28, 2001, will receive base funding as follows:

a. For approved Tribes whose land area exceeds 5,000 square kilometers (approximately 1,930 square miles, or about 1,235,000 acres), EPA will provide $50,000 of base funding.

b. For all other approved Tribes, EPA will provide $30,000 of base funding.

EPA considered whether other factors such as population and water resources should be used, in addition to or instead of land area, to distinguish Tribes with the greatest needs from other Tribes. EPA recognizes that each of these factors is relevant and in some circumstances significant. EPA ultimately chose land area as the deciding factor for a cutoff because nonpoint source pollution is strongly related to land use; thus land area is a reasonable criterion that generally is highly relevant to identifying Tribes with the greatest needs (recognizing that Tribes have needs that significantly exceed available resources).

The base funding of $30,000 per Tribe (or $50,000 for the Tribes with the largest land areas) may be used for a range of activities that implement the Tribe's approved NPS management program, including hiring a program coordinator; conducting nonpoint source education programs; providing training; and implementing, alone or in conjunction with other agencies or other funding sources, on-the-ground watershed projects. In general, this base funding should not be used for assessment activities.

Each Tribe that requests base funding must submit a proposed work plan to the appropriate EPA Regional office that conforms to applicable legal requirements and guidelines and is consistent with the Tribe's nonpoint source management program. This proposed work plan should clearly describe each significant category of activity to be funded; the roles of any Federal, local, or other partners in completing each activity; the schedule and budget for implementing funded activities; and the outputs to be produced by performance of the activity. Outputs of activities should be quantified; results of projects should be measurable and indicators to do so clearly stated. Tribes should submit their proposed work plans to the appropriate Regional office by February 16, 2001. If a Tribe does not submit an approvable proposed work plan by that date, its allocated $30,000 (or $50,000) will be added to the competitive pool, discussed immediately below, which will be used to fund Tribal watershed projects.

Regions should work with the Tribes to expeditiously award the base grants. However, if the Tribe will be awarded additional funds to implement a watershed project, as discussed below, the Tribe may prefer combining the formal process for submitting its final application for both the base and competitive funds. Regions should confer with their Tribes and endeavor to proceed in a manner and on a schedule that is most compatible with the Tribes' preferences.

2. Competitive Funding: Process and Schedule To Select Watershed Projects for FY 2001 Funding

The remaining funds will be awarded to Tribes that have approved nonpoint

source management programs as of January 28, 2001, on a competitive basis to provide funding for on-the-ground nonpoint source watershed projects that are designed to achieve additional water quality improvement. Each selected project will be eligible to receive up to $100,000, depending on the demonstrated need. These funds will be awarded using the process described below.

a. Watershed Project Review Committee

As we did for the FY 2000 grants, EPA will establish a watershed project review committee comprised of nine EPA staff, including three EPA Regional Nonpoint Source Coordinators, three EPA Regional Tribal Coordinators, two staff members of the Nonpoint Source Control Branch staff, and one staff member of the American Indian Environmental Office. The committee will then make funding decisions in accordance with the process described below.

b. Watershed Project Summaries

Tribes that have approved nonpoint source assessments and management programs as well as TAS status as of January 28, 2001, are invited to apply for watershed project funding by submitting watershed project summaries for proposed projects ranging between $50,000 and $100,000. (This funding is in addition to the base funding that each approved Tribe will receive, as described above.) Tribes that apply for funding for watershed projects should submit a brief (*e.g.,* 3–5 pages) summary of a watershed project implementation plan by February 5, 2001. (Complete grant applications should not be submitted until after projects are selected, pursuant to EPA's review of watershed project summaries as described below.)

Tribes seeking watershed project funding should submit their watershed project summaries by mailing them, by February 5, 2001, to Ed Drabkowski of the Nonpoint Source Control Branch, Mail Code 4503F, U.S. Environmental Protection Agency, Ariel Rios Building, 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460; faxing them to Ed at 202–260–7024; or emailing them to *drabkowski.ed@epa.gov.* We will immediately provide copies of the submitted summaries to the Review Committee. (Email versions would be appreciated where possible because they can be shared among the reviewers most rapidly and easily.)

The watershed project summary should outline the problem to be addressed; the project's goals and objectives; the lead implementing agency (either the Tribe or another organization authorized by the Tribe to be the project leader) and other agencies that will be authorized to expend project funds; the types of measures or practices that will be implemented; the projected implementation schedule; the project's budget; and the environmental indicators and/or other performance measures that will be used to evaluate the success of the project. (The Appendix to this memorandum contains more information on these elements of well-designed watershed implementation plans.)

Perhaps most important, each watershed plan summary should be clearly written with enough detail to indicate to the reviewing committee why the proposed project should be selected for funding. This is critical to help ensure that the best projects are funded.

c. Selection Criteria for Funding Watershed Projects

In ranking the projects, each reviewer on EPA's watershed project review committee will consider the extent to which the following factors are present in each project.

1. The watershed plan summary includes a clear and specific identification of the water quality problem to be addressed, including the pollutants of concern and their sources (including critical areas to be treated, if known).

2. The watershed project consists of implementation actions that are intended to help restore an impaired waterbody for which a total maximum daily load (TMDL) has been developed or a similar process has been used to establish restoration needs (for surface or ground water protection)

Note: EPA recognizes that most Tribes have not yet developed TMDLs. However, where a Tribe has developed a relevant water quality standard and TMDL and seeks Section 319 funding to assist in the implementation of the TMDL, that should be considered by reviewers to be a relevant factor.

3. The tribe has conducted a Unified Watershed Assessment, and the proposed project is planned to be implemented in a Category I watershed.

4. The project is designed to include cooperation and/or combination of resources with other agencies and other parties to provide additional technical and/or financial assistance to the project.

5. The watershed plan summary includes a clear and objective statement of the project's goals and objectives, in terms of controlling the resources and/or of improving/protecting water quality.

6. The summary identifies the management measures or practices to be implemented and the location where these measures and practices will be implemented.

7. The summary identifies the cost of the project and the amount of Section 319 grant dollars that are requested. (This must be within the $50,000–100,000 range.) Please note that a 40% non-Federal match is also required. However, if a Tribe demonstrates that it does not have adequate funds to meet the required match, EPA may approve a 10% non-Federal match.

8. The summary includes an implementation schedule.

9. The summary includes a statement of how the project will be evaluated to determine its success and to derive lessons that will assist the Tribe (and other Tribes) in future projects.

d. Award of Grants for Tribal Watershed Projects

(i) *Award Decisions.* The Watershed Project Review Committee will hold a conference call prior to reviewing the proposed watershed projects to ensure that all Committee members fully understand and agree on how to objectively apply the criteria discussed above. Rankings will be developed by considering all of the factors as a whole, in accordance with a weighting system to be decided upon by the Committee.

They will then review the proposed watershed projects and hold a second conference call by March 1 to discuss the projects. Following the second conference call, each Committee member will separately rank the projects and forward their suggested rankings to Ed Drabkowski in the Nonpoint Source Control Branch in EPA Headquarters by March 15, 2001. Headquarters will tally the members' rankings and then hold a final conference call with the Review Committee to provide a final opportunity for members of the Review Committee to discuss the rankings among themselves. By March 30, 2001, EPA will announce which projects have been selected for funding. The Tribes whose watershed projects have been selected for funding will be notified immediately by phone or email, with a written letter to follow.

(ii) *Final Work Plans/Full Grant Applications.* Once a Region and Tribe have been notified of the amount that will be awarded to the Tribe, they will discuss any changes that need to be made in the Tribe's proposed workplan. After making appropriate changes, the Tribe will submit a complete grant

application to the Region by May 28, 2001. If a Tribe fails to or is unable to submit an approvable work plan by May 28, 2001, the 319(h) grant will instead be awarded to the next highest ranking unfunded application. Regions should endeavor to finalize the grant awards no later than 60 days after receipt of a complete grant application with an approvable work plan.

(iii) *Match Requirements.* The match requirement for Section 319 grants is 40 percent of the approved work plan costs, which include both the base funding and competitive funding components discussed above. In general, consistent with 40 CFR § 31.24, the match requirement may be satisfied by allowable costs borne by non-Federal grants, by cash donations from non-Federal third parties, or by the value of third party in-kind contributions.

EPA's current regulations also provide that EPA may decrease the Tribal match requirement to as low as 10% ''upon application and demonstration by the Tribe that it does not have adequate funds (including Federal funds authorized by statute to be used for matching purposes, tribal funds or in-kind contributions) to meet the required match.'' See 40 CFR 35.760 (2000).

In making grant awards to Tribes that provide for a reduced match requirement, Regions should include a brief finding that the Tribe has demonstrated that it does not have adequate funds to meet the required match.

Intertribal Consortia

Some Tribes have formed intertribal consortia to promote cooperative work. Currently, intertribal consortia are not eligible to receive Section 319 grants. In the preamble to the proposed Tribal rule published on July 23, 1999, EPA discussed (at 64 FR 40085) a proposal to treat a group of individually eligible Tribes as eligible for grants. EPA anticipates that when the final rule is promulgated, intertribal consortia will be eligible for Section 319 grants. However, since the rule is not yet finalized, and since Tribes must submit their FY 2001 grant proposals soon, as discussed earlier in these guidelines, we expect that intertribal consortia will not be eligible to apply for and receive Section 319 grants in FY 2001.

Technical Assistance to Tribes

In addition to providing nonpoint source funding to Tribes, EPA remains committed to providing continued technical assistance to Tribes in their efforts to control nonpoint source pollution. During the past several years, EPA has presented fourteen workshops to approximately 250 Tribes throughout the United States to assist them in developing: (1) Nonpoint source assessments to further their understanding of nonpoint source pollution and its impact on water quality; (2) nonpoint source management programs to apply solutions to address their nonpoint source problems; and (3) specific projects to effect on-the-ground solutions. The workshops also have provided information on related EPA and other programs that can help Tribes address nonpoint source pollution, including the provision of technical and funding assistance. (EPA has also held related workshops that have focused on helping Tribes develop Unified Watershed Assessments that address both point and nonpoint source issues that affect their watersheds.) EPA intends to continue providing nonpoint source workshops to interested Tribes around the United States in FY 2001 and to provide other appropriate technical assistance as needed.

Non-Tribal Lands

During the past year, questions have arisen as to the extent to which Section 319(h) grants may be awarded to Tribes for use outside the reservation. To clarify this issue, we discuss below two types of off-reservation activities: (1) Activities that are related to waters within a reservation, such as those relating to sources upstream of a waterway entering the reservation, and (2) activities that are unrelated to waters of a reservation. As discussed below, the first type of these activities may be eligible; the second is not.

1. Activities That Are Related to Waters Within a Reservation

Section 518 (e) of the CWA provides that EPA may treat an Indian Tribe as a State for purposes of Section 319 of the CWA if, among other things, ''the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are * * * within the borders of an Indian reservation.'' 33 U.S.C. § 1377 (e)(2). EPA already awards grants to Tribes under Section 106 of the CWA for activities performed outside of a reservation that pertain to reservation waters, such as evaluating impacts of upstream waters on water resources within a reservation. Similarly, EPA has awarded section 106 grants to States to conduct monitoring outside of state borders. EPA has concluded that grants awarded to an Indian Tribe pursuant to Section 319(h) may similarly be used to perform eligible Section 319(h) activities outside of a reservation if: (1) The activity pertains to the management and protection of waters within the reservation, and (2) just as for on-reservation activities, the Tribe meets all other applicable requirements.

2. Activities That Are Unrelated to Waters of a Reservation

As discussed above, EPA is authorized to award Section 319(h) grants to Tribes to perform eligible Section 319(h) activities if the activities pertain to the management and protection of waters within a reservation and the Tribe meets all other applicable requirements. In contrast, EPA is not authorized to award Section 319(h) grants for activities that do not pertain to waters of a reservation. For off-reservation areas, including ''usual and accustomed'' hunting, fishing, and gathering places, EPA must determine whether the activities pertain to waters of a reservation prior to awarding a grant.

Conclusion

We believe that the lifting of the 1/3% statutory cap once again in FY 2001 provides the Tribes and EPA with an excellent opportunity to further Tribal efforts to reduce nonpoint pollution and enhance water quality on Tribal lands. EPA looks forward to working closely with the Tribes to assist them in implementing effective nonpoint source programs in FY 2001 and creating a sound basis to assure that adequate funds will continue to be provided in the future.

If you have any questions, please do not hesitate to call me at (202) 260–7166 (or email at *wayland.robert@epa.gov*), or have your staff contact Ed Drabkowski at (202) 260–7009 (or email at *drabkowski.ed@epa.gov*).

cc: Kathy Gorospe, Director, American Indian Environmental Office, EPA
Ben Smith, AIEO
Jerry Pardilla, National Tribal Environmental Council
Billy Frank, Northwest Indian Fisheries Council
Don Sampson, Columbia River Intertribal Fish Commission
James Schlender, Great Lakes Indian Fish and Wildlife Commission
All Tribes that have an approved Nonpoint Source Management Programs and/or Unified Watershed Assessment or have attended a Nonpoint Source Tribal Workshop
Regional Water Quality Branch Chiefs
Regional Nonpoint Source Coordinators

Appendix

[This Appendix is a copy of Appendix C of the Nonpoint Source Program and Grants

Guidance for Fiscal Year 1997 and Future Years (May 1996), modified slightly to apply to Tribal programs rather than State programs. The entire guidance may be viewed at *www.epa.gov/owow/nps/guide.html*].

Elements of a Well-Designed Watershed Implementation Plan

A well-designed plan for a successful watershed implementation project typically includes the following:

1. Define the Problem

• *Identification of water quality threat or problem*—Information is provided on whether the water resource is threatened or its use is impaired from the Tribe's nonpoint source assessment report, 303(d) list, or other Tribal water quality assessment reports.

• *Critical areas*—The approximate size and location of the critical areas to be treated is identified on a map and quantified. The critical areas are of an appropriate size to ensure that the measures implemented will have a significant impact on restoring or protecting designated beneficial uses within the watershed.

2. Build a Project Team and Public Support

• *Institutional roles and responsibilities*—Roles and responsibilities of agencies and organizations active within the watershed are identified, regardless of funding source. All Tribal, Federal, and State agencies and other organizations that have potential roles to play in assisting in the design and implementation of the project are identified and included as appropriate in the project development and implementation process. Where possible, one agency at the local level is identified as the lead agency for the watershed project.

• *Information/education and public participation component*—The nonpoint source watershed plan documents how interested and affected public are or will be involved in the selection, design and implementation of the watershed project. Additionally, the educational activities to be conducted in the watershed project are identified, including a schedule. The project also includes a plan for communicating lessons learned to other areas of the Tribe through the Tribe's nonpoint source information and education program.

3. Set Goals and Identify Solutions

• *Nonpoint source control objectives*—The nonpoint source watershed plan describes what is expected to be accomplished in a two to five year period. Objectives relate to all the identified water quality problems, are quantitative, and make progress towards achieving implementation of technology-based measures or achieving Tribal water quality goals. For example, where water goals are not met and a 75 percent reduction of a particular pollutant is needed to achieve them, an objective might be to reduce the pollutant loadings to the waterbody by 75 percent.

4. Implement Controls

• *Implementation schedule*—A schedule describing the location and type of BMPs and programs to be implemented within the watershed and the projected time of implementation are provided within the plan. The plan also includes an estimate of the costs of the planned activities.

5. Measure Success

• *Monitoring and evaluation*—Utilizing the project goals identified in the work plan, the plan should also provide an appropriate monitoring component to evaluate effectiveness, including ambient effects monitoring, beneficial use assessments, and environmental indicators (see Section II-A and Appendix B of the May 1996 nonpoint source guidance).

[FR Doc. 00–32397 Filed 12–19–00; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[CC Docket No. 92–237; DA 00–2822]

Next Meeting of the North American Numbering Council

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: On December 14, 2000, the Commission released a public notice announcing the January 16 and 17, 2001, meeting and agenda of the North American Numbering Council (NANC). The intended effect of this action is to make the public aware of the NANC's next meeting and its agenda.

FOR FURTHER INFORMATION CONTACT: Cheryl Callahan, Designated Federal Officer (DFO) at (202) 418–2320 or cchallaha@fcc.gov. The address is: Network Services Division, Common Carrier Bureau, Federal Communications Commission, The Portals, 445 12th Street, SW, Suite 6A207, Washington, DC 20554. The fax number is: (202) 418–2345. The TTY number is: (202) 418–0484.

SUPPLEMENTARY INFORMATION: Released: December 14, 2000.

The North American Numbering Council (NANC) has scheduled a meeting to be held Tuesday, January 16, 2001, from 8:30 a.m. until 5:00 p.m., and on Wednesday, January 17, from 8:30 a.m., until 12 noon. The meeting will be held at the Federal Communications Commission, Portals II, 445 12th Street, SW, Room TW–C305, Washington, DC.

This meeting is open to members of the general public. The FCC will attempt to accommodate as many participants as possible. The public may submit written statements to the NANC, which must be received two business days before the meeting. In addition, oral statements at the meeting by parties or entities not represented on the NANC will be permitted to the extent time permits. Such statements will be limited to five minutes in length by any one party or entity, and requests to make an oral statement must be received two business days before the meeting. Requests to make an oral statement or provide written comments to the NANC should be sent to Cheryl Callahan at the address under **FOR FURTHER INFORMATION CONTACT,** stated above.

Proposed Agenda

1. Approval of November 28–29, 2000, meeting minutes.
2. NRO (Dkt No 99–200) Second Report and Order.
3. North American Numbering Plan Administration (NANPA) Report. 2Q00 Neutrality Audit dated Aug 17, NRUF Update, and Enterprise Services Update.
4. Report of NANPA Oversight Working Group. Status of NANPA Requirements and Status of NANPA Performance Review.
5. Report of Numbering Resource Optimization (NRO) Working Group. Final NRUF Requirements Document, Continuing Review of NANP–E, and Monitoring of State Pooling Trials.
6. Industry Numbering Committee Report. NANP–E Alternatives Presentation.
7. CTIA Presentation on Imminent Exhaust Procedures.
8. Report of Toll Free Access Codes IMG.
9. Report of the Local Number Portability Administration (LNPA) Working Group. Wireless Number Portability Subcommittee.
10. Report of Cost Recovery Working Group. Status of NBANC B&C Technical Requirements.
11. Steering Group Meeting. Table of NANC Projects, The Big Picture (outline), 2H00 NANC Meeting Dates.
12. Steering Group Report
13. Report from NBANC
14. Reseller CIC IMG status report
15. Oversight of LLCs NPAC
16. Meeting Procedures IMG
17. Public participation (5 minutes each, if any)
18. Other Business

Federal Communications Commission.

Diane Griffin Harmon,

Deputy Chief, Network Services Division, Common Carrier Bureau.

[FR Doc. 00–32386 Filed 12–19–00; 8:45 am]

BILLING CODE 6712–01–U

FEDERAL MARITIME COMMISSION

Notice of Agreement(s) Filed

The Commission hereby gives notice of the filing of the following

agreement(s) under the Shipping Act of 1984. Interested parties can review or obtain copies of agreements at the Washington, DC offices of the Commission, 800 North Capitol Street, N.W., Room 940. Interested parties may submit comments on an agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days of the date this notice appears in the **Federal Register**.

Agreement No.: 011463–004.

Title: East Coast North America to West Coast South America and Caribbean Cooperative Working Agreement.

Parties: Compania Sud Americana de Vapores S.A. (CSAV), APL Co. PTE Ltd., Hamburg-Sudamerikanische Dampfschifffahrts-Gesellschaft KG d.b.a. Crowley American Transport, Compania Chilena de Navegacion Interoceanica S.A.

Synopsis: The proposed amendment provides that the agreement will remain in effect until at least March 31, 2001, and provides for the inclusion within the agreement, slots presently allocated under the CSAV/CCNI/Columbus Space Charter Agreement, FMC Agreement No. 011653.

Agreement No.: 011689–002.

Title: Zim/CSCL Space Charter Agreement.

Parties: China Shipping Container Lines Co. Ltd., Zim Israel Navigation Co., Ltd.

Synopsis: The agreement allows the mutual chartering of slots on the parties' vessels for dry-cargo containers, reefers, and empty containers in the U.S. Pacific trades to and from the PRC, South Korea, Japan, and Taiwan.

Agreement No.: 011738.

Title: ACL/WWL Slot Charter Agreement.

Parties: Atlantic Container Line AB (ACL), Wallenius Wilhelmsen Lines AS (WWL).

Synopsis: The proposed agreement authorizes ACL to charter space on WWL vessels in the trade between Northern Europe and the U.S. Atlantic and Gulf.

Agreement No.: 201114.

Title: Oakland Evergreen Terminal Use Agreement.

Parties: City of Oakland: Board of Port Commissioners, Evergreen Marine Corp. (Taiwan) Ltd.

Synopsis: The agreement is a terminal use agreement for portions of the Ben E. Nutter Container Terminal. The agreement runs through July 31, 2005.

Dated: December 15, 2000.

By Order of the Federal Maritime Commission.

Bryant L. VanBrakle,

Secretary.

[FR Doc. 00–32421 Filed 12–19–00; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License; Revocations

The Federal Maritime Commission hereby gives notice that the following ocean transportation intermediary licenses have been revoked pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. app. 1718) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, effective on the corresponding dates shown below:

License Number: 4337N.

Name: Air-Land & Sea Transport, Inc. d/b/a Celestial Navigation.

Address: 3000 Wilcrest, Suite 350, Houston, TX 77042.

Date Revoked: March 30, 2000.

Reason: Failed to maintain a valid bond.

License Number: 15001N.

Name: Straight Shipping Service, Inc.

Address: 320 Northern Blvd., Great Neck, NY 11021.

Date Revoked: August 24, 2000.

Reason: Failed to maintain a valid bond.

License Number: 15609N.

Name: Yining International Inc.

Address: 43–45 Smart Street, Suite 301, Flushing, NY 11355.

Date Revoked: November 12, 2000.

Reason: Failed to maintain a valid bond.

Sandra L. Kusumoto,

Director, Bureau of Consumer Complaints and Licensing.

[FR Doc. 00–32420 Filed 12–19–00; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License; Reissuances

Notice is hereby given that the following Ocean Transportation Intermediary license has been reissued by the Federal Maritime Commission pursuant to section 19 of the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 (46 U.S.C. app. 1718) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR 515.

License No.	Name/address	Date reissued
4541F	Southeast Logistics International, Inc., 122 Agape Street, Williamson, GA 30292	October 31, 2000

Sandra L. Kusumoto,

Director, Bureau of Consumer Complaints and Licensing.

[FR Doc. 00–32419 Filed 12–19–00; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 19817 (j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors/ Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than January 3, 2001.

A. Federal Reserve Bank of New York (Betsy Buttrill White, Senior Vice President) 33 Liberty Street, New York, New York 10045–0001:

1. Warwick Community Bancorp, Inc. ESOP, Warwick, New York; to acquire additional voting shares of Warwick Community Bancorp, Inc., Warwick, New York, and thereby indirectly acquire additional voting shares of Warwick Savings Bank, Warwick, New York, and The Towne Center Bank, Lodi, New Jersey.

B. Federal Reserve Bank of Dallas (W. Arthur Tribble, Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. John Eric Swenson, Spur, Texas; to acquire additional voting shares of Ranco Bancshares, Inc., Spur, Texas;

and thereby indirectly acquire additional voting shares of Spur Security Bank, Spur, Texas.

Board of Governors of the Federal Reserve System, December 14, 2000.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 00–32357 Filed 12–19–00; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL TRADE COMMISSION

[File No. 001 015; Docket No. C–3989]

America Online, Inc., and Time Warner Inc.; Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint that accompanies the consent agreement and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before January 16, 2001.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, Room H–159, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Richard Parker, FTC/H–374, 600 Pennsylvania Avenue, NW., Washington, DC 20580. (202) 326–2574.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46, and section 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for December 14, 2000), on the World Wide Web, at *http://www.ftc.gov/os/2000/12/index.htm* A paper copy can be obtained from the FTC Public Reference Room, Room H–130, 600 Pennsylvania Avenue, NW., Washington, DC 20580, either in person or by calling (202) 326–3627.

Public comment is invited. Comments should be directed to: FTC/Office of the Secretary, Room H–159, 600 Pennsylvania Avenue, NW., Washington, DC 20580. Two paper copies of each comment should be filed, and should be accompanied, if possible, by a 3½ inch diskette containing an electronic copy of the comment. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with section 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

Analysis of Proposed Consent Order To Aid Public Comment

I. Introduction

The Federal Trade Commission (''Commission'') has accepted for public comment from America Online, Inc. (''AOL'') and Time Warner Inc. (Time Warner'') (collectively ''Proposed Respondents'') an Agreement Containing Consent Orders (''Proposed Consent Agreement''), including the Decision and Order (''Proposed Order''). The Proposed Respondents have also reviewed a draft complaint. The Commission has now issued the complaint and an Order to Hold Separate (''Hold Separate Order''). The Proposed Consent Agreement intends to remedy the likely anticompetitive effects arising from the merger of AOL and Time Warner.

II. The Parties and the Transaction

AOL is the world's leading internet service provider (''ISP''), providing access to the internet for consumers and businesses. AOL operates two ISPs: America Online, with more than 25 million members; and CompuServe, with more than 2.8 million members. AOL also owns several leading Internet products including AOL Instant Messenger, ICQ, Digital City, MapQuest, and MoviePhone; the AOL.com and Netscape.com portals; the Netscape 6, Netscape Navigator and Communicator browsers; and Spinner.com and NullSoft's Winamp, leaders in Internet music.

Time Warner is the nation's second largest cable television distributor, and one of the leading cable television network providers. Time Warner's cable systems pass approximately 20.9 million homes and serve approximately 12.6 million cable television subscribers, or approximately 20% of U.S. cable television households. Time Warner, or its principally owned subsidiaries, owns leading cable television networks, such as HBO, Cinemax, CNN, TNT, TBS Superstation, Turner Classic Movies and Cartoon Network.

Time Warner also owns, directly or through affiliated businesses, a wide conglomeration of entertainment or media businesses. Time Warner's holdings include leading magazine franchises, such as Time, People and Sports Illustrated; copyrighted music from many of the world's leading recording artists that it produces and distributes through a family of established record labels, such as Warner Bros. Records, Atlantic Records, Elektra Entertainment and Warner Music International; the unique and extensive film and animation libraries owned or managed by Warner Bros. and New Line Cinema; and trademarks, such as the Looney Tunes characters, Batman and The Flintstones; the WB Network, a national broadcasting network; and Internet websites, such as CNN.com. Time Warner is the majority owner of Road Runner (the trade name of ServiceCo, LLC), the second largest provider of cable broadband ISP service in the U.S., serving more than 1.1 million subscribers. Road Runner has an exclusive contract to provide cable broadband ISP service via Time Warner's cable systems through December 2001.

On January 10, 2000, AOL and Time Warner entered into an Agreement and Plan of Merger (the ''merger''), pursuant to which Time Warner common stockholders will receive 1.5 shares of the combined AOL Time Warner (''combined company,'' or ''AOL Time Warner'') for each share of Time Warner common stock they hold. AOL common stockholders will receive one share of common stock of AOL Time Warner for each share of AOL common stock they hold.

III. The Proposed Complaint

According to the complaint the Commission intends to issue, AOL's merger with Time Warner will have anticompetitive effects in three relevant product markets: (1) The market for broadband Internet access; (2) the market for residential broadband Internet transport services, or last mile access; and (3) the market for interactive television (''ITV'') services.

AOL is the dominant narrowband ISP. Its narrowband customer base positions AOL to become a significant broadband ISP competitor as well. Time Warner provides broadband Internet access through Road Runner, a partially owned subsidiary in which it has a controlling interest. AOL and Road Runner are two of the most significant broadband ISP

competitors in Time Warner cable areas. According to the Commission's draft complaint, the relevant broadband ISP markets are or are likely to become highly concentrated as a result of the merger, and the merger will increase the ability of the combined firm to unilaterly exercise market power in Time Warner cable areas and throughout the United States. Moreover, new entry is not likely to be timely or sufficient to prevent the combined firm from exercising market power.

In the market for broadband Internet transports services, the Commission's complaint alleges that cable television lines and digital subscriber lines (''DSL'') are the two principal means of providing last mile access for broadband ISPs to the customers. Satellite and fixed wireless technologies also provide last mile access, but consumers do not view them as viable alternatives for DSL or cable broadband access. Currently, AOL's principal means of providing broadband access to its subscribers is through DSL, and every broadband subscriber it signs represents a lost revenue opportunity for cable broadband providers. AOL's merger with Time Warner will reduce its incentives to promote and market broadband access through DSL in Time Warner cable areas, adversely affecting DSL rollout in those areas and nationally, and will increase AOL Time Warner's ability to exercise unilateral market power in those areas.

According to the Commission's complaint, ITV combines television programming with Internet functionality. Cable television lines have distinct competitive advantages over DSL in providing ITV services to broadband customers. AOL recently launched AOL TV, a first generation ITV service, and is well positioned to become the leading ITV provider. Local cable companies will play the key role in enabling the delivery of ITV services. After the merger, AOL Time Warner will have incentives to prevent or deter rival ITV providers from competing with AOL's ITV service. Thus, the merger could enable AOL to exercise unilateral market power in the market for ITV services in Time Warner cable areas, which also affects the ability of ITV providers to compete nationally.

IV. Terms of the Proposed Order

The Proposed Order is effective for a term of five years and resolves the Commission's antitrust concerns with the merger as discussed below.

A. Broadband Internet Access Services

Under the terms of the Proposed Order, before Time Warner can make AOL's broadband ISP service available in certain identified cable divisions representing over 70 percent of Time Warner's cable customers (''Identified Cable Divisions''),[1] Time Warner must first make available cable broadband service offered by Earthlink, Inc. pursuant to an agreement between Time Warner and Earthlink that the Commission has evaluated and approved.

In addition, Respondents cannot begin to advertise or promote AOL's broadband ISP service to subscribers in a cable division until Earthlink's competing ISP service is available to subscribers in that cable division or Earthlink advertises or promotes its service in that cable division, whichever occurs first. These provisions ensure that a competing ISP service, which is not affiliated with AOL Time Warner, is available to subscribers in most Time Warner cable areas at the same time that AOL introduces its cable broadband ISP service. It does not prevent Time Warner from conducting tests involving a limited number of subscribers that are purely for technological and operational implementation purposes, rather than for commercial purposes.

Within 90 days of making AOL's broadband ISP service available to subscribers, Time Warner must enter into agreements to carry at least two other non-affiliated broadband ISPs to provide cable broadband ISP services in the Identified Cable Divisions. The non-affiliated ISPs, and Time Warner's agreements with them, must receive the prior approval of the Commission. If Time Warner fails to enter into such agreements within this time period, the Commission may appoint a trustee who will have the authority to enter into such agreements on Time Warner's behalf. These agreements must also receive the prior approval of the Commission. These agreements must be on terms comparable to either the Earthlink agreement, or any agreement between AOL and another cable system to provide AOL's cable broadband ISP service over that cable system.[2]

In Time Warner's other cable divisions, Time Warner must enter into cable broadband ISP service agreements that have received the prior approval of the Commission with at least three other non-affiliated ISPs that have received the prior approval of the Commission within 90 days of making AOL's cable broadband ISP service available in each such division. If Time Warner fails to enter into such agreements within this time period, the Commission may appoint a trustee who will have the authority to enter into such agreements, which will be subject to the prior approval of the Commission. These agreements must be on terms comparable to either another alternative cable broadband ISP service agreement between a broadband ISP and the Proposed Respondents approved by the Commission, or any agreement between AOL and another cable system to provide AOL's cable broadband ISP service over that cable company's system.

The Proposed Order requires Time Warner to include several provisions in the agreements it negotiates with the non-affiliated ISPs. Specifically:

- Time Warner must include a most favored nation (''MFN'') clause in all alternative cable broadband ISP service agreements submitted to the Commission for approval. The MFN must provide that if AOL executes a cable broadband ISP service agreement with another cable system operator, Respondents must provide a copy of the agreement with that cable system operator to a Monitor Trustee appointed by the Commission; give notice of the execution of the agreement to each non-affiliated ISPs that is a party to an alternative cable broadband ISP service agreement approved by the Commission; and give the non-affiliated ISPs the ability to convert to all of the rates and terms in the cable system operator's agreement;
- Time Warner must also include in all alternative cable broadband ISP service agreements submitted to the Commission for approval a requirement that if Proposed Respondents makes available different levels of service to their affiliated ISPs, they must make those levels of service available to non-affiliated ISPs;
- Time Warner must also include in all alternative cable broadband ISP service agreements submitted to the Commission for approval a requirement that if Proposed Respondents make available any network flow monitoring data or usage accounting to any of their affiliated ISPs, they must make that same data or accounting available to non-affiliated ISPs;
- Time Warner must also include in all alternative cable broadband ISP service agreements, at the option of the non-affiliated ISP, a requirement that

[1] The identified cable divisions to which this provision applies are: New York City, Tampa Bay, Central Florida, Houston, Raleigh/Fayetteville, Western Ohio, Northern Ohio, Charlotte, Los Angeles, Milwaukee, Greensboro, Hawaii, Cincinnati, San Antonio, Syracuse, Kansas City, South Carolina, Columbus, Rochester, Albany, and any other cable division with 300,000 subscribers or more that is controlled by Respondents.

[2] This provision applies to the following cable systems: Adelphia, AT&T, Cablevision, Charter, Comcast, and Cox.

disputes concerning compliance with the rates, terms, and conditions of that agreement shall be submitted to binding arbitration; and

• If requested by a non-affiliated ISP, Time Warner must provide the nonaffiliated ISPs with the same point of connection within Time Warner's cable divisions that Time Warner provides to affiliated ISPs. This provision is intended to ensure that Time Warner may not discriminate against non-affiliated ISPs by providing them with a less-advantageous connection point to its network than it provides to AOL.

If any of the alternative cable broadband ISP service agreements approved by the Commission is for a term that terminates prior to expiration of the Proposed Order (*i.e.,* five years from the date the Proposed Order becomes final), the Proposed Order requires Time Warner to enter into an additional alternative cable broadband ISP service agreement with a nonaffiliated ISP, subject to the Commission's approval, that must take effect immediately upon the expiration of the original agreement. If the original alternative cable broadband ISP service agreement is for a term of at least three years, Time Warner must offer the non-affiliated ISP that is a party to that agreement an option to renew the agreement for at least two years.

If Time Warner terminates any of the alternative cable broadband ISP service agreements approved by the Commission before the expiration of the Proposed Order, the Proposed Order requires Time Warner to enter into an additional alternative cable broadband ISP service agreement with a non-affiliated ISP, subject to the Commission's approval, which must take effect immediately upon the expiration of the original agreement.

If any non-affiliated ISP terminates its alternative cable broadband ISP service agreement approved by the Commission before the expiration of the Proposed Order, or if the non-affiliated ISP ceases to make its ISP service available to subscribers in a particular identified cable division, Time Warner must enter into an additional alternative cable broadband ISP service agreement with a non-affiliated ISP, subject to the Commission's approval, within 90 days after the original non-affiliated cable broadband ISP service is no longer available to subscribers.

In addition to the broadband ISP service agreements described above, the Proposed Order also requires Time Warner to negotiate and enter into arms' length, commercial agreements with any other non-affiliated ISP that seeks to provide cable broadband ISP service on Time Warner's cable system. Time Warner may decline to enter into such negotiations or agreements or impose rates, terms, or conditions based on cable broadband capacity constraints, other cable broadband technical limitations, or cable broadband business considerations, but only so long as it makes such determinations without discrimination on the basis of affiliation and not on the basis of the impact on Proposed Respondents' ISPs (including, but not limited to a decrease in subscribers of Proposed Respondents' ISPs).

The purpose of these provisions is to ensure that a full range of content and services from non-affiliated ISPs is available to subscribers; prevent discrimination by Proposed Respondents as to non-affiliated ISPs on the basis of affiliation, which would interfere with the ability of the non-affiliated ISP to provide a full range of content and services; and remedy the lessening of competition in the market for broadband ISP service as alleged in the Commission's complaint.

B. Interactive Television and Other Internet Services

Section III of the Proposed Order prohibits Time Warner from interfering in any way with content passed along the bandwidth contracted for and being used by non-affiliated ISPs in compliance with their agreements with Proposed Respondents. The Proposed Order also prohibits Time Warner from discriminating on the basis of affiliation in the transmission or modification of content that Time Warner has contracted to deliver to subscribers over its cable systems. The Proposed Order specifically prohibits Time Warner from interfering with the ability to a subscriber to use, in conjunction with ITV services provided by a non-affiliated entity, interactive signals, triggers, or other content that the Proposed Respondents have agreed to carry. If Time Warner has agreed to transmit ITV signals or interactive triggers that AOL subscribers can use, it cannot block transmission of such ITV signals or triggers to subscribers using a competing ITV service. In addition, the Proposed Order prohibits the Proposed Respondents from entering into any agreement with any other cable system that would interfere with the ability of the other cable system to enter into agreements with non-affiliated ISPs or ITV providers.

The Proposed Order also requires the Proposed Respondents to provide the Commission with all complaints from any non-affiliated broadband ISP relating to the failure of the Proposed Respondents to make content available. The Proposed Order also requires the Proposed Respondents to notify the Commission whenever a television programmer complains that the Proposed Respondents have failed to carry interactive triggers, signals or content through its cable systems.

C. Broadband Transport Services

Section IV of the Proposed Order requires AOL to charge the same or comparable price for its DSL service to subscribers in Time Warner cable areas where AOL cable broadband ISP service or Road Runner is available as AOL charges for its DSL service in areas in which neither AOL cable broadband ISP service nor Road Runner is available. However, AOL may charge different prices for its DSL service to the extent such pricing differences reflect any actual cost differences for DSL transmission services. The Proposed Respondents must include a description of these cost differences in the reports they are required to submit to the Commission.

The Proposed Order also requires AOL to market and promote its DSL services to subscribers in Time Warner cable areas where AOL cable broadband ISP service or Road Runner is available at the same or comparable level and in the same or comparable manner as it markets and promotes DSL services to subscribers in areas in which neither AOL cable broadband ISP service nor Road Runner is available.

D. Monitor Trustee Provisions

The Proposed Consent Order authorizes the Commission to appoint a Monitor Trustee to monitor compliance with the Order at any time after the Proposed Respondents sign the Consent Agreement. The Proposed Consent Order provides the Monitor Trustee with the power and authority to monitor the Proposed Respondents' compliance with the terms of the Proposed Consent Order, and full and complete access to personnel, books, records, documents, and facilities of the Proposed Respondents to fulfill that responsibility. In addition, the Monitor Trustee may request any other relevant information that relate to the Proposed Respondents' obligations under the Proposed Consent Order. The Proposed Consent Order precludes Proposed Respondents from taking any action to interfere with or impede the Monitor Trustee's ability to perform his or her responsibilities or to monitor compliance with the Proposed Consent Order.

The Monitor Trustee may hire such consultants, accountants, attorneys, and other assistants as are reasonably necessary to carry out the monitor Trustee's duties and responsibilities. The Proposed Consent Order requires the Proposed Respondents to bear the cost and expense of hiring these assistants.

E. Trustee Provisions

The Proposed Consent Order provides that the Commission may appoint a trustee to enter into broadband agreements with non-affiliated ISPs in two instances. First, if the Proposed Respondents have failed to enter into agreements with two additional ISPs in the Identified Cable Divisions within 90 days of making an affiliated ISP available to subscribers, the Commission may appoint a trustee to enter into an agreements, subject to the prior approval of the Commission. The trustee shall, for an additional 90 days, offer to enter into agreements with non-affiliated ISPs that are comparable, taken as a whole, to (1) the Earthlink agreement; or (2) any broadband agreement AOL enters into with any other cable system operator. The trustee's obligation is to ensure that at least two non-affiliated ISPs are available on the Time Warner system in these divisions in addition to Earthlink.

The Commission may also appoint a trustee to enter into agreements in other time Warner cable divisions if the Proposed Respondents fail to enter into agreements with at least three non-affiliated ISPs that the Commission approves within 90 days of making any affiliated ISP available. The trustee shall, for an additional 90 days, offer to enter into agreements with non-affiliated ISPs that are comparable, taken as a whole, to (1) any other broadband agreement with a non-affiliated ISP for carriage on any Time Warner cable system; or (2) any broadband agreement AOL enters into with any other cable system operator. The trustee's obligation is to ensure that at least three non-affiliated ISPs are available on the Time Warner cable systems in these divisions.

F. Order to Hold Separate

In addition to the Proposed Order, the Commission also issued an Order to Hold Separate (''Hold Separate Order''). The purpose of the Hold Separate Order is to prevent interim harm to competition and to prevent AOL from gaining a competitive first mover advantage through a relationship with Road Runner.

The Hold Separate Order requires the Proposed Respondents to hold AOL and Road Runner separate in each Identified Cable Division until they have made an affiliated ISP available to broadband customers in that Identified Cable Division. The Hold Separate Order expressly prohibits AOL and Road Runner from, among other things, cross or joint promotional activities, joint or cooperative advertising, and any steps to benefit, directly or indirectly, from each other's business activities.

The Commission may appoint a trustee to monitor compliance with the terms of the Hold Separate Order.

V. Opportunity for Public Comment

The Proposed Consent Agreement has been placed on the public record for 30 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the Proposed Consent Agreement and the comments received and will decide whether or not to make the Proposed Order final.

By accepting the Proposed Agreement subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to invite public comment on the Proposed Consent Agreement, to aid the Commission in its determination of whether it should make final the Proposed Order contains in the agreement. This analysis is not intended to constitute an official interpretation of the Proposed Order, nor is it intended to modify the terms of the Proposed Order in any way.

By direction of the Commission.

Donald S. Clark,

Secretary.

Concurring Statement of Commissioned Mozelle W. Thompson

The Commission voted today to accept the proposed consent in America On Line, Inc./Time Warner Inc., File Number 001–0105. This merger marks the first, and potentially most significant convergence of an Internet giant with a media, entertainment and cable conglomerate. Because it will form a broadband Internet powerhouse spanning the three market tiers of content, consumer interface, and broadband conduit, it may also shape the very contours of the market for high speed internet. In reviewing the merger, I have been concerned that without relief, the transaction would have threatened the significant open market environment that high technology and Internet companies, innovators, and consumers enjoy. I voted to accept the settlement, however, because the consent will not only provide a means to address these concerns, but will also sent an important message to the market that high speed internet should continue to provide consumers with choice of service and diversity of content.

It is important to note that our remedy does give me pause for several reasons. First, the remedy—as some might observe—appears to be an unusually regulatory solution for a merger order. I generally prefer the divestiture of an ongoing business—*i.e.,* structural relief—to restore lost competition, a policy that the Commission has increasingly favored when settling merger cases.[1] Moreover, it is difficult to determine whether the order's five-year duration is too limited to accomplish the full goal of the relief.

Second, I am concerned that the Commission's open access relief might not preclude the possibility of harm from the merged entity's control of AOL and Time Warner content along with the Time Warner cable systems. The settlement nonetheless marks an important first step for future open competition on cable for Internet service providers and content providers. The relief provides that the Commission will supervise AOL Time Warner's conduct for five years; but it tells the market to continue to demand openness and competition in this important area. I note that the negotiated relief was improved from the companies' earliest proposals.

That being said, I also hope that the public does not over-interpret today's decision; despite the fact that this merger has been allowed to proceed without challenge, I expect that the Commission will scrutinize future Internet mergers as it does any merger—on a case-by-case basis. Moreover, the Commission will continue to exercise its antitrust responsibilities by taking appropriate action against anti-competitive behavior. Finally, though many interested parties will, no doubt, scrutinize the terms of the order ISP access agreements, these should not necessarily be seen as a template for future Internet access, but should instead be regarded as examples of how the public should share the benefits provided by the principles of Internet openness and diversity.

[1] In matters such as this, where the parties repeatedly failed to articulate how the merger would benefit consumers, I tend to believe structural relief—or outright challenge of the merger—is even more warranted to preserve the public interest.

For those reasons, I concur with accepting the proposed consent orders.

[FR Doc. 00–32394 Filed 12–19–00; 8:45 am]

BILLING CODE 6750–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Agency Information Collection Activities: Proposed Collections; Comment Request

The Department of Health and Human Services, Office of the Secretary will periodically publish summaries of proposed information collection projects and solicit public comments in compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995. To request more information on the project or to obtain a copy of the information collection plans and instruments, call the OS Reports Clearance Officer on (202) 690–6207.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Proposed Projects 1. Federal Government-wide Automated Assurance and Institutional Review Board Registration System—NEW—The Office of Human Research Protection is proposing a Government-wide standardized, automated process for filing the assurance pertaining to the protection of human subjects in research, and for registering Institutional Review Boards (IRBs). Respondents: Research Institutions; Burden Information for the Assurance—Annual Number of Respondents: 1,334; Average Burden per Response: 2 hours; Total Annual Burden for Assurance: 2,668—Burden Information for IRB Registration—Annual Number of Respondents: 667; Average Burden per Response: 1 hour; Total Annual Burden for IRB Registration: 667 hours—Total Burden: 3335 hours.

Send comments to Cynthia Agens Bauer, OS Reports Clearance Officer, Room 503H, Humphrey Building, 200 Independence Avenue SW., Washington, DC 20201. Written comments should be received within 60 days of this notice.

Dated: December 7, 2000.

Dennis P. Williams,

Deputy Assistant Secretary, Budget.

[FR Doc. 00–32388 Filed 12–19–00; 8:45 am]

BILLING CODE 4160–17–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Susceptibility of Foodborne Pathogens from Humans, Food, and Animals

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA), Center for Veterinary Medicine (CVM), announces that funds may be available to support an unsolicited grant application submitted by the Fundacion Mexicana para la Salud, Int. Hospital O'Horan, Merida, Yucatan, Mexico. The applicant has requested funds to study the epidemiology of *Salmonella*, *Campylobacter* and generic *Escherichia coli* in four states in Mexico to better define the susceptibility patterns of the pathogens and the risk factors associated with drug resistance, particularly quinolone resistance.

FOR FURTHER INFORMATION CONTACT:

Regarding the administrative and financial management aspects of this notice: Peggy L. Jones, Division of Contracts and Procurement Management (HFA–520), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–7160. Correspondence hand-carried or commercially delivered should be addressed to 5630 Fishers Lane (HFA–520), rm. 2129, Rockville, MD 20857.

Regarding the programmatic aspects of this notice: David B. Batson, Office of Research (HFV–502), Center for Veterinary Medicine, Food and Drug Administration, 8401 Muirkirk Rd., Laurel, MD 20708, 301–827–8021.

SUPPLEMENTARY INFORMATION:

I. Objectives

The specific objectives of the proposed project are to: (1) Develop effective surveillance of antimicrobial resistance in foodborne pathogens in human, food, and veterinary laboratories at the four participating sites; (2) standardize the methods for isolation, identification, and antimicrobial susceptibility testing of foodborne pathogens at these four sites; (3) determine the prevalence of *Salmonella* spp., *Campylobacter* spp., and quinolone-resistant generic *E. coli* in asymptomatic and ill humans, poultry, pork, beef, and healthy food animals on farms; (4) identify and compare susceptibility profiles of the *Salmonella* spp., *Campylobacter* spp., and generic *E. coli* isolates; and (5) assess the importance of direct and indirect contact with food-animals as risk factors for quinolone-resistance in these isolates.

II. Eligible Applicants

Assistance will only be provided to the Fundacion Mexicana para la Salud because of the following:

1. The Fundacion Mexicana para la Salud is the only organization that submitted an unsolicited application for the purpose stated above.
2. The project proposed by the applicant specifically addresses the National Antimicrobial Resistance Monitoring System objectives in general and international objectives for the establishment of an international data base.
3. The knowledge of sources of exposure to drug resistant pathogens in Mexico would provide information that could be made available to travelers and would also assist in making assessments of the levels of fluoroquinolone resistance in domestic cases of illness acquired from animal food products imported from Mexico and Guatemala.
4. An international data base can provide information to the international community on the level of antimicrobial drug resistance in foodborne pathogens, providing a means for assessing public health concerns.
5. The proposal would benefit CVM and the international community in the establishment of an international data base for antimicrobial susceptibility and enhance food safety activities globally.

III. Funding

We anticipate that approximately $371,144, which is the requested level of funding, or some lesser amount will be made available in fiscal year (FY) 2001 to fund this project. It is expected that the award will begin sometime in FY 2001 and will be made for a 12-month budget period within a project period of up to 3 years. Funding estimates may change. Continuation awards within an approved project period will be made on the basis of satisfactory progress as evidenced by required reports and the availability of funds.

Dated: December 11, 2000.

Margaret M. Dotzel,

Associate Commissioner for Policy.

[FR Doc. 00–32378 Filed 12–19–00; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 00D 1618]

Draft ''Guidance for Industry: Variances for Blood Collection from Individuals with Hereditary Hemochromatosis;'' Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance document entitled ''Guidance for Industry: Variances for Blood Collection from Individuals with Hereditary Hemochromatosis'' dated December 2000. The draft guidance document provides recommendations to blood establishments that wish to distribute blood and blood components collected from individuals with diagnosed hereditary hemochromatosis without indicating the donor's disease on the container label, or collect blood more frequently than every 8 weeks without a physical examination and certification of the donor's health by a physician on the day of donation. This draft guidance document identifies the conditions under which FDA will consider approving the above as alternative procedures, or variances, to the current regulations, and provides guidance on what to submit when requesting these variances. These recommendations apply to all blood establishments, whether or not they hold a U.S. License for the manufacture of blood and blood components.

DATES: Submit written comments on the draft guidance to ensure their adequate consideration in preparation of the final document by March 20, 2001.

ADDRESSES: Submit written requests for single copies of ''Guidance for Industry: Variances for Blood Collection from Individuals with Hereditary Hemochromatosis'' dated December 2000, to the Office of Communication, Training, and Manufacturers Assistance (HFM 40), Center for Biological Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852 1448. Send one self-addressed adhesive label to assist the office in processing your requests. The document may also be obtained by mail by calling the CBER Voice Information System at 1 800 835 4709 or 301 827 1800, or by fax by calling the FAX Information system at 1 888 CBER FAX or 301 827 3844. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

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

FOR FURTHER INFORMATION CONTACT: Paula S. McKeever, Center for Biologics Evaluation and Research (HFM 17), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852 1448, 301 827 6210.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance document entitled ''Guidance for Industry: Variances for Blood Collection from Individuals with Hereditary Hemochromatosis'' dated December 2000. This document identifies the conditions under which FDA will consider approving the above as alternative procedures, or variances, to the current regulations, under the provisions of 21 CFR 640.120 and provides guidance on what to submit when requesting these variances.

On April 29, 1999, the Public Health Service Advisory Committee on Blood Safety and Availability (ACBSA) recommended that the Department of Health and Human Services (DHHS) ''create policies that eliminate incentives to seek [blood] donation for purposes of phlebotomy'' from patients with diagnosed hemochromatosis who require phlebotomy as therapy for their disease. Further, as undue incentives to donate blood for transfusion (rather than being therapeutically phlebotomized) are removed, DHHS ''should create policies that eliminate barriers to using this resource'' to augment the country's blood supply (Ref. 1).

On August 10, 1999, the Commissioner of Food and Drugs made a commitment to consider case-by-case exemptions to existing blood labeling and donor suitability regulations for blood establishments that can verify that therapeutic phlebotomy for hemochromatosis is performed at no expense to the patient (Ref. 2). FDA additionally committed itself to work with the Health Care Financing Administration in ensuring that the financial incentives for persons with hereditary hemochromatosis (HH) to donate blood for transfusion are removed. This issue was further discussed at the FDA Blood Products Advisory Committee meeting on September 16, 1999 (Ref. 3). The statutory authority and scope of jurisdiction of HCFA limits its ability to reduce or eliminate costs of treatment for HH patients, many of whom are covered by private insurers, or do not have health insurance. Thus, for the foreseeable future, if blood centers wish to distribute blood collected from donors with HH without disease labeling, they will have the responsibility of removing financial incentives for these donors. Each blood center will have to evaluate the advantages of entering these donors into their donor pool.

The draft guidance document is being issued consistent with the final rule on good guidance practices (21 CFR 10.15; 65 FR 56468, September 19, 2000). The draft guidance document represents the agency's current thinking on blood collection from individuals with hereditary hemochromatosis. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute, regulations, or both. As with other guidance documents, FDA does not intend this document to be all-inclusive and cautions that not all information may be applicable to all situations. The document is intended to provide information and does not set forth requirements.

II. References

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

1. Nightingale, S. D., Summary of Advisory Committee Meeting of April 29 and 30, 1999. May 13, 1999. http://www.hhs.gov/partner/bloodsafety/04 99sum.html

2. Henney, J. E., Memorandum Blood Donations by Individuals with Hemo chromatosis, August 10, 1999. http://www.hhs.gov/partner/bloodsafety/JEH8 10jpg

3. Blood Products Advisory Committee, 64th Meeting, September 16, 1999. http://www.fda.gov/ohrms/dockets/ac/cber99.htm-Blood Products Advisory Committee

III. Comments

The draft guidance document is being distributed for comment purposes only and is not intended for implementation at this time. Interested persons may submit to the Dockets Management Branch (address above) written comments regarding this draft guidance

document. Submit written comments to ensure adequate consideration in preparation of the final document by March 20, 2001. Two copies of any comments are to be submitted, except individuals may submit one copy. Comments are to be identified with the docket number found in the brackets in the heading of this document. A copy of the document and received comments are available for public examination in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

IV. Electronic Access

Persons with access to the Internet may obtain the document at http://www.fda.gov/cber/guidelines.htm.

Dated: November 28, 2000.

Margaret M. Dotzel,

Associate Commissioner for Policy.

[FR Doc. 00–32377 Filed 12–19–00; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[Document Identifier: HCFA–R–39]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Health Care Financing Administration, DHHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Health Care Financing Administration (HCFA), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Type of Information Collection Request: Extension of a currently approved collection; *Title of Information Collection:* Home Health Medicare Conditions of Participation (CoP) Information Collection Requirements and Supporting Regulations at 42 CFR 484; *Form No.:* HCFA–R–39 (OMB #0938–0365); *Use:* Home health agency must meet certain Medicare CoP to ensure that they meet the Federal patient health and safety regulations these requirements contain information collection; *Frequency:* Annually; *Affected Public:* Business or other for-profit, Not-for-profit institutions; *Number of Respondents:* 7,500; *Total Annual Responses:* 7,500; *Total Annual Hours:* 56,209.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access HCFA's Web Site address at http://www.hcfa.gov/regs/prdact95.htm, or E-mail your request, including your address, phone number, OMB number, and HCFA document identifier, to Paperwork@hcfa.gov, or call the Reports Clearance Office on (410) 786–1326. Written comments and recommendations for the proposed information collections must be mailed within 60 days of this notice directly to the HCFA Paperwork Clearance Officer designated at the following address: HCFA, Office of Information Services, Security and Standards Group, Division of HCFA Enterprise Standards, Attention: Julie Brown, Room N2–14–26, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: December 5, 2000.

John P. Burke III,

Reports Clearance Officer, Security and Standards Group, Division of HCFA Enterprise Standards.

[FR Doc. 00–32336 Filed 12–19–00; 8:45 am]

BILLING CODE 4120–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[Document Identifier: HCFA–R–260]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Health Care Financing Administration, DHHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Health Care Financing Administration (HCFA), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Type of Information Request: Extension of a currently approved collection; *Title of Information Collection:* Quality Improvement System for Managed Care (QISMC); *Form Number:* HCFA–R–0260 (OMB approval #: 0938–0745); *Use:* The QISMC standards and guidelines implement regulatory requirements relating to Medicare and Medicaid managed care organizations' operation and performance in the areas of quality measurement and improvement, delivery of health care, and enrollee services; *Frequency:* Annual; *Affected Public:* Business or other for-profit; *Number of Respondents:* 261; *Total Annual Responses:* 261; *Total Annual Hours Requested:* 1 hour.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access HCFA's Web Site address at http://www.hcfa.gov/regs/prdact95.htm, or E-mail your request, including your address, phone number, OMB number, and HCFA document identifier, to Paperwork@hcfa.gov, or call the Reports Clearance Office on (410) 786–1326. Written comments and recommendations for the proposed information collections must be mailed within 60 days of this notice directly to the HCFA Paperwork Clearance Officer designated at the following address: HCFA, Office of Information Services, Security and Standards Group, Division of HCFA Enterprise Standards, Attention: Julie Brown, Room N2–14–26, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: December 5, 2000.

John P. Burke III,

HCFA Reports Clearance Officer, HCFA Office of Information Services, Security and Standards Group, Division of HCFA Enterprise Standards.

[FR Doc. 00–32337 Filed 12–19–00; 8:45 am]

BILLING CODE 4120–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[Document Identifier: HCFA–10000]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Health Care Financing Administration, DHHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Health Care Financing Administration (HCFA), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Type of Information Request: Extension of a currently approved collection; *Title of Information Collection:* Medicare Consumer Assessment Survey of Health Plan Survey (CAHPS)—Fee for Service; *HCFA Form Number:* HCFA–10000 (OMB approval #: 0938–0796); *Use:* Under the Balanced Budget Act of 1997, HCFA is required to provide general and plan comparative information to beneficiaries that will help them make more informed health plan choices. A CAHPS fee for service survey is needed to provide information comparable to those data collected from the CAHPS managed care survey; *Frequency:* Annually; *Affected Public:* Individuals or households; *Number of Respondents:* 168,000; *Total Annual Responses:* 134,400; *Total Annual Burden Hours:* 44,800.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access HCFA's Web Site address at http://www.hcfa.gov/regs/prdact95.htm, or E-mail your request, including your address, phone number, OMB number, and HCFA document identifier, to Paperwork@hcfa.gov, or call the Reports Clearance Office on (410) 786–1326. Written comments and recommendations for the proposed information collections must be mailed within 30 days of this notice directly to the OMB desk officer: OMB Human Resources and Housing Branch, Attention: Wendy Taylor, New Executive Office Building, Room 10235, Washington, DC 20503.

Dated: December 5, 2000.

John P. Burke III,

HCFA Reports Clearance Officer, HCFA Office of Information Services, Security and Standards Group, Division of HCFA Enterprise Standards.

[FR Doc. 00–32334 Filed 12–19–00; 8:45 am]

BILLING CODE 4120–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[Document Identifier: HCFA–10026]

Emergency Clearance: Public Information Collection Requirements Submitted to the Office of Management and Budget (OMB)

AGENCY: Health Care Financing Administration, DHHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Health Care Financing Administration (HCFA), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

We are, however, requesting an emergency review of the information collections referenced below. In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, we have submitted to the Office of Management and Budget (OMB) the following requirements for emergency review. We are requesting an emergency review because the collection of this information is needed before the expiration of the normal time limits under OMB's regulations at 5 CFR Part 1320. This is necessary to ensure that Medicare beneficiaries are able to continue to receive care in the event that their managed care provider leaves the Medicare program. We cannot reasonably comply with the normal clearance procedures because of public harm due to an unanticipated event. An unexpectedly significant number of managed care plans withdrew from Medicare or reduced their service areas at the end of 1998 and 1999 and more will withdraw at the end of 2000. We are concerned about the impact of the withdrawals on beneficiaries, particularly those living in areas with no remaining managed care options. We are also concerned about beneficiary confusion related to the withdrawals and beneficiary understanding of the options for replacing managed care coverage. As a result we need to conduct a survey that will give us the information we need to assist the beneficiaries.

HCFA is requesting OMB review and approval of this collection by January 15, 2001 with a 180-day approval period. Written comments and recommendations will be accepted from the public if received by the individuals designated below by January 8, 2001. During this 180-day period, we will publish a separate **Federal Register** notice announcing the initiation of an extensive 60-day agency review and public comment period on these requirements. We will submit the requirements for OMB review and an extension of this emergency approval. *Type of Information Request:* New collection; *Title of Information Collection:* Survey of Beneficiaries Who Involuntarily Disenroll from Their Managed Care Plan; *HCFA Form Number:* HCFA–10026 (OMB approval #: 0938–NEW); *Use:* In December 2000, over 100 managed care plans will withdraw from Medicare or reduce their service area, affecting nearly 1,000,000 Medicare beneficiaries. HCFA wishes to survey approximately 3,400 affected beneficiaries in early 2001 to determine how they were affected by the withdrawals and whether they received sufficient information about options for replacing their managed care coverage; *Frequency:* Once; *Affected Public:* Individuals or households; *Number of Respondents:* 3,385; *Total Annual Responses:* 3,385; *Total Annual Burden Hours:* 587.

We have submitted a copy of this notice to OMB for its review of these information collections. A notice will be published in the **Federal Register** when approval is obtained.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access HCFA's Web Site address at http://www.hcfa.gov/regs/prdact95.htm, or E-mail your request, including your address, phone number, OMB number, and HCFA document identifier, to Paperwork@hcfa.gov, or call the Reports Clearance Office on (410) 786–1326.

Interested persons are invited to send comments regarding the burden or any other aspect of these collections of information requirements.

However, as noted above, comments on these information collection and recordkeeping requirements must be mailed and/or faxed to the designees referenced below, by January 8, 2001:

Health Care Financing Administration, Office of Information Services, Security and Standards Group, Division of HCFA Enterprise Standards, Room N2–14–26, 7500 Security Boulevard, Baltimore, MD 21244–1850. Fax Number: (410) 786–0207 Attn: Julie Brown HCFA–10026

and,

Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Fax Number: (202) 395–6974 or (202) 395–5167 Attn: Wendy Taylor HCFA Desk Officer.

Dated: December 5, 2000.

John P. Burke III,

HCFA Reports Clearance Officer, HCFA, Office of Information Services, Security and Standards Group, Division of HCFA Enterprise Standards.

[FR Doc. 00–32335 Filed 12–19–00; 8:45 am]

BILLING CODE 4120–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, Public Health Service, DHHS.

ACTION: Notice.

SUMMARY: The inventions listed below are owned by agencies of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

ADDRESSES: Licensing information and copies of the U.S. patent applications listed below may be obtained by contacting Vasant Gandhi, J.D., Ph.D., at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; telephone: 301/496–7056 ext. 224; fax: 301/402–0220; e-mail: gandhiv@od.nih.gov. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

Human Erythropoietin Receptor Transgenic Mice

Constance T. Noguchi (NIDDK)
DHHS Reference No. E–272–00/0

The inventors have developed a transgenic mouse which expresses the human erythropoietin receptor. Erythropoietin is a cytokine or hormone required for the production of red blood cells and acts by binding on early, undifferentiated blood progenitor cells to stimulate red blood cell formation. The model is particularly useful as human infectious agents or gene therapy vectors that selectively target human cells expressing the erythropoietin receptor can be studied.

Background scientific detail may be found in Liu, C., Liu, Z.Y., Shen, K. and Noguchi, C. T. (1997), ''Regulated human erythropoietin receptor expression in mouse brain'', J. Biol. Chem. 272:32395–32400.

Antitumor Immunity Elicited by Defensin-Tumor Antigen Fusions

Arya Biragyn, Larry W. Kwak (NCI)
DHHS Reference No. E–196–00/0 filed 15 Sep 2000

Tumor antigens are known to be poorly immunogenic and attempts to elicit immune responses against the epitopes of antigens specific to tumor cells have been largely unsuccessful. The inventors have developed a cancer vaccine comprising a defensin fused to a tumor antigen or viral antigen to enhance the immunogenicity of the tumor antigen or viral antigen. The inventors have demonstrated, with animal data, that chimeric proteins, comprising a defensin fused to a model tumor antigen (lymphoma-derived single-chain Fv), when administered to a subject, generate a measurable humoral and anti-tumor cellular immune response.

Methods and Compositions of Viral Chemokine-Antigen Fusion Proteins as Vaccines for Tumors and AIDS

Arya Biragyn, Larry W. Kwak (NCI)
DHHS Reference No. E–194–00/0 filed 15 Sep 2000

Tumor antigens are known to be poorly immunogenic and attempts to elicit immune responses against the epitopes of antigens specific to tumor cells have been largely unsuccessful. The inventors have developed a cancer vaccine comprising a tumor antigen fused with a human chemokine or viral antigen to enhance the immunogenicity of the tumor antigen or viral antigen. The inventors have demonstrated, with animal data, that chimeric proteins, comprising a viral chemokine fused to a model tumor antigen (lymphoma-derived single-chain Fv), when administered to a subject, generate a measurable humoral and anti-tumor cellular immune response.

HCDS1 Kinase Activates Breast Tumor Suppressor BRCA1 and Promotes DNA Damage Repair

Jay H. Chung (NHLBI)
DHHS Reference No. E–192–00/0 filed 06 Jul 2000

BRCA1 plays an important role in the cellular response to DNA damage. The technology relates to the development of BRCA1 serine 988 mutants and a method to modulate BRCA1 activity. For example, one mutant interferes with normal BRCA1 function and may thereby increase sensitivity of tumor cells to chemotherapeutic agents. Another mutant shows constitutive activity in the absence of cell cycle checkpoint enzyme hCds1 activation and may thereby increase the resistance of normal tissue to genotoxic agents such as ionizing radiation.

Specific Binding Agents for KSHV vIL–6 that Neutralize a Biological Activity

Yoshiyasu Aoki, Giovanna Tosato (NCI)
DHHS Reference No. E–180–00/0 filed 31 Jul 2000

This invention relates to the field of herpesviruses, more specifically to human herpesvirus 8 (HHV–8), also known as Kaposi's sarcoma associated herpesvirus (KSHV), and to agents that bind the viral IL–6 encoded by this virus. KSHV encodes various proteins that have features suggesting their role in promoting cellular growth and transformation, including viral homologues of cyclin D, G-protein coupled receptor, interferon regulatory factor, macrophage inflammatory proteins and IL–6. All these viral proteins display structural similarities to their cellular counterparts. The inventors have developed a specific binding agent for KSHV interleukin-6 (vIL–6), which neutralizes vIL–6 activity.

Utilization of Non-Viral Sequences for Minus-Strand DNA Transfer and Gene Reconstitution

Wei-Shau Hu, Vinay K. Pathak (NCI)
DHHS Reference No. E–134–00/0 filed 19 May 2000

This technology relates to novel retroviral vectors for the introduction of heterologous nucleic acid into a host cell. Integration of these vectors into the nucleic acid of a host cell results in reconstitution and duplication of the heterologous nucleic acid in the cellular genome. The invention describes a method to efficiently reconstitute genes during virus replication. Vectors have been developed that enable gene reconstitution, by including two halves of a gene, each half having a small region of homology. The 3′ half of the gene is inserted into the 5′ terminal repeat, before the ''R'' region, and the 5′ half of the gene is inserted into the 3′ terminal repeat, between the ''U3'' region and the ''R'' region. Upon transfer into a cell and viral integration into the genome, two complete copies of the gene are reconstituted (gene duplication), one in the 5′ long terminal repeat (LTR) and one in the 3′ LTR. The virus can be used to transfer two copies of genes, such as toxic genes, into a desired cell population, or can be used to detect the presence of competent retroviruses (as a detection system). This technique can be utilized for delivery of toxic genes for cancer gene therapy or for high-sensitivity detection of replication-competent retroviruses during propagation of viral stocks.

Gadd45a-Null Mice (45C Clone) and Cells Derived from Them

MC Hollander, MS Sheikh, D Bulavin, LA Henmueller (NCI)
DHHS Reference No. E–129–00/0

This technology relates to the creation of a mouse cell line that harbor homozygous deletions of the Gadd45 gene. Gadd45 was the first gene discovered to be controlled by another gene, p53, the most highly mutated gene in human cancer. Cells lacking Gadd45 are less able to deal with DNA damage and are prone to alternations in genomic integrity. Both of these attributes are critical for the prevention of cancer. Gadd45 null mice have a high frequency of parturition failure.

The mice can be used to investigate the effect that the aforementioned attributes have a cell growth and integrity and carcinogenesis. As the Gadd45a-null nice show defects in cell cycle control and DNA repair, they will be useful in toxicology and drug screening. For pharmaceutical studies using chemical libraries, these mice and their derived cells may be useful in identifying inhibitors of specific molecular pathways. Also, the mice will be a useful model for studying delivery failure and cervical dilation.

Usage of Two Yeast Strains in the Identification of Specific Inhibitors of Polo Kinases

Kyung S. Lee, Sukgil Song (NCI)
DHHS reference No. E–100–00/0 filed 23 May 2000

This technology relates to the usage of two yeast strains in the identification of specific inhibitors of polo kinases. Polo kinases are characterized by the presence of a distinct region of homology in the non-catalytic C-terminal domain termed the ''polo-box''. The polo subfamily of protein kinases appears to play a critical role in cell proliferation and cell division. The polo-box domain of mammalian polo kinase, Plk, and the budding yeast functional homolog, Cdc5, are essential for their subcellular localization and functions. The two yeast mutants can be used to screen for inhibitors of polo-box function.

A Transgenic Mouse Model for Tetracycline Regulated Gene Expression in the Mouse Epidermis

Adam B. Glick (NCI)
DHHS Reference No. E–226–99/0

This technology related to the creation of several transgenic mouse lines that will produce conditional overexpression of foreign genes in the mouse epidermis. Foreign genes are frequently expressed in mice to create models of human disease by using a promoter or regulatory region that is tissue specific. In previous models expression of the target gene is always on. In these new models expression is conditional such that timing and level of expression can be completely controlled by the investigator. The inventor has taken advantage of the bigenic tetracycline regulatory system first described by Grossen and Bujard to create the present transgenic mouse lines. The system utilizes two transgenic lines that are then bred together to create a double transgenic mouse. One transgenic line expresses the tetracycline regulated transcriptional transactivator tTA or rTA linked to keratin 5 (K5) promoter. These transgenic lines have been designated K5/tTA and K5/rTA. The K5 promoter is expressed in the epidermis hair follicles and several other squamous epithelia such as tongue trachea and forestomach. The second transgenic line carries the target gene linked to the tetO binding sites for the tTA or rTA proteins. In double transgenic mice, the tTA binds to the tetO sequence and causes high levels of expression of the target gene. However, the ability of the tTA to bind to DNA is prevented by the antibiotic tetracycline. If animals are maintained on tetracycline in the drinking water or fed, the expression of the target gene is suppressed; upon removal of the antibiotic, gene expression is induced. In contrast tetracyclines are required to induce expression of the target by the rTA. The ability of this bigenic system to suppress expression of the target gene is crucial for a functional analysis of genes which produce an embryonic or neonatal lethal phenotype when expressed at high levels during gestation. In addition, different levels of gene expression can be achieved through titration of the tetracycline dose. Studies in the inventor's laboratory has confirmed that the K5/tTA and rTA can transactivate expression of target genes in the epidermis at high levels, uniformly throughout the tissue, and that transactivation is tightly controlled by tetracycline analogues. The mouse epidermis is a useful system for modeling for human fibrotic and blistering skin diseases, dissecting the critical factors in would healing and multistage carcinogenesis in lining epithelia. This conditional expression system should greatly enhance the ability to assess function of specific target genes in these processes, and to create useful *in vivo* models for the development of novel therapeutics.

Dated: December 12, 2000.

Jack Spiegel,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 00–32366 Filed 12–19–00; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

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 Cancer Institute Special Emphasis Panel Human Papillomavirus Type 16 Vaccine Trial in Costa Rica.

Date: January 8, 2001.

Time: 9 a.m. to 5 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute, 6130 Executive Boulevard, Conference Room F, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Lalita D. Palekar, PhD, Scientific Review Administrator, Special Review, Referral and Resources Branch, Division of Extramural Activities, National Cancer Institute, National Institutes of Health, 6116 Executive Boulevard, Room 8066, Bethesda, MD 20892–7405, (301) 496–7575.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: December 13, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00–32358 Filed 12–19–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Research Resources; Notice of 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 open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The 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: Scientific and Technical Review Board on Biomedical and Behavioral Research Facilities.

Date: January 23–25, 2001.

Open: January 23, 2001, 8:00 am to 9:00 am.

Agenda: To discuss program planning and issues.

Place: DoubleTree Hotel, 1750 Rockville Pike, Rockville, MD 20852.

Closed: January 23, 2001, 9:00 am to Adjournment.

Agenda: To review and evaluate grant applications.

Place: DoubleTree Hotel, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: D.G. Patel, PhD., Scientific Review Administrator, Office of Review, National Center for Research Resources, National Institutes of Health, 6705 Rockledge Drive, Room 6018, Bethesda, MD 20892–7965, (301) 435–0824, dgpatel@ncrr.nih.gov.

Name of Committee: National Center for Research Resources Initial Review Group, Comparative Medicine Review Committee.

Date: February 13–14, 2001.

Open: February 13, 2001, 8:00 am to 9:00 pm.

Agenda: To discuss program planning and other issues.

Place: Gaithersburg Hilton, 620 Perry Parkway, Gaithersburg, MD 20878.

Closed: February 13, 2001, 9:00 am to Adjournment.

Agenda: To review and evaluate grant applications.

Place: Gaithersburg Hilton, 620 Perry Parkway, Gaithersburg, MD 20878.

Contact Person: Camille M. King, Scientific Review Administrator, Office of Review, National Center for Research Resources, National Institutes of Health, One Rockledge Centre, MSC 7965, 6705 Rockledge Drive, Suite 6018, Bethesda, MD 20892–7965, (301) 435–0815, kingc@ncrr.nih.gov.

Name of Committee: National Center for Research Resources Initial Review Group, General Clinical Research Centers Review Committee.

Date: February 13–15, 2001.

Closed: February 13, 2001, 8:00 am to Adjournment.

Agenda: To review and evaluate grant applications.

Place: Gaithersburg Marriott, Washingtonian Center, 9751 Washingtonian Boulevard, Gaithersburg, MD 20878.

Open: February 14, 2001, 8:00 am to 9:30 am.

Agenda: To discuss program planning and other issues.

Place: Gaithersburg Marriott, Washingtonian Center, 9751 Washingtonian Boulevard, Gaithersburg, MD 20878.

Closed: February 14, 2001, 9:30 am to Adjournment.

Agenda: To review and evaluate grant applications.

Place: Gaithersburg Marriott, Washingtonian Center, 9751 Washingtonian Boulevard, Gaithersburg, MD 20878.

Contact Person: John L. Meyer, PhD, Deputy Director, Office of Review, National Center for Research Resources, National Institutes of Health, One Rockledge Centre, Room 6018, 6705 Rockledge Drive, MSC 7965, Bethesda, MD 20892–7965, 301–435–0806, meyerj@ncrr.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine, 93.306; 93.333, Clinical Research, 93.333, 93.371, Biomedical Technology; 93.389, Research Infrastructure, National Institutes of Health, HHS).

Dated: December 13, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00–32360 Filed 12–19–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Research Resources; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in 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 Center for Research Resources Initial Review Group, Research Centers in Minority Institutions Review Committee.

Date: February 22–23, 2001.

Open: February 22, 2001, 8 a.m. to 10 a.m.

Agenda: To discuss program planning and other issues.

Place: Residence Inn, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Closed: February 22, 2001, 10 a.m. to Adjournment.

Agenda: To review and evaluate grant applications.

Place: Residence Inn, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: C. William Angus, PhD, Scientific Review Administrator, Office of Review, National Center for Research Resources, 6705 Rockledge Drive, MSC 7965, Room 6018, Bethesda, MD 20892–7965, 301–435–0812.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine, 93.306; 96.333, Clinical Research, 93.333; 93.371, Biomedical Technology; 93.389, Research Infrastructure, National Institutes of Health, HHS)

Dated: December 13, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00–32362 Filed 12–19–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Child Health and Human Development; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the National Advisory Board on Medical Rehabilitation Research.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: National Advisory Board on Medical Rehabilitation Research.

Date: January 3, 2001.

Time: 8:45 am to 5 pm.

Agenda: The agenda will include reports by the Director, NICHD and Director, NCMRR, update on NCMRR Training activities, discussion of the future of medical rehabilitation, and other business of the Board.

Place: Bethesda Marriott, 5151 Pooks Hill Rd, Bethesda, MD 20814.

Contact Person: Ralph M. Nitkin, PhD, Director, BSCD, National Center for Medical Rehabilitation Research, National Institute of Child Health and Human Development, NIH, 6100 Building, Room 2A03, Bethesda, MD 20892, (301) 402–4206.

(Catalogue of Federal Domestic Assistance Program Nos. 93.209, Contraception and Infertility Loan Repayment Program; 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research, National Institutes of Health, HHS)

Dated: December 13, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00–32359 Filed 12–19–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; 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 Mental Health Special Emphasis Panel.

Date: December 19, 2000.

Time: 2:00 pm to 3:00 pm.

Agenda: To review and evaluate grant applications.

Place: Neuroscience Center, National Institutes of Health, 6001 Executive Blvd., Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Henry J. Haigler, PhD, Scientific Review Administrator, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Rm. 6150, MSC 9608, Bethesda, MD 20892–9608, 301/433–7216.

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. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: December 13, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00–32364 Filed 12–19–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the Center for Scientific Review Advisory Committee.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: Center for Scientific Review Advisory Committee.

Date: January 22–23, 2001.

Time: 8:30 am to 1 pm.

Agenda: Discussion of activities to evaluate organization and function of the Center for Scientific Review.

Place: National Institutes of Health, Two Rockledge Center, Conference Room 9100, 6701 Rockledge Drive, Bethesda, MD 20892.

Contact Person: Robert W. Eisinger, PhD, Associate Director, Office of Planning, Analysis and Evaluation, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3016, MSC 7776, Bethesda, MD 20892, 301–435–1111.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306; Comparative Medicine, 93.306; 93.333, Clincal 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: December 13, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00–32363 Filed 12–19–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Clinical Center; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the Board of Governors of the Warren Grant Mangnuson Clinical Center.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other

reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for discussion of personnel qualifications and performance, the disclosure of which, would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Governors of the Warren Grant Magnuson Clinical Center.

Date: January 26, 2001.

Open: 9 am to 12:30 pm.

Agenda: For discussion of programmatic policies and issues.

Place: National Institutes of Health, Clinical Center Medical Board Room, 2C116, 9000 Rockville Pike, Bethesda, MD 20892.

Closed: 12:30 pm to 1 pm.

Agenda: To review and evaluate personnel qualifications.

Place: National Institutes of Health, Clinical Center Medical Board Room, 2C116, 9000 Rockville Pike, Bethesda, MD 20892.

Contact Person: Maureen E. Gormley, Executive Secretary, Warren Grant Magnuson Clinical Center, National Institutes of Health, Building 10, Room 2C146, Bethesda, MD 20892, 301–496–2897.

Dated: December 13, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00–32361 Filed 12–19–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant of Exclusive License: Treatment of Retroviral Infections With a Phorbol Ester Derivative

AGENCY: National Institutes of Health, Public Health Service, DHHS.

ACTION: Notice.

SUMMARY: This is notice in accordance with 35 U.S.C. 209(c)(1) and 37 CFR 404.7(a)(1)(i) that the National Institutes of Health (NIH), Department of Health and Human Services (DHHS), is contemplating the grant of an exclusive license worldwide to practice the inventions embodies in patents under **SUPPLEMENTARY INFORMATION** to AIDS Research Alliance of America, having a place of business in West Hollywood, California. The Government of the United States of America is an assignee of the patent rights in these inventions.

DATE: Only written comments and/or license applications which are received by the NIH Office of Technology Transfer on or before February 20, 2001 will be considered.

ADDRESSES: Requests for a copy of these patent applications, inquiries, comments, and other materials relating to the contemplated license should be directed to: Sally Hu, Technology Licensing Specialist, Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; Telephone: (301) 496–7056, ext. 265; Facsimile: (301) 402–0220. A signed Confidential Disclosure Agreement (CDA) may be required to receive copies of the patent application.

SUPPLEMENTARY INFORMATION: The patents and patent applications to be licensed are:

''Antiviral Composition'', U.S. Patent Application Serial No. 07/530,562 filed May 30, 1990;

''Antiviral Composition'', U.S. Patent Application Serial No. 08/424,558 filed April 17, 1995, issued as U.S. Patent No. 5,599,839 on February 4, 1997; and

Their foreign cognates including: Australian Patent No. 639343 issued November 12, 1993; Canadian Patent No. 2,083,945 issued February 7, 1995; European Patent No. 0531413 issued August 28, 1998 (designating Austria, Belgium, Switzerland, Germany, Denmark, Spain, France, Greece, Italy, Netherlands, Sweden, Luxembourg and the United Kingdom); and Japanese Patent No. 2020302 issued February 19, 1996.

The subject inventors have identified a method of treating viral infections comprising the 12-deoxyphorbol ester derivative known as prostratin. The patent specifically discusses an anti-viral composition and methods of treating patients with viral infections using such composition. The anti-viral composition of the present invention comprises prostratin and a pharmaceutically acceptable carrier. While purportedly having anti-viral activity, this composition reportedly does not have substantial tumor promoting activity and does not have other substantial toxicological properties that would preclude its use in treating viral infections.

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 60 days from the date of this published Notice, NIH receives written evidence and argument that 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.

The field of use may be limited to a method of treating retroviral infections (*e.g.,* HIV/AIDS) comprising the use of prostratin (a phorbol ester derivative).

Properly filed competing applications for a license filed in response to this notice will be treated as objections to the contemplated license. Since prostratin was originally isolated from flora primarily located in Western Samoa, the NIH is concerned that the collection and utilization of the natural material comport with all applicable Federal and Western Samoan policies related to biodiversity. In order to comport with such policies, the successful applicant will also be required to negotiate and enter into agreements with the appropriate Western Samoan Government agencies. Comments and objections submitted in response to this notice will not be made available for public inspection, and, to the extent permitted by law, will not be released under the Freedom of Information Act (FOIA), 5 U.S.C. 552.

Dated: December 12, 2000.

Jack Spiegel,

Director, Division of Technology Development and Transfer, Office of Technology Transfer.

[FR Doc. 00–32365 Filed 12–19–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4520–FA–04]

Announcement of Funding Awards for FY 1999 Public and Indian Housing Resident Opportunity and Self Sufficiency (ROSS) Program

AGENCY: Office of Public and Indian Housing, HUD.

ACTION: Announcement of funding awards.

SUMMARY: In accordance with section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, this announcement notifies the public of funding decisions made by the Department for funding under the FY 1999 Notice of Funding Availability (NOFA) for the Resident Opportunity and Self Sufficiency Programs for Fiscal Year 1999. This announcement contains the consolidated names and addresses of those award recipients selected for funding based on the rating and ranking of all applications within each State and the allocation of vouchers and funding available for each State.

FOR FURTHER INFORMATION CONTACT: for questions concerning the FY 1999 Resident Opportunities and Self

Sufficiency (ROSS) awards, contact the Office of Public and Indian Housing's Grant Management Center, Director, Michael E. Diggs, Department of Housing and Urban Development, Washington, DC, telephone (202) 358–0221. For the hearing or speech impaired, these numbers may be accessed via TTY (text telephone) by calling the Federal Information Relay Service at 1 (800) 877–8339. (Other than the ''800'' TTY number, these telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION: The purpose the program is to link services to public housing residents by providing grants for supportive service, resident empowerment activities, and activities assist residents in becoming economically self-sufficient.

The ROSS program assistance made available in this notice is authorized by the Departments of Veterans Affairs and Housing and Urban Development, Independent Agencies Appropriation Act of 1999 (Pub. L. 105–276, 112 Stat. 2461, approved October 21, 1998), and the Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, 1998 (Pub. L. 105–65, 111 Stat. 1344, approved October 27, 1997), (FY Appropriations Act).

The Fiscal Year 1999 awards announced in this Notice were selected for funding in a competition announced in a **Federal Register** Notice published on August 10, 1999 (64 FR 43530). Applications were scored based on the selection criteria in that Notice and funding selections made based on the rating and ranking of applications within each State.

The Catalog of Federal Domestic Assistance number for this program is 14.870.

The amount announced in the Notice of Funding Availability for ROSS was $66,600,000. The ROSS allocations to Public Housing Authorities based on requirements announced in the NOFA added up to $40,630,049. In accordance with section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989 (103 Stat. 1987, 42 U.S.C. 3545), the Department is publishing the names, addresses, and amounts of 393 awards made under the ROSS programs competitions in Appendix A.

Dated: December 13, 2000.

Milan Ozdinec,

Acting General Deputy Assistant Secretary for Public and Indian Housing.

Appendix A

1999 Capacity Building Funding Awards

Applicant name	Applicant address	City	State	Zip	Amount
Jefferson County Assisted Housing Corporation.	3700 Industrial Parkway	Birmingham	Alabama	35271	$150,000
Avolon Gardens Resident Advisory	769 Camelot Way #110	Los Angeles	California	90002	15,000
Independent Square Resident Advisory Council.	2455 S. St. Andrews Place	Los Angeles	California	90018	15,000
Connecticut Housing Coalition	30 Jordan Lane	Wethersfield	Connecticut	06109	240,000
Acorn Tenant Union Training and Organizing Project (ATU–TOP).	739 8th Street SE	Washington	District of Columbia.	20003	150,000
National Association of Housing Cooperatives, Inc.	1401 New York Avenue, NW Suite 100.	Washington	District of Columbia.	20005	210,000
Orange Avenue United Tenants Association.	1700 Joe Louis Street	Tallahassee	Florida	32304	105,000
Residents Advisory Board of Southward Village Annex, Inc.	2425 Bay Street	Fort Myers	Florida	33901	62,200
Affordable Housing Development Corporation of Macon and Taylor Counties.	137 Richardson Street	Montezuma	Georgia	31063	90,000
Committee for Boston Public Housing.	100 Terrace Street Suite B	Roxbury	Massachusetts	02120	105,000
Michigan State University	1801 W. Main Street	Lansing	Michigan	48915	240,000
New Jersey Association of Public and Subsidized Housing.	303 Washington Street	Newark	New Jersey	07102	240,000
Community Service Society of New York.	105 East 22nd Street	New York	New York	10010	80,000
Hawkins Village Resident Council	14 A Hawkins Village	Rankin	Pennsylvania	15104	15,000
Samish Indian Nation	1610 Commercial Avenue, Suite A&B, PO Box.	Anacortes	Washington	98221	33,000
					1,750,20

1999 Conflict Resolution Funding Awards

Applicant name	Applicant address	City	State	Zip	Amount
Volunteers of America of MN—Senior Resource Division.	5905 Golden Valley Road—Suite 110.	Golden Valley	Minnesota	55422–4490	$340,000
					240,000

1999 Resident Management and Business Development Funding Awards

Applicant name	Applicant address	City	State	Zip	Amount
Round Valley Resident Organization.	PO Box 753 Navajo County	Pinon	Arizona	86510	$100,000
Sierra Vista Resident Council	1661 E 11th Street	Stockton	California	95206	100,000
Colonial Village Tenants Association.	123 Camelita Court	Oxnard	California	93030	100,000
Highland Dwelling Resident Council.	640 Atlantic Street, SE	Washington	District of Columbia.	20032	100,000
Barry Farm Dwellings Resident Council.	1326 Stevens Road, SE	Washington	District of Columbia.	20020	100,000
Fort Dupont and Additions Resident Council.	24 Ridge Road, SE	Washington	District of Columbia.	20019	100,000
Garfield Terrace Family Resident Council.	2371 11th Street NW	Washington	District of Columbia.	20001	100,000
Sibley Plaza Resident Association, Inc.	1140 North Capitol Street NW	Washington	District of Columbia.	20002	100,000
Scattered Sites Resident Council	1312 Girard St., NW	Washington	District of Columbia.	20009	100,000
Resident Initiative Council Martin Luther King, Jr. Apts., I.	819 South Street, Apt #41	Daytona Beach	Florida	32114	100,000
M.L. King Highrise RA	535 Whitehall Street #409	Atlanta	Georgia	30315	100,000
Thomasville Heights, Inc	1150 Henry Thomas Drive	Atlanta	Georgia	30315	100,000
Barge Road Highrise RA	2440 Barge Road, SW	Atlanta	Georgia	30331	100,000
Georgia Avenue Tenants Association, Inc..	174 Georgia Avenue #511	Atlanta	Georgia	30312	100,000
Allen Road Mid-Rise RA	144 Allen Road	Atlanta	Georgia	30305	100,000
Sparta Resident Council, Inc.	808 Dyer Drive	Sparta	Georgia	31087	100,000
Roosevelt House Highrise RA, Inc	582 Techwood Drive, NW Suite 301.	Atlanta	Georgia	30313	100,000
Cheshire Bridge Road RA	2170 Cheshire Bridge Road #10	Atlanta	Georgia	30324	100,000
Piedmont Highrise, Inc	3601 Piemont Road, N.E. Apt 1215.	Atlanta	Georgia	30305	100,000
Hightower Manor Resident Council Inc..	2611 MLK, Jr. Drive., SW	Atlanta	Georgia	30311	100,000
Lakeview-Ogeeche, Inc	PO Box 627	Sparta	Georgia	31087	100,000
Cosby-Spear Highrise RA, Inc	355 North Avenue	Atlanta	Georgia	30308	100,000
Blackburn Terrace Resident Management Corp. (BTRMC).	3091 Baltimore Avenue	Indianapolis	Indiana	46218	100,000
Laurelwood Apartment Resident Management Corp. (LRMC).	3346 Teakwood Drive	Indianapolis	Indiana	46227–3239	100,000
Summit View Resident Council	PO Box 116	Bowling Green	Kentucky	42102	100,000
Dosker Manor Resident Council	413 E. Muhammad Ali Blvd, Box G 21.	Louisville	Kentucky	40202	100,000
Robeson-Schwartz Resident Association.	15 Wright Place	New Brunswick	New Jersey	08903	100,000
Riverside Terrace Resident Council.	29 Harris Place	Paterson	New Jersey	07514	100,000
Newark Tenants Council, Inc	303 Washington Street	Newark	New Jersey	07102	100,000
United Resident of Taylor Center, Inc.	791 Shannon	Las Cruces	New Mexico	88001	100,000
Honor Heights Towers Resident Association.	300 N 40th	Muskogee	Oklahoma	74401	100,000
McKees Rock Terrace	5228 Broadway 4–B Oleander Homes.	McKees Rocks	Pennsylvania	15136	100,000
Sheldon Park Resident Management Corporation.	480 Park Avenue	Natrona Heights	Pennsylvania	15065	100,000
Oleander Homes Resident Council	5228 Broadway 4B	Galveston	Texas	77551	100,000
Magnolia Homes Resident Council	1601 Strand, 13G Magnolia Homes.	Galveston	Texas	77550	100,000
Calvert Square Advisory Council	983 Bagnall Road	Norfolk	Virginia	23504	100,000
Eastern Shoshone Resident Council.	PO Box 1250	Fort Washakie	Wyoming	82514	100,000
					3,7000,000.0

1999 Elderly Service Coordinators Funding Awards

Applicant name	Applicant address	City	State	Zip	Amount
Florence Housing Authority	303 North Pine Street	Florence	Alabama	35630	$39,347
Jefferson County Housing Authority.	3700 Industrial Parkway	Birmingham	Alabama	35217	31,917

1999 ELDERLY SERVICE COORDINATORS FUNDING AWARDS—Continued

Applicant name	Applicant address	City	State	Zip	Amount
Alaska Finance Corporation	PO Box 101020	Anchorage	Alaska	99510–1020	29,164
Cioth of Tucson/Community Services Department.	Post Office Box 27210	Tucson	Arizona	85726	51,000
City of Phoenix Housing Department.	251 W. Washington St., 4th Fl	Phoenix	Arizona	85003	178,121
Housing Authority of North Little Rock.	2201 Division/P.O. Box 516	North Little Rock.	Arkansas	72114	53,272
Housing Authority of the County of Kern.	525 Roberts Land	Bakersfield	California	93308	45,144
Housing Authority of the City of Sacramento.	630 I Street	Sacramento	California	95814	193,724
Housing Authority of the City of Oakland.	1619 Harrison Street	Oakland	California	94612	89,983
San Diego Housing Commission.	1625 Newton Avenue	San Diego	California	92113	55,985
Denver Housing Authority	1100 West Colfax	Denver	Colorado	80204	50,000
Housing Authority of the City of Norwalk.	24½ Monroe Street	Norwalk	Connecticut	06854	37,638
West Haven Housing Authority	15 Glade Street	West Haven	Connecticut	06516	39,458
Housing Authority of the City of Fort Pierce.	707 North 7th Street	Fort Pierce	Florida	34950	39,150
Fort Myers Housing Authority	4224 Michigan Avenue	Fort Myers	Florida	33916	42,600
Miami–Dade Housing Authority	1401 NW 7th Street	Miami	Florida	33125	230,000
Jacksonville Housing Authority	1300 Broad Street	Jacksonville	Florida	32202	54,896
The Housing Authority of the City of Augusta, GA.	1425 Walston Way, P.O.	Augusta	Georgia	30914	105,672
Housing Authority of the City of East St. Louis.	700 North 20th Street	East St. Louis	Illinois	62205	225,000
Rockford Housing Authority	223 South Wennebago Street	Rockford	Illinois	61102	55,335
Decator Housing Authority	1808 E Locust Street	Decatur	Illinois	62521	37,426
Housing Authority of Champaign County.	205 West Park Avenue	Champaign	Illinois	61820	25,680
Housing Authority of Marion County, IL.	719 E. Howard–P.O. Box 689	Centralia	Illinois	62801	30,000
Housing Authority of Joliet	Post Office Box 2519	Joliet	Illinois	60434	33,550
St. Clair County Housing Authority.	100 North 48th Street	Belleville	Illinois	62226	33,320
Housing Authority of the County of Lake, IL.	33928 North Route 45	Grayslake	Illinois	60030	27,000
Housing Authority of the County of Cook.	310 South Michigan, 15th Floor	Chicago	Illinois	60604	225,000
Chicago Housing Authority	626 West Jackson Boulevard	Chicago	Illinois	60661	600,000
Housing Authority of the City of Fort Wayne.	2013 South Anthony Boulevard	Fort Wayne	Indiana	46869–3489	39,056
Housing Authority of the City of Kokomo.	210 E. Taylor Street	Kokomo	Indiana	46903–1207	34,586
City of Des Moines Department of Housing Services.	1101 Crocker	Des Moines	Iowa	50309	94,612
Ottumwa Housing Authority	102 West Finley Avenue	Ottumwa	Iowa	52501	31,980
Lawrence Housing Authority	1600 Haskell Avenue	Lawrence	Kansas	66044–4399	32,030
Housing Authority of Henderson	111 South Adams Street	Henderson	Kentucky	42420	33,519
Housing Authority of Mayfield	312 Brookside Dr	Mayfield	Kentucky	42066	30,000
Housing Authority of Bowling Green.	P.O. Box 116	Bowling Green	Kentucky	42102–0116	30,600
Housing Authority of East Baton Rouge Parish.	4546 North Street	Baton Rouge	Louisiana	70806	24,873
Portland Housing Authority	14 Baxter Blvd.	Portland	Maine	04101	81,816
Housing Authority of Baltimore City.	417 East Fayette Street Suite 265.	Baltimore	Maryland	21202	297,222
Hagerstown Housing Authority	35 West Baltimore Street	Hagerstown	Maryland	21740	50,000
Housing Commission of Anne Arundel, County.	7885 Gordon Court	Glen Burnie	Maryland	21060–2817	31,611
Housing Opportunities Commission of Montgomery Co.	10400 Detrick Avenue	Kensington	Maryland	20895	52,378
Housing Authority of the City of Cumberland Maryland.	635 East First Street	Cumberland	Maryland	21502	31,135
Cambridge Housing Authority	675 Massachusetts Avenue	Cambridge	Massachusetts	02139	148,412
Lawrence Housing Authority	353 Elm Street	Lawrence	Massachusetts	01841	50,000
Boston Housing Authority	52 Chauncy Street	Boston	Massachusetts	02111	222,537
New Bedford Housing Authority	134 South Second St. PO Box 2081 Bristol County.	New Bedford	Massachusetts	02741	43,497
Lynn Housing Authority	10 Church Street	Lynn	Massachusetts	01902	44,880

1999 ELDERLY SERVICE COORDINATORS FUNDING AWARDS—Continued

Applicant name	Applicant address	City	State	Zip	Amount
Brockton Housing Authority	45 Goddard Road	Brockton	Massachusetts	02301	208,744
Worcester Housing Authority	40 Belmont Street	Worcester	Massachusetts	01605	232,404
Malden Housing Authority	630 Salem Street	Malden	Massachusetts	02148	50,000
Flint Housing Commission	3820 Richfield Road	Flint	Michigan	48506	56,650
Port Huron Housing Commission.	805 Seventh Street	Port Huron	Michigan	48060	31,750
Plymouth Housing Commission	1160 Sheridan	Plymouth	Michigan	48170	32,640
Jackson Housing Commission	301 Steward Avenue	Jackson	Michigan	49201	30,600
Inkster Housing Commission	4500 Inkster Road	Inkster	Michigan	48141	38,613
St. Paul Public Housing Agency	480 Cedar Street Suite 600	St. Paul	Minnesota	55101	196,100
Housing and Redevelopment Authority of Duluth, MN.	222 E. 2nd Street	Duluth	Minnesota	55816–0900	43,985
South St. Paul and Dakota County HRA.	125 Third Avenue North	South St. Paul	Minnesota	55075	53,469
Minneapolis Public Housing Authority.	1001 Washington Avenue North.	Minneaplis	Minnesota	55401	229,500
Tennessee Valley Regional Housing Authority.	Post Office Box 1329	Corinth	Mississippi	38835–1329	50,000
Mississippi Regional Housing Authority VIII.	2909 26th Avenue	Gulfport	Mississippi	39505–2347	31,800
Housing Authority of the City of Biloxi.	Post Office Box 447	Biloxi	Mississippi	39533	30,000
Housing Authority of the City of Columbia.	207 Park Avenue	Columbia	Missouri	65203	24,000
Saint Louis Housing Authority	4100 Lindell Boulevard	St. Louis	Missouri	63108	39,461
Housing Authority of Kansas City.	712 Broadway	Kansas	Missouri	64106	54,346
Housing Authority of the County of Clark.	5390 East Flamingo Road	Las Vegas	Nevada	89122	30,600
Housing Authority of the City of Las Vegas.	420 North Tenth Street	Las Vegas	Nevada	89101	228,377
Laconia Housing and Redevelopment Authority.	25 Union Avenue	New Hampshire	New Hampshire	03246	31,508
Manchester Housing Redevelopment Authiority.	198 Hanover Street	Hillsborough	New Hampshire	03104	51,000
Secaucus Housing Authority	700 County Avenue	Secaucus	New Jersey	07094	30,000
Santa Fe Civic Housing Authority Inc.	Post Office Box 4039	Santa Fe	New Mexico	87505	29,160
Niagara Falls Housing Authority	744 Tenth Street	Niagara Falls	New York	14301	76,500
Buffalo Municipal Housing Authority.	300 Perry Street	Buffalo	New York	14204	157,968
Albany Housing Authority	4 Lincoln Square	Albany	New York	12202	64,787
Plattsburgh Housing Authority	39 Oak Street	Plattsburgh	New York	12901	35,640
Elmira Housing Authority	346 Woodlawn Avenue	Elmira	New York	14901	41,070
Hempstead Public Housing Authority.	260 Clinton Street	Hampstead	New York	11550	58,000
Syracuse Housing Authority	516 Burt Street	Syracuse	New York	13202	199,030
Rochester Housing Authority	140 West Avenue	Rochester	New York	14611–2744	184,375
Jamestown Housing Authority	110 West Third Street	Jamestown	New York	14701	50,276
Schenectady Municipal Housing Authority.	315 Broadway	Schenectady	New York	12305	50,000
Housing Authority of the City of Asheville.	165 S. French Broad Avenue	Asheville	North Carolina	28801	41,844
Greensboro Housing Authority	Post Office Box 21287	Greensboro	North Carolina	27420	55,000
Housing Authority of Winston-Salem.	901 Cleveland Avenue	Winston-Salem	North Carolina	27101	151,000
Minot Housing Authority	310 2nd Street SE	Minot	North Dakota	58701	39,305
Cuyahoga Metropolitan Housing Authority.	6001 Woodland Avenue 5th Floor.	Cleveland	Ohio	44104	229,500
Ashtabula Metropolitan Housing Authority.	3526 Lake Avenue	Ashtabula	Ohio	44004	31,425
Jefferson Metropolitan Housing Authority.	815 North Sixth Avenue	Steubenville	Ohio	43952	30,000
Cincinnati Metropolitan Housing Authority.	16 West Central Parkway	Cincinnati	Ohio	45210	131,537
Youngstown Metropolitan Housing Authority.	131 W. Boardman Street	Youngstown	Ohio	44503	50,000
Lucas Metropolitan Housing Authority.	435 Nebraska Avenue	Toledo	Ohio	43602	225,000
Zanesville Metropolitan Housing Authority.	407 Pershing Road	Zanesville	Ohio	43701	30,600

1999 ELDERLY SERVICE COORDINATORS FUNDING AWARDS—Continued

Applicant name	Applicant address	City	State	Zip	Amount
Oklahoma City Housing Authority.	1700 Northeast Fourth Street	Oklahoma	Oklahoma	73117–3800	215,220
Housing Authority of the City of Tulsa.	415 E. Independence	Tulsa	Oklahoma	74148–0369	78,552
Miami Public Housing Authority	205 B. NE	Miami	Oklahoma	74355	34,440
Housing Authority of Portland Oregon.	135 SW. Ash Street	Portland	Oregon	97204	182,400
Housing Authority and Urban Renewal Agency of Polk County.	204 SW Walnut Avenue	Dallas	Oregon	97338	35,797
Philadelphia Housing Authority	12 South 23rd Street	Philadelphia	Pennsylvania	19103	200,254
Housing Authority of the County of Butler.	111 S. Cliff Street, P.O. Box 1917.	Butler	Pennsylvania	16003–1917	33,750
Housing Authority of the County of Beaver.	300 State Street	Beaver	Pennsylvania	15009	110,000
Bucks County Housing Authority	350 S. Main Street—Suite 205	Doylestown	Pennsylvania	18901	27,000
Housing Authority of the County of Dauphin.	501 Mohn Street	Steelton	Pennsylvania	17113–0598	50,000
Lancaster City Housing Authority.	325 Church Street	Lancaster	Pennsylvania	17602	43,648
Altoona Housing Authority	2700 Pleasant Valley Boulevard.	Altoona	Pennsylvania	16602	28,755
Housing Authority of the City of York.	P.O. Boxs 1963	York	Pennsylvania	17405	35,984
Housing Authority of Northumberland County.	50 Mahoning Street	Milton	Pennsylvania	17847	30,000
Pattucket Housing Authority	214 Roosevelt Avenue	Pawtucket	Rhode Island	02816	78,750
Housing Authority of the City of Woonsocket, RI.	679 Social Street	Woonsocket	Rhode Island	02895	73,011
Town of Cumberland Housing Authority.	One Mendon Road	Cumberland	Rhode Island	02864	32,790
Cranston Housing Authority	50 Birch Street	Cranston	Rhode Island	02920	37,500
Housing Authority of the City of Newport.	1 York Street	Newport	Rhode Island	02840	30,000
Spartanburg Housing Authority	P.O. Box 2828	Spartanburg	South Carolina	29304–2828	50,000
Housing Authority of the City of Charleston.	550 Meeting Street	Charleston	South Carolina	29401	55,000
Metropolitan Development and Housing Agency.	Post Office Box 846	Nashville	Tennessee	37202	96,364
Knoxville's Community Development Corporation.	901 Broadway, N.E	Knoxville	Tennessee	37927	306,870
Chattanooga Housing Authority	Post Office Box 1486	Chattanooga	Tennessee	37401	$241,370
Memphis Housing Authority	700 Adams Avenue	Memphis	Tennessee	38105	153,000
City of Waco Housing Authority	1001 Washington Street	Waco	Texas	76703	31,170
Housing Authority of the City of Galveston, TX.	4700 Broadway	Galveston	Texas	77551	38,697
Housing Authority of the City of San Antonio.	818 South Flores Street	San Antonio	Texas	78204	289,615
Housing Authority of the City of Austin.	1640B East Second Street	Austin	Texas	78702	63,025
Housing Authority of the City of Corpus Christi.	3701 Ayers Street	Corpus Christi	Texas	78415	30,000
Laredo Housing Authority	2000 San Francisco Avenue	Laredo	Texas	78040	35,577
Fort Worth Housing Authority	1201 E. 13th Street; P.O. Box 430.	Fort Worth	Texas	76102	59,623
Temple Housing Authority	700 W Calhoun	Temple	Texas	76503–1326	31,304
Housing Authority of the City of Dallas.	3939 N. Hampton Road	Dallas	Texas	75212	53,485
Richmond Redevelopment and Housing Authority.	901 Chamberlayne Parkway	Richmond	Virginia	23261–6887	282,222
Marion Redevelopment Housing Authority.	237 Miller Avenue	Marion	Virginia	24354	225,000
Alexandria Redevelopment and Housing Authority.	600 North Fairfax Street	Alexandria	Virginia	22314	38,064
Norfolk Redevelopment & Housing Authority.	P.O. Box 968	Norfolk	Virginia	23501	46,377
Tacoma Housing Authority	902 South L. Street	Tacoma	Washington	98405	47,925
Housing Authority County of King.	15455 65th Avenue South	Tukwila	Washington	98188	252,687
Housing Authority of the City of Seattle.	120 6th Avenue North	Seattle	Washington	98109	240,975

1999 ELDERLY SERVICE COORDINATORS FUNDING AWARDS—Continued

Applicant name	Applicant address	City	State	Zip	Amount
Huntington West Virginia Housing Authority.	#30 Northcott Court	Huntington	West Virginia	25722	33,548
Appleton Housing Authority	525 N. Oneida Street	Appleton	Wisconsin	54911	20,000
Milwaukee Housing Authority	809 North BroadWay	Milwaukee	Wisconsin	53201–0324	108,533
Housing Authority City of Oshkosh.	600 Merritt Avenue	Oshkosh	Wisconsin	54449–0030	38,030
					12,058,002

1999 RESIDENT SERVICE DELIVERY MODELS FUNDING AWARDS

Applicant name	Address	City	State	Amount
Housing Authority of the City of Calexico.	1006 East 5th Street	Calexico	California	$75,000
Housing Authority of the City of Tacoma	902 South L Street	Tacoma	Washington	75,000
Housing Authority of Milwaukee	809 North Broadway	Milwaukee	Wisconsin	250,000
Chillicothe Metropolitan Housing Authority.	178 West Fourth St	Chillicothe	Ohio	75,000
HA and Community Service Agency of Lane County.	177 Day Island Road	Eugene	Oregon	100,000
Housing Authority of Covington	2940 Madison Avenue	Covington	Kentucky	75,000
Albany Housing Authority	4 Lincoln Square	Albany	New York	250,000
City of Albuquerque Department of Family and Career Services.	400 Marquette Suite 504	Albequerque	New Mexico	75,000
City Wide Residents Council	480 Cedar Street #600	St. Paul	Minnesota	75,000
Danville Redevelopment and Housing Authority.	651 Cardinal Place	Danville	Virginia	75,000
Dayton Metropolitan Housing Authority	400 Wayne Avenue	Dayton	Ohio	100,000
Housing Authority of the City of East St. Louis.	700 North 20th Street	East S. Louis	Illinois	250,000
The Indianapolis Housing Agency	Five Indiana Square	Indianapolis	Indiana	250,000
Housing Authority of St. Louis County	8865 Natural Bridge RD	St. Louis	Missouri	75,000
Housing Authority of the City of Charlotte.	1301 South Boulevard P.O. Box 36795	Charlotte	North Carolina	250,000
Housing Authority of the City of Providence.	100 Broad Street	Providence	Rhode Island	100,000
Lynn Housing Authority	10 Church Street	Lynn	Massachusetts	75,000
Housing Authority of the City of Austin	1640–B East Second Street	Austin	Texas	249,757
Housing Authority of the City of Shreveport.	623 Jordan Street	Shreveport	Louisiana	75,000
Lowell Housing Authority	Lowell HA, 350 Moody St. PO Box 60	Lowell	Massachusetts	100,000
San Diego Housing Commission	1625 Newton Avenue	San Diego	California	250,000
Foundation for the Homeownership Development, Inc.	Calle 18, M–19 Condado Moderno	Caguas	Puerto Rico	75,000
Housing Authority of the City of Wheeling.	11 Community St	Wheeling	West Virginia	100,000
Schenectady Municipal Housing Authority.	375 Broadway	Schenectady	New York	75,000
Tampa Housing Authority	1800 North Rome Ave	Tampa	Florida	250,000
Housing Authority of Fulton	200 N. Highland Drive	Fulton	Kentucky	75,000
Housing Authority of the County of Butler.	114 Woody Drive	Butler	Pennsylvania	100,000
Worcester Housing Authority	40 Belmont Street	Worchester	Massachusetts	250,000
Grand Rapids Housing Commission	1420 Fuller SE	Grand Rapids	Michigan	27,125
Housing Authority of the City of Elizabeth.	688 Maple Avenue	Elizabeth	New Jersey	74,996
Housing Authority of the County of Riverside.	5555 Alington Avenue	Riverside	California	75,000
Housing Authority of the City of Annapolis.	1217 Madison Street	Annapolis	Maryland	75,000
Housing Authority of the City of Salem	P.O. Box 808	Salem	Oregon	75,000
Housing Authority of the City of Seattle	120 Sixth Avenue North	Seattle	Washington	250,000
Allegheny County Housing Authority	341 Fourth Avenue	Pittsburgh	Pennsylvania	250,000
Housing Authority of the City of Los Angeles.	520 South Lafayette Park Pl Suite 400	Los Angeles	California	250,000
Kitsap County Consolidated Housing Authority.	9307 Bayshore Dr. NW	Silverdale	Washington	75,000
Spokane Housing Authority	55 W. Mission Suite 104	Spokane	Washington	75,000
The Housing Authority of Baltimore City	417 E. Fayette Street Suite 265	Baltimore	Maryland	500,000
Town of Johnston Housing Authority	8 Forand Circle	Johnston	Rhode Island	75,000

1999 RESIDENT SERVICE DELIVERY MODELS FUNDING AWARDS—Continued

Applicant name	Address	City	State	Amount
Hampton Redevelopment and Housing Authority.	1300 Thomas St	Hampton	Virginia	75,000
Knoxville's Community Development Corporation.	901 Broadway N.E.	Knoxville	Tennessee	250,000
The District of Columbia Housing Authority.	1133 North Capital Street N.E. Suite 325.	Washington	District of Columbia	250,000
Broward County Housing Authority	1773 North State Rd 7	Lauderhill	Florida	75,000
Cambridge Housing Authority	675 Massachusetts Avenue	Cambridge	Massachusetts	75,000
Dover Housing Authority	62 Whittier Street	Dover	New Hampshire	100,000
Fort Walton Beach Housing Authority	27 Robinwood Drive, SW	Fort Walton Beach	Florida	75,000
Gainsville Housing Authority	100 NE 8th Avenue, Oak Park	Gainsville	Florida	27,125
Housing Authority of the City of Bloomington.	104 E. Wood Street	Bloomington	Illinois	75,000
Housing Authority of the City of Hartford	475 Flatbush Avenue	Hartford	Connecticut	250,000
Vecindario de Esperanza Resident Council, Inc.	2324 Calle Contenta #8	Las Vegas	New Mexico	68,372
Detroit Housing Commission	1301 E. Jefferson	Detroit	Michigan	250,000
Housing Authority of Fresno County	1331 Fulton Mall	Fresno	California	75,000
Housing Authority of Joliet	6 S. Broadway St.	Joliet	Illinois	75,000
RESPECT Inc.	411 S.E. 8th Street	Evansville	Indiana	75,000
The Housing Authority of the City of Dallas.	3939 N. Hampton Road	Dallas	Texas	100,000
Fort Worth Housing Authority,	1201 E. 13th Street P.O. Box 430	Fort Worth	Texas	75,000
Housing Authority of the City of Frederick.	209 Madison Street	Frederick	Maryland	75,000
Temple Housing Authority	700 W. Calhoun	Temple	Texas	75,000
The Housing Authority of the City of Evansville.	500 Court St.	Evansville	Indiana	100,000
The Housing Authority of the City of Spartansburg.	325 South Church P.O. Box 2828	Spartanburg	South Carolina	75,000
Waynesboro Redevelopment and Housing Authority.	1700 New Hope Road P.O. Box 1138	Waynesboro	Virginia	74,998
Lawrence Housing Authority	353 Elm Street	Lawrence	Massachusetts	75,000
Anniston Housing Authority	500 Glen Addie Avenue	Anniston	Alabama	75,000
City of Phoenix Housing Department	830 East Jefferson	Phoenix	Arizona	250,000
City of Waco Housing Authority	1001 Washington Avenue	Waco	Texas	100,000
Flint Area Consolidated Housing Authority.	137 Richardson Street P.O. Box 67	Montezuma	Georgia	75,000
Housing Authority of Hopkinsville	P.O. Box 437	Hopkinsville	Kentucky	75,000
Housing Authority of Louisville	420 S. 8th Street	Louisville	Kentucky	100,000
Housing Authority of the City of Las Vegas.	420 North 10th Street	Las Vegas	Nevada	250,000
Housing Authority of the County of Contra Costa.	3133 Estudillo Street	Martinez	California	75,000
La Salle University, Nursing Center, Health Center.	1900 W. Olney Ave. Box 808	Philadelphia	Pennsylvania	75,000
Augusta Housing Authority	1425 Walton Way	Augusta	Georgia	249,414
Children's Case Management Organization, Inc.	1720 E. Tiffany Drive #101	West Palm Beach	Florida	75,000
Helena Housing Authority	812 Abbey	Helena	Montana	75,000
Housing Authority of the City of Tulsa	415 East Independence P.O. Box 6369	Tulsa	Oklahoma	250,000
Ocala Housing Authority	233 S.W. 3rd Street PO Box 2468	Ocala	Florida	75,000
Philadelphia Housing Authority	12 South 23rd Street	Philadelphia	Pennsylvania	500,000
Plymouth Housing Authority	69 Allerton Street	Plymouth	Massachusetts	27,125
Housing Authority of the City of New Albany.	PO Box 275	New Albany	Indiana	75,000
Joann Dorsey Family Homes Resident Council.	1115–A Dorsey Drive	Champaign	Illinois	75,000
Georgetown Housing Authority	39 Scroggin Park	Georgetown	Kentucky	75,000
Housing Authority of Murray	716 Nash Drive	Murray	Kentucky	27,125
Housing Authority of the County of King	15455–65th Ave South	Tukwila	Washington	250,000
Oak Ridge Housing Authority	10 Van Hicks Lane	Oak Ridge	Tennessee	75,000
Fargo Housing and Redevelopment Authority.	325 Broadway	Fargo	North Dakota	99,900
Housing Authority of Chester County 1st Floor.	30 West Barnard Street	West Chester	Pennsylvania	27,125
Housing Authority of the County of Luzerne.	250 First Ave	Kingsotn	Pennsylvania	100,000
Housing Authority of the Township of Irvington.	624 Nye Avenue	Irvington	New Jersey	75,000
Alexandria Redevelopment and Housing Authority.	600 North Fairfax Street	Alexandria	Virginia	209,355

1999 RESIDENT SERVICE DELIVERY MODELS FUNDING AWARDS—Continued

Applicant name	Address	City	State	Amount
Housing Authority of Columbus, Georgia	1000 Wynnton Road	Columbus	Georgia	250,000
Housing Authority of Cynthiana	149 Federal Street PO Box 351	Cynthiana	Kentucky	27,125
The City of Lawrence Housing Authority	1600 Haskell Avenue	Lawrence	Kansas	75,000
Buffalo Municipal Housing Authority	300 Perry St	Buffalo	New York	229,848
North Bend City Housing Authority	1700 Monroe	North Bend	Oregon	75,000
Rochester Housing Authority	86 Vienna Street	Rochester	New York	250,000
White Plains Housing Authority	223 Dr. Martin Luther King, Jr., Blvd.	White Plains	New York	100,000
Housing Authority of the township of Woodbridge.	20 Bunns Lane	Woodbridge	New Jersey	75,000
The Housing Authority of the City of Independence.	210 South Pleasant	Independence	Missouri	75,000
Catlettsburg Housing Authority	210 24th Street	Catlettsburg	Kentucky	10,650
Chester Housing Authority	1010 Madison St.	Chester	Pennsylvania	75,000
Denver Housing Authority	2650 Welton Street	Denver	Colorado	250,000
Hillside Family Organization, Incorporated.	1452 N. 7th St.	Milwaukee	Wisconsin	75,000
Housing Authority of the City of Charleston.	911 Michael Avenue	Charleston	West Virginia	99,999
Housing Authority of the City of El Paso	5300 E. Paisano drive	El Paso	Texas	250,000
Housing Authority of the City of Oxnard	1500 Colonia Road	Oxnard	California	75,000
Port Chester Housing Authority	2 Weber Drive	Port Chester	New York	27,125
Cohoes Housing Authority	100 Manor Site	Cohoes	New York	27,125
Highland Park Housing Authority	242 South Sixth Ave	Highland Park	New Jersey	27,125
Housing Authority of the City of Brunswick.	1126 Albany St	Brunswich	Georgia	75,000
Atlantic City Housing Authority	201–A Maryland Avenue	Atlantic City	New Jersey	100,000
Crossville Housing Authority	202 Irwin Avenue P.O. Box 425	Crossville	Tennessee	27,125
Housing Authority of Brevard County	615 Kurek Court	Meritt Island	Florida	75,000
Housing Authority of Jefferson County	801 Vine Street	Louisville	Kentucky	27,125
Jefferson County Housing Authority	6025 W. 38th Avenue	Wheat Ridge	Colorado	75,000
Hutchinson Housing & Redevelopment Authority.	133 Third Avenue SW	Hutchinson	Minnesota	27,125
Minneapolis Public Housing Authority	1001 Washington Ave North	Minneapolis	Minnesota	150,000
River Rouge Housing Commission	180 Visger	River Rouge	Michigan	75,000
Edison Housing Authority	Willard Dunham Drive	Edison	New Jersey	75,000
Niagara Falls Housing Authority	744 Tenth Street	Niagara Falls	New York	75,000
Housing Authority of Glasgow	106 Bunche Ave	Galsgow	Kentucky	100,000
Delaware County Housing Authority	1855 Constitution Avenue	Woodlyn	Pennsylvania	27,125
Housing Authority of Martin	110 R. Griffith Drive #1101 P.O. Box 806.	Martin	Kentucky	75,000
Corporacion Para El Desarrollo Del Oeste, Inc.	Ave. Corazones #1020, Bo. Sabalos	Mayaguez	Puerto Rico	75,000
Housing Opportunities Commission of Montgomery County, Maryland.	10400 Detrick Avenue	Kensington	Maryland	75,000
Logan County Metropolitan Housing Authority.	116 North Everett Street	Bellefontaine	Ohio	75,000
B.W. Cooper Resident Management Corp.	3422 Earhart Boulevard	New Orleans	Louisiana	75,000
Housing Authority of Henderson	111 South Adams Street	Henderson	Kentucky	27,125
Housing Authority of Providence	101 Ceterridge Drive	Providence	Kentucky	75,000
Rockingham Housing Authority	908 Armistead St	Rockingham	North Carolina	27,125
Springfield Housing Authority	25 Saab Court	Springfield	Massachusetts	75,000
Housing Authority of Fulton County	10 Park Place South, S.E. Suite 240	Atlanta	Georgia	75,000
Jackson Housing Authority	125 Preston Street	Jackson	Tennessee	75,000
Suffolk Redevelopment and Housing Authority.	530 East Pinner Street	Suffolk	Virginia	74,973
The Housing Authority of the City of Harlingen.	202 South First Street	Harlingen	Texas	75,000
Housinig Authority of the City of Bremerton.	110 Russell Road	Bremerton	Washington	74,185
Housing Authority of the City of Fresno	1331 Fulton Mall	Fresno	California	250,000
Housing Authority of the Town of Angola.	617 N. Williams St	Angola	Indiana	26,940
Area Housing Authority for the County of Ventura.	1400 West Hillcrest Drive	Newbury Park	California	27,125
Cincinnati Metropolitan Housing Authority.	16 West Central Parkway	Cincinnati	Ohio	150,000
Huntington West Virginia Housing Authority.	P.O. Box 2183	Huntington	West Virginia	75,000
Housing Authority of the City of Danville, Illinois.	1607 Clyman Lane P.O. Box 312	Danville	Illinois	75,000
Englewood Housing Authority	111 West Street	Englewood	New Jersey	27,125

1999 RESIDENT SERVICE DELIVERY MODELS FUNDING AWARDS—Continued

Applicant name	Address	City	State	Amount
Town of Coventry Housing Authority	14 Manchester Circle	Coventry	Rhode Island	9,042
Housing Authority of the City of Rahway	165 E. Grand Avenue	Rahway	New Jersey	75,000
Jackson Housing Commission	301 Steward Avenue	Jackson	Michigan	25,000
Lucas Metropolitan Housing Authority	435 Nebraska Avenue	Toledo	Ohio	250,000
Truth or Consequences Housing Authority.	108 South Cedar Street	Truth or	New Mexico	75,000
Chicago Housing Authority	626 West Jackson Boulevard	Chicago	Illinois	478,200
Lenior Housing Authority	431 Vance Street N.W	Lenior	North Carolina	75,000
Housing Authority of Pikeville	327 Hellier St	Pikeville	Kentucky	59,740
Housing Authority of the City of Stamford.	22 Clinton Avenue	Stamford	Connecticut	75,000
Housing Authority of the Town of Laurinburg.	1300 Woodlawn Street P.O. Box 1437	Lurinburg	North Carolina	75,000
Altoona Housing Authority	2700 Pleasant Valley Boulevard	Altona	Pennsylvania	75,000
Cranston Housing Authority	50 Birch Street	Cranston	Rhode Island	75,000
Housing Authority of the City of Paterson.	60 Van Houten Street	Paterson	New Jersey	250,000
Housing Authority of the City of Ocilla, Georgia.	534 N Alder Street	Ocilla	Georgia	75,000
Housing Authority of the City of Union City.	3911 Kennedy Boulevard	Union City	New Jersey	75,000
Lee County Housing Authority	14170 Warner Cir., N/W	N. Fort Myers	Florida	27,125
The Municipal Housing Authority for the City of Yonkers.	1511 Central Park Avenue	Yonkers	New York	250,000
Lafitte Resident Council Housing Authority.	501 N. Galvez	New Orleans	Louisiana	75,000
Village of Great Neck Housing Authority	700 Middle Neck Road	Great Neck	New York	27,125
Norfolk Redevelopment and Housing Authority.	201 Granby Street	Norfolk	Virginia	250,000
Institute for Self Governance, Inc.	870 Market Street #423	San Francisco	California	75,000
Morgan County Housing Authority	301 West Beecher	Jacksonville	Illinois	75,000
Housing Authority of Salt Lake City	1776 South West Temple	Salt Lake City	Utah	75,000
Woonsocket Housing Authority	679 Social Street	Woonsocket	Rhode Island	100,000
Geneva Housing Authority	P.O. Box 153	Geneva	New York	75,000
Housing Authority of the City of Laurel, Mississippi.	701 Beacon Street	Laurel	Mississippi	75,000
Junction City Housing Authority	1202 Country Club Lane	Junction City	Kansas	75,000
Sunset Village Resident Council, Inc	2810 Louden	Las Vegas	New Mexico	75,000
Richmond Redevelopment and Housing Authority.	901 Chamberlayne Parkway	Richmond	Virginia	100,000
The Housing Authority of Greenville	511 Augusta Street P.O. Box 10047	Greenville	South Carolina	100,000
Camden Housing Authority	1300 Admiral Wilson Boulevard	Camden	New Jersey	250,000
Housing Authority of the City of Linden	1601 Dill Avenue	Linden	New Jersey	27,125
Lebanon Housing Authority	400 Ingram Avenue	Campbellsville	Kentucky	75,000
Starkeville Housing Authority	101 Woods St	Starkville	Mississippi	75,000
Keene Housing Authority	105 Castle Street	Keene	New Hampshire	75,000
Housing Authority of the County of Lycoming.	1941 Lincoln Drive	Williamsport	Pennsylvania	75,000
Housing Authority of the City of Hope	720 Texas St	Hope	Arkansas	75,000
Cheyenned Housing Authority	3304 Sheridan Street	Cheyenne	Wyoming	27,125
Weehawken Housing Authority	525 Gregory Ave.	Weehawken	New Jersey	27,125
Housing Authority of the City of High Point.	500 East Russell Avenue PO Box 1779	High Point	North Carolina	75,000
St. Mary's County Housing Authority	23115 Leonard Hall Drive, P.O. Box 653.	Leonardtown	Maryland	75,000
Newport News Redevelopment and Housing Authority.	227 27th Street P.O. Box 77	Newport News	Virginia	250,000
Troy Housing Authority	403 Main Street	Troy	North Carolina	75,000
Housing Authority of Horse Cave	990 North Dixie Street P.O. Box 8	Horse Cave	Kentucky	27,125
Cameron County Housing Authority	65 Castellan Circle	Brownsville	Texas	75,000
Municipal Housing Authority of the City of Utica, New York.	509 Second Street	Utica	New York	75,000
Housing Authority of Hazard	100 Campbell St, Room A	Hazard	Kentucky	75,000
National Association of Resident Management Corporation.	4521 Douglas, NE	Washington	District of Columbia	75,000
Bad River Band of Lake Superior Tribe of Chippewa Indians.	P.O. Box 57	Onanah	Wisconsin	75,000
Bear Soldier RMC, Sanding Rock Reservation.	P.O. Box 565	McLaughlin	South Dakota	75,000
Colville Indian Housing Authority	P.O. Box 528	Nespelem	Washington	75,000
Fort Independence Indian Reservation	P.O. Box 67	Independence	California	75,000

1999 RESIDENT SERVICE DELIVERY MODELS FUNDING AWARDS—Continued

Applicant name	Address	City	State	Amount
Housing Authority of the City of North Little Rock, AR.	P.O. Box 516	North Little Rock	Arkansas	100,000
Lac Courte Oreilles Housing Authority	13416 W. Trepania Road	Hayward	Wisconsin	75,000
Muscogee Creek Nation of Oklahoma	P.O. Boc 580	Okmulgee	Oklahoma	250,000
Oglala Sioux Tribe	P.O. Box 3001	Pine Ridge	South Dakota	75,000
The Housing Authority of the City of Atlanta.	739 West Peachtree Street, N.E	Atlanta	Georgia	500,000
Umatilla Reservation Housing Authority	51 Umatilla Loop P.O. Box 1658	Pendelton	Oregon	75,000
Winnebago Housing and Development Commission.	Corner of Beck & Elm P.O. Box 669	Winnebago	Nebraska	75,000
Total Amount Funded				22,214,244

[FR Doc. 00–32307 Filed 12–19–00; 8:45 am]

BILLING CODE 4210–33–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4412–FA–03; FR–4413–FA–03; and FR–4415–FA–03; and FR–4416–FA–03]

Announcement of Funding Awards; Office of Public and Indian Housing FY 1999 Awards for the Housing Choice Voucher Programs

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Announcement of funding awards.

SUMMARY: In accordance with section 102(a)(4)(c) of the Department of Housing and Urban Development Reform Act of 1989, this announcement notifies the public of funding awards for Fiscal Year (FY) 1999 to housing agencies and non-profit agencies under the housing choice voucher programs. The purpose of this Notice is to publish the names and addresses of the award winners and the amount of the awards made available by HUD to provide rental assistance to very low income families.

FOR FURTHER INFORMATION CONTACT: Michael Diggs, Director, Grants Management Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 501 Schools Street, SW., Suite 800, Washington, DC 20024, telephone 202/358–0273. For the hearing or speech impaired, these numbers may be accessed via TTY (text telephone) by calling the Federal Information Relay Service at 1–800–877–8339. (Other than the ''800'' TTY number, these telephone numbers are not toll-free).

SUPPLEMENTARY INFORMATION: The regulations governing the housing choice voucher programs are published at 24 CFR part 982. The regulations for allocating housing assistance budget authority under section 213(d) of the Housing and Community Development Act of 1974 are published at 24 CFR part 791, subpart D.

The purpose of the housing choice voucher programs is to assist eligible families to pay the rent for decent, safe, and sanitary housing, or to purchase a modest home. The FY 1999 awards announced in this notice were selected for funding consistent with the provisions in the Notices of Funding Availability (NOFAs) published in the **Federal Register** on March 5, 1999 (64 FR 10904), March 8, 1999 (64 FR 11278; 11294; 11302; 11310), and July 27, 1999 (64 FR 40686).

The March 5, 1999 (64 FR 10904) NOFA made available housing choice vouchers from the Family Unification Program to assist families for who the lack of adequate housing is a primary factor in the separation, or imminent separation of children from their families. The March 8, 1999 NOFAs made available housing choice vouchers for: (a) Persons with disabilities in support of designated housing allocation plans (64 FR 11294); (b) non-elderly disabled families in connection with certain Section 8 project based developments where the owner has established a preference for admission of elderly households (64 FR 11310); and (c) persons with disabilities under the Mainstream housing Program (64 FR 11302).

The March 8, 1999 (64 FR 11278) and July 27, 1999 (64 FR 40686) NOFA's made available Family Self-Sufficiency (FSS) Coordinator funds to hire FSS program coordinators.

A total of $151,644,990 in budget authority for 17,960 housing choice vouchers was awarded to recipients. A total of $28,499,099 in budget was awarded to hire FSS program coordinators, $75,318 was used to fund FY 1998 eligible recipients that were not funded.

The Catalog of Federal Domestic Assistance numbers for this program are 14.855 and 14.857.

In accordance with section 102(a)(4)(c) of the Department of Housing and Urban Development Reform Act of 1989 (103 Stat. 11987, 42 U.S.C. 3545), the Department is publishing the names, addresses, and amounts of those awards as show in Appendix A.

Dated: December 13, 2000.

Milan Ozdinec,

Acting General Deputy Assistant Secretary for Public and Indian Housing.

Appendix A

FISCAL YEAR 1999 FUNDING AWARDS FOR MAINSTREAM HOUSING OPPORTUNITIES FOR PERSONS WITH DISABILITIES—1 YEAR

Applicant name	Address	City	State	Zip	Amount
Jefferson County Housing Authority.	3700 Industrial Parkway	Birmingham	Alabama	35217–	$272,794
Alameda City Housing Authority	701 Atlantic Avenue	Alameda City	California	94501–	462,492
Anaheim Housing Authority	210 S. Anaheim Blvd., Suite 203	Anaheim	California	92805–	367,336

FISCAL YEAR 1999 FUNDING AWARDS FOR MAINSTREAM HOUSING OPPORTUNITIES FOR PERSONS WITH DISABILITIES—1 YEAR—Continued

Applicant name	Address	City	State	Zip	Amount
City of Carlsbad	2965 Roosevelt Street, Suite B	Carlsbad	California	92008–	283,971
City of Fresno Housing Authority	P.O. Box 11985	Fresno	California	93776–1985	212,095
County of Fresno Housing Authority.	P.O. Box 11985	Fresno	California	93776–1985	212,095
Kern County	525 Roberts Lane	Kern County	California	93308–	171,643
San Bernardino County	1053 North ''D'' Street	San Bernardino	California	92410–	353,686
San Francisco Housing Authority	440 Turk Street	San Francisco	California	94102–	599,866
San Joe City Housing Authority	505 W. Julian Street	San Jose	California	95110–	628,467
Aurora Housing Authority	10745 East Kentucky Avenue	Aurora	Colorado	80012–	386,297
Denver Housing Authority	P.O. Box 40305	Denver	Colorado	80204–	280,625
Jefferson County Housing Authority.	6025 West 38th Avenue	Wheat Ridge	Colorado	80033–	215,345
New Britain Housing Authority	34 Merimac Road	New Britain	Connecticut	06053–	467,424
Windsor Housing Authority	35 Mack Street	Windsor	Connecticut	06095–	29,942
City of Cocoa Housing Authority	615 Kuret Court	Merrit	Florida	32953–	342,936
Hialeah Housing Authority	70 East 7th Street	Hialeah	Florida	33010–	327,067
Atlanta Housing Authority	1720 Peachtree St. NW	Atlanta	Georgia		415,440
Rome Housing Authority	800 North Fifth Avenue	Rome	Georgia	30162–1425	161,071
GHURA	117 Bien Venida Avenue	Sinajana	Guam	96296–	560,498
Chicago Housing Authority	626 West Jackson Blvd	Chicago	Illinois	60661–	383,106
Fort Wayne Housing Authority	2013 S. Anthony Blvd	Ft. Wayne	Indiana	46803–	201,996
Mid-Iowa Regional Housing Authority.	1814 Central Avenue	Fort Dodge	Indiana	50501–4236	74,274
Noblesville Housing Authority	320 Kings Land	Noblesville	Indiana	46060–	236,603
Sioux City Housing Authority	P.O. Box 447	Sioux City	Indiana	51102–	125,477
Waterloo Housing Authority	620 Mulberry Street	Waterloo	Indiana	50703–	110,323
Wichita Housing Authority	455 North Main Street	Wichita	Kansas	67202–1606	287,738
Greenup County Housing Authority.	1214 Riverside Blvd	Wurtland	Kentucky	41144–	211,492
Lafayette Housing Authority	100 C.O. Circle	Lafayette	Louisiana	70501–	194,659
Town of Oberlin	P.O. Box 370	Oberlin	Louisiana	70655–	203,220
Maine State Housing Authority	353 Water Street	Augusta	Maine	04330–5633	199,109
Housing Authority of Baltimore City.	417 E. Lafayette Street	Baltimore	Maryland	21202–	338,467
Beverly MA Housing Authority	137 Bridge Street	Beverly	Massachusetts	01915–	431,702
Clemsford MA Housing Authority	10 Wilson Street	Chelmsford	Massachusetts	01824–	337,366
Dedham MA Housing Authority	163 Dedham Boulevard	Dedham	Massachusetts	02026–	425,318
Franklin County Regional Housing Authority.	P.O. Box 30	Turner Falls	Massachusetts	01376–	103,421
Methuen MA Housing Authority	24 Mystic Street	Methuen	Massachusetts	01844–	344,275
Sandwich MA Housing Authority	20 Tom's Way	Sandwich	Massachusetts	02563–	113,818
Springfield MA Housing Authority	25 Saab Ct	Springfield	Massachusetts	01101–	257,482
Yarmouth MA Housing Authority	Long Pond Plaza	South Yarmouth	Massachusetts	02644–	326,830
Montcalm County Housing Commission.	P.O. Box 249	Howard City	Michigan	49329–	115,570
MS Regional Housing Authority No. V.	P.O. Box 419	Newton	Mississippi	39345–	166,046
MS Regional Housing Authority No. VI.	P.O. Drawer 8746	Jackson	Mississippi	39284–8746	258,350
Nevada Rural	2100 California Street	Carson City	Nevada	88970–1	380,085
Atlantic City Housing Authority	P.O. Box 1258	Atlantic City	New Jersey	08404–	311,458
Bergen County Housing Authority	21 Main Street	Hackensack	New Jersey	07601	467,786
Carteret Housing Authority	96 Roosevelt Avenue	Carteret	New Jersey	07008–	333,044
Housing Authority of the Borough of Somerville.	25 West End Avenue	Somerville	New Jersey	08876–	62,462
Monmouth County Housing Authority.	P.O. Box 3000	Freehold	New Jersey	07728–	520,750
Newark Housing Authority	57 Sussex Avenue	Newark	New Jersey	07103–	375,667
NJDCA	P.O. Box 051	Trenton	New Jersey	08625–	377,135
Paterson Dept. of Community Development.	125 Ellison Street	Paterson	New Jersey	07505–	392,618
City of Oswego Community Development Office.	20 West Oneida St., 3rd Floor	Oswego	New York	13126–	89,366
Johnstown Housing Authority	33–41 East Main Street	Johnstown	New York	12095–	80,638
New York City Housing Authority	250 Broadway	New York	New York	10007–	501,038
Town of Amherst (Erie Co PHA Consort).	1195 Main Street	Buffalo	New York	14209–	217,130
Town of Colonie	Memorial Town Hall	Newtonville	New York	12128–	71,008
Charlotte Housing Authority	P.O. Box 36795	Charlotte	North Carolina	28263–	299,981
Winston-Salem Housing Authority	901 Cleveland Avenue	Winston-Salem	North Carolina	27101–	262,397
Minot Housing Authority	310 Second Street, SE	Minot	North Dakota	58701–	174,394

FISCAL YEAR 1999 FUNDING AWARDS FOR MAINSTREAM HOUSING OPPORTUNITIES FOR PERSONS WITH DISABILITIES—1 YEAR—Continued

Applicant name	Address	City	State	Zip	Amount
Clermont Housing Authority	65 South Market Street	Batavia	Ohio	45103–	288,679
Highland Housing Authority	121 E. East Street House	Washington Court	Ohio	43160–	149,407
Lorain Housing Authority	1600 Kansas	Lorain	Ohio	44052–3317	247,464
Middletown Housing Authority	128 City Centre Mall	Middletown	Ohio	45042	304,307
Delaware County, PA Housing Authority.	P.O. Box 100	Woodlyn	Pennsylvania	19094–0100	320,983
Monroe County Housing Authority	1055 West Main Street	Strousburg	Pennsylvania	18360–1427	99,473
East Providence RI Housing Authority.	99 Goldsmith Avenue	East Providence	Rhode Island	02914–224	117,158
Johnston Housing Authority	8 Forand Circle	Johnston	Rhode Island	02919–	229,354
Pennington County Housing Authority.	1805 West Fulton Street	Rapid City	South Dakota	57702–4358	227,234
Corsicana Housing Authority	P.O. Box 1090	Corsicana	Texas	75151–	236,810
Deep East Texas COG	174 East Lamar Street	Jasper	Texas	75951–	217,678
Houston Housing Authority	P.O. Box 2971	Houston	Texas	77252–	410,405
David County Housing Authority	P.O. Box 328	Farmington	Utah	84025–	316,236
Provo City Housing Authority	650 West 100 North	Provo	Utah	84601–	144,029
Vermont State Housing Authority	One Prospect Street	Montpelier	Vermont	05602–	215,062
Waynesboro Redevelopment and Housing Authority.	P.O. Box 1138	Waynesboro	Virginia	22980–	22,667
City of Anacortes	719 Q Avenue	Anacortes	Washington	98221–	86,813

FISCAL YEAR 1999 FUNDING AWARDS FOR MAINSTREAM HOUSING OPPORTUNITIES FOR PERSONS WITH DISABILITIES—5 YEAR

Applicant name	Address	City	State	Zip	Amount
Housing Authority of Walker County, AL.	P.O. Box 607	Dora	Alabama	35062–	$791,012
Los Angeles City Housing Authority	2600 Wilshire Blvd	Los Angeles City	California	90057–	1,91,692
Conn. Dept. of Social Services	25 Sigourney Street	Hartford	Connecticut	06106–	2,235,952
Dover, DE Housing Authority	76 Stevenson Drive	Dover	Delaware	19901–	644,964
Boley Centers for Behavorial Health Care, Inc..	1236 Dr. M.L. King St., North.	St. Petersburg	Florida	33705–	1,724,780
Miami-Dade Housing Agency	1401 NW 7th Street	Miami	Florida	3312–	2,620,976
Springfield Housing Authority	200 North 11th Street	Springfield	Illinois	60661–	1,736,924
Community Support Programs, Inc	610 Marshall St., Suite 405	Shreveport	Louisiana	71101–365	770,112
Augusta ME Housing Authority	16 Cony Street	Augusta	Maine	04330–	899,240
Brunswick ME Housing Authority	12 Stone Street	Brunswick	Maine	04011–	227,752
The ARC of Northern Chesapeake Region.	P.O. Box 610	Aberdeen	Maryland	21001–	2,495,496
MD Dept. of Housing and Community Development.	100 Community Place, Room 4222.	Crownsville	Maryland	21032–	1,156,936
The Bridge of Central Massachusetts, Inc.	10 Southwest Cutoff	Northborough	Massachusetts	01532–	722,052
Dept. of Hsg and Community Development (DHCD).	1 Congress Street	Boston	Massachusetts	02114–	2,513,584
Plymouth HRA	3400 Plymouth Boulevard	Plymouth	Minnesota	55447–148	311,956
Community Housing Network	821 East Admiral	Kansas City	Missouri	64106–	1,648,044
Barrier Free Futures, Inc	P.O. Box 4495	Santa Fe	New Mexico	87502–	438,461
Gloversville Housing Authority	181 West Street	Gloversville	New York	12078–	413,032
Albany Housing Authority	4 Lincoln Square	Albany	New York	12202–	1,529,348
Southern Tier Environment for Living (STEL).	515 Washington Street	Jamestown	New York	14701–	419,668
Rochester Housing Authority	140 West Avenue	Rochester	New York	14611–	1,483,008
Mercy Haven	859 Connetquot Avenue	Islip Terrace	New York	11752–	3,427,000
Columbus Housing Authority	960 E. Fifth Avenue	Columbus	Ohio	43201–309	1,211,180
PVA Circle of Homes	17608 Euclid Avenue	Cleveland	Ohio	44112–121	1,307,276
Fayette Metropolitan Authority	121 E. East Street	Washington Court	Ohio	43160–	1,046,536
Coos-Curry Housing Authority	1700 Monroe Street	North Bend	Oregon	97459–	367,968
Housing Authority of Douglas County.	902 West Stanton Street	Roseburg	Oregon	97940–	142,228
Josephine Hsg. and Community Development Council.	P.O. Box 1940	Grants Pass	Oregon	97204–	1,405,132
Resource for Human Development, Inc.	4333 Kelly Drive	Philadelphia	Pennsylvania	19129–	637,816
Kent County Mental Health Center, Inc. 301 S.	300 Centerville Road, Suite	Warwick	Rhode Island	02888–	1,745,008
Gateway Healthcare, Inc	1516 Atwood Avenue	Johnston	Rhode Island	02919–	1,668,340
Crossville Housing Authority	P.O. Box 425	Crossville	Tennessee	38557–	110,368

FISCAL YEAR 1999 FUNDING AWARDS FOR MAINSTREAM HOUSING OPPORTUNITIES FOR PERSONS WITH DISABILITIES—5 YEAR—Continued

Applicant name	Address	City	State	Zip	Amount
Dallas Housing Authority	3939 North Hampton	Dallas	Texas	75212–	2,029,280
Beaver County Housing Authority	P.O. Box 1670	Beaver	Utah	84713–	229,644
Piedmont Housing Alliance	515 Park Street	Charlottesville	Virginia	22902–	1,632,908
Bellingham Watcom County	P.O. Box 9701	Bellingham	Washington	98227–970	1,599,000
Thurston County	503 West 4th Avenue	Olympia	Washington	98501–	1,573,776
Waukesha County	120 Corrina Blvd	Waukesha	Wisconsin	53186–	1,378,932

FISCAL YEAR 1999 FUNDING AWARDS FOR FAMILY SELF-SUFFICIENCY

Applicant name	Address	City	State	ZIP	Amount
Jefferson County PHA	3700 Industrial Parkway	Birmingham	Alabama	35217–	$31,433
Huntsville PHA	P.O. Box 486	Huntsville	Alabama	35804–	28,718
Leeds PHA	P.O. Box 513	Leeds	Alabama	35094–	26,829
Florence PHA	303 North Pine Street	Florence	Alabama	35630–	39,537
Bessemer PHA	P.O. Box 1390	Bessemer	Alabama	35020–	32,344
Ozark PHA	P.O. Box 566	Ozark	Alabama	36361–	33,328
Walker County PHA	P.O. Box 607	Dora	Alabama	35062–	32,348
Uniontown PHA	P.O. Box 633	Uniontown	Alabama	36786–	23,943
Birmingham PHA	P.O. Box 55906	Birmingham	Alabama	35233–	46,350
Mobile PHA	P.O. Box 1345	Mobile	Alabama	36633–	35,655
Montgomery Housing Authority	1020 Bell Street	Montgomery	Alabama	36104–	33,372
Tallassee PHA	904 Hickory Street	Tallassee	Alabama	36078–	17,913
Jacksonville PHA	895 Gardner Drive	Jacksonville	Alabama	36265–	28,957
Decatur PHA	P.O. Box 878	Decatur	Alabama	35601–	29,994
Tuscaloosa PHA	P.O. Box 2281	Tuscaloosa	Alabama	35403–	40,451
Prichard PHA	P.O. Box 10307	Prichard	Alabama	36610–	36,364
Alaska Housing Finance Corp (AHFC).	P.O. Box 101020	Anchorage	Alaska	99510–1020	46,350
Mesa Housing Authority	415 N. Pasadena Street	Mesa	Arizona	96201–	44,640
Yuma City Housing Authority	1350 W. Colorado Street	Yuma	Arizona	85364–	39,330
Mohave County Housing Authority.	809 E. Beale Street	Kingman	Arizona	86402–	31,883
Tucson Housing Authority	1501 N. Oracle Road	Tucson	Arizona	85726–	46,350
Scottsdale Housing Authority	7522 E. First Street	Scottsdale	Arizona	85251–	46,350
Maricopa Housing Authority	2024 N. 7th Street	Phoenix	Arizona	85006–	46,350
Chandler Housing Authority	P.O. Box 4008	Chandler	Arizona	85244–	39,281
Phoenix Housing Authority	251 W. Washington St., 4th Floor.	Phoenix	Arizona	85003–	46,145
Siloam Springs Housing Authority.	P.O. Box 280	Siloam Springs	Arkansas	72761–	30,563
Conway Housing Authority	355 South Michell	Conway	Arkansas	72032–	25,569
West Memphis Housing Authority.	2820 Harrison St	West Memphis	Arkansas	72301–	29,047
Mississippi co. PFB	808 W. Keiser	Osceola	Arkansas	72370–	31,143
Pulaski Co. Housing Authority	201 s. Broadway Suite 430	Little Rock	Arkansas	72201–	25,604
Ft. Smith Housing Authority	2100 No. 31st Street	Fort Smith	Arkansas	72904–	29,328
UHDC—Pope Co	P.O. box 846	Russellville	Arkansas	72811–	31,897
Northwest Regional Housing Authority.	P.O. Box 2568	Harrison	Arkansas	72602–	35,513
St. Francis Co. Housing Authority.	P.O. Box 310	Forrest City	Arkansas	72335–	22,229
Jonesboro URHA	330 Union Street	Jonesboro	Arkansas	72401–	25,146
No. Little Rock Housing Authority.	P.O. Box 516	North Little Rock	Arkansas	72115–	34,694
Harrison Housing Authority	P.O. Box 1715	Harrison	Arkansas	72601–	41,434
Lee Co. Housing Authority	100 West Main St	Marianne	Arkansas	72360–	20,744
Pine Bluff Housing Authority	P.O. Box 8872	Pine Bluff	Arkansas	71611–	23,643
Hope Housing Authority	720 Texas St	Hope	Arkansas	71801–	24,238
Little Rock Housing Authority	1000 Wolk Street	Little Rock	Arkansas	72202–	30,000
White River Regional Housing Authority.	P.O. Box 650	Melbourne	Arkansas	72556–	46,303
Wynne Housing Authority	PO Box 522	Wynne	Arkansas	72396–	22,290
Glendale Housing Authority	141 North Glendale Avenue	Glendale	California	91206–	46,350
Orange County Housing Authority.	1770 N Broadway	Santa Ana	California	92706–	46,350
San Buenaventura Housing Authority.	PO Box 1648	Ventura	California	93002–	46,350
San Jose Housing Authority	505 West Julian Street	San Jose	California	95110–	46,348
Shasta Housing Authority	1670 Market St., Suite 300	Redding	California	96001–	38,611

FISCAL YEAR 1999 FUNDING AWARDS FOR FAMILY SELF-SUFFICIENCY—Continued

Applicant name	Address	City	State	ZIP	Amount
Sonoma Housing Authority	1440 Guerneville Road	Santa Rosa	California	95403–	46,350
Lakewood Housing Authority	5050 N. Clark Ave	Lakewood	California	90712–	46,350
Santa Clara Housing Authority	505 West Julian Street	San Jose	California	95110–	46,348
Compton Housing Authority	600 North Alameda Suite 163	Compton	California	90221–	42,600
Sacramento City Redevelopment.	Sacramento Hsg & Redevelopment.	Sacramento	California	95812–	30,728
Oxnard Housing Authority	1470 Colonia Road	Oxnard	California	93030–	46,350
Redding Housing Authority	760 Parkview Avenue	Redding	California	96001–	46,350
Alameda City Housing Authority	701 Atlantic Avenue	Alameda	California	94501–	23,175
HCD, State of California	P.O. Box 952050	Sacramento	California	94252–	45,312
Oakland Housing Authority	1619 Harrison Street	Oakland	California	94612–	46,350
Solano Housing Authority	601 West Texas Street	Fairfield	California	94533–	45,173
Los Angeles City Housing Authority.	P.O. Box 17157	Los Angeles	California	90057–	46,350
Butte Housing Authority	580 Vallobrosa Avenue	Chicago	California	95926–	38,836
Riverside County Housing Authority.	5555 Arlington Avenue	Riverside	California	92504–	46,350
Kern County Housing Authority	525 Roberts Lane	Bakersfield	California	93308–	46,350
Garden Grove Housing Authority.	1400 Stanford Avenue	Garden Grove	California	94842–	46,350
Santa Barbara City Housing Authority.	808 Laguana St	Santa Barbara	California	93101–	46,350
San Diego Housing Community	1625 Newton Avenue	San Diego	California	92113–	46,350
Alameda County Housing Authority.	22941 Atherton Street	Hayward	California	94541–	43,512
Long Beach Housing Authority	333 West Ocean Blvd 7th Fl	Long Beach	California	90802–	46,350
Fairfield Housing Authority	100 Webster	Fairfield	California	94533–	46,350
Culver City Housing Authority	P.O. Box 507	Culver City	California	90232–	33,100
Napa Housing Authority	P.O. Box 660	Napa	California	94559–	46,350
Los Angeles County Housing Authority.	C.D.C. County of Los Angeles	Monterey Park	California	91755–	46,350
Oceanside Housing Authority	300 North Coast Highway	Oceanside	California	92054–	46,350
Marin Housing Authority	P.O. Box 4282	San Rafael	California	94913–	46,350
Santa Paula Housing Authority	P.O. Box 404	Santa Paula	California	93060–	46,350
Kings Co. Housing Authority	P.O. Box 355	Hanford	California	93232–	41,705
Carlsbad Housing Authority	2965 Roosevelt St. B	Carlsbad	California	92008–	46,350
Ventura County Housing Authority.	99 South Glenn Drive	Camarillo	California	93010–	46,350
Contra Costa Housing Authority	3133 Estudillo Street	Martinez	California	94553–	46,350
Imperial Valley Housing Authority.	1401 D Street	Brawley	California	92227–	46,350
Berkeley Housing Authority	1901 Farview Street	Berkeley	California	94703–	46,350
Mardera Housing Authority	205 G Street	Madera	California	93637–	44,870
Yuba Housing Authority	938 14th Street	Marysville	California	95901–	43,819
Upland Housing Authority	1226 N Campus Avenue	Upland	California	91786–	32,481
Merced Housing Authority	405 U Street	Merced	California	95340–	44,480
Roseville Housing Authority	405 No. Coast Highway	Roseville	California	95678–	44,460
Vacaville Housing Authority	40 Eldridge Avenue	Vacaville	California	95688–	46,350
San Luis Obispo	P.O. Box 638	San Luis Obispo	California	93406–	46,350
Fresno County Housing Authority.	PO Box 11985	Fresno	California	93776–	44,500
Monterey Housing Authority	123 Rico Street	Salinas	California	93907–	46,350
San Francisco Housing Authority.	440 Turk Street	San Francisco	California	94102–	46,350
San Bernardino Housing Authority.	1053 North D Street	San Bernardino	California	92410	46,350
El Dorado Housing Authority	360 Fair Lane	Placerville	California	95667–	46,350
Anaheim Housing Authority	201 So. Anaheim Blvd	Anaheim	California	92805–	46,350
Norwalk Housing Authority	12035 Firestone Blvd	Norwalk	California	90650–	46,350
Benicia Housing Authority	28 Riverhill Drive	Benicia	California	94510–	46,350
Denver Housing Authority	Box 40305-Mile Hi Stn	Denver	Colorado	80204–	38,868
Colorado Div of Housing	1313 Sherman St., Rm 518	Denver	Colorado	80203–	46,350
Pueblo Housing Authority Avenue.	1414 North Santa Fe	Pueblo	Colorado	81003–	30,900
Arvada Housing Authority	8001 Ralston Road	Arvada	Colorado	80002–	35,404
Montrose City Housing Authority.	222 Hap Court	Olathe	Colorado	81425–	31,482
Aurora Housing Authority	10745 E. Kentucky Ave	Aurora	Colorado	80012–	35,597
Lakewood Housing Authority	445 So. Allison Pkwy	Lakewood	Colorado	80002–	35,404
Colorado Department Human Services.	4131 S. Julian Way	Denver	Colorado	80236–	45,577
Fort Collins Housing Authority	1715 W. Mountain Ave	Fort Collins	Colorado	80521–	35,650

FISCAL YEAR 1999 FUNDING AWARDS FOR FAMILY SELF-SUFFICIENCY—Continued

Applicant name	Address	City	State	ZIP	Amount
Grand Junction Housing Authority.	805 Main St	Grand Junction	Colorado	81501–	28,478
Jefferson City Housing Authority	6025 W. 38th Avenue	Wheatridge	Colorado	80033–	35,404
Englewood Housing Authority	3560 S. Sherman St	Englewood	Colorado	80110–	41,057
Adams County Housing Authority.	7190 Colorado Blvd	Commerce City	Colorado	80022–	41,324
Boulder City Housing Authority	PO Box 471	Boulder	Colorado	80306–	40,728
Garfield City Housing Authority	2128 Railroad Avenue	Rifle	Colorado	81425–	41,291
Ansonia Housing Authority	36 Main Street	Ansonia	Connecticut	06401	44,785
Torrington Housing Authority	110 Prospect Street	Torrington	Connecticut	06106–	31,613
Milford Housing Authority	75 DeMaio Drive	Milford	Connecticut	06460–	36,000
Meriden Housing Authority	22 Church Street	Meriden	Connecticut	06457–	46,332
Middletown Housing Authority	40 Broad Street	Middleton	Connecticut	06457–	30,400
Delaware State Housing Authority.	820 Silver Lake Blvd	Dover	Delaware	19904–	41,200
Dover Housing Authority	76 Stevenson Drive	Dover	Delaware	19904–	31,931
District of Columbia Housing Authority.	1133 North Capitol Street NE	Washington	District of Columbia.	20002–	46,350
Orlando Housing Authority	300 Reeves Court	Orlando	Florida	32801–	43,384
Boca Raton Housing Authority	201 West Palmetto Park Road	Boca Raton	Florida	33432–	28,638
City of Lakeland Housing Authority.	P O Box 1009	Lakeland	Florida	33802–	46,337
Riviera Beach Housing Authority.	2014 West 17th Court	Riviera Beach	Florida	33404–	40,161
Tallahassee Housing Authority	2940 Grady Road	Tallahassee	Florida	32312–	38,640
City of Sarasota Housing Authority.	1300 Sixth Street	Sarasota	Florida	34236–	29,446
Pompano Beach Housing Authority.	P.O. Box 2006	Pompano Beach	Florida	33061–	25,668
City Of Miami Beach Housing Authority.	200 Alton Road	Miami Beach	Florida	33139–	45,000
Walton County Housing Authority.	P.O. Box 1258	Defuniak Springs	Florida	32432–	37,035
Deland Housing Authority	300 Sunflower Circle	Deland	Florida	32724–	42,404
Hernando County Housing Authority.	20 N. Main Street	Brooksville	Florida	34601–	37,209
City of Ft. Myers—CRA	3326 Dr. Martin Luther King Jr. Blvd.	Fort Meyers	Florida	33902–	46,350
Palm Beach County Housing Authority.	3432 W 45th Street	West Palm Beach	Florida	33407–	35,200
West Palm Beach Housing Authority.	3801 Georgia Avenue	West Palm Beach	Florida	33405–	32,370
City of Pensacola Housing Authority.	180 Governmental Center	Pensacola	Florida	32521–	32,217
Broward County Housing Authority.	1773 North State Road 7	Lauderhill	Florida	33313–	38,900
Deerfield Beach Housing Authority.	425 N.W. 1st Terrace	Deerfield Beach	Florida	33441–	43,032
Brevard County Housing Authority.	P.O. Box 338	Merritt Island	Florida	32952–	38,742
Orange County Housing Authority.	525 E. South Street	Orlando	Florida	32801–	42,765
City of Ft. Lauderdale Housing Authority.	437 SW 4th Avenue	Ft. Lauderdale	Florida	33315–	45,396
Pasco City Housing Authority	14517 7th Street	Dade City	Florida	33525–	38,136
Delray Beach Housing Authority	770 SW 12th Terrace	Delray Beach	Florida	33444–	39,085
Hollywood Housing Authority	7300 North Davie Road Extension.	Hollywood	Flordia	33024–	14,183
Collier County Housing Authority.	1800 Farm Worker Way	Immokallee	Florida	33934–	38,702
Gainesville Housing Authority	P.O. Box 1468	Gainesville	Florida	32602–	37,178
County of Volusia Housing Authority.	123 West Indiana Avenue	Deland	Florida	32720–	31,618
Clearwater Housing Authority	P.O. Box 960	Clearwater	Florida	34617–	34,862
Panama City Housing Authority	804 E 15th Street	Panama City	Florida	32405–	26,265
Daytona Beach Housing Authority.	118 Cedar Street	Daytona	Florida	32114–	35,780
DeKalb Co. Housing Authority	P.O. Box 1627	Decatur	Georgia	30031–	45,007
Rome Housing Authority	P.O. Box 1428	Rome	Georgia	30161–	31,000
Brunswick Housing Authority	P.O. Box 1118	Brunswick	Georgia	31521–	30,142
Jonesboro Housing Authority	P.O. Box 458	Jonesboro	Georgia	30235–	32,550

FISCAL YEAR 1999 FUNDING AWARDS FOR FAMILY SELF-SUFFICIENCY—Continued

Applicant name	Address	City	State	ZIP	Amount
Georgia Department of Community Affairs.	60 Executive Pkwy South, NE	Atlanta	Georgia	30326	37,356
Albany Housing Authority	P.O. Box 485	Albany	Georgia	31702–	27,824
Macon Housing Authority	P.O. Box 4928	Macon	Georgia	31206–	32,227
Atlanta Housing Authority	739 West Peachtree Street NE	Atlanta	Georgia	30365–	34,765
City of Marietta Section 8 Dept.	205 Lawrence Street	Marietta	Georgia	30061–	45,320
Guam Housing Authority	117 Bien Venida Avenue	Sinajana	Guam	96926–	34,192
Kauai Housing Authority	4193 Hardy Street	Lihue	Hawaii	96776–	46,343
State of Hawaii HCDC	677 Queen Street	Honolulu	Hawaii	96776–	38,470
SW Idaho Coop. Housing Authority.	1108 West Finch Drive	Nanpa	Idaho	83651–	31,200
Idaho Housing	P.O. Box 7899	Boise	Idaho	83707–	46,350
Ada County Housing Authority	680 Cunningham Place	Boise	Idaho	83702–	41,362
Boise City Housing Authority	680 Cunningham Place	Boise	Idaho	83702–	42,516
Madison County HA	1609 Olive Street	Collinsville	Illinois	62234–	39,540
Kendall Housing Authority Center.	500–A, Countryside	Yorkville	Illinois	60560–	9,266
Chicago Housing Authority Boulevard.	626 West Jackson	Chicago	Illinois	60661–	46,250
Cook County Housing Authority	310 South Michigan Ave	Chicago	Illinois	60604–	46,000
Bloomington Housing Authority	104 East Wood Street	Bloomington	Illinois	61701–	39,793
Elgin Housing Authority	120 South State Street	Elgin	Illinois	60123–	36,680
Rockford Housing Authority	223 South Winnebago Street	Rockford	Illinois	61102–	45,052
Waukegan Housing Authority	215 South Utica Street	Waukegan	Illinois	60085–	43,672
Franklin County Housing Authority.	Post Office Box 68	West F Frankfort	Illinois	62896–	28,083
Peoria Housing Authority	100 South Sheridan Road	Peoria	Illinois	61605–	31,749
East St. Louis Housing Authority.	700 North 20th Street	East St. Louis	Illinois	62205–	36,848
Champaign County Housing Authority.	205 West Park Avenue	Champaign	Illinois	60085–	29,264
McHenry County Housing Authority.	Post Office Box 1109	Woodstock	Illinois	60098–	38,710
Terre Haute Housing Authority	One Dreiser Square	Terre Haute	Indiana	47803–	46,144
IN Family & Social Service (IDFSSA).	402 West Washington Street	Indianapolis	Indiana	46205–	46,350
Elkart Housing Authority	1396 Benham Avenue	Elkart	Indiana	46516–	33,475
Logansport Housing Authority	417 North Street, Suite 102	Logansport	Indiana	46947–	24,411
Peru Housing Authority	701 East Main Street	Peru	Indiana	46970–	27,675
Knox County Housing Authority	11 Powell Street	Bicknell	Indiana	47512–	19,500
Indianapolis Housing Authority	5 Indiana Square	Indianapolis	Indiana	46204–	36,350
Vincennes Housing Authority	501 Hart Street	Vincennes	Indiana	47591–	18,565
Muncie Housing Authority	409 East First Street	Muncie	Indiana	47302–	23,989
Evansville Housing Authority	500 Court Street	Evansville	Indiana	47708–	36,050
Bloomington Housing Authority	1007 North Summit Street	Bloomington	Indiana	47402–	32,342
Columbus Housing Authority	799 McClure Road	Columbus	Indiana	47201–	39,508
Fort Wayne Housing Authority	Post Office Box 13489	Fort Wayne	Indiana	46803–	35,409
Delaware County Housing Authority.	2401 South Haddix Avenue	Muncie	Indiana	47302–	32,500
Mariion Housing Authority	601 South Adams Street	Marion	Indiana	46953–	31,694
Goshen Housing Authority	302 South Fifth Street	Goshen	Indiana	46526–	38,569
Waterloo Housing Authority	620 Mulberry Street	Waterloo	Iowa	50703–	46,350
Central Iowa Regional Housing Authority.	1111 Ninth Street	Des Moines	Iowa	50314–	46,350
Fort Dodge Housing Authority	700 South 17th Street	Fort Dodge	Iowa	50501–	46,350
Eastern Iowa Regional Housing Authority.	P.O. Box 1140	Dubque	Iowa	52004–	42,922
Iowa City Housing Authority	401 E. Washington Street	Iowa	Iowa	52240–	43,596
Region XII Regional Housing Authority.	108 West 16th Street	Carroll	Iowa	51401–	46,146
Southern Iowa Regional Housing Authority.	219 N Pine	Creston	Iowa	50801–	32,797
North Iowa Regional	217 2nd Street, SW	Mason City	Iowa	50401–	46,350
Iowa Northland Regional Housing Authority.	2530 University Avenue	Waterloo	Iowa	50701–	38,246
Sioux City Housing Authority	Box 447	Sioux City	Iowa	51102–	46,350
Upper Explorerland Housing Authority.	134 W. Greene St.	Postville	Iowa	52162–	39,666
City of Dubuque Housing Authority.	1805 Central Avenue	Dubuque	Iowa	52001–	30,652
Northwest Iowa Regional Housing Authority.	P.O. Box 446	Spencer	Iowa	51301–	35,503

FISCAL YEAR 1999 FUNDING AWARDS FOR FAMILY SELF-SUFFICIENCY—Continued

Applicant name	Address	City	State	ZIP	Amount
Ottumwa Housing Authority	102 West Finley Avenue	Ottumwa	Iowa	52501–	34,836
Mid-Iowa Regional Housing Authority.	1814 Central Avenue	Fort Dodge	Iowa	50501–	32,600
Cedar Rapids Housing Authority	Cedar Rapids Housing Services.	Cedar Rapids	Iowa	52401–	46,350
Lyon CO/ECKAN	P.O. Box 100	Ottawa	Kansas	66067–	29,020
Brown CO/NEK–CAP	Route 4, Box 187	Hiawatha	Kansas	66434–	31,534
Topeka Housing Authority	2101 SE California	Topeka	Kansas	66607–	32,534
Ford Co. Housing Authority	240 San Jose Drive	Dodge City	Kansas	67801–	30,159
Lawrence Housing Authority	1600 Haskell Avenue	Lawrence	Kansas	66044–	30,205
Fort Scott Housing Authority	315 Scott Avenue	Fort Scott	Kansas	66701–	12,238
Pike County Housing Authority	P.O. Box 1468	Pikeville	Kentucky	41501–	45,061
Somerset Housing Authority	P.O. Box 449	Somerset	Kentucky	42502–	32,454
Boone Co. Housing Authority	P.O. Box 536	Burlington	Kentucky	41005–	34,057
Cynthiana Housing Authority	P.O. Box 351	Cynthiana	Kentucky	41031–	43,464
Newport Housing Authority	P.O. Box 459	Newport	Kentucky	41072–	28,737
Georgetown Housing Authority	139 Scroggin Park	Georgetown	Kentucky	40324–	11,940
Paducah Housing Authority	P.O. Box 2267	Paducah	Kentucky	42002–	32,611
Bowling Green CDA	P.O. Box 430	Bowling Green	Kentucky	42102–	38,825
Greenup Co	1214 Riverside Boulevard	Wurtland	Kentucky	41144–	43,706
Kentucky Housing Authority	1231 Louisville Road	Frankfort	Kentucky	40601–	36,874
Floyd County Housing Authority	36 Blaine Hall Street, Apt. 37	Prestonburg	Kentucky	41653–	32,320
Pineville Housing Authority	P.O. Box 460	Pineville	Kentucky	40977–	14,832
Lexington Housing Authority	300 West New Circle Road	Lexington	Kentucky	40203–	41,135
Jefferson Co. Housing Authority	801 Vine Street	Louisville	Kentucky	40324–	39,666
Louisville Housing Authority	420 S. 8th Street	Louisville	Kentucky	40203–	46,344
Henderson Housing Authority	111 South Adams Street	Henderson	Kentucky	42420–	30,797
Cumberland Valley Housing Authority.	P.O. Box 806	Barbourville	Kentucky	40906–	46,350
Lafayette Housing Authority	100 C O Circle	Lafayette	Louisiana	70501–	30,480
Jefferson Parish Housing Authority.	1718 Betty Street	Marrero	Louisiana	70072–	46,020
Webster Parish Housing Authority.	P.O. Box 389	Minden	Louisiana	71055–	22,423
Lincoln Parish Housing Authority.	109 E. Mississippi	Ruston	Louisiana	71270–	14,528
Lafourche Parish Housing Authority.	P.O. Drawer 5548	Thibodaux	Louisiana	70302–	30,000
Bienville Parish Housing Authority.	109 E. Mississippi	Ruston	Louisiana	71270–	14,528
Lake Charles Housing Authority	P.O. Box 1206	Lake Charles	Louisiana	70602–	14,397
Winn Parish Housing Authority	P.O. Box 951	Winnfield	Louisiana	71483–	21,730
DeSoto Parish	533 Jordan St.	Shreveport	Louisiana	71101–	14,528
Washington Parish Housing Authority.	26074 Hwy. 21, Box 12	Angie	Louisiana	70426–	17,706
Maine State Housing Authority	353 Water Street	Augusta	Maine	04330–	46,350
Old Town, ME Housing Authority.	165 South Main Street	Old Town	Maine	04468–	36,855
Portland Housing Authority	14 Baxter Boulevard	Portland	Maine	04101–	46,350
Caribou, ME Housing Authority	25 High Street	Caribou	Maine	04736–	36,139
Bangor, ME Housing Authority	161 Davis Road	Bangor	Maine	04101–	35,996
Westbrook, ME Housing Authority.	30 Liza Harmon Drive	Westbrook	Maine	04092–	46,350
Augusta, ME Housing Authority	16 Convy Street	Augusta	Maine	04330–	24,509
Calvert County Housing Authority.	P.O. Box 2509	Prince Frederick	Maryland	20678–	37,277
Carrol County Bureau of Housing Community Dev.	10 Distillary Drive	Westminister	Maryland	21157–	33,326
City of Westminister Public Housing Agency.	56 West Main Street	Westminister	Maryland	21157–	34,908
State of Maryland Housing	100 Community Place	Crownsville	Maryland	21032–	25,000
Housing Authority of the City of Frederick.	209 Madison Street	Frederick	Maryland	21701–	40,295
HA of the City of Hagerstown	35 W. Baltimore Street	Hagerstown	Maryland	21701–	46,350
Housing Opportunities Community.	10400 Detrick Avenue	Kensington	Maryland	20895–	46,350
Hartford County Housing Agency.	15 South Main Street	Bel Air	Maryland	21014–	42,741
HA of the City of Havre de Grace.	101 Stansbury Court	Havre De Grace	Maryland	21708–	27,126

FISCAL YEAR 1999 FUNDING AWARDS FOR FAMILY SELF-SUFFICIENCY—Continued

Applicant name	Address	City	State	ZIP	Amount
St. Mary's County Housing Authority.	PO Box 653	Leonardtown	Maryland	20650–	46,350
Cecil County Housing Agency	129 East Main Street	Elkton	Maryland	21921–	42,662
Prince George's County Housing Authority.	9400 Peppercorn Place, Suite 200.	Largo	Maryland	20774–	46,350
Rockville Housing Authority	14 Moore Drive	Rockville	Maryland	20850–	46,350
MA Dept. of Housing Community Development.	One Congress Street	Boston	Massachusetts	02114–	46,350
Greenfield Housing Authority	One Elm Terrace	Greenfield	Massachusetts	01301–	40,500
Brookline MA Housing Authority	90 Longwood Avenue	Brookline	Massachusetts	00216–	42,222
Saugus, MA Housing Authority	19 Talbot Street	Saugus	Massachusetts	01906–	34,598
Woburn, MA Housing Authority	59 Campbell Street	Woburn	Massachusetts	01801–	46,350
Everett, MA Housing Authority	90 Chelsea Street	Everett	Massachusetts	02149–	46,350
Leominister, MA Housing Authority.	100 Main Street	Leominster	Massachusetts	01453–	41,638
Andover, MA Housing Authority	100 Morton Street	Andover	Massachusetts	01810–	46,350
North Andover, MA Housing Authority.	One Morkeski Meadows	North Andover	Massachusetts	01845–	25,441
Lowell, MA Housing Authority	350 Moody Street	Lowell	Massachusetts	01853–	46,350
Shrewsbury, MA Housing Authority.	36 North Quinsigamond Avenue.	Shrewsbury	Massachusetts	01545–	24,772
Milford, MA Housing Authority	45 Birmingham Court	Milford	Massachusetts	01757–	13,637
Gardner, MA Housing Authority	116 Church Street	Gardner	Massachusetts	01440–	42,890
Gloucester, MA Housing Authority.	99 Prospect Street	Gloucester	Massachusetts	01913–	35,266
North Attleborough, MA Housing Authority.	20 South Washington Street	North Attleborough	Massachusetts	02760–	29,926
Attleborough, MA Housing Authority.	37 Carlon Street	Attleborough	Massachusetts	02703–	25,116
Norwood, MA Housing Authority	40 William Shyne Circle	Norwood	Massachusetts	02062–	40,757
Holbrook, MA Housing Authority	One Holbrook Court	Holbrook	Massachusetts	02343–	29,362
Dedham, MA Housing Authority	163 Dedham Boulevard	Dedham	Massachusetts	02026–	41,960
Amherst, MA Housing Authority	33 Kellogg Avenue	Amherst	Massachusetts	01002–	25,126
Dennis, MA Housing Authority	167 Center Street	South Dennis	Massachusetts	02660–	34,306
Avon, MA Housing Authority	1 Fellowship Circle	Avon	Massachusetts	02322–	25,441
Mansfield, MA Housing Authority.	22 Bicentennial Court	Mansfield	Massachusetts	02048–	24,846
Reading, MA Housing Authority	22 Frank D. Tanner Drive	Reading	Massachusetts	01867–	27,291
Brockton, MA Housing Authority	45 Goddard Road	Brockton	Massachusetts	02403–	45,114
Arlington, MA Housing Authority	4 Winslow Street	Arlington	Massachusetts	02174–	28,954
Medford, MA Housing Authority	121 Riverside Avenue	Medord	Massachusetts	02155–	39,130
Peabody, MA Housing Authority	75 North Central Street #2	Peabody	Massachusetts	01960–	35,762
Plymouth, MA Housing Authority.	69 Allerton Street	Plymouth	Massachusetts	01720–	33,993
Framingham, MA Housing Authority.	1 John J. Brady Drive	Framingham	Massachusetts	01701–	46,350
Melrose, MA Housing Authority	910 Main Street	Melrose	Massachusetts	03276–	27,069
Acton, MA Housing Authority	68 Windsor Avenue	Acton	Massachusetts	01720–	32,241
Hanson, MA Housing Authority	Meetinghouse Lane	Hanson	Massachusetts	02341–	24,395
Methuen, MA Housing Authority	24 Mystic Street	Methuen	Massachusetts	01844–	19,500
Quincy, MA Housing Authority	80 Clay Street	Qunicy	Massachusetts	02710–	46,350
Lynn MA Housing Authority	174 South Common Street	Lynn	Massachusetts	01905–	45,895
Braintree, MA Housing Authority	25 Roosevelt Street	Braintree	Massachusetts	02184–	13,926
Wakefield, MA Housing Authority.	26 Crescent Street	Wakefield	Massachusetts	01880–	24,888
Danvers, MS Housing Authority	14 Stone Street	Danvers	Massachusetts	01923–	23,013
Holyoke, MA Housing Authority	475 Maple Street	Holyoke	Massachusetts	01040–	42,000
Salem Housing Authority	27 Charter Street	Salem	Massachusetts	01970–	45,076
Chelmsford, MA Housing Authority.	10 Wilson Street	Chelmsford	Massachusetts	01824–	24,804
Somerville, MS Housing Authority.	30 Memorial Road	Somerville	Massachusetts	02145–	43,260
Worcester, MA Housing Authority.	40 Belmont Street	Worcester	Massachusetts	01605–	36,834
Traverse City H.C	10200 Carter Centre	Traverse	Michigan	49684–	28,392
Wayne CPD	600 Randolph	Detroit	Michigan	48226–	33,300
Kent Co. H.C	741 Beltline Avenue	Grand Rapids	Michigan	49505–	42,189
Dearborn Hts. Housing Authority.	26155 Richardson Street	Dearborn Heights	Michigan	48127–	31,320
Plymouth H.C	1160 Sheridan	Plymouth	Michigan	48107–	41,894
Detroit H.C	1301 East Jefferson Avenue	Detroit	Michigan	48207–	46,350
Saginaw H.C	2811 Davenport	Saginaw	Michigan	48602–	25,500

FISCAL YEAR 1999 FUNDING AWARDS FOR FAMILY SELF-SUFFICIENCY—Continued

Applicant name	Address	City	State	ZIP	Amount
Grand Rapids, H.C	1420 Fuller Avenue SE	Grand Rapids	Michigan	49507–	46,350
Jackson H.C	301 Steward Avenue	Jackson	Michigan	49201–	24,274
Westland H.C	32175 Dorsey Road	Westland	Michigan	48185–	30,596
NW Minnesota Multi-Co. HRA	P.O. Box 128	Mentor	Minnesota	56736–	32,782
St. Louis Park Housing Authority.	5005 Minnetonka Blvd.	St. Louis Park	Minnesota	55416–	21,444
Washington County HRA	321 Broadway Avenue	St. Paul Park	Minnesota	55071–	24,044
South St. Paul HRA	125 South Third Avenue	South St. Paul	Minnesota	55075–	42,800
Brainerd HRA	410 East River Road	Brainerd	Minnesota	56401–	41,752
South Eastern Minnesota Mult	134 East Second Street	Wabasha	Minnesota	55981–	45,411
Scott County HRA	323 South Naumkeag Street	Shakopoee	Minnesota	55379–	15,943
Dakota County Housing Authority.	2496 145th Street West	Rosemount	Minnesota	55068–	40,998
Metropolitan Council HRA	230 East 5th Street	St. Paul	Minnesota	55105–	46,350
Plymouth HRA	3400 Plymouth Boulevard	Plymouth	Minnesota	55441–	14,557
Winona HRA	1756 Kraemer Drive	Winona	Minnesota	55987–	12,180
Duluth HRA	222 East 2nd Street	Duluth	Minnesota	55816–	46,350
South Central Minnesota Multi-Co..	410 Jackson Street, Suite 1000	Mankato	Minnesota	56001–	31,027
MS Regional HA No. IV	P.O. Box 1051	Columbus	Mississippi	39703–	26,800
TN Valley Regional Housing Authority.	P.O. Box 1329	Corinth	Mississippi	38834–	24,182
North Delta Regional Housing Authority.	P.O. Box 1153	Clarksdale	Mississippi	38614–	29,250
MS Regional HA No. VII	P.O. Box 886	McComb	Mississippi	39648–	24,649
MS Regional HA No. V	P.O. Box 419	Newton	Mississippi	39345–	28,083
MS Regional HA No. VIII	P.O. Box 2347	Gulfport	Mississippi	39503–	38,162
St. Clair Housing Authority	106 W. 4th Street	Appleton	Missouri	64724–	29,367
HA of the City of St. Charles	1041 Olive Street	St. Charles	Missouri	63301–	30,789
St. Francois County PHA	403 Glendale Street	Park Hills	Missouri	63601–	25,113
Ripley County PHA	3019 Fair St	Poplar Bluff	Missouri	63901–	25,913
HA of the City of St. Louis	4100 Lindell Blvd	St. Louis	Missouri	63108–	40,150
Liberty Housing Authority	P.O. Box 159	Liberty	Missouri	64068–	33,089
Franklin County PHA	4640 Yaeger Road	Hillsboro	Missouri	63050–	30,051
St. Louis County Housing Authority.	8865 Natural Bridge	St. Louis	Missouri	63121–	30,080
Springfield Housing Authority	421 W. Madison St	Springfield	Missouri	65806–	24,293
Lincoln County PHA	16 North Court	Bowling Green	Missouri	63334–	25,539
Kansas City Housing Authority	712 Broadway	Kansas City	Missouri	64105–	36,232
Phelps County PHA	#4 Industrial Drive	St. James	Missouri	65559–	23,558
Billings Housing Authority	2415 First Ave. N	Billings	Montana	59101–	38,649
Missoula Housing Authority	1319 E. Broadway	Missoula	Montana	59802–	30,622
Helena Housing Authority	812 Abbey St	Helena	Montana	59601–	45,998
Kearney Housing Authority	2715 Avenue I	Kearney	Nebraska	68847–	28,971
Bellevue Housing Authority	8214 Armstrong Circle	Omaha	Nebraska	68147–	27,335
Douglas County Housing Authority.	5404 North 107th Plaza	Omaha	Nebraska	68134–	32,540
Central Nebraska Joint Housing	P.O. Box 509	Loup City	Nebraska	68853–	25,421
Blair Housing Authority	758 South 16th Street	Blair	Nebraska	68008–	15,289
Goldenrod Joint Housing Authority.	P.O. Box 280	Windsor	Nebraska	68791–	28,326
Norfolk Housing Authority	111 S. First Street	Norfolk	Nebraska	68701–	32,782
North Las Vegas Housing Authority.	1632 Yale Street	North Las Vegas	Nevada	89030–	46,350
Clark Co. Housing Authority	5390 E. Flamingo Road	Las Vegas	Nevada	89122–5338	45,995
Las Vegas Housing Authority	P.O. Box 1897	Las Vegas	Nevada	89125–1897	46,350
Keene, NH Housing Authority	105 Castle Street	Keene	New Hampshire	03431–	36,355
Manchester Housing Redevelopment Authority.	198 Hanover Street	Manchester	New Hampshire	03104–	46,138
Dover, NH Housing Authority	62 Whittier Street	Dover	New Hampshire	03820–	12,497
Nashua, NH Housing Authority	101 Major Drive	Nashua	New Hampshire	03060–	34,544
Perth Amboy	881 Amboy Ave, P.O. Box 390	Perth Amboy	New Jersey	08862–	46,350
Vineland Housing Authority	191 Chestnut Avenue	Vineland	New Jersey	08360–5499	42,230
Lakewood Housing Authority	317 Sampson Avenue	Lakewood	New Jersey	08701–3565	46,350
NJDCA (Monmouth co.)	101 S. Broad Street CN800	Trenton	New Jersey	08625–0800	45,394
Dover Housing Authority	215 East Blackwell Street	Dover	New Jersey	07801–4142	45,404
Plainfield Housing Authority	510 East Front Street	Plainfield	New Jersey	07060–	42,967
Passaic Co Housing Authority	317 Pennsylvania Avenue	Paterson	New Jersey	07503–	36,553
Lakewood RAP	231 Third Street	Lakewood	New Jersey	08701–	46,350
Burlington Co. Housing Authority.	795 Woodlane Road	Mt. Holly	New Jersey	00860–6000	30,844

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Applicant name	Address	City	State	ZIP	Amount
W. East Orange Housing Authority.	160 Halsted Street	East Orange	New Jersey	07018–4228	46,350
Monmouth Co. Housing Authority.	P.O. Box 3000	Freehold	New Jersey	07728–	46,350
Asbury Park Housing Authority	1000½ Third Avenue	Asbury Park	New Jersey	08662–	44,000
Paterson Housing Authority	60 Van Housten Street PO Box H.	Paterson	New Jersey	07509–	45,887
Boonton Housing Authority	125 Chestnut Street	Boonton	New Jersey	07005–3761	45,895
Montclair Housing Authority	205 Claremont Avenue	Montclair	New Jersey	07042–	46,331
Woodbridge Housing Authority	10 Bunns Lane	Woodbridge	New Jersey	07095–	42,846
Weehawken Housing Authority	525 Gregory Avenue	Weehawken	New Jersey	07098–5713	45,805
Millville Housing Authority	P.O. Box 803 122 E Main Street.	Millville	New Jersey	08332–0803	29,804
Warren Co. Housing Authority	415B Front Street	Belvidere	New Jersey	07823–1512	46,350
Fort Lee Housing Authority	1403 Teresa Drive	Fort Lee	New Jersey	07024–2102	45,457
Long Branch Housing Authority	P.O. Box 336-Garfield Court	Long Beach	New Jersey	07740–	42,500
Union City Housing Authority	3911 Kennedy Blvd	Union City	New Jersey	07087–	46,150
Hunterdon Co. Housing Authority.	71 Main Street-Administration Bldg.	Flemington	New Jersey	08822–1200	46,331
Morris County Housing Authority.	99 Ketch Road	Morristown	New Jersey	07960–	46,350
Atlantic City Housing Authority	227 No. Vermont Avenue	Atlantic City	New Jersey	08404–	36,050
Neptune Housing Authority	Box 726	Neptune	New Jersey	07753–	37,153
Brick Housing Authority	165 Chambers Bridge Road	Brick	New Jersey	08723–	46,100
Truth or Consequences Housing Authority.	108 South Cedar Street	Truth or Consequences.	New Mexico	87571–	46,350
Alamogrodo Housing Authority	P.O. Box 5336	Alamogordo	New Mexico	88311–5336	46,350
Taos Co. Housing Authority	Box 4239	Taos	New Mexico	87571–	35,252
Dona Ana Co. Housing Authority.	2407 W. Picacho, Suite A–2	Las Curces	New Mexico	88005–	36,002
Clovis Housing Authority	P.O. Box 1240	Clovis	New Mexico	88102–	30,487
Santa Fe Co. Housing Authority	52 Camino De Jacobo	Santa Fe	New Mexico	87502–	38,792
Santa Fe Civic Housing Authority.	P.O. Box 4039	Santa Fe	New Mexico	87502–	39,140
Bernalillo Co. Housing Authority	620 Lomas Blvd NW	Albuquerque	New Mexico	87102–	40,825
Region IV Housing Authority	418 Main Street/EPCG	Clovis	New Mexico	88101–	32,782
Socoro Co. Housing Authority	PO Box 00	Socorro	New Mexico	87801–	19,140
Amherst Town Housing Authority.	1195 Main Street	Buffalo	New York	14029–2102	40,734
Colonie Town Housing Authority	242 Union Street	Schenectady	New York	12305–	44,453
Guilderland Town Housing Authority.	242 Union Street	Schenectady	New York	12305–	43,990
NY State Division of Housing	25 Beaver Street	New York	New York	10004–	23,175
Cohoes Housing Authority	100 Manor Sites	Cohoes	New York	12047–2603	37,371
North Tonawanda City Housing Authority.	1195 Main Street	Buffalo	New York	14209–	20,367
Babylon Housing Assist. Agency.	281 Phelps Land Room #9	N. Babylon	New York	11703–4006	45,928
Rochester Housing Authority	140 West Avenue	Rochester	New York	14611–2744	36,566
NYSHFA–DHCR	25 Beaver Street	New York	New York	10004–	23,175
Yorktown Housing Authority	363 Underhill Ave	Yorktown Heights	New York	10598–	46,350
North Fork Housing	110 South Street	Greenport	New York	1202–0300	37,500
Monticello Housing Authority	76 Evergreen Drive	Monticello	New York	12701–1630	46,331–
New Rochelle Municipal HA	50 Sickles Avenue	New Rochelle	New York	10801–4029	46,350
Gloversville Housing Authority	181 West Street	Gloversville	New York	12078–1911	41,581
City of White Plains Housing Authority.	255 Main Street	White Plains	New York	10601–2475	18,000
Poughkeepsie City Housing Authority.	P.O. Box 300	Poughkeepsie	New York	12602–0300	36,549
Amsterdam Housing Authority	52 Division Street	Amsterdam	New York	12010–4002	43,043
Fulton City Housing Authority	125 West Broadway	Fulton	New York	13069–	28,731
Buffalo City Housing Authority	470 Franklin Street	Buffalo	New York	14202–	39,000
Town of Smithtown Housing Authority.	P.O. Box 575	Smithtown	New York	11944–	44,594
Union Town Housing Authority	3111 East Main Street	Endwell	New York	13760–	26,068
Schenectady Housing Authority	375 Broadway	Schenectady	New York	12305–2595	31,615
Poughkeepsie Housing Authority.	21 Charles Street	Poughkeepsie	New York	12601–0632	44,440
Plattsburgh Housing Authority	39 Oak Street	Plattsburgh	New York	12901–2830	31,543
Albany Housing Authority	4 Lincoln Square	Albany	New York	12010–4002	42,948
Kiryas Joel Housing Authority	51 Forest Road Suite 360	Monroe	New York	10950–	46,350
Mountain Projects, Inc.	2251 Old Balsam Road	Waynesville	North Carolina	28786–	29,049

FISCAL YEAR 1999 FUNDING AWARDS FOR FAMILY SELF-SUFFICIENCY—Continued

Applicant name	Address	City	State	ZIP	Amount
Greensboro Housing Authority	P.O. Box 21287	Greensboro	North Carolina	27420–	46,350
Wake County Housing Authority	P.O. Box 399	Zebulon	North Carolina	27597–	28,223
East Spencer Housing Authority	P.O. Box 367	East Spencer	North Carolina	29039–	37,004
Asheville Housing Authority	P.O. Box 1898	Asheville	North Carolina	28802–	31,382
Northwestern Region Housing Authority.	P.O. Box 2510	Boon	North Carolina	28607–	34,145
Gastonia Housing Authority	P.O. Box 2398	Gastonia	North Carolina	28053–	32,000
Raleigh Housing Authority	P.O. Box 28007	Raleigh	North Carolina	27611–	36,660
Rowan County Housing Authority.	310 Long Meadow Drive	Salisbury	North Carolina	28147–	32,202
Asheboro Housing Authority	P.O. Box 609	Asheboro	North Carolina	27204–	32,569
Economic Improvement Council	P.O. Box 549	Edenton	North Carolina	27932–	28,567
Western Carolina C.A.A.	P.O. Box 685	Hendersonville	North Carolina	28793–	29,268
Concord Department of Housing.	P.O. Box 308	Concord	North Carolina	28025–	13,831
Statesville Housing Authority	110 West Allison Street	Statesville	North Carolina	28677–	41,419
Macon Prog. for Progress	P.O. Box 700	Franklin	North Carolina	28734–	20,169
Winston-Salem Housing Authority.	901 Cleveland Avenue	Winston-Salem	North Carolina	27101–	42,000
Chatham County Housing Authority.	190 Sanford Street	Pittsboro	North Carolina	27312–	22,967
Rocky Mount Housing Authority	P.O. Box 4717	Rocky Mount	North Carolina	27803–	31,149
Mid-East Regional Housing Authority.	P.O. Box 1046	Washington	North Carolina	27889–	23,277
Isothemal Planning & Development.	P.O. Box 841	Rutherfordton	North Carolina	28139–	30,480
Minot Housing Authority	310 Second St. SE	Minot	North Carolina	58701–	20,688
Sandhills Community Action	P.O. Box 937	Carthage	North Carolina	29327–	46,350
Sanford Housing Authority	P.O. Box 636	Sanford	North Carolina	27331–	32,505
Graham Housing Authority	P.O. Box 88	Graham	North Carolina	27253–	21,855
High Point Housing Authority	P.O. Box 1779	High Point	North Carolina	27261–	46,350
Brunswick County Housing Authority.	P.O. Box 9	Bolivia	North Carolina	28422–	28,755
Laurinburg Housing Authority	P.O. Box 1437	Lauringburg	North Carolina	28358–	39,937
Thomasville Housing Authority	201 James Avenue	Thomasville	North Carolina	27360–	24,000
Twin Rivers Opportunity	P.O. Box 1482	New Bern	North Carolina	28563–	35,371
Lexington Housing Authority	P.O. Box 1085	Lexington	North Carolina	27293–	37,454
Durham Housing Authority	P.O. Box 1726	Durham	North Carolina	27702–	46,104
Wilmington Housing Authority	P.O. Box 899	Wilmington	North Carolina	28402–	35,589
Grand Forks Housing Authority	1405 First Avenue N	Grand Forks	North Dakota	58201–	46,350
Tuscarawas Housing Authority	134 Second Street, SW	New Philadelphia	Ohio	4463–	46,282
Chillicothe House Authority	178 West Fourth Street	Chillocothe	Ohio	45601–	15,184
Pickaway Housing Authority	176 Rustic Drive	Circleville	Ohio	43113–	24,092
Lorain Housing Authority	1600 Kansas Ave.	Lorain	Ohio	44052–	46,105
Middletown Housing Authority	128 City Centre Mall	Middletown	Ohio	45402–	22,160
Cincinnati Housing Authority	16 West Central Parkway	Cincinnati	Ohio	45210–	46,350
Youngstown Housing Authority	131 W. Boardman St	Youngston	Ohio	44503–	33,372
Cuyahoga Housing Authority	1441 West 25th Street	Cleveland	Ohio	44113–	46,350
Hancock Housing Authority	129 W. Sandusky St	Findlay	Ohio	45840–	19,496
Wayne Housing Authority	200 Market Street	Wooster	Ohio	44691–	36,192
Fayette Housing Authority	101 E. East Street	Washington Court	Ohio	43106–	26,892
Akron Housing Authority	100 West Cedar Street	Akron	Ohio	44307–	31,574
Logan Housing Authority	116 North Everett St	Bellefontain	Ohio	43311–	35,229
Adams Housing Authority	900 Cemetary Street	Manchester	Ohio	45144–	31,714
Lucas Housing Authority	435 Nebraska Avenue	Toledo	Ohio	43697–	38,464
Cambridge Housing Authority	P.O. Box 1388	Cambridge	Ohio	43725–	29,916
Allen Housing Authority	600 South Main Street	Lima	Ohio	45804–	29,616
Clermont Housing Authority	P.O. Box 151–65 S. Market Street.	Batavia	Ohio	45103–	21,258
Vinton Housing Authority	P.O. Box 487	McArthur	Ohio	45651–	32,730
Columbus Housing Authority	960 East Fifth Avenue	Columbus	Ohio	43201–	43,267
Warren Housing Authority	990 East Ridge Drive	Lebanon	Ohio	45036–	28,587
Hamilton Housing Authority	P.O. Box 69	Wauseon	Ohio	43567–	41,286
Morrow Housing Authority	298 East Center Street, Suite B	Marion	Ohio	43302–	31,471
Marietta-Housing Authority	P.O. Box 708	Marietta	Ohio	45750–	35,457
Bowling Green Housing Authority.	304 N. Church St	Bowling Green	Ohio	43402–	30,705
Medina Housing Authority	850 Walter Road	Medina	Ohio	44256–	31,090
Jefferson Housing Authority	815 North Sixth Avenue	Steubenville	Ohio	43952–	44,099
Zanesville Housing Authority	407 Pershing Road	Zanesville	Ohio	43701–	43,260
Morgan Housing Authority	4580 North State Route #376 NW.	McConnelsville	Ohio	43756–	17,000

FISCAL YEAR 1999 FUNDING AWARDS FOR FAMILY SELF-SUFFICIENCY—Continued

Applicant name	Address	City	State	ZIP	Amount
Springfield Housing Authority	437 East John Street	Springfield	Ohio	45505–	46,350
Portage Housing Authority	2832 State Route 59	Raveena	Ohio	44266–	38,223
Meigs Housing Authority	237 Race Street	Middleport	Ohio	45760–	11,619
Dayton Housing Authority	400 Wayne Avenue	Dayton	Ohio	45410–	39,322
Delaware Housing Authority	P.O. Box 1292	Delaware	Ohio	43051–	39,338
Oklahoma Housing Finance Agency (OHFA).	PO Box 26720	Oklahoma City	Oklahoma	73126–	38,617
Shawnee Housing Authority	PO Box 3427	Shawnee	Oklahoma	74802–	39,314
Muskogee Housing Authority	200 N 40th	Muskogee	Oklahoma	74401–	35,350
Stillwater Housing Authority	807 S. Lowry	Stillwater	Oklahoma	74074–	32,782
Hugo Housing Authority	PO Box 727	Hugo	Oklahoma	74743–	27,698
Oklahoma City PHA	1700 N.E. 4th Street	Oklahoma	Oklahoma	73117–	24,162
Broken Bow Housing Authority	PO Box 177	Broken Bow	Oklahoma	74728–	17,803
Norman Housing Authority	700 North Berry Road	Norman	Oklahoma	73069–	36,696
Tulsa PHA	PO BOX 6369	Tulsa	Oklahoma	74148–	37,785
Linn-Benton Housing Authority	1250 SE Queen Avenue	Albany	Oregon	97321–	41,917
Portland Housing Authority	135 SW Ash St	Portland	Oregon	97204–	46,350
HACSA of Lane Co.	177 Day Island Road	Eugene	Oregon	97401–	46,350
Mid Columbia Housing Authority	506 East 2nd Street	The Dalles	Oregon	97058–	29,512
Central Oregon Housing Authority.	2445 SW Canal Blvd	Remond	Oregon	97756–	32,233
Jackson County Housing Authority.	2231 Table Rock Road	Medford	Oregon	97501–	29,834
HA of Yamhill Co.	POB 865	McMinniville	Oregon	97128–	39,305
City of Salem Housing Authority	POB 808	Salem	Oregon	97308–	38,907
NE Oregon Housing Authority	POB 3357	La Grande	Oregon	97850–	28,942
Northwest Oregon Housing Authority.	1508 Exchange	Astoria	Oregon	97103–	27,428
Lincoln County Housing Authority.	POB 1470	Newport	Oregon	97365–	28,973
Malheur County Housing Authority.	959 Fortner Street	Ontario	Oregon	97914–	21,176
Douglas County Housing Authority.	902 West Stanton Street	Roseburg	Oregon	97204–	30,118
Marion County Housing Authority.	3150 Lancaster Drive NE	Salem	Oregon	97305–	33,356
Washington Co. Housing Authority.	111 NE Lincoln	Hillsboro	Oregon	97124–	43,561
Clackamas Co. Housing Authority.	POB 1510	Oregon City	Oregon	97045–	46,350
Centre Co. Housing Authority	602 E. Howard Street	Lewsburg	Pennsylvania	17837–	10,400
Lehigh Co. Housing Authority	635 Broad Street	Carlisle	Pennsylvania	17013–	26,000
Williamsport Housing Authority	505 Center Street	Milton	Pennsylvania	17847–	34,842
Union County Housing Authority	1610 Industrial Blvd.	Emmaus	Pennsylvania	18049–	41,200
Montour Co. Housing Authority	One Beaver Place	Danville	Pennsylvania	17821–	46,350
Lancaster City Housing Authority.	325 Church Street	Lancaster	Pennsylvania	17602–	43,855
Westmoreland County Housing	R.D. #6, P.O. BOX 223	Greensburg	Pennsylvania	15601–	39,155
Chester Housing Authority	1010 Madison Street, P.O. Box 380.	Chester	Pennsylvania	19016–	46,200
Indiana County Housing Authority.	104 Philadelphia Street	Indiana	Pennsylvania	15701–	16,865
Altoona Housing Authority	2700 Pleasant Valley Blvd.	Altoona	Pennsylvania	16601–	46,350
Dauphin Co. Housing Authority	PO Box 7598	Steelton	Pennsylvania	17113–	38,858
Pittsburgh Housing Authority	200 Ross Street, 9th Floor	Pittsburgh	Pennsylvania	15216–	35,000
Chester County Housing Authority.	30 West Barnard Street	West Chester	Pennsylvania	19382–	43,682
York Housing Authority	31 S. Broad Street	York	Pennsylvania	17405–	38,436
Northumberland Co. Housing Authority.	50 Mahoning Street	Sunbury	Pennsylvania	17801–	28,462
Cumberland Co. Housing Authority.	114 North Hanover Street	Reading	Pennsylvania	19606–	14,751
Armstrong County Housing Authority.	350 S. Jefferson Street	Kittanning	Pennsylvania	16201–	19,154
Montogmery Co. Housing Authority.	1875 New Hope Street	Norristown	Pennsylvania	19401–	46,350
Delaware Co. Housing Authority	1855 Constitution Avenue	Woodlyn	Pennsylvania	19094–	24,480
Harrisburg Housing Authority	351 Chestnut Street	Harrisburg	Pennsylvania	17101–	45,612
Adams Co. Housing Authority	139 Carlisle Street	Bellefonte	Pennsylvania	16823–	37,480
Berks Co. Housing Authority	1803 Butter Lane	Williamsport	Pennsylvania	17701–	36,013

FISCAL YEAR 1999 FUNDING AWARDS FOR FAMILY SELF-SUFFICIENCY—Continued

Applicant name	Address	City	State	ZIP	Amount
Sunbury Housing Authority	705 Market Street, P.O. Box 458.	Indiana	Pennsylvania	15701–	28,462
Wilkes-Barre Housing Authority	50 Lincoln Plaza	Wilkes-Barre	Pennsylvania	18702–	44,712
Caroline Housing Authority	P.O. Box 8	Ponce	Puerto Rico	00733–	24,153
Ponce Housing Authority	P.O. Box 1709	Ponce	Puerto Rico	02882–	24,434
Coventry RI Housing Authority	14 Manchester Cricle	Cumberland	Rhode Island	02864–	39,000
East Greenwich, RI Housing Authority.	146 First Avenue	North Providence	Rhode Island	02904–	28,199
Providence, RI Housing Authority.	100 Broad Street	Providence	Rhodel Island	02903–	46,350
Cumberland, RI Housing Authority.	One Mendon Road	Central Falls	Rhode Island	02863–	41,097
North Providence, RI Housing Authority.	945 Charles Street	Coventry	Rhode Island	02864–	35,513
Pawtucket, RI Housing Authority.	214 Roosevelt Avenue	Providence	Rhode Island	02903–	37,198
Narragansett, RI Housing Authority.	25 Fifth Avenue	East Greenwich	Rhode Island	02818–	37,700
Central Falls, RI Housing Authority.	30 Washington Street	Woonsocket	Rhode Island	02895–	29,926
Woonsockett, RI HA	679 Social Street	Pawtucket	Rhode Island	02862–	10,300
Charleston County Housing Authority.	P.O. Box 6188	Anderson	South Carolina	29624–	30,489
Myrtle Beach Housing Authority	P.O. Box 2468	Greenwood	South Carolina	29624–	39,988
Beaufort Housing Authority	P.O. Box 1104	Conway	South Carolina	29527–	21,210
Greenwood Housing Authority	P.O. Box 973	Florence	South Carolina	29503–	32,782
SC State Fin. & Dev	919 Bluff Road	Columbia	South Carolina	29201–	41,191
Anderson Housing Authority	1335 E. River Street	Myrtle Beach	South Carolina	29578–	31,808
Florence Housing Authority	P.O. Drawer 969	Beaufort	South Carolina	29901–	28,591
Columbia Housing Authority	1917 Harden Street	Columbia	South Carolina		21,147
Conway Housing Authority	2303 Leonard Avenue	Columbia	South Carolina	29204–	25,619
Mobridge Housing Authority	P.O. Box 370	Mobridge	South Dakota	57601–	32,030
Brookings Housing Authority	Post Office Box 432	Brookings	South Dakota	57006–	20,845
East TN Human Resource Agency Inc.	9111 Cross Park Drive	Knoxville	Tennessee	37923–	30,323
Jackson Housing Authority	P.O. Box 3188	Jackson	Tennessee	38301–	38,934
Oak Ridge Housing Authority	10 Van Hicks Lane	Oak Ridge	Tennessee	37830–	30,385
Crossville Housing Authority	P.O. Box 425	Crossville	Tennessee	38557–	35,866
Kingsport Housing Authority	P.O. Box 44	Kinsport	Tennessee	37202–	44,478
Metro Development & Housing	P.O. Box 846	Nashville	Tennessee	37202–	46,350
Southeast TN Human Resource Agency.	P.O. Box 909	Dunlap	Tennessee	37327–	38,678
Montogmery Housing Authority	1022 McCall	Conroe	Texas	77301–	29,981
Hidalgo County Housing Authority.	1800 N. Texas Blvd	Weslaco	Texas	78596–	36,786
Tarrant County Housing Authority.	P.O. Box 672	Taylor	Texas	76574–	41,689
Harris County Housing Authority	2727 El Camino	Houston	Texas	77054–	33,835
Central Texas COG	P.O. Box 729	Belton	Texas	76513–	31,569
Deep E. Texas COG	274 E. Lamar	Jasper	Texas	75951–	30,404
Corpus Christi Housing Authority.	3701 Ayers Street	Corpus Christi	Texas	78415–	29,546
Corsicana Housing Authority	P.O. Box 1090	Corsicana	Texas	75110–	41,609
Plano Housing Authority	P.O. Box 338	Celeste	Texas	75423–	32,237
Rosenberg Housing Authority	927 Second Street	Rosenberg	Texas	77471–	20,000
Lubbock Housing Authority	P.O. Box 2568	Lubbock	Texas	79408–	27,012
Port Arthur Housing Authority	P.O. Box 2295	Port Arthur	Texas	77643–	42,800
Tyler Housing Authority	P.O. Box 2039	Tyler	Texas	75710–	39,000
Wichita Falls Housing Authority	P.O. Box 1431	Witchita Falls	Texas	76307–	35,678
Texoma COG	3201 Texoma Parkway	Sherman	Texas	75020–	33,000
Fort Worth Housing Authority	P.O. Box 430	Fort Worth	Texas	76101–	39,348
Houston Housing Authority	P.O. Box 2971	Houston	Texas	77252–	25,875
Brownsville Housing Authority	P.O. Box 4420	Brownsville	Texas	78523–	22,324
Kingsville Housing Authority	1000 W Corral	Kingsville	Texas	78363–	45,540
Austin Housing Authority	P.O. Box 6159	Austin	Texas	78762–	32,448
Garland Housing Authority	210 Carver St.	Garland	Texas	75046–	39,436
Cameron County Housing Authority.	P.O. Box 5806	Brownsville	Texas	78520–	37,469
Texas City Housing Authority	817 Second Avenue North	Texas City	Texas	77590–	24,846
Baytown Housing Authority	805 Nazro Street	Baytown	Texas	77520–	43,984
Galveston Housing Authority	4700 Broadway	Galveston	Texas	77551–	33,592
San Angelo Housing Authority	115 West 1st Street	San Angelo	Texas	76903–	30,821

FISCAL YEAR 1999 FUNDING AWARDS FOR FAMILY SELF-SUFFICIENCY—Continued

Applicant name	Address	City	State	ZIP	Amount
Harlingen Housing Authority	P.O. Box 1669	Harlingen	Texas	78551–	32,251
Waco Housing Authority	P.O. Box 978	Waco	Texas	76703–	33,954
Arlington Housing Authority	501 W. Sanford St	Arlington	Texas	76011–	40,842
Provo Housing Authority	650 W. 100 N	Provo	Utah	84601–	38,545
Cedar City Housing Authority	2390 West HWY 56	Cedar City	Utah	84720–	40,344
Utah County Housing Authority	240 E. Center	Provo	Utah	84606–	37,388
Salt Lake City Housing Authority.	1776 SW Temple	Salt Lake City	Utah	84115–	24,077
Salt Lake County Housing Authority.	3595 S. Main Street	Salt Lake City	Utah	84115–	39,891
Davis County Housing Authority	P.O. Box 328	Farmington	Utah	84025–	36,052
West Valley City Housing Authority.	3600 Constitution Blvd	West Valley City	Utah	84119–	31,606
Vermont State Housing Authority.	One Prospect Street	Montpelier	Vermont	05602–	42,769
Burlington, VT Housing Authority.	230 St. Paul Street	Burlington	Vermont	05401–	35,025
VIHA PHA (Virgin Islands)	P.O. Box 7668	St. Thomas	Virgin Island	00801–	45,798
Virginia Beach Housing Authority.	2424 Courthouse Drive, Building 18A.	Virginia Beach	Virginia	23456–	33,121
Hampton Housing Authority	P.O. Box 280	Hampton	Virginia	23669–	33,566
Newport News Housing Authority.	P.O. Box 77	Newport News	Virginia	23607–	46,350
Lee & Wise County	P.O. Box 665	Jonesville	Virginia	24263–	31,702
Charlottesville Housing Authority.	P.O. Box 1405	Charlottesville	Virginia	22902–	23,373
Albemarle Housing Authority	401 McIntire Road	Charlottesville	Virginia	22902–	41,280
Chesapeake Housing Authority	P.O. Box 1304	Chesapeake	Virginia	23320–	37,225
Portsmouth Housing Authority	P.O. Box 1098	Portsmouth	Virginia	23705–	36,612
Waynesboro Housing Authority	1700 New Hope Road	Waynesboro	Virginia	22980–	29,943
City Of Tacoma Housing Authority.	902 South L. Street	Tacoma	Washington	98405–	38,064
Vancouver Housing Authority	2500 Main Street	Vancouver	Washington	98660–	39,665
City Of Everett Housing Authority.	P.O. Box 1547	Everett	Washington	90206–	38,025
Spokane Housing Authority	West 55 Mission Street	Spokane	Washington	99201–	46,350
Walla Walla Housing Authority	501 Cayuse Street	Walla Walla	Washington	99362–	26,000
Thurston County Housing Authority.	505 West Fourth Avenue	Olympia	Washington	98501–	46,350
Pierce County Housing Authority.	P.O. Box 45410	Tacoma	Washington	98445–	40,566
City Of Richland Housing Authority.	650 George Washington Way	Richland	Washington	99352–	42,561
Snohomish County Housing Authority.	12645 4th Avenue West, Suite 200.	Everett	Washington	98204–	24,383
City Of Pasco Housing Authority.	820 North First Avenue	Pasco	Washington	99301–	34,961
Island County Housing Authority	7 Northwest 6th Street	Coupeville	Washington	98239–	43,260
Wenatchee Housing Authority	1555 South Methow Street	Wenatchee	Washington	98801–	34,128
King County Housing Authority	15455 65th Avenue South	Seattle	Washington	98188–	46,350
Kitsap County Consolidated	9265 Bayshore Drive Northwest	Silverdale	Washington	98383–	43,870
City Of Kennewick Housing Authority.	P.O. Box 6737	Kennewick	Washington	99336–	45,895
City Of Bremerton Housing Authority.	P.O. Box 4460	Bremerton	Washington	98312–	20,686
Asotin County Housing Authority.	1212 Fair Street	Clarkston	Washington	99403–	28,730
Clallam County Housing Authority.	2603 South Francis Street	Port Angeles	Washington	98362–	40,973
Jefferson County Housing Authority.	P.O. Box 2109	Port Townsend	Washington	98368–	27,958
City Of Longview Housing Authority.	1207 Commerce Avenue	Longview	Washington	98632–	29,046
Grant County Housing Authority	1139 Larson Boulevard	Moses Lake	Washington	98837–	41,235
Yakima Housing Authority	P.O. Box 2910	Yakima	Washington	98907–	37,854
Bellingham Housing Authority	P.O. Box 9701	Bellingham	Washington	98227–	37,912
Kanawha County Housing & Redevelopment Auth..	P.O. Box 3826	Charleston	West Virginia	25338–	32,785
Charleston Housing Agency	P.O. Box 86	Charleston	West Virginia	25321–	30,276
Mingo County Housing Authority.	P.O. Box 2239	Williamson	West Virginia	25661–	19,800

FISCAL YEAR 1999 FUNDING AWARDS FOR FAMILY SELF-SUFFICIENCY—Continued

Applicant name	Address	City	State	ZIP	Amount
Raleigh County Housing Authority.	P.O. Box BD	Beckley	West Virginia	26802–	29,457
HA of the City of Weirton	525 Cove Road	Weirton	West Virginia	26062–	26,263
Parkersburg Housing Authority	1901 Cameron Avenue	Parkersburg	West Virginia	26101–	24,000
Benwood Housing Authority	2200 Marshall Street	Benwood	West Virginia	26301–	32,160
Huntington WV Housing Authority.	P.O. Box 2183	Huntington	West Virginia	25722–	30,967
Greenbrier County Housing Authority.	103 W Randolph St	Lewisburg	West Virginia	24901–	20,420
Housing Authority of the City of Buckhannon.	23½ Hinkle Drive	Buckhannon	West Virginia	26201–	19,920
Housing Authority of the City Fairmont.	517 Fairmont Avenue	Fairmont	West Virginia	26554–	22,660
Eau Claire County Housing Authority.	721 Oxford Avenue, Rm 1590	Eau Clair	Wisconsin	54703–	35,049
Dunn County Housing Authority	1421 Stout Rd., Suite 100	Menomonie	Wisconsin	54751–	33,901
Racine Co. Housing Authority	837 Main Street	Racine	Wisconsin	53403–	39,030
Milwaukee Co. Housing Authority.	907 North 10th Street	Milwaukee	Wisconsin	53233–	45,264
Kenosha County Housing Authority.	625–52nd Street	Kenosha	Wisconsin	53104–	39,778
Green Bay City Housing Authority.	100 North Jefferson St., Rm 608.	Green Bay	Wisconsin	54301–	40,796
Appleton Housing Authority	525 North Oneida Street	Appleton	Wisconsin	54911–	35,425
Walworth County Housing Authority.	Courthouse Annex, W3929 County NN.	Elkhorn	Wisconsin	53121–	33,383
Superior Housing Authority	1219 N. Eighth Street	Superior	Wisconsin	54880–	37,507
Cheyenne Housing Authority	3304 Sheridan Ave	Cheyenne	Wyoming	82009–	24,928
Casper Housing Authority	1607 CY Ave., Suite 301	Casper	Wyoming	82604–	20,267

FISCAL YEAR 1999 FUNDING AWARDS FOR FAMILY SELF-SUFFICIENCY SUPPLEMENTAL

Applicant name	Applicant address	City	State	Zip	Amount
Arkadelphia Housing Authority	670 South 6th	Arkadelphia	Arkansas	71923–	$32,800
Stanislaus Housing Authority	1701 Robertson Road	Modesto	California	95352–	46,350
Pasadena Housing Authority	100 N. Garfield	Pasadena	California	91109–	44,279
San Mateo Housing Authority	264 Harbor Boulevard Bldg. A	Belmont	California	94002–	46,350
San Joaquin Housing Authority	PO Box 447	Stockton	California	95291–	41,746
Santa Rosa Housing Authority	PO Box 1806	Santa Rosa	California	95402–	46,350
Pomona Housing Authority	505 S. Garvey	Pomona	California	91769–	46,350
Santa Ana Housing Authority	20 Civic Plaza	Santa Ana	California	92702	46,350
San Diego County Housing Authority.	3989 Ruffins Rd	San Diego	California	92123–	46,350
Santa Monica Housing Authority	2121 Cloverfield Boulevard	Santa Monica	California	90404–	46,350
Yolo County Housing Authority	PO Box 1867	Woodland	California	95776–	31,782
Nevada County Housing Authority.	10433 Willow Valley Rd	Nevada City	California	95953–	31,502
Vallejo Housing Authority	PO Box 1432	Vallejo	California	94590–	46,350
Loveland Housing Authority	375 West 37th Street	Loveland	Colorado	80538–	23,829
Bridgeport Housing Authority	150 Highland Avenue	Bridgeport	Connecticut	06604–	39,000
Connecticut Department of Social Services.	25 Sigourney Street	Hartford	Connecticut	06106–	40,190
Ocala Housing Authority	P.O. Box 2468	Ocala	Florida	34478–2468	45,220
Miami-Dade Housing Authority	1401 NW 7th Street	Miami	Florida	33125–	46,350
Lee County Housing Authority	14170 Warner Circle NW	North Fort	Florida	33903–	23,500
City of Fort Pierce Housing Authority.	707 North 7th Street	Fort Pierce	Florida	33450–	44,641
City of Tampa Housing Authority.	1514 Union Street	Tampa	Florida	33607–	46,350
Hialeah Housing Authority	70 East 7th Street	Hialeah	Florida	33010–	19,406
Hillborough County Housing Authority.	P.O. Box 1110	Tampa	Florida	33601–	46,249
Fulton County Housing Authority.	10 Park Place South, S.E	Atlanta	Georgia	30303–2928	43,673
Decatur Housing Authority	P.O. Box 1627	Decatur	Georgia	30031–	45,007
Augusta Housing Authority	P.O. Box 3248	Augusta	Geogia	30904–1246	42,645
Springfield Housing Authority	200 North 11th Street	Springfield	Illinois	62703–	42,642
Kokomo Housing Authority	210 East Taylor Street	Kokomo	Indiana	46903–1207	31,521
South Bend Housing Authority	501 South Scott Street	Southbend	Indiana	46634–0057	32,960

FISCAL YEAR 1999 FUNDING AWARDS FOR FAMILY SELF-SUFFICIENCY SUPPLEMENTAL—Continued

Applicant name	Applicant address	City	State	Zip	Amount
Lafayette Housing Authority	100 Executive Drive	Lafayette	Indiana	47903–6687	32,787
Hammond Housing Authority	7329 Columbia Circle West	Hammond	Indiana	46324–	35,834
Gary Housing Authority	578 Broadway	Gary	Indiana	46402–	31,437
Council Bluffs Housing Authority	505 S. Sixth St.	Council Bluffs	Iowa	51501–	32,712
Chanute Housing Authority	110 South Ronda Lane	Chanute	Kansas	66720–1954	13,963
Atchinson Housing Authority	103 S. 7th Street	Atchison	Kansas	66002	13,649
Wichita Housing Authority	321 N. Riverview	Wichita	Kansas	67203–	46,350
City of Covington Housing Authority.	638 Madison Avenue	Covington	Kentucky	41011–2298	46,350
Campbellsville Public Housing Authority/Bardstown.	PO Box 597	Campbellsville	Kentucky	42719–	24,206
Richmond Section 8	PO Box 250	Richmond	Kentucky	40476–	31,468
New Orleans Housing Authority	918 Carondelet	New Orleans	Louisiana	71030–	31,200
Shreveport Housing Authority	623 Jordan	Shreveport	Louisiana	71101–	45,760
Calcasieu Parish Housing Authority.	PO Box 1583	Lake Charles	Louisiana	70602–1583	20,061
Mt. Desert Housing Authority	PO Box 28	Bar Harbor	Maine	04609–	34,951
Howard County Housing Authority.	6751 Columbia Gateway Dr. 3rd Fl.	Columbia	Maryland	21046–	30,359
Anne Arundel Co	7885 Gordon Court	Glen Burnie	Maryland	21060–2817	33,025
Baltimore City Housing Authority.	417 E. Fayette Street	Baltimore	Maryland	21202–	46,090
Tewksbury Housing Authority	Saunders Circle	Tewksbury	Massachusetts	02741	16,200
New Bedford Housing Authority	134 South Second Street	New Bedford	Massachusetts	02471–	45,128
Boston Housing Authority	52 Chauncy Street	Boston	Massachusetts	02111–	46,350
Flint Housing Commission	3820 Richfield Road	Flint	Michigan	48508–	40,000
Michigan State Housing Development Authority.	401 S. Washington Sq. PO Box 30044.	Lansing	Michigan	48909–	44,000
Wyoming Housing Corporation	2450 36th Street	Wyoming	Michigan	49509–	36,638
Virginia HRA	442 Pine Mill Court	Virginia	Minnesota	55792–3040	46,350
Long Beach Housing Authority	PO Box 418	Long Beach	Mississippi	39560–	18,500
Mississippi Regional Housing Authority VI.	PO Drawer 8746	Jackson	Mississippi	39284–8746	44,269
Biloxi Housing Authority	PO Box 447	Biloxi	Mississippi	39533–	20,500
Jasper County Housing Authority.	305 Virginia	Joplin	Missouri	64802–	23,522
Independence Housing Authority.	210 Pleasant Avenue	Independence	Missouri	64050–	40,170
New Hampshire Housing Finance Authority.	PO Box 5087	Manchester	New Hampshire	03108–	45,360
Laconia Housing and Redevelopment.	25 Union Avenue	Laconia	New Hampshire	03246–	37,492
Jersey City Housing Authority	400 US Highway #1	Jersey City	New Jersey	07309–	46,200
Paterson DCD	125 Ellison Street 4th Floor	Paterson	New Jersey	07505–	28,840
Glassboro Housing Authority	737 Lincoln Blvd	Glassboro	New Jersey	08028–	30,835
Albuquerque Housing Authority	1840 University SE	Albuquerque	New Mexico	87106–	38,501
Region VI Housing Authority	226 N. Main St. Suite 301	Roswell	New Mexico	88202–	21,112
Region II Housing Authority	220 Bernalillo Street	Las Vegas	New Mexico	87701–	40,320
Port Jervis Community Development.	13–19 Jersey Avenue P.O. Box 1002.	Port Jervis	New York	12771–	29,733
Bethlehem Tn	242 Union Street	Schenectady	New York	12305–1497	21,995
Coeymans Tn	242 Union Street	Schenectady	New York	12305–1497	21,995
Rotterdam Tn	242 Union St	Schenectady	New York	12305–1497	46,350
Ithaca Housing Authority	800 South Plain Street	Ithaca	New York	14850–5353	46,350
NYC Department of Housing Preservation and Development.	100 Gold Street	New York	New York	10038–1605	46,350
Syracuse Housing Authority	516 Burt Street	Syracuse	New York	13202–3999	44,079
Franklin-Vance-Warren Opportunity, Inc.	P.O. Box 1453	Henderson	North Carolina	27536–	37,861
Charlotte Housing Authority	P.O. Box 36795	Charlotte	North Carolina	28326–	41,180
Kinston Housing Authority	P.O. Box 697	Kinston	North Carolina	28502–	32,500
Coastal Community Action Agency.	P.O. Box 90	Beaufort	North Carolina	28516–	30,974
DOP Consolidated Human Services Agency.	P.O. Drawer 796	Jacksonville	North Carolina	28541–	24,067
Greenville Housing Authority	P.O. Box 1426	Greenville	North Carolina	27832–4	30,083
Fargo Housing Authority	P.O. Box 430	Fargo	North Dakota	58107–	34,604
Stutsman County Housing Authority.	217 First Avenue North	Jamestown	North Dakota	58072–	24,157

FISCAL YEAR 1999 FUNDING AWARDS FOR FAMILY SELF-SUFFICIENCY SUPPLEMENTAL—Continued

Applicant name	Applicant address	City	State	Zip	Amount
Erie Metropolitan Housing Authority.	322 Warren Street	Sandusky	Ohio	44870–	45,508
Jackson Metropolitan Housing Authority.	P.O. Box 619	Wellston	Ohio	45692–	35,666
Coos-Curry Housing Authority	1700 Monroe	North Bend	Oregon	97459–	34,635
Klamath Housing Authority	P.O. Box 5110	Klamath Falls	Oregon	97601–	21,742
Philadelphia Housing Authority	12 S. 23rd Street	Philadelphia	Pennsylvania	19103–	44,247
Clarion County Housing Authority.	8 West Main Street	Clarion	Pennsylvania	16214–	33,550
Butler County Housing Authority	111 South Cliff Street	Butler	Pennsylvania	16003–	37,548
Municipality of Aguas Buenas	P.O. Box 128	Aguas Buenas	Puerto Rico	00703–	17,486
Municipality of Hormigueros	Box 97	Hormigueros	Puerto Rico	00660–	46,350
Municipality of Adjuntas	Box 1009	Adjuntas	Puerto Rico	00601–	17,700
Municipality of Isabela	Box 507	Isabela	Puerto Rico	00662–	12,106
Municipality of Bayamon	Box 2988	Bayamon	Puerto Rico	00960–	17,330
Rhode Island Housing and Mortgage Finance Corp.	44 Washington Street	Providence	Rhode Island	02903–	46,150
Greenville Housing Authority	P.O. Box 10047	Greenville	South Carolina	29603	25,283
Spartanburg Housing Authority	P.O. Box 2828	Spartanburg	South Carolina	29306–	36,400
City of Charleston Housing Authority.	20 Franklin Street	Charleston	South Carolina	29401–	40,170
Sioux Falls Housing and Redevelopment Commission.	804 S. Minnesota Avenue	Sioux Falls	South Dakota	57104–	36,761
Tennessee Housing Development Agency.	PO Box 3550	Knoxville	Tennessee	37927–3550	35,692
El Paso Housing Authority	PO Box 9895	El Paso	Texas	07999–	31,624
Midland County Housing Authority.	600 N. Baird Suite B	Midland	Texas	79701–	35,854
Mesquite Housing Authority	PO Box 850137	Mesquite	Texas	75148–	22,355
City of Longview Housing Authority.	PO Box 1952	Longview	Texas	75606–1952	37,249
City of Grand Prairie Housing & Community Development.	PO Box 534045	Grand Prairie	Texas	75053–4245	40,776
Beaumont Housing Authority	PO Box 1312	Bueaumont	Texas	77708–	33,084
Anthony Housing Authority	PO Box 1710	Anthony	Texas	79821–	25,013
Travis County Housing Authority.	PO Box 1527	Austin	Texas	78767–	34,420
Pharr Housing Authority	211 W AUDREY	Pharr	Texas	78577–	41,195
Panhandle Community Services	PO Box 32150	Amarillo	Texas	79129–2150	40,442
Mission Housing Authority	906 E 8th Street	Mission	Texas	78572–	16,993
Texarkana Housing Authority	1611 N. Robinson Road	Texarkana	Texas	75501–	23,607
Edinburg Housing Authority	PO Box 295	Edinburg	Texas	78540–	34,966
San Antonio Housing Authority	PO Drawer 1300	San Antonio	Texas	78295–	39,415
Dallas Housing Authority	3939 N. Hampton	Dallas	Texas	75212–	42,120
South Plains Regional Housing Authority.	PO Box 690	Levelland	Texas	79336–	24,898
Port Isabel Housing Authority	PO Box 1196	Port Isabell	Texas	78578–1196	21,500
Grand County Housing Authority.	1075 S. Highway 191 Suite B	Moab	Utah	84532–	14,560
Carbon County Housing Authority.	251 South 1600 East	Price	Utah	84501–	18,236
Barre Housing Authority	4 Humbert Street	Barre	Vermont	05641–	24,092
Norfolk Redevelopment Housing Authority.	PO Box 968	Norfolk	Virginia	23501–	41,727
Grays Harbor County Housing Authority.	602 East First Street	Aberdeen	Washington	98520–2665	38,384
City of Seattle Housing Authority.	120 Sixth Ave., No	Seattle	Washington	98109–	46,350
Beckley Housing Authority	PO Box 1780	Beckley	West Virginia	25802–1780	22,620
Wheeling Housing Authority	11 Community St.—Elm Grove	Wheeling	West Virginia	26003–0289	35,050
Waukesha Housing Authority	120 Corrina Blvd	Waukehs	Wisconsin	53186–	46,350
Waukesha County Housing Authority.	120 Corrina Blvd	Waukens	Wisconsin	53186–	41,338

FISCAL YEAR 1999 FUNDING AWARD FOR FAMILY UNIFICATION PROGRAM

Applicant name	Address	City	State	Zip	Amount
Housing Authority of the City of Yuma.	1350 West Colorado St	Yuma	Arizona	85364	$564,684

FISCAL YEAR 1999 FUNDING AWARD FOR FAMILY UNIFICATION PROGRAM—Continued

Applicant name	Address	City	State	Zip	Amount
Alameda County Housing Authority.	22941 Atherton Street	Haywood	California	94541	584,964
Anaheim Housing Authority	201 S. Anaheim Blvd., Ste 203	Anaheim	California	92805	747,491
City of Los Angeles Housing Authority.	2600 Wilshire Blvd	Los Angeles	California	90057	882,744
County of Los Angeles Housing Authority.	4800 Cesar Chavez Avenue	Los Angeles	California	90022	780,324
Fresno City Housing Authority	1331 Fulton Mall	Fresno	California	93776	330,770
Fresno County Housing Authority.	1331 Fulton Mall	Fresno	California	93776	330,770
Mendocino Co. Community Development.	1076 N. State St	Ukiah	California	95482	106,864
Merced Co. Housing Authority	405''U'' Street	Merced	California	95340	626,783
Monterey Co. Housing Authority	123 Rico Street	Salinas	California	93907	132,364
Oceanside Housing Authority	300 N. Coast Highway	Oceanside	California	92054	623,892
Riverside Co. Housing Authority	5555 Arlington Avenue	Riverside	California	92504	576,636
Sacramento City Housing Authority.	601 I Street	Sacramento	California	95814	563,377
Sacramento County Housing Authority.	6011 I Street	Sacramento	California	95814	563,232
San Bernardino County HA	1053 North ''D'' Street	San Bernardino	California	92410	302,298
San Diego County Housing Authority.	3989 Ruffin Road	San Diego	California	92123	636,552
San Jose City Housing Authority	505 W. Julian Street	San Jose	California	95110	1,346,099
Santa Clara County Housing Authority.	505 W. Julian Street	San Jose	California	95110	1,165,518
Stanislaus Co. Housing Authority.	PO Box 581918	Modesto	California	95358	319,368
Jefferson County Housing Authority.	6025 West 38th Avenue	Wheatridge	Colorado	80033	687,108
District of Columbia Housing Authority.	1133 North Capitol, NE	Washington, DC	District of Columbia.	20002	532,717
Brevard County Housing Authority.	615 Kuret Court	Merritt Island	Florida	32953	626,484
Broward County Housing Authority.	1773 N. State Road	Lauderhill	Florida	33313	530,619
Hialeah Housing Authority	70 East 7th Street	Hialeah	Florida	33010	817,008
Lakeland Housing Authority	430 S. Hartsell Ave., PO Box 1009.	Lakeland	Florida	33802	396,865
Miami-Dade Housing Agency	1401 NW 7th Street	Miami	Florida	33125	845,352
Palm Beach County Housing Authority.	3432 West 45th Street	West Palm Beach	Florida	33407	837,300
Pasco County Housing Authority	14517 7th Street	Dade City	Florida	33523	586,092
Tampa Housing Authority	1514 Union Street	Tampa	Florida	33607	752,352
Atlanta HA	1720 Peachtree Street, NW	Atlanta	Georgia	30309	1,044,000
Augusta HA	PO Box 3246	Augusta	Georgia	30914	524,652
Decatur Housing Authority	PO Box 1627	Decatur	Georgia	30031	427,074
Rome Housing Authority	PO Box 1428	Rome	Georgia	30162	102,678
Guam HURA	117 Bien Venida Avenue	Sinajana	Guam	96926	944,412
Champaign Housing Authority	205 West Park Avenue	Champaign	Illinois	61820	218,346
Chicago Housing Authority	626 West Jackson Blvd	Chicago	Illinois	60661	948,048
Kokomo Housing Authority	210 E. Taylor St., PO Box 1207	Kokomo	Indiana	46903	12,951
Broussard PHA	PO Box 553	Broussard	Louisiana	70518	186,716
Housing Authority City of Baltimore.	417 E. Fayette Street	Baltimore	Maryland	21202	428,274
Housing Authority of Prince George's County.	9400 Peppercorn Place	Largo	Maryland	20774	982,176
MA Dept. of Housing and Community Dev. (DHCD).	1 Congress Street	Boston	Massachusetts	02114	927,528
Worecester MA Housing Authority.	40 Belmont Street	Worcester	Massachusetts	01749	428,856
Dearborn Hts HC	26155 Richardson	Dearborn Heights	Michigan	48127	381,924
Kent County HC	741 East Beltline Avenue NE	Grand Rapids	Michigan	49505	271,170
Saginaw HC	2811 Davenport St. Box A	Saginaw	Michigan	48602	494,784
Metropolitan Council HRA	230 East Fifth Street	St. Paul	Minnesota	55101	572,712
Mississippi Regional HA No. VI	PO Drawer 8746	Jackson	Mississipi	39284	728,365
City of Las Vegas Housing Authority.	420 N. 10th Street	Las Vegas	Nevada	89101	738,132
Clark Co. Housing Authority	5390 East Flamingo Rd.	Las Vegas	Nevada	89122	638,581
Nevada Rural Housing Authority	2100 California Street	Carson City	Nevada	89701	678,020
NJ Department of Community Affairs.	PO Box 51	Trenton	New Jersey	08625	745,846

FISCAL YEAR 1999 FUNDING AWARD FOR FAMILY UNIFICATION PROGRAM—Continued

Applicant name	Address	City	State	Zip	Amount
Bernalillo County Housing Authority.	620 Lomas Blvd. NW		New Mexico	87102	518,712
Binghamton Housing Authority (NEW).	35 Exchange St	Binghamton	New York	13901	231,933
NYC Depart. of Hsg. Preservation & Dev..	100 Gold St. Rm 501	New York	New York	10038	1,003,716
NYS DHCR	25 Beaver St	New York	New York	10004	997,825
NYSHFA-DHCR	25 Beaver Street	New York	New York	10004	283,895
Rochester Housing Authority	675 W. Main Street	Rochester	New York	14611	532,872
Town of Amherst Housing Authority.	1195 Main Street	Buffalo	New York	14209	611,245
Greensboro Housing Authority	PO Box 21287	Greensboro	North Carolina	27420	604,728
Winston-Salem Housing Authority.	901 Cleveland Avenue	Winston-Salem	North Carolina	27420	743,328
Cuyahoga Housing Authority/ Eden, Inc..	1441 West 25th Street	Cleveland	Ohio	44113	655,248
Dayton Housing Authority	400 Wayne Avenue	Dayton	Ohio	45410	552,013
Fayette Housing Authority	121 E. East Street	Washington Court House.	Ohio	43160	186,966
Highland Housing Authority (NEW).	121 E. East Street	Washington Court House.	Ohio	43160	209,524
Licking Housing Authority	85 West Church Street	Newark	Ohio	43055	248,940
Middletown Housing Authority	128 City Centre Mall	Middletown	Ohio	45042	398,544
Wayne Housing Authority	200 South Market Street	Wooster	Ohio	44591	59,998
Zanesville Housing Authority	407 Pershing Road	Zanesville	Ohio	43701	178,908
Muskogee Housing Authority	200 N. 40th Street	Muskogee	Oklahoma	74402	195,065
Oklahoma City Housing Authority.	1700 N.E. 4th Street	Oklahoma	Oklahoma	73117	221,754
Douglas County Housing Authority.	902 West Stanton Street	Roseburg	Oregon	97470	193,549
Housing Authority of Jackson County.	2231 Table Rock Rd	Medford	Oregon	97501	283,104
Polk County Housing Authority	PO Box 467	Dallas	Oregon	97338	296,328
Delaware County Housing Authority.	1855 Constitution Avenue	Woodlyn	Pennsylvania	19094	612,083
Wayne County HA	130 Carbondale Road	Waymart	Pennsylvania	18472	63,668
Municipality of Bayamon	PO Box 1588	Bayamon	Puerto Rico	00960	463,920
Municipality of Dorado	Box 588	Dorado	Puerto Rico	00646	225,150
Rhode Island Housing and Mortgage Finance Corp.	44 Washington Street	Providence	Rhode Island	02903	587,567
Anthony Housing Authority	PO Box 1710	Anthony	Texas	79821	310,470
Beaumont Housing Authority	PO Box 1312	Beumont	Texas	77704	425,892
City of Amarillo Housing Authority.	PO Box 1971	Amarillo	Texas	79105	162,291
Corsicana Housing Authority	PO Box 1090	Corsicana	Texas	75151	229,542
Hidalgo County Housing Authority.	1800 N. Texas Blvd	Weslaco	Texas	78596	192,090
Houston Housing Authority	PO Box 2971	Houston	Texas	77252	262,668
Texoma COG (Fanning Co.)	3201 Texoma Parkway, Suite 240.	Sherman	Texas	75090	100,227
Texoma COG (Grayson Co.)	3201 Texoma Parkway, Suite 240.	Sherman	Texas	72090	117,920
Burlington Housing Authority	230 St. Paul Street	Burlington	Vermont	05401	685,176
Albermarle Housing Authority	401 McIntire Road	Charlottesville	Virginia	22902	322,668
Charlottesville Housing Authority	PO Box 1405	Charlottesville	Virginia	22902	68,664
Jefferson County Housing Authority.	PO Box 2109	Port Townsend	Washington	98368	241,758
Spokane Housing Authority	West 55 Mission Ste 104	Spokane	Washington	99201	417,733
Thurston County Housing Authority.	503 West Fourth Avenue	Olympia	Washington	98501	142,114

FISCAL YEAR 1999 FUNDING AWARDS FOR DESIGNATED HOUSING PLANS

Applicant name	Applicant address	City	State	Zip	Amount
Danbury Housing Authority	2 Mill Ridge Road	Danbury	Connecticut	06813–	$1,000,792
Middletown Housing Authority	40 Broad Street	Middletown	Connecticut	06457–	200,688
Distirct of Columbia Housing Authority.	1133 North Capitol, NE	Washington, DC	District of Columbia	20001–	278,323
Miami-Dade Housing Authority	111 NW 1st St. 29th Floor	Miami	Florida	33125–	2,039,440
Tampa Housing Authority	1514 Union Street	Tampa	Florida	33607–	605,700

FISCAL YEAR 1999 FUNDING AWARDS FOR DESIGNATED HOUSING PLANS—Continued

Applicant name	Applicant address	City	State	Zip	Amount
Chicago Housing Authority	626 West Jackson Blvd	Chicago	Illinois	60661–	1,116,768
Witchita Housing Authority	455 North Main	Witchita	Kansas	67202–	714,945
Lawrence Housing Authority	1600 Haskell Avenue	Lawrence	Kansas	66044–	124,230
Framingham Housing Authority	1 John J. Brady Drive	Framingham	Massachusetts	01702–	866,600
Boston Housing Authority	52 Chauncy Street	Boston	Massachusetts	02111–	1,555,216
City of Las Vegas	P.O. Box 1897	Las Vegas	Nevada	89125–	1,023,432
New York City Housing Authority	250 Broadway	New York	New York	10007–	1,563,073
Buffalo Municipal Housing Authority	300 Perry Street	Buffalo	New York	14204–	385,224
Charlotte Housing Authority	P.O. Box 36795	Charlotte	North Carolina	28236–	983,040
Butler County Housing Authority	111 S. Cliff Street	Butler	Pennsylvania	16003–1917	238,215
Philadelphia Housing Authority	12 South 23rd Street	Philadelphia	Pennsylvania	19103–	856,782
Bucks County	350 Main Street, Suite 205	Doylestown	Pennsylvania	18901–	787,026
Bristol Housing Authority	P.O. Box 535	Bristol	Rhode Island	02809–0535	185,664

FISCAL YEAR 1999 FUNDING AWARDS FOR PROJECT-BASED DEVELOPMENTS

Applicant name	Address	City	State	Zip	Amt funded
Danbury Housing Authority	2 Mill Ridge Road	Danbury	Connecticut	06813–	$321,888.00
Jefferson Parish Housing Authority	1716 Betty Street	Marrero	Louisiana	70072–	778,584.00
Shreveport Housing Authority	623 Jordan Street	Shreveport	Louisiana	71101–	644,736.00
Commonwealth of MA, (DHCD)	1 Congress St	Boston	Massachusetts	02114–	1,093,000.00
Lebanon Housing Authority	13 Romano Circle, PO Box 5475.	West Lebanon	New Hampshire	03784–	50,328.00
Buffalo Municipal Housing Authority	300 Perry Street	Buffalo	New York	14202–	449,424.00
Columbus Housing Authority	960 E. Fifth Avenue	Columbus	Ohio	43201–3096	650,600.00
Housing Authority of Skagit County	2021 E. College Way, Suite 101.	Mount Vernon	Washington	98273–	851,928.00
Spokane Housing Authority	West Mission St., Suite 104	Spokane	Washington	99201–3298	73,188.00

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BILLING CODE 4210–33–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4560–N–15]

FY 2000 Super Notice of Funding Availability (SuperNOFA) for HUD's Housing, Community Development and Empowerment Programs and Section 8 Housing Voucher Assistance; Notice of Amendment and Clarification to the Continuum of Care Program

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Super notice of funding availability (SuperNOFA) for HUD grant programs; notice of amendment and clarification to the continuum of care program.

SUMMARY: On February 24, 2000, HUD published its Fiscal Year 2000 Super Notice of Funding Availability (SuperNOFA) for Housing, Community Development and Empowerment Programs, and Section 8 Housing Voucher Assistance. This document makes one clarification and two amendments to the Continuum of Care program requirements in the FY 2000 SuperNOFA. First, this document clarifies that funding for Shelter Plus Care renewal projects will be made from the separate McKinney Act appropriation established by the Congress for this purpose under the FY 2001 HUD Appropriations Act. This document also makes two amendments to the Continuum of Care program to reflect the establishment of this separate appropriation in HUD's implementation of the 30 percent permanent housing funding requirement under the FY 2000 HUD Appropriations Act.

FOR FURTHER INFORMATION CONTACT: Clifford Taffet, Office of Special Needs Assistance, Office of Community Planning and Development, U.S. Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7266, Washington, DC 20410; telephone (202) 708–1234 (this is not a toll-free telephone number). Hearing and speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: On February 24, 2000 (65 FR 9322) published its Fiscal Year 2000 Super Notice of Funding Availability (SuperNOFA) for Housing, Community Development and Empowerment Programs, and Section 8 Housing Voucher Assistance. This document makes one clarification and two amendments to the Continuum of Care program requirements contained in the FY 2000 SuperNOFA (beginning at 65 FR 9850). The clarification and changes made by this document are as follows:

A. McKinney Act Funding for Shelter Plus Care Renewal Projects

The Continuum of Care program section of the FY 2000 SuperNOFA, reserved for HUD the right to skip over eligible Shelter Plus Care renewal projects submitted in the competition and to fund them from sources ''other than the McKinney Act'' should the Congress pass legislation allowing this (see 65 FR 9851, third column). At the time of publication of the FY 2000 SuperNOFA, HUD believed that, were Congress to act, the source of funds for these renewals would be the Section 8 Housing Certificate Fund. However, the FY 2001 HUD Appropriations Act (Public Law 106–377, approved October 27, 2000) establishes a separate appropriation under the McKinney Act for this purpose. Therefore, HUD is publishing this document to inform interested parties that these non-competitive awards will be funded from this separate special appropriation under the McKinney Act.

B. Permanent Housing Funding Requirements

The FY 2000 HUD Appropriations Act (Public Law 106–24, approved October 20, 1999) requires that ''not less than 30 percent of these funds shall be used for permanent housing'' (which the FY 2000 Continuum of Care NOFA defines to include Shelter Plus Care renewal projects). The action taken by Congress to fund Shelter Plus Care renewal projects, a significant component of permanent housing funding in previous years, from a source other than the FY 2000 Homeless Assistance Grants appropriation, prevents these projects from counting toward the 30 percent permanent housing requirement contained in the FY 2000 HUD Appropriations Act. As a consequence, HUD will find it necessary, as contemplated in the FY 2000 Continuum of Care program section of the SuperNOFA, to skip over higher scoring non-permanent housing projects in order to reach the 30 percent requirement. However, in order to reduce the impact on existing homeless programs in implementing this statutory requirement, and in keeping with expressed Congressional intent to maintain existing programs and infrastructure for homeless assistance, HUD is amending the FY 2000 Continuum of Care NOFA as follows:

1. Funding for Supportive Housing Program (SHP) Renewal Projects Assigned 40 Need Points.

Section III(A)(2) of the FY 2000 Continuum of Care NOFA reserved for HUD the authority to use FY 2001 funds, if available, to conditionally select for one year of funding lower-rated eligible Supportive Housing Program (SHP) renewal projects that were assigned 40 need points if two criteria were met. The first criterion was that these projects had to be part of Continuum of Care systems ''that would not otherwise receive funding.'' Since the recent Congressional action will result in at least one permanent housing project being funded in many Continua of Care which scored below the projected funding line, these Continua of Care would be made ineligible for renewal funding under this authority. In order to avoid this unintended consequence of the congressional action, the criterion is being amended to read ''that would not otherwise receive funding for these projects'' so that it would apply specifically to these lower rated eligible SHP renewal projects that were assigned 40 need points, thus allowing these renewal projects to be funded under this authority.

2. Skipping Over of Higher Scoring Non-Permanent Housing Projects.

Section V(A)(7) of the FY 2000 Continuum of Care NOFA described the 30 percent permanent housing funding requirement established by Congress for the Continuum of Care competition. This section is being amended to permit HUD to first skip over new non-permanent housing projects when making project selections in order to meet the 30 percent requirement. If the 30 percent requirement has not been met after skipping over the new non-permanent housing projects, then HUD will skip over non-permanent housing renewal projects. In skipping over new non-permanent housing projects, HUD will begin with the lowest rated (eligible) fundable new non-permanent project at the projected funding line and continue up the rating and ranking until the 30 percent requirement is met. If HUD is required to skip over non-permanent housing renewal projects, HUD will proceed in the same way.

Accordingly, in the Super Notice of Funding Availability for Housing, Community Development, and Empowerment Programs and Section 8 Housing Voucher Assistance for Fiscal Year 2000, notice document 00–4123, beginning at 65 FR 9322, in the issue of Friday, February 24, 2000, the following clarifications and corrections are made to the Continuum of Care NOFA, commencing at 9851:

1. On page 9853, the last paragraph starting in the first column is amended to read as follows:

* * * * *

Your local needs analysis process must consider the need to continue funding for projects expiring in calendar year 2001, and you must assign a priority to those projects requesting renewal. HUD will not fund renewals out of order on the priority list except as may be necessary to achieve the new 30 percent overall permanent housing requirement. HUD reserves the authority to use FY 2001 funds, if available, to conditionally select for one year of funding lower-rated eligible SHP renewal projects that are assigned 40 need points in continuum of care systems that: (1) Would not otherwise receive funding for these projects; and (2) have not previously been awarded funds under this authority.

* * * * *

2. On page 9856, the last full paragraph starting in the third column is amended to read as follows:

* * * * *

In accordance with the appropriation for homeless assistance grants in the Fiscal Year 2000 Appropriation Act for HUD (Pub.L. 106–24, approved October 20, 1999; 113 Stat. 1047), HUD will use not less than 30 percent of the total FY 2000 homeless grant assistance appropriation to fund projects that meet the definition of permanent housing. Projects meeting the definition of permanent housing are: (1) New Shelter Plus Care projects; (2) Section 8 SRO projects; and (3) new and renewal projects designated as permanent housing for homeless persons with disabilities under the Supportive Housing Program. Since the FY 2000 homeless grant assistance appropriation is $1.020 billion, not less than $306 million must be awarded to permanent housing projects unless an insufficient number of approvable permanent housing projects is submitted in which case HUD will carry over the amount of the permanent housing funding shortfall to next year's competition. This permanent housing funding requirement may result in higher scoring non-permanent housing projects being skipped over to fund lower scoring permanent housing projects or, within a continuum, higher priority non-permanent housing projects being skipped over to fund lower priority permanent housing projects. HUD will first skip over new non-permanent housing projects when making project selections in order to meet the 30 percent requirement. If the 30 percent requirement has not been met after skipping over the new non-permanent housing projects, then HUD will skip over non-permanent housing renewal projects. In skipping over new non-permanent housing projects, HUD will begin with the lowest rated (eligible) fundable new non-permanent project at the projected funding line and continue up the rating and ranking until the 30 percent requirement is met. If HUD is required to skip over non-permanent housing renewal projects, HUD will proceed in the same way.

* * * * *

Dated: December 14, 2000.

Cardell Cooper,

Assistant Secretary for Community Planning and Development.

[FR Doc. 00–32371 Filed 12–19–00; 8:45 am]

BILLING CODE 4210–29–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Federal Housing Enterprise Oversight

Solicitation of Public Comments on Systemic Risk

AGENCY: Office of Federal Housing Enterprise Oversight, HUD.

ACTION: Extension of the period for the submission of public comments.

SUMMARY: On October 30, 2000, the Office of Federal Housing Enterprise Oversight (OFHEO) published a notice entitled ''Solicitation of Public Comments on Systemic Risk'' in the **Federal Register** (65 FR 64718). OFHEO sought to examine the nature and magnitude of any risks the Federal National Mortgage Association (Fannie

Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) may pose to the financial system in general and to the U.S. housing finance markets in particular; whether and to what extent Fannie Mae and Freddie Mac contribute to or mitigate systemic risk; and actions that OFHEO and others could take to limit any systemic risk the Enterprises may pose. OFHEO has been requested to extend the comment period. To ensure that the public has ample opportunity to participate in the solicitation, today's notice extends the public comment period from December 29, 2000, through January 29, 2001.

DATES: The comment period is extended until January 29, 2001.

ADDRESSES: Send written comments to Robert S. Seiler, Jr., Manager of Policy Analysis, Office of Federal Housing Enterprise Oversight, 1700 G. Street, NW., Fourth Floor, Washington, DC 20552. All comments will be posted on the OFHEO web site at *http://www.ofheo.gov*. OFHEO requests that written comments submitted in hard copy also be accompanied by an electronic version in MS Word© or in portable document format (PDF) on 3.5″ disk. Alternatively, comments may also be sent by electronic mail to *sysrisk@ofheo.gov*.

FOR FURTHER INFORMATION CONTACT: Robert S. Seiler, Jr., Manager of Policy Analysis, Office of Federal Housing Enterprise Oversight, 1700 G Street, NW., Fourth Floor, Washington, DC 20552, telephone (202) 414–3785 (not a toll free number). The telephone number for the Telecommunications Device for the Deaf is: (800) 877–8339.

Dated: December 14, 2000.

Armando Falcon, Jr.,

Director, Office of Federal Housing Enterprise Oversight.

[FR Doc. 00–32325 Filed 12–19–00; 8:45 am]

BILLING CODE 4220–01–U

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Letters of Authorization To Take Marine Mammals

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of issuance of a Letter of Authorization to take marine mammals incidental to oil and gas industry activities.

SUMMARY: In accordance with section 101(a)(5)(A) of the Marine Mammal Protection Act of 1972, as amended, and the U.S. Fish and Wildlife Service implementing regulations [50 CFR 18.72(f)(3)], notice is hereby given that a Letter of Authorization to take polar bears incidental to oil and gas industry exploration activities has been issued to the following companies.

Company	Activity	Date Issued
Phillips Alaska, Inc	Exploration	November 7, 2000.
Phillips Alaska, Inc	Exploration	November 7, 2000.
Phillips Alaska, Inc	Exploration	November 7, 2000.
Phillips Alaska, Inc	Exploration	November 7, 2000.
Phillips Alaska, Inc	Exploration	November 7, 2000.
Phillips Alaska, Inc	Exploration	November 7, 2000.
Phillips Alaska, Inc	Exploration	November 8, 2000.
Phillips Alaska, Inc	Exploration	November 8, 2000.
Phillips Alaska, Inc	Exploration	November 8, 2000.
Phillips Alaska, Inc	Exploration	November 8, 2000.
Phillips Alaska, Inc	Exploration	November 9, 2000.
Phillips Alaska, Inc	Exploration	November 9, 2000.
Phillips Alaska, Inc	Development	November 13, 2000.
Fairweather Geophysical, LLC	Exploration	November 13, 2000.

CONTACT: Mr. John W. Bridges at the U.S. Fish and Wildlife Service, Marine Mammals Management Office, 1011 East Tudor Road, Anchorage, Alaska 99503, (808) 362–5148 or (907) 786–3810.

SUPPLEMENTARY INFORMATION: The letters of Authorization were issued in accordance with U.S. Fish and Wildlife Service Federal Rules and Regulations ''Marine Mammals; Incidental Take During Specified Activities (65 FR 16828; March 30, 2000).''

Dated: November 28, 2000.

David B. Allen,

Regional Director.

[FR Doc. 00–32338 Filed 12–19–00; 8:45 am]

BILLING CODE 4310–55–M

DEPARTMENT OF INTERIOR

Bureau of Land Management

[NV–910–00–0777XX–241A]

Call for Nominations for Resource Advisory Council

AGENCY: Bureau of Land Management, Department of the Interior.

ACTION: Notice of vacancy on Resource Advisory Council and call for nominations.

SUMMARY: The purpose of this notice is to solicit public nominations for the Bureau of Land Management's (BLM's) Northeastern Great Basin Resource Advisory Council (RAC) and Mojave-Southern Great Basin RAC in Nevada, to fill vacancies on those RACs for an individual holding elective office in Nevada. The RAC provides advice and recommendations to BLM's Elko, Ely, Battle Mountain and Las Vegas Field Offices on land use planning and management of the public lands within their geographic areas. Public nominations will be considered for 45 days after the publication date of this notice.

The Federal Land Policy and Management Act (FLPMA) directs the Secretary of the Interior to involve the public in planning and issues related to management of lands administered by BLM. Section 309 of FLPMA directs the Secretary to select 10 to 15 member citizen-based advisory councils that are established and authorized consistent with the requirements of Federal Advisory Committee Act (FACA). As required by the FACA, the interests represented by the individuals appointed to the RAC must be balanced and representative of the various issues concerned with the management of public lands.

These include three categories, one of which is Category three, holders of State, county or local elected office, employees of a State agency responsible

for management of natural resources, academicians involved in natural sciences, representatives of Indian tribes, and the public-at-large.

The elected officials whose terms have not yet expired will no longer hold elective office after December 31, and this notice is to solicit nominations for replacements. Nominations should be sent to Jo Simpson, BLM Nevada State Office, P.O. Box 12000, Reno, Nevada, 89520–0006; telephone (775) 861–6586.

FOR FURTHER INFORMATION CONTACT: Jo Simpson, Chief, Office of Communications, Bureau of Land Management, Nevada State Office, at 775–861–6586.

Dated: December 7, 2000.

Jean Rivers-Council,

Associate State Director, Nevada.

[FR Doc. 00–32339 Filed 12–19–00; 8:45 am]

BILLING CODE 4310–HC–M

DEPARTMENT OF LABOR

Employment and Training Administration

Workforce Investment Act; National Farmworkers Jobs Program under Section 167; Notice of renewal of Migrant and Seasonal Farmworker Employment and Training Advisory Committee

In accordance with the provisions of the Federal Advisory Committee Act, the Secretary of Labor has determined that the renewal of the Migrant and Seasonal Farmworker Employment and Training Advisory Committee (the Committee) is in the public interest and is consistent with the requirements of title I, section 167 of the Workforce Investment Act (WIA).

Established under 20 CFR 669.160(b), the Committee will provide advice to the Secretary and the Assistant Secretary for Employment and Training regarding the overall operation and administration of the National Farmworkers Jobs Program (NFJP) authorized under WIA title I, section 167, as well as the implementation of other programs providing services to Migrant and Seasonal Farmworker youth and adults under this Act. The Secretary and Assistant Secretary views the Committee as the primary vehicle to accomplish the Department's commitment to work in partnership with the Migrant and Seasonal Farmworker program community on employment and training issues.

The Committee shall consist of approximately fifteen representatives as follows: twelve from the NFJP grantee community with field experience in the daily operation and administration of migrant and seasonal farmworker programs, appointed by the Secretary from among individuals nominated by NFJP grantee organizations, and three representatives from organizations, associations and other Federal agencies with expertise relative to migrant and seasonal farmworkers, to be appointed directly by the Secretary.

The Committee shall function solely as an advisory body, and in compliance with the provisions of the Federal Advisory Committee Act. Its charter will be filed under the Act fifteen days from the date of publication.

Interested persons are invited to submit comments regarding renewal of the Migrant and Seasonal Farmworker Employment and Training Advisory Committee. Such comments should be addressed to Alicia Fernandez-Mott, Chief, Division of Migrant and Seasonal Farmworker Programs, Office of National Programs, Employment and Training Administration, Room N–4641, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone: (202) 219–5500.

Signed at Washington, DC, this 27th day of November, 2000.

Alexis M. Herman,

Secretary of Labor.

[FR Doc. 00–32408 Filed 12–19–00; 8:45 am]

BILLING CODE 4510–30–M

NATIONAL CREDIT UNION ADMINISTRATION

Sunshine Act Meeting

Notice of Change In Subject of Meeting

The National Credit Union Administration Board determined that its business required the deletion of a portion of one of the personnel matters from the previously announced closed meeting (**Federal Register**, Vol. 65, No. 238, page 77394, December 11, 2000) scheduled for Thursday, December 14, 2000.

The Board voted two-to-one, Board Member Dollar voting no, that agency business required a portion of one of the personnel matters be removed from the closed agenda. Earlier announcement of this change was not possible.

The previously announced items were:

1. Administrative Action under Part 704 of NCUA's Rules and Regulations. Closed pursuant to exemption (8).

2. Administrative Action under Part 708 of NCUA's Rules and Regulations. Closed pursuant to exemption (8).

3. Two (2) Personnel Matters. Closed pursuant to exemptions (2) and (6).

FOR FURTHER INFORMATION CONTACT: Becky Baker, Secretary of the Board, Telephone (703) 518–6304.

Sheila Albin,

Acting Secretary of the Board

[FR Doc. 00–32434 Filed 12–15–00; 4:47 pm]

BILLING CODE 7535–01–M

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Comment Request

AGENCY: National Science Foundation.

ACTION: Submission for OMB review; comment request.

SUMMARY: The National Science Foundation (NSF) has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995, Pub. L. 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; or (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: Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for National Science Foundation, 725–17th Street, NW., Room 10235, Washington, DC, 20503, and to Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 295, Arlington, Virginia 22230 or send e-mail to splimpto@nsf.gov. Comments regarding this information collection are best assured of having their full effect if received within 30 days of this notification. Copies of the submission may be obtained by calling 703–292–7556.

NSF 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.

Title: Survey of Doctoral Recipients.

OMB Control Number: 3145–0020.

Summary of Collection: The Bureau of the Census will conduct this study again for NSF in 2001. The Bureau conducted the 1999 survey. National Research Council (NRC) conducted the survey from 1973 through 1995, and the National Opinion Research Center (NORC) conducted the 1997 survey. Questionnaires will be mailed in April 16, 2001 and nonrespondents to the mail questionnaire will receive computer assisted telephone interviewing. The survey will be collected in conformance with the Privacy Act of 1974 and the individual's response to the survey is voluntary. The first Federal Register notice for this survey was 65 FR 55056, published September 12, 2000, and no comments were received.

Need and Use of the Information: The purpose of this longitudinal study is to provide national estimates of the doctorate level science and engineering workforce and changes in employment, education and demographic characteristics. The study is one of the three components of the Scientists and Engineers Statistical Data System (SESTAT). NSF uses this information to prepare Congressionally mandated reports such as Science and Engineering Indicators and Women, Minorities and Persons with Disabilities in Science and Engineering. A public release file of collected data, edited to protect respondent confidentiality, will be made available to researchers on CD–ROM and on the World Wide Web.

Description of Respondents: Individuals.

Number of Respondents: 34,000.

Frequency of Responses: Biennial reporting.

Total Burden Hours: 14,167.

Dated: December 14, 2000.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 00–32327 Filed 12–19–00; 8:45 am]

BILLING CODE 7555–01–M

NATIONAL SCIENCE FOUNDATION

Notice of Permit Applications Received Under the Antarctic Conservation Act of 1978 (P.L. 95–541)

AGENCY: National Science Foundation.

ACTION: Notice of permit applications received under the Antarctic Conservation Act of 1978, Pub. Law 95–541.

SUMMARY: The National Science Foundation (NSF) is required to publish notice of permit applications received to conduct activities regulated under the Antarctic Conservation Act of 1978. NSF has published regulations under the Antarctic Conservation Act at Title 45 Part 670 of the Code of Federal Regulations. This is the required notice of permit applications received.

DATES: Interested parties are invited to submit written data, comments, or views with respect to this permit application by January 18, 2001. Permit applications may be inspected by interested parties at the Permit Office, address below.

ADDRESSES: Comments should be addressed to Permit Office, Room 755, Office of Polar Programs, National Science Foundation, 4201 Wilson Boulevard, Arlington, Virginia 22230.

FOR FURTHER INFORMATION CONTACT: Nadene G. Kennedy at the above address or (703) 292–7405.

SUPPLEMENTARY INFORMATION: The National Science Foundation, as directed by the Antarctic Conservation Act of 1978 (Public Law 95–541), has developed regulations that implement the ''Agreed Measures for the Conservation of Antarctic Fauna and Flora'' for all United States citizens. The Agreed Measures, developed by the Antarctic Treaty Consultative Parties, recommended establishment of a permit system for various activities in Antarctica and designation of certain animals and certain geographic areas as requiring special protection. The regulations establish such a permit system to designate Specially Protected Areas and Sites of Special Scientific Interest.

The applications received are as follows:

Permit Application No. 2001–024

Applicant: Raymond V. Arnaudo, Department of State, OES/OA, Room 5805, 2201 C Street, NW., Washington, DC 20520–7818.

Activity for Which Permit is Requested: Enter Antarctic Specially Protected Areas. The applicant proposes to conduct inspections of several Antarctic Peninsula Antarctic Specially Protected Areas, as provided for in Article VII(1) of the Antarctic Treaty, during the February 2001 cruise of the LAURENCE M. GOULD. The applicant proposes to inspect the following sites on an opportunity basis: Litchfield Island (ASPA 113); Biscoe Point, Anvers Island (ASPA 139); Western Shore of Admiralty Bay (ASPA 128); Shores of Port Foster, Deception Island (ASPA 140); Potter Peninsula, King George Island (ASPA 132); and, Ardley Island (ASPA 150). Access to the sites will be by zodiac.

Location: Litchfield Island (ASPA 113); Biscoe Point, Anvers Island (ASPA 139); Western Shore of Admiralty Bay (ASPA 128); Shores of Port Foster, Deception Island (ASPA 140); Potter Peninsula, King George Island (ASPA 132); and, Ardley Island (ASPA 150).

Dates: February 4, 2001 to March 4, 2001.

Nadene G. Kennedy,

Permit Officer, Office of Polar Programs.

[FR Doc. 00–32326 Filed 12–19–00; 8:45 am]

BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–348 and 50–364]

Southern Nuclear Operating Company, Inc.; Alabama Power Company; Joseph M. Farley Nuclear Plant, Units 1 and 2; Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License Nos. NPF–2 and NPF–8 issued to Southern Nuclear Operating Company, Inc, (the licensee) for operation of Farley Nuclear Plant, Units 1 and 2, located in Houston County, Alabama.

The proposed amendment would revise Technical Specification 5.5.14, ''Technical Specification (TS) Bases Control Program,'' to be consistent with the changes to 10 CFR 50.59 as published in the **Federal Register** (Volume 64, Number 19 1) on October 4, 1999. This change incorporates Nuclear Energy Institute Technical Specification Task Force (TSTF) Standard TS Change Traveler, TSTF–364 Revision 0, ''Revision to TS Bases Control Program to Incorporate Changes to 10 CFR 50.59.''

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed

amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the change involve a significant increase in the probability or consequences of an accident previously evaluated?

The proposed change deletes the reference to unreviewed safety question as defined in 10 CFR 50.59. Deletion of the definition of unreviewed safety question was approved by the NRC with the revision of 10 CFR 50.59. Consequently, the probability of an accident previously evaluated is not significantly increased. Changes to the TS Bases are still evaluated in accordance with 10 CFR 50.59. As a result, the consequences of any accident previously evaluated are not significantly affected. Therefore, this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the change create the possibility of a new or different kind of accident from any accident previously analyzed?

The proposed change does not involve a physical alteration of the plant (no new or different type of equipment will be installed) or a change in the methods governing normal plant operation. Therefore, this change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the change involve a significant reduction in a margin of safety?

The proposed change will not reduce a margin of safety because it has no direct effect on any safety analyses assumptions. Changes to the TS Bases that result in meeting the criteria in paragraph 10 CFR 50.59(c)(2) will still require NRC approval pursuant to 10 CFR 50.59. This change is administrative in nature based on the revision to 10 CFR 50.59. Therefore the proposed change does not involve a significant reduction in a margin of safety.

Based on the previous information, the proposed changes do not involve a significant hazards consideration as defined in 10 CFR 50.92.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received. Should the Commission take this action, it will publish in the **Federal Register** a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D59, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Documents may be examined, and/or copies for a fee, at the NRC'S Public Document Room, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland.

The filing of requests for hearing and petitions for leave to intervene is discussed below.

By January 19, 2001, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested persons should consult a current coy of 10 CFR 2.714 which is available at the Commission's Public Document Room, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland, and accessible electronically through the ADAMS Public Electronic Reading Room link at the NRC Web site (*http://www.nrc.gov*). If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to 15 days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirement described above.

Not later than 15 days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if

proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, or may be delivered to the Commission's Public Document Room, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland, by the above date. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and to M. Stanford Blanton, Esq., Balch and Bingham, Post Office Box 306, 1710 Sixth Avenue North, Birmingham, Alabama 35201, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)–(v) and 2.714(d).

For further details with respect to this action, see the application for amendment of October 9, 2000 as supplemented on December 4, 2000, which are available for public inspection at the Commission's Public Document Room, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland, and accessible electronically through the ADAMS Public Electronic Reading Room link at the NRC Web site (http://www.nrc.gov).

Dated at Rockville, Maryland, this 14th day of December 2000.

For the Nuclear Regulatory Commission

L. Mark Padovan,

Project Manager, Project Directorate II–1, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 00–32426 Filed 12–19–00; 8:45 am]

BILLING CODE 7590–01–M

NUCLEAR REGULATORY COMMISSION

[Docket Number 40–8989]

Issuance of Directors Decision Under 10 CFR 2.206

Notice is hereby given that by petitions dated February 24, 2000, and March 13, 2000, the Snake River Alliance and Envirocare of Utah respectively, requested that the NRC assume responsibility for Formerly Utilized Sites Remedial Action Program (FUSRAP) radioactively contaminated material and ensure its proper disposal in an NRC licensed facility. As the basis for these requests, the petitioners stated that the NRC, under sections 81 and 84 of the Atomic Energy Act (AEA), was given authority by Congress to regulate all 11e.(2) material regardless of when it was generated. The request was referred to the Director of the Office of Nuclear Material Safety and Safeguards.

The Director, Office of Nuclear Material Safety and Safeguards, has determined that the requests should be denied for the reasons stated in the ''Director's Decision Under 10 CFR 2.206'' (DD–00–06), the complete text of which is available for public inspection in the Commission's Public Document Room, located at One White Fint North, 11555 Rockville Pike (first floor), Rockville, Maryland, and via the NRC Web site (http://www.nrc.gov) on the World Wide Web, under the ''Public Involvement'' icon. The NRC will continue to refrain from imposing disposal requirements for the mill tailings generated at FUSRAP sites, because the material is outside of the agency's jurisdiction.

A copy of this Decision has been filed with the Secretary of the Commission for the Commission's review in accordance with 10 CFR 2.206(c) of the Commission's regulations. As provided by that regulation, this Decision will constitute the final action of the Commission 25 days after the date of issuance unless the Commission, on its own motion, institutes review of the Decision within that time.

Dated at Rockville, Maryland, this 13th day of December, 2000.

For the Nuclear Regulatory Commission.

William F. Kane,

Director, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 00–32427 Filed 12–19–00; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–43720; File No. SR–NASD–00–67]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Interval Delay Parameters for the Nasdaq National Market Execution System

December 13, 2000.

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 November 6, 2000, the National Association of Securities Dealers, Inc., through its wholly-owned subsidiary The Nasdaq Stock Market, Inc. (''Nasdaq'') filed with the Securities and Exchange Commission (''SEC'') or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. Nasdaq filed the proposed rule change pursuant to section 19(b)(3)(A) of the Act,[3] and Rule 19b–4(f)(5) thereunder.[4] Pursuant to Rule 19b–4(f)(5), Nasdaq has designated this proposal as one effecting a change in an existing order-entry or trading system of a self-regulatory organization that does not: (1) Significantly affect the protection of investors or the public interest, (2) impose any significant burden on competition, or (3) significantly have the effect of limiting the access to or availability of the system. As such, the proposed rule change is immediately effective upon the Commission's receipt of this filing. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(5).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq is proposing to amend Rule 4710(b) of the National Association of Securities Dealers, Inc. (''NASD'' or ''Association''), to modify the Nasdaq National Market Execution System (''NNMS'') to reduce from five seconds to two seconds the interval delay between executions against the same market maker in any security included in the Nasdaq 100 Index. Nasdaq will establish this rule change as a pilot program for six months, beginning on the date of launch of the NNMS, during which time Nasdaq will monitor and analyze system performance with respect to the interval delay. Below is the text of the proposed rule change. Proposed new language is italicized; proposed deletions are in brackets.

* * * * *

4710. Participant Obligations in NNMS

(a) No Change.

(b) Market Makers:

(1) An NNMS Market Maker in an NNMS Security shall be subject to the following requirements:

(A) No change.

(B) No Change.

(C) No Change.

(D) *(1) Except as provided in subparagraph (2) below,* [A] after the NNMS system has executed an order against a market maker's displayed quote and reserve size (if applicable), that market maker shall not be required to execute another order at its bid or offer in the same security until *5 seconds* [a predetermined time period] has elapsed from the time the order was executed, as measured by the time of execution in the Nasdaq system. [This period of time shall initially be established as 5 seconds, but may be modified upon Commission approval and appropriate notification to NNMS participants.]

(2) For securities included in the Nasdaq 100 Index, after the NNMS system has executed an order against a market maker's displayed quote and reserve size (if applicable), that market maker shall not be required to execute another order at its bid or offer in the same security until 2 seconds has elapsed from the time the order was executed, as measured by the time of execution in the Nasdaq system.

(c) through (e). 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, Nasdaq 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. Nasdaq 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

On January 14, 2000, the Commission approved the creation of The Nasdaq National Market Execution System (NNMS), a new platform for trading Nasdaq National Market (NNM) securities.[5] Under the rule changes, the NNMS will become Nasdaq's primary automatic execution trading platform, and SelectNet generally will be used to deliver negotiable orders to market makers and ECNs that participate in the NNMS. The NNMS will enhance the automatic execution system for the trading of NNMM securities by, among other things, reducing from 17 seconds to five seconds the delay between executions against the same market maker. The NNMS will not affect trading of Nasdaq SmallCap securities.

Nasdaq has determined that it is necessary to modify the approved interval delay parameter of the NNMS, prior to implementation of the system. Nasdaq expects that changing SelectNet from a liability to a non-liability system will cause much of the order and message traffic now in SelectNet to migrate to the automatic execution facility, the NNMS. If this occurs, the presence of a five-second interval delay could hinder the efficient and orderly operation of the system by causing a queuing of orders. Following Commission approval to the NNMS, Nasdaq market participants have expressed to Nasdaq their concern that such quering will occur in the NNMS in securities with rapid order flow unless the interval delay parameter is reduced from the current five seconds. Accordingly, Nasdaq proposes to reduce from five seconds to two seconds the delay between executions against the same market participant in the same security for any security included in the Nasdaq 100 Index, which are generally the securities with the heaviest order flow.[6]

As noted in the original rule proposal, SR–NASD–99–11, the interval delay is designed to balance both the need for fast executions and also the necessity of giving market makers adequate time to monitor and update their quotes in response to rapidly changing market conditions. Nasdaq now strongly believes that, with respect to securities included in the Nasdaq 100 Index, the need for fast executions in rapidly moving securities is greater than originally anticipated. Nasdaq shares the concerns of its members that the risk of a queuing of orders in these securities is significantly higher than in other, slower-moving issues. At the same time, the cost of such queuing is also higher in fast-moving markets, as it would delay orders from many market participants for the benefit of a single market participant. Reducing the interval delay from five seconds to two seconds would also protect investors by decreasing the likelihood that the market will move against them after an order is placed.

In addition, Nasdaq believes that two seconds is an adequate time period for market makers in Nasdaq 100 Index securities to monitor and update their quotes. A large number of market makers compete for order executions in these securities, and market makers in these securities have become accustomed to fast-moving markets, and to monitoring and updating their quotations under such conditions. In addition to the interval delay parameter, market makers have several other tools for managing their quotes, including the Actual Size Rule and the system's Auto-Quote Refresh functionality. Considering all these factors, Nasdaq believes that this reduction in the interval delay is reasonable and appropriate to maintaining orderly markets in rapidly moving securities such as those in the Nasdaq 100 Index.

Based on the above, Nasdaq believes that the proposed rule changes are consistent with the provisions of Section 15A(b)(6) of the Act in that the proposed rule changes are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in the regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in

[5] *See* Securities Exchange Act Release 34–42344 (January 14, 2000), 65 FR 3897 (January 25, 2000).

[6] Nasdaq represents that it is establishing this rule change as a pilot program beginning on the date of launch of the NNMS and continuing for six months. During that time, Nasdaq will monitor the performance of the system under these parameters to determine whether the Nasdaq 100 Index is the proper measure for identifying stocks that require a shortened interval delay. Nasdaq states that it is also evaluating whether to shorten the interval delay on a stock-by-stock and day-to-day basis to accommodate increased trading in non-Nasdaq-100 issues due to significant corporate or market events.

general, to protect investors and the public interest.

Nasdaq believes that the proposal also is consistent with Section 11A(a)(1)(C), which provides that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure: (1) Economically efficient execution of securities transactions; (2) fair competition among brokers and dealers; (3) the availability to brokers, dealers and investors of information with respect to quotations and transactions in securities; (4) the practicability of brokers executing investors orders in the best market; and (5) an opportunity for investors orders to be executed without the participation of a dealer. Specifically, Nasdaq believes that this proposal will improve the mechanism for the efficient display and automatic execution of customer limit orders. Thus, the proposed rule change is consistent with Section 11A and the SEC's Order Handling Rules, and in particular the Display Rule.

(B) Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)[7] of the Act and Rule 19b–4(f)(5)[8] thereunder in that it constitutes a change in an existing order-entry or trading system of a self-regulatory organization that does not: (1) significantly affect the protection of investors or the public interest, (2) impose any significant burden on competition, or (3) significantly have the effect of limiting the access to or availability of the system. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule 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 NASD. All submissions should refer to the file number in the caption above and should be submitted by January 10, 2001.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 00–32333 Filed 12–19–00; 8:45 am]

BILLING CODE 8010–01–M

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(5).

[9] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice No. 3494]

Advisory Committee Meeting on Law Applicable to Securities Intermediaries; Meeting Notice

The Advisory Committee on Private International Law will hold a study group meeting on Friday January 5, 2001 on law applicable to securities intermediaries, and in particular the law applicable to dispositions of securities held through an indirect holding system. The meeting will be held at the Federal Reserve Bank of New York.

The meeting will provide an opportunity for public comment on developments in the securities transaction field, including clearance and settlement and the role of indirect holding systems, with regard to possible international rules to determine law applicable to those transactions. The meeting will facilitate preparation of United States positions in connection with the work of international organizations affecting private law aspects of this topic, including the Hague Conference on Private International Law project to prepare rules on law applicable to intermediaries. A secondary topic will be the feasibility of harmonized substantive rules for consideration by other international bodies, such as the United Nations Commission on International Trade Law (UNCITRAL), or by regional groups of states.

The agenda, subject to availability of time, will include a review of developments involving direct and indirect holders of securities, transfers of interest, dematerialization and immobilization of securities, and the systemic role of multiple indirect holding systems. The meeting will also examine whether harmonization through national law, industry or commercial sector rules, or by international treaty is feasible and is necessary. Among other issues, an applicable law regime might address what law governs transfers of securities held through custodial accounts and financial intermediaries; the rights to securities in custodial accounts; the rights of owners of securities as well as entities secured thereby; the relation to third party creditors; and the legal nature of interests in securities held by such intermediaries or through central clearing systems.

Documentation for the meeting will includes a recent study by the Permanent Bureau of the Hague Conference concerning ''law applicable to dispositions of securities held through indirect holding systems. The document may be obtained at www.hcch.net, or from the Office of the Assistant Legal Adviser for Private International Law by contacting Rosie Gonzales at 202 776–8420 or by fax 202–776–8482.

Attendance: The public is invited to attend up to the capacity of the meeting room and may participate subject to the rulings of the chair. The meeting will take place at 10 a.m. to 3 pm at the New York Federal Reserve Bank at 33 Liberty Street, NYC in the 10th Floor Board Room. Since access to the building is controlled, persons wishing to attend should, prior to cob Wednesday, January 3, Joyce Hansen, Sr. Vice President, New York Federal Reserve, phone: 212–720–5024; fax: 212–720–1756 or contact Harold Burman, Office

of the Legal Adviser, 202–776–8421; fax: 202 776–8482.

Harold S. Burman,

Executive Director, Secretary of State's Advisory Committee on Private International Law, U.S.Department of State.

[FR Doc. 00–32410 Filed 12–19–00; 8:45 am]

BILLING CODE 4710–08–P

TENNESSEE VALLEY AUTHORITY

Environmental Impact Statement—Guntersville Reservoir Land Management Plan, Jackson and Marshall Counties, Alabama; Marion County, TN

AGENCY: Tennessee Valley Authority (TVA).

ACTION: Notice of intent.

SUMMARY: This notice is provided in accordance with the Council on Environmental Quality's regulations (40 CFR parts 1500 to 1508) and TVA's procedures implementing the National Environmental Policy Act. TVA will prepare an Environmental Impact Statement (EIS) on alternatives for management of Guntersville Reservoir project lands in Jackson and Marshall Counties in Alabama and Marion County in Tennessee.

DATES: Comments on the scope of the EIS should be received on, or before January 31, 2001.

ADDRESSES: Written comments should be sent to Jon M. Loney, Manager, NEPA Administration, Environmental Policy and Planning, Tennessee Valley Authority, 400 West Summit Hill Drive, Knoxville, Tennessee 37902–1499.

FOR FURTHER INFORMATION CONTACT: Harold M. Draper, NEPA Specialist, Environmental Policy and Planning, Tennessee Valley Authority, 400 West Summit Hill Drive, WT 8C, Knoxville, Tennessee 37902–1499; telephone (865) 632–6889, or e-mail *hmdraper@tva.gov.*

SUPPLEMENTARY INFORMATION:

Background

Guntersville Reservoir is the second largest of 23 multipurpose reservoirs operated by TVA for navigation, flood control, power production, recreation, and other uses. Located on the Tennessee River, the reservoir is 76 miles long and extends through parts of three counties in Alabama and Tennessee. TVA originally acquired 109,671 acres for reservoir construction. Of that, 56,300 acres are covered by water during normal summer pool. Subsequent transfers of land by TVA for economic, industrial, residential, or public recreation development have resulted in a current balance of 38,837 acres of TVA land on Guntersville Reservoir. TVA is considering updating a 1982 land allocation plan and allocating additional lands that were not considered in the 1982 plan. These additional lands are generally narrow shoreline strips, but also include the 1300-acre Murphy Hill Generating Plant site, where an electric power plant was never built. Because the 1982 plan does not reflect current demands for land, TVA is proposing to update the plan to reflect community needs and current TVA policies.

TVA develops reservoir land management plans to help in the management of reservoir properties in its custody. These plans allocate lands to various categories of uses, and are then used to guide the types of activities that will be considered on each tract of land. By providing a clear statement of how TVA intends to manage land and by identifying land for specific uses, TVA hopes to balance conflicting uses and facilitate decision making for use of its land. Each plan is submitted for approval by the TVA Board of Directors and adopted as policy to provide for long-term land stewardship and accomplishment of TVA responsibilities under the TVA Act of 1933.

In developing the Guntersville Reservoir Land Management Plan, it is anticipated that lands currently committed to a specific use would be allocated to that current use unless there is an overriding need to change. Commitments include transfers, easements, leases, licenses, contracts, utilities, outstanding land rights, or developed recreation areas. All lands under TVA control would be allocated in the planning process. At this time, TVA anticipates that two alternatives would be analyzed in the EIS. Other alternatives may be developed in response to public or agency comments. Under the No Action alternative, TVA would continue to rely on its existing 1982 Guntersville Reservoir Land Management Plan. This plan allocates land into 16 categories, including natural areas, forest and wildlife management, recreation, and industrial sites.

A second alternative would allocate reservoir lands into seven land use zones. It is anticipated that a sizable portion of these lands would be allocated to natural resource conservation and sensitive resource protection categories. However, in order to grandfather existing uses and to accommodate future development, smaller acreages would also be allocated to industrial and commercial development, recreation, and residential access.

This EIS will tier from TVA's Final EIS, Shoreline Management Initiative: An Assessment of Residential Shoreline Development Impacts in the Tennessee Valley (November 1998). That EIS evaluated alternative policies for managing residential uses along TVA's reservoir system, including Guntersville Reservoir.

Scoping

TVA held meetings to inform the public of the land allocation plan update and to solicit input in March 20, 2000 in South Pittsburg, Tennessee; March 21, 2000 in Scottsboro, Alabama; and March 23, 2000 in Guntersville, Alabama. These meetings were attended by 112 people. In addition, written comments were invited through a news release, newspaper notices, and a web-site notice. Subsequent to the scoping meetings, TVA determined that the development of an EIS would allow a better understanding of the impacts of the alternatives. Accordingly, this notice publishes TVA's intent to prepare an EIS. Based on the results of the previous scoping, TVA anticipates that the EIS will include discussions of the potential effects of alternatives on the following resource areas: aquatic ecology, water quality, wetlands, terrestrial ecology, cultural resources, noise, recreation, visual resources, threatened and endangered species, and navigation. Other issues which may be discussed, depending on the potential impacts of the alternatives, include floodplains, prime farmland, and air quality.

Since three meetings have already been conducted, TVA does not plan to hold additional meetings for scoping. However, written comments on the scope of issues to be addressed in the EIS are still requested. The participation of affected Federal, state, and local agencies and Indian tribes, as well as other interested persons is invited. Further, pursuant to the National Historic Preservation Act, TVA is interested in receiving comments on the potential of the proposed land allocation plan to affect historic properties. Written comments on the scope of the EIS should be received on, or before January 31, 2001. Following publication of the draft EIS, public comments on the draft plan will be solicited.

Dated: December 4, 2000.

Kathryn J. Jackson,

Executive Vice President, River System Operations & Environment.

[FR Doc. 00–32324 Filed 12–19–00; 8:45 am]

BILLING CODE 8120–08–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Noise Exposure Map Notice; Naples Municipal Airport, Naples, FL

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces its determination that the revised noise exposure maps submitted by the Naples Airport Authority for Naples Municipal Airport under the provisions of Title I of the Aviation Safety and Noise Abatement Act of 1979 (Public Law 96–193) and 14 CFR part 150 are in compliance with applicable requirements.

EFFECTIVE DATES: The effective date of the FAA's determination on the noise exposure map is December 7, 2000.

FOR FURTHER INFORMATION CONTACT: Mr. Tommy J. Pickering, P.E., Federal Aviation Administration, Orlando Airports District Office, 5950 Hazeltine National Drive, Suite 400, Orlando, Florida 32822, (407) 812–6331, Extension 29.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA finds that the revised noise exposure maps submitted for Naples Municipal Airport are in compliance with applicable requirements of Part 150, effective December 7, 2000.

Under section 103 of the Aviation Safety and noise Abatement Act of 1979 (hereinafter referred to as ''the Act''), an airport operator may submit to the FAA noise exposure maps which meet applicable regulations and which depict noncompatible land uses as of the date of submission of such maps, a description of projected aircraft operations, and the ways in which such operations will affect such maps. The Act requires such maps to be developed in consultation with interested and affected parties in the local community, government agencies, and persons using the airport.

An airport operator who has submitted noise exposure maps that are found by FAA to be in compliance with the requirements of Federal Aviation Regulation (FAR) Part 150, promulgated pursuant to Title I of the Act, may submit a noise compatibility program for FAA approval which sets forth the measures the operator has taken or proposes for the reduction of existing noncompatible uses and for the prevention of the introduction of additional noncompatabile uses.

The FAA has completed its review of the revised noise exposure maps and related descriptions submitted by the Naples Airport Authority. The specific maps under consideration are ''2000 NOISE EXPOSURE MAP'' and ''2005 NOISE EXPOSURE MAP'' in the submission. The FAA has determined that these maps for Naples Municipal Airport are in compliance with applicable requirements. This determination is effective on December 7, 2000. FAA's determination on an airport operator's noise exposure maps is limited to a finding that the maps were developed in accordance with the procedures contained in Appendix A of FAR Part 150. Such determination does not constitute approval of the applicant's data, information or plans, or a commitment to approve a noise compatibility program or to fund the implementation of that program.

If questions arise concerning the precise relationship of specific properties to noise exposure contours depicted on a noise exposure map submitted under Section 103 of the Act, it should be noted that the FAA is not involved in any way in determining the relative locations of specific properties with regard to the depicted noise contours, or in interpreting the noise exposure maps to resolve questions concerning, for example, which properties should be covered by the provisions of section 107 of the Act. These functions are inseparable from the ultimate land use control and planning responsibilities of local government. These local responsibilities are not changed in any way under Part 150 or through FAA's review of noise exposure maps. Therefore, the responsibility for the detailed overlaying of noise exposure contours onto the map depicting properties on the surface rests exclusively with the airport operator which submitted those maps, or with those public agencies and planning agencies with which consultation is required under section 103 of the Act. The FAA has relied on the certification by the airport operator, under section 150.21 of FAR Part 150, that the statutorily required consultation has been accomplished.

Copies of the revised noise exposure maps and of the FAA's evaluation of the maps are available for examination at the following locations:

Federal Aviation Administration, Orlando Airports District Office, 5950 Hazeltine National Drive, Suite 400, Orlando, Florida 32822

Naples Airport Authority, 160 Aviation Drive North, Naples, FL 34104

Questions may be directed to the individual named above under the heading, **FOR FURTHER INFORMATION CONTACT.**

Issued in Olrando, Florida December 7, 2000.

W. Dean Stringer,

Manager, Orlando Airports District Office.

[FR Doc. 00–32418 Filed 12–19–00; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2000–77]

Petitions for Exemption; Summary of Petitions Received; Dispositions of Petitions Issued

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for exemption received and of dispositions of prior petitions.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption part 11 of Title 14, Code of Federal Regulations (14 CFR), this notice contains a summary of certain petitions seeking relief from specified requirements of 14 CFR, dispositions of certain petitions previously received, and corrections. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATES: Comments on petitions received must identify the petition docket number involved and must be received on or before January 9, 2001.

ADDRESSES: Send comments on any petition in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rule Docket (ABC–200), Petition Docket No._____, 800 Independence Avenue, SW., Washington, DC 20591.

The petition, any comments received, and a copy of any final disposition are filed in the assigned regulatory docket and are available for examination in the Rules Docket (AGC–200), Room 9150, FAA Headquarters Building (FOB 10A), 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–3132.

FOR FURTHER INFORMATION CONTACT: Forest Rawls (202) 267–8033, or Vanessa Wilkins (202) 267–8029, Office

of Rulemaking (ARM–1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to §§ 11.85 and 11.91.

Issued in Washington, DC, on December 14, 2000.

Donald P. Byrne,

Assistant Chief Counsel for Regulations.

Dispositions of Petitions

Docket No.: 30103.
Petitioner: HeliQwest International, Inc.
Section of the 14 CFR Affected: 14 CFR 133.19(a)93) and 133.51.
Description of Relief Sought/ Disposition: To permit HeliQwest to conduct external-load operations in the United States using its dry-leased, Canadian-registered Bell 205A–1 helicopter (Registration Mark C–GEAK, Serial No. 30183).
Grant 11/20/00, Exemption No. 7383

Docket No.: 26048
Petitioner: National Test Pilot School
Section of the 14 CFR Affected: 14 CFR 91.319(a)(1) and (2)
Description of Relief Sought/ Disposition: To permit NTPS to (1) train non-flight-test students, (2) revise the limits of the areas within which the NTPS operates its experimental category aircraft, (3) reduce the total flight time required for rated U.S. and certain foreign military or former military pilot students from 1,000 hours to 750 hours, and (4) permit pilot students to operate aircraft in solo flight with a current Letter of Authorization (LOA).
Denial, 11/28/00, Exemption No. 5778F

Docket No.: 29320
Petitioner: Wisconsin Aviation, Inc.
Section of the 14 CFR Affected: 14 CFR 135.163 and 135.181
Description of Relief Sought/ Disposition: To permit WAI to (1) conduct passenger-carrying operations in single-engine airplanes in certain, limited instrument flight rules (IFR) conditions as were permitted previously by § § 135.103 and 135.181 before the adoption of Amendment No. 135–70; (2) conduct such operations without equipping its airplanes with two independent electrical power-generating sources, or a standby battery or alternate source of electrical power; and (3) a redundant energy-system for gyroscopic instruments.
Denial, 11/20/00, Exemption No. 7382

Docket No.: 30183
Petitioner: Aero Sports Connection, Inc.
Section of the 14 CFR Affected: 14 CFR 91.319(a)(2)
Description of Relief Sought/ Disposition: To permit ASC members who own an aircraft with an experimental certificate to be compensated for the use of the aircraft in transition training conducted by authorized flight instructors.
Grant, 11/28/00, Exemption No. 7390

Docket No.: 28663
Petitioner: Goodyear do Brasil Produtos de Borracha Ltda.
*Section of the 14 CFR Affected:*14 CFR 145.47(b)
Description of Relief Sought/ Disposition: To permit Goodyear to use the calibration standards of the Instituto Nacional de Metrologia, Normalizaçao e Qualidade Industrial in lieu of the calibration standards of the U.S. National Institute of Standards and Technology to test its inspection and test equipment.
Grant, 11/30/00, Exemption No. 6547B

Docket No.: 27001
Petitioner: BAE Systems Regional Aircraft (formerly British Aerospace Regional Aircraft)
Section of the 14 CFR Affected: 14 CFR § § 25.562(c)(5) and 25.785(a)
Description of Relief Sought/ Disposition: To permit the retrofit of front row passenger seating in Jetstream Series 4100 airplanes already delivered.
Grant, 11/21/00, Exemption No. 5587G

Docket No.: 23495
Petitioner: Department of the Army
Section of the 14 CFR Affected: 14 CFR 91.209(a)(1) and (2)
Description of Relief Sought/ Disposition: To permit the Army to conduct certain military training operations at night without lighted aircraft position lights.
Grant, 11/20/00, Exemption No. 3946F

Docket No.: 29820
Petitioner: Bombardier Aerospace
Section of the 14 CFR Affected: 14 CFR 25.785(b)
Description of Relief Sought/ Disposition: To provide relief from the general occupant protection requirements for occupants of multiple place side-facing seats that are occupied during takeoff and landing for Bombardier Global Model BD–7001A10 airplanes manufactured prior to January 1, 2004.
Partial Grant, 11/17/00, Exemption No. 7120A

Petitions for Exemption

Docket No.: 26649
Petitioner: Boeing Company
Section of the 14 CFR Affected: 14 CFR 25.562(b)(2)
Description of Relief Sought: To permit flight deck seats on the Boeing Models 777–200LR and 777–300ER airplanes, without complying with the floor pitch and roll requirements of 25.562(b)(2) (Amendment 25–64).

Docket No.: 30162
Petitioner: Emerson Electric Co.
Section of the 14 CFR Affected: Paragraphs 4(a) and 4(b) of Appendix A to 14 CFR part 91
Description of Relief Sought: To allow Emerson to operate its aircraft, with Honeywell and Collins avionics installed, in an ''on-condition'' maintenance program in accordance with the equipment manufacturer's recommendations for on-aircraft ground or flight check, rather than meeting the bench check requirements of paragraphs 4(a) and 4(b) of Appendix A of part 91.

Docket No.: 30166
Petitioner: Balloon Federation of America
Section of the 14 CFR Affected: 14 CFR 91.119(b) and (c)
Description of Relief Sought: To permit BFA to conduct a safety study during which BFA member pilots would be allowed to operate balloons (1) Below an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft, when operated over congested areas, and (2) below an altitude of 500 feet above the surface in other than congested areas.

Docket No.: 30155
Petitioner: University of Oklahoma Department of Aviation
Section of the 14 CFR Affected: 14 CFR 141.36(b)(2)(i), (c)(3)(i), and (d)(1)
Description of Relief Sought: To allow ODA to (1) Use an assistant chief instructor who has not had at least one year of flight training experience, (2) use an assistant chief instructor who has not had at least one year of instrument flight instructor experience, and (3) use an assistant chief instructor who has had at least 700 hours rather than 1,000 hours of experience as a pilot in command.

Docket No.: 30059
Petitioner: Saudi Arabian Oil Company
Section of the 14 CFR Affected: 14 CFR 61.51(f)
Description of Relief Sought: To permit Saudi Aramco commercial helicopter pilots flying as second pilots aboard Bell 212, 412, or 214ST helicopters operated by Saudi Aramco to count such time as second-in-command time toward fulfillment of the flight time requirements of 14 CFR necessary to take the airline transport pilot practical test.

Docket No.: 30172
Petitioner: Raytheon Aerospace Support Services
Section of the 14 CFR Affected: 14 CFR 145.61
Description of Relief Sought: To allow Raytheon to perform work on U.S. Customs airplanes without retaining a copy of the records of the work performed.

[FR Doc. 00–32417 Filed 12–19–00; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Notification of Modification of Information Collection Requirements; Comment Request

AGENCY: Federal Railroad Administration, DOT.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and its implementing regulations, the Federal Railroad Administration (FRA) hereby announces that it intends to modify existing instructions of three currently approved information collection reporting forms. The revised instructions will be added to the next edition of the FRA Guide for Preparing Accident/Incident Reports. For a projected five-year period, FRA seeks to gather additional data that is needed in order to enhance rail safety. However, only the instructions will be revised. FRA contemplates no change to the data elements of any of the three applicable reporting forms, and believes there will be no change in the number of responses. FRA seeks to capture information concerning ''remote control devices'' that is not presently provided by the railroads in order to further reduce the number and severity of railroad accidents/incidents, and accompanying casualties to railroad workers and members of the public. FRA estimates that there will be no change in the burden time per response for each form; that there will be no change in the total burden hours for the three relevant reporting forms; and that there will be no change in the total burden hours for the entire currently approved information collection. FRA is working with members of the railroad industry and members of railroad labor unions in this partnership effort. FRA has met with representatives of the railroad industry and railroad labor unions to explain the type of data needed and to solicit their views. FRA will continue to consult with them regarding final changes to the instructions to be included in the next Guide. FRA includes a copy of the modified instructions with this notice.

DATES: Comments are requested no later than February 20, 2001.

ADDRESSES: Submit written comments on any or all of the following proposed activities by mail to either: Robert Brogan, Office of Safety, Planning and Evaluation Division, RRS–21, Federal Railroad Administration, 1120 Vermont Ave., NW., Mail Stop 17, Washington, DC 20590, (telephone: (202)–493–6292), or Nancy Friedman, Trial Attorney, Office of Chief Counsel, Federal Railroad Administration, 1120 Vermont Ave., NW., Mail Stop 10, Washington, DC 20590, (telephone: (202)–493–6034). (These telephone numbers are not toll-free.) Commenters requesting FRA to acknowledge receipt of their respective comments must include a self-addressed stamped postcard stating, ''Comments on OMB control number 2130–0500.'' Alternatively, comments may be transmitted via facsimile to (202) 493–6265 or (202) 493–6068, or E-mail to Robert Brogan at *robert.brogan@ fra.dot.gov*, or to Nancy Friedman at *nancy.friedman@ fra.dot.gov.* Please refer to the assigned OMB control number in any correspondence submitted. FRA will summarize comments received in response to this notice in a subsequent notice and include them in its currently approved information collection submission, as necessary.

FOR FURTHER INFORMATION CONTACT: Robert Brogan, Office of Planning and Evaluation Division, RRS–21, FRA, 1120 Vermont Ave., NW., Mail Stop 17, Washington, DC 20590 (telephone: (202) 493–6292) or Nancy Friedman, Trial Attorney, Office of Chief Counsel, FRA, 1120 Vermont Ave., NW., Mail Stop 10, Washington, DC 20590 (telephone: (202) 493–6034). (These telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act of 1995 (PRA), Pub. L. No. 104–13, § 2, 109 Stat. 163 (1995) (codified as revised at 44 U.S.C. §§ 3501–3520), and its implementing regulations, 5 CFR part 1320, require Federal agencies to provide 60-days notice to the public for comment on information collection activities before seeking approval for reinstatement or renewal by OMB. 44 U.S.C. § 3506(c)(2)(A); 5 CFR §§ 1320.8(d)(1), 1320.10(e)(1), 1320.12(a). Specifically, FRA invites interested respondents to comment on the following summary of proposed information collection activities regarding (i) whether the information collection activities are necessary for FRA to properly execute its functions, including whether the activities will have practical utility; (ii) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (iii) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (iv) ways for FRA to minimize the burden of information collection activities on the public by automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.*, permitting electronic submission of responses). *See* 44 U.S.C. § 3506(c)(2)(A)(i)–(iv); 5 CFR 1320.8(d)(1)(i)–(iv). FRA believes that soliciting public comment will promote its efforts to reduce the administrative and paperwork burdens associated with the collection of information mandated by Federal regulations. In summary, FRA reasons that comments received will advance three objectives: (i) Reduce reporting burdens; (ii) ensure that it organizes information collection requirements in a ''user friendly'' format to improve the use of such information; and (iii) accurately assess the resources expended to retrieve and produce information requested. *See* 44 U.S.C. § 3501.

Below is a brief summary of currently approved information collection activities that FRA seeks to slightly modify. FRA requests continuation of the current approval for the reasons listed in the summary above.

Title: Accident/Incident Reporting and Recordkeeping.

OMB Control Number: 2130–0500.

Abstract: The collection of information is due to accident reporting regulations set forth in 49 CFR part 225 which require railroads to submit monthly reports summarizing collisions, derailments, and certain other accident/incidents involving damages above a periodically revised dollar threshold, as well as certain injuries to passengers, employees, and other persons on railroad property (including those which are railroad work-related). Because the reporting requirements and information needed regarding each category are unique, a different form is used for each category. FRA is modifying the instructions for two of the three referenced agency forms to request that the ''Special Study Block'' (SSB) of each form be used to capture (with coded letters) information pertaining to accidents/incidents which involve ''remote control'' devices. The third form will capture the required data with

an annotation in the narrative portion of the form.

FRA publishes these instructions as provided for in the final section pertaining to ''Special Study Blocks'' included in the preamble to FRA's final rule on Railroad Accident Reporting (49 CFR part 225). Specifically, the Final Decision section of ''Special Study Blocks'' in the preamble to that final rule provides that: ''The Rail Equipment Accident/Incident Report (Form FRA F 6180.54) contains two SSBs in block ''49.'' As the need arises, FRA will notify the railroads in writing, or if appropriate, through publication in the **Federal Register**, of the purpose and the type of information that is to be collected. FRA will be as specific as possible in order to minimize both costs and the amount of time associated with the collection of this new information. Each SSB has 20 characters in order to standardize the data structure for computer files. FRA believes the SSBs will prove extremely valuable in collecting information to help FRA identify and evaluate issues of safety concern as well as other non-safety issues as the need arises.

FRA anticipates that use of one or more SSBs will be occasional, rather than continuous. As appropriate, FRA will consult with the Railroad Safety Advisory Committee (RSAC) before formulating the respective information collections.'' (see 61 FR 30947; June 18, 1996).

Form Number(s): FRA F 6180.54, FRA F 6180.55a, FRA F 6180.57.

Affected Public: Businesses.

Respondent Universe: 685 railroads.

Frequency of Submission: On occasion.

Total Responses: 18,500 (for 3 listed forms); 75,352 (for entire information collection).

Estimated Total Annual Burden: 28,900 hours (for 3 listed forms); 63,058 hours (for entire information collection).

Status: Continuation of Current Approval.

Pursuant to 44 U.S.C. 3507(a) and 5 CFR 1320.5(b), 1320.8(b)(3)(vi), FRA informs all interested parties that it may not conduct or sponsor, and a respondent is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Authority: 44 U.S.C. §§ 3501–3520.

Kathy A. Weiner,

Director, Office of Information Technology and Support Systems, Federal Railroad Administration.

Attachment to Federal Register Notice

Listed below are proposed changes to instructions for FRA Forms F 6180.54, 6180.55a, and 6180.57 to be included in the next edition of FRA's Guide to Preparing Accident/Incident Reports. The changes specify the type of information to be captured about remote controlled devices through the use of coded letters in the ''Special Study Blocks.''

General Definition

Remote Control Transmitter/Receiver—A term used to describe the critical components involved in operating on-track equipment by radio signals transmitted from a portable transmitter to a receiver located on board the on-track equipment. The device will be capable of transmitting from outside of the operating compartment of a designated and equipped unit of on-track rail equipment and will transmit coded command signals which will operate, at a minimum, the equipment's speed, direction, braking and shutdown systems.

Specific Code and Definition for

Rail Equipment accident/incident (Form 6180.54)

Remotely Controlled Operation—A movement of on-track rail equipment that is controlled by an employee or contractor using a remote transmitter/receiver designed to control the locomotive, maintenance machine, or other type of self-propelled on-track rail equipment. (Code = R)

When, on Form FRA F 6180.54, the *Special Study Block* (49) is annotated with the letter ''R'', it will indicate that remotely controlled operations were in effect.

When, on Form FRA F 6180.54, the *Special Study Block* (49) is left *blank*, it will indicate conventional or non-remote equipment movement.

Note: Entries in Block 34 relate to the number of locomotive units and their placement in a consist or train. Notations in Block 34 are separate and apart from data being collected in Special Study Block 49.

Specific Code and Definition for

Highway-Rail Grade Crossing accident/incident (Form 6180.57)

Remotely Controlled Operation—A movement of on-track rail equipment that is controlled by an employee or contractor using a remote transmitter/receiver designed to control the locomotive, maintenance machine, or other type of self-propelled on-track rail equipment. (Code = R)

When, on Form FRA F 6180.57, the *Special Study Block* (53a) is annotated with the letter ''R'', it will indicate that remotely controlled operations were in effect.

When, on Form FRA F 6180.57, the *Special Study Block* (53a) is left *blank,* it will indicate conventional or non-remote equipment was involved.

Specific Codes and Definitions for:

Railroad Casualties to persons: Injury Illness Summary (Form 6180.55a)

Remotely Controlled Operation—A movement of on-track rail equipment that is controlled by an employee or contractor using a remote transmitter/receiver designed to control the locomotive, maintenance machine, or other type of self-propelled on-track rail equipment. (Code = R)

Carrying—When an injured/ill employee or contractor, has on his or her person a remote transmitter capable of controlling the locomotive, maintenance machine, or other type of self-propelled on-track rail equipment. (Code = C)

Not Carrying—When *any* person is injured or becomes ill during a remotely controlled operation, and the injured/ill person is *not carrying* a remote transmitter capable of controlling a locomotive, maintenance machine, or other type of self-propelled on-track rail equipment. (Code = N)

Operating—When an injured/ill employee or contractor, at the time of the accident/incident, has on his or her person a remote transmitter capable of controlling a locomotive or maintenance machine, and other type of self-propelled on-track rail equipment. (Code = O)

Not Operating—When an injured/ill employee, at the time of the accident/incident, has on his person a remote transmitter capable of controlling a locomotive or maintenance machine, and is *not* operating the remote transmitter. (Code = N)

Below are all possible valid coding scenarios for casualty reporting involving Remote Control Operations.

When used, any three (3) letter combination *must* be preceded by an asterisk (*) and *must* be shown as the first four (4) characters in the reporting area headed ''narrative''.

RCO = Remotely Controlled Operation, injured/ill employee or contractor is carrying remotely controlled transmitter, and is operating the remotely controlled movement at the time of accident/incident.

RCN = Remotely Controlled Operation, injured/ill employee or contractor is carrying remotely controlled transmitter, and is NOT operating the remotely controlled movement at the time of accident/incident.

RNN = Remotely Controlled Operation, Injured/Ill person is NOT carrying remotely controlled transmitter, and is NOT operating the remotely controlled movement at the time of accident/incident.

When, on Form FRA F 6180.55a, the reporting area headed ''narrative'' *is not* annotated with any three (3) letter combination (shown above) preceded by an asterisk (*) and shown as the first four (4) characters in the ''narrative'' section, it will indicate that remotely controlled operations were *not* in effect.

Addition to Appendix F: Tools, Machinery, Appliances, Structures, Surfaces (etc.) Circumstance Codes:

Add: *''34–Remote Control Transmission Unit''*

[FR Doc. 00–32415 Filed 12–19–00; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 33972]

Austin Area Terminal Railroad, Inc.—Change in Operators Exemption—Trans-Global Solutions, Inc.

Austin Area Terminal Railroad, Inc. (AATR) has filed a verified notice of exemption under 49 CFR 1150.31 to change operators from Trans-Global Solutions, Inc. d/b/a Austin Area Terminal Railroad (TGS) to AATR on a line of railroad owned by Capital Metropolitan Transportation Authority.[1] The line extends between milepost AUNW–MP0.0 (SPT–MP 57.00), west of Giddings, to milepost AUNW–MP154.07 (SPT–MP 99.04), at Llano, including the Marble Falls Branch (6.43 miles), the Scobee Spur (3.3 miles), and the Burnet Spur (0.93 mile), for approximately 162 miles, in Bastrop, Burnet, Lee, Llano, Travis, and Williamson Counties, TX. This change in operators is exempt under 49 CFR 1150.31(a)(3).[2]

The parties indicate that the exemption will be effective on or about December 13, 2000. The earliest the transaction can be consummated is December 13, 2000 (7 days after the exemption was filed).

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to reopen the proceeding to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 33972, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Edward D. Greenberg, Esq., Galland, Kharasch, Greenberg, Fellman & Swirsky, P.C., Canal Square, 1054 Thirty-First Street, NW., Washington, DC 20007–4492.

Board decisions and notices are available on our website at *http://WWW.STB.DOT.GOV.*

Decided: December 12, 2000.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 00–32156 Filed 12–19–00; 8:45 am]

BILLING CODE 4915–00–P

[1] AATR is a wholly owned subsidiary of TGS.

[2] In order to qualify for a change in operators exemption, an applicant must give notice to shippers on the line. *See* 49 CFR 1150.32(b). By letter filed on December 11, 2000, AATR has certified to the Board that it has sent notice to all shippers on the line that AATR will be providing service in place of TGS.

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–406 (Sub–No. 13X)]

Central Kansas Railway, L.L.C.—Abandonment Exemption—in Reno, Kingman, Harper, Rice, and McPherson Counties, KS

Central Kansas Railway, L.L.C. (CKR) has filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon: (1) its H&S Branch between: (a) milepost 3.6 at Hutchinson and milepost 31.1 at Kingman; and (b) milepost 48.2 at Rago and milepost 59.7 at Harper; and (2) its McPherson Branch between milepost 58.0 at Conway and milepost 77.4 at Lyons, a distance of approximately 58.4 miles in Reno, Kingman, Harper, McPherson, and Rice Counties, KS. The line traverses United States Postal Service Zip Codes 67501, 67502, 67503, 67504, 67505, 67058, 67068, 67128, 67142, 67457, 67460, 67554, and 67570.

CKR has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) there has been no overhead traffic on the line during the past two years; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8 (historic reports), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment and discontinuance shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed. Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on January 19, 2001, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by January 2, 2001. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by January 9, 2001, with: Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, NW., Washington, DC 20423.

A copy of any petition filed with the Board should be sent to applicant's representative: Karl Morell, Ball Janik LLP, 1455 F St., NW., Suite 225, Washington, DC 20005.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

[1] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Service Rail Lines,* 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[2] Each offer of financial assistance must be accompanied by the filing fee, which currently is set at $1000. *See* 49 CFR 1002.2(f)(25).

CKR has filed an environmental report which addresses the effects, if any, on the environmental and historic resources. The Section of Environmental Analysis (SEA) will issue an environmental assessment (EA) by December 22, 2000. Interested persons may obtain a copy of the EA by writing to SEA (Room 500, Surface Transportation Board, Washington, DC 20423) or by calling SEA, at (202) 565–1545. Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), CKR shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned its line. If consummation has not been effected by CKR's filing of a notice of consummation by December 20, 2001, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our website at http://WWW.STB.DOT.GOV.

Decided: December 12, 2000.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 00–32279 Filed 12–19–00; 8:45 am]

BILLING CODE 4915–00–P

Federal Register

Wednesday,
December 20, 2000

Part II

Department of Labor

Employment Standards Administration

20 CFR Part 718 et al.

Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended; Final Rule

DEPARTMENT OF LABOR

Employment Standards Administration

20 CFR Parts 718, 722, 725, 726, 727

RIN 1215–AA99

Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended

AGENCY: Employment Standards Administration, Labor.

ACTION: Final rule.

SUMMARY: On January 22, 1997, the Department issued a proposed rule to amend the regulations implementing the Black Lung Benefits Act. 62 FR 3338–3435 (Jan. 22, 1997). When the comment period closed on August 21, 1997, the Department had received written submissions from almost 200 interested persons, including coal miners, coal mine operators, insurers, physicians, and attorneys. The Department also held hearings in Charleston, West Virginia, and Washington, D.C. at which over 50 people testified. The Department carefully reviewed the testimony and the comments and, on October 8, 1999, issued a second notice of proposed rulemaking. 64 FR 54966–55072 (Oct. 8, 1999). In its second notice, the Department proposed changing several of the most important provisions in its initial proposal. The Department also explained its decision not to alter the original proposal with respect to other key regulations based on the comments received to date. Finally, the Department prepared an initial regulatory flexibility analysis. In order to ensure that small businesses that could be affected by the Department's proposal received appropriate notice of the Department's proposed changes, the Department mailed a copy of the second notice of proposed rulemaking to all coal mine operators contained in the databases maintained by the Mine Safety and Health Administration.

The Department initially allowed interested parties until December 7, 1999 to file comments to its second proposal, but extended that period until January 6, 2000. The Department received 37 written submissions before the close of the comment period, from groups representing both coal miners and coal mine operators. The Department also received comments from individual miners, various coal mining and insurance companies, as well as from claims processing organizations, attorneys, and various professional organizations. The Department has carefully reviewed all of the comments, and is issuing its final rule. The rule contains a final regulatory flexibility analysis as required by the Regulatory Flexibility Act.

EFFECTIVE DATE: January 19, 2001.

FOR FURTHER INFORMATION CONTACT: James L. DeMarce, (202) 693–0046.

SUPPLEMENTARY INFORMATION: The Department's final rule reprints 20 CFR Parts 718 (except Tables B1 through B6 in Appendix B), 722, 725, and 726 in their entirety. The Department has not revised all of the regulations in these parts. A detailed list of the regulations to which the Department has made substantive revisions follows the Summary of Noteworthy Regulations below, accompanied by a list of regulations to which the Department has made technical revisions, a list of regulations that the Department has deleted, and a list of regulations that the Department has not changed in any manner.

Summary of Noteworthy Provisions

District Director Claims Processing

These final regulations implementing the Black Lung Benefits Act provide simplified administrative procedures for the adjudication of claims pending before the Office of Workers' Compensation Programs (OWCP). The new streamlined procedures are less formal and should be easier for claims participants to understand. They require the district director to issue fewer documents and therefore involve fewer procedural steps and deadlines. They also require fewer responses from the parties. These changes are in response to the many comments the Department has received asking that OWCP's procedures be simplified and made less formal and adversarial.

In its initial notice of proposed rulemaking, the Department announced its intent to amend these regulations with the goal of helping to improve services, streamline the adjudication process and simplify the regulations' language. The Department noted OWCP's many years of experience administering the program and the variety of ideas for change which had resulted from it. 62 FR 3338 (Jan. 22, 1997). In the second notice of proposed rulemaking, the Department emphasized its commitment to improve the quality of the information it provides the parties to a black lung claim. As part of this commitment, the Department noted its intent to substantially rewrite the documents used by district directors to notify parties of the ''initial findings'' on their claims. The Department stated its goal was to help make claim processing by district offices easier to understand and to give claimants a clear picture of the medical evidence developed in connection with their claims so that they were able to make more informed decisions as to how to proceed. The Department also noted that it had attempted to ''eliminat[e] the hierarchy of response times'' at the district director level. 64 FR 54992 (Oct. 8, 1999). After the receipt of many comments addressing its proposals, the Department has determined that a more comprehensive streamlining of district director procedures is warranted.

The Department has therefore eliminated the use of initial findings and the required responses to them, as well as the district director's initial adjudication as proposed in §§ 725.410–725.413. Similarly, the Department has altered the rules governing informal conferences, § 725.416. If a conference is held, no memorandum of conference will result, § 725.417(c). Instead, OWCP will issue only one decisional document at the conclusion of the district director's processing of a claim: in most cases a proposed decision and order, § 725.418. The proposed decision and order will give rise to the thirty-day period for requesting a hearing before the Office of Administrative Law Judges and, if no such hearing is requested, to the one-year period for filing a request for modification, § 725.419. The proposed decision and order will also contain the district director's final designation of the responsible operator liable for the payment of benefits, and the dismissal of all other potentially liable operators that had previously received notice of the claim.

The Department hopes that the absence of documents with titles such as ''initial findings'' and ''memorandum of conference'' will encourage a less adversarial and less formal development of the necessary evidence and will promote more timely evidentiary development. As previously proposed, the district director will engage in a preliminary gathering of the relevant evidence. He will develop medical evidence, including the complete pulmonary evaluation, §§ 725.405–725.406. He will identify and notify those coal mine operators among the claimant's former employers which he deems to be potentially liable operators, § 725.407, and gather evidence from them regarding their employment of the miner and their status as operators, § 725.408. At the conclusion of this evidence-gathering, however, rather than issue an initial finding (a document with the appearance of a preliminary adjudication of the claim), the district director will issue a schedule for the submission of additional evidence, § 725.410. This

document will contain a summary of the results of the complete pulmonary evaluation and the district director's preliminary analysis of that evidence. The analysis will include a discussion of any of the elements of entitlement that appear not to have been established and why. The schedule will also contain the district director's designation of a responsible operator liable for the payment of claimant's benefits. If the designated responsible operator is not the miner's last employer, the district director will include with the schedule the statements necessary to comply with § 725.495(d).

The schedule will allow the claimant and the designated responsible operator not less than 60 days to submit additional evidence, including evidence relevant to the claimant's entitlement to benefits and the employer's liability for them. The schedule will also allow at least an additional 30 days within which to respond to evidence the other party submits, § 725.410(b). These time periods may be extended for good cause shown, § 725.423. The district director will serve the schedule by certified mail on all parties and will include with it copies of all relevant evidence, § 725.410(c). The schedule will also inform the claimant and the designated responsible operator of their rights, including the right to submit additional evidence and the right to further adjudication of the claim, § 725.410(a)(4). Finally, the schedule will notify the claimant that he has the right to obtain representation and that, if the designated responsible operator fails to accept the claimant's entitlement within the specified time and the claimant establishes his entitlement to benefits payable by that operator, the responsible operator will be liable for a reasonable attorney's fee.

The new procedure requires a responsible operator to respond within 30 days as to the liability designation in the schedule, § 725.412(a)(1). Silence on the responsible operator's part will be deemed an acceptance of the district director's designation as to its liability. Silence on the operator's part with respect to claimant's entitlement, however, will be deemed a controversion. If the operator wishes to accept a claimant's entitlement to benefits, it must file a statement indicating this intent within 30 days of issuance of the district director's schedule, § 725.412(b). Thus, this schedule requires a less comprehensive operator response than the initial findings would have. The responsible operator must file a response only to contest its liability and/or to accept a claimant's entitlement to benefits. In addition, fewer parties are required to respond to the schedule since the claimant need not respond at all.

By contrast, if the district director concludes that there is no operator responsible for the payment of benefits and that the results of the complete pulmonary evaluation support a finding of eligibility, the district director shall issue a proposed decision and order awarding the claimant benefits, § 725.411. In such a case, no schedule for the submission of additional evidence is necessary, and no claimant response to the proposed decision and order is required.

At the conclusion of the time scheduled for the submission of additional evidence, § 725.415(b), the district director may either notify additional operators of their potential liability for benefits under § 725.407, issue another schedule for the submission of additional evidence identifying another potentially liable operator as the responsible operator liable for the payment of benefits, § 725.410, schedule a case for an informal conference, § 725.416, or issue a proposed decision and order, § 725.418. In the event the district director issues another schedule for the submission of additional evidence pursuant to § 725.410, the district director shall not permit the development or submission of any additional medical evidence until after he has determined the responsible operator liable for the payment of benefits. If the operator determined to be the responsible operator has not had the opportunity to submit medical evidence, the district director shall afford that operator the opportunity outlined in § 725.410. The designated responsible operator may elect to adopt any medical evidence previously submitted by another operator as its own, subject to the § 725.414 limitations.

The regulations also contain significant modifications to the informal conference procedure in order to reduce delay and to ensure that conferences are held only in appropriate cases. Thus, if an informal conference is scheduled, it must be held within 90 days of the conclusion of the evidentiary development period unless a party requests that it be postponed for good cause, § 725.416(a). A district director may schedule a conference only if all the parties to a claim are represented or deemed represented, although lay representation is sufficient, § 725.416(b). If all the pertinent requirements are met, however, and an informal conference is scheduled, the unexcused failure of a party to appear constitutes grounds for the imposition of sanctions, § 725.416(c). These sanctions may include denial of the claim by reason of abandonment, § 725.409(a)(4). In the event an ALJ ultimately reviews the denial by reason of abandonment and concludes that it was improper, he may proceed to address the merits of the claim, but only with the written agreement of the Director, § 725.409(c).

In most cases, however, at the conclusion of either the evidentiary development period or informal conference proceedings, the district director will issue a proposed decision and order setting forth his findings and conclusions with respect to the claim. In order to reduce the delay caused by informal conferences, the regulations require issuance of a proposed decision and order within 20 days after the conclusion of all informal conference proceedings, § 725.418(a). The proposed decision and order will contain the district director's final designation of the responsible operator liable for the payment of benefits, and will dismiss, as parties to the claim, all other potentially liable operators that received notification pursuant to § 725.407. Any party may request a hearing within 30 days of issuance of the decision and order, § 725.419(a). If no party responds to the proposed decision, it shall become final and effective upon the expiration of the 30-day period and no further proceedings with respect to the claim shall be possible, except for the filing of a request for modification, § 725.419(d).

The Department hopes that this simplified procedure will reduce, if not eliminate, hearing requests filed before the conclusion of a district director's claims processing. In the event a hearing request is filed before a district director has concluded his adjudication of the claim, however, OWCP will honor the request at the conclusion of processing in the absence of a party's affirmative statement that it no longer desires a hearing. Thus, if a claimant has previously requested a hearing and has been denied benefits in a proposed decision and order, the case will be forwarded to the Office of Administrative Law Judges for hearing in the absence of a statement that a hearing is no longer desired. Similarly, if an operator has previously requested a hearing, and the proposed decision and order awards the claimant benefits, OWCP will forward the claim for hearing absent a statement from the operator that it no longer desires a hearing, § 725.418(c).

Evidentiary Development

Documentary Evidence

With one substantive addition and several deletions, these final rules implement the Department's second proposal with respect to the development of both documentary medical evidence and evidence pertaining to operator liability. The designated responsible operator may submit documentary medical evidence either to the district director or to the administrative law judge (ALJ) up to 20 days before an ALJ hearing, or even thereafter, if good cause is shown. Documentary medical evidence may only be submitted up to the numerical limitations outlined in §§ 725.414(a), however, absent a showing of good cause, § 725.456(b). Thus, each side in a claim may submit two chest x-ray interpretations, the results of two pulmonary function tests, two arterial blood gas studies and two medical reports as its affirmative case. In addition, each party may submit one piece of evidence in rebuttal of each piece of evidence submitted by the opposing party. Finally, in a case in which rebuttal evidence has been submitted, the party that originally proferred the evidence which has been the subject of rebuttal may submit one additional statement to rehabilitate its evidence.

By contrast, documentary evidence as to operator liability must be submitted to the district director, absent a showing of exceptional circumstances, §§ 725.408(b)(2), 725.414(d), 725.456(b). There is no limit on the amount of such evidence that may be submitted, however.

At the urging of commenters representing both industry and claimants, the Department has made one addition to § 725.414(a). The Department has added a specific limitation on the amount of autopsy and biopsy evidence which may be submitted in a claim. Each side may submit one autopsy report and one report of each biopsy as part of an affirmative case. Each side may submit one autopsy report and one report of each biopsy in rebuttal of the opponent's case. Finally, where the original autopsy or biopsy evidence has been the subject of rebuttal, the party that submitted the original report may submit an additional statement from the physician who authored that report.

The Department has deleted language throughout § 725.414 referring to potentially liable operators since only the designated responsible operator and/or the Trust Fund will have the authority to develop documentary medical evidence in a claim. The Department has also deleted one provision of proposed § 725.414, § 725.414(e), as well as the comparable provision proposed as § 725.456(c). These subsections would have provided that any evidence obtained by a party while a claim was pending before a district director but withheld from the district director or any other party shall not be admitted into the record in any later proceedings in the absence of extraordinary circumstances unless its admission is requested by another party. Commenters opposed these provisions, and the Department has agreed to delete them. The Department believes they are no longer necessary, given the significant alteration in the district director's methods for gathering evidence under the new regulations, *see* preamble to § 725.456. In addition, these rules would have posed a danger to parties who are unrepresented before the district director and might have run afoul of the rules unintentionally.

Complete Pulmonary Evaluation

With one exception, these final rules implement the Department's second proposal with respect to the administration of the complete pulmonary evaluation required by 30 U.S.C. 923(b). The Department will allow each claimant to select the physician or facility to perform his evaluation from a list of authorized providers maintained by the Department. The list in each case will include all authorized physicians and facilities in the state of the miner's residence and contiguous states, § 725.406(b). The Department will also make available to the claimant's treating physician, at the claimant's request, the results of the objective testing administered as part of the complete pulmonary evaluation and will inform the claimant that any opinion submitted by his treating physician will count as one of the two medical reports that the miner may submit, § 725.406(d).

The Department has not included in the final regulation at § 725.406, however, the provision proposed as subsection (e) which would have allowed the district director to require the claimant to be reexamined after the completion of the complete pulmonary evaluation if the district director believed that unresolved medical questions remained. Commenters from both industry and claimants' groups opposed this provision, and the Department has concluded it is no longer necessary. The complete pulmonary evaluation will now be performed by a highly qualified physician who may be asked by the district director to clarify and/or supplement an initial report if unresolved medical questions remain. In addition, the components of the complete pulmonary evaluation are to be in substantial compliance with the applicable quality standards and the district director retains authority elsewhere in § 725.406 to schedule the miner for further examination or testing to ensure compliance with these standards.

In the second notice of proposed rulemaking, the Department also announced its intent to perform the best possible respiratory and pulmonary evaluation of miners applying for benefits. The Department promised a thorough examination, performed in compliance with the quality standards, in order to provide each claimant with a realistic appraisal of his condition and the district director with a sound evidentiary basis for a preliminary evaluation of the claim. The Department also announced its intent to develop more rigorous standards for physicians who perform complete pulmonary evaluations. The Department invited the interested public to comment on the possible standards that might be used to select physicians and facilities, 64 FR 54988–54989 (Oct. 8, 1999).

The comments the Department received are discussed in detail in the preamble to § 725.406. It is the Department's intent, however, to include in its Black Lung Program Manual the requirements for a physician's or medical facility's inclusion on the list. The Manual is available to the public in every district office of OWCP. Thus, the requirements for participation in OWCP's program and the manner in which the Department has used those requirements to select physicians for inclusion on the approved list will be public information. The Department does not intend to screen the contents of physicians' prior reports and testimony before including them on the list. The Department intends only to ascertain that the required professional credentials are present.

Witnesses

These final rules adopt the provisions governing witness testimony proposed in the Department's second notice of proposed rulemaking. No person shall be permitted to testify as a witness at a hearing, pursuant to deposition or by interrogatory unless that person meets the requirements of § 725.414(c). Thus, in the case of a witness offering testimony relevant to the liability of a potentially liable operator or the identification of a responsible operator,

the witness must have been identified while the claim was pending before the district director in the absence of extraordinary circumstances, § 725.457(c)(1). In the case of a physician offering testimony relevant to the physical condition of the miner, the physician must have prepared a medical report submitted into evidence. Alternatively, the party offering the physician's testimony must have submitted fewer than two medical reports into evidence in which case the physician's testimony shall be considered a medical report for the purpose of the evidentiary limitations in § 725.414(c). A party may offer the testimony of more than two physicians only upon a finding of good cause, § 725.457(c)(2).

Treating Physicians' Opinions

The Department has adopted a rule governing the weighing of treating physicians' opinions similar to the one proposed in its second notice of proposed rulemaking, § 718.104(d). The rule is discussed in detail in the preamble to § 718.104. The language of § 718.104(d) has been altered to provide that, in appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight. *See* § 718.104(d)(5). The rule's purpose is to recognize that a physician's professional relationship with the miner may enhance his insight into the miner's pulmonary condition. A treating physician may develop a more in-depth knowledge and understanding of the miner's respiratory and pulmonary condition than a physician who examines the miner only once or who reviews others' examination reports. Section 718.104(d) is not an outcome-determinative evidentiary rule, however. It does not preclude consideration of other relevant evidence of record. Rather, it provides criteria for evaluating the quality of the doctor-patient relationship. The criteria at § 718.104(d)(1)–(4) are indicia of the potential insight the physician may have gained from on-going treatment of the miner. The rule is designed to force a careful and thorough assessment of the treatment relationship. If the adjudicator concludes the treating physician has a special understanding of the miner's pulmonary health, that opinion may receive ''controlling weight'' over contrary opinions. That determination may be made, however, only after the adjudicator considers the credibility of the physician's opinion in light of its documentation and reasoning and the relative merits of the other relevant medical evidence of record.

Definition of Pneumoconiosis and Establishing Total Disability Due to Pneumoconiosis

The Department has adopted the proposed definition of pneumoconiosis without alteration. In the preamble to § 718.201, the Department explains that the term ''legal pneumoconiosis'' does not create a new medical diagnosis, but rather reflects the statute's definition of the disease as ''a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.'' 30 U.S.C. 902(b). The preamble also explains in detail the Department's decision to include chronic obstructive pulmonary disease in the definition of pneumoconiosis to the extent it is shown to have arisen from coal mine employment. The Department attempts to clarify that not all obstructive lung disease is pneumoconiosis. It remains the claimant's burden of persuasion to demonstrate that his obstructive lung disease arose out of his coal mine employment and therefore falls within the statutory definition of pneumoconiosis. The Department has concluded, however, that the prevailing view of the medical community and the substantial weight of the medical and scientific literature supports the conclusion that exposure to coal mine dust may cause chronic obstructive pulmonary disease. Each miner must therefore be given the opportunity to prove that his obstructive lung disease arose out of his coal mine employment and constitutes ''legal'' pneumoconiosis.

The Department has also adopted the proposed regulation defining total disability and disability due to pneumoconiosis with one alteration, § 718.204. To clarify its original intent concerning the extent to which pneumoconiosis must contribute to a miner's total disability, the Department has amended the language of §§ 718.204(c)(1)(i) and 718.204(c)(1)(ii) by adding the words ''material'' and ''materially.'' Thus, a miner has established that his pneumoconiosis is a substantially contributing cause of his disability if it either has a material adverse effect on his respiratory or pulmonary condition or materially worsens a totally disabling respiratory or pulmonary impairment caused by a disease or exposure unrelated to coal mine dust. Evidence that pneumoconiosis made only a negligible, inconsequential or insignificant contribution to the miner's disability is insufficient to establish total disability due to pneumoconiosis. This change is discussed in detail in the preamble at § 718.204. The Department has also adopted one important proposed change with respect to the clinical evidence which may be used to establish total disability, *see* preamble to § 718.103. The Department has concluded that the claims adjudication process would benefit by making mandatory the use of the flow-volume loop in pulmonary function testing (spirometry testing). The Department has previously noted that the test, conducted in this manner, provides a ''more reliable method of ensuring valid, verifiable results * * *.'' 64 FR 54975 (Oct. 8, 1999). In the second notice of proposed rulemaking, the Department announced its intent to conduct a survey of physicians, clinics and facilities which perform pulmonary function testing to evaluate the prevalence of spirometers capable of producing a flow-volume loop. The Department has now evaluated the results of its survey and has concluded that the prevalence of the necessary equipment and the willingness of those physicians who do not currently have it to buy it, warrant the mandatory usage of such equipment.

Subsequent Claims

These final rules adopt the regulation governing subsequent claims that was proposed in the Department's second notice of proposed rulemaking. A subsequent claim is an application for benefits filed more than one year after the denial of a previous claim. It may be adjudicated on its merits only if the claimant demonstrates that an applicable condition of entitlement has changed in the interim. In the second proposal, the Department justified the rule by noting that ''allowing the filing of a subsequent claim for benefits which alleges a worsening of the miner's condition, * * * merely recognizes the progressive nature of pneumoconiosis.'' 64 FR 54968 (Oct. 8, 1999). In the preamble to § 725.309, the Department responds in detail to those commenters who oppose the regulation. They argue, in part, that the Department's recognition of pneumoconiosis as a latent and progressive disease is scientifically unsound. The Department has summarized the scientific and medical evidence supporting its view that pneumoconiosis is both latent and progressive and has responded to the criticism leveled at that evidence. It is the Department's conclusion that the record contains abundant evidence to justify the regulation governing subsequent claims.

Attorneys' Fees

With minor changes, these final rules promulgate the regulation governing the payment of a claimant's attorney's fee as it was proposed in the Department's second notice of proposed rulemaking, § 725.367. The Department wishes to encourage attorneys to represent claimants early in the administrative process, given the important decisions which may be made by a claimant while a claim is pending before the district director. For example, the rules now limit the quantity of medical evidence that a claimant may submit in support of his entitlement. A claimant may request that the Department send the objective test results from his complete pulmonary evaluation to his treating physician. Any treating physician's opinion which is submitted to the district director, however, may become one of the claimant's two medical reports. The Department's rule governing attorney's fees, therefore, seeks to encourage early attorney involvement by providing a different starting point for employer and Fund attorney fee liability. Although the creation of an adversarial relationship and the ultimately successful prosecution of a claim are still necessary to trigger employer or Fund liability, once that liability is triggered, a reasonable fee will be awarded for all necessary work performed, even if it was performed before the creation of the adversarial relationship.

The text of the regulation has been altered in minor ways. The language describing the fee to which an attorney is entitled has been amended to conform with § 725.366. Section 725.367 therefore provides for the payment of a ''reasonable fee[] for necessary services performed. * * *'' In addition, the regulation has been amended to conform with the revised district director claims procedure. Thus, § 725.367(a)(1) now provides that if the responsible operator designated by the district director pursuant to § 725.410(a)(3) fails to accept the claimant's entitlement to benefits within the 30 day period provided by § 725.412(b) and is ultimately determined to be liable for benefits, the operator shall also be liable for a reasonable attorney's fee. Similarly, if there is no operator that may be held liable for the payment of benefits, the district director issues a schedule for the submission of additional evidence under § 725.410, and the claimant successfully prosecutes his application for benefits, the Fund will be liable for a reasonable attorney's fee, § 725.367(a)(2). Finally, if the district director issues more than one schedule for the submission of additional evidence in order to designate a different operator as the responsible operator, and that operator is ultimately determined to be liable for the payment of benefits, that operator will be liable for the payment of claimant's attorney's fee if it fails to accept the claimant's entitlement within 30 days of the date upon which it is notified of its designation as responsible operator.

True Doubt

The Department has not adopted a ''true doubt'' rule in these regulations. The ''true doubt'' rule was an evidentiary weighing principle under which an issue was resolved in favor of the claimant if the probative evidence for and against the claimant was in equipoise. The Department believes that evaluation of conflicting medical evidence requires careful consideration of a wide variety of disparate factors affecting the credibility of that evidence. The presence of these factors makes it unlikely that a factfinder will be able to conclude that conflicting evidence is truly in equipoise. *See* preamble to § 718.3.

Criteria for Determining a Responsible Operator

The Department has made two changes to the regulation governing the identification of a responsible operator, § 725.495. That regulation now provides that if the miner's most recent employer was a self-insured operator which no longer possesses sufficient assets to secure the payment of benefits when the miner files his claim, the Department will not name a previous employer as responsible operator. Rather, the claim will be the responsibility of the Black Lung Disability Trust Fund. The Department has made this change in response to a comment that stated that it is unfair to name a prior employer as liable for a claim when the financial inability of the later employer to pay the claim is the fault of the Department. Because the Department has the authority to accept or reject applications for self-insurance and to set minimum standards for qualifying as a self-insurer, the Department agrees with the commenter. Thus, to the extent the security deposited by a self-insured coal mine operator pursuant to § 726.104 proves insufficient to pay individual claims, liability will not be placed on previous employers, but rather on the Trust Fund. The Department has also altered the language of § 725.495(d) to reflect the changes made in the regulations governing district director claims processing, §§ 725.410–725.413. The district director will no longer issue an initial finding naming a responsible operator but rather will finally designate in a proposed decision and order one operator as the responsible operator liable for a claim, § 725.418(d).

Insurance Endorsement

In the second notice of proposed rulemaking, the Department opened § 726.203 for comment, noting that representatives of the insurance industry had told the Department that a different version of the insurance endorsement than the one contained in § 726.203(a) had been in use since 1984 with the Department's consent. The Department invited the submission of any document the insurance industry might possess from the Department authorizing use of the different endorsement. 64 FR 54969–70, 55005–06 (Oct. 8, 1999). The Department has carefully considered the comments submitted in response to the second notice of proposed rulemaking and declines to amend § 726.203. The revised black lung endorsement offered by the commenters would materially alter the obligations and coverage provided by the insurance industry, thereby increasing the potential exposure of coal mine operators and the Black Lung Disability Trust Fund, *see* preamble to § 726.203.

Explanation of Changes

Complete List of Substantive Revisions

The Department has made substantive revisions to the following regulations: § 718.3, § 718.101, § 718.102, § 718.103, § 718.104, § 718.105, § 718.106, § 718.107, § 718.201, § 718.202, § 718.204, § 718.205, § 718.301, Appendix B to part 718, Appendix C to Part 718, part 722 (entire), § 725.1, § 725.2, § 725.4, § 725.101, § 725.103, § 725.202, § 725.203, § 725.204, § 725.209, § 725.212, § 725.213, § 725.214, § 725.215, § 725.219, § 725.221, § 725.222, § 725.223, § 725.306, § 725.309, § 725.310, § 725.311, § 725.351, § 725.362, § 725.367, § 725.403, § 725.405, § 725.406, § 725.407, § 725.408, § 725.409, § 725.410, § 725.411, § 725.412, § 725.413, § 725.414, § 725.415, § 725.416, § 725.417, § 725.418, § 725.421, § 725.423, § 725.452, § 725.454, § 725.456, § 725.457, § 725.458, § 725.459, § 725.465, § 725.478, § 725.479, § 725.490, § 725.491, § 725.492, § 725.493, § 725.494, § 725.495, § 725.502, § 725.503, § 725.515, § 725.522, § 725.530, § 725.533, § 725.537, § 725.543, § 725.544, § 725.547, § 725.548, § 725.606,

§ 725.608, § 725.609, § 725.620, § 725.621, § 725.701, § 725.706, § 726.2, § 726.3, § 726.8, § 726.101, § 726.104, § 726.105, § 726.106, § 726.109, § 726.110, § 726.111, § 726.114, § 726.300, § 726.301, § 726.302, § 726.303, § 726.304, § 726.305, § 726.306, § 726.307, § 726.308, § 726.309, § 726.310, § 726.311, § 726.312, § 726.313, § 726.314, § 726.315, § 726.316, § 726.317, § 726.318, § 726.319, and § 726.320. Detailed explanations of the reasons for the Department's revisions may be found in the discussion of individual regulations below.

Complete List of Technical Revisions

The Department has made only technical changes to the following regulations: § 718.1, § 718.2, § 718.4, 718.303, Appendix A to Part 718, § 725.3, § 725.102, § 725.201, § 725.206, § 725.207, § 725.216, § 725.217, § 725.218, § 725.220, § 725.301, § 725.302, § 725.350, § 725.360, § 725.366, § 725.401, § 725.402, § 725.404, § 725.419, § 725.420, § 725.450, § 725.451, § 725.455, § 725.462, § 725.463, § 725.466, § 725.480, § 725.496, § 725.497, § 725.501, § 725.504, § 725.505, § 725.506, § 725.507, § 725.510, § 725.513, § 725.514, § 725.521, § 725.531, § 725.532, § 725.536, § 725.540, § 725.601, § 725.603, § 725.604, § 725.605, § 725.607, § 725.702, § 725.703, § 725.704, § 725.705, § 725.707, § 725.708, § 725.711, § 726.1, § 726.4, § 726.103, § 726.203, § 726.207, § 726.208, § 726.209, § 726.210, § 726.211, § 726.212, and § 726.213. In its first notice of proposed rulemaking, the Department revised § 725.3 to create a new subpart E in part 725, and to recognize the relabeling of the remaining subparts. The Department inadvertently omitted the regulation from the list of technical revisions, however. Accordingly, § 725.3 now appears in the complete list of technical revisions. The Department also inadvertently omitted §§ 725.206 and 725.540 from the list of technical revisions. The Department added a reference to § 725.4(d) to each regulation, *see* 62 FR 3340–41 (Jan. 22, 1997). The Department also inadvertently omitted § 725.207 from the list of technical revisions. The Department replaced commas in subsections (b) and (c) with the word ''and.'' The Department also inadvertently omitted § 725.497 from the list of technical revisions. The Department replaced references to the ''Trust Fund'' with references to the ''fund,'' the term defined in § 725.101(a)(8), and capitalized the word ''section'' in subsections (a) and (b). Finally, the Department inadvertently omitted § 725.601 from the list of technical revisions. The Department replaced references to ''deputy commissioner'' with references to ''district director,'' *see* 62 FR 3340 (Jan. 22, 1997), and replaced a reference to the ''Trust Fund'' with a reference to the ''fund.'' The Department explained the other technical changes that it was making to the regulations in its first and second notices of proposed rulemaking. *See* 62 FR 3340–41 (Jan. 22, 1997); 64 FR 54970 (Oct. 8, 1999). With the exception of § 726.203, none of the regulations listed above were open for comment. The Department's decision not to revise § 726.203, other than the technical revisions discussed in the Department's first notice of proposed rulemaking, is explained in the preamble to § 726.203.

Complete List of Deleted Regulations

The following regulations have been deleted: § 718.307, § 718.401, § 718.402, § 718.403, § 718.404, § 725.453A, § 725.459A, § 725.503A, § 725.701A, and part 727 (entire). The Department explained its decision to incorporate the text of sections 725.453A, 725.459A, 725.503A, and 725.701A into other regulations in its first notice of proposed rulemaking. *See* list of Technical revisions, 62 FR 3341 (Jan. 22, 1997). Detailed explanations of the Department's decision to delete the remaining regulations in this list may be found in the discussion of individual regulations below.

Complete List of Unchanged Regulations

The following regulations have not been revised: § 718.203, § 718.206, § 718.302, § 718.304, § 718.305, § 718.306, § 725.205, § 725.208, § 725.210, § 725.211, § 725.224, § 725.225, § 725.226, § 725.227, § 725.228, § 725.229, § 725.230, § 725.231, § 725.232, § 725.233, § 725.303, § 725.304, § 725.305, § 725.307, § 725.308, § 725.352, § 725.361, § 725.363, § 725.364, § 725.365, § 725.422, § 725.453, § 725.460, § 725.461, § 725.464, § 725.475, § 725.476, § 725.477, § 725.481, § 725.482, § 725.483, § 725.511, § 725.512, § 725.520, § 725.534, § 725.535, § 725.538, § 725.539, § 725.541, § 725.542, § 725.545, § 725.546, § 725.602, § 725.710, § 726.5, § 726.6, § 726.7, § 726.102, § 726.107, § 726.108, § 726.112, § 726.113, § 726.115, § 726.201, § 726.202, § 726.204, § 726.205, and § 726.206. The Department did not accept comments on these regulations, and is re-promulgating the regulations for the convenience of readers.

For purposes of this preamble, ''he'', ''his'', and ''him'' shall include ''she'', ''hers'', and ''her''.

20 CFR Part 718—Standards for Determining Coal Miners' Total Disability or Death Due to Pneumoconiosis

Subpart A—General

20 CFR 718.3

(a)(i) In the initial notice of proposed rulemaking, the Department invited public comment on the continued use of the ''true doubt'' rule, and specifically on the language contained in § 718.3(c), which had been cited to the Supreme Court in support of the rule. 62 FR 3341 (Jan. 22, 1997). The ''true doubt'' rule is an evidentiary principle which requires the adjudicator to find in favor of the claimant on a factual issue if the evidence for and against the claimant is evenly balanced. The Supreme Court invalidated the ''true doubt'' rule in *Director, OWCP* v. *Greenwich Collieries,* 512 U.S. 267 (1994). The Court held § 718.3(c) failed to define the rule effectively, and that the rule, as applied by the Benefits Review Board, violated the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, by relieving the claimant of the burden of proving his or her claim by a preponderance of the evidence (the ''burden of persuasion''). The Department therefore proposed deleting § 718.3(c) and moving the existing 20 CFR 718.403 (1999) (''Burden of proof'') to proposed § 725.103. (ii) In the second notice of proposed rulemaking, the Department addressed the comments responding to the proposed deletion of paragraph (c). 64 FR 54974 (Oct. 8, 1999). Some comments urged the Department to promulgate a version of the ''true doubt'' rule which would comply with *Greenwich Collieries.* Other comments suggested retaining paragraph (c) as a statement of general principle and a reminder to adjudicators of the purpose of the Black Lung Benefits Act (BLBA). The Department rejected both suggestions. The Department concluded a ''true doubt'' evidentiary rule would not improve claims adjudication. Rather, the factfinder must conduct an in-depth analysis of the medical evidence in each case, and resolve credibility issues. The Department also noted that evidence is rarely in equipoise because a factfinder must consider such a wide variety of factors in weighing it: Physicians' qualifications, clinical documentation,

reasoning, relationship to other medical evidence, etc. With respect to paragraph (c) as a statement of principle, the Department considered the provision unnecessary because it would be unenforceable, and because the principles appear in the legislative history of the BLBA which may be cited by a party in litigation. Moreover, the Department noted it had addressed the difficulties confronted by claimants in proving their claims in other regulations, *e.g.,* by requiring substantial compliance rather than strict compliance with the quality standards for medical evidence. (iii) The Department has received four additional comments concerning the ''true doubt'' rule.

(b) Two comments observe that the Department has the regulatory authority to promulgate a ''true doubt'' rule which will comply with *Greenwich Collieries,* and three comments urge the need for such a rule to implement Congressional intent that all reasonable doubt be resolved in the claimant's favor. The Department recognizes that it has the statutory authority to depart from the requirements of the APA and allocate burdens of production and persuasion among the parties. The Department, however, does not believe codification of the ''true doubt'' rule is necessary to afford claimants the protections Congress intended in directing resolution of reasonable doubts in their favor. Rather than a statement of general principle, the Department has provided assistance to claimants in other ways. As noted in the second notice of proposed rulemaking, the Department eased the level of compliance with the quality standards for clinical tests and medical reports from strict adherence to ''substantial compliance.'' 64 FR 54974 (Oct. 8, 1999). The reduced standard allows the adjudicator more leeway to determine in each particular case whether any defects in compliance undermine the credibility of the test or report. Another example is the ''treating physician'' rule in § 718.104(d). The regulation enhances the weight an adjudicator may give to a miner's treating physician's opinion provided the opinion meets certain standards. In addition, § 725.406(d) provides each claimant with the opportunity to have his or her treating physician receive objective test results (such as a chest x-ray reading and pulmonary function study results), in substantial compliance with the regulations' quality standards. This provision ensures that the claimant's treating physician's opinion may be based on complying evidence. Finally, the Department has adopted burden-shifting presumptions such as the default onset date for the commencement of benefits, § 725.503(b), (d), and the presumption of coverage for pulmonary-related medical benefits, § 725.701(e), which assist claimants on medical treatment issues. These provisions significantly reduce the need for a ''true doubt'' rule.

(c) Three comments contend a ''true doubt'' rule is necessary because the limitations on the quantity of medical evidence imposed by the regulations will result in increased instances in which the evidence for and against entitlement is in equipoise despite scrupulous consideration of all relevant factors affecting credibility. The Department disagrees. The adjudicator must examine several variables in weighing the credibility of each item of medical evidence, especially physicians' opinions. Age of the opinion, reasoning, underlying clinical data, the physician's level of expertise, reliability of employment, social and medical histories, etc., are all factors to be considered in each report. As for clinical studies, the quality standards establish criteria to measure the reliability of the clinical results, and physicians' reviews of the results provide additional information on the studies' validity. When all available information is assembled, the Department believes few medical records for and against entitlement will be in equipoise. Furthermore, the limitations on evidence should prompt each party to bolster the credibility of its medical evidence and challenge the credibility of its opponent's case.

(d) One comment states the ''true doubt'' rule is especially needed for weighing chest x-rays because that type of evidence involves very few variables (film quality, readers' expertise) which can affect the credibility of the evidence. The Department believes no need exists to adopt a specialized ''true doubt'' rule for use in weighing only x-rays. Such a rule would place undue importance on one type of evidence, and would overemphasize the role of x-rays in determining whether the miner has pneumoconiosis. Chest x-rays are used to determine whether the miner has ''clinical'' pneumoconiosis, *i.e.,* ''the lung disease caused by fibrotic reaction of the lung tissue to inhaled dust, which is generally visible on chest x-rays as opacities.'' *Hobbs* v. *Clinchfield Coal Co.,* 917 F.2d 790, 791 n. 1 (4th Cir. 1990) (citation omitted). The BLBA explicitly prohibits the denial of a claim based solely on negative x-rays. 30 U.S.C. 923(b). The reason for this prohibition is Congress' reservations about the reliability of negative x-rays as trustworthy evidence that the miner does not have pneumoconiosis. *Usery* v. *Turner Elkhorn Mining Co.,* 428 U.S. 1, 31–34 (1976). Consequently, Congress has limited the use of negative x-rays in evaluating a miner's entitlement to benefits. Even if the x-ray readings in a particular claim appear to be truly balanced and therefore insufficient to meet the preponderance standard, however, the claimant may nevertheless establish the existence of clinical pneumoconiosis. For example, a factfinder might find one x-ray reading more credible than another based on a radiologist's explanation, contained in a supplemental report or deposition testimony, of the reasons for his x-ray diagnosis. Such reasons may include consideration of the miner's complete occupational history, including the length of his or her coal mine employment, and the absence of other injurious exposures, *see* 45 FR 13687, Discussion and changes, § 718.202 (Feb. 29, 1980). In addition, a claimant may prove the existence of ''legal'' pneumoconiosis. This broader category of compensable disease comprises ''all lung diseases which * * * [are] significantly related to, or substantially aggravated by, dust exposure in coal mine employment.'' *Hobbs,* 917 F.2d 4 791 n. 1; *see also Barber* v. *Director, OWCP,* 43 F.3d 899, 901 (4th Cir. 1995). In weighing medical evidence relevant to ''legal'' pneumoconiosis, the adjudicator may consider a variety of factors which affect the weight of the medical evidence, *e.g.*, the physicians' expertise, the reasoning and documentation in the medical reports, the comparative consistency or inconsistency of the opinions with other medical evidence such as hospital reports, etc. A claimant has ample opportunity to establish that (s)he has a lung disease caused by coal mine employment in addition to the narrow type of disease discoverable by x-rays. The Department therefore rejects the position that a ''true doubt'' rule should be available for the purpose of resolving conflicts in x-ray evidence.

(e) One comment suggests a ''true doubt'' rule would be useful in resolving conflicts between qualifying and nonqualifying pulmonary function and blood gas studies. The commenter acknowledges that more factors exist to determine the credibility of these types of clinical evidence than exist when chest x-ray evidence is in conflict, but nevertheless recommends making the rule applicable in the event the evidence is in equipoise. Both pulmonary function (§ 718.103) and

blood gas studies (§ 718.105) must comply with far more detailed quality standards than x-rays. Although only ''substantial compliance'' is required under the regulations, the more detailed standards necessarily provide more points of comparison between studies and more bases for preferring one study to another. A party may challenge another party's study by submitting expert opinion evidence demonstrating the study is unreliable or invalid. Given the numerous means of challenging or bolstering a study, the Department does not believe a ''true doubt'' rule would play a significant role in weighing pulmonary function studies and blood gas studies. No change in the regulation is appropriate.

(f) No other comments have been received concerning this section, and no changes have been made in it.

Subpart B

20 CFR 718.101

(a) In the initial notice of proposed rulemaking, the Department added subsection (b) to emphasize that the part 718 quality standards apply to all evidence developed by any party in connection with a claim filed after March 31, 1980, and to claims governed by part 727 if the evidence was developed after that date. 62 FR 3341 (Jan. 22, 1997). Paragraph (b) also established a single standard of compliance for all clinical tests and medical reports, in place of the varying standards contained in the former individual regulations. The Department revised paragraph (b) in the second notice of proposed rulemaking to clarify that the quality standards will apply only prospectively to evidence developed in connection with a claim, after promulgation of these regulations. The Department noted it wished to avoid invalidating evidence already submitted in pending claims based on the parties' settled expectations. 64 FR 54974–75 (Oct. 8, 1999). The Department also responded to numerous comments received after the initial notice of proposed rulemaking. It rejected comments opposing the general applicability of the quality standards to medical evidence and advocating consideration of noncomplying evidence, citing the need for technically accurate and reliable evidence for the adjudication of entitlement issues. For the same reason, the Department rejected comments disputing its authority to impose quality standards on medical evidence as inconsistent with the Black Lung Benefits Act's (BLBA) requirement that ''all relevant evidence'' be considered. *See* 30 U.S.C. 923(b). The Department concluded quality standards are consistent with the mandated consideration of all relevant evidence because noncomplying evidence is inherently unreliable, and therefore not relevant to the adjudication of a claim. The Department rejected the suggestion that the criteria enumerated in the quality standards should provide the only grounds for invalidating medical evidence; rather, parties may develop any evidence which addresses the validity of the evidence. The Department explained there was no need to add an exemption from the quality standards for hospitalization and treatment records because § 718.101 is clear that it applies quality standards only to evidence developed ''in connection with a claim'' for black lung benefits. Finally, the Department rejected as unnecessary a requirement that the Department notify a party if its evidence is noncomplying and allow it to rehabilitate the evidence because the responsibility for submitting complying evidence rests with the party submitting it. The district director is already responsible for ensuring the complete pulmonary examination required by 30 U.S.C. 923(b) complies with all applicable quality standards. In addition, if an opposing party challenges evidence as noncomplying, the party originally submitting it may rehabilitate the evidence by submitting an additional report from the author of the original report.

(b) Two comments reiterate the general argument that 30 U.S.C. 923(b) and the Administrative Procedure Act (APA), 5 U.S.C. 556(d), require consideration of ''all relevant evidence,'' and the Department therefore cannot exclude from the adjudicator's consideration noncomplying medical evidence. The Department previously addressed, and rejected, this argument in the second notice of proposed rulemaking. 64 FR 54974 (Oct. 8, 1999). The Department stated that noncomplying evidence is not ''relevant evidence'' because it is inherently unreliable, and cannot form the basis for awarding or denying a claim. Upon further consideration, the Department concludes this statement, while accurate in the majority of cases, should be qualified. Evidence which does not substantially comply with the applicable standard generally is not very reliable. Noncomplying evidence should only form the basis for awarding or denying a claim in limited circumstances. All three of the following requirements must be met: no evidence exists which does comply with the applicable standards; the defect(s) cannot be cured by a supplementary opinion or other evidence; and the death of the miner precludes developing evidence which would be in substantial compliance. In order for such evidence to support an award or denial, the adjudicator must find the evidence sufficiently reliable to establish the fact(s) for which it is offered despite its failure to meet the threshold ''substantial compliance'' standard. The Department therefore rejects the commenters' general position that noncomplying evidence cannot be excluded under 30 U.S.C. 923(b), although the Department recognizes a limited exception to the standards' gatekeeping function for some claims involving deceased miners.

(c) Two comments cite specific examples of circumstances in which allegedly probative physicians' opinions could be disregarded on compliance grounds. (i) In one example, the commenter cites as potentially noncomplying a medical opinion diagnosing ''legal'' pneumoconiosis based on valid pulmonary function and arterial blood gas testing, but omitting any chest x-ray testing. The Department has previously considered the position that a medical report should not automatically be found noncomplying based on the absence of an x-ray. 64 FR 54977 (Oct. 8, 1999). In rejecting the comment that the quality standard applicable to reports of physical examination (§ 718.104) should not make a chest x-ray a standard requirement, the Department noted that an x-ray is an integral part of any examination for pneumoconiosis. The Department further noted, however, that medical evidence must only be in ''substantial compliance'' with the applicable quality standards; the party proffering the evidence may demonstrate that the evidence is reliable despite its failure to comply with every criterion in the standard. The Department reiterates that position. Whether any particular piece of evidence is in ''substantial compliance'' with the standards, and therefore reliable, is a matter for the adjudicator to determine taking into consideration all relevant circumstances. One important factor is the element(s) of entitlement for which the evidence is offered. In the example cited above, the lack of an x-ray is not necessarily fatal. The report may contain: valid and pertinent other tests and information upon which the physician can make a diagnosis; accurate medical, smoking and employment histories; results of a physical examination confirming the

presence of pulmonary symptoms or impairment; and pulmonary function study and/or blood gas studies demonstrating impairment. Based on this documentation, the physician may provide a documented and reasoned diagnosis of ''legal pneumoconiosis'' which the adjudicator considers reliable, *i.e.,* in ''substantial compliance'' with the quality standards. *See* 45 FR 13687 (Feb. 29, 1980), § 718.202, Discussion and changes (h). (ii) In another example, the commenter posits a ''positive'' medical opinion based on an invalid pulmonary function test, valid arterial blood gas testing, physical examination and other data. The lack of a valid pulmonary function study is not necessarily a reason to reject the entire report. The hypothetical assumes a valid blood gas test, physical examination, etc. As in the first example, this testing and information may support a documented and reasoned diagnosis depending on the purpose for which the report is offered. If the physical examination and clinical tests other than the pulmonary function study substantiate the presence of a pulmonary/respiratory impairment, the factfinder may deem the physician's diagnosis a reliable assessment of the miner's extent of impairment. If the employment, smoking and other personal information is accurate, the adjudicator may accept the physician's conclusions about the cause of the miner's pulmonary or respiratory impairment. If, however, the physician clearly relied on the invalid pulmonary function study (or other inaccurate data or information), the adjudicator may find the opinion unreliable in one or more respects. (iii) The Department emphasizes that the ''substantial compliance'' standard is a rule of reason. In each case in which an issue of noncompliance is raised, the factfinder must identify any failure to comply strictly with the applicable quality standard. The factfinder must then determine whether the test or report is reliable despite its failure to comply with every criterion in the standard. This finding is necessarily dependent to an extent on the element(s) of entitlement for which the test or report may be relevant. The significance of the particular defect must therefore be ascertained by considering whether it is critical to the physician's conclusions. In the first example, the lack of an x-ray may be excused if the physician has offered a documented and reasoned diagnosis of ''legal'' pneumoconiosis. In the second example, the invalid pulmonary function study may or may not affect an otherwise documented and reasoned evaluation of the miner's respiratory/pulmonary condition. No categorical response, however, can be given to the hypotheticals since the reliability, and therefore the probative value, of the reports can only be evaluated in the context of an actual claim. No change in the regulation is warranted.

(d) One comment urges the Department to include a provision specifically exempting those medical tests and reports generated outside the black lung benefits claim context from the quality standards. Specifically, the commenter requests that the text of the regulation make clear that chest x-rays, pulmonary function tests and blood gas studies administered in the hospital or as part of the miner's routine care be exempted from quality standards applicability. The Department previously addressed this concern in the second notice of proposed rulemaking. 64 FR 54975 (Oct. 8, 1999). The Department noted that § 718.101 limits the applicability of the quality standards to evidence ''developed * * * in connection with a claim for benefits'' governed by 20 CFR parts 718, 725 or 727. Despite the inapplicability of the quality standards to certain categories of evidence, the adjudicator still must be persuaded that the evidence is reliable in order for it to form the basis for a finding of fact on an entitlement issue. Additional exclusionary language in the regulation is therefore unnecessary.

(e) One comment contends all medical evidence involving a deceased miner should be considered without regard to the quality standards because the miner is no longer available for further testing. The Department disagrees. The regulations provide that a deceased miner's noncomplying chest x-rays, pulmonary function studies and medical reports may form the basis of an award or denial of benefits under certain circumstances provided no complying study or report is available. *See* §§ 718.102(e) (x-rays), 718.103(c) (pulmonary function studies), 718.104(c) (medical reports). The Department has added a similar provision to § 718.105 (arterial blood gas studies). With respect to each category of evidence, the availability of tests or reports in substantial compliance with the applicable quality standards makes reliance on the noncomplying tests or reports unnecessary; the record already contains reliable evidence addressing the deceased miner's pulmonary condition, and reliable evidence is the fundamental purpose of the quality standards. Furthermore, excusing noncompliance for all evidence involving a deceased miner ignores the fact that existing evidence may be brought into substantial compliance despite the unavailability of the miner. The party offering the evidence may obtain a supplementary opinion from the physician who conducted the noncomplying test or authored the report, and cure the defect(s). Finally, the party may submit the noncomplying evidence in any event, ecognizing that it may be considered but cannot establish any fact for which complying evidence is in the record.

(f) One comment suggests that applying the quality standards only prospectively will sanction the acceptance of inferior evidence if the evidence was developed before the effective date of these regulations. The commenter also contends the Department's rationale for prospective application implies the former quality standards will not apply to evidence developed before the effective date of these regulations, especially for unrepresented claimants. The Department disagrees. In the initial notice of proposed rulemaking, proposed § 718.101(b) required all evidence developed in conjunction with a black lung benefits claim to comply with the applicable quality standards. 62 FR 3374 (Jan. 22, 1997). The Department stated that the purpose of § 718.101(b) was to make clear the Department's disagreement with Benefits Review Board precedent holding the former 20 CFR part 718 quality standards applied only to evidence developed by the Director. 62 FR 3341 (January 22, 1997). One comment, in response to the first proposal, noted that, as written, § 718.101(b) would invalidate evidence in claims pending before the Department which was valid under prevailing Board precedent at the time the evidence was generated. The Department responded to this concern in the second notice of proposed rulemaking by revising § 718.101 to apply the quality standards only to evidence developed after the effective date of the regulations. 64 FR 55010 (Oct. 8, 1999). In explaining the revision, the Department acknowledged the ''substantial hardship'' which might occur, especially for unrepresented claimants, if medical evidence which complied with the law when submitted into evidence became invalid after the regulations become effective. This explanation, however, is not a concession as to the correctness of the Board's decisions. Since 1980, the Department has consistently taken the position that the 20 CFR part 718 quality standards apply to all evidence

developed by any party in black lung benefits claim litigation. Although the Board has rejected the Department's position, *Gorzalka* v. *Big Horn Coal Co.,* 16 Black Lung Rep. 1–48, 1–51 (1990) (and cases collected), the only court of appeals to consider the issue has agreed with the Department. *Director, OWCP* v. *Mangifest,* 826 F.2d 1318 (3d Cir. 1987). The Department adheres to this view with respect to any evidence developed in conjunction with a claim by any party before the effective date of the proposed regulations.

(g) Two comments approve of the prospective application of the quality standards. One comment approves of the ''substantial compliance'' standard.

(h) No other comments have been received concerning this section, and no changes have been made in it.

20 CFR 718.102

(a) In the initial notice of proposed rulemaking, the Department proposed three minor changes to § 718.102: eliminating the reference to the compliance standard in light of the substantial compliance language of general applicability in § 718.101(b); adding language presuming compliance with the technical criteria for chest x-rays in Appendix A; and correcting a typographical error in subsection (e) which cited to a nonexistent regulation. 62 FR 3342 (Jan. 22, 1997). The Department did not propose any additional changes in the second notice of proposed rulemaking. 64 FR 54971 (Oct. 8, 1999). In the final rule, the Department has changed subsection (e) to clarify the probative value of noncomplying x-rays in the case of a deceased miner. Specifically, this provision states that an x-ray, which is not in substantial compliance with the quality standard, may still establish the presence or absence of pneumoconiosis if the x-ray is of sufficient quality for a board-eligible radiologist, board-certified radiologist, or ''B'' reader to interpret the film. The Department has also added a sentence to subsection (b) to inform interested parties where they may obtain a copy of the ILO classification.

(b) One comment argues that § 718.102(b) should state that an x-ray cannot establish the absence of pneumoconiosis unless it complies with the quality standards and is classified according to a recognized scheme. The commenter further argues that § 718.102(b) and (e), in conjunction with § 718.101(b), are insufficient to impose this requirement. Section 718.102(b) identifies the classification systems which are acceptable for black lung claims. Subsection (e) states that no x-ray may demonstrate either the presence or absence of pneumoconiosis unless it complies with reporting requirements, *i.e.,* paragraph (b). Section 718.101(b) reinforces this requirement by stating that ''any evidence'' which is not in substantial compliance with the applicable quality standard cannot ''establish the fact for which it is proffered.'' For purposes of the quality standards, ''substantial compliance'' may mean less than strict compliance with each and every requirement of the applicable quality standard if the evidence is nevertheless deemed reliable by the factfinder. The adjudicator must determine whether the x-ray reading is, or is not, in substantial compliance if one or more items of required information have been omitted, including classification of x-ray findings according to any of the reporting schemes in § 718.102(b). In some circumstances, the adjudicator may determine that the x-ray interpretation provides sufficient information to make a factual finding on the presence or absence of pneumoconiosis. For example, the physician may describe the film findings in terms of ''no pneumoconiosis,'' rather than classifying the film as ''0/-, 0/0 or 0/1.'' Such a reading may be considered sufficiently detailed to be in ''substantial compliance'' notwithstanding the lack of classification. Conversely, the physician's description or reporting of x-ray film findings may indicate (s)he read the film for reasons unrelated to diagnosing the existence of pneumoconiosis, *e.g.,* lung cancer or cardiac surgery. The adjudicator may consider that evidence not in substantial compliance because it does not reliably address the presence or absence of pneumoconiosis. Accordingly, the Department disagrees with the commenter's position that any unclassified x-ray is not in ''substantial compliance'' with § 718.102.

(c) Four comments suggest adding the phrase ''in and of itself'' to the subsection (e) prohibition on using unclassified x-rays to demonstrate the presence or absence of pneumoconiosis. The comments contend that the change would make clear that x-ray evidence of some disease process, in conjunction with other evidence, could be used to prove the miner has a lung disease caused by coal dust exposure, *i.e.,* ''legal'' pneumoconiosis. The recommended change is unnecessary. An unclassified x-ray which yields positive indications of lung disease cannot establish the presence of pneumoconiosis under § 718.202(a)(1), which is intended as a means of proving only the existence of clinical pneumoconiosis. An x-ray report, however, may also be part of a medical report which must be considered under § 718.202(a)(4). Even an unclassified x-ray may therefore provide some clinical basis for a diagnosis of a respiratory disease arising out of coal mine employment under that section. Consequently, provision is already made for consideration of the results of an unclassified x-ray in the context of a medical report. In this context, it may be used to support a diagnosis of legal pneumoconiosis.

(d) No other comments were received concerning this section, and no other changes have been made in it.

20 CFR 718.103

(a)(i) The Department proposed amending § 718.103 in the initial notice of proposed rulemaking to take into account proposed § 718.101(b), which would establish a single standard of ''substantial compliance'' for all of the quality standards. 62 FR 3342 (Jan. 22, 1997). The Department also proposed changes to § 718.103(c) to harmonize it with § 718.102(e) (X-rays). Both provisions operate in the same manner and for the same purposes: to presume compliance with technical requirements in the applicable appendices to part 718; to permit rebuttal of the presumed compliance with relevant evidence; and to permit exceptions to the quality standards for a deceased miner if the claim presents limited evidence. (ii) In response to comments received concerning the initial notice of proposed rulemaking, the Department recommended several additional changes to § 718.103 in the second notice of proposed rulemaking. 64 FR 54975–76 (Oct. 8, 1999). One physician testified at the Washington, D.C., hearing that a flow-volume loop provided a more acceptable basis for obtaining verifiable test results than the proposed prohibition on an initial inspiration from room air. The Department agreed, and proposed changing both § 718.103 and Appendix B to require flow-volume loops for every pulmonary function test obtained after the effective date of the final regulation. The Department invited additional comment on this proposal. The Department also announced its intention to survey clinics and facilities which specialize in the treatment of pulmonary conditions to ascertain the extent to which they already used spirometers capable of producing flow-volume loops. The same physician observed that 20 CFR 718.103(a) (1999) required that pulmonary function

testing produce either a Forced Vital Capacity (FVC) or a Maximum Voluntary Ventilation (MVV) result, yet also required a one-second Forced Expiratory Volume (FEV1) which must be derived from the FVC. The Department agreed the regulation was inconsistent, and proposed a revision to § 718.103(a) making the FVC a required result along with the FEV1 and the MVV optional. The Department also proposed increasing the allowable difference between the two largest MVV values from 5 percent to 10 percent in § 718.103(b) to harmonize the regulation with Appendix B. The former and initially proposed § 718.103(b) required submission of three tracings of the MVV maneuver unless the two largest MVV results were within 5 percent of each other, in which case only two tracings were necessary. By contrast, Appendix B has consistently stated that the variation between the two largest MVV shall not exceed 10 percent. The Department chose the more liberal variation. The Department agreed that the validity of the MVV and FEVl/FVC values must be assessed independently, and that the MVV maneuver is optional for compliance purposes. The Department, however, rejected the suggestion to remove certain technical requirements from the quality standards to avoid invalidating a pulmonary function test for less than strict compliance; the Department responded that the ''substantial compliance'' standard would allow a party to establish the credibility of the study, notwithstanding the absence of one or more of the § 718.103 requirements. Finally, the Department proposed revisions to §§ 718.104(a)(6) and 718.204(b)(2)(iv) to recognize that a medical report cannot be rejected for lack of a pulmonary function study if the performance of the test was medically contraindicated. (iii) For the final rule, the Department has changed the word ''submitted'' in § 718.103(b) to ''developed'' to conform the regulation to similar usage in § 718.101(b). The Department also changed the opening phrase of the first sentence in § 718.103(c) to clarify that paragraph (c) is an exception to the remainder of § 718.103. Finally, the Department amended the final sentence in subsection (c) to make clear that a noncomplying pulmonary function test involving a deceased miner may be used to establish the presence or absence of a respiratory or pulmonary impairment under limited circumstances. If no complying test is in the record and, in the adjudicator's opinion, the noncomplying test yielded technically valid results and the miner provided good cooperation, the party submitting the noncomplying test may rely on it.

(b) The Department announced its intention in the second notice of proposed rulemaking to conduct a survey of the physicians, clinics and facilities which perform pulmonary function testing (spirometry testing) to evaluate the prevalence of spirometers capable of producing a flow-volume loop. The Department considered the survey necessary in light of its conclusion that the flow-volume loop may provide a ''more reliable method of ensuring valid, verifiable results in pulmonary function testing.'' 64 FR 54975 (Oct. 8, 1999). The Department also cited the relatively inexpensive cost (approximately $2000) for a spirometer capable of producing the flow-volume loop. The Department sent out the survey, dated March 7, 2000, to approximately 1800 pulmonary clinics, facilities and physicians board-certified in internal medicine with a subspecialty in pulmonary disease (Rulemaking Record Ex. 107), and received 225 responses (Rulemaking Record Ex. 109). Of those responses, only nine indicated they did not perform pulmonary function testing on equipment producing a flow-volume loop. Of those nine, five indicated they would consider obtaining the necessary equipment. An additional 19 surveys did not respond to the questions concerning spirometric testing. The remaining respondents, 197 in all, unanimously used the flow-volume loop. Based on these survey results, the Department concludes the benefit to the claims adjudication process in obtaining reliable pulmonary function data warrants revising § 718.103(a) and Appendix B to make the flow-volume loop a mandatory requirement for any pulmonary function test conducted after the effective date of these regulations in connection with a claim for benefits under the Black Lung Benefits Act (BLBA).

(c) One comment opposes the flow-volume loop requirement because spirometric equipment which records this data may not be universally available. The Department disagrees. In the second notice of proposed rulemaking, the Department proposed using the flow-volume loop because it provides a reliable and relatively inexpensive means of producing valid, verifiable pulmonary function test results. 64 FR 54975 (Oct. 8, 1999). The Department's survey of physicians, clinics and facilities which perform pulmonary function testing confirmed the widespread use of spirometers capable of producing flow-volume loops. Although some clinics and individual physicians may not utilize such machines, the Department has concluded that the overall benefit to the claims adjudication process warrants required use of this technology. In any event, the claimant should always have access to one set of testing which complies with the quality standards, including the flow-volume loop requirement, as a result of the pulmonary examination authorized by 30 U.S.C. 923(b). This provision of the BLBA requires the Black Lung Disability Trust Fund to afford each miner-claimant the opportunity to substantiate his or her claim by means of a complete pulmonary examination at no expense to the claimant. *See* also § 725.406(a). Under § 725.406(c), the district director is responsible for ensuring that the examination authorized by 30 U.S.C. 923(b) is in ''substantial compliance'' with the requirements of part 718, including the quality standards. Section 725.406(d) requires the Department to make available to the claimant's physician, on the claimant's request, the clinical test results obtained in conjunction with the pulmonary examination. Thus, contrary to the commenter's concern, the claimant's physician should routinely be able to consider substantially complying clinical testing of the miner in formulating an opinion, despite the lack of capable technology in his or her own practice.

(d) One comment approves of the § 718.103 revisions generally, and particularly approves of the language making clear that the Maximum Voluntary Ventilation maneuver is optional. One comment supports the use of flow-volume loops and changes to § 718.103(a) which eliminate internal inconsistencies and clarify that the Maximum Voluntary Ventilation maneuver is optional. One comment approves of requiring pulmonary function test results using flow-volume loops and the increase from 5 percent to 10 percent in the maximum variation between the two largest MVV values.

(e) No other comments were received concerning this section, and no other changes have been made in it.

20 CFR 718.104

(a)(i) The Department proposed several changes to § 718.104 in the initial notice of proposed rulemaking. 62 FR 3342–43, 3375 (Jan. 22, 1997). One change required that each medical opinion developed in connection with a claim be based on specified tests and information, including a chest x-ray and pulmonary function study which comply with the applicable quality standards. Another change proposed

guidelines for the adjudicator to determine whether to afford special weight to an opinion from the miner's treating physician. The Department considered codification of the treating physician's special status appropriate, given its longstanding judicial recognition in the caselaw. In order to ensure a critical analysis of the physician-patient relationship, the guidelines described four basic factors the adjudicator must consider: whether the physician provided pulmonary or non-pulmonary treatment; how long the physician treated the miner; how often the physician treated the miner; and what types of tests and examinations the physician conducted. Finally, the Department emphasized that the adjudicator must consider not only the quality of the physician's relationship with the miner, but also the reasoning and documentation in the opinion itself, and in the context of the remainder of the record, before crediting that opinion. (ii) In the second notice of proposed rulemaking, the Department responded to the extensive comments which the proposed regulation had elicited. 64 FR 54976–77 (Oct. 8, 1999). The Department revised the regulation to excuse mandatory pulmonary function testing if it was medically contraindicated and the physician conducted other types of medically accepted diagnostic tests; to make explicit that a treating physician's opinion could be used to establish all elements of a miner's entitlement; and to accept the physician's statement as to subsection (d)'s treating relationship criteria, absent contrary evidence from another party. The Department rejected comments which advocated the automatic acceptance of a treating physician's opinion if it satisfied the criteria of subsections (d)(1) through (5) and was documented and reasoned, regardless of the remaining medical evidence. The Department also rejected one comment which contended the regulation already mandated the automatic acceptance of a treating physician's opinion in violation of 30 U.S.C. 923(b) (requiring consideration of all relevant evidence). In response, the Department emphasized that § 718.104(d) only required the adjudicator to consider the possible enhanced value of a treating physician's opinion, and did not require a mechanistic acceptance of that opinion. The Department responded in similar fashion to several comments which contended that all medical opinions, including a treating physician's opinion, should be evaluated only on the strength of their documentation and reasoning and each physician's professional qualifications. With respect to a comment recommending placement of the treating physician rule in a separate regulation, the Department concluded no change was warranted; subsection (d)'s position in the quality standards governing reports of physician examinations underscored that a treating physician's opinion was required to satisfy the same quality standards as any other physician examination report developed in connection with a claim for benefits. The Department acknowledged some commenters' concern that unrepresented claimants would likely submit noncomplying reports from their treating physicians. The Department, however, rejected the suggestion that treating physicians' opinions should be exempted from the evidentiary limitations for that reason. Instead, the Department noted its own obligation to inform claimants in an understandable manner about the evidentiary limitations, and to provide any claimant's treating physician with the results of the § 725.406 objective testing upon the claimant's request. The Department denied one comment's suggestion that language in the initial notice of proposed rulemaking (*see* 62 FR 3339 (Jan. 22, 1997)) made an adjudicator's failure to consider a physician's training and specialization reversible error. In the Department's view, a physician's qualifications were an issue only when raised by a party. The Department also rejected the suggestion that a chest x-ray, administered and read in accordance with § 718.102, not be mandatory documentation for a complying report of physical examination. The Department cited the importance of such a diagnostic test and the flexibility of the ''substantial compliance'' standard in excusing noncompliance depending on the particular circumstances of the case. In response to two comments, the Department declined to remove a limitation on the use of noncomplying medical opinions. The regulation therefore allowed consideration of reports of physical examination not in substantial compliance with § 718.104 only if the miner was deceased, the physician was unavailable to cure the defects in the report, and there was no complying report in the record. In explanation, the Department emphasized that entitlement decisions must be based on the best available evidence. Finally, the Department invited additional public comment on alternative means of determining when a treating physician's opinion should receive ''controlling weight,'' including whether the Department should adopt the Social Security Administration's rule. (iii) For purposes of the final rule, the Department has altered subsection (c) to conform this provision to the general ''substantial compliance'' standard in § 718.101(b). As amended, § 718.104(c) makes clear that a noncomplying report of physical examination may nevertheless provide evidence for a factual finding in certain limited circumstances involving a deceased miner and the lack of any complying report of physical examination in the record. The report must have been prepared by a physician who is ''unavailable,'' *e.g.,* deceased, whose whereabouts are unknown, etc. The report must also be found to possess sufficient indicia of reliability that the adjudicator may reasonably rely on it for factual findings.

(b) Several comments oppose granting special weight to the opinion of a miner's treating physician, contending the rule either intrudes on the adjudicator's role in evaluating evidence or compels the acceptance of an opinion from the treating physician regardless of contrary opinions from physicians with greater expertise in pulmonary medicine. The Department responded to a similar criticism in the second notice of proposed rulemaking. 64 FR 54976 (Oct. 8, 1999). In rejecting a commenter's view that § 718.104(d) effectively precluded consideration of all relevant evidence in favor of the opinion of the miner's treating physician, the Department emphasized the real purpose of the rule: to recognize that a physician's professional relationship with the miner may enhance his or her insight into the miner's pulmonary condition. The Department does not believe that, as proposed, section 718.104(d) contained an outcome-determinative evidentiary rule. *See* 64 FR 54977 (Oct. 8, 1999). The Department has revised the language of section 718.104(d), however, in light of several commenters' continued confusion as to the role of § 718.104(d) in weighing reports of physical examinations. The Department hopes to clarify its original intent with this revision. Like the previously proposed version, subsection (d) acknowledges the special weight which the opinion of a miner's treating physician may receive from the adjudicator. Section 718.104(d)(1)–(4) provide criteria for evaluating the quality of that doctor-patient relationship as indicia of the potential insight the physician may have gained from on-going treatment of the miner.

Instead of compelling the automatic acceptance of the treating physician's opinion, section 718.104(d) is designed to force a careful and thorough assessment of the treatment relationship. The adjudicator may conclude that no additional weight is due the physician's opinion because one or more of the criteria establish facts which make such weight inappropriate. For example, the physician may have provided only a short-term course of treatment, or have actually examined the miner only infrequently. The adjudicator should consider giving additional weight to the treating physician's opinion only when review of the regulatory criteria establishes the physician's thorough understanding of the miner's pulmonary condition. Subsection (d)(5) describes the next step in the adjudicator's inquiry: the adjudicator must consider whether the treating physician's opinion is supported by sufficient documentation and reasoning, and must weigh it with all other reasoned and documented medical opinions in the record. In addition, the fact finder must consider all other relevant evidence of record. The regulation provides that only after the adjudicator finishes this weighing may he, in appropriate cases, base his decision to give ''controlling weight'' to the opinion of the miner's treating physician on that physician's superior understanding of the miner's pulmonary condition. The Department recognizes that each case will present different issues regarding both the extent to which the treating physician meets the four criteria in subsection (d)(1)–(4), the documentation and reasoning of that physician's opinion, and the relative merits of the other relevant medical evidence of record. As a result, the regulation does not attempt to dictate the outcome of any particular case. The Department therefore rejects the position that § 718.104(d) intrudes on the fact-finding responsibilities of the adjudicator.

(c) One comment opposes requiring each physician's opinion to include an x-ray or pulmonary function study conducted according to the applicable quality standards. The commenter suggests these tests are not always necessary for a relevant and credible opinion, and cites three examples: (i) A physician diagnoses an obstructive lung impairment based on valid pulmonary function testing, examination, etc., but does not obtain an x-ray. With respect to the mandatory x-ray requirement, the Department has previously addressed this argument in the second notice of proposed rulemaking, 64 FR 54977 (Oct. 8, 1999), and reiterates its position in responding to comments under § 718.101 of this rule. X-rays are an integral part of any informed and complete pulmonary evaluation of a miner; a general requirement for inclusion of this test is therefore appropriate. The Department also notes, however, that the quality standards require only ''substantial compliance'' with the various criteria, not technical compliance with every criterion in every quality standard in every case. A factfinder may conclude the omission of an x-ray does not undermine the overall credibility of the opinion, but this determination must be made on a case-by-case basis. The same commenter poses this example in the context of § 718.101. The Department's response to that hypothetical makes certain critical assumptions in concluding the physician's opinion may be found in ''substantial compliance'' with the quality standards: the valid pulmonary function study demonstrates the presence of a pulmonary/respiratory impairment; the physician's examination of the miner identifies signs or symptoms of a pulmonary condition; and the physician has an accurate understanding of the miner's employment, smoking and personal histories. If the clinical tests and other information provide a documented basis for a reasoned and reliable opinion, the factfinder may find the diagnosis of ''legal pneumoconiosis'' in ''substantial compliance'' with § 718.104 despite the absence of the x-ray. (ii) A physician finds complicated pneumoconiosis on an x-ray, but does not conduct a pulmonary function test. One means of diagnosing complicated pneumoconiosis is by x-ray. 30 U.S.C. 921(c)(3)(A). The x-ray evidence is relevant to §§ 718.202(a)(3) and 718.304(a); accordingly, § 718.102 provides the applicable quality standards, and not § 718.104. The lack of a pulmonary function study does not affect the probative value of the x-ray reading(s) as evidence of complicated pneumoconiosis under 30 U.S.C. 921(c)(3)(A), because a pulmonary function study is not relevant to that means of invoking the irrebuttable presumption. Although all relevant evidence must be weighed in determining whether the miner has complicated pneumoconiosis, *Melnick* v. *Consolidation Coal Co.,* 16 Black Lung Rep. 1–31, 1–33 (1991), the evidence must pertain to the means of diagnosing or refuting the existence of complicated pneumoconiosis as provided by 30 U.S.C. 921(c)(3)(B) and (C). *Cf. Double B Mining* v. *Blankenship,* 177 F.3d 240, 243 (4th Cir. 1999) (holding factfinder must determine whether evidence relevant to each method of invoking irrebuttable presumption is ''equivalent,'' and establishes same underlying condition). The physician's report may provide additional valuable insight into his or her reasons for interpreting the x-ray as positive for complicated pneumoconiosis rather than some other condition detectable by x-ray; to that extent, the report may be relevant to weighing the credibility of the x-ray evidence. As a report of physical examination, however, the hypothetical report does not satisfy the ''substantial compliance'' standard. (iii) In his report of physical examination, a physician relies in part on a noncomplying pulmonary function test, but another complying test yields comparable results. Again, ''substantial compliance'' is a test of evidentiary reliability based on all relevant circumstances of the particular case. The factfinder must evaluate those circumstances and determine whether the specific omission undermines the credibility of the evidence. In the hypothetical, the factfinder must consider not only the defects in the physician's pulmonary function study, but also the remaining documentation in the report (other clinical studies, the miner's employment, smoking and personal information, *etc.*). If the report otherwise complies with § 718.104, the invalid pulmonary function study may be mitigated by the presence of a complying study which confirms the physician's interpretation of the invalid study.

(d) One comment supports the revision of § 718.104(a)(6) in the second notice of proposed rulemaking, which exempts a miner from mandatory pulmonary function testing if the test is medically contraindicated, and allows a physician preparing a report of physical examination to substitute other medically acceptable clinical and laboratory diagnostic techniques in support of his conclusions. 64 FR 54976, 55011 (Oct. 8, 1999).

(e) One comment recommends the Department delete the conditions in § 718.104(c) that, in the case of a deceased miner, limit the consideration of a report from a physician who is not available if the report is not in substantial compliance with the quality standards. This provision permits the adjudicator to base a finding on such evidence only if the record does not contain any physician's report which is in substantial compliance. No change in the regulation is necessary. Although ''substantial compliance'' is a flexible

concept, it is also necessary to ensure that claims are adjudicated using the most reliable evidence available. Consequently, the Department has incorporated limitations throughout the quality standards on the use of noncomplying evidence in claims involving deceased miners in which there is no complying evidence of record. The fact that a miner is deceased is not necessarily a bar to rehabilitating noncomplying evidence. With respect to reports of physical examination, the physician who is available to review and further comment on his or her own report may cure the defect and bring the report into substantial compliance. If, however, the physician is unavailable, § 718.104(c) permits noncomplying evidence to be considered if there is no complying evidence of record. The Department believes noncomplying evidence should be used to establish facts about a deceased miner's condition only when no practical alternative is available. As long as complying evidence or the means of achieving compliance exist, noncomplying evidence should not be the basis for determining the validity of a claim.

(f) One comment objects to the retroactive application of the changes made to § 718.104. None of these changes, however, apply retroactively. Section 718.101(b) provides that the ''standards for the administration of clinical tests and examinations'' will govern all evidence developed in connection with benefits claims after the effective date of the final rule. Section 718.104 contains the quality standards for any ''[r]eport of physical examinations,'' including reports prepared by a miner's treating physician. Physicians' medical reports are expressly included in the terms of § 718.101(b). Consequently, the changes to § 718.104 apply only to evidence developed after the effective date of the final rule. With respect to treating physicians' opinions developed and submitted before the effective date of the final rule, the judicial precedent summarized in the Department's initial notice of proposed rulemaking continues to apply. *See* 62 FR 3342 (Jan. 22, 1997). These decisions recognize that special weight may be afforded the opinion of a miner's treating physician based on the physician's opportunity to observe the miner over a period of time.

(g) Two comments state the ''treating physician'' rule has no scientific basis because a treating physician is in no better position than any other physician to assess a miner's pulmonary status. The commenters note that a primary care physician will often, as a matter of medical practice, refer an individual to a physician with particular training for specialized care; the primary care provider may therefore have little, if any, qualified understanding of the patient's health problems. The commenters also state that the essential basis for a reasoned diagnosis is valid objective testing and sound interpretation of the data rather than patient complaints and physical examinations. Finally, the commenters conclude that frequency of contact alone does not provide any advantage for a physician in developing a comprehensive understanding of the patient's condition. The commenters' concerns do not provide a basis for abandoning the rule. First, the miner's ''treating physician'' is not necessarily the physician with whom the miner has a long-standing generalized relationship if another physician actually provides specialized treatment for respiratory or pulmonary problems. If the miner's primary care provider refers the miner to a pulmonary specialist for treatment, then that specialist may be considered the miner's ''treating physician'' for purposes of his or her pulmonary condition. If, however, the specialist provides an opinion to the primary care physician which forms the basis for the miner's treatment by the latter, the primary care physician's opinion is strengthened by reliance on the specialist's expertise. Second, the Department agrees that valid clinical testing and a reasoned medical report are necessary prerequisites for a credible medical opinion. A treating physician's opinion is subject to the Department's quality standards, which require the report to be based on specific clinical tests, findings and other data and information. See § 718.104(a)(l)-(6). A treating physician's report must be reasoned as well as documented (§ 718.104(d)(5)). In this regard, a treating physician's opinion is no different than any other physician's opinion developed in connection with a claim for benefits. The Department does not intend to displace the long-standing judicial precedent that sanctions the rejection of a treating physician's report if it fails the basic requirements for credible evidence. *See, e.g., Sterling Smokeless Coal Co.* v. *Akers,* 131 F.3d 43 8, 441 (4th Cir. 1997); *Lango* v. *Director, OWCP,* 104 F.3d 573, 577 (3d Cir. 1997); *Peabody Coal Co.* v. *Helms,* 901 F.2d 571, 573–74 (7th Cir. 1990); *see generally Halsey* v. *Richardson,* 441 F.2d 1230, 1236 (6th Cir. 1971) (rejecting ''a mechanical rule insulating a treating doctor's opinion from attack, no matter how respectable and persuasive may be opposing opinions by doctors who examined a claimant on only one occasion''). As for the commenters' statement that the frequency of patient contact provides no advantage to a physician, this view is too simplistic. Frequency of treatment is only one of the regulatory criteria (§ 718.104(d)(3)) the adjudicator must consider in assessing the treating physician relationship. The number of visits must be viewed in the context of the other criteria (nature of relationship, duration of relationship, type and extent of treatment). The totality of the information demanded by the criteria establishes the overall quality of the doctor-patient relationship, which guides the adjudicator in determining whether to accord the treating physician's opinion controlling weight. The comments do not state a basis for changing or eliminating the ''treating physician'' rule.

(h) Two comments contend the ''treating physician'' rule creates an ''evidentiary preference'' which violates section 7 of the Administrative Procedure Act (APA), 5 U.S.C. 556. Although the Social Security Administration (SSA) has also promulgated a regulation, 20 CFR 404.1527(d) (1999), addressing the weight to be given a treating physician's opinion, the commenters argue there is no adverse party in SSA claims, and the APA does not apply to SSA claims adjudication. By implication, the commenters suggest the Department cannot adopt a ''treating physician'' rule comparable to the SSA model, or any rule which affords special weight to a treating physician's opinion. The Department disagrees. As an initial matter, whether the APA does or does not apply to SSA claims adjudications is irrelevant to evaluating the validity of § 718.104(d). The Supreme Court has expressly refused to resolve the issue because ''the social security administrative procedure does not vary from that prescribed by the APA. Indeed, the latter is modeled upon the Social Security Act.'' *Richardson* v. *Perales,* 402 U.S. 389, 409 (1971). In any event, the commenters misapprehend both the nature of § 718.104(d) and the critical differences between that regulation and the SSA version. The commenters describe the ''treating physician'' rule as an ''evidentiary preference.'' The Department interprets this phrase to characterize the rule as a burden-shifting presumption which imposes on the party opposing the claim the burden to overcome the ''preference'' for the treating physician's opinion. The Department, however, has repeatedly emphasized in the second

notice of proposed rulemaking and its responses to comments in this rule that § 718.104(d) does not create a presumption in favor of the treating physician's opinion. *See* 64 FR 54976–77 (Oct. 8, 1999). The regulation provides a set of criteria to guide the adjudicator's evaluation of the treating physician's professional relationship with the miner, and ensure a critical and thorough factual determination whether that opinion should ultimately be given ''controlling weight.'' Aside from assessing the strength or weakness of the treating physician's report, the adjudicator must also weigh that report against all other relevant evidence in the record. Consequently, § 718.104(d) is not a strict, outcome-determinative rule like more traditional evidentiary presumptions. These characteristics also distinguish § 718.104(d) from SSA's version in 20 CFR 404.1527(d). Both regulations state that ''controlling weight'' may be given to a treating physician's report. Section 404.1527(d), however, provides that ''[g]enerally, we give more weight to opinions from your treating sources, * * *.'' 20 CFR 404.1527(d)(2) (1999). This language demonstrates an affirmative preference for reports from treating physicians; § 718.104(d) is more qualified in permitting ''controlling weight'' only if the regulatory criteria warrant it. Another significant difference between the regulations is the role the criteria play in determining the weight given the medical evidence. Section 404.1527(d) makes the criteria relevant only after the adjudicator refuses to give the treating physician ''controlling weight:'' ''Unless we give a treating source's opinion controlling weight * * * we consider all of the following factors in deciding the weight we give to any medical opinion.'' The regulation lists several criteria which are similar to those listed in § 718.104(d)(l)-(4). Section 718.104(d) makes the same criteria the basis for determining in the first place whether to give the treating physician controlling weight. To the extent 20 CFR 404.1527(d) operates like an evidentiary presumption, it does not affect the validity of § 718.104(d) because § 718.104(d) clearly is not a presumption in favor of the treating physician's opinions. Accordingly, the Department rejects the commenters' position that the rule violates the APA.

(i) Three comments oppose the requirement in § 718.104(d)(5) that the adjudicator must weigh a treating physician's opinion against the contrary relevant evidence in the record. One comment states that affording a treating physician's opinion ''controlling weight'' is meaningless unless the adjudicator may accept the opinion despite a reasoned and documented contrary opinion by a pulmonary specialist submitted by another party; otherwise, according to the commenter, a treating physician's opinion will prevail only when it echoes similar opinions from other physicians. Another comment interprets subsection (d) as a burden-shifting device which affords the treating physician's opinion presumptive controlling weight unless the opposing party overcomes that opinion by a preponderance of the evidence. The Department has previously responded to comments contending that a treating physician's opinion should receive conclusive weight once the adjudicator reviews the opinion in light of the criteria enumerated in subsection (d)(1)–(4). 64 FR 54976 (Oct. 8, 1999). The Department rejected this position because it artificially limits the adjudicator's consideration of the evidence, and may promote a mechanistic and uncritical acceptance of the treating physician's opinion at the expense of more credible contrary evidence. No basis for departing from this position is established by the new comments. The Department emphasizes that the ''treating physician'' rule guides the adjudicator in determining whether the physician's doctor-patient relationship warrants special consideration of the doctor's conclusions. The rule does not require the adjudicator to defer to those conclusions regardless of the other evidence in the record. The adjudicator must have the latitude to determine which, among the conflicting opinions, presents the most comprehensive and credible assessment of the miner's pulmonary health. For the same reasons, the Department does not consider subsection (d) to be an evidentiary presumption which shifts the burden of production or persuasion to the party opposing entitlement upon the submission of an opinion from a miner's treating physician. Accordingly, the Department declines to eliminate the requirement in subsection (d)(5) that a treating physician's opinion must be considered in light of all relevant evidence in the record.

(j) One comment objects to comparing a treating physician's qualifications to those of any other physician in the record. The commenter suggests comparative qualifications may provide a basis for refusing controlling weight to the treating physician's opinion if another physician has superior credentials. The Department responded to a similar comment in the second notice of proposed rulemaking, and noted that professional credentials are only one factor the adjudicator may consider in weighing medical opinions. 64 FR 54977 (Oct. 8, 1999). No basis exists, however, for insulating the treating physician from a consideration of his or her qualifications, or prohibiting giving additional weight to the opinion of a physician with specialized training in a relevant area of medicine. Although expertise is only one of several potentially relevant factors to consider, it is nonetheless a significant consideration. *See, e.g., Milburn Colliery Co.* v. *Hicks,* 138 F.3d 524, 536 (4th Cir. 1998). Furthermore, the commenter's concern over comparative qualifications overlooks an important consideration underlying the ''treating physician'' rule. In black lung benefits claims, the principal issue ordinarily is the miner's pulmonary condition. The treating physician may develop a more in-depth knowledge and understanding of that issue than a physician with greater academic credentials and minimal, or nonexistent, contact with the miner. The purpose of the § 718.104(d) criteria is to enable the adjudicator to determine whether the treating physician has such informed knowledge that his or her opinion merits special weight.

(k) One comment suggests a consultative physician's opinion should receive the same weight accorded a treating physician if the consultant relies on the treating physician's report, the results of clinical tests, medical records, etc., and the consulting report satisfies the § 718.104(d) criteria. The Department rejects this suggestion. If any physician (other than the treating physician) could receive enhanced weight by incorporating consideration of the treating physician's opinion into his or her consulting opinion, the consultative physician(s) for each party would stand on equal footing based on access to the treating physician's report. No reason would therefore exist for the rule. In any event, a consultative physician's reliance on the treating physician's report does not necessarily confer the same benefit the treating physician may derive from the nature, duration, frequency and extent of treatment during the physician-patient relationship with the miner.

(l) Two comments oppose making the quality standards applicable to the report of physical examination prepared by a miner's treating physician. The commenters suggest removing subsection (d) from § 718.104 and making it a separate regulation. The Department rejected the identical

argument in the second notice of proposed rulemaking. 64 FR 54976–77 (Oct. 8, 1999). The Department intends the quality standards to apply to any physician's report developed in connection with a claim for benefits, including any report prepared by a treating physician. Although a treating physician may have a superior perspective on the miner's health in certain circumstances, status alone does not guarantee the validity of the physician's opinion.

(m) Two comments recommend allowing a miner or a miner's family members to attest to the nature of the miner's relationship with his or her treating physician. The Department disagrees. Although persons other than the physician may have some direct knowledge of the miner's treatment, only the physician can provide a complete picture of the doctor-patient relationship, as well as documentary evidence of the specific clinical tests conducted. In addition, if representations as to the criteria in (d)(1) through (4) are challenged, it is the physician's records, including treatment notes, etc., which will enable the adjudicator to evaluate the quality of the relationship. Evidence from persons other than the physician may supplement the physician's characterization of the miner's treatment, but the physician (or the physician's records) remains the best primary source for depicting the miner's treatment.

(n) In the second notice of proposed rulemaking, the Department invited comment on alternatives to the revised ''treating physician'' rule, including whether to adopt a version of the rule comparable to the Social Security Administration's (SSA) regulation, 20 CFR 404.1527(d) (1999). 64 FR 54976 (Oct. 8, 1999). (i) Two comments oppose in general terms using the SSA regulation to evaluate the treating physician's opinion. (ii) One comment recommends incorporating language from the SSA regulation that more weight should ''generally'' be given a miner's treating physician. *See* 20 CFR 404.1527(d)(2) (1999). The commenter opposes any other use of the SSA regulation. The additional language is inappropriate. *See* paragraph (h), above. Section 718.104(d) outlines the circumstances in which a treating physician may be afforded ''controlling weight'' on entitlement issues. Although the regulation recognizes the special value which may attach to a treating physician's report in certain circumstances, the Department does not intend to deflect attention from the necessity for critical examination of the physician's reasoning and documentation. The Department has previously explained the intended limits of section 718.104(d) as an evidentiary rule which guides consideration of a treating physician's opinion but does not impose a strict outcome. 64 FR 54977 (Oct. 8, 1999). The recommended additional language does not further this purpose. Accordingly, the recommendation is rejected. (iii) No comment recommended adopting the SSA regulation in place of the regulation as proposed by the Department.

(o) Several comments approve generally of the ''treating physician'' rule.

(p) No other comments were received concerning this section, and no other changes have been made in it.

20 CFR 718.105

(a)(i) In the initial notice of proposed rulemaking, the Department proposed amending § 718.105 to address arterial blood gas studies which are administered during a miner's terminal hospitalization, *i.e.,* ''deathbed'' studies. 62 FR 3342–43 (Jan. 22, 1997). Specifically, the Department expressed concern that such studies may produce qualifying values for reasons unrelated to chronic pulmonary disease. The Department therefore suggested a new requirement that a claimant must submit a physician's report linking the blood gas study results to a chronic pulmonary condition caused by exposure to coal mine dust in order to rely on the qualifying results as evidence of total disability. 62 FR 3375 (Jan. 22, 1997). (ii) In response to comments received, the Department deleted the requirement that, in the case of blood gas studies administered during a hospitalization that ends in the miner's death, the chronic pulmonary condition must be shown to be related to the miner's exposure to coal mine dust; the Department agreed the causation requirement was inappropriate because § 718.105 addresses the existence of a chronic pulmonary impairment, and not its source. 64 FR 54977–78 (Oct. 8, 1999). The Department also agreed to a minor change in technical nomenclature by changing ''p'' to ''P'' to denote partial pressure. Finally, the Department rejected those comments which opposed requiring the claimant to establish a link between a miner's ''deathbed'' blood gas study and a chronic pulmonary condition. The Department concluded the proposed requirement was necessary because the miner's qualifying test results during a terminal hospitalization may be related to an acute non-pulmonary condition rather than a chronic pulmonary impairment. 64 FR 54977 (Oct. 8, 1999).

(b) One comment recommends the Department afford consideration to noncomplying blood gas studies in the case of a deceased miner since such consideration is given elsewhere in the regulations for x-rays (§ 718.102(e)) and pulmonary function studies (§ 718.103(c)). The regulations also outline specific circumstances under which a report of physical examination of a miner now deceased may be considered by an adjudication officer notwithstanding its failure to substantially comply with § 718.104(a) and (b). *See* § 718.104(c), above. The Department agrees, and has revised § 718.105 accordingly by adding subsection (e). This provision is comparable to § 718.103(c), and permits the adjudicator to consider a deceased miner's blood gas studies not in substantial compliance with subsections (a), (b) and (c) if they are the only available tests and, in the adjudicator's opinion, are technically valid. Subsection (e) also requires any such test to meet the requirements of subsection (d) if the test was obtained during a miner's hospitalization ending in death and yielded qualifying values. The claimant must submit a physician's opinion establishing that the qualifying values reflect a chronic pulmonary impairment and not some acute condition unrelated to a chronic pulmonary impairment.

(c) Two comments oppose requiring the claimant to prove a miner's chronic respiratory or pulmonary impairment caused his qualifying ''deathbed'' blood gas results. The commenters argue that the party opposing entitlement should bear the burden of proving a non-respiratory or non-pulmonary condition caused the qualifying results since that party has equal access to the miner's hospital records and physicians. The Department disagrees. The claimant bears the general burden of persuasion to establish entitlement to benefits by a preponderance of the evidence, except to the extent a presumption eases that burden. *See generally Director, OWCP* v. *Greenwich Collieries,* 512 U.S. 267 (1994). One facet of the claimant's burden is the responsibility to ensure that the clinical tests such as blood gas studies substantially comply with the quality standard. The quality standard provides some assurance to the adjudicator that the clinical test is valid, accurate and reliable evidence of the factual proposition for which it is proffered. The Department considers a physician's opinion necessary to establish a nexus between ''deathbed''

blood gas studies and a chronic pulmonary disease; raw clinical test results under these circumstances are not sufficiently instructive for a lay adjudicator to make such a determination. The fact that the party opposing entitlement may have equal access to relevant information about the circumstances and interpretation of the blood gas testing is not determinative in allocating the burden of persuasion. The Department does not perceive any basis for shifting the overall burden of proof from the claimant to the opposing party in the case of qualifying ''deathbed'' blood gas studies. The comments do not address the Department's explanation in the second notice of proposed rulemaking, 64 FR 54977–78 (Oct. 8, 1999), for imposing this requirement, beyond noting continued opposition. The Department therefore rejects the comments' position.

(d) No other comments were received concerning this section, and no other changes have been made in it.

20 CFR 718.106

(a) The Department proposed minor changes to § 718.106 in the initial notice of proposed rulemaking to account for the adoption of a general standard of substantial compliance with the quality standards (§ 718.101), and to adopt consistent terminology for evidence which is not in substantial compliance with the applicable standard. 62 FR 3343 (Jan. 22, 1997). The Department responded to several comments in the second notice of proposed rulemaking. 64 FR 54978 (Oct. 8, 1999). At the urging of several commenters, the Department restored subsection (c) to § 718.106, explaining that the omission of that provision from the initial proposed version of the regulation was inadvertent. Other comments expressed concern that the requirement for a gross macroscopic inspection of the lungs would preclude reliance on reviewing physicians, who ordinarily review only the autopsy protocol and inspect tissue samples microscopically. The Department responded that only the autopsy itself must include the gross macroscopic inspection of the lungs; the requirement does not extend to opinions prepared by reviewing physicians. Finally, the Department rejected the recommendation of some commenters to adopt the standards for diagnosing pneumoconiosis by autopsy or biopsy set forth in Kleinerman *et al.,* ''Pathologic Criteria for Assessing Coal Workers'' Pneumoconiosis,'' in the *Archives of Pathology and Laboratory Medicine* (1979). The Department emphasized its historic reluctance to adopt specific standards for such diagnoses; the lack of evidence in the record that the medical community agrees on a particular standard; and the lack of evidence indicating the Kleinerman article reflects an accepted standard.

(b)(i) One comment again recommends adopting the criteria for diagnosing pneumoconiosis by autopsy or biopsy contained in the Kleinerman article as the ''accepted'' pathologic standard. The Department has previously noted that the record does not substantiate the existence of a consensus among physicians for making diagnoses using these criteria, or the acceptance of the Kleinerman article as representative of the medical community's views. 64 FR 54978 (Oct. 8, 1999). Indeed, two other commenters commend the Department for refusing to accept these criteria, noting that other pathologists do not agree that this article represents a universal or prevailing standard. One commenter suggests, for example, that Dr. Kleinerman's view that a two-centimeter lesion on autopsy or biopsy is necessary for a diagnosis of complicated pneumoconiosis is not universally accepted, and that other pathologists would require only a one-centimeter lesion. The commenter urging adoption of the Kleinerman criteria does not supply any additional information in support of its recommendation. The Department therefore has no basis in the record for adopting the suggested standard. (ii) One comment cites *Double B Mining, Inc.* v. *Blankenship,* 177 F.3d 240 (4th Cir. 1999), as legal authority for rejecting the Kleinerman article. In that case, the Court considered whether a biopsy diagnosis of a certain-sized fibrotic nodule amounted to a ''massive lesion'' for purposes of proving the miner had complicated pneumoconiosis under 30 U.S.C. 921(c)(3) (irrebuttable presumption of total disability due to pneumoconiosis invoked by proof of complicated pneumoconiosis). The Court cited, among other sources, the Kleinerman article as requiring a minimum two-centimeter nodule to constitute a ''massive lesion.'' The Court declined to adopt the two-centimeter rule because ''[t]he [Black Lung Benefits Act] does not mandate use of the medical definition of complicated pneumoconiosis.'' 177 F.3d at 244. Instead, the Court held the adjudicator must determine whether a particular nodule discovered by biopsy would be equivalent to a one-centimeter opacity if diagnosed by x-ray. The *Blankenship* decision rejects only the mandatory use of the medical community's standards for diagnosing complicated pneumoconiosis by biopsy in view of the court's statutory analysis. The Court does not accept or reject any specific clinical criteria for biopsy diagnoses, and the Department does not interpret the decision as repudiating the Kleinerman article in particular.

(c)(i) Three comments approve of the restored paragraph (c). (ii) Two comments approve of the Department's clarification in the second notice of proposed rulemaking that the § 718.106(a) requirement for a gross macroscopic inspection of the lungs applies only to the autopsy itself and not to a reviewing physician's opinion. 64 FR 54978 (Oct. 8, 1999).

(d) No other comments were received concerning this section, and no other changes have been made in it.

20 CFR 718.107

(a) In the initial notice of proposed rulemaking, the Department proposed a clarification of § 718.107 which addresses medical evidence not otherwise covered by the quality standards. 62 FR 3343 (Jan. 22, 1997). Proposed subsection (b) required the party submitting such evidence to establish that the evidence is medically acceptable and relevant to proving the existence or nonexistence of pneumoconiosis, the sequelae of pneumoconiosis or a ''respiratory impairment.'' The Department responded to comments received from the public in the second notice of proposed rulemaking. 64 FR 54978 (Oct. 8, 1999). The Department changed the reference in subsection (a) from ''respiratory impairment'' to ''respiratory or pulmonary impairment.'' The Department rejected as unnecessary a recommendation that disability and disability causation should be added to the relevant issues because the regulation adequately stated the purposes for which ''other medical evidence'' could be submitted. One comment approved of § 718.107 as proposed in the initial notice of proposed rulemaking.

(b) For purposes of the final rule, the Department emphasizes that § 718.107 as a whole is intended to permit any party to offer any medical test or procedure which may be relevant to any disputed medical issue relating to a claimant's entitlement to benefits provided the requirements of subsection (b) are met.

(c) No other comments were received concerning this section, and no other changes have been made in it.

Subpart C

20 CFR 718.201

(a) In the initial notice of proposed rulemaking, the Department proposed amending § 718.201. 62 FR 3343–44, 3376 (Jan. 22, 1997). The amendments were designed to clarify the regulatory definition and conform it to the statute, which broadly defines pneumoconiosis as ''a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.'' 30 U.S.C. 902(b). To that end, the Department proposed three revisions.

First, the Department inserted the terms ''clinical'' and ''legal'' pneumoconiosis into the regulation to conform it to the terminology uniformly adopted by the courts to distinguish between the two forms of lung disease compensable under the statute: pneumoconiosis, as that disease is defined by the medical community, and any chronic lung disease arising out of coal mine employment. Second, the Department proposed revising the definition to make clear that both restrictive and obstructive lung disease may fall within the definition of pneumoconiosis if shown to have arisen from coal mine employment. Third, the Department proposed a revision to recognize the latent and progressive nature of the disease. The last two changes, for which the Department cited scientific evidence in support, 62 FR 3343–44 (Jan. 22, 1997), were proposed as a result of recent litigation on these issues. The Department specifically sought comments on these revisions.

The Department received numerous favorable and unfavorable comments and testimony on the proposals. 64 FR 54978–79 (Oct. 8, 1999). One commenter objected to the revised definition because it would include all obstructive pulmonary diseases. A number of commenters complained that the Department lacked the statutory authority to implement the proposals, and that the Department had violated the statute by failing to consult with the National Institute for Occupational Safety and Health (NIOSH) before proposing the changes. 30 U.S.C. 902(f)(1)(D). Several commenters also argued that the Department's proposed definition was scientifically unsound, and presented testimony from a panel of pulmonary physicians at the Department's July 22, 1997 hearing in Washington, D.C., to substantiate their views. Two commenters contended that because Congress had rejected an amendment to the statutory definition of pneumoconiosis which would have included obstructive lung disorders, the Department could not accomplish the same change through regulation. The Department also received numerous comments in support of the revised definition. Among the favorable comments was one from NIOSH, transmitted by letter dated August 20, 1997 and signed by Dr. Paul A. Schulte, Director of NIOSH's Education and Information Division. Rulemaking Record, Exhibit 5–173. NIOSH supported the Department's proposal to amend the definition to include chronic obstructive pulmonary disease and to reflect the scientific evidence that pneumoconiosis is a progressive condition that may become detectable only after cessation of coal mine employment in some cases. The Department also received favorable comments and testimony from physicians with expertise in pulmonary diseases.

Given the widely divergent comments and testimony received from medical professionals on the proposed regulation, the Department sought additional guidance from NIOSH, notwithstanding the fact that NIOSH had already commented in support of the initial proposal. The Department transmitted a copy of all of the testimony and commentary it had received to Dr. Linda Rosenstock, the Director of NIOSH, and asked NIOSH to determine, in light of the then existing record, whether NIOSH continued to support the Department's proposal. Rulemaking Record, Exhibit 66. NIOSH responded, in a December 7, 1998 letter from Dr. Schulte, that ''[t]he unfavorable comments received by DOL do not alter our previous position: NIOSH scientific analysis supports the proposed definitional changes.'' Dr. Schulte provided additional medical references to support NIOSH's conclusion. Rulemaking Record, Exhibit 72.

The Department responded to the comments it had received in its second notice of proposed rulemaking. 64 FR 54978–79 (Oct. 8, 1999). The Department emphasized that the proposed revision was designed to make clear that obstructive lung disease may fall within the definition of pneumoconiosis, but only if it is shown to have arisen from coal mine employment; thus, the proposed definition would not alter the former regulations' (20 CFR 718.202(a)(4), 718.203 (1999)) requirement that each miner bear the burden of proving that his lung disease arose out of his coal mine employment. The Department also notified the public of NIOSH's December 7, 1998 response, including the additional evidence NIOSH cited. 64 FR 54978–79 (Oct. 8, 1999). Recognizing that Congress created NIOSH as a source of expertise in occupational disease and the analysis of occupational disease research, the Department concluded it saw no scientific or legal basis upon which to alter its proposed change to the definition of pneumoconiosis. The Department further stated its disagreement that Congressional inaction invalidated its proposed revision of the definition since it was acting within the scope of Congress' grant of regulatory authority. Accordingly, the Department proposed no additional changes to this regulation in the second notice of proposed rulemaking. 64 FR 55012–13 (Oct. 8, 1999). The Department has now amended subsection (a)(1) by deleting a comma for grammatical reasons.

(b) The Department has again received both favorable and unfavorable comments on its proposed revision to the definition of pneumoconiosis. To the extent these comments are directed specifically to the Department's proposal to define pneumoconiosis as a latent and progressive disease, the Department's response is set forth in the preamble under § 725.309. The Department responds here to the remainder of the relevant comments, including those addressing the Department's proposal to include obstructive lung diseases arising out of coal mine employment within the definition of pneumoconiosis. Where a scientific article or treatise is cited, the Department has also cited to a Rulemaking Record Exhibit or, when appropriate, the **Federal Register,** where that source appears. This second citation is not an exhaustive list; thus, each source may appear at additional points in the Rulemaking Record.

(c) One comment objects to the Department's inclusion of the term ''legal pneumoconiosis'' in the revised definition because there is no such ''phenomenon.'' Another comment expresses the concern that the revised regulation would create a new medical diagnosis. The statute defines pneumoconiosis as ''a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.'' 30 U.S.C. 902(b). This broad definition encompasses not only coal workers' pneumoconiosis as that disease is contemplated by the medical community, but also any other chronic lung disease demonstrably related to coal mine employment but not typically denominated as pneumoconiosis in medical circles. Thus, the Department is making a legal distinction, rather than a medical one, by employing the phrase ''legal pneumoconiosis'' in order to

properly implement Congress' intent. In so doing, the Department is acknowledging the distinction already adopted by the circuit courts of appeals in construing and applying the statutory definition. *See, e.g., Gulf & Western Industries* v. *Ling,* 176 F.3d 226, 231–32 (4th Cir. 1999); *Bradberry* v. *Director, OWCP,* 117 F.3d 1361, 1368 (11th Cir. 1997); *Labelle Processing Co.* v. *Swarrow,* 72 F.3d 308, 315 (3d Cir. 1995); *Consolidation Coal Co.* v. *Hage,* 908 F.2d 393, 395–396 (8th Cir. 1990); *Campbell* v. *Consolidation Coal Co.,* 811 F.2d 302, 304 (6th Cir. 1987); *Peabody Coal Co.* v. *Lowis,* 708 F.2d 266, 268 n.4 (7th Cir. 1983).

(d) Several comments express concern over including obstructive pulmonary diseases in the definition of pneumoconiosis, believing such change will result in compensating miners for diseases caused by factors unrelated to coal mine employment. Whether coal mine dust exposure can cause chronic obstructive pulmonary disease is a question of medical and scientific fact that will not vary from case to case; thus, it is an appropriate question for the Department to answer by regulation. *See generally Peabody Coal Co.* v. *Spese,* 117 F.3d 1001, 1010 (7th Cir. 1997) (*en banc*); Davis, *Administrative Law Treatise,* § 6.7, 261–262 (3d ed. 1994). The revised definition will eliminate the need for litigation of this issue on a claim-by-claim basis, and render invalid as inconsistent with the regulations medical opinions which categorically exclude obstructive lung disorders from occupationally-related pathologies. The Department reiterates, however, that the revised definition does not alter the former regulations' (20 CFR 718.202(a)(4), 718.203 (1999)) requirement that each miner bear the burden of proving that his obstructive lung disease did in fact arise out of his coal mine employment, and not from another source. Thus, instead of attempting to force the conclusion, as one commenter contends, that all obstructive lung disorders are compensable, or to require responsible operators to compensate miners for non-occupationally related diseases, the language of the proposed regulation makes plain that only ''obstructive pulmonary disease arising out of coal mine employment'' falls within the definition of pneumoconiosis.

(e) Several comments criticize the Department's consultation with NIOSH. Calling the Department's solicitation of an opinion from NIOSH on the relevant medical questions a ''post-hoc attempt to rationalize the validity of its medical conclusions'' and a ''purely political act,'' one commenter states that Dr. Shulte's letter cannot substitute for ''genuine scientific review.'' Other commenters allege that NIOSH presented no serious medical or scientific analysis to support its position. To the extent these comments accuse the Department of obtaining assistance from NIOSH's information officer rather than its scientific staff, the Department's response is set forth in the preamble under § 725.309. NIOSH voluntarily submitted its first statement in support of the proposed revision to the definition of pneumoconiosis during the public comment period for the initial rulemaking proceeding. The Department then actively solicited an additional opinion from NIOSH in response to other comments the Department had received requesting such consultation and not, as the commenter suggests, to provide ''post-hoc'' rationalization for the proposed revisions to the regulation. NIOSH responded, and the Department set forth the substance of the response in the second notice of proposed rulemaking. 64 FR 54978–79. In response to the second notice, NIOSH once again submitted an unsolicited comment during the public comment period reaffirming its earlier statements that it had reviewed the proposed rule and supported it. Thus, NIOSH has supported the Department's proposal from the outset. Further, in each of its communications, NIOSH repeatedly provided concrete support for its comments by referencing appropriate studies and its own publication, National Institute for Occupational Safety and Health, *Criteria for a Recommended Standard, Occupational Exposure to Respirable Coal Mine Dust* (1995). 62 FR 3343 (Jan. 22, 1997); Rulemaking Record, Exhibit 2–1. This publication provides the most exhaustive review and analysis of the relevant scientific and medical evidence through 1995, including its evaluation of the evidence regarding the role smoking plays in a coal miner's respiratory status. The conclusions NIOSH reached there as a result of its analysis fully support the position it has taken in commenting during these rulemaking proceedings. Accordingly, the Department rejects these broad-based attacks on NIOSH's conclusions as a basis for altering this regulation.

(f) Various comments state, without specificity, that the Department's proposed revisions to the definition of pneumoconiosis lack valid scientific or medical support. Other comments attack the scientific basis of the conclusions that the Department and NIOSH have drawn from the evidence of record. In support, these commenters have submitted an analysis of some of the available medical literature from Dr. Gregory Fino, a Board-certified physician in Pulmonary Diseases, and Dr. Barbara Bahl, who has a doctorate in nursing and biostatistics. Their review of the literature regarding obstructive lung disease and pulmonary dysfunction in coal miners led them to conclude that virtually all of the articles they reviewed are flawed, and that there is no evidence of a clinically significant reduction in lung function resulting from coal mine dust exposure. (Rulemaking Record, Exhibit 89–37, Appendix C). They elaborate:

> There are a number of statements that can and cannot be said about obstruction in coal miners. Some of the articles discussed in Table 1 above do demonstrate a reduction in the FEV1 in highly selected cohorts of miners. Because of selection bias, the results cannot be applied to all miners in general. Since the reductions in the FEV1 are averages, it is statistically impossible to state whether a given miner would have FEV1 reductions greater than or less than the stated amount. The articles do not say and do not show that coal mine dust inhalation causes a clinically significant reduction in the FEV1. Just because a statistically significant reduction was encountered in the selected cohorts, there is no evidence at all that the reductions would participate in any respiratory impairment or disability.
>
> While there is no doubt that some miners do have clinically significant obstruction as a result of coal mine dust inhalation, it occurs in cases of severe fibrosis where a combined obstructive and restrictive defect is present. However, there is no evidence that there is a clinically significant reduction in the FEV1 as a result of chronic obstructive lung disease due to coal mine dust inhalation. None of the studies show that. None of the studies can be generalized to the average coal miner. Moreover, statistical significance neither implies nor infers clinical significance. As the above studies demonstrate, statistical significance has created many numbers that are not applicable to the evaluation of coal miners. The conclusions reached by Morgan (1, 24, 35) and published over two decades [ago] still hold true: coal mine dust may cause slight, clinically insignificant decreases in the FEV1 in some miners. There is no evidence that these decreases cause or contribute to pulmonary disability and no support for the assumption in the Department's regulation that coal dust causes or contributed to any miner's obstructive lung disease.

Rulemaking Record, Exhibit 89–37, Appendix C at 24–25. In a separate review of literature relating to emphysema in particular, Drs. Fino and Bahl conclude that ''[t]he amount of emphysema in the lungs of miners increases with the severity of simple coal workers' pneumoconiosis.'' This increase in severity as shown by chest

X-ray or autopsy ''is not correlated with a worsening of lung function,'' and the relevant studies ''have not shown clinically significant deterioration in lung function as the emphysema worsens.'' Rulemaking Record, Exhibit 89–37, Appendix C at 32–33.

The Department has reviewed all of the medical and scientific evidence referenced in the rulemaking record, and does not agree that the record lacks valid support for the proposition that coal mine dust exposure can cause obstructive pulmonary disease. The Department's position is fully supported by NIOSH, the statutory advisor to the black lung benefits program, which responded favorably to the Department's proposed revisions. Rulemaking Record, Exhibits 5–173, 72, 89–26. The considerable body of literature documenting coal mine dust exposure's causal effect on the development of chronic bronchitis, emphysema and associated airways obstruction constitutes a clear and substantial basis for this aspect of the revised definition of pneumoconiosis.

The term ''chronic obstructive pulmonary disease'' (COPD) includes three disease processes characterized by airway dysfunction: chronic bronchitis, emphysema and asthma. Airflow limitation and shortness of breath are features of COPD, and lung function testing is used to establish its presence. Clinical studies, pathological findings, and scientific evidence regarding the cellular mechanisms of lung injury link, in a substantial way, coal mine dust exposure to pulmonary impairment and chronic obstructive lung disease. In discharging its congressionally-mandated duty to recommend a permissible exposure limit for coal mine dust, NIOSH conducted a comprehensive review of the available medical and scientific evidence addressing the impact of coal mine dust exposure on coal miners. It published its findings in National Institute for Occupational Safety and Health, *Criteria for a Recommended Standard, Occupational Exposure to Respirable Coal Mine Dust* (1995) (*Criteria*). 62 FR 3343 (Jan. 22, 1997); Rulemaking Record, Exhibit 2–1. NIOSH concluded that ''[i]n addition to the risk of simple CWP and PMF [progressive massive fibrosis], epidemiological studies have shown that coal miners have an increased risk of developing COPD.'' *Criteria* 4.2.3.2, Rulemaking Record, Exhibit 2–1 at 57.

Drs. Fino and Bahl disagree, but the Department believes that their opinions are not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature. For example, Seaton, in ''Coal Workers' Pneumoconiosis,'' in Morgan WKC, Seaton A, eds., *Occupational Lung Diseases* (WB Saunders Co., 3d ed. 1995) 374–406, *see also* Rulemaking Record, Exhibit 89–37, Appendix C at 34, 42, reviewed much of the same published evidence and made the following analysis:

> Lung function, measured as the forced expiratory volume in 1 second (FEV1) has been shown both in cross-sectional and longitudinal studies to decline in relation to increasing underground dust exposure but not in relation to estimates of exposure to oxides of nitrogen. This decline occurs at a similar rate in smokers and nonsmokers, although the loss of lung function overall is greater in smokers, the two effects being additive.

Similarly, Becklake, in ''Pneumoconiosis,'' in Murray J, Nadel J, eds., *Textbook of Pulmonary Medicine* (1st ed. 1988) 1556–1592, *see also Criteria,* Rulemaking Record, Exhibit 2–1 at 204, concludes:

> Most evidence to date indicates that exposure to coal mine dust can cause chronic airflow limitation in life and emphysema at autopsy, and this may occur independently of CWP * * * The relationships between hypersecretion of mucus (chronic bronchitis) and chronic airflow limitation (emphysema) on the one hand and environmental factor of coal mining exposure on the other appear to be similar to those found for cigarette smoking.

Oxman and colleagues analyzed the available literature assessing the relationship between occupational dust exposures and COPD in 1993. Oxman AD, Muir DCF, Shannon HS, Stock SR, Hnizdo E, Lange HJ, ''Occupational dust exposure and chronic obstructive pulmonary disease: A systematic overview of the evidence,'' Am Rev Resp Dis, 148:38–48 (1993); see also Rulemaking Record, Exhibit 5–174, Appendix 8. Reports were analyzed for methodological criteria including dust exposure, control for smoking, exclusion of confounding pulmonary conditions, referral bias, and adequate follow-up. Thirteen reports that met their rigorous screening criteria were analyzed. They concluded that all of the studies found a statistically significant association between cumulative dust exposure and decline in lung function, and that coal mine dust can be a cause of chronic bronchitis. Unlike Drs. Fino and Bahl, the Oxman analysis concluded there was also a clinically significant loss of lung function in smokers and nonsmokers.

Drs. Fino and Bahl state that all of the studies identifying a decline in lung function ''are flawed because of selection bias. The results are not generalizable to the general population of miners.'' Rulemaking Record, Exhibit 89–37, Appendix C at 21. As recognized by many of the authors of these studies, the results are susceptible to a selection bias caused by miners leaving the industry between the time of initial pulmonary function measurement and those taken later during the follow-up period. Because of the ''healthy worker effect,'' it would be expected that workers more prone to the respiratory impairments caused by coal mine dust inhalation would leave mining and the healthier workers would continue working. Oxman concluded that ''[a]lthough it is impossible to estimate precisely the magnitude of this bias,'' its direction ''is towards underestimating the association between dust and loss of lung function, or failure to recognize a more susceptible subgroup of workers.'' Oxman at 46. Thus, this selection bias actually *underestimates* the association between inhalation of coal mine dust and loss of lung function. As Oxman explains, ''it is likely that the results underestimate the effect of occupational dust exposure on lung function, COPD, and chronic bronchitis. The magnitude of the bias is not clear, but it might, in some cases, result in estimates that are 50% or more of the true coefficients.'' Oxman at 47. Moreover, as Coggon and Newman Taylor remarked in the course of surveying the relevant medical literature, such selection effects are relatively unimportant because ''[t]here is no obvious reason why the relation of symptoms and lung function to dust should have been weaker in those omitted from investigation.'' Coggon D, Newman Taylor A, ''Coal mining and chronic obstructive pulmonary disease: a review of the evidence,'' Thorax 53:398–407, 400 (1998); *see also* 64 FR 54979 (Oct. 8, 1999) Simply stated, there is a clear relationship between coal mine dust and COPD and lung dysfunction, and that relationship is likely to be *stronger* than what we are able to measure.

Drs. Fino and Bahl conclude that any minimal obstruction resulting from coal mine dust exposure is not clinically significant. Marine's cross-sectional 1988 study of coal miners, however, found clinically significant decreases in pulmonary function in both smokers and nonsmokers. Marine WM, Gurr D, Jacobsen M, ''Clinically important respiratory effects of dust exposure and smoking in British coal miners,'' Am Rev Resp Dis, 137:106–112 (1988); *see also Criteria,* § 4.2.2.1, Rulemaking Record, Exhibit 2–1 at 52. This study also noted that the presence of chronic

bronchitis was clearly related to cumulative dust exposure. The table below summarizes the study's data:

Measure of respiratory dysfunction	Cumulative dust exposure (in percent)					
	Zero exposure		Intermediate exposure (174 ghm $^{-3}$)		High exposure (348 ghm $^{-3}$)	
	Smoker	Nonsmoker	Smoker	Nonsmoker	Smoker	Nonsmoker
FEV1 <80%	17.1	9.7	24.2	15.5	40.0	23.9
Chronic bronchitis	30.5	7.9	41.2	14.8	52.8	26.3
Chronic bronchitis+FEV1 <80%	7.6	1.5	14.9	3.9	27.3	9.8
FEV1 <65%	5.0	3.2	8.5	5.0	14.2	7.7

NOTE TO TABLE: *Percentages are estimates of prevalence of measures of respiratory dysfunction based on linear logistic models at an age of 47 years at varying amounts of cumulative dust exposure.*

As can be seen from this table, the incidence of nonsmoking coal miners with intermediate dust exposure developing moderate obstruction (FEV1 of less than 80%) is roughly equal to the incidence of moderate obstruction in smokers with no mining exposure (15.5% v. 17.1%). Similarly, the incidence of non-smoking miners with intermediate exposure developing severe airways obstruction (FEV1 of less than 65%) is equal to the incidence of severe obstruction in non-mining smokers (5.0% for both groups). Nonsmokers with high exposure are at greater risk for developing moderate or severe obstruction than unexposed smokers. Smokers who mine have additive risk for developing significant obstruction. The risk of chronic bronchitis clearly increases with increasing dust exposure; again smokers who mine have an additive risk of developing chronic bronchitis. The message from the Marine study is unequivocal: Even in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis. The risk is additive with cigarette smoking.

Drs. Fino and Bahl criticize the Marine study because it used the mean of each miner's three FEV1 values rather than the highest. Rulemaking Record, Exhibit 89–37, Appendix C at 17, 21. This, however, does not appear to be a significant problem given that a number of other studies which used the highest FEV1 value for analysis also showed the same adverse relationship between coal dust inhalation and pulmonary impairment. One such study was reported by Attfield and Hodous in 1992. Attfield MD, Hodous TK, ''Pulmonary function of U.S. coal miners related to dust exposure estimates,'' Am Rev Respir Dis 145:605–609 (1992); *see also* Criteria, § 4.2.2, Rulemaking Record, Exhibit 2–1 at 51. Attfield and Hodous analyzed pulmonary function data (specifically, FEV1, FVC and FEV1/FVC ratio) drawn from Round 1 of the National Study of Coal Workers' Pneumoconiosis, along with job-specific cumulative dust exposure estimates for U.S. underground coal miners, to determine whether there was an exposure-response relationship. This group of 7,139 miners worked both before and after 1970, when federally-mandated dust control standards were implemented. Allowing for decrements due to age and smoking history, Attfield and Hodous demonstrated a clear relationship between dust exposure and a decline in pulmonary function of about 5 to 9 milliliters a year, even in miners with no radiographic evidence of clinical coal workers' pneumoconiosis. These results were similar to those reached in studies of British coal miners.

Drs. Fino and Bahl (Rulemaking Record, Exhibit 89–37, Appendix C at 22), as well as other commenters, criticize this study and similar ones that are based on exposures prior to 1970, when federally-mandated dust control standards were implemented, on the grounds of selection bias. Their theory is that only those miners who worked in a dust-controlled environment are representative of the current adverse effects of coal mine dust exposure. This theory is flawed. While lower dust exposure should reduce both the occurrence and the severity of lung disease, the *kinds* of diseases will remain the same. Indeed, Attfield and Hodous specifically chose to use data from miners with presumably higher dust exposures so as to facilitate the detection of exposure-response relationships. Attfield and Hodous, Am Rev Respir Dis 145:605.

In any event, analysis of data from miners who worked only in dust-controlled conditions confirm the connection between coal mine dust exposure and obstructive lung disease. Seixas and colleagues considered a group of 1,185 miners who began working in 1970 or later. Seixas NS, Robins TG, Attfield MD, Moulton LH, ''Exposure-response relationships for coal mine dust and obstructive lung disease following enactment of the Federal Coal Mine Health and Safety Act of 1969,'' Am J Ind Med 21:715–732 (1992); *see also* Criteria, § 4.2.2.3.1, Rulemaking Record, Exhibit 2–1 at 54. The data they reviewed was collected during Round 4 of the National Study of Coal Workers' Pneumoconiosis, and included chest X-rays, ventilatory function tests (including FEV1, FVC and FEV1/FVC ratio), and relevant histories for each miner. The results of this cross-sectional analysis, when adjusted for age, race/ethnicity and smoking, demonstrated a declination in pulmonary function attributable to coal mine dust-induced obstructive lung disease.

Longitudinal studies have confirmed these results. *See generally Criteria,* § 4.2.2.3.1.2, Rulemaking Record, Exhibit 2–1 at 55. One noteworthy study is Attfield MD, ''Longitudinal decline in FEV1 in United States coalminers,'' Thorax 40:132–137 (1985); *see also Criteria,* § 4.2.2.3.1.2, Rulemaking Record, Exhibit 2–1 at 55. Using medical data from two National Coal Study surveys held nine years apart, Attfield evaluated the effects of dust exposure on a group of 1,072 miners aged 20–49 years. The data included chest X-rays, smoking and work histories, and spirometry, as well as dust exposure estimates. After accounting for age, height and smoking, Attfield found a coal mine dust-related FEV1 loss of 36 to 84 ml over 11 years, with an additional loss among smokers. Attfield's results confirmed similar studies analyzing data from miners in the U.K. *See, e.g.,* Love RG, Miller BG, ''Longitudinal study of lung function in coal-miners,'' Thorax 37:193–197 (1982); *see also* Criteria, § 4.2.2.3.1.2, Rulemaking Record, Exhibit 2–1 at 55.

Drs. Fino and Bahl contend, however, that the average decline shown in these studies, while perhaps statistically

relevant, is not clinically relevant and does not result in any impairment. Attfield and Hodous responded succinctly to such criticism, equating pulmonary function decrements in miners to the decline of lung function in non-mining smokers from the general population: ''If it is thought that a 5- to 9-ml decrement of FEV1 per year is clinically insignificant, it must be remembered that the average decrement for smokers was only 5 ml per pack year. This, in itself, is also a minor loss of lung function. However it is well known that smoking can cause severe effects in some smokers.'' Attfield and Hodous, Am Rev Respir Dis 145:608. Just as not all smokers develop COPD and pulmonary dysfunction, pulmonary impairment is not universal in coal miners. Drs. Fino and Bahl state that ''an average loss of FEV1 means that 50% of the miners will have losses in excess of the average and 50% will have losses smaller than the average.'' Rulemaking Record, Exhibit 89–37, Appendix C at 21. This conclusion does not stand up to scrutiny because it confuses the *average* with the *median.* As can be seen from Marine's table above, only a minority of miners will have significant decrements in pulmonary function. As the majority of miners may have small or, perhaps in some cases, no decline in pulmonary function, the average decline of the population studied can appear to be relatively small. Despite this, the individual miners affected can have quite severe disease, and statistical averaging hides this effect. The amended definition clarifies that these miners have a right to prove their case with evidence of a disabling obstructive lung disease that arose out of coal mine employment.

Pointing to Coggon and Newman Taylor's statement that ''some scientists have expressed doubts as to whether coal mine dust can cause clinically important loss of lung function,'' Coggon D, Newman Taylor A, ''Coal mining and chronic obstructive pulmonary disease: A review of the evidence,'' Thorax 53:398–407 (1998); *see also* 64 FR 54979 (Oct. 8. 1999); Rulemaking Record, Exhibit 89–37, Appendix C at 24, Drs. Fino and Bahl state that the studies have not shown this type of loss of pulmonary function. Rulemaking Record, Exhibit 89–37, Appendix C at 24. The implication that Coggon and colleague agree with this conclusion is misleading. The paragraph containing the quoted sentence notes that there is evidence connecting COPD with coal mining and that ''in view of this continuing controversy, it is helpful to review the evidence as it now stands.'' The authors reviewed data from the National Study of Coal Workers' Pneumoconiosis, the Pneumoconiosis Field Research Programme (U.K.), studies from Sardinia and Germany, and mortality and necropsy studies. They concluded:

> Reductions in lung function have been found in relation to coal mining with remarkable consistency. * * * Individually, all of the studies that have addressed the relation of coal mining to lung function have limitations, but these vary from one investigation to another and often would tend to obscure rather than exaggerate any effect of dust. The balance of evidence points overwhelmingly to impairment of lung function from coal mine dust exposure.

Coggon, Thorax 53:405. Coggon and Newman Taylor further concluded that: Coal mine dust inhalation can be disabling, and arguments against this thesis are ''unconvincing'; and ''the combined effects of coal mine dust and smoking on FEV1 appear to be additive.'' Coggon, Thorax 53:405–406. Thus, this study supports the Department's position.

Similarly, several of the medical treatises and studies cited by another commenter in support of its contention that there is no such causal link between coal mine dust exposure and obstructive lung disease do not negate (and, in fact, support) the conclusion the Department and NIOSH have reached. *See, e.g.*, Morgan WKC, ''Pneumoconiosis,'' in Brewis RAL, Corrin B, Geddes DM, Gibson GJ, eds., *Respiratory Medicine* (WB Saunders Co., 2d ed. 1995) 581; *see also* Rulemaking Record, Exhibit 89–21, attachment 1 (''it is clear that bronchitis induced by coal-mine dust, henceforth referred to as industrial bronchitis, leads to a reduction in ventilatory capacity''); Green FHY, Vallyathan V, ''Coal Workers'' Pneumoconiosis and Pneumoconiosis Due to Other Carbonaceous Dusts,'' in Chung A, Green FHY, eds., *Pathology of Occupational Lung Disease* (2d ed. 1998) 189; *see also* Rulemaking Record, Exhibit 89–21, attachment 2 (coal dust exposure is ''associated with significant deficits in lung function in the absence of [clinical] CWP, reinforcing the view that COPD and CWP have independent risk factors''); ''Occupational Lung Disease,'' in Hasleton PS, ed., *Spencer's Pathology of the Lung* (5th ed. 1996) 482; *see also* Rulemaking Record, Exhibit 89–21, attachment 4 (''A considerable body of evidence indicates that chronic bronchitis and emphysema in coal workers is directly related to tobacco usage and cumulative exposure to respirable dust during life.''); Roy TM *et al.,* ''Cigarette Smoking and Federal Black Lung Benefits in Bituminous Coal Miners,'' J Occ Med 31(2):100 (1989); *see also* Rulemaking Record, Exhibit 89–21, attachment 5 (''Well-designed investigations have now documented that coal dust exposure can cause reductions in FEV1 that are independent of age and cigarette smoking. * * * it appears that the major damage caused by cigarette smoking is additive to the minor damage which can be attributed to coal dust.''); Surgeon General, U.S. Department of Health and Human Services, ''Respiratory Disease in Coal Miners,'' *The Health Consequences of Smoking: Cancer and Chronic Lung disease in the Workplace*, 313 (1985); *see also* Rulemaking Record, Exhibit 89–21, attachment 11 (concluding that ''increasing coal dust exposure is associated with increasing airflow obstruction in both smokers and nonsmokers''). To the extent this commenter advocates that tobacco smoking, rather than coal mine dust exposure, causes the only significant obstructive disorders miners develop, and that the definition of pneumoconiosis ''must be tightened to deal with the truth of tobacco's role in causing what has been compensated as black lung,'' the Department reiterates that the studies cited above, as well as others, found a significant decrement in coal miners' pulmonary function in addition to that caused by smoking. Whether a particular miner's disability is due to his coal mine employment or smoking habit must be resolved on a claim-by-claim basis under the criteria set forth at § 718.204.

Drs. Fino and Bahl find no scientific support that clinically significant emphysema exists in coal miners without progressive massive fibrosis, Rulemaking Record, Exhibit 89–37, Appendix C at 31, but the available pathologic evidence is to the contrary. Cockcroft evaluated 39 coal workers and 48 non-coal worker controls dying of cardiac causes in 1979. Cockcroft A, Wagner JC, Ryder R, Seal RME, Lyons JP, Andersson N, ''Post-mortem study of emphysema in coalworkers and non-coalworkers,'' Lancet 2:600–603 (1982); *see also* Criteria, § 4.2.2.2, Rulemaking Record, Exhibit 2–1 at 52. Centrilobular emphysema (the predominant type observed) was significantly more common among the coal workers. The severity of the emphysema was related to the amount of dust in the lungs. These findings held even after controlling for age and smoking habits.

Similarly, Leigh and colleagues analyzed 886 miners who died between 1949 and 1982. Leigh J, Outhred KG, McKenzie HI, Glick M, Wiles AN,

''Quantified pathology of emphysema, pneumoconiosis and chronic bronchitis in coal workers,'' BR J Indust Med 40:258–263 (1983); *see also Criteria*, § 4.2.2.2, Rulemaking Record, Exhibit 2–1 at 53. They found that miners with more years of face work had worse emphysema pathologically. In a subsequent study of 264 underground coal miners exposed to mixed coal and silica dust, Leigh performed a multiple regression analysis to assess the effects of total lung coal content, total lung silica content, smoking history, and years at the coal face on pulmonary function, extent of emphysema, and extent of fibrosis. Leigh J, Driscoll TR, Cole BD, Beck RW, Hull BP, Yang J, ''Quantitative relation between emphysema and lung mineral content in coalworkers,'' Occ Environ Med 51:400–407 (1994); *see also Criteria*, § 4.2.2.2, Rulemaking Record, Exhibit 2–1 at 53. Multiple regression analysis is a powerful statistical tool used to identify which of a series of variables is responsible for an observed correlation, and to eliminate apparent correlations that can be explained by other true relationships. He made the following important findings: (1) The extent of emphysema was strongly related to the total coal content of the lung, age and smoking; (2) in miners who were lifelong non-smokers, the extent of emphysema was strongly related to coal content and age; (3) the extent of emphysema was unrelated to lung silica content; and (4) the extent of lung fibrosis was related to silica content. The authors concluded that ''these results provide strong evidence that emphysema in coalworkers is causally related to lung coal content.'' Leigh, Occ Environ Med 51:400.

Ruckley and colleagues achieved similar results in examining the lungs of 450 coal workers to determine the association between coal mine dust exposure and dust-related fibrosis and emphysema. Ruckley VA, Gauld SJ, Chapman JS, *et al.,* ''Emphysema and dust exposure in a group of coal workers,'' Am Rev Resp Dis 129:528–532 (1984); *see also Criteria*, § 4.2.2.2, Rulemaking Record, Exhibit 2–1 at 53. Emphysema was graded by standard techniques, smoking histories were obtained by questionnaire and Pneumoconiosis Panel records, and lung dust content was analyzed pathologically. Relationships between emphysema and possible explanatory variables were tested by multiple logistic regression models, which exclude confounding variables in analyzing causal effects. The authors found emphysematous changes in 72% of miners who smoked, 65% of ex-smokers, and 42% of nonsmoking miners; emphysema scores were higher in patients with increasing evidence of pneumoconiotic disease; and increasing coal lung dust was associated with the presence of emphysema. Forty-seven percent of miners with no fibrotic lesions had emphysema. Ruckley concluded that ''the results support the conclusion that the relationship observed between respirable dust and emphysema in coal workers is, in some way, causal.'' Ruckley, Am Rev Resp Dis 129:532.

Drs. Fino and Bahl point to several other sources in support of their view that clinically significant emphysema is not related to coal dust exposure in the absence of PMF. They quote Morgan's textbook, *Occupational Lung Diseases*, as saying that changes of focal emphysema cannot be equated with airways obstruction. The commenters fail to note additional comments in the same textbook:

> The increased risk of centriacinar emphysema in PMF cases away from the lesion, and, in simple pneumoconiosis, in relation to dust exposure supports the hypothesis that coal dust exposure sufficient to cause alveolar inflammation and fibrosis also initiates centriacinar emphysema. This seems a likely explanation for the consistent epidemiologic finding of decrements in FEV1 and FVC and a rise in residual volume in relation to the indices of dust exposure in coal miners.

Seaton, *Occupational Lung Diseases* at 400–401. Morgan's conclusions are also somewhat suspect because he has admitted that at least in commenting on the Cockcroft paper, some of his criticisms were inaccurate and not valid or fair. Judgement of Mr. Justice Turner, The British Coal Respiratory Disease Litigation, Jan. 23, 1998, Rulemaking Record, Exhibit 72. Dr. Fino and Bahl's citation to Snider, Snider GL, ''Emphysema: the first two centuries-and beyond. A historical overview, with suggestions for future reference,'' Am Rev Resp Dis 146:1333–1344 (Part 1) and 146:1615–1622 (Part 2) (1992); *see also* Rulemaking Record, Exhibit 89–37, Appendix C at 34, is also unhelpful because the articles contain no opinion as to whether emphysema in coal miners can be clinically significant or affects pulmonary function. Coal dust exposure was plainly not the focus of these articles.

The Department's proposed revision to the definition of pneumoconiosis is also supported by the growing evidence of the adverse affects of coal mine dust exposure at the cellular level leading to obstructive lung disease. *Criteria*, 4.3, Rulemaking Record, Exhibit 2–1 at 65–69; *see generally* Coggon, Thorax 53:404. Alveolar macrophages are cells that are normally situated in the alveoli, or gas-exchange units of the lung. Their normal function is to recognize foreign substances, phagocytize (ingest) these substances, and activate other inflammatory cells. Coal dust, in turn, causes leakage of destructive protease and elastase enzymes from alveolar macrophages. These enzymes can destroy the network of elastin and collagen proteins that comprise the underlying support structure of the lung architecture; the release of these enzymes from inflammatory cells is thus associated with the production of emphysema. Lung lavage studies are performed by washing an area of lung with saline instilled through a fiberoptic bronchoscope placed through a subject's throat and wedged into the lung. These studies of nonsmoking coal miners with simple CWP showed activation of macrophages with evidence of ingestion of dust particles, a finding not present in normal controls. Takemura T, Rom WM, Ferrans VJ, Crystal RG, ''Morphologic characterization of alveolar macrophages from subject with occupational exposure to inorganic particles,'' Am Rev Resp Dis 140:1674–1685 (1989); *see also Criteria*, § 4.3.3, Rulemaking Record, Exhibit 2–1 at 69. A subsequent lavage study of nonsmoking coal miners found that the macrophages spontaneously released substances toxic to the lung, including reactive oxygen species and elastase. These substances were released in significantly higher quantities in miners than in non-mining smokers or in non-mining nonsmokers without lung disease. Rom WN, ''Basic mechanisms leading to focal emphysema in coal workers'' pneumoconiosis,'' Environ Res 53:16–28 (1990); *see also* Rulemaking Record, Exhibit 5–174, Appendix 8. As noted, the reactive oxygen species damage cell membranes, cell proteins, and DNA. Over-secretion of these substances may overwhelm the lung's natural defenses (such as anti-oxidants and anti-proteases). The unopposed proteases and elastases can destroy lung tissue, causing emphysema.

Reactive oxygen substances have been shown to damage anti-proteases in the lung. Anti-proteases are enzymes that protect the lung from proteases and elastases that are released during an inflammatory reaction (such as that produced by inhalation of coal mine dust). Without this protection, the proteases and elastases can destroy the elastin and collagen that comprise the structure of the lung, resulting in

emphysematous changes. This was demonstrated in an animal model of coal dust inhalation, where the coal dust was found to increase elastase levels and cause degradation of alpha-1 antitrypsin (one of the protective enzymes) in association with pathologic findings of emphysema. *In vitro* studies have also demonstrated that the protective anti-protease activity of alpha-1 antitrypsin is decreased by exposure to coal dust. These observations support the theory that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms—namely, the excess release of destructive enzymes from dust- (or smoke-) stimulated inflammatory cells in association with a decrease in protective enzymes in the lung.

Animal and human studies have also shown that coal mine dust inhalation can recruit neutrophils, another inflammatory cell, into the lung. Rom WN (1990). Activated neutrophils produce elastase as well as other inflammatory mediators. The recruitment of neutrophils and the activation of alveolar macrophages is greater in nonsmoking coal miners with pulmonary impairment than either non-miners or nonsmoking miners without pulmonary impairment. This suggests that a combination of coal mine dust exposure and host susceptibility may be required to produce disease. Thus, although many of the studies evaluating mechanisms of pathogenesis of coal mine dust exposure concentrate on the development of fibrosis, there is considerable basic scientific data linking coal mine dust to the development of obstructive airways disease.

Moreover, cytokines, which are chemical substances released from a number of cells in the lung, have been implicated in the development of lung disease in coal miners. *Criteria,* § 4.3.1, Rulemaking Record, Exhibit 2–1 at 65–69. Tumor necrosis factor-α (TNF) and Interleukin 6 (IL–6) are two of them. TNF is released by alveolar macrophages as well as other cells in response to coal dusts (as well as other mineral dusts). TNF stimulates lung fibrosis. Patients with progressive CWP have higher TNF release from lung monocytes. TNF release is also increased in coal miners with airflow obstruction. TNF has been demonstrated to be an important mediator in obstructive airways diseases including COPD and asthma. Alveolar macrophages have been shown to release IL–6 in response to exposure to coal mine dust. Increased IL–6 levels were noted in lungs of coal miners with CWP. IL–6 has been implicated in the creation of inflammatory changes of the lower respiratory tract in chronic bronchitis as well as reactive airways disease. In addition, other cellular mediators, including leukotriene B4, thromboxane A2, prostaglandin E2, and platelet activating factor, have been shown to be produced by alveolar macrophages or other pulmonary cells in response to coal mine dust and are well known to play a role in the production of reactive airways disease. Thus, there is considerable basic scientific data linking coal dust to the development of obstructive airways disease.

One commenter repeatedly accuses the Department of not supporting its definitional change with ''peer-reviewed'' scientific and medical studies, but does not point to any study or article in particular. The Department rejects this assertion. Each of the articles and studies cited above, as well as the majority relied upon by NIOSH in the Criteria document, appeared in a peer-reviewed journal: American Review of Respiratory Disease, American Journal of Industrial Medicine, Thorax, Journal of Occupational Medicine, Lancet, British Journal of Industrial Medicine, Occupational Environmental Medicine, Environmental Research, and others. The textbooks relied upon are authored and edited by highly respected professionals in the field. Textbook editors serve as peer-reviewers of the relevant published literature because they comprehensively survey, evaluate the validity of, and comment on, the literature. Seaton's review in Morgan and Seaton's *Occupational Lung Disease* is a good example. Moreover, the NIOSH *Criteria* document, Rulemaking Record, Exhibit 2–1, received extensive peer review prior to its publication. *See Criteria,* Rulemaking Record, Exhibit 2–1 at xxii–xxiv.

It bears repeating that in developing its recommended dust exposure standard, NIOSH carefully reviewed the available evidence on lung disease in coal miners. NIOSH also considered the strength of the evidence, including the sampling and statistical analysis techniques used, *Criteria,* § 7.3.4, Rulemaking Record, Exhibit 2–1 at 124, and concluded that the science provided a substantial basis for adopting a permissible dust exposure limit. NIOSH summarized its findings based on some of the studies detailed above, along with others, as follows:

> In addition to the risk of simple CWP and PMF, epidemiological studies have shown that coal miners have an increased risk of developing COPD. COPD may be detected from decrements in certain measures of lung function, especially FEV1 and the ratio of FEV1/FVC. Decrements in lung function associated with exposure to coal mine dust are severe enough to be disabling in some miners, whether or not pneumoconiosis is also present. A severe or disabling decrement in lung function is defined here as an FEV1 <65% of expected normal values; an impairment in lung function is defined as an FEV1 <80% of predicted normal values. An exposure-response relationship between respirable coal mine dust exposure and decrements in lung function has been observed in cross-sectional studies and confirmed in longitudinal studies.

Criteria, 4.2.3.2 (citations omitted), Rulemaking Record, Exhibit 2–1 at 57. That coal mine dust exposure can cause obstructive lung disease is now a well-documented fact.

Finally, the Department's position is consistent with the growing body of case law recognizing that obstructive lung diseases can arise from coal mine dust exposure. *See generally Labelle Processing Co.* v. *Swarrow,* 72 F.3d 308, 315 (3d Cir. 1995) (''Chronic bronchitis, as a chronic pulmonary disease, falls within the legal definition of pneumoconiosis.''); *Kline* v. *Director, OWCP,* 877 F.2d 1175, 1178 (3d Cir. 1989) (The legal definition of pneumoconiosis ''encompasses a wider range of afflictions than does the more restrictive medical definition of coal workers' pneumoconiosis.''); *Richardson* v. *Director, OWCP,* 94 F.3d 164, 166 n.2 (4th Cir. 1996) (''COPD, if it arises out of coal-mine employment, clearly is encompassed within the legal definition of pneumoconiosis, even though it is a disease apart from clinical pneumoconiosis.''); *Warth* v. *Southern Ohio Coal Co.,* 60 F.3d 173, 175 (4th Cir. 1995) (''Chronic obstructive lung disease * * * is encompassed within the definition of pneumoconiosis for purposes of entitlement to Black Lung benefits.''); *Barber* v. *Director, OWCP,* 43 F.3d 899, 901 (4th Cir. 1995) (''physicians generally use 'pneumoconiosis' as a *medical* term that comprises merely a small subset of the afflictions compensable under the Act''); *Bethlehem Mines Corp.* v. *Massey,* 736 F.2d 120, 124 (4th Cir. 1984) (recognizing that emphysema can be aggravated by coal dust exposure); *Peabody Coal Co.* v. *Holskey,* 888 F.2d 440, 442 (6th Cir. 1989) (substantial evidence supported ALJ's decision to credit doctor who believed miner's chronic obstructive pulmonary disease was related to coal dust exposure over doctor who believed the disease was caused solely by cigarette smoking); *Campbell* v. *Consolidation Coal Co.,* 811 F.2d 302, 304 (6th Cir. 1987) (where miner had obstructive lung disease and no evidence demonstrated it was not

related to coal mine employment, employer failed to rebut interim presumption of entitlement); *Freeman United Coal Mining Co.* v. *OWCP,* 957 F.2d 302, 303 (7th Cir. 1992) (recognizing that the Act's definition of pneumoconiosis encompasses obstructive disease caused in whole or in part by exposure to coal dust); *Old Ben Coal Co.* v. *Prewitt,* 755 F.2d 588, 591 (7th Cir. 1985) (recognizing that chronic obstructive pulmonary disease ''fits the statutory definition'' of pneumoconiosis); *Associated Elec. Coop., Inc.* v. *Hudson,* 73 F.3d 845, 847 (8th Cir. 1996) (affirming award of benefits based on medical evidence of ''severe obstructive lung disease caused by coal dust exposure''); *Consolidation Coal Co.* v. *Hage,* 908 F.2d 393, 395 (8th Cir. 1990) (chronic obstructive lung disease ''constitutes a type of ailment which Congress deems sufficient to entitle a claimant to Black Lung benefits''); *Bradberry* v. *Director, OWCP,* 117 F.3d 1361, 1368 (11th Cir. 1997) (''COPD that arises from coal-mine employment falls within the legal definition of pneumoconiosis.''); *Stomps* v. *Director, OWCP,* 816 F.2d 1533, 1536 (11th Cir. 1987) (ordering award of benefits on strength of medical opinion that miner's totally disabling chronic obstructive pulmonary disease was caused in part by coal mine employment).

Contrary to the commenters' argument, then, the record does contain overwhelming scientific and medical evidence demonstrating that coal mine dust exposure can cause obstructive lung disease. The Department therefore declines to change the definition of pneumoconiosis as proposed.

(g) One comment suggests that the Department delete the term ''anthracosis'' from the definition of pneumoconiosis, contending that it is a term commonly used to denote anthracotic pigmentation, without associated disease process, on biopsy or autopsy of the lungs. The Department has accommodated this concern in the proposed revisions to § 718.202(a)(2). The revised version of § 718.202(a)(2) explicitly provides that ''[a] finding in an autopsy or biopsy of anthracotic pigmentation * * * shall not be sufficient, by itself, to establish the existence of pneumoconiosis.'' 64 FR 55013 (Oct. 8, 1999). Thus, the Department does not believe that a change to the definition of pneumoconiosis is necessary.

(h) Several comments suggest that the Department appoint an expert panel to review the scientific and medical evidence on the obstructive disease, latency and progressivity proposed revisions to the regulation. The Department declines to follow this suggestion. As set forth above, the relevant scientific and medical information available on these topics has been thoroughly reviewed by highly-qualified experts, including NIOSH, the advisor designated by Congress to consult with the Department in developing criteria for total disability due to pneumoconiosis under the Black Lung Benefits Act. 30 U.S.C. 902(f)(1)(D). Accordingly, to the extent these commenters note that ''since coal-workers'' pneumoconiosis is a medical condition, * * * this determination [establishing a proper definition of pneumoconiosis] should be left to the medical experts,'' the comment ignores both the statutory definition of pneumoconiosis and the large body of scientific evidence already reviewed by medical experts, as outlined above.

(i) One comment criticizes the Department for not considering two major sources of information regarding U.S. coal miners: the National Coal Study, which the commenter states has provided a wealth of longitudinal information about the health of miners, and the NIOSH X-ray Surveillance Program. The commenter is incorrect. The information from both of these programs is a major focus of NIOSH's *Criteria* document, Rulemaking Record, Exhibit 2–1, and is further analyzed in many of the articles considered by the Department and NIOSH in proposing the revisions.

(j) One comment generally objects to the proposed revisions and urges the Department to collect data developed by the Universities of Kentucky and Louisville since the 1996 comprehensive reform of the Kentucky state workers' compensation law, a program the commenter states is based on objective medical findings of ''certified B readers.'' The commenter believes that this data would more accurately reflect modern day dust control in coal mining than the studies relied upon by the Department. As discussed above, the Department's conclusions are fully supported by the ample data it has already reviewed, including data generated from time periods post-dating implementation of federally-mandated dust control measures. Moreover, the Department does not believe this information would be particularly relevant to the proposed revisions of the definition of pneumoconiosis. A ''certified B reader'' is a physician proved by examination to be proficient in assessing the quality of chest X-rays and in using the ILO–U/C system to classify X-rays for pneumoconiosis. 20 CFR 718.202(a)(1)(ii)(E) (1999). While this information may show the incidence of clinical pneumoconiosis in a given population of coal miners, it is not particularly relevant to the other subset of diseases compensable under the Black Lung Benefits Act, namely, any chronic lung disease arising out of coal mine employment.

(k) Another comment implies that the proposed definitional changes adopt arbitrary medical ''presumptions'' without consultation with any pulmonary experts. As discussed above, all of the scientific and medical evidence upon which the Department relies has been thoroughly reviewed and evaluated by experts in the field. It is not the Department's intent to create a ''presumption'' with the proposed revisions to the definition. Instead, the revisions are designed to define pneumoconiosis in accordance with the best science currently available to the Department while leaving with the miner the burden of persuading the factfinder that he has a lung disease falling within this definition.

(l) Two comments note that the proposed definition (at least insofar as it recognizes that both obstructive and restrictive lung disease may be caused by exposure to coal mine dust) was rejected by Congress and should not be adopted. The Department has already responded to this criticism. 64 FR 54972 (Oct. 8, 1999). No further discussion is necessary.

(m) Two comments, while supporting the proposed changes, ask the Department to amend the regulation further by requiring factfinders to categorically reject as non-conforming any physician's opinion stating either that coal dust cannot cause, or causes only trivial, obstructive lung impairments, or that coal dust-induced lung diseases cannot manifest themselves after a miner's exposure to coal mine dust ceases. The commenters state that such a change would forestall parties opposing miners' entitlement from needlessly prolonging litigation. A physician's opinion based on a premise fundamentally at odds with the statute and regulations is flawed, and the factfinder must weigh that physician's opinion accordingly. *See, e.g., Robinson* v. *Missouri Mining Co.,* 955 F.2d 1181, 1183 (8th Cir. 1992); *Penn Allegheny Coal Co.* v. *Mercatell,* 878 F.2d 106, 109–110 (3d Cir. 1989). This principle will continue to govern under the revised regulation. Thus, the Department does not believe a change to the proposed regulation is necessary.

(n) Several comments support the proposal, noting that the revisions to the

definition of pneumoconiosis are supported by the current state of medical knowledge.

(o) Two comments urge the Department to join the lawsuit filed by the Department of Justice to recover money from the tobacco industry for costs incurred by the black lung program for compensating and treating smoking-related disabilities. The comment is not directed to any regulatory proposal, and no response is warranted.

(p) No other comments were received concerning this section, and no further changes have been made in it.

20 CFR 718.202

(a) In the initial notice of proposed rulemaking, the Department proposed changing § 718.202 only to the extent of clarifying that a diagnosis of anthracotic pigment by biopsy, standing alone, is not equivalent to a diagnosis of pneumoconiosis. Former § 718.202(a)(2) imposed this limitation with respect to autopsy evidence only, and the Department noted there was no reason to treat the two types of evidence differently. 62 FR 3345, 3376 (Jan. 22, 1997). The Department did not propose any further changes to § 718.202 in the second notice of proposed rulemaking, although the regulation remained open for comment. 64 FR 54971 (Oct. 8, 1999).

(b) One comment supports the Department's proposed change as consistent with mainstream scientific findings. Several other comments support this change, but also advocate adopting the criteria for diagnosing pneumoconiosis by autopsy or biopsy developed by the American College of Pathologists and Public Health Service. For the reasons set out in the preamble to § 718.106, the Department cannot make this change.

(c) Two comments urge the inclusion of language stating that a negative chest x-ray cannot form the basis of a physician's reasoned finding of no pneumoconiosis as the disease is defined in the statute and regulations. The suggested addition is unnecessary for several reasons. The Black Lung Benefits Act already prohibits the denial of a claim solely on the basis of a negative x-ray. 30 U.S.C. 923(b). A physician's opinion ruling out the presence of the disease based solely on a negative x-ray would be similarly insufficient; such an opinion would amount to no more than a repetition of the x-ray findings. *See Worhach* v. *Director, OWCP,* 17 Black Lung Rep. 1–105, 1–110 (1993) (physician's opinion which merely restates x-ray findings is not a diagnosis of pneumoconiosis for purposes of § 718.202(a)(4)). Furthermore, § 718.202(a)(4) already recognizes that a diagnosis of pneumoconiosis may be made based on a documented and reasoned medical opinion despite a negative x-ray. *Warth* v. *Southern Ohio Coal Co.,* 60 F.3d 173, 174–75 n.* (4th Cir. 1995) (holding physician's opinion that pneumoconiosis cannot be diagnosed absent positive x-ray or tissue samples conflicts with § 718.202(a)(4) because physician's diagnosis may be based on other clinical evidence notwithstanding negative x-ray). Finally, only a physician can determine the diagnostic value of a negative x-ray in assessing the presence or absence of a respiratory or pulmonary disease in a particular miner. The law only prohibits making the negative x-ray the sole and conclusive basis for ruling out the disease.

(d) One comment would limit relevant radiological qualifications to board-certification in radiology and certification as a B-reader. Although these two qualifications may encompass most physicians' expert training, a rigid rule prohibiting consideration of any other aspect of a physician's background is undesirable. The adjudicator should consider any relevant factor in assessing a physician's credibility, and each party may prove or refute the relevance of that factor. *See Worhach* v. *Director, OWCP,* 17 Black Lung Rep. 1–105, 1–108 (1993) (holding adjudicator may properly consider physician's professorship in radiology in weighing radiological qualifications under § 718.202(a)(1)); *compare Melnick* v. *Consolidation Coal Co.,* 16 Black Lung Rep. 1–31, 1–37 (1991) (*en banc*) (holding adjudicator may not consider physician's ''prestigious teaching position'' outside the field of radiology under § 718.202(a)(1) in assessing physician's radiological competence).

(e)(i) Three comments favor language recognizing that CT scans are not reliable diagnostic tools for evaluating the presence or absence of pneumoconiosis because no standardized criteria exist for interpreting them. Another comment, however, argues that a negative CT scan effectively precludes a diagnosis of pneumoconiosis because of its level of clinical sophistication. General language accepting or rejecting the use of CT scans is not necessary. The Department did not propose any such language, or develop the record to ascertain the medical community's views. The comments take diametrically opposite views on the use of these tests, which provides no basis for adopting either view. Furthermore, the Department favors consideration of new and more accurate diagnostic technologies as they become available in the future. *See* preamble to § 718.107, 62 FR 3343 (Jan. 22, 1997). Any party may support or challenge the probative value of a particular test with expert opinions. No useful purpose would therefore be served by adopting a blanket exclusion of any particular type of testing. (ii) Based on the alleged unreliability of CT scans, two comments urge the Department to make clear that a claimant may refuse to undergo a CT scan without prejudicing the adjudication of his or her claim. The Department rejects this position. The adjudicator should determine whether a claimant's refusal to undergo a CT scan (or any other medical test) is reasonable in light of all relevant circumstances in the particular case. A general exoneration for all claimants refusing CT scans is not warranted, especially since the Department does not endorse the commenters' premise that this technology is necessarily unreliable in the absence of standardized criteria for interpreting it. (iii) One comment contends the CT scan is sufficiently reliable that a negative result effectively rules out the existence of pneumoconiosis. The statutory definition of ''pneumoconiosis,'' however, encompasses a broader spectrum of diseases than those pathologic conditions which can be detected by clinical diagnostic tests such as x-rays or CT scans. *See generally Island Creek Coal Co.* v. *Compton,* F.3d, No. 98–2051, 2000 WL 524798, *4 (4th Cir. May 2, 2000) (reviewing medical and legal definitions of ''pneumoconiosis,'' the latter of which is broader). For purposes of the Black Lung Benefits Act, ''pneumoconiosis'' includes any ''chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.'' 30 U.S.C. 902(b). A CT scan may provide reliable evidence in a particular claim that the miner does not have any evidence of the disease which can be detected by that particular diagnostic technique. The record, however, does not contain any medical evidence demonstrating the capacity of CT scans to rule out the existence of all diseases ''arising out of coal mine employment.'' *See Compton,* F.3d, 2000 WL 524798, *4 (noting that a medical diagnosis of no pneumoconiosis is not equivalent to a diagnosis of no legal pneumoconiosis), *citing Hobbs* v. *Clinchfield Coal Co.,* 45 F.3d 819, 821 (4th Cir. 1995). The Department therefore cannot accept the commenter's

position that a negative CT scan is self-sufficient evidence that the miner does not have ''pneumoconiosis'' for purposes of the statute.

(e) No other comments were received concerning this section, and no changes have been made in it.

20 CFR 718.204

(a)(i) The Department proposed several significant changes to § 718.204 in the initial notice of proposed rulemaking. 62 FR 3344–45, 3377–78 (Jan. 22, 1997). One revision clarified that ''total disability'' does not take into consideration any disabling non-respiratory conditions, *i.e.,* a miner may be totally disabled for purposes of the Black Lung Benefits Act (BLBA) notwithstanding the existence of any independently disabling non-respiratory/pulmonary impairments. This change emphasized the Department's disagreement with *Peabody Coal Co.* v. *Vigna,* 22 F.3d 1388 (7th Cir. 1994) (holding claimant's entitlement precluded by disabling stroke which was unrelated to coal mine employment and occurred before evidence of disability due to pneumoconiosis); *contra Youghiogheny & Ohio Coal Co.* v. *McAngues,* 996 F.2d 130 (6th Cir. 1993), *cert. den.* 510 U.S. 1040 (1994) (holding miner's disabling injuries from automobile accident irrelevant to disability determination under BLBA). Another revision codified holdings in two circuits that ''disability'' for purposes of the BLBA is a totally disabling respiratory or pulmonary impairment, and not ''whole person'' disability. The Department also proposed a definition for ''disability causation'' to harmonize the various formulations of that standard in circuit court decisions: a miner is totally disabled ''due to pneumoconiosis'' if the disease is a ''substantially contributing cause'' of the miner's disability. Similarly, the Department proposed recognizing that pneumoconiosis may worsen a totally disabling respiratory or pulmonary impairment which is itself unrelated to coal mine employment. Finally, the Department proposed a number of editorial changes to § 718.204 to rationalize its structure. 62 FR 3344–45 (Jan. 22, 1997). (ii) In the second notice of proposed rulemaking, the Department proposed a minor revision to § 718.204(b)(2)(iv) by restoring language from 20 CFR 718.204(c)(4) (1999), which had been omitted inadvertently. The language set forth the circumstances under which a medical report may establish the miner's total disability. 64 FR 54979, 55014 (Oct. 8, 1999). The Department also responded to numerous comments it had received concerning the proposed regulation. 64 FR 54979–80 (Oct. 8, 1999). Several comments expressed both support for, and opposition to, the Department's rejection of *Vigna's* holding that a pre-existing totally disabling impairment which is unrelated to coal mine employment precludes entitlement under the BLBA. The Department concluded the commenters had provided no reason for changing the proposed regulation. The Department also rejected comments which recommended adopting a ''whole person'' standard for total disability, rather than the proposed definition limiting disability to pulmonary and respiratory impairments. The commenters offered no rationale in support of the requested change other than a statutory interpretation of ''total disability'' previously rejected by two circuit courts in favor of the Department's position. With respect to ''disability causation,'' the Department rejected: challenges to its authority to define ''disability due to pneumoconiosis'' given the statute's broad grant of rulemaking authority and the ambiguity in the statutory term; various alternative formulations of the disability causation standard in place of ''substantially contributing cause'' inasmuch as the Department's definition reflected a general consensus in the existing caselaw; and arguments that the ''substantially contributing cause'' standard permitted awards based solely on smoking-related disability because such awards are contrary to both the BLBA and judicial precedent. Other than the restoration of language to § 718.204(b)(2)(iv), the Department did not propose any additional changes to § 718.204. 64 FR 54979–80 (Oct. 8, 1999).

(b) In both the first and second notices of proposed rulemaking, the Department proposed identical language defining total disability due to pneumoconiosis. 62 FR 3345, 3377; 64 FR 54979–54980, 55014. The Department explained its authority to define this statutory element of entitlement and proposed using a substantially contributing cause standard. Thus, a miner would be found totally disabled due to pneumoconiosis if he establishes that his pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. In both proposals, the Department explained that this standard was based on court of appeals precedent which had developed since 1989 and varied very little from circuit to circuit.

The Department also proposed that pneumoconiosis be considered a substantially contributing cause of the miner's disability if it either has an adverse effect on the miner's respiratory or pulmonary condition or worsens a totally disabling respiratory or pulmonary impairment caused by a disease or exposure unrelated to coal mine employment. §§ 718.204(c)(1)(i), 718.204(c)(1)(ii). In neither proposal did the Department describe the extent to which pneumoconiosis must have produced an adverse effect or worsened a totally disabling respiratory impairment. The Department did not mean to alter the current law through its proposals, however, or to suggest that *any* adverse effect, no matter how limited, was sufficient to establish total disability due to pneumoconiosis. Rather, the Department meant only to codify the numerous decisions of the courts of appeals which, in the process of deciding when a miner is totally disabled due to pneumoconiosis, have also ruled on what evidence is legally sufficient to establish that element of entitlement. In order to clarify this consistent intent, the Department has added the word ''material'' to § 718.204(c)(1)(i) and ''materially'' to § 718.204(c)(1)(ii). In so doing, the Department intends merely to implement the holdings of the courts of appeals. Thus, evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner's total disability is insufficient to establish that pneumoconiosis is a substantially contributing cause of that disability.

The Department is also mindful, however, that Congress enacted the Act in large part to permit benefit awards to miners whose entitlement under state workers' compensation laws was precluded by burdensome causation requirements. *Adams* v. *Director, OWCP,* 886 F.2d 818, 825 (6th Cir. 1989); *Mangus* v. *Director, OWCP,* 882 F.2d 1527, 1530–1531 (10th Cir. 1989). Moreover, the courts have also recognized the difficulties that would confront a miner who must prove the relative amounts that various causal elements contribute to his totally disabling respiratory or pulmonary impairment. *See Compton* v. *Inland Steel Coal Co.,* 933 F.2d 477, 481–483 (7th Cir. 1991); *Adams,* 886 F.2d at 825; *Mangus,* 882 F.2d at 1530–1531. The courts have held that a claim will not be denied simply because a physician reasonably may be unwilling or unable to account, as a percentage or otherwise, for the exact degree of impairment caused by pneumoconiosis. *See, e.g., Barger* v. *Abston Constr. Co.,* 196 F.3d 1261 (11th Cir. 1999) (Table) (opinion

that pneumoconiosis was ''at least a partial contributing cause'' of miner's disability sufficient to prove disability due to pneumoconiosis); *Cross Mountain Coal Co.* v. *Ward,* 93 F.3d 211, 218 (6th Cir. 1996) (opinion that miner's ''impairment is due to his combined dust exposure, coal workers'' pneumoconiosis as well as his cigarette smoking history'' sufficient); *Benjamin Coal Co.* v. *McMasters,* 27 F.3d 555 (3d Cir. 1994) (Table) (opinions that (1) pneumoconiosis was the ''least significant'' factor contributing to miner's disability, and (2) coal dust exposure and cigarette smoking contributed to miner's impairment but doctor was unable ''to differentiate between the effects of the two causes'' sufficient); *Compton* v. *Inland Steel Coal Co.,* 933 F.2d 477, 479 (7th Cir. 1991) (opinion that ''pneumoconiosis * * * was one of the conditions that brought about the pulmonary impairment'' sufficient); *Robinson* v. *Pickands Mather & Co.,* 914 F.2d 35, 36 (4th Cir. 1990) (opinion that miner's ''disability was consistent with occupational pneumoconiosis'' sufficient); *Lollar* v. *Alabama By-Products Corp.,* 893 F.2d 1258, 1267 (11th Cir. 1989) (physician's diagnosis of ''restrictive pulmonary functions and pleural disease by chest x-ray with minimal parenchymal disease, all of which is consistent with coal workers' pneumoconiosis,'' sufficient); *Adams* v. *Director, OWCP,* 886 F.2d 818, 826 (6th Cir. 1989) (diagnosis of ''total disability resulting from a combination of pneumoconiosis, emphysema and chronic obstructive lung disease'' sufficient); *Bonessa* v. *United States Steel Corp.,* 884 F.2d 726 (3d Cir. 1989) (opinion that pneumoconiosis made a ''substantial contribution'' to miner's disability sufficient); *Mangus* v. *Director, OWCP,* 882 F.2d 1527 (10th Cir. 1989) (evidence that miner's pneumoconiosis caused complications requiring removal of entire lung during surgery intended to remove only part of lung as treatment of lung cancer, sufficient).

(c)(i) One comment states the Department has not justified its revision of § 718.204(a) making disabling non-pulmonary/respiratory impairments irrelevant in determining whether a miner is totally disabled under the BLBA. The Department has previously addressed this issue in both the initial and second notices of proposed rulemaking. 62 FR 3344–45 (Jan. 22, 1997); 64 FR 54979 (Oct. 8, 1999). In both instances, the Department cited *McAngues,* 996 F.2d 130, as authority for its view that non-pulmonary/respiratory impairments cannot be considered in a disability determination. *McAngues,* 996 F.2d at 134–35, quotes with approval the following language from *Twin Pines Coal Co.* v. *U.S. Dept. of Labor,* 854 F.2d 1212 (10th Cir. 1988):

> * * * [A] review of the cases, the statute, its legislative history, and its interpretation by the benefits review board * * * shows that the statute is intended to confer special benefits on miners who are disabled due to pneumoconiosis whether or not they are disabled from a different cause. Even when other causes are themselves independently disabling '[t]he concurrence of two sufficient disabling medical causes one within the ambit of the Act, and the other not, will in no way prevent a miner from claiming benefits under the Act.'

854 F.2d at 1215, *quoting Peabody Coal Co.* v. *Director, OWCP* [*Huber*], 778 F.2d 358, 363 (7th Cir. 1985); *see also Cross Mountain Coal Co.* v. *Ward,* 93 F.3d 211, 217 (6th Cir. 1996). This line of authority from three federal courts of appeals fully supports the Department's revision of § 718.204(a). Although *Vigna* adopts a contrary interpretation of the BLBA, the Seventh Circuit did not address its own precedent in *Huber* or the contrary decisions in *McAngues* and *Twin Pines.* Accordingly, the Department does not consider *Vigna* a sufficient basis for altering the regulation. (ii) Several comments support the Department's position.

(d) One comment contends the limitations on introducing evidence concerning non-respiratory or pulmonary impairments deprive the ''but for'' disability causation standard of any practical meaning in terms of proving that pneumoconiosis played little, if any, role in the miner's disability. The Department disagrees with the commenter's position for two reasons. First, the Department has adopted a ''substantially contributing cause'' standard, which is not the equivalent of a ''but for'' standard. ''Substantially contributing cause'' means pneumoconiosis has a material adverse effect on a miner's respiratory or pulmonary condition (§ 718.204(c)(1)(i)). This standard is less rigorous than a ''but for'' test. Second, only respiratory and pulmonary impairments are relevant to determining whether the miner is totally disabled for purposes of the Black Lung Benefits Act, and identifying the causes of that disability. The commenter's position effectively rests on the Seventh Circuit's interpretation of disability causation in *Peabody Coal Co.* v. *Vigna,* 22 F.3d 1388 (7th Cir. 1994). In that decision, the Court held a miner's entitlement to benefits was precluded by his disabling stroke because the stroke was unrelated to coal mine employment and occurred before any evidence the miner was disabled by pneumoconiosis. The Department disagrees with *Vigna.* Non-respiratory or pulmonary disabilities may co-exist with total disability due to pneumoconiosis, but the former are irrelevant for purposes of determining whether a miner is entitled to black lung benefits. Consequently, non-respiratory or pulmonary impairments have no relevance to the disability causation standard, and the limitation on introducing evidence concerning such conditions is appropriate.

(e) Three comments oppose the revised definition of ''total disability'' to the extent it requires proof of a totally disabling respiratory or pulmonary impairment. The commenters urge the Department to adopt a definition which incorporates a ''whole person'' definition of disability, *i.e.,* total disability based on a combination of pneumoconiosis and any other physical impairments which prevent the miner from performing his or her usual coal mine work or comparable and gainful work. The Department has previously rejected the ''whole person'' standard in both the initial and second notices of proposed rulemaking. 62 FR 3345 (Jan. 22, 1997); 64 FR 54979 (Oct. 8, 1999). The Department has consistently taken the position that proof of a totally disabling respiratory or pulmonary impairment is an essential element of a miner's claim for black lung benefits. *See, e.g., Beatty* v. *Danri Corp. & Triangle Enter.,* 49 F.3d 993, 1001 (3d Cir. 1995); *Jewell Smokeless Coal Corp.* v. *Street,* 42 F.3d 241, 243 (4th Cir. 1994); *Lollar* v. *Alabama By-Products Corp.,* 893 F.2d 1258, 1262–1263 (11th Cir. 1990); *Bosco* v. *Twin Pines Coal Co.,* 892 F.2d 1473, 1480 (10th Cir. 1989); *Adams* v. *Director, OWCP,* 886 F.2d 818, 820 (6th Cir. 1989). Adoption of a ''whole person'' definition of total disability would greatly expand the black lung benefits program and transform it into a general disability program for coal miners. The Department is convinced such a result has never been the intent of Congress. Moreover, unlike the Social Security Administration which has regulations, procedures, and personnel devoted to the evaluation of impairments from the ''whole person'' perspective, the Department simply is not equipped to evaluate such impairments. The Department's approach to the definition of total disability is not undermined by the allowance of survivors' claims where death was due in part to nonrespiratory or nonpulmonary

conditions but was actually hastened by pneumoconiosis.

Allowance of survivors' claims in such situations is consistent with the legislative history of the 1981 amendments to the BLBA. 62 FR 3345 (Jan. 22, 1997); 48 FR 24276–77 (May 31, 1983), In addition, the determination of whether pneumoconiosis actually hastened death in a given case does not require the types of regulations, procedures and personnel that would be required by a ''whole person'' disability definition.

(f) One comment opposes the requirement in § 718.204(b)(2)(iv) that a physician's opinion must be documented as well as reasoned in order to establish the existence of a totally disabling respiratory or pulmonary impairment. The commenter states that an opinion should be considered sufficient if it is ''reasoned.'' The commenter also criticizes the regulation for failing to define the requisite documentation. The commenter does not state a basis for changing the regulation. The most fundamental requirement for any physician's opinion is that it identify the information and data upon which the physician relies in order to form a judgment about the miner's pulmonary condition. Unless the adjudicator is aware of the documentation, (s)he is in no position to determine whether the opinion is ''reasoned.'' A physician provides a ''reasoned'' opinion by explaining conclusions in light of factual premises which consist of personal and occupational information about the miner and the results of clinical tests and a physical examination, *i.e.,* the ''documentation.'' *See generally Director, OWCP* v. *Rowe,* 710 F.2d 251, 255 (6th Cir. 1983). If one or more of the premises is faulty or inconsistent with the conclusions reached by the physician, the adjudicator may find the opinion not credible. Contrary to the commenter's position, a physician's reasoning cannot be divorced from the underlying documentation. As for defining the necessary documentation, § 718.104(a) sets forth the basic requirements for any report of physical examination obtained in connection with a claim for black lung benefits, and subsection (b) accommodates any additional testing the physician may consider useful.

(g) One comment challenges the Department's authority to promulgate a disability causation standard. The commenter also contends the Department cannot adopt a causation standard which permits a finding of total disability due to pneumoconiosis if the miner's pneumoconiosis worsens a totally disabling respiratory or pulmonary impairment which is itself unrelated to coal mine employment. § 718.204(c)(1)(ii). The Department rejects both positions. The Department has previously addressed comments contesting its authority to issue a regulation defining disability causation in the second notice of proposed rulemaking. 64 FR 54979–80 (Oct. 8, 1999). The Department cited the explicit rulemaking authority conferred by Congress in 30 U.S.C. 902(f)(1), which makes ''total disability'' subject to the meaning established by the Department through regulations. The Department also noted that benefits may be paid for total disability ''due to pneumoconiosis,'' 30 U.S.C. 922(a)(1), but that ''due to'' is ambiguous and therefore a valid subject for regulatory interpretation. With respect to the ''worsening'' standard, the Department adopted this definition in response to the Fourth Circuit's decision in *Dehue Coal Co.* v. *Ballard,* 65 F.3d 1189 (4th Cir. 1995). In that decision, the Court held that a miner who had totally-disabling lung cancer was not entitled to benefits because his pneumoconiosis, by definition, could not contribute to his disability. The Department believes a miner should not be denied benefits if the miner's pneumoconiosis causes further deterioration of a totally disabling (non-occupationally related) pulmonary or respiratory impairment. Although the effect is cumulative or additive, the pneumoconiosis nevertheless further diminishes the miner's already-compromised lung function. The Department stresses that this causation standard does not require an award of benefits simply because the miner has pneumoconiosis and the pneumoconiosis adversely affects his or her pulmonary condition. No award is permitted if there is not also present a totally disabling respiratory or pulmonary impairment. In such a case, the miner is entitled to benefits because (s)he is totally disabled and pneumoconiosis is a part of the overall disabling condition.

(h) Three comments contend generally that the disability causation standard promotes awards for smoking-induced disability. The Department has previously considered, and rejected, the same contention in the second notice of proposed rulemaking. 64 FR 54980 (Oct. 8, 1999). The BLBA, judicial precedent, and the program regulations do not permit an award based solely on smoking-induced disability. Because the commenters do not state any additional grounds for their contention, no further response is necessary.

(i) One comment suggests the role of smoking in causing disability undermines the regulatory presumptions by negating the validity of their factual premises. Specifically, the commenter argues that the rational connection between established and presumed facts is broken if the miner smoked. The Department disagrees with this analysis. The presumptions contained in §§ 718.302–718.306 are all derived from the BLBA. *See* 30 U.S.C. 921(c)(1) [implemented by § 718.302]; 921(c)(2) [implemented by § 718.303]; 921(c)(3) [implemented by § 718.304]; 921(c)(4) [implemented by § 718.305]; 921(c)(5) [implemented by § 718.306]. The regulatory presumptions are therefore authorized by the statute itself. The Supreme Court has upheld the constitutionality of 30 U.S.C. 921(c)(1)–(4) in *Usery* v. *Turner Elkhorn Mining Co.,* 428 U.S. 1, 22–31 (1976). In the 1981 amendments to the BLBA, Congress limited the applicability of 30 U.S.C. 921(c)(2) and (4) to claims filed before January 1, 1982, and 921(c)(5) to claims filed before June 30, 1982. Consequently, three of the statutory presumptions have little effect on the adjudication of black lung claims at this time. The Department also does not accept the commenter's premise that allegedly widespread cigarette smoking among miners has effectively destroyed the basis for the presumptions. If any individual miner's smoking is proven the sole cause of his or her disability, death or disease, the party opposing entitlement has rebutted the presumption (except with respect to § 718.304, which is irrebuttable). The presumption itself is not invalid if the presumed fact is disproved; rather, the evidence simply establishes that the presumed facts are not true in the particular case. Accordingly, the Department rejects the commenter's view that the incidence of smoking among miners necessarily causes constitutional infirmities in the regulatory presumptions.

(j) One comment urges the Department to join the lawsuit filed by the Department of Justice to recover money from the tobacco industry for benefits approved by the Department based on disability caused by cigarette smoking. The comment is not directed to any regulatory proposal, and no response is warranted.

(k) One comment supports the ''substantially contributing cause'' standard.

(l) No other comments have been received concerning this section, and no changes have been made in it.

20 CFR 718.205

(a) In the initial notice of proposed rulemaking, the Department proposed codifying its position, unanimously supported by circuit court precedent, that recognizes a causal relationship between a miner's death and pneumoconiosis if the disease hastened the miner's death. 62 FR 3345–46, 3378 (Jan. 22, 1997). The Department responded to the comments received when it issued the second notice of proposed rulemaking. 64 FR 54980 (Oct. 8, 1999). Several comments urged the Department to reinstate automatic entitlement for survivors of miners who were totally disabled by pneumoconiosis, but did not die from that disease (so-called ''unrelated death benefits''); one comment concluded the Department had effectuated that result by adopting the ''hastening death'' standard in § 718.205(c)(5). The Department rejected the first suggestion because the 1981 amendments to the Black Lung Benefits Act (BLBA) allow benefits in survivors' claims filed after January 1, 1982, only if the miner died due to pneumoconiosis. Similarly, the Department disagreed with the commenter's interpretation of the ''hastening death'' standard, citing its universal acceptance by the six circuits with jurisdiction over 90 percent of black lung claims litigation. The Department also rejected a recommendation that it make applicable to claims filed after January 1, 1982, a more lenient regulatory standard applicable to claims filed before 1982, since the standard was based on a statutory presumption (30 U.S.C. 921(c)(2)) repealed by Congress in the 1981 amendments. The Department did not propose any further changes to § 718.205 in the second notice of proposed rulemaking, although the regulation remained open for further comment. 64 FR 54971 (Oct. 8, 1999).

(b) One comment opposes the ''hastening death'' standard because it reinstates survivors' ''unrelated death benefits.'' The commenter states broadly that any lingering, non-traumatic, death will be affected by every disease process present in the individual. The Department disagrees. The commenter does not cite any medical support for its position, and it does not respond to the Department's explanation rejecting any similarity between the ''hastening death'' standard and ''unrelated death benefits'' in the second notice of proposed rulemaking. 64 FR 54980 (Oct. 8, 1999). Moreover, the commenter's premise overlooks the role of the claims adjudication process, which requires the claimant to submit credible medical evidence establishing a detectable hastening of the miner's death on account of pneumoconiosis. The party opposing entitlement has ample opportunity in each survivor's claim to submit evidence proving pneumoconiosis played no role in the miner's death.

(c) One comment argues that at least half of approved survivors' claims are based on deaths attributable to the adverse health effects of smoking. The commenter recommends reallocating the costs of these claims to the tobacco industry. The comment is not directed toward any regulatory proposal, and no response is warranted.

(d) Two comments generally assert the ''hastening death'' standard cannot be implemented by the Department because the regulation violates the notice and comment provisions of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* The commenters do not indicate in what manner these APA requirements have been violated. Assuming the commenters are asserting the Department improperly adopted the ''hastening death'' standard in litigation rather than through rulemaking, the Department disagrees. The Department promulgated 20 CFR 718.205 in 1983, after complying with the APA's notice and comment provisions, in response to the 1981 amendments to the BLBA. 48 FR 24272 (May 31, 1983). Under those amendments, a deceased miner's survivor who filed a claim on or after January 1, 1982, is eligible for benefits only if the miner's death was due to pneumoconiosis. Based on the legislative history of the 1981 amendments, the Department provided that death will be considered ''due to pneumoconiosis'' where pneumoconiosis was at least ''a substantially contributing cause or factor.'' 20 CFR 718.205(c)(2) (1999). In later litigation, the Department set forth its interpretation of the regulatory phrase ''substantially contributing cause or factor,'' and consistently maintained that this standard is met by evidence proving pneumoconiosis actually hastened the miner's death. The ''hastening death'' standard gives practical meaning to the phrase ''substantially contributing cause.'' *See Bradberry* v. *Director, OWCP,* 117 F.3d 1361, 1365–66 (11 Cir. 1997) *and* cases cited therein. The Department is the administrator of the BLBA and, in that role, has the authority to interpret its own regulations. Indeed, because the Department's interpretation is reasonable and consistent with the regulatory language, every court of appeals to have considered the question has deferred to the Department's interpretation. *Bradberry,* 117 F.3d 1361, 1366–67; *Northern Coal Co.* v. *Director, OWCP,* 100 F.3d 871, 874 (10th Cir. 1996); *Brown* v. *Rock Creek Mining Co.,* 996 F.2d 812, 816 (6th Cir. 1993); *Peabody Coal Co.* v. *Director, OWCP,* 972 F.2d 178, 183 (7th Cir. 1992); *Shuff* v. *Cedar Creek Coal Co.,* 967 F.2d 977, 980 (4th Cir. 1992), *cert. den.* 506 U.S. 1050 (1993); *Lukosevicz* v. *Director, OWCP,* 888 F.3d 1001, 1006 (3d Cir. 1989). Accordingly, the ''hastening death'' standard is a permissible interpretation of § 718.205(c)(2), which was promulgated after public notice and comment in accordance with the APA.

(e) Two comments contend the Department cannot apply § 718.205(c)(5) to pending claims without violating a prohibition on retroactive rulemaking. (i) The Department previously addressed the retroactivity issue in the initial notice of proposed rulemaking. 62 FR 3347–48 (Jan. 22, 1997). The Department acknowledged the Supreme Court's holding in *Bowen* v. *Georgetown University Hospital,* 488 U.S. 204, 208 (1988), which limits the retroactive applicability of agency regulations unless Congress has expressly authorized such regulations. Although the Black Lung Benefits Act (BLBA) does not contain the express statutory authority required by *Bowen,* the Department concluded many of the proposed regulations could nevertheless apply to pending claims. These regulations, or revisions to regulations, principally clarify the Department's interpretation of the BLBA and the current program regulations. Revised regulations which could significantly change the regulated community's existing obligations and expectations, however, apply only prospectively to claims filed after the effective date of the final regulations. The Department reiterated this position in the second notice of proposed rulemaking. 64 FR 54981–82 (Oct. 8, 1999). It rejected recommendations to make all of the revisions either fully retroactive or entirely prospective. The Department adhered to its earlier explanation in the initial notice of proposed rulemaking: some regulations could apply to pending claims because they codify existing agency interpretations of the BLBA and regulations, while other regulations must be limited to prospective application because they involve significant changes to the existing program which could disrupt the parties' interests. The Department therefore declined to adopt a single approach for all of the revisions. Finally, the Department rejected arguments against retroactive

rulemaking premised on the Contract Clause of the United States Constitution, art. I, § 10, cl. 1, and the impairment of contracts. 64 FR 54981–82 (Oct. 8, 1999). (ii) The most recent comments do not cite any legal authority contradicting the Department's extensive analysis of the retroactivity issues in the initial and second notices of proposed rulemaking. In any event, the Department's analysis remains valid. An agency regulation does not run afoul of *Bowen* simply because it may operate retroactively. ''So long as a change in a regulation does not announce a new rule, but rather merely clarifies or codifies an existing policy, that regulation can apply retroactively. A rule clarifying an unsettled or confusing area of the law 'does not change the law, but restates what the law according to the agency is and has always been' * * * [.]'' *Orr* v. *Hawk,* 156 F.3d 651, 654 (6th Cir. 1998), *reh'g en banc den.,* 172 F.3d 411 (6th Cir. 1999), *quoting Pope* v. *Shalala,* 998 F.2d 473, 483 (7th Cir. 1993). *See also First National Bank of Chicago* v. *Standard Bank & Trust,* 172 F.3d 472, 478 (7th Cir. 1999) (noting *Bowen's* ban on retroactivity is inapplicable if rule is clarification rather than legislative change); *compare National Mining Assoc.* v. *U.S. Dept. of Interior,* 177 F.3d 1, 8 (D.C. Cir. 1999) (agency rule interpreting statute to impose liability for pre-rule acts gives retroactive effect which *Bowen* prohibits absent express statutory authority). As the Department explained in both the initial and second notices of proposed rulemaking, § 718.205(c)(5) simply codifies the Department's longstanding interpretation of the legal standard for proving a miner's pneumoconiosis was a ''substantially contributing cause'' of his or her death under the BLBA and part 718 regulations. 62 FR 3345–46 (Jan. 22, 1997); 64 FR 54980 (Oct. 8, 1999). Six circuit courts have adopted this interpretation while no court has disagreed. *Bradberry* v. *Director, OWCP,* 117 F.3d 1361, 1365–66 (11th Cir. 1997); *Northern Coal Co.* v. *Director, OWCP,* 100 F.3d 871, 874 (10th Cir. 1996); *Brown* v. *Rock Creek Mining Co.,* 996 F.2d 812, 816 (6th Cir. 1993); *Peabody Coal Co.* v. *Director, OWCP,* 972 F.2d 178, 183 (7th Cir. 1992); *Shuff* v. *Cedar Creek Coal Co.,* 967 F.2d 977, 980 (4th Cir. 1992), *cert. den.* 506 U.S. 1050 (1993); *Lukosevicz* v. *Director, OWCP,* 888 F.2d 1001, 1006 (3d Cir. 1989); *but see Tackett* v. *Armco, Inc.,* 16 Black Lung Rep. 1–88, 1–93 (1992), *vacated on remand* 17 Black Lung Rep. 1–103, 1–104 (1993) (rejecting ''hastening death'' standard, but vacating opinion on remand in light of controlling decision in *Shuff*). Section 718.205(c)(5) therefore represents a clarifying regulation which the Department may validly implement with retroactive effect for claims pending on the date the regulation becomes effective. (iii) Based on the foregoing analysis, the Department also rejects one commenter's position that the BLBA requires a ''direct cause and effect relationship'' between the miner's pneumoconiosis and death in order for a survivor to be entitled to benefits, at least insofar as the commenter would require that pneumoconiosis be the immediate, sole and proximate cause of the miner's death. Pneumoconiosis may be the direct, or proximate, cause of a miner's death (§ 718.205(c)(1)), but entitlement may also be premised on the lesser ''hastening death'' standard (§ 718.205(c)(2), (5)). The circuit court precedents cited above have unanimously upheld this interpretation. In both cases, a ''direct'' effect links the pneumoconiosis to the miner's death, *i.e.,* either as the leading, or contributing, cause of the miner's death. The Department's interpretation reflects Congressional intent that benefits be awarded if the survivor establishes that pneumoconiosis was a contributing cause of the miner's death, although not the sole and immediate cause. *See* 45 FR 13690 (Feb. 29, 1980); 48 FR 24276–78 (May 31, 1983).

(f) The Department received written comments and expert hearing testimony from physicians on the role pneumoconiosis may play in a miner's death. (i) *Expert Comments.* Drs. Ben V. Branscomb, Distinguished Professor Emeritus, University of Alabama (Birmingham), and William C. Bailey, Professor of Medicine and Eminent Scholar, Chair in Pulmonary Disease, University of Alabama (Birmingham), (Rulemaking Record Ex. 5–174, Appendix 8), comment that the medical literature does not substantiate any hastening effect of simple pneumoconiosis on the timing of a miner's death. They do acknowledge that severe complicated pneumoconiosis could have an additive effect in some instances, but only by reducing the miner's lifespan marginally. The physicians conclude that pneumoconiosis usually does not affect a miner's death from non-lung disease conditions, nor does mild or moderate stable pulmonary insufficiency affect other diseases leading to death. At the Department's Washington, D.C., public hearing, Dr. Branscomb also observed that simple pneumoconiosis has no effect on the common causes of death, and does not otherwise influence the course of a miner's death. Rulemaking Record (Ex. 35), Transcript, *Hearing on Proposed Changes to the Black Lung Program Regulations* (July 22, 1997), pp 47–48. At the same hearings, Dr. Robert Cohen, Chief, Division of Pulmonary Medicine, Cook County (IL) Hospital, generally described the means by which impairment of lung function from pneumoconiosis could weaken the body's defenses to infections and increase susceptibility to other disease processes. Rulemaking Record (Ex. 35), Transcript (July 23, 1997), pp 421–23. Dr. Gregory J. Fino, board-certified in Internal Medicine and in the subspecialty of Pulmonary Disease, (Rulemaking Record, Ex. 89–37, Appendix C), notes several studies which have shown that complicated pneumoconiosis is a cause of death, while other studies provide less authoritative evidence that simple pneumoconiosis may be a cause of death. This physician concludes that pneumoconiosis may be implicated in a miner's death provided the death is respiratory-related and the pneumoconiosis has caused respiratory dysfunction during the miner's life. With respect to non-respiratory deaths, Dr. Fino states that the medical literature does not document any contributory relationship between death and pneumoconiosis. (ii) *Scientific literature.* One of the principal scientific documents cited by the Department in both the initial and second notices of proposed rulemaking is the National Institute of Occupational Safety and Health's (NIOSH) *Criteria for a Recommended Standard, Occupational Exposure to Respirable Coal Mine Dust* (1995) (*Criteria*). 62 FR 3343 (Jan. 22, 1997); 64 FR 54978–79 (Oct. 8, 1999); Rulemaking Record, Exhibit 2–1. NIOSH cited studies from the United States and the United Kingdom which documented increases in mortality among miners from lung diseases related to respirable dust. *Criteria,* § 4.2.5.1, Rulemaking Record, Exhibit 2–1 at 63–64, *citing* Miller BG, Jacobsen M, ''Dust exposure, pneumoconiosis, and mortality of coal miners,'' Br J Ind Med 42:723–733 (1985), and Keumpel ED, *et al.,* ''An exposure-response analysis of mortality among U.S. miners,'' Am J Ind Med 28(2):167–184 (1995). Miller and Jacobson noted ''significant'' increases in mortality among U.K. miners with radiographic evidence of progressive massive fibrosis, and ''slightly decreased'' survival rates among miners with radiographic evidence of simple pneumoconiosis compared to miners without pneumoconiosis. Kuempel *et*

al. found increases in pneumoconiosis mortality among U.S. miners with progressive massive fibrosis, simple pneumoconiosis and exposure to dust of higher-rank coals. Based on these studies, NIOSH concluded: ''[M]iners with working lifetime exposures to respirable coal mine dust at a mean concentration of 2 mg/m^3 have an increased risk of dying from pneumoconiosis, chronic bronchitis, or emphysema.'' *Criteria,* § 4.2.5.1, Rulemaking Record, Exhibit 2–1 at 64. In the second notice of proposed rulemaking, the Department referenced another study which NIOSH had cited to the Department, Coggon D, *et al.,* ''Coal mining and chronic obstructive pulmonary disease: a review of the evidence,'' Thorax 53:398–407 (1998); *see also* 64 FR 54979 (Oct. 8. 1999). The authors reviewed studies on mortality in coal miners and reported that mortality attributed to chronic obstructive pulmonary disease was higher in miners than the general population. Among the studies submitted by one commenter is Green FHY, Vallyathan V, ''Coal Workers' Pneumoconiosis and Pneumoconiosis Due to Other Carbonaceous Dusts,'' in Chung A, Green FHY, eds., *Pathology of Occupational Lung Disease* (2d ed. 1998) 129; *see also* Rulemaking Record, Exhibit 89–21, attachment 2. Green and Vallyathan state that ''[a]pproximately 4% of coal miner deaths are directly attributable to pneumoconiosis,'' but note that the ''excess mortality rate from pneumoconiosis'' is primarily attributable to progressive massive fibrosis. (p. 137). The authors further note, however, that ''[d]eath from pneumoconiosis, chronic bronchitis, and emphysema has been related to cumulative dust exposure,'' citing Miller and Jacobson, and Kuempel *et al.* In contrast, Parker and Banks conclude, ''a series of mortality reports have not convincingly shown that simple [coal workers' pneumoconiosis] is associated with premature mortality, but that [progressive massive fibrosis] adversely affects survival * * *.'' Parker, Banks, ''Lung diseases in coal workers,'' *Occupational Lung Disease* (1998); *see also* Rulemaking Record, Exhibit 89–21, attachment 3. Parker and Banks also cite the results of the study by Kuempel *et al. See also* Morgan WKC, ''Dust, Disability, and Death,'' Am Rev Resp Dis 134:639, 641 (1986); Rulemaking Record, Exhibit 89–21, attachment 8 (concluding more emphasis should be placed on reducing cigarette smoking among miners than dust levels in mines to reduce mortality). (iii) By incorporating the ''hastening death'' standard into the regulation, the Department is clarifying the applicable statutory standard: a survivor is entitled to benefits if the miner's death was due to pneumoconiosis. This standard, in the Department's view as well as in the unanimous view of the circuit courts of appeals that have considered it, accords with Congress' intent to compensate survivors of miners whose deaths were in some way related to pneumoconiosis, as that term is broadly defined by the statute. The Department emphasizes, however, that the survivor must establish that the miner's death was hastened by pneumoconiosis in each case. The Rulemaking Record, including the variety of expert medical comments, studies and opinions on the potential contributory role of pneumoconiosis in the deaths of coal miners, does not demonstrate the necessity to depart from the hastening death legal standard. These views appear relatively consistent in stating that complicated pneumoconiosis (also called progressive massive fibrosis) may contribute to a miner's death given the severity of the disease. While opinions differ as to the possibility that simple pneumoconiosis can adversely affect the mortality process, the Department is persuaded by NIOSH's conclusion that the mortality studies it reviewed substantiate an increased risk of death from respiratory diseases which may be encompassed within the BLBA's definition of ''pneumoconiosis.'' NIOSH is the government agency charged with conducting research into occupationally-related health problems. In that capacity, the Department has previously consulted with NIOSH concerning issues related to the proposed definition of pneumoconiosis in § 718.201. 64 FR 54978–79 (Oct. 8, 1999); *see also* 30 U.S.C. 902(f)(1)(D) (Department to consult with NIOSH on criteria for tests which establish total disability in miners). The Department therefore considers NIOSH's view particularly significant in evaluating the conflicting medical opinions concerning the ''hastening death'' standard, especially since its views are consistent with other studies submitted into the record. To the extent the commenters express the view that simple pneumoconiosis can never cause death, such views are inconsistent with the BLBA. The statute contemplates an award of benefits based upon proof of pneumoconiosis as defined in the statute (which encompasses simple pneumoconiosis), and not just upon proof of complicated pneumoconiosis. *See, e.g., Penn Allegheny Coal Co.* v. *Mercatell,* 878 F.2d 106, 109–110 (3d Cir. 1989); *Wetherill* v. *Director, OWCP,* 812 F.2d 376, 382 (7th Cir. 1987). Similarly, regarding the connection between simple pneumoconiosis and non-respiratory deaths in particular, the comments from Drs. Bailey and Branscomb, along with those of Dr. Fino, focus on clinical pneumoconiosis as opposed to pneumoconiosis as more broadly defined by the statute; thus, they do not address whether, for instance, chronic obstructive pulmonary disease induced by coal mine dust exposure can, in certain circumstances, contribute to a non-respiratory death. Moreover, while Drs. Bailey and Branscomb indicate that a causal nexus between pneumoconiosis and a non-respiratory death would be unusual, they do not rule it out as a medical possibility. Dr. Cohen explained how such a cause and effect relationship could occur. Even though non-respiratory deaths hastened by pneumoconiosis may occur relatively infrequently, the survivor should nevertheless be given the opportunity to prove that pneumoconiosis had a tangible impact on the miner's death in those instances. Thus, the Department believes the ''hastening death'' standard sets a reasonable benchmark for proving, in any particular case, that pneumoconiosis contributed to the miner's death. Of course, the burden of persuasion remains with the survivor to prove that the miner's death was due to pneumoconiosis.

(g) One comment supports the ''hastening death'' standard.

(h) No other comments have been received concerning this section, and no changes have been made in it.

Subpart D

20 CFR 718.301

(a) In the initial notice of proposed rulemaking, the Department proposed deleting 20 CFR 718.301(b) (1999), which defined ''year'' for purposes of calculating the length of a miner's coal mine employment. 62 FR 3346 (Jan. 22, 1997). The Department proposed replacing subsection (b) and a separate provision in 20 CFR 725.493(b) (1999) (defining ''year'' of coal mine employment for identifying responsible operator) with a single definition of ''year'' in § 725.101(a)(32). The Department concluded that a single definition with general applicability was appropriate since the calculation of the length of a miner's employment is the same inquiry under both §§ 718.301 and 725.493(b). The Department proposed no additional changes to this regulation in the second notice of

proposed rulemaking. 64 FR 54971 (Oct. 8, 1999).

(b) No comments were received concerning this section, and no other changes have been made in it.

20 CFR 718.307

(a) In the initial notice of proposed rulemaking, the Department proposed moving the content of § 718.307(a) to § 725.103 to establish a regulation of general applicability concerning burdens of proof. 62 FR 3346 (Jan. 22, 1997). The Department also proposed deleting § 718.307(b) because it duplicated proposed § 725.103. The Department did not discuss § 718.307 in its second notice of proposed rulemaking, although the regulation remained open for public comment. 64 FR 54971 (Oct. 8, 1999).

(b) No comments were received concerning this section. It has therefore been removed.

20 CFR 718.401

(a) The Department proposed deleting 20 CFR 718.401 (1999) in the initial notice of proposed rulemaking because the provision duplicated material in proposed §§ 725.405 and 725.406. Former § 718.401 addressed each miner's statutory right to a complete pulmonary evaluation at no expense to the miner, a right outlined in proposed § 725.406. *See* 30 U.S.C. 923(b). Former § 718.401 also addressed the development of additional medical evidence necessary for the adjudication of a claim, subject matter that has been relocated to proposed § 725.405. Since both proposed § 725.405 and § 725.406 are regulations with program-wide applicability, the Department noted that no comparable regulation was necessary in part 718. 62 FR 3346 (Jan. 22, 1997). The Department proposed no additional changes to this regulation in the second notice of proposed rulemaking. 64 FR 54971 (Oct. 8, 1999).

(b) No comments were received concerning this section. It has therefore been removed.

20 CFR 718.402

(a) The Department proposed deleting 20 CFR 718.402 (1999) in the initial notice of proposed rulemaking because its content duplicated provisions of proposed § 725.414, which addressed a claimant's unreasonable refusal to cooperate in the medical development of his claim. 62 FR 3346 (Jan. 22, 1997). The Department proposed no additional changes to this regulation in the second notice of proposed rulemaking. 64 FR 54971 (Oct. 8, 1999).

(b) No comments were received concerning this section. It has therefore been removed.

20 CFR 718.403

(a) The Department proposed deleting 20 CFR 718.403 (1999) in the initial notice of proposed rulemaking and placing its provisions in part 725 as proposed § 725.103. Section 718.403 dealt with a party's burden of proof, and part 725 did not contain a comparable provision of program-wide applicability. 62 FR 3346 (Jan. 22, 1997). The Department proposed no additional changes to this regulation in the second notice of proposed rulemaking. 64 FR 54971 (Oct. 8, 1999).

(b) No comments were received concerning this section. It has therefore been removed.

20 CFR 718.404

(a) The Department proposed deleting 20 CFR 718.404 (1999) in the initial notice of proposed rulemaking and placing its provisions in part 725 as proposed § 725.203(c) and (d). Former § 718.404(a) addressed a miner's obligation to inform the Department if (s)he returns to coal mine employment; subsection (b) recognized the Department's authority to reopen a miner's final award during his or her lifetime and develop additional evidence if any issue arises concerning the continuing validity of the award. 62 FR 3346 (Jan. 22, 1997). The Department proposed no additional changes to this regulation in the second notice of proposed rulemaking. 64 FR 54971 (Oct. 8, 1999).

(b) No comments were received concerning this section. It has therefore been removed.

Appendix B to Part 718

(a) In the initial notice of proposed rulemaking, the Department proposed eliminating the option of taking an initial inspiration from the open air before commencing the pulmonary function maneuver. 62 FR 3346 (Jan. 22, 1997). The Department noted that open-air inspiration could not be recorded on the spirogram, which precluded any confirmation by a reviewing physician that the miner had taken a full breath. Thus, the test could yield spurious abnormal values. In the second notice of proposed rulemaking, the Department proposed Appendix changes to implement a requirement that physicians use the flow-volume loop in reporting pulmonary function test results. 64 FR 54981 (Oct. 8, 1999). The Department also responded to numerous comments. Some comments considered the requirement that the two highest FEV1 results vary by no more than 5 percent or 100 ml to be overly restrictive, and suggested either eliminating the requirement or liberalizing it to allow a variability limit of 10 percent or 200 ml. The Department was reluctant to eliminate the variation standard completely because it provided a baseline for ensuring the validity of the test. The Department acknowledged, however, that some individuals might be unable to provide pulmonary function results within the 5 percent variance standard. The Department therefore invited comment on alternative criteria which would guarantee reproducibility of the FEV1 and FVC values while permitting consideration of valid FEV1 results exceeding the 5 percent standard. Other comments criticized the disability table values as too stringent. The Department declined to consider any changes to the tables because it did not propose revising them in the initial notice of proposed rulemaking, and the commenters did not provide medical support for any revisions.

(b) Three comments oppose limiting the acceptable variation between the two largest FEV1's of the three acceptable tracings to 5 percent of the largest FEV1 or 100 ml, whichever is greater. *See* Appendix B(2)(ii)(G), of part 718. One comment urges the Department to raise the acceptable percentage of variability from 5 percent to 10 percent. A second comment states the 5 percent variation is too specific. This commenter recommends the physician reporting the study be allowed to use his judgment as to whether the test is acceptable. The third comment, submitted by the National Institute of Occupational Safety and Health (NIOSH), does not identify a specific percentage of increased acceptable variability, but recommends the Department include a provision permitting consideration of pulmonary function studies which exceed the 5 percent limit provided the failure of the test to comply with the standard is noted in the report. The Department agrees with the suggested revision recommended by NIOSH, and has amended Appendix B(2)(ii)(G) to adopt that suggestion with one addition. The Department has added the phrase ''by the physician conducting or reviewing the test.'' This language will ensure that a physician certifies the results of the pulmonary function test while recognizing that it does not meet the 5 percent variability requirement. The amended language will provide the adjudicator with greater flexibility in determining whether the pulmonary

function study actually substantiates the presence of a significant pulmonary impairment, despite the lack of reproducible spirometric curves within the 5 percent range.

(c) One comment recommends the Department revise the disability tables and adopt the more liberal pulmonary function disability criteria used by the Department of Justice for the Radiation Exposure Compensation Program. Although the Department received comments criticizing the table values as too stringent in response to its initial notice of proposed rulemaking, the Department did not propose any revisions to the tables in the second notice of proposed rulemaking, in part, because the commenters failed to provide any medical support for their recommendation that the tables be modified. 64 FR 54981, 55009 (Oct. 8, 1999). The Department does not consider the present comment to provide a sufficient basis for revision of these disability criteria. It constitutes the only comment the Department has received which included medical evidence suggesting alternate table values. Thus, the Department cannot determine whether the proffered evidence represents a consensus within the medical community about disability as measured by pulmonary function studies. The Department does not have an adequate record upon which to formulate a judgment about the validity of the current tables or the proposed changes. No change in the Appendix B table values is made.

(d) No other comments have been received concerning this section, and no other changes have been made in it.

Appendix C to Part 718

(a) The Department proposed amending Appendix C in the initial notice of proposed rulemaking to state that arterial blood gas studies should not be administered to a miner during, or soon after, an acute respiratory illness. 62 FR 3346, 3381 (Jan. 22, 1997). In the preamble to § 718.105 in the second notice of proposed rulemaking, the Department stated that one comment had noted the correct nomenclature for partial pressure of oxygen and carbon dioxide is an upper-case ''P,'' not the lower-case ''p'' then in use. The Department changed the references in § 718.105(c)(6) in the second proposal, but neglected to change the Appendix C table headings. Those changes have now been made. 64 FR 54971, 54977, 55012, 55017–18 (Oct. 8, 1999).

(b) No other comments were received concerning Appendix C, and no further changes have been made in it.

20 CFR Part 722—Criteria for Determining Whether State Workers' Compensation Laws Provide Adequate Coverage for Pneumoconiosis and Listing of Approved State Laws

20 CFR Part 722

(a) In its initial notice of proposed rulemaking, the Department proposed removing many of the regulations in 20 CFR Part 722 because they were obsolete. 62 FR 3346–47 (Jan. 22, 1997). Since 1973, Part 722 has set forth a procedure under which any state may request that the Secretary certify that its workers' compensation laws provide ''adequate coverage'' for occupational pneumoconiosis. Such a certification would prevent any claim for benefits arising in that state from being adjudicated under the Black Lung Benefits Act. 30 U.S.C. 931. In addition, Part 722 has provided a set of specific criteria that states were required to meet in order to obtain the requested certification. Because the Part 722 regulations had not been amended since 1973 although the statute had been amended in both 1978 and 1981, the Department proposed replacing the specific Part 722 criteria with a general statement of the statutory criteria for certification and the statement that in the future, the Department would review the workers' compensation laws of any state that applies for certification in light of the then-current statutory requirements. The Department stated that it would certify adequate coverage only if state law guaranteed at least the same compensation, to the same individuals, as is provided by the Act. The Department did not address Part 722 in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999).

(b) The Department has replaced a comma in the second sentence of § 722.3(a) with a semicolon to correct the punctuation of that sentence. In addition, the Department has added the word ''relevant'' to qualify the phrase ''administrative or court decision'' in the same sentence. This revision clarifies the Department's intent that states submit only relevant administrative or court decisions.

(c) One comment, in the context of setting forth alternatives for the Department to consider under the Regulatory Flexibility Act, urges the Department to establish specific criteria the Department will use to determine when a state black lung program provides adequate coverage for pneumoconiosis. This revision, the commenter suggests, would allow state legislatures to make reasoned decisions about whether to amend their workers' compensation laws in an attempt to provide the ''adequate coverage for pneumoconiosis'' the federal statute requires. In addition, the commenter suggests that the Department establish a formal, ongoing review of state workers' compensation laws to determine whether or not they provide adequate coverage.

Although no state has applied for certification in the 27 years that the Department has administered the program, the Department accepts the commenter's suggestion that the publication of specific criteria would be helpful to state legislators who wish to amend their state's laws in order to obtain Secretarial certification and thereby preclude the application of federal law to their state's coal mine operators. Publication of a current set of criteria, however, will require considerable study and additional drafting, and would needlessly delay final promulgation of the remaining regulations in the Department's proposal. Following completion of that work, the Department will issue a new notice of proposed rulemaking in order to ensure that interested parties have an opportunity to comment upon possible Secretarial certification criteria. The Department believes that in the interim the revised Part 722 will accommodate any state seeking certification.

The Department does not believe, however, that it would be productive to engage in a formal, ongoing review of each state's laws in order to determine whether they provide adequate coverage for occupational pneumoconiosis. States that revise their workers' compensation laws to meet the Department's criteria will do so in order to preempt the application of the Black Lung Benefits Act. Those states will have a clear incentive to submit an application to the Department for the appropriate certification. Relying on states to initiate the certification process thus makes the most efficient use of government resources at both the state and federal levels.

(d) The Department has not received any specific comments relevant to the individual regulations in Part 722, and no changes have been made in them.

20 CFR Part 725—Claims for Benefits Under Part C of Title IV of the Federal Mine Safety and Health Act, As Amended

Subpart A

20 CFR 725.1

(a) In its first notice of proposed rulemaking, the Department proposed adding subsection (k) to § 725.1 to

describe the incorporation into the Black Lung Benefits Act of a number of provisions of the Social Security Act. In addition, the new subsection noted the Department's authority to vary the application of the incorporated provisions. 62 FR 3347 (Jan. 22, 1997). The Department did not discuss section 725.1 in its second notice of proposed rulemaking, *see* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999).

(b) One comment submitted in connection with the Department's first notice of proposed rulemaking and renewed in connection with the Department second notice of proposed rulemaking criticizes subsections (j) and (k) as confusing and inconsistent. The comment states that the subsections are confusing because they do not identify the individual instances in which the Department has altered the incorporated provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA) and the Social Security Act (SSA). The comment also argues that the two subsections are inconsistent because subsection (j) limits the instances in which the BLBA departs from the LHWCA, while subsection (k) implies other departures may be contemplated. With respect to the first criticism, the Department believes that specific enumeration of the departures from incorporated LHWCA provisions is unnecessary. The objective of subsection (j) is simply to acknowledge that certain LHWCA provisions are incorporated into the Black Lung Benefits Act (BLBA) and that the BLBA confers specific authority on the Department to promulgate regulations which vary the terms of these incorporated provisions. *See* 30 U.S.C. § 932(a). Subsection (k) fulfills the same objective by acknowledging that there are also SSA provisions incorporated into the BLBA. Most of those provisions were incorporated into Part B of the BLBA, governing the adjudication of claims filed with the Social Security Administration prior to July 1, 1973, when Congress amended the BLBA in 1972 and 1977. *See, e.g.,* 30 U.S.C. 922(a)(5)(1)(B), incorporating the SSA definition of the term ''disability.'' These provisions are also incorporated into Part C, governing the adjudication of claims filed with the Labor Department, by 30 U.S.C. 940, but only ''to the extent appropriate.'' Subsection (k) recognizes the Department's authority to determine the extent to which the use of these incorporated provisions is appropriate. Furthermore, subsection (k) is consistent with subsection (j) because it notes that the Department may resolve conflicts which arise from the incorporation of inconsistent provisions of the two statutes. Thus, for example, the Department may choose to depart from an incorporated LHWCA provision (subsection (j)) because it has determined that a comparable but inconsistent SSA provision, which is also incorporated, better serves the interests of the program.

The Department acknowledges that, as originally proposed, subsection (k) did not contain any reference to the SSA excess earnings offset, 42 U.S.C. 403(b)–(1), incorporated into section 422(g). The Department's original explanation of subsection (k), 62 FR 3385 (Jan. 22, 1997), also inadvertently omitted specific mention of section 422(g). Section 430 gives the Department the authority to determine the extent to which application of incorporated SSA provisions into Part B of the Act is appropriate in the context of adjudicating claims under Part C. Section 422(g), however, provides no similar authority. It is located in Part C of the Act, and the Department applies the incorporated SSA offset provision as if it were a part of the BLBA. *See* 20 CFR 725.536 (1999). The Department has added an additional sentence to the end of subsection (k) to describe this incorporation. In addition, the Department has revised the first sentence of subsection (k) to recognize that section 402 of the BLBA is contained in Part A. The Department has also revised the fourth and seventh sentences of subsection (k) to clarify their meaning.

(c) No other comments were received concerning this section, and no other changes have been made in it.

20 CFR 725.2

(a) In its first notice of proposed rulemaking, the Department proposed revising section 725.2 in order to distinguish between revisions that would affect pending claims and revisions that would be applied prospectively only, *i.e.*, only to claims filed after the effective date of the revised regulations. The Department drew a distinction between revisions that merely clarified the Department's interpretation of the statute and existing regulations or were procedural regulations, and those that altered the obligations and expectations of the parties or could not easily be applied to pending claims. 62 FR 3347–48 (Jan. 22, 1997). The Department also explained the legal basis for its decision to apply certain regulations retroactively. In its second notice of proposed rulemaking, the Department added a regulation, § 725.351, to the list of revised regulations which would apply only prospectively. 64 FR 54981–82 (Oct. 8, 1999). In addition, the Department answered several comments, reiterating its belief that it lacked the statutory authority to make the final rule applicable, in its entirety, to all pending claims and rejecting the argument that the Department lacked the authority to apply any of the regulations to pending claims.

(b) One of the comments received in connection with section 725.367 contends that the Department's regulation governing the payment of attorneys' fees by responsible operators should not be applied retroactively. The Department agrees; section 725.367 was inadvertently omitted from the list of revised regulations in the Department's second notice of proposed rulemaking that should apply only to claims filed after the effective date of these revisions. As revised, the regulation significantly alters the attorneys' fees that are payable by the responsible coal mine operator. *See* 64 FR 54987 (Oct. 8, 1999) (discussing the Fourth Circuit's decision in *Clinchfield Coal Co.* v. *Harris*, 149 F.3d 407 (4th Cir. 1998)). In addition, because section 725.367 may increase the amount of attorneys' fees an operator has to pay in a contested case, it may influence the operator's decision to controvert the claimant's entitlement to benefits. In these circumstances, the Department agrees that the revised version of § 725.367 should not be applied to claims filed before the effective date of the Department's rulemaking. The Department also inadvertently omitted §§ 725.409, which governs denials of a claim by reason of abandonment, 725.416, which governs informal conference proceedings, and 725.458, which governs deposition testimony, from the list of revised regulations that should be applied prospectively only.

Similarly, section 725.465 was not open for comment in the Department's first notice of proposed rulemaking, 62 FR 3340–41 (Jan. 22, 1997). The Department proposed revising § 725.465 in its second notice of proposed rulemaking, 64 FR 54971, 54997 (Oct. 8, 1999), and has revised the regulation again in the final rule. As revised, § 725.465 prohibits the dismissal of the responsible operator finally designated by the district director from the adjudication of claims without the consent of the Director. The revision is an integral part of the new rules governing the identification, notification, and adjudication of which of the miner's former employers, if any, should be held liable for the payment of

his benefits (§§ 725.407–725.408, 725.415, 725.418, 725.491–725.495). The Department has also revised § 725.421(b), which governs the referral of a claim to the Office of Administrative Law Judges and the evidence to be transmitted to that Office for admission into the record at the hearing. The revisions to § 725.421(b) reflect the new rules governing the identification, notification and adjudication of the responsible operator. Because the revisions of those rules are prospective only, the revised version of sections 725.421(b) and 725.465 should be treated similarly. The Department has amended subsection (c) to add §§ 725.367, 725.409, 725.416, 725.421(b), 725.458, and 725.465 to the list of regulations which may be applied only prospectively.

(c) A number of comments continue to insist that the Department's regulations are impermissibly retroactive, and that the Department's proposal violates the Supreme Court's decisions in *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204 (1988) and *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998). In *Bowen*, the Supreme Court held that, absent an explicit statutory grant of authority, administrative agencies could not promulgate retroactive rules. In its first notice of proposed rulemaking, the Department acknowledged that the Black Lung Benefits Act did not give the Department authority to promulgate regulations with a retroactive effect. 62 FR 3347 (Jan. 22, 1997). *Eastern Enterprises* did not involve the regulatory authority of administrative agencies; in that case, a majority of the Court held the Congress had violated the due process clause of the Fifth Amendment to the Constitution by improperly imposing retroactive burdens on coal mine operators in enacting certain provisions of the Coal Industry Retiree Health Benefit Act. For purposes of analyzing the Department's regulations, *Bowen* is the more restrictive decision. Because Congress did not grant the Department specific authority to engage in retroactive rulemaking under the Black Lung Benefits Act, the regulations will be permissible under *Bowen* only if they do not have a true retroactive effect. *Eastern Enterprises*, a case in which the retroactive effect of the legislation was clear, is inapposite to this analysis.

The Department addressed the retroactivity issue in its earlier notices of proposed rulemaking, 62 FR 3347–48 (Jan. 22, 1997) and 64 FR 54981–82 (Oct. 8, 1999). The Department observed that the issue of what constitutes a retroactive effect is complex. With respect to rules that clarify the Department's interpretation of former regulations, the Department quoted *Pope* v. *Shalala*, 998F.2d 473 (7th Cir. 1993), *overruled on other grounds, Johnson* v. *Apfel*, 189 F.3d 561, 563 (7th Cir. 1999), for the proposition that an agency's rules of clarification, in contrast to its rules of substantive law, may be given retroactive effect. The Sixth Circuit issued a similar holding in *Orr* v. *Hawk*, 156 F.3d 651, 654 (1994).

Underlying both the *Pope* and *Orr* decisions is the Supreme Court's opinion in *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129 (1936). Both the Sixth and Seventh Circuits quote *Manhattan General* for the proposition that a rule clarifying an unsettled or confusing area of law ''is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand.'' 297 U.S. at 135, quoted at 998 F.2d at 483; 156 F.3d at 653. Both courts thus recognized that the Supreme Court's decision in *Bowen*, which was issued in 1988, did not overrule its 1936 decision in *Manhattan General* with respect to what constitutes a retroactive rule. *See First National Bank of Chicago* v. *Standard Bank & Trust*, 172 F.3d 472, 478 (7th Cir. 1999) (stating that if the regulation at issue ''was merely a clarification, rather than a legislative change, *Bowen*'s ban on retroactivity is inapplicable'').

The Department's rulemaking includes a number of such clarifications. For example, the revised versions of §§ 718.201 (definition of pneumoconiosis), 718.204 (criteria for establishing total disability due to pneumoconiosis) and 718.205 (criteria for establishing death due to pneumoconiosis) each represent a consensus of the federal courts of appeals that have considered how to interpret former regulations. *See* preamble to §§ 718.201 (citing cases recognizing an obstructive component to pneumoconiosis); 725.309 (citing cases recognizing the progressive nature of pneumoconiosis); 718.204; and 718.205. Moreover, none of the appellate decisions with respect to these regulations represents a change from prior administrative practice. Thus, a party litigating a case in which the court applied such an interpretation would not be entitled to have the case remanded to allow that party an opportunity to develop additional evidence. *See Betty B Coal Co.* v. *Director, OWCP*, 194 F.3d 491, 501 (4th Cir. 1999) (''* * * we are reluctant to compel reopening as a matter of constitutional law any time debatable questions of law are resolved by the BRB or the courts. When such open questions are answered, the law has been declared, not changed.''). Any party to litigation must assume the risk that a law or regulation will be interpreted in a manner other than that which it had hoped. The Department's embodiment of those decisions in regulatory form should not insulate the parties from their application to pending claims.

Similarly, the regulations in Part 725 that the Department intends to apply to pending claims represent clarifications of unsettled or confusing areas of the law. In particular, one commenter has objected to the application of §§ 725.502, 725.537, and 726.8 to pending claims. Section 725.502 provides parties to a claim with knowledge of when each benefit payment is due. In the first notice of proposed rulemaking, the Department observed that the revisions are consistent with the Department's current practice, and with appellate decisions interpreting section 21(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 921(a), as incorporated into the Black Lung Benefits Act by 30 U.S.C. 932(a). 62 FR 3365 (Jan. 22, 1997). Section 725.537 codifies the Department's position, upheld in litigation, with respect to the payment of benefits in cases in which the miner is survived by more than one surviving spouse. The revision ensures the proper implementation of 42 U.S.C. 416(d)(1) and (h)(1), Social Security Act provisions that are incorporated into the Black Lung Benefits Act by 30 U.S.C. 902(a)(2). As *Pope* and *Orr* recognize, *Bowen* does not prohibit the Department from promulgating regulations to codify its position with respect to these issues. Finally, the Department has responded to the contention that retroactive liability is imposed by § 726.8 in the preamble to § 726.8.

The same commenter has also argued that §§ 725.542–.544, 725.547, and 725.548 should not be retroactively applied to coal mine operators. Section 725.2, however, explicitly makes § 725.547 applicable to newly filed claims only. Sections 725.542 through 725.544 are applicable to operators only by operation of section 725.547; they are therefore also applicable only to claims filed after the effective date of these regulations. Finally, § 725.548 represents a renaming and renumbering of a part of the former regulation at § 725.547. 64 FR 55003 (Oct. 8, 1999). The Department does not believe that its decision to rename and renumber a previous regulation should be considered in any way retroactive.

By contrast, where the revision represents a clear change in the Department's interpretation, such as the regulation governing the payment of attorneys' fees by responsible operators, *see* 64 FR 54987 (Oct. 8, 1999) (discussing the Fourth Circuit's decision in *Clinchfield Coal Co.* v. *Harris,* 149 F.3d 407 (4th Cir. 1998)), the Department has made the change prospective only. Similarly, the revised procedures governing the processing and adjudication of claims, sections 725.351, 725.406 through 725.418, 725.423, 725.454 through 725.459, and 725.465, the regulations governing the identity of the responsible operator liable for the payment of benefits, sections 725.491 through 725.495, and the revised regulation governing operator overpayments, section 725.547, are expressly limited in their applicability to newly filed claims. In addition, the revisions of sections 725.309 and 725.310, governing additional claims and modification, respectively, are prospective only. The Department has thus taken considerable care to ensure that its revisions do not violate the Supreme Court's general prohibition against retroactive regulations.

(c) One commenter urges that the Department's prospective revisions not be made applicable to subsequent claims. Instead, the commenter suggests, they should be applied only to first-time claims filed by new claimants. The Department does not agree that a subsequent claim differs from a first-time claim for purposes of applying the revised regulations. In 1983, the Department considered a similar request when it promulgated regulations to implement the Black Lung Benefits Amendments of 1981, which transferred liability for certain claims from coal mine operators to the Black Lung Disability Trust Fund. A number of commenters suggested that a ''claim'' should be defined as a cause of action, so that an individual would only ever have one ''claim'' for benefits. The Department rejected the suggestion:

> The Department believes that the claims as cause of action analogy is misplaced. The more correct analogy would be to a complaint or other preliminary pleading which is filed to initiate an adjudication of the nature of the right or the validity of the cause of action which is being asserted. Throughout its various versions, the Act has been consistent in requiring that a claim must be filed before any determination of eligibility for benefits could be undertaken.

48 FR 24283 (May 31, 1983). Similarly, the Department has always required that a subsequent claim be adjudicated according to the standards in effect at the time the new application is filed. For example, a miner whose 1977 claim was adjudicated and denied under the interim presumption, 20 CFR § 727.203 (1999), is not entitled to have a 1987 claim adjudicated under the same criteria. Instead, that claim must be adjudicated under the more restrictive Part 718 criteria. *See Peabody Coal Co.* v. *Spese,* 117 F.3d 1001, 1007 (7th Cir. 1997). The Department does not believe that it should alter its consistent treatment of subsequent claims in order to exclude those claims from consideration under the Department's revised regulations.

(d) One commenter urges the Department to alter its definition of a ''pending'' claim, which allows a claim to be considered ''pending'' for up to one year after it is denied. The commenter suggests that the definition violates the jurisdictional rules governing finality set forth in 33 U.S.C. § 921. The Department does not agree that its definition violates any principles of finality. Currently, a claimant may file a request for modification at any time within one year after the denial of a claim. 20 CFR § 725.310 (1999). In fact, even a new claim filed during the one-year period will serve to reopen the existing claim. *See Betty B Coal Co.* v. *Director, OWCP,* 194 F3d 491, 497 (4th Cir. 1999). Consequently, an employer has no expectation that a denied claim has been fully and completely resolved until after the one-year period has passed.

The Department's definition of a ''pending claim'' is intended to prevent the application of certain regulatory revisions (those which will be applied only on a prospective basis) to any claim that was filed before the date on which those revisions take effect. The definition includes claims pending at various stages of adjudication (*i.e.,* before the district directors, the Office of Administrative Law Judges, the Benefits Review Board, or the federal courts). In addition, some claims that have been finally denied prior to the effective date of the revisions can be revived by a subsequent request for modification. For example, a claim may have been finally denied three months before the rules became effective, and the claimant may file a request for modification nine months later (or six months after the revised regulations took effect). The Department does not intend that the revised regulations that are prospective only (including, for example, the limitation on evidence) be used to adjudicate such a claim, and has drafted the definition of a ''pending claim'' to ensure that result.

20 CFR 725.4

(a) In its first notice of proposed rulemaking, the Department proposed revising subsection (d) to reflect the Department's decision to discontinue publication of the Part 727 regulations in the Code of Federal Regulations. 62 FR 3348 (Jan. 22, 1997). Subsection (d) therefore referred parties interested in reviewing the Part 727 regulations to the **Federal Register** or the most recent version of the Code of Federal Regulations containing the rules. The Department did not discuss § 725.4 in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999).

(b) Three comments urge the Department to continue publishing the Part 727 regulations because some claims governed by those regulations are still in litigation. It remains the Department's position, however, that future publication of Part 727 is unnecessary, in part because these regulations do not apply to any claim filed after March 31, 1980. Thus, more than twenty years have passed since claims were filed to which these regulations apply. In addition, the Code of Federal Regulations has printed these regulations annually for twenty years. Consequently, access to Part 727 is readily available in the public domain for the relatively few claims still subject to those regulations.

(c) No other comments were received concerning this section, and no changes have been made in it.

20 CFR 725.101

(a)(i) The Department proposed amending the definition of ''benefits'' (§ 725.101(a)(6)) in the initial notice of proposed rulemaking to include the cost of the initial complete pulmonary examination of the claimant authorized by the statute, 30 U.S.C. 923(b); § 725.406, and subsidized by the Trust Fund. 62 FR 3386 (Jan. 22, 1997). Several commenters opposed the change because they believed the revised definition would impose liability for the examination's cost on the claimant if the claim were ultimately denied or withdrawn. In response, the Department assured the commenters that the cost could not be shifted to the claimant despite its classification as a ''benefit.'' 64 FR 54982 (Oct. 8, 1999). The Department also proposed adding a reference to augmented benefits and a cross-reference to its definitional regulation (§ 725.520(c)). 64 FR 55023 (Oct. 8, 1999). The Department intended this change for the convenience of parties looking for a comprehensive

definition. 64 FR 54982 (Oct. 8, 1999). (ii) Citing the Department's representations concerning the exclusion of the complete pulmonary examination from costs recoverable from the claimant, two comments now support the amended definition. (iii) One comment opposes the change because it shifts the cost of the examination to the responsible operator if the claim is approved. The Department responded to this argument in the second notice of proposed rulemaking by noting its disagreement; since 1978, the regulations (20 CFR 725.406(c)) have required the operator found liable for the claimant's benefits to reimburse the Fund for the expenses associated with the initial pulmonary examination. 64 FR 54982 (Oct. 8, 1999). The present comment states the Department does not have the authority to shift the cost of the examination, citing *West Virginia University Hospitals, Inc.* v. *Casey,* 499 U.S. 83 (1991). At issue in *Casey* was the authority of a federal court to shift liability from one party to its opponent for the fees of experts retained to perform nontestimonial services. The Supreme Court held the fee shifting must be limited to the specific categories of expenses enumerated in the statute which authorized the trial court to award fees. Because nontestimonial expert services did not come within the ambit of any statutory category of reimbursable expenses, the Court held the district court could not reallocate fee liability. In so holding, the Court rejected the argument that such expenses could be considered part of an ''attorney's fee,'' liability for which did shift.

The Department considers *Casey* inapposite to the redefinition of ''benefits.'' That decision establishes only that fees for nontestimonial expert services cannot be considered ''attorney fees'' for purposes of a statute which shifts attorney fee liability to a prevailing party's opponent. *Casey* does not preclude the Department from defining a particular nontestimonial expert service—the § 725.406 medical examination—as a ''benefit,'' liability for which does shift to the responsible operator if the claim is ultimately approved. (iv) The Department has the statutory authority to define ''benefits'' to include the cost of the initial medical examination, and to require a responsible operator to pay for the examination in the event the claim is ultimately approved. The Black Lung Benefits Act (BLBA) incorporates section 7 of the Longshore and Harbor Workers' Compensation Act (LHWCA). 33 U.S.C 907, as incorporated by 30 U.S.C 932(a). Section 7(e) provides:

> In the event that medical questions are raised in any case, the Secretary shall have the power to cause the employee to be examined by a physician employed or selected by the Secretary and to obtain from such physician a report containing his estimate of the employee's physical impairment * * * The Secretary shall have the power in his discretion to charge the cost of examination or review under this subsection to the employer, if he is a self-insurer, or to the insurance company which is carrying the risk, in appropriate cases, or to the special fund * * *.

33 U.S.C. 907(e). Each miner's claim filed under the Black Lung Benefits Act (BLBA) raises ''medical questions'' because the status of the miner-claimant's pulmonary condition is the primary issue in every claim. Section 7(e) authorizes the Department to provide each miner-claimant with a complete pulmonary examination, and therefore address the ''medical questions'' raised by the claim. Thus, Section 7(e) provides the Department with the method for fulfilling its obligation under 30 U.S.C. 923(b) to provide each miner with the opportunity to substantiate his claim by undergoing a complete pulmonary evaluation. Section 7(e) also authorizes the Department, at its discretion, to charge the cost of the examination to the responsible operator. The Department's regulations have recognized this statutory authority since 1972, when section 7 was first incorporated into the BLBA, without regard to whether the claimant ultimately prevailed. 20 CFR 725.139, 37 FR 25466 (Nov. 30, 1972) (deputy commissioner has discretion to assess the operator or its insurer for the cost of a physician's examination conducted to resolve medical questions raised); 725.133 (1978) (deputy commissioner has the authority to assess a notified operator or its insurer for the cost of the miner-claimant's initial medical examination). The Department promulgated its current regulation implementing section 7(e) for BLBA purposes (20 CFR 725.406(c)) in 1978 after Congress amended section 413(b) to provide for complete pulmonary examinations. It requires the operator adjudged liable for the claimant's benefits to reimburse the Fund for the expenses associated with the examination. The Department has determined that such assessments are appropriate in those cases in which the award of benefits for which an individual operator is liable has become final. In the remaining cases, the Department believes the cost of the examinations should be absorbed by the coal mining industry as a whole by imposing the costs on the Trust Fund. 26 U.S.C. 9501(d)(1). As money payable under section 932(a), which incorporates section 7, the pulmonary examination cost is properly classified as a ''benefit'' and the liable operator must reimburse the Trust Fund for such cost under 30 U.S.C. 934. The responsible operator is required to secure the payment of benefits for which it is liable under section 932. 30 U.S.C. 933(a). The Department accordingly rejects the comment's position that it lacks the authority to define ''benefits'' to include the cost of the pulmonary examination required by 30 U.S.C. 923(b). (v) No other comments were received concerning this definition, and no changes were made in it.

(b)(i) In the initial notice of proposed rulemaking, the Department proposed amending § 725.101(a)(13), ''Coal Preparation,'' and (a)(19), ''Miner or Coal Miner,'' to specify that coke oven workers are excluded from coverage under the BLBA. 62 FR 3386, 3387 (Jan. 22, 1997). The Department received three comments supporting the proposed change, which were noted in the preamble to the second proposed rulemaking, 64 FR 54982 (Oct. 8, 1999). The Department further clarifies the intended scope of these definitions. In the initial notice of proposed rulemaking, the Department noted a long held position that ''the preparation activities undertaken at coke ovens are not covered by the BLBA.'' 62 FR 3348 (Jan. 22, 1997). The Department now believes this language may have been too broad, and accordingly amends the language of § 725.101(a)(19) to effectuate its intention that the definition of ''Miner'' exclude from coverage only those workers in the coke industry who are actually employed as coke-oven workers, *i.e.,* those at the coke-producing ovens. *See, e.g., Sexton* v. *Mathews,* 538 F.2d 88, 89 (4th Cir. 1975) (holding an individual who loaded coke ovens with coal, leveled the coal inside the oven, and shoveled finished coke for shipment, was not a ''coal miner'' under the BLBA). The Department, however, does not intend for the identity of the individual's employer as a coke manufacturer to be the determinative inquiry. In some cases, coke industry employees may be otherwise employed in activities which amount to custom coal preparation or come within the types of activities enumerated in § 725.101(a)(13). Those workers should not be excluded from BLBA coverage solely because they are employed by a coke producer. *See Hanna* v. *Director,*

OWCP, 860 F.2d 88, 92 (3d Cir. 1988) (stating: ''[T]he appropriate characterization of [the claimant's] work for purposes of entitlement under the Act is determined by evaluation of what he did, and not by who employed him''). The plain language of the statutory and regulatory definitions of ''miner'' focuses on what work the individual performed and where (s)he performed that work, and not who employed the individual. With respect to ''Coal preparation,'' the Department has deleted the reference to coke oven workers because the phrase is redundant in view of the language in ''Miner.'' (ii) No other comments were received concerning these definitions. (iii) The Department has changed § 725.101(a)(19) by substituting the words ''coal mine dust'' for ''coal dust.'' This change makes the regulation consistent with the Department's long-held position that the occupational dust exposure at issue under the BLBA is the total exposure arising from coal mining and not only exposure to coal dust itself. The Department previously explained this position in the second notice of proposed rulemaking. There the Department made the same change to § 725.491(d). 64 FR 54998 (Oct. 8, 1999). A comment responding to the initial notice of proposed rulemaking, 62 FR 3409 (Jan. 22, 1997), had identified an inconsistency between the reference to ''coal mine dust'' in the definition of a ''miner'' (§ 725.202) and the reference to ''coal dust'' in § 725.491. The Department agreed that a consistent reference to ''coal mine dust'' should be used throughout the regulations. ''Coal mine dust'' means any dust generated in the course of coal mining operations, including construction. The Department noted that this interpretation is consistent with Congressional intent to compensate for a broad array of dust-related lung diseases which can be linked to coal mining. 64 FR 54998 (Oct. 8, 1999). Finally, by making the change in § 725.101(a)(19), the Department expresses its disagreement with the result reached by the Tenth Circuit in *Bridger Coal Co./Pac. Minerals, Inc.* v. *Director, OWCP [Harrop],* 927 F.2d 1150 (10th Cir. 1991), which held that ''coal dust'' means only dust actually containing coal particulates. 927 F.2d at 1154. In the Department's view, *Harrop* represents too narrow a reading of Congress' intent. *See William Bros., Inc.* v. *Pate,* 833 F.2d 261, 264 (11th Cir. 1987); *Williamson Shaft Contracting Co.* v. *Phillips,* 794 F.2d 865, 870 (3d Cir. 1986) (both cases agreeing with the Department that ''coal mine dust'' is a permissible interpretation of BLBA).

(c) The Department proposed amending § 725.101(a)(16), ''District Director,'' in the initial notice of proposed rulemaking to substitute that title for ''Deputy Commissioner,'' and ensure that any actions taken by a district director would be afforded the same legal force as any action of a deputy commissioner. 62 FR 3348, 3386 (Jan. 22, 1997). No comments were received concerning this definition, and no changes were made in it.

(d) The Department proposed amending § 725.101(a)(17), ''Division or DCMWC,'' in the initial notice of proposed rulemaking to identify the agency within the Department which contains the Office of Workers' Compensation Programs and the Division of Coal Mine Workers' Compensation. 62 FR 3348, 3386 (Jan. 22, 1999). No comments were received concerning this definition, and no changes were made in it.

(e)(i) In the initial notice of proposed rulemaking, the Department proposed amending the definition of ''workers' compensation law'' (725.101(a)(31)) to exclude certain benefits paid from a state's general revenues. 62 FR 3387 (Jan. 22, 1997). The proposal responded to decisions from the Benefits Review Board and Third Circuit rejecting the Department's longstanding interpretation of the term. *O'Brockta* v. *Eastern Associated Coal Co.*, 18 Black Lung Rep.1–72, 1–79/1–80 (1994), *aff'd sub nom Director, OWCP* v. *Eastern Associated Coal Co.*, 54 F.3d 141, 148–150 (3d Cir. 1995). 62 FR 3348–49 (Jan. 22, 1997). The Department received comments to its initial proposal opposing the change and, in the second notice of proposed rulemaking, explained that the Third Circuit had suggested the Department alter the regulation to reflect accurately the Department's intended meaning. 64 FR 54982–83 (Oct. 8, 1999). (ii) Two new comments support the Department's change. (iii) One comment opposes the amended definition because it will adversely affect the Trust Fund financially by making certain state benefits unavailable for offset against corresponding federal benefits. The commenter notes the change will therefore indirectly affect the coal producers who finance the Fund. The comment, however, overlooks the fact that any adverse effect on operators is expected to be minimal because of the very small number of claims which would be affected by the exclusion of state-funded benefits. This effect is also spread across the entire industry since the industry as a whole pays the coal excise tax. Finally, using state benefits entirely funded by state general revenues to offset federal benefits would confer a windfall on responsible operators, at least in those few cases in which such state payments may be available concurrently with a period of federal entitlement. If such were the case, an individual operator would be able to offset its monthly federal benefits liability by an amount of money the state paid the claimant from its own general revenues. Thus, the operator would profit by using state benefits which it had not paid to reduce its federal liability. The proposed definition of ''workers' compensation law'' eliminates this windfall. (iv) One comment opposes the change because it codifies an alleged political agreement between the Department and one congressman, and favors only Pennsylvania residents. The commenter also states that the change will not affect pending or new claims from that state, but may have unintended consequences elsewhere. Neither point provides any basis for changing the Department's proposal, the purpose of which is to clarify long-standing policy. With respect to the first point, the comment fails to consider the historical basis of the Department's policy and its grounding in the legislative history of the BLBA. Part B of the BLBA contains a ''maintenance of effort'' provision, 30 U.S.C. 924(d), which states that no federal benefits shall be paid to the resident of any State which reduces the resident's state worker's compensation benefits because of a federal award. Both Parts B and C also each require federal benefits to be reduced by the amount of any payments received by a claimant under a state workers' compensation program for disability caused by pneumoconiosis. 30 U.S.C. 922(b), 932(g). On the eve of the BLBA's enactment in 1969, the House Managers of the bill explained in the joint conference report: ''Benefit payments made under State programs funded by general revenues are not included in the maintenance of effort provision in the House amendment for the reason that they are not to be considered workmen's compensation, unemployment compensation, disability insurance programs as such programs are generally understood, and as they are intended to be understood within the context of this benefit program.'' H.R. Rep. No. 761, 91st Cong., 1st Sess. (1969), *reprinted in* Senate Comm. on Labor and Public Welfare, *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, 1507, 1530 (1975). Congressman Dent of Pennsylvania

reinforced this understanding in his discussion of the offset provisions and which state benefits could be used to offset the federal benefits:

> We are not talking about State programs funded through general revenues. Any State that has such programs could reduce benefits payable to persons eligible to receive them under this provision. If the State did not so reduce the benefits, such benefits could not be offset or deducted from payments under this provision.

115 Cong. Rec. 39713 (1969). No contrary expression of understanding appears in the legislative history. Consequently, the Department fairly understood Congressional intent to exclude state-funded disability benefits being used to reduce federal benefits. The Third Circuit did not invalidate the Department's policy or contradict its understanding of Congressional intent; the Court merely held that the Department's regulation was inconsistent with its policy, and therefore the policy could not be sustained. As for the limited impact of proposed § 725.101(a)(31) on Pennsylvania residents, the Department acknowledges that Pennsylvania enacted legislation in 1970 to suspend state benefits paid from general revenues if the claimant received a federal award. 77 P.S. 1401(k). Those benefits therefore become unavailable for offset against federal payments in any event. The possibility remains that Pennsylvania may change its law in the future. Because the *O'Brockta* decision raises doubt concerning the Department's interpretation of ''workers' compensation law,'' the Department believes the regulation should be clarified to implement Congressional intent to exclude state benefits funded by general revenues. Finally, the potential impact of the change on states other than Pennsylvania is speculative at best, but all states, like the public as a whole, are entitled to a clear statement of governmental policy. In the event any other State enacts legislation comparable to the Pennsylvania program in the future, the legislature will have a clear understanding of the Department's position on the meaning of ''workers' compensation law.'' (v) No other comments were received concerning this definition, and no changes were made in it.

(f)(i) The Department initially proposed a uniform definition of ''year'' (§ 725.101(a)(32)) for computing the length of coal mine employment when required in the adjudication of claims. 62 FR 3387 (Jan. 22, 1997). Under the proposed definition, a ''year'' encompassed either a calendar year or partial periods totaling a year, during which the miner must have received pay for work as a miner for at least 125 days; computing a year included periods when the miner received pay while on an approved absence, *e.g.* vacation or sick leave. The Department proposed that, to the extent the evidence permitted, the beginning and ending dates of all periods of coal mine employment be ascertained. In the event the evidence was insufficient to establish such dates or if the miner's employment lasted less than a year, the Department proposed a formula for computing the length of coal mine employment based on the miner's annual earnings compared to average wage statistics for miners compiled by the Bureau of Labor Statistics (BLS). In response to a comment opposing the inclusion of approved absences from work in computing the length of coal mine employment, the Department cited judicial decisions upholding its position. 64 FR 54983 (Oct. 8, 1999). In the second notice of proposed rulemaking, the Department altered the regulation to account for leap years by adding ''366 days'' to the definition. 64 FR 55024 (Oct. 8, 1999). The Department now has amended the language of § 725.101(a)(32) to clarify that periods of approved absences count only towards the miner's ''year'' of employment, and not to the actual 125 ''working days'' during which the miner must have worked and received pay as a miner. Thus, in order to have one year of coal mine employment, the regulation contemplates an employment relationship totaling 365 days, within which 125 days were spent working and being exposed to coal mine dust, as opposed to being on vacation or sick leave. (ii) In response to the second notice of proposed rulemaking, two comments support the new definition because it does not afford definitive weight to Social Security Administration records. The Department emphasized in its second notice of proposed rulemaking that § 725.101(a)(32) does not place special weight on any particular type of evidence in determining how long an individual worked as a coal miner. 64 FR 54983 (Oct. 8, 1999). Rather, § 725.101(a)(32)(ii) recognizes that factual findings concerning a miner's work history should be based on all of the credible evidence available to the adjudicator. (iii) One comment opposes the proposed formula for computing a year because it may underestimate a miner's employment if the miner worked in a low-wage geographic area. The commenter urges crediting a Social Security earnings quarter of coverage as a calendar quarter of coal mine employment, particularly for periods of coal mine employment that occurred many years ago. Although this comment raises a legitimate concern, no change in the regulation is necessary. The proposed formula provides a default means of determining the length of time an individual worked as a coal miner. This method may be used when the beginning and ending dates of the miner's work cannot be ascertained from the existing evidence, or the miner worked less than a year as a miner. Moreover, the Department notes that the regulation allows a party to introduce any relevant evidence concerning the miner's employment. In any individual case, the miner may prove that the wages he received were below the industry average. (iv) One comment opposes the inclusion of non-work periods of employment when calculating a year of employment because the miner is not exposed to any occupational hazard during such periods. The Department disagrees, at least with respect to determining whether the miner worked a ''year.'' Judicial precedent has firmly established the legitimacy of counting periods of absence from the workplace for sickness or vacations as part of the miner's year(s) of employment. *See* 64 FR 54983 (Oct. 8, 1999). Despite the lack of actual exposure to coal mine dust during these periods, the employment relationship between the miner and his employer remains intact. Consequently, such periods of non-exposure may be included in the computation of the miner's work history. The Department agrees, however, that such absences should not be included when determining whether the miner actually worked at least 125 days during the year. The 125-day requirement means days of actual employment as a coal miner, and the regulation has been clarified to make the Department's position clear. *See generally Director, OWCP* v. *Gardner*, 882 F.2d 67, 69–70 (3d Cir. 1989) (noting ''[t]he 125 day limit [in 20 CFR 725.493(b)] relates to the minimum amount of time the miner may have been exposed to coal dust while in employment by [the] operator.''); *but see Thomas* v. *BethEnergy Mines, Inc.,* 21 Black Lung Rep. 1–10 (1997) (holding sick leave may be counted in determining whether miner worked 125 days during year). Thus, the periods of approved absence from the workplace may be counted only towards the miner's calendar year of work. (v) One comment generally opposes the definition contending it is based on outmoded concepts and

science. The commenter notes that miners today are exposed to less dust as a result of more hygienic working conditions. The Department, however, believes the definition provides a rational methodology for determining the length of a miner's employment relationship with an operator. The essential issues are the period(s) of time the coal mine operator employed the miner, and the number of days during a year of employment that the individual actually worked as a coal miner. If the miner actually worked at least 125 days during a calendar year or partial periods of different years totaling a 365-day period, then the miner has worked one year for purposes of the program regulations. Whether the miner was exposed to reduced levels of coal mine dust during the working days is irrelevant to this computation. Rather, such evidence may be relevant to an operator's attempt to rebut the presumption of regular and continuous exposure to coal mine dust found in § 725.491(d). With respect to the 125-working day issue, the Department notes its disagreement with *Landes* v. *Director, OWCP*, 997 F.2d 1192, 1197–98 (7th Cir. 1993), and *Yauk* v. *Director, OWCP*, 912 F.2d 192, 195 (8th Cir. 1989) (both cases decided under 20 CFR 718.301(b)). In both cases, the court held that a miner should receive credit for a full year of employment for each partial period of each calendar year during which the miner worked at least 125 days. The Department believes the partial periods must be aggregated until they amount to one year of coal mine employment comprising a 365-day period. Only then should the factfinder determine whether the miner spent at least 125 working days as a coal miner during the year. *See Croucher* v. *Director, OWCP*, 20 Black Lung Rep. 1–67 (1996) (holding ''year'' means calendar year or partial periods totaling calendar year; opposing party may establish irregular employment by showing miner worked fewer than 125 days during year). Consequently, no basis has been provided for abandoning the proposed definition of a ''year.'' (vi) No other comments were received concerning this definition, and no changes were made in it.

20 CFR 725.103

(a) In the initial notice of proposed rulemaking, the Department proposed § 725.103 as a regulation of general applicability to delineate the general burdens of proof for the parties to a claim. 62 FR 3388 (Jan. 22, 1997). The comments opposing this regulation challenged the Department's authority to adjust the burdens of proof among the parties. The Department responded with a detailed analysis of the relevant precedent and its own authority. 64 FR 54972–74 (Oct. 8, 1999). For a number of reasons, the Department concluded that the Administrative Procedure Act (APA), 5 U.S.C. 556(d), does not preclude it from incorporating presumptions into the regulations which reallocate the burden of proving certain facts. First, the statute itself places limitations on the operation of the APA while conferring on the Secretary broad regulatory authority. The Federal Mine Safety and Health Act (FMSHA), which includes the Black Lung Benefits Act (BLBA) as title IV, generally exempts its provisions from the APA. 30 U.S.C. 956. The BLBA, however, incorporates section 19 of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 919(d), thereby making the APA applicable to the adjudication of claims. The incorporation of the APA is subject to one important constraint: Congress conferred on the Secretary the authority to vary the terms of the incorporated provisions by regulation. 30 U.S.C. 932(a) (provisions of LHWCA apply to BLBA ''except as otherwise provided * * * by regulations of the Secretary''). *See generally Director, OWCP* v. *National Mines Corp.,* 554 F.2d 1267, 1273–74 (4th Cir. 1977); *Patton* v. *Director, OWCP,* 763 F.2d 553, 559–60 (3d Cir. 1985). Second, the Department noted that the Supreme Court's decision in *Director, OWCP* v. *Greenwich Collieries,* 512 U.S. 267 (1994), did not address, much less restrict, the Department's statutory authority to alter the applicability of the APA. In *Greenwich Collieries,* the Supreme Court addressed only whether the Department had promulgated a regulatory presumption (20 CFR 718.3) that required a finding for the claimant if the evidence for and against a claimant on a particular issue was evenly balanced. The Court considered § 718.3(c) too ambiguous to operate as an exception to the APA's requirement that the party who bears the burden of persuasion must prevail by a preponderance of the evidence. Because the Court's interpretation of the regulation resolved the issue, the Court did not reach the Department's argument that it has statutory authority to override 5 U.S.C. 556(d) by regulation and shift the burden of persuasion as well. Furthermore, the Court did not decide which party bears the burden of persuasion; rather, it determined only what standard of proof must be met by the party bearing the burden of persuasion. The Department therefore concluded *Greenwich Collieries* does not prohibit the Department from assigning burdens of proof to parties other than the claimant if necessary to achieve the goals of the BLBA. 64 FR 54973 (Oct. 8, 1999). Finally, the Department surveyed other decisions which upheld the authority of an agency to allocate the burden of persuasion by means of factual presumptions. This caselaw lent additional support for the Department's conclusion that its general rulemaking authority permitted it to adjust the burdens of proof among the parties, provided a rational basis existed between the proven facts and those presumed.

(b) One comment contends the Department has no authority under the APA to allocate burdens of proof in a proceeding before an administrative law judge (ALJ). The comment cites no authority, statutory or otherwise, for this proposition. For purposes of responding to the comment, the Department assumes the reference to ALJ proceedings means a reference to a proceeding governed by the APA, including 5 U.S.C. 556(d) (allocating burden of persuasion to proponent of a rule or order). In the second notice of proposed rulemaking, the Department examined the statutory authority which permits it to vary the terms of the APA by regulation. 64 FR 54973 (Oct. 8, 1999). The comment provides no refutation of the conclusions drawn from this analysis. Because the Department has already responded to the substance of the comment's objection, no further response is warranted.

(c) One comment suggests the Supreme Court's decision in *Allentown Mack Sales & Service, Inc.* v. *NLRB,* 522 U.S. 359 (1998), prohibits the Department from reallocating burdens of proof absent statutory authority. As an initial matter, the Department addressed this decision in its second notice of proposed rulemaking. 64 FR 54973 (Oct. 8, 1999). The Department quoted *dicta* from the majority opinion which explicitly supports the authority of an agency to promulgate ''counterfactual evidentiary presumptions * * * as a way of furthering legal or policy goals[.]'' 522 U.S. at 378. The comment does not respond to this analysis, or explain in what manner the Department has erroneously interpreted the decision. In any event, the Department believes *Allentown Mack* provides no precedential basis for limiting the Department's authority to assign burdens of production and persuasion to parties other than the claimant. That case involved a dispute over the evidentiary showing a company must

make to deny recognition to an incumbent union. According to NLRB case law, the company must establish a ''reasonable doubt'' that the union enjoys the majority support of its members. The NLRB held that Allentown Mack had not established the existence of such doubt by a preponderance of the evidence. The Supreme Court ultimately overturned the Board's factual findings because the Court concluded the Board had applied in actuality a higher burden of proof than it had announced in its decisions. 522 U.S. at 378–80. Although the comment depicts this decision as an extension of *Greenwich Collieries, Allentown Mack* has no bearing on an agency's authority to vary the terms of the APA or reallocate the burden of persuasion to a party other than the proponent of a rule or order. *Allentown Mack* establishes only the proposition that an agency cannot announce one standard of proof in principle and apply a higher standard of proof in practice. The Department therefore rejects the comment's position.

(d) No other comments were received concerning this definition, and no changes were made in it.

Subpart B

20 CFR 725.202

(a) The Department proposed changing the definition of ''miner'' in the initial notice of proposed rulemaking. 62 FR 3388–89 (Jan. 22, 1997). Specifically, the Department proposed creating a rebuttable presumption that any individual working in or around a coal mine or coal preparation facility was a ''miner'' within the meaning of the Black Lung Benefits Act (BLBA). The party liable for benefits could rebut the presumption by proving the individual did not perform coal extraction, preparation or transportation work while at the mine site, or did not engage in mine maintenance or construction. The presumption could also be rebutted by demonstrating that the individual was not regularly employed around a coal mine or coal preparation facility. The Department also proposed restructuring the existing regulation (20 CFR 725.202) to differentiate special provisions applicable only to transportation and construction workers. *See generally* 64 FR 3349 (Jan. 22, 1997). The Department did not propose any further changes to this regulation in the second notice of proposed rulemaking. 64 FR 54971 (Oct. 8, 1999).

(b) Two comments generally object to the revised definition of ''miner,'' arguing that it forces operators to defend against claims from employees only peripherally involved in the coal mining process. The revisions primarily rearrange the component parts of 20 CFR 725.202(a), and segregate special provisions involving construction and transportation workers. The regulation does include a rebuttable presumption that any on-site worker at a coal mine or coal preparation facility is a ''miner.'' This presumption reflects the rational assumption that an individual working in or around a coal mine is involved in the extraction, preparation or transportation of coal, or in the construction of a mine site; these functions are enumerated by the statutory definition of a ''miner.'' The operator may rebut the presumption by disproving either the required nexus between the worker's duties and coal mining, or any regular employment at a coal mine facility. This burden is not onerous given the operator's access to information about the use and duties of the workers at its facilities.

(c) One comment objects to coverage for coal mine construction workers whose jobs are integral to the construction of a coal mine site or facility. The commenter argues that coverage should include only those construction workers whose jobs are integral to the extraction or preparation of coal, citing *William Bros., Inc.* v. *Pate,* 833 F.2d 261 (11th Cir. 1987), and *Bridger Coal Co./Pac. Minerals, Inc.* v. *Director, OWCP [Harrop],* 927 F.2d 1150 (10th Cir. 1991), and only if those individuals are also exposed to coal dust as a result of their work. The Department, however, believes the focus on mine construction, rather than coal extraction or preparation, is consistent with Congressional intent in extending coverage to construction workers. The Fourth Circuit has identified the flaw in using the traditional ''situs/function'' test for coal mine construction workers: ''Coal mine construction * * * involves neither the extraction nor preparation of coal. If, therefore, we apply the two-step test to coal mine construction workers, they would rarely, if ever, qualify as miners under the Act.'' *The Glem Co.* v. *McKinney,* 33 F.3d 340, 342 (4th Cir. 1994). The logical inquiry concerning the construction workers' activities must therefore look to coal mine construction, which inevitably (and generally) involves the pre-extraction work of building the mine facility itself. That such work is consistent with work at a coal mine is evident from the statutory definition of ''coal mine:'' ''an area of land and all structures, facilities, * * * shafts, slopes, tunnels * * * and other property, real or personal, * * * used in, *or to be used in,* the work of extracting'' coal. 30 U.S.C. 802(h)(2) (emphasis supplied); *see also* 20 CFR 725.101(a)(23) (renumbered as § 725.101(a)(12)). A construction worker who builds the ''coal mine'' is a ''miner'' to the extent work at the covered site exposes him or her to ''coal mine dust.'' Moreover, the fact that the claimant worked at non-operational mines is not, by itself, sufficient to establish a lack of coal mine dust exposure. The construction process itself may expose the miner to coal mine dust. In addition, a coal mine construction worker exposed to coal mine dust from an operating coal mine in the vicinity of the construction site is a ''miner'' under the Black Lung Benefits Act (BLBA). *R&H Steel Buildings* v. *Director, OWCP,* 146 F.3d 514, 516–17 (7th Cir. 1998).

Pate and *Harrop,* cited by the commenter, do not provide compelling authority to depart from the proposed regulation. In *Pate,* the Court stated that ''construction workers are covered only if they have been exposed to dust arising from the extraction or preparation of coal.'' 833 F.2d at 266 (footnote omitted). Limiting covered construction activities to work involving dust exposure from coal extraction and preparation, however, incorrectly combines two independent elements of the definition of ''miner'': the ''function'' requirement for qualifying as a miner under the BLBA, *i.e.,* working in the extraction or preparation or transportation of coal or in coal mine construction, and the exposure requirement for a construction worker. The two are unrelated. The only plausible explanation for separately including construction workers in the statutory definition of ''miner'' is Congress' recognition of their unique functional status. Construction workers generally perform their work before a mine becomes operational. Consequently, they generally will not be involved in the extraction or preparation of coal, or exposed to dust from such activities. While rejecting this position, the Court did acknowledge the Department's authority to implement its views through regulation: ''If the Secretary has a position he wishes to express, he can do it through the proper forum, i.e., the implementation of new, clarifying regulations.'' 833 F.2d at 265. Section 725.202 represents the exercise of that authority.

In *Harrop,* the Court held that the exposure to ''coal mine dust,'' required by 20 CFR 725.202(a) for coverage of a construction worker, involves exposure to ''dust containing coal.'' 927 F.2d at 1154, citing *Pate.* It interpreted the

statutory coverage of construction workers to reach only those individuals who are exposed to actual coal dust, despite acknowledging the variety of other (non-coal) dusts which may be inhaled at a mine construction site. The Department has consistently taken the position that ''coal mine dust'' means any dust generated at a coal mine site, and that exposure to coal mine dust is sufficient to meet the statutory definition of ''miner''for construction workers. 20 CFR 725.202(a); *see generally Williamson Shaft Contracting Co.* v. *Phillips,* 794 F.2d 865, 869 (3d Cir. 1986) (upholding validity of 20 CFR 725.202(a) because Congress understood ''coal dust'' to mean ''the various dusts around a coal mine''). The interpretation of coverage reached by the Court in *Harrop* would effectively exclude most, if not all, construction workers from the definition of ''miner'' after Congress explicitly changed the definition to include them. The Department declines to adopt the more restrictive standard suggested by the Tenth Circuit and the commenter.

(d) One comment objects to the application to construction workers of the rebuttable presumption that any on-site worker is a ''miner.'' For the reasons expressed in paragraph (b), the Department believes any individual whose employment requires him or her to perform work at a coal mine can logically be presumed to be involved in a covered coal mine function. The commenter has provided no reason to exclude construction workers from that presumption, and the Department declines to do so.

(e) One comment received after publication of the initial notice of proposed rulemaking and referenced again after publication of the second notice objects to subsection (d), which describes the elements of entitlement for a miner and references the specific regulatory criteria in Part 718 for establishing those elements. The comment links its objection to criticisms of the specific Part 718 regulations rather than any aspect of subsection (d). The Department's responses to those criticisms are discussed under the particular Part 718 sections. No further response in the context of this regulation is necessary.

(f) Two comments support the revised section 725.202.

(g) No other comments concerning this section have been received, and no changes have been made in it.

20 CFR 725.203

(a)(i) The Department proposed changing § 725.203 in the initial notice of proposed rulemaking to eliminate the filing of a claim as an element of entitlement for a miner. 62 FR 3389 (Jan. 22, 1997). This change clarified that a miner is entitled to benefits for all periods of compensable disability, including any period which occurred prior to the filing of the claim. 62 FR 3349 (Jan. 22, 1997). The Department also incorporated into § 725.203 provisions from 20 CFR 718.404, which was deleted. These provisions require an entitled miner to notify the Department if (s)he returns to coal mining or comparable work, and authorize the Department to reopen a final miner's award in appropriate circumstances for the development of additional evidence and the reevaluation of entitlement. 62 FR 3349, 3389 (Jan. 22, 1997). Finally, § 725.203(b)(2) now refers to § 725.504, which is the renumbered version of § 725.503A. 62 FR 3341 (Jan. 22, 1997). The Department proposed no further changes to § 725.203 in the second notice of proposed rulemaking. 64 FR 54971 (Oct. 8, 1999). (ii) The Department has now further amended § 725.203(d), however, to restore language requiring the beneficiary to submit ''medical reports and other evidence'' if the Office determines the evidence is necessary to resolve any question concerning the validity of the award. This phrase appears in 20 CFR 718.404(b), and was inadvertently omitted in the earlier proposal to change § 725.203. The Benefits Review Board has since interpreted the phrase in § 718.404(b) to involve discovery requests. *Stiltner* v. *Westmoreland Coal Co.,* Black Lung Rep., BRB No. 98–0337, slip op. at 5 (Jan. 31, 2000) (en banc). The Department did not intend the changes to § 725.203(d) to foreclose evidentiary development other than medical examinations of the miner. The Department therefore adds the language formerly in § 718.404(b) to § 725.203(d), and clarifies its intent that the miner may be required to submit to medical examinations, produce medical evidence and answer discovery requests when the circumstances raise any issue concerning the validity of the award after the award becomes final.

(b)(i) One comment suggests the revision of subsection (a) improperly extends the eligibility period. The Department rejects this interpretation. The change merely harmonizes that provision with § 725.503, and ensures the miner's entitlement to benefits for any period of eligibility which predates the filing of a claim. *See* 62 FR 3349 (Jan. 22, 1997). (ii) Two comments approve of the change to subsection (a).

(c) Three comments oppose subsection (d) because it permits the Department to reopen an approved claim if issues arise concerning its validity. Subsection (d) simply recognizes the Department's authority to investigate any finally approved miner's claim if circumstances raise an issue pertaining to the validity of the award. Such authority is necessary in order to monitor a miner's continuing eligibility and prevent the payment of benefits to any claimant whose eligibility ceases. The Department rejects the suggestion that this authority should be limited to cases involving fraud or the miner's return to coal mining. Limiting the reopening authority under subsection (d) in this manner would be inconsistent with the Department's statutory authority to modify an award based on a factual mistake or change in condition at any time within one year after the last payment of benefits. 33 U.S.C. 922, as incorporated by 30 U.S.C. 932(a); 20 CFR 725.310. Furthermore, such a limitation would impinge on the right of responsible operator to petition for modification and request a medical examination if circumstances call into question the entitlement of the miner. The Department emphasizes that the responsible operator does not have an absolute right to compel the claimant to submit to a medical examination for purposes of the modification petition. *Selak* v. *Wyoming Pocahantas Land Company,* 21 Black Lung Rep. 1–173, 1–178 (1999); *see also Stiltner* v. *Westmoreland Coal Co.,* Black Lung Rep., BRB No. 98–0337, slip op. at 5 (Jan. 31, 2000) (en banc) (holding operator does not have absolute right to compel claimant to respond to discovery request under 20 CFR 718.404(b) in connection with modification petition). Upon production of reasonable evidence justifying the request, however, the district director (or administrative law judge) may order the claimant to submit to a medical examination. *Selak,* 21 Black Lung Rep. at 1–179.

(d) One comment urges the Department to limit its authority to reopen awards under subsection (d) to the first year after the award becomes final. Such a limitation, however, is inconsistent with the Department's statutory authority to modify. 33 U.S.C. 922, as incorporated. In the case of an award, that authority extends to ''one year after the date of the last payment of compensation.'' Furthermore, the limitation would also adversely affect the responsible operator's right to request modification if it became aware of circumstances which call into question the validity of the award. *See* response to comments (c).

(e) In response to the initial notice of proposed rulemaking, one comment opposed subsection (d) because the provision did not expressly acknowledge that a claim may be reopened if the miner's condition improved. The Department previously rejected a similar suggestion when it promulgated the final version of 20 CFR 718.404 in 1980. The Department initially proposed § 718.404 with a requirement that an entitled individual contact the Office of Workers' Compensation Programs if ''[h]is or her respiratory or pulmonary condition improves[.]'' 43 FR 17727 (Apr. 25, 1978). The requirement was deleted in the final version ''in response to comments and testimony stating that pneumoconiosis does not, in fact, improve.'' 45 FR 13694 (Feb. 29, 1980). The same commenter submitted an additional response to the second notice of proposed rulemaking, and now approves of subsection (d) because it does not preclude the right of a liable party to challenge a final award at a later date. The Department therefore declines to incorporate any language affirmatively citing improvement in a miner's health as grounds for reopening an award.

(f) No other comments were received concerning this section, and no changes have been made in it.

20 CFR 725.204

(a) The Department proposed amending § 725.204 in the initial notice of proposed rulemaking to conform the regulatory criteria for marital relationships to intervening changes in the law since the regulation was issued in 1978. 62 FR 3349–50 (Jan. 22, 1997). The Department provided a detailed statutory analysis in the initial notice. To summarize: the Black Lung Benefits Act (BLBA) incorporates the definition of a dependent ''wife'' used by the Social Security Act (SSA), 42 U.S.C. 416(h)(1), as incorporated by 30 U.S.C. 902(a)(2), (e). The SSA recognizes both ''legal'' and ''deemed'' spouses; the latter is an individual who married the wage earner while ignorant that some legal impediment existed to deny validity to the marriage. Before 1990, § 416(h) contained a provision preventing a ''deemed spouse'' from receiving benefits if a ''legal'' spouse existed and was receiving benefits on the wage earner's account. 42 U.S.C. 416(h)(1)(B). The Department included this limitation in the dependency criteria when it promulgated § 725.204. 20 CFR 725.204(d)(1). In 1990, Congress amended the SSA to remove the prohibition on ''deemed spouse'' entitlement if a legal spouse existed and was receiving benefits. 104 Stat. 1388–278 to 1388–280 (1990). Legislative history clearly established Congressional intent to permit both the ''deemed'' spouse and the legal spouse to receive concurrent benefits. *See* H.R. Rep. No. 101–964, 1990 U.S.C.C. & A.N. 2649, 2650 (conference report). Accordingly, the Department proposed similar changes to § 725.204 to delete the regulatory bar to ''deemed'' spouse entitlement under the BLBA. The Department proposed no additional changes to this regulation in its second notice of proposed rulemaking. 64 FR 54971 (Oct. 8, 1999).

(b) Two comments approve of the change to this section acknowledging the eligibility of a spouse to receive benefits despite the existence of a legal impediment to the validity of the marriage to the miner unless the individual entered into the marriage with knowledge it was not valid.

(c) No other comments concerning this section were received, and no changes have been made in it.

20 CFR 725.209

(a) In the initial notice of proposed rulemaking, the Department erroneously proposed changing § 725.209(a)(2)(ii) to state that, in order to be considered a dependent, a child who is at least 18 and not a student must be under a disability that commenced before the age of 22. 62 FR 3390 (Jan. 22, 1997). The purpose of the change was to reflect in the regulation itself the age by which certain children's disabilities must commence, a requirement imposed by an incorporated provision of the Social Security Act. 42 U.S.C. 402(d)(1)(B)(ii), as incorporated into the BLBA by 30 U.S.C. 902(g). 62 FR 3350 (Jan. 22, 1997). After further consideration, however, the Department reproposed the regulation without the new language. 64 FR 55026 (Oct. 8, 1999). Eliminating the age by which the disability must have begun for a dependent child harmonizes § 725.209 with the statutory definition by preserving the distinction between a child/augmentee and a child/beneficiary (*see* § 725.221). A child who claims benefits in his or her own right based on personal disability (child/beneficiary) must prove the disability arose before age 22 as required by 30 U.S.C. 902(g). 30 U.S.C. 922(a)(3). A dependent child who is an augmentee of a beneficiary, however, is exempt from this requirement because the statutory definition of ''dependent'' explicitly exempts a ''child'' from the requirement that disability begin by a certain age. 30 U.S.C. 902(a)(1). *See generally* 64 FR 54983 (Oct. 8, 1999).

(b) Reference should be made to the Department's response to comments concerning § 725.219 to determine the effect of marriage on a child's dependency status under § 725.209(a)(1).

(c) No comments concerning changes to this section were received in response to either the initial notice of proposed rulemaking or the second notice of proposed rulemaking, and no further changes have been made in it.

20 CFR 725.212

(a) In the initial notice of proposed rulemaking, the Department proposed amending § 725.212 to codify the right of each surviving spouse of a deceased miner to receive a full monthly benefit without regard to the existence of any other entitled surviving spouse. 62 FR 3390 (Jan. 22, 1997). The Department concluded that both statutory analysis and Congress' intent compelled this result, and explained at length the reasoning behind the conclusion. 62 FR 3350–51 (Jan. 22, 1997). *See also* § 725.537, and response to comments. The Department proposed no further changes to this regulation in its second notice of proposed rulemaking. 64 FR 54971 (Oct. 8, 1999).

(b) Five comments object to subsection (b) because it permits each surviving spouse of a deceased miner to receive full monthly benefits if (s)he establishes eligibility regardless of the existence of any other entitled surviving spouse. The commenters assert that the change will increase the cost of paying survivors' benefits. Increased costs alone do not justify denying eligible individuals the benefits to which they are entitled by law.

(c) Two comments argue the change is not permitted by the relevant statutes; one comment disputes the Department's conclusion that its earlier procedure was adopted in error, citing undocumented representations by the Social Security Administration (SSA) to the Department in 1978. In the initial notice of proposed rulemaking, the Department provided a detailed legal analysis of the pertinent statutory authorities and legislative history, all of which support awarding full monthly benefits to more than one surviving spouse. *See* 62 FR 3350–51 (Jan. 22, 1997). Congress amended the Social Security Act in 1965 to allow benefits to a divorced surviving spouse as a ''widow'' of the miner. Pub. L. No. 89–97, § 308(b)(1), 79 Stat. 286 (1965). The legislative history of the amendment clearly established Congress' intent that payment of benefits to two (or more) ''widows'' would not reduce the benefits paid to either of the widows. S.

Rep. No. 404, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S.C.C. & A.N. 1943, 2047. In 1972, Congress amended the BLBA definition of ''widow'' to adopt the Social Security Act definition. 30 U.S.C. 902(e). The legislative history is equally clear that Congress intended to conform the BLBA definition to the Social Security Act definition. S. Rep. No. 743, 92nd Cong., 2d. Sess., *reprinted in* 1972 U.S.C.C. & A.N. 2305, 2332. The BLBA also reinforces this interpretation because it requires a ''widow'' to receive benefits at prescribed rates and makes no allowance for a reduction based on the existence of more than one widow. 30 U.S.C. 922(a)(2). To date, two courts of appeals and the Benefits Review Board have accepted the Department's position. *Peabody Coal Co.* v. *Director, OWCP [Ricker],* 182 F.3d 637, 642 (8th Cir. 1999); *Mays et al.* v. *Piney Mountain Coal Co.,* 21 Black Lung Rep. 1–59, 1–65/1–66 (1997), *aff'd* 176 F.3d 753, 764–765 (4th Cir. 1999). No court has reached a contrary result, and no comment has addressed the substance of this analysis. Consequently, the Department has no basis for changing the regulation. Finally, the Department cannot respond to the alleged communication between SSA and the Department because the comment provides no detailed evidence as to the nature or content of the communication. In any event, an undocumented assertion concerning another agency's intention cannot form the basis for displacing a proper interpretation of the pertinent statutes, especially when courts have unanimously upheld that interpretation.

(d) One comment states that the SSA regulations implementing part B of the BLBA do not permit more than one surviving spouse to receive full benefits. SSA's program regulations (20 CFR part 410) are silent on the entitlement of multiple surviving spouses. In any event, the Department has independent authority to issue regulations for part C of the BLBA, 30 U.S.C. 936(a), and § 725.212 is consistent with the applicable provisions of the BLBA and the SSA as incorporated.

(e) One comment states that the current Coal Mine (BLBA) Procedure Manual is consistent with the position that full monthly benefits cannot be paid to each surviving spouse when more than one spouse qualifies for one deceased miner. This statement is simply erroneous. Since at least 1994, the Procedure Manual has unequivocally provided that ''[w]hen a surviving spouse and a surviving divorced spouse both qualify as primary beneficiaries, each is entitled to full basic benefits plus full augmentation.'' Coal Mine (BLBA) Procedure Manual, ch. 2–900, ¶ 8.f (Sept. 1994).

(f) One comment contends the Department lacks the authority to require an operator to pay the same benefit twice. The Department rejects this contention. As discussed above, the BLBA unequivocally requires the payment of full monthly benefits to each surviving spouse who fulfills the eligibility criteria. The statute does not recognize any limitation on the liability for these benefits, or any reduction in the amount to which the eligible surviving spouse is entitled.

(g) Two comments support the change in subsection (b).

(h) No other comments were received concerning this section, and no changes have been made in it.

20 CFR 725.213

(a) The Department proposed amending § 725.213 in the initial notice of proposed rulemaking to harmonize that regulation with changes to § 725.204, which now recognizes the independent eligibility of a ''deemed'' spouse to receive benefits notwithstanding the existence of a legal spouse who is also receiving benefits. 62 FR 3351 (Jan. 22, 1997) The Department also proposed adding paragraph (c) to codify the right of a surviving beneficiary, who loses eligibility through some legal impediment, to resume eligibility upon the cessation of that impediment. The Department did not propose any further changes to the regulation in its second notice of proposed rulemaking. 64 FR 54971 (Oct. 8, 1999).

(b) Two comments object to reentitlement for a surviving spouse who loses eligibility, but later reestablishes all the requirements. The commenter states in general terms that the provision is contrary to the Social Security Act (SSA), represents an unwarranted increase in benefits liability, and should be abandoned. The commenter cites no specific authority for its argument. The legislative history of 30 U.S.C. 902(e), the statutory definition of ''widow'' which § 725.213 implements, establishes congressional intent to afford a miner's widow the same right to resumption of black lung benefits upon termination of a remarriage as exists for a widow receiving SSA benefits.

The Black Lung Benefits Act (BLBA), as enacted in 1969, defined ''widow'' to mean

> the wife living with or dependent for support on the decedent at the time of his death, or living apart for reasonable cause or because of his desertion, *who has not remarried.*

Pub. L. 91–173, § 402(e), 83 Stat. 793 (1969) (emphasis supplied). The emphasized language excluded from coverage any miner's survivor who later remarried, without regard to the subsequent termination of the marriage. In 1972, Congress amended the definition of 'widow' by enacting the current version. In pertinent part, the phrase ''who is not married'' replaced ''who has not remarried.'' The Senate report accompanying the proposed amendments states that ''[t]he term 'widow' in § 402(e) is likewise redefined to conform to the Social Security Act definition.'' S. Rep. No. 743, 92nd Cong., 2d. Sess. 30, *reprinted in* 2 Comm. On Labor and Pub. Welfare, 94th Cong., 1st Sess., *Legislative History of the Federal Coal Mine Health and Safety Act of 1969,* at 1974 (1975). The legislative history therefore unequivocally establishes congressional intent to define ''widow'' for purposes of the Black Lung Benefits Act and SSA in the same manner.

At the time of the 1972 amendments to the BLBA, the SSA defined a ''widow'' as an individual who ''is not married.'' 42 U.S.C. 403(e)(1)(A). Congress had previously amended the SSA definition in 1965 by replacing the phrase ''has not remarried'' with ''is not married.'' Pub. L. 89–97, § 308(b)(1), 79 Stat. 286, 376 (1965). The legislative history of the amendment indicates that Congress intended an aged divorced wife, widow or surviving divorced wife, who was not married at the age of eligibility, to retain ''whatever rights to benefits she has ever had, regardless of intervening marriages, which have ended in death, divorce or annulment.'' S. Rep. No. 404, 89th Cong., 1st Sess., *reprinted in* 1965 U.S.C.C. & A.N. 1943, 2048. The legislative history therefore underscores the congressional intention to permit restoration of SSA eligibility to a widow whose intervening marriage has terminated. The Social Security Administration regulations implementing Part B of the BLBA confirm this view:

> An individual is entitled to benefits as a widow, or as a surviving divorced wife, for each month beginning with the first month in which all of the conditions of entitlement * * * are satisfied. If such individual remarries, payment of benefits ends with the month before the month of remarriage * * *. Should the remarriage subsequently end, payment of benefits may be resumed * * *.

20 CFR 410.211(a). The Sixth Circuit and the Benefits Review Board have also adopted the Department's position, and no circuit has taken a contrary view. *Wolf Creek Collieries* v. *Robinson,* 872 F.2d 1264, 1266 (6th Cir. 1989); *Luchino* v. *Director, OWCP,* 8 Black Lung Rep. 1–

453, 1–456 (1986). The commenter's objection must be rejected.

In promulgating § 725.213, the Department recognizes that permitting reentitlement of surviving spouses and children (§ 725.219) treats these classes of beneficiaries more generously than surviving brothers and sisters of the deceased miner (§ 725.223). One comment notes it is appropriate to end benefit entitlement permanently when a brother or sister marries, and implies the same treatment should be accorded all other classes of beneficiaries and augmentees, including surviving spouses and children. The Department believes the difference in treatment is required by the BLBA. Section 412(a)(5) states that ''[n]o benefits to a sister or brother shall be payable under this paragraph for any month beginning with the month in which he or she * * * marries.'' 30 U.S.C. 922(a)(5). This provision terminates eligibility if a miner's brother or sister who is receiving benefits marries. Unlike the statutory definitions of ''widow'' and ''child,'' 30 U.S.C. 902(e), (g), section 412(a)(5) focuses on the occurrence of an event when ineligibility commences rather than the individual's status. The widow's or child's marriage status can change over time; once the event of marriage occurs for a brother or sister, ''no benefits shall be payable.'' The regulations therefore exclude brothers and sisters from reentitlement once they marry.

(c) One comment states that reentitling a surviving spouse after the termination of his or her intervening marriage is contrary to the SSA regulations implementing part B of the BLBA. The comment is incorrect. Section 410.211(a) provides that payment of benefits terminates if a surviving spouse or divorced wife remarries while receiving benefits; however, ''[s]hould the remarriage subsequently end, payment of benefits may be resumed * * * .'' 20 CFR 410.211(a). Sections 725.213 and 410.211 are therefore entirely consistent.

(d) Two comments support the new subsection (c).

(e) No other comments concerning this section were received, and no changes have been made in it.

20 CFR 725.214

(a) The Department proposed amending § 725.214 in the initial notice of proposed rulemaking to conform the regulatory criteria for marital relationships to intervening changes in the law since the regulation was issued in 1978. 62 FR 3349–50 (Jan. 22, 1997). Specifically, the Department intended this regulation (as well as § 725.204) to reflect statutory changes which now permit the surviving spouse of a miner, whose marriage is invalid due to a legal impediment, to receive benefits notwithstanding the existence of a legally-married spouse who also is receiving benefits. Consequently, the Department proposed eliminating language in 20 CFR 725.214(d) which required the termination of benefits for the surviving spouse whose marriage is invalid upon the entitlement of the legal spouse. The Department proposed no additional changes to this regulation in the second notice of proposed rulemaking. 64 FR 54971 (Oct. 8, 1999). For purposes of this rule, the Department has corrected one typographical error and made minor grammatical changes. The first and second notices of proposed rulemaking used the word ''interstate'' in § 725.214(c) to describe a miner's personal property. 62 FR 3391 (Jan. 22, 1997); 64 FR 55027 (Oct. 8, 1999). The correct word is ''intestate,'' and that word has been substituted in the regulation. In § 725.214(d), the Department has deleted the word ''and'' which immediately followed the phrase ''in a purported marriage between them,'' and added commas, as appropriate, to clarify the meaning of the provision.

(b) One comment objects to permitting a surviving spouse, whose marriage to the deceased miner may be invalid due to certain legal impediments, to maintain eligibility despite another person's eligibility as the miner's surviving spouse. The commenter states generally that the provision is contrary to the Social Security Act (SSA) and imposes an unwarranted increase in benefits liability. Neither objection demonstrates any basis for abandoning the revision. The Department proposed the same change in connection with § 725.204, and provided a detailed legal analysis of the reasons supporting the revision in its initial notice of proposed rulemaking. *See* 62 FR 3349–50 (Jan. 22, 1997). The Black Lung Benefits Act (BLBA) incorporates the definition of a dependent ''wife'' used by the SSA, 42 U.S.C. 416(h)(1), as incorporated by 30 U.S.C. 902(a)(2), (e). The SSA recognizes both ''legal'' and ''deemed'' spouses as potentially eligible for benefits on a single wage earner's record. The ''deemed'' spouse is an individual who married the wage earner while unaware that some legal impediment existed to the marriage. Before 1990, § 416(h) prohibited a ''deemed spouse'' from receiving benefits if a ''legal'' spouse existed and was receiving benefits on the wage earner's account. 42 U.S.C. 416(h)(1)(B). The Department imposed a similar limitation in the dependency criteria when it promulgated 20 CFR 725.204(d)(1). In 1990, Congress amended the SSA to remove the prohibition on ''deemed spouse'' entitlement if a legal spouse existed and was receiving benefits. 104 Stat. 1388–278 to 1388–280 (1990). Legislative history clearly established Congressional intent to permit both the ''deemed'' spouse and the legal spouse to receive concurrent benefits. *See* H.R. Rep. No. 101–964, 1990 U.S.C.C. & A.N. 2649, 2650 (conference report). Accordingly, the Department proposed similar changes to § 725.214 to delete the regulatory bar to ''deemed'' spouse entitlement under the BLBA. The comment does not respond to this analysis with any specific reasoning demonstrating the alleged inconsistency with the SSA or refuting the Department's authority to implement this change. Finally, increased benefits liability alone is not a legitimate basis for denying benefits to eligible claimants under the BLBA.

(c) No other comments concerning this section were received, and no other changes have been made in it.

20 CFR 725.215

(a) In the initial notice of proposed rulemaking, the Department proposed clarifying the intended operation of § 725.215(g)(3) by changing a reference in that regulation from ''section'' to ''paragraph.'' 62 FR 3391 (Jan. 22, 1997). The change ensures that the exception to the nine-month marriage rule is confined to subsection (g) rather than applicable to the entire regulation. 62 FR 3351 (Jan. 22, 1997). The Department proposed no additional changes to this regulation in the second notice of proposed rulemaking. 64 FR 54971 (Oct. 8, 1999).

(b) No comments concerning this section were received, and no changes have been made in it.

20 CFR 725.219

(a) In the initial notice of proposed rulemaking, the Department proposed changing § 725.219 to account for a change in the age of onset of disability in the Social Security Act (SSA), 42 U.S.C. 402(d)(1)(B), which is incorporated into the Black Lung Benefits Act's (BLBA) definition of ''child,'' 30 U.S.C. 902(g). 62 FR 3350 (Jan. 22, 1997). The Department did not propose any additional changes in the second notice of proposed rulemaking. 64 FR 54971 (Oct. 8, 1999). The Department, however, did assert in general terms that marriage is a

permanent bar to future entitlement for any individual other than a miner's surviving spouse or surviving divorced spouse. 64 FR 54983–84 (Oct. 8, 1999). Based on this position, the Department withdrew a proposed change to § 725.223 which extended reentitlement to a miner's surviving dependent brother or sister if the sibling married while receiving benefits, but the marriage later ended.

(b) Two comments recommend adopting a provision (analogous to § 725.213(c)) which would allow a deceased miner's surviving disabled child, whose entitlement terminates upon marriage, to regain eligibility when that marriage ends. Formerly, the regulations permitted a child whose entitlement terminated at age 18 to apply for reinstatement if the child was a student, younger than age 23, and was not married. 20 CFR 725.219(c). The regulations did not make any provision for reentitling a disabled child whose entitlement is terminated by marriage. The Department agrees with the comments that such a provision is appropriate, and therefore has added subsection (d). This provision enables a child whose entitlement terminates upon marriage to apply for reinstatement of benefits once the marriage terminates. Subsection (d) also excuses the child-beneficiary from any requirement to reestablish the deceased miner's total disability or death due to pneumoconiosis.

The BLBA provides that survivor's benefits ''shall only be paid to a child for so long as he meets the criteria for the term 'child' contained in section 402(g).'' 30 U.S.C. 922(a)(3). Section 402(g) defines ''child'' to mean a:

child or a stepchild who is—

(1) unmarried; and

(2)(A) under eighteen years of age, or

(B)(i) under a disability as defined in section 423(d) of title 42

(ii) which began before the age specified in section 402(d)(1)(B)(ii) of title 42, or, in the case of a student, before he ceased to be a student; or

(C) a student.

30 U.S.C. 902(g). The literal language of the statute does not preclude a child's eligibility for all time based upon the existence of a marriage. Rather, the two statutory provisions authorize the payment of benefits to an eligible child survivor ''for so long as'' (s)he ''is unmarried.'' If a marriage terminates prior to any period of eligibility, the child is nevertheless unmarried when (s)he becomes entitled to benefits. *See Adler* v. *Peabody Coal Co.,* Black Lung Rep., BRB No. 98–1513 BLA (Feb. 4, 2000). If the child marries while receiving benefits, (s)he cannot continue as an eligible survivor for the duration of the marriage. *Sullenberger* v. *Director, OWCP,* Black Lung Rep., BRB No. 99–0449 BLA (March 8, 2000) Upon cessation of the marital relationship, however, the child again ''is unmarried,'' which complies with the statutory requirement. Assuming all other conditions for eligibility are met, an ''unmarried'' child retains his or her status as a ''child'' under the plain language of the statute notwithstanding the occurrence of the marriage. In this regard, the Department disagrees with the broad statement in *Reigh* v. *Director, OWCP,* 20 Black Lung Rep. 1–44 (1996), that a surviving child of a miner cannot revive her status as the unmarried dependent of her parents upon the death of her husband. 20 Black Lung Rep. at 1–48.

The Department's interpretation of the plain language of § 402(g) gains support from Congress' decision to omit certain provisions of 42 U.S.C. 402(d) (the Social Security Act) from the BLBA. Significantly, Congress did not incorporate § 402(d)(6), which permits a child to become reentitled to benefits after turning 18 if the child is a student under age 22 or disabled, ''provided no event specified in paragraph (1)(D) has occurred.'' 42 U.S.C. 402(d)(6). Section 402(d)(1)(D) states that a child's benefits terminate ''the month preceding * * * the month in which such child dies or marries[.]'' In *McMahon* v. *Califano,* 605 F.2d 49 (2d Cir. 1979), *cert. den.* 444 U.S. 847 the Court held that ''the only reasonable interpretation of [§ 402(d)(6) and (d)(1)(D)] is that any marriage occurring subsequent to a child's initial entitlement to benefits terminates those benefits and prevents re-entitlement in the future.'' 605 F.2d at 53; *see also Downs* v. *D.C. Police & Firefighters Retirement and Relief Bd.,* 666 A.2d 860 (D.C.C.A. 1995) (holding disabled child's annuity permanently terminated when child married and later divorced). Otherwise, the Court concluded, the proviso language of § 402(d)(6) would be superfluous because no other interpretation would afford it any meaning. Congress therefore has implemented a policy determination that a disabled child receiving SSA benefits should become permanently ineligible if the child marries, regardless of the subsequent termination of the marriage. By omitting the incorporation of these provisions into the BLBA definition of ''child,'' however, the Department concludes that Congress did not intend to adopt the same policy for the BLBA.

The legislative history of the definition of ''child'' does not support a contrary interpretation. The BLBA originally defined ''dependent'' to mean a dependent wife or child within the meaning of 5 U.S.C. 8110; ''wife'' and ''child'' were not defined separately. 30 U.S.C. 902(a) (1969). Section 8110 defined a dependent child as an ''unmarried child'' living with, or receiving regular contributions from, the employee if the child is under 18 years of age; over that age but incapable of self-support because of a physical or mental impairment; or a student. 5 U.S.C. 8110(a)(3). In 1972, Congress amended the BLBA to include a new definition of ''dependent'' and separate definitions of ''child'' and ''widow.'' 30 U.S.C. 902(a), (g), (e) (1972). The legislative history of the 1972 amendments simply states that the statutory definition of ''child'' conformed to the SSA definition. S. Rep. No. 743, 92nd Cong., 2nd Sess. (1972), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., *History of the Federal Coal Mine Health and Safety Act of 1969,* as amended through 1974, Part 2—Appendix at 1946, 1974 (1975). That conformance extended only to the specific adoption of SSA eligibility criteria for age, disability, and student requirements, but did not include provisions such as the permanent ban on reentitlement for a child who marries in § 402(d)(6). Consequently, the Department is free to depart from the SSA eligibility scheme contained in § 402(d)(6) by permitting reentitlement.

The effect of marriage on a claimant's eligibility has also arisen in connection with a miner's surviving spouse. 30 U.S.C. 902(e). Since the 1972 amendments, the statutory definition of ''widow'' has limited eligibility to a miner's surviving spouse or surviving divorced spouse ''who is not married.'' Legislative history linking the 1972 amendment of 30 U.S.C. 902(e) to changes in the parallel SSA definition clearly establish Congress' intention to permit reentitlement for a widow who remarried after the beneficiary's death and later became unmarried. *See generally Wolf Creek Collieries* v. *Robinson,* 872 F.2d 1264, 1266 (6th Cir. 1989); *Luchino* v. *Director,* OWCP, 8 Black Lung Rep. 1–453, 1–456 (1986). The statutory definitions of ''widow'' and ''child'' are alike in that both require the individual to be unmarried as a condition of eligibility. The legislative history of the Black Lung Benefits Act's 1972 amendments strongly supports limiting the effect of an intervening marriage on a surviving spouse's eligibility, and does not contradict affording the same treatment

to a child. In the absence of such contradictory evidence of Congress' intentions, both statutory definitions should be construed alike given the similarities in their language. Accordingly, a presently unmarried child of a miner is eligible for benefits notwithstanding any prior marriage. The marriage merely suspends the child's eligibility for benefits for the duration of the marriage if the child marries during a period of entitlement. Eligibility then resumes upon termination of the marriage, assuming all other conditions of eligibility can be satisfied. If the child's marriage terminates prior to any period of entitlement, the marriage has no effect upon the child's eligibility.

(c) No other comments concerning this section were received, and no other changes have been made in it.

20 CFR 725.221

(a) The Department proposed changing the date of onset of disability in § 725.221 from 18 to 22 years of age to conform the regulation to the same change in 42 U.S.C. 423(d). 62 FR 3350, 3392 (Jan. 22, 1997). The Department proposed no additional changes in the second notice of proposed rulemaking. 64 FR 54791 (Oct. 8, 1999).

(b) One comment supported the change in the age by which disability must commence.

(c) No other comments were received concerning this section, and no changes have been made in it.

20 CFR 725.222

(a) The Department proposed changing the date of onset of disability in § 725.222 from 18 to 22 years of age to conform the regulation to the same change in 42 U.S.C. 423(d). 62 FR 3350, 3392 (Jan. 22, 1997). The Department proposed no additional changes in the second notice of proposed rulemaking. 64 FR 54791 (Oct. 8, 1999).

(b) One comment recommends that subsection (b) allow a deceased miner's parent, brother or sister to claim benefits unless the miner's surviving spouse or child has established entitlement. The Department rejects this change because it is inconsistent with the Black Lung Benefits Act. Section 412 of the Act provides guidelines for the payment of benefits to eligible beneficiaries. 30 U.S.C. 922. Section 412(a)(5) states, in pertinent part, that a dependent parent of a deceased miner ''who is not survived at the time of [the miner's] death by a widow or a child'' is eligible for benefits. 30 U.S.C. 922(a)(5). The same provision also states that a dependent surviving sibling of the deceased miner ''who is not survived at the time of [the miner's] death by a widow, child, or parent'' is eligible for benefits. The current language in 20 CFR 725.222(b) follows the statutory language, and no change in that subsection is appropriate. The statutory provisions are unequivocal: the existence of a surviving spouse or child is sufficient to preclude entitlement for other survivors even if the spouse or child is not receiving benefits.

This interpretation is further supported by another provision of section 412. Paragraph (a)(3) states that ''no entitlement to benefits as a child shall be established under this paragraph (3) for any month for which entitlement to benefits as a widow is established under paragraph (2).'' 30 U.S.C. 922(a)(3). Under this provision, a child may receive benefits even if a surviving spouse exists unless (or until) the spouse establishes his or her own entitlement and supersedes the child as the primary beneficiary. By using different eligibility criteria within the same statutory provision, Congress drew a clear distinction between the circumstances in which the existence of an eligible surviving spouse could preclude any potential beneficiary with lesser standing from obtaining benefits. The child may therefore constitute a primary beneficiary until such time as the spouse asserts (and proves) his or her own entitlement; at that time, the spouse replaces the child as the beneficiary. The mere existence of a surviving spouse or child, however, does preclude an otherwise eligible parent or sibling from claiming benefits. The commenter's recommended change would violate the distinction between classes of eligible beneficiaries which Congress has drawn. The recommendation must be rejected.

(c) One comment supported the change in age, from 18 to 22, by which disability must commence.

(d) No other comments concerning this section were received, and no changes have been made in it.

20 CFR 725.223

(a) In the initial notice of proposed rulemaking, the Department proposed revising § 725.223 to adopt the change in age limits for disability specified by 42 U.S.C. 402(d)(1)(B), as incorporated by the Black Lung Benefits Act (BLBA), 30 U.S.C. 922(a)(5). 62 FR 3351, 3393 (Jan. 22, 1997). The Department also proposed adding subsection (d) to permit reentitlement for a miner's dependent brother or sister whose eligibility had terminated upon marriage, provided the marriage ended and the individual again fulfilled all the eligibility criteria. The Department thereafter reconsidered this proposal, and suggested its removal in the second notice of proposed rulemaking. 64 FR 55029 (Oct. 8, 1999). The Department concluded that the proposed subsection (d) contradicted longstanding agency policy, which permitted reentitlement upon cessation of marriage only in the case of a surviving spouse. Because the Department stated it considered a miner's children permanently barred from reentitlement upon the cessation of marriage, it declined to afford preferential treatment to the miner's siblings. In the case of a married sibling who becomes the miner's dependent, the Department concluded that eligibility should not be precluded by the existence of the marriage if the sibling's spouse provided no support. Once a married sibling received support or an unmarried dependent married, however, the Department relied on the assumption that the married sibling would receive support from the spouse and a sibling whose marriage terminated would rely on savings or property from the marriage, etc. 64 FR 54983–84 (Oct. 8, 1999).

(b) The Department has changed its position that reentitlement for beneficiaries after resumption of unmarried status must be confined to surviving spouses and surviving divorced spouses. *See* § 725.219(d) above, with respect to children. Although the Department recognizes reentitlement for children as well as spouses, the Department has not changed its views about the effect of marriage as a permanent bar to reentitlement for a miner's brother or sister. The BLBA supports this policy. Section 412(a)(5) states that ''[n]o benefits to a sister or brother shall be payable under this paragraph for any month beginning with the month in which he or she * * * marries.'' 30 U.S.C. 922(a)(5). This provision is unequivocal. Once a brother or sister who is receiving benefits marries, eligibility terminates. That the termination is permanent may be inferred from the phrasing of the provision: upon marriage, no benefits are payable to the sibling ''for *any* month'' starting with the month of the marriage. Section 412(a)(5) does not include any qualifying language which would suggest that benefits are not payable simply for the duration of the marriage. Rather, it identifies a point when ineligibility commences, with no provision for restoring eligibility. In this regard, section 412(a)(5) differs from the statutory definitions of ''widow'' and ''child,'' 30 U.S.C. 902(e), (g). Section 412(a)(5) links the occurrence of an event to the termination of eligibility

while the ''widow'' and ''child'' definitions focus on the individual's status. The widow's or child's marriage status can change; consequently these individuals can move in or out of eligibility. Once a brother or sister marries, ''no benefits shall be payable * * *.'' The BLBA therefore requires that a miner's brothers and sisters be excluded from reentitlement upon the dissolution of marriage.

(c) One comment endorses the withdrawal of proposed subsection (d), and a return to current practice with respect to the marriage of a miner's brothers and sisters.

(d) No other comments concerning this section were received, and no changes have been made in it.

Subpart C

20 CFR 725.306

(a) In its first notice of proposed rulemaking, the Department proposed revising § 725.306(a)(3) by cross-referencing § 725.522 so that an unrelated revision of the term ''benefits'' in section 725.101(a)(6) would not adversely affect a claimant's ability to withdraw his claim for benefits. The Department specifically noted its intention not to require reimbursement of the amount spent on the claimant's complete pulmonary evaluation as a condition for withdrawal of a claim, notwithstanding its proposal to include the complete pulmonary evaluation within the definition of ''benefits.'' 62 FR 3351 (Jan. 22, 1997). The Department did not discuss section 725.306 in its second notice of proposed rulemaking. *See* list of changes in the Department's second proposal, 64 FR 54971 (Oct. 8, 1999).

(b) Several comments opposed the revised definition of ''benefits,'' § 725.101(a)(6), because it includes the cost of the miner's complete pulmonary examination for which the Department is liable in the absence of a final award of benefits. The commenters believe the revised definition will impose liability on the miner under § 725.306 for repayment of the cost of the examination if he should decide to withdraw his claim. For the reasons stated in the Department's initial notice of proposed rulemaking, 62 FR 3351 (Jan. 22, 1997), and in response to comments received in connection with § 725.101(a)(6), 64 FR 54982 (Oct. 8, 1999), the Department has not made reimbursement of the examination ''benefit'' a price for withdrawing a claim. No other comments were received concerning this section, and no changes have been made in it.

20 CFR 725.308

Although the Department received comments relevant to this section, the regulation was not open for comment, *see* 62 Fed. Reg. 3341 (Jan. 22, 1997); 64 Fed. Reg. 54971 (Oct. 8, 1999). It was repromulgated only for the convenience of readers. Accordingly, no changes are being made in this section.

20 CFR 725.309

(a) In its first notice of proposed rulemaking, the Department proposed revising § 725.309 to clarify the rule governing subsequent claims. 62 FR 3351 (Jan. 22, 1997). A subsequent claim is an application filed by the same individual after final denial of a prior claim. The Department observed that a majority of the federal appellate courts that had considered the issue had deferred to the Department's interpretation of the former regulation governing such claims. That regulation required a claimant to establish that he had suffered a material change in condition since the denial of his earlier claim in order to escape the denial of the later claim on the grounds of the prior denial. 20 CFR 725.309 (1999). The Department's interpretation of that rule allowed miners to establish the necessary material change in condition by introducing new evidence that demonstrated a change in one of the necessary elements of entitlement, such as the existence of pneumoconiosis. The Department proposed to codify its interpretation by creating a rebuttable presumption that the miner's condition had changed if new evidence established one of the elements of entitlement previously resolved against the miner. An operator could rebut the presumption by establishing that the earlier denial was erroneous, *i.e.*, that the new evidence submitted by the claimant did not demonstrate a change in his condition but simply that the earlier determination was mistaken. If the presumption was not rebutted, the factfinder would weigh all of the evidence on the remaining elements of entitlement to determine whether the claimant was entitled to benefits. The original proposal also provided that the remaining issues of entitlement were subject to *de novo* adjudication unless the parties had stipulated to, or waived their right to contest, those issues in the earlier proceeding. Thus, once the claimant established a change in his condition, no parties to the claim were entitled to rely on findings made in connection with the denial of the prior claim.

The Department substantially revised its proposal in its second notice of proposed rulemaking. 64 FR 54984–85 (Oct. 8, 1999). The Department deleted the rebuttable presumption and substituted a threshold test which allowed the miner to litigate his entitlement to benefits without regard to any previous findings by producing new evidence that established any of the elements of entitlement previously resolved against him. The Department explained that this test effectuated the Fourth Circuit's decision in *Lisa Lee Mines* v. *Director, OWCP,* 86 F.3d 1358 (4th Cir. 1996), *cert. denied,* 117 S. Ct. 763 (1997), by accepting the correctness of the earlier denial of benefits. In addition, in response to several comments, the Department restored a provision requiring the denial of an additional survivor's claim, but limited the circumstances in which such a denial was appropriate. The Department proposed the automatic denial of an additional survivor's claim in cases in which the denial of the previous claim was based solely on a finding or findings that were not subject to change. For example, if the earlier claim was denied solely because the miner did not die due to pneumoconiosis, the regulation would require the denial of any additional claim as well. The Department responded to other comments, rejecting the suggestion that the revised regulation was inconsistent with § 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 922, as incorporated by 30 U.S.C. 932(a), and § 413(d) of the Black Lung Benefits Act, 30 U.S.C. 923(d). Finally, the Department discussed why findings favorable to the claimant that were made in the previous denial of benefits should not be given preclusive effect, and clarified the date from which benefits were payable in the event an additional claim was awarded.

(b) Two comments object to the Department's rule allowing subsequent claims on the basis that the record lacks adequate justification of the latency and progressivity of pneumoconiosis. In its first notice of proposed rulemaking, the Department proposed revising the definition of the term ''pneumoconiosis'' in § 718.201 to, among other things, explicitly recognize that it referred to a progressive disease. 62 FR 3343–44 (Jan. 22, 1997). Several commenters argued that the Department's proposed definition was scientifically unsound, and presented testimony from a panel of physicians with expertise in pulmonary medicine at the Department's July 22, 1997 hearing in Washington, D.C. The Department also received comments and testimony in support of its proposal.

The commenters opposed to the Department's proposal also objected to the Department's failure to consult the National Institute of Occupational Safety and Health (NIOSH). Although NIOSH had commented favorably on the Department's proposal, and specifically on the provision recognizing the progressive nature of pneumoconiosis, the Department decided, in light of the divergent comments it had received from medical professionals, to seek additional guidance from NIOSH. The Department transmitted a copy of all of the testimony and commentary it had received to Dr. Linda Rosenstock, the Director of NIOSH, and asked NIOSH to determine, in light of the then existing record, whether NIOSH continued to support the Department's proposal. NIOSH responded, in a December 7, 1998 letter from Dr. Paul Schulte, the Director of NIOSH's Education and Information Division, that ''[t]he unfavorable comments received by DOL do not alter our previous position: NIOSH scientific analysis supports the proposed definitional changes.'' Dr. Schulte provided additional medical references to support NIOSH's conclusion. The Department notified parties of this additional evidence in its second notice of proposed rulemaking. *See* 64 FR 54978–79 (Oct. 8, 1999).

One commenter accuses the Department of obtaining assistance from NIOSH's information officer rather than its scientific staff. The Department does not agree that the identity or title of the agency official through whom NIOSH chose to communicate its response to the Department's inquiry renders that response invalid. The Department's request was sent to the Director of NIOSH, and observed that the resolution of the issues related to the definition of the term ''pneumoconiosis'' required scientific and medical expertise. Dr. Schulte's letter, transmitted on behalf of NIOSH in response to the Department's request, specifically refers to ''NIOSH scientific analysis.'' Accordingly, the Department rejects the commenter's inferences that its consultation with NIOSH was less than complete, and that the Department sought to exclude the agency's scientific staff. To the extent that the statute imposes an obligation to consult with NIOSH on the definition of ''pneumoconiosis,'' the Department has fully complied with that obligation.

The commenters opposed to the Department's proposal also attack the scientific basis of the conclusion that the Department and NIOSH have drawn from the evidence of record. In the following discussion, where a scientific article or treatise is cited, the Department has also cited to a Rulemaking Record Exhibit or, when appropriate, the **Federal Register**, where that source appears. This second citation is not an exhaustive list; thus, each source may appear at additional points in the Rulemaking Record. In support of their attack, the commenters have submitted an analysis of the available medical literature from Dr. Gregory Fino, a Board-certified physician in Internal Medicine and Pulmonary Disease, and Dr. Barbara Bahl, who has a doctorate in nursing and biostatistics. Drs. Fino and Bahl analyze nine articles and textbooks dealing with latency, which they define parenthetically as ''0/0 or 0/1 to 1/0+.'' The analysis thus focuses on evidence that would show that a miner whose chest X-rays are classified by a radiologist as ''negative'' (0/0 or 0/1 under the ILO–UC classification scheme, *see* 20 CFR 718.102(b)), after he leaves the mine can develop a disease that will result in chest X-rays that are classified as ''positive.'' Under the ILO–UC scheme, an X-ray classified as category 1, 2, or 3, ranging from 1/0 to 3/3, is considered positive for simple pneumoconiosis. An X-ray classified as A, B, or C is considered positive for complicated pneumoconiosis, also known as progressive massive fibrosis or massive pulmonary fibrosis. 20 CFR 718.102(b), 718.304(a) (1999). They conclude that ''the medical literature provides no evidence that coal workers' pneumoconiosis or silicosis in coalminers is a latent disease. There is also no evidence to show that the development of pulmonary impairment is latent.'' Rulemaking Record, Exhibit, 89–37, Appendix C at 29.

Drs. Fino and Bahl also analyzed five articles dealing with progression, which they define parenthetically as ''1/0 to 1/0.+'' Their analysis of progression thus focuses on whether individuals whose chest X-rays are initially read as 1/0, the lowest positive classification in the ILO–UC scheme, may have later chest X-rays classified greater than 1/0. They observe that ''there are authors who have identified progression of pneumoconiosis in coal miners,'' but that other authors have reached the contrary conclusion. They conclude as follows:

> Why do some miners progress within the ILO scale of simple pneumoconiosis and others do not? The answer lies in the proper definition of pneumoconiosis. Careful attention must be made to differentiate simple coal workers' pneumoconiosis and silicosis. The miners who have been described to progress over time after exposure ceases are miners who have likely contracted silicosis, not simple coal workers' pneumoconiosis. * * *
>
> Silicosis may be a progressive disease in a small percentage of miners after coal mine dust exposure ends. The literature does not support the statement that coal workers' pneumoconiosis is progressive absent further dust exposure. There are no studies that show progressive impairment in miners who have left the mines. The studies do not show any progression in industrial bronchitis after a miner leaves the mines. In fact, the studies do suggest that the minor reduction in the FEV1 [Forced Expiratory Volume in one second] as a result of industrial bronchitis occurs in the first few years of mining and then the effect over the remaining years in the mines is negligible and may even recover.

Rulemaking Record, Exhibit 89–37, Appendix C at 30–31. In evaluating the medical evidence contained in the rulemaking record, the Department is mindful that Congress provided an exceptionally broad definition of the term ''pneumoconiosis:'' ''a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.'' 30 U.S.C. 902(b). The regulatory definitions promulgated by the Department over the last 25 years have reflected the scope of this provision.

In 1978, the Department promulgated its interim criteria, 20 CFR Part 727. Those criteria included a definition of ''pneumoconiosis'' at 20 CFR 727.202. After repeating the statutory definition, the regulation further provided that ''[t]his definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis[,]anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis[,] silicosis, or silicotuberculosis arising out of coal mine employment.'' 43 FR 36825 (Aug. 18, 1978). The Department promulgated its permanent criteria, 20 CFR Part 718, in 1980. Section 718.201, entitled ''Definition of pneumoconiosis,'' contained a definition that was identical to that of § 727.202. 45 FR 13685 (Feb. 29, 1980). The federal courts of appeals have long recognized that the Act compensates not merely coal workers' pneumoconiosis, as that term is used by the medical community, but ''legal'' pneumoconiosis. *See, e.g., Peabody Coal Co.* v. *Lowis,* 708 F.2d 266, 268 n.4 (7th Cir. 1983) (''the 'legal' definition of pneumoconiosis contained in the above-quoted regulation [§ 727.202] includes not only 'true or clinical' pneumoconiosis but also other respiratory or pulmonary diseases arising from dust exposure in coal mine employment''); *Gulf & Western Industries* v. *Ling,* 176 F.3d 226, 231 (4th Cir. 1999) (''[the regulations detail the breadth of what is frequently called

'legal' pneumoconiosis * * *''); *see also* the Department's preamble to § 718.201.

The Department has reviewed all of the medical literature referenced in the record, and does not agree that it lacks support for the proposition that pneumoconiosis is a latent, progressive disease. Contrary to Dr. Fino's conclusions, a number of medical references document the latent, progressive nature of the disease. For example, Seaton, in ''Coal Workers' Pneumoconiosis,'' in Morgan, WKC and Seaton A, eds., *Occupational Lung Diseases* (WB Saunders Co., 3d ed. 1995) 389, *see also* Rulemaking Record, Exhibit 89–37, Appendix C at 34, 42, contains the observation that ''PMF [Progressive massive fibrosis] may occur after dust exposure has ceased, even when the miner has left the industry with no apparent simple pneumoconiosis, although this will only occur if the worker has had substantial dust exposure''). Similarly, National Institute for Occupational Safety and Health, *Criteria for a Recommended Standard: Occupational Exposure to Respirable Coal Mine Dust,* § 4.2.1.3.1, Rulemaking Record, Exhibit 2–1 at 48, summarized an article (Maclaren WM, Soutar CA, ''Progressive massive fibrosis and simple pneumoconiosis in ex-miners,'' Br. J. Ind. Med. 42:734–740 (1985)) as follows: ''Among 1,902 ex-miners who had not developed PMF within 4 years of leaving mining, 172 (9%) developed PMF after leaving mining. Of those 172 miners with PMF, 32% had no evidence of simple CWP (category 0) when they left mining.'' In that article, in fact, Maclaren and Soutar reported both small opacities (evidence of simple pneumoconiosis) and large opacities (evidence of complicated pneumoconiosis) in ex-miners who did not show evidence of coal workers' pneumoconiosis after the miners left the industry.

Moreover, contrary to the conclusion of Dr. Fino and Dr. Bahl, the study conducted by Donnan *et al.* did find significant evidence of latency. Donnan PT, Miller BG, Scarisbrick DA, Seaton A, Wightman AJA, Soutar CA, ''Progression of simple pneumoconiosis in ex-coalminers after cessation of exposure to coalmine dust,'' IOM report TM/97/07 (Institute of Occupational Medicine, December 1997) 1–67, see also Rulemaking Record, Exhibit 89–37, Appendix C at 26, 29. Dr. Fino and Dr. Bahl write that ''only one out of 200 miners [in the study] was found to progress from a negative to a positive film.'' That conclusion, however, was not the conclusion of the study's authors. Their tables 3.4a (Median profusion score for 14 CWP progressors and 19 PMF progressors) and 3.4b (Median profusion score for 161 CWP non-progressors) compare X-rays taken within two years of the dates on which the 200 miners left the coal mining industry with X-rays taken 10 years later. They demonstrate that of 138 ex-miners whose early X-rays were read as 0/0 or 0/1, 11 had later X-rays read as positive for either simple or complicated pneumoconiosis. This proportion, 7.97%, has epidemiologic significance, and supports the authors' conclusion that ''[t]he results have demonstrated that progression does occur after cessation of exposure.'' Donnan *et al.* at 23.

In light of this evidence, the Department is not persuaded by the reliance Dr. Fino and Dr. Bahl place on the conclusion of Drs. Merchant, Taylor and Hodous in ''Occupational Respiratory Diseases'' (National Institute for Occupational Safety and Health, 1986), *see also* Rulemaking Record, Exhibit 89–37, Appendix C at 26. Dr. Fino and Dr. Bahl quote the textbook's statement that ''the chance of radiological progression over ten years at a mean dust concentration of 2 milligrams per cubic meter is essentially zero for a miner with x-ray category 0/0.'' This textbook was published by the Division of Respiratory Disease Studies of the Appalachian Laboratory for Occupational Safety and Health, a component of the National Institute of Occupational Safety and Health, more than 10 years prior to the Donnan study. In light of NIOSH's conclusion that scientific analysis supports the Department's regulations, the Department does not agree that the statement by Merchant *et al.* requires the Department to revise its regulatory approach.

Similarly, the Department is not persuaded by Dr. Fino and Dr. Bahl's attempt to dismiss the effect of silica on coal miners, and therefore to discount the applicability of studies demonstrating the latency and progressivity of silicosis. It remains the Department's position that pneumoconiosis, as defined in the statute, 30 U.S.C. 902(b), is both latent and progressive. The statutory definition includes both simple coal workers' pneumoconiosis and silicosis. Although they acknowledge studies showing that silicosis is a latent, progressive disease, Dr. Fino and Dr. Bahl argue that coal workers' pneumoconiosis must be distinguished from silicosis. The Black Lung Benefits Act, however, does not permit such a distinction. As discussed above, the regulatory definition of the term ''pneumoconiosis,'' implementing the broad statutory definition, includes silicosis within the list of conditions that must be considered pneumoconiosis. In addition, inclusion of silicosis in the definition of pneumoconiosis is based on practical as well as legal considerations. It is difficult to separate the effects of coal and silica in the occupational setting. Coal contains a number of non-organic materials, including quartz, and the percentage of quartz is greater in high rank coals. Seaton, ''Coal Workers' Pneumoconiosis,'' in Morgan, WKC and Seaton A, eds., *Occupational Lung Diseases* (WB Saunders Co., 3d ed. 1995) 389, *see also* Rulemaking Record, Exhibit 89–37, Appendix C at 34, 42. Seaton and colleagues reported a cohort of miners who had a rapid progression of radiologic findings resembling silicosis, despite a relatively low total coal dust exposure. Seaton A, Dick JA, Dodgson J, Jacobsen M., ''Quartz and pneumoconiosis in coal miners,'' Lancet 2:1272 (1981), *see also* Rulemaking Record, Exhibit 2–1 at 50. Analysis revealed that the percentage of quartz in the mixed coal mine dust was significantly higher in these affected miners than in matched controls. They concluded that quartz exposure was an important factor contributing to pneumoconiosis in some miners and that disease in such miners was more aggressive. Moreover, miners who drill into hard rock, such as those who bore shafts or work as roof bolters, are exposed to higher concentrations of quartz and are known to be at higher risk for developing silicosis. Seaton, ''Coal Workers' Pneumoconiosis,'' in Morgan, WKC and Seaton A, eds., *Occupational Lung Diseases* (WB Saunders Co., 3d ed. 1995) 389, *see also* Rulemaking Record, Exhibit 89–37, Appendix C at 34, 42. Based on these observations, it is reasonable to conclude that there is a clear risk of developing pneumoconiosis with characteristics of silicosis in coal miners exposed to dusts with high quartz content. Accordingly, the Department believes that it may properly rely on studies of silicosis in promulgating regulations governing the compensability of pneumoconiosis as that term has been defined by Congress. *See also* Beckett WS, ''Occupational Respiratory Diseases,'' The New England Journal of Medicine, 342:406–13 (Feb. 12, 2000) (citing a study of silicosis to support the conclusion that ''[w]ith many substances (including coal and silica dust), the disease may progress for decades after the exposure has ceased.''). (Dr. Beckett's review article did not appear until after the

rulemaking record had closed; it is cited only as additional evidence confirming the Department's previous use of studies involving silicosis).

Finally, there is also evidence that lung function can continue to deteriorate after a miner leaves the coal mining industry. The authors of Dimich-Ward H and Bates DV, ''Reanalysis of a longitudinal study of pulmonary function in coal miners in Lorraine, France,'' Am J Ind Med, 25:613–623 (1994), *see also* 62 FR 3344 (Jan. 22, 1997), demonstrated a decline of pulmonary function in both smoking and non-smoking coal miners that continues over time even after retirement from mining. Given this evidence of progression, it is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period. Because the legal definition of ''pneumoconiosis'' includes impairments that arise from coal mine employment, regardless of whether a miner shows X-ray evidence of pneumoconiosis, this evidence of deterioration of lung function among miners, including miners who did not smoke, is particularly significant.

The commenters also cite the 1985 report of the Surgeon General, U.S. Department of Health and Human Services, *The Health Consequences of Smoking: Cancer and Chronic Lung Disease in the Workplace* (1985), *see also* Rulemaking Record, Exhibit 89–21, Appendix 11, in support of their argument. Of the seven items listed in the ''Summary and Conclusions'' section of Chapter Seven, ''Respiratory Disease in Coal Miners,'' none addresses the latency or progressivity of pneumoconiosis. In addition, the Surgeon General's report, which focused on the health consequences of smoking, did not review many of the articles on which the Department's conclusion is based. Because the overwhelming majority of the references cited by the Department in its first and second notices of proposed rulemaking, *see* 62 FR 3343–44 (Jan. 22, 1997); 64 FR 54978–79 (Oct. 8, 1999), as well as the references discussed above, were prepared after 1985, this is not surprising. Accordingly, the Department does not believe that anything in the Surgeon General's report requires the Department to ignore the conclusions that it has drawn from the studies and articles in the rulemaking record.

Contrary to the commenters' argument, then, the record does contain abundant evidence demonstrating that pneumoconiosis is a latent, progressive disease. That evidence is certainly sufficient to justify the Department's regulation governing subsequent claims. Moreover, neither the regulation permitting subsequent claims nor the Department's explicit recognition of the progressive nature of the disease represents a departure from the Department's prior positions. The Department's original promulgation of a regulation governing subsequent claims in 1978 was based on the progressive nature of the disease. 43 FR 36785 (Aug. 18, 1978). The federal courts of appeals have also recognized that pneumoconiosis is a progressive disease. *Plesh* v. *Director, OWCP,* 71 F.3d 103, 108 (3d Cir. 1995) (''pneumoconiosis is progressive and incurable''); *Labelle Processing Co.* v. *Swarrow,* 72 F.3d 308, 314–315 (3d Cir. 1995) (''Congress, in enacting the BLBA, recognized the perniciously progressive nature of the disease * * *. Moreover, courts have long acknowledged that pneumoconiosis is a progressive and irreversible disease.''); *Kowalchick* v. *Director, OWCP,* 893 F.2d 615, 621 (3d Cir. 1990) (''That the three earliest x-rays of record * * * were read negative is not inconsistent with the progressive nature of pneumoconiosis.''); *Shendock* v. *Director, OWCP,* 893 F.2d 1458, 1467 n.10 (3d Cir. 1990) (''it is well recognized that pneumoconiosis is a progressive disease whose symptoms increase in severity over time''); *Bethenergy Mines Inc.* v. *Director, OWCP,* 854 F.2d 632, 636 (3d Cir. 1988) (''Due to the progressive nature of pneumoconiosis, a coal mine operator is less likely to know the details underlying a particular claim than an employer is in the typical case arising under the LHWCA.''); *Zielinski* v. *Califano,* 580 F.2d 103, 107 (3d Cir. 1978) (''pneumoconiosis and related lung diseases progress slowly''); *Eastern Associated Coal Corp.* v. *Director, OWCP,* ____ F.3d ____, No. 99–1312, slip op. at pp. 11–12 (4th Cir. July 12, 2000) (observing ''the assumption of progressivity that underlies much of the statutory regime''); *Lane Hollow Coal Co.* v. *Lockhart,* 137 F.3d 799, 803 (4th Cir. 1998) (''pneumoconiosis is progressive and irreversible''); *Adkins* v. *Director, OWCP,* 958 F.2d 49, 51 (4th Cir. 1992) (''pneumoconiosis is a progressive disease''); *Greer* v. *Director, OWCP,* 940 F.2d 88, 90 (4th Cir. 1991) (pneumoconiosis is ''a slowly-progressing condition''); *Hamrick* v. *Schweiker,* 679 F.2d 1078, 1081 (4th Cir. 1982) (''pneumoconiosis is a progressive disease''); Prater v. Harris, 620 F.2d 1074, 1082 (4th Cir. 1980) (''pneumoconiosis is a progressive disease''); *Barnes* v. *Mathews,* 562 F.2d 278, 279 (4th Cir. 1977) (''pneumoconiosis is a slow, progressive disease often difficult to diagnose at early stages''); *Crace* v. *Kentland-Elkhorn Coal Corp.,* 109 F.3d 1163, 1167 (6th Cir. 1997) (''because of the progressive nature of pneumoconiosis, more recent evidence is often accorded more weight''); *Consolidation Coal Co.* v. *McMahon,* 77 F.3d 898, 906 (6th Cir. 1996) (recognizing ''the progressive nature of pneumoconiosis''); *Sharondale Corp.* v. *Ross,* 42 F.3d 993, 997 (6th Cir. 1994) (''the material change provision [provides] relief from the principles of finality for those miners whose conditions have deteriorated due to the progressive nature of black lung disease''); *Johnson* v. *Peabody Coal Co.,* 26 F.3d 618, 620 (6th Cir. 1994) (''Pneumoconiosis is a progressive debilitating disease.''); *Woodward* v. *Director, OWCP,* 991 F.2d 314, 320 (6th Cir. 1993) (''Pneumoconiosis is a progressive and degenerative disease.''); *Campbell* v. *Consolidation Coal Co.,* 811 F.2d 302, 303 (6th Cir. 1987) (recognizing ''the progressive nature of pneumoconiosis''); *Back* v. *Director, OWCP,* 796 F.2d 169, 172 (6th Cir. 1986) (''Because of the progressive nature of pneumoconiosis, earlier negative and later positive X-rays of the same individual are not necessarily in conflict.''); *Orange* v. *Island Creek Coal Co.,* 786 F.2d 724, 727 (6th Cir. 1986) (''pneumoconiosis * * * is a progressive disease''); *Director, OWCP* v. *Bivens,* 757 F.2d 781, 788 (6th Cir. 1985) (''the Black Lung Benefits Act provides compensation for disability based on an invisible and progressive disease''); *Collins* v. *Sec'y of HHS,* 734 F.2d 1177, 1180 (6th Cir. 1984) (''Medically we note that pneumoconiosis is a slow, progressive disease. Its characteristics and symptoms often do not manifest themselves in a way that promote [sic] immediate detection. In some cases the disease may take years before it is readily detectable.''); *Smith* v. *Califano,* 682 F.2d 583, 587 (6th Cir. 1982) (''coal workers'' pneumoconiosis * * * is a progressive disease''); *Hill* v. *Califano,* 592 F.2d 341, 345 (6th Cir. 1979) (''pneumoconiosis is a slowly progressive disease''); *Morris* v. *Mathews,* 557 F.2d 563, 568 (6th Cir. 1977) (recognizing Congressional finding that ''pneumoconiosis [is] a progressive chronic dust disease of the lung''); *Begley* v. *Mathews,* 544 F.2d 1345, 1354 (6th Cir. 1976) (describing pneumoconiosis as ''a disease known to be of a slowly progressive character''); *Amax Coal Co.* v. *Franklin,* 957 F.2d 355, 359 (7th Cir. 1992) (''Black lung

disease, at least when broadly defined, is a progressive disease * * *.''); *Dotson* v. *Peabody Coal Co.,* 846 F.2d 1134, 1139 (7th Cir. 1988) (''Pneumoconiosis is a progressive disease* * *''.); *Russell* v. *Director, OWCP,* 829 F.2d 615, 616 (7th Cir. 1987) (''Coal miners'' pneumoconiosis (black lung) is a progressive, debilitating disease.''); *Amax Coal Co.* v. *Director, OWCP,* 801 F.2d 958, 964 (7th Cir. 1986) (recognizing ''the difficulty of clinically diagnosing the progressive disease''); *Consolidation Coal Co.* v. *Chubb,* 741 F.2d 968, 973 (7th Cir. 1984) (''In light of the progressive nature of pneumoconiosis, [the ALJ's] according greater weight to the recent x-ray was not irrational.''); *Lovilia Coal Co.* v. *Harvey,* 109 F.3d 445, 450 (8th Cir. 1997) (recognizing progressive nature of pneumoconiosis); *Robinson* v. *Missouri Mining Co.,* 955 F.2d 1181, 1184 (8th Cir. 1992) (''pneumoconiosis is a progressive disease''); *Campbell* v. *Director, OWCP,* 846 F.2d 502, 509 (8th Cir. 1988) (''pneumoconiosis is a progressive disease''); *Newman* v. *Director, OWCP,* 745 F.2d 1162, 1165 (8th Cir. 1984) (''pneumoconiosis is a progressive disease''); *Padavich* v. *Mathews,* 561 F.2d 142, 146 (8th Cir. 1977) (''Pneumoconiosis is a progressive illness* * *.''); *Humphreville* v. *Mathews,* 560 F.2d 347, 349 (8th Cir. 1977) (''pneumoconiosis is a progressive disease''); *Wyoming Fuel Co.* v. *Director, OWCP,* 90 F.3d 1502, 1507 (10th Cir. 1996) (recognizing ''the nature of pneumoconiosis as a disease that develops progressively and is difficult to diagnose''); *Lukman* v. *Director, OWCP,* 896 F.2d 1248, 1253 (10th Cir. 1990) (recognizing real purpose of duplicate claims regulation is to provide ''miners with progressively worsening health full and equal access to black lung benefits.''); *Ohler* v. *Sec'y of HEW,* 583 F.2d 501, 506 (10th Cir. 1978) (''pneumoconiosis is a progressive disease, as is emphysema''); *Paluso* v. *Mathews,* 573 F.2d 4, 10 (10th Cir. 1978) (''It is well-established medically that pneumoconiosis is a progressive disease which frequently defies diagnosis.''); *Alabama Dry Dock and Shipbuilding Corp.* v. *Sowell,* 933 F.2d 1561, 1566 (11th Cir. 1991) (black lung ''can lie essentially dormant in the body for many years after an employee has left his employment before progressing to the point where [it] is disabling''); *Curse* v. *Director, OWCP,* 843 F.2d 456, 457 (11th Cir. 1988) (recognizing black lung disease develops slowly and progressively); *Doss* v. *Califano,* 598 F.2d 419, 421 (11th Cir. 1979) (''pneumoconiosis is a progressive disease''); *but see Zeigler Coal Co.* v. *Lemon,* 23 F.3d 1235, 1238 (7th Cir. 1994) (chastising an administrative law judge for assuming that pneumoconiosis is progressive without any evidence in the record to support the assumption).

Although one commenter asserts that the regulation creates an irrebuttable presumption that each miner's condition is progressive, it actually does no such thing. As revised, § 725.309 simply effectuates the current one-element test adopted by a substantial number of federal appellate courts and most recently the Benefits Review Board, *Allen* v. *Mead Corp.,* ____ Black Lung Rep. (MB) ____, BRB No. 99–0474 BLA (May 31, 2000). The one-element test allows a miner who demonstrates a material change in one of the conditions of entitlement previously decided against him to avoid an automatic bar on establishing his current entitlement to benefits. To the extent that the commenter would require each miner to submit scientific evidence establishing that the change in his specific condition represents latent, progressive pneumoconiosis, the Department disagrees and has therefore not imposed such an evidentiary burden on claimants. Rather, the miner continues to bear the burden of establishing all of the statutory elements of entitlement, except to the extent that he is aided by two statutory presumptions, 30 U.S.C. 921(c)(1) and (c)(3). The revised regulation continues to afford coal mine operators an opportunity to introduce contrary evidence weighing against entitlement.

(c) One comment submitted in connection with the first notice of proposed rulemaking, and cited by another comment submitted in connection with the second notice of proposed rulemaking, suggests that the Department's proposed revision would compensate the 15 to 20 percent of cigarette smokers who develop chronic airway obstruction if they spent 10 years or more in the coal mining industry. The Department does not agree that the possibility that miners will suffer reduced pulmonary function as a result of cigarette smoking justifies the automatic denial of additional claims by miners under § 725.309. In addition, the previously cited study by Dimich-Ward and Bates documented the progressive decrement in lung function among both miners who smoked and those who did not. Dimich-Ward H, Bates DV, ''Reanalysis of a longitudinal study of pulmonary function in coal miners in Lorraine, France,'' Am J Ind Med, 25:613–623 (1994), see also 62 FR 3344 (Jan. 22, 1997). The Department accordingly believes that a miner who files his first claim before he is truly totally disabled, but later becomes totally disabled, must be afforded an opportunity to establish that his condition is related to his coal mine employment. Under § 718.204, the miner continues to bear the burden of proving this element of his entitlement. To the extent that a coal mine operator produces medical evidence demonstrating that the miner's total disability is due solely to cigarette smoking, that evidence would also be relevant to the inquiry under § 718.204.

(d) A number of comments argue that § 725.309 violates accepted principles of claim preclusion and issue preclusion, particularly with respect to the treatment of additional claims filed by miners' survivors. The Department disagrees. In its initial proposal, the Department explained that its additional filing rules gave full effect to the principles of claim preclusion but that the applicability of these principles was limited in two important respects: (1) The liberal reopening provision created by Congress under § 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 922, incorporated into the Black Lung Benefits Act by 30 U.S.C. 932(a); and (2) the recognition that an individual's eligibility for workers' compensation benefits is not fixed at a single time, but, especially with respect to occupational diseases, may be subject to relitigation even if the worker's first claim is denied. 62 FR 3352 (Jan. 22, 1997). Under these principles, and subject to the limitation that the party must have a full and fair opportunity to litigate its position, *Kremer* v. *Chemical Constr. Corp.,* 456 U.S. 461, 481 n. 22 (1982), a final adjudication of the merits of a cause of action will preclude the parties from relitigating issues that were or could have been raised in the first proceeding. *Rivet* v. *Regions Bank of Louisiana,* 522 U.S. 470, 476 (1998), citing *Federated Department Stores, Inc.* v. *Moitie,* 452 U.S. 394, 398 (1981).

Section 725.309 applies these principles to the adjudication of black lung benefits claims. For example, if the sole basis for denying a miner's claim is a finding on an issue that is not subject to change, and that the miner had an opportunity to fully and fairly litigate, a subsequent claim by the miner must also be denied. Thus, where the first claim was denied solely on the grounds that the applicant did not work as a miner, and he does not allege that he engaged in any additional coal mine employment since he filed that application, his second claim must be denied as well. Where the issue is subject to change, however, neither claim preclusion principles nor

§ 725.309 bars the litigation of the miner's additional claim. For example, where the original denial was based on the miner's failure to establish that his respiratory impairment was totally disabling, and new evidence establishes that that condition has worsened, the miner should not be barred from prosecuting a second application for benefits.

The regulation gives similar treatment to cases involving miners' survivors. Where a previous survivor's claim was denied solely on the basis that the survivor did not prove that the miner died due to pneumoconiosis, an element not subject to change, the survivor may be barred from litigating another claim filed more than one year after the denial of the first one. The Department does not agree, however, with the commenters' suggestion that none of the elements of a survivor's claim is subject to change. In the case of a miner's survivor, for example, the Secretary's regulations recognize, consistent with Departmental practice, court of appeals precedent, and applicable Social Security law, that although a miner's survivor who remarries is not then eligible for benefits, she may become re-entitled to benefits if that marriage ends. *See* preamble to § 725.213. Section 725.309 recognizes this possibility by allowing a miner's survivor to litigate a second claim where one of the grounds on which the first claim was denied, *e.g.,* that the survivor was married, is subject to change.

Moreover, § 725.309 incorporates two other limitations which are accepted components of traditional claim preclusion. First, where none of the elements is subject to change, and denial by virtue of claim preclusion is appropriate under § 725.309, the regulation requires the party defending the claim to specifically plead that doctrine. The Supreme Court has observed that ''[c]laim preclusion (res judicata), as Rule 8(c) of the Federal Rules of Civil Procedure makes clear, is an affirmative defense.'' *Rivet,* 522 U.S. at 476. Section 725.309 similarly requires an operator seeking the denial of an additional survivor's claim by virtue of preclusion to raise that issue at the appropriate time. Like traditional claim preclusion, § 725.309 offers the party defending the cause of action an affirmative defense that is subject to waiver if not properly and timely raised. *See, e.g., Garry* v. *Geils,* 82 F.3d 1362, 1367 n. 8 (7th Cir.1996).

Second, claim preclusion is inappropriate even in traditional civil litigation where the party against whom the defense is invoked was not able to fully litigate those issues which the defendant now seeks to bar. *Kremer,* 456 U.S. at 481 n. 22. For example, this issue would arise if the administrative law judge adjudicating the survivor's first claim found that the survivor's remarriage barred her entitlement, and alternatively concluded that the miner did not die due to pneumoconiosis. In that case, the survivor could not have overturned the adverse finding on the cause of the miner's death because she would not have been able to avoid the prohibition on the eligibility of remarried widows. Accordingly, she could not be said to have had a full and fair opportunity to litigate the issue of the cause of the miner's death. In these circumstances, neither ordinary principles of claims preclusion nor § 725.309 would preclude her from litigating her entitlement to benefits in a subsequent claim.

Similarly, the Department's application of claim preclusion to additional claims contains an exception based on the absence of an opportunity to fully and fairly litigate the issues in a previous proceeding. As the Department explained in its second notice of proposed rulemaking, where one of the applicable conditions of entitlement has changed, *e.g.,* where the miner has become totally disabled or a survivor has ended her second marriage, neither the party defending against the claim—the coal mine operator or the Trust Fund—nor the claimant is entitled to rely on findings made in connection with the denial of an earlier claim for benefits. 64 FR 54985 (Oct. 8, 1999). One commenter's suggestion that an administrative law judge's determination in the original proceeding that an X-ray is not worthy of credit precludes any further litigation of that issue in a subsequent proceeding simply reflects a misunderstanding of the tenets of issue preclusion. Where that finding was not essential to the original denial of benefits, because the ALJ ultimately denied benefits on another basis, or used alternative bases, issue preclusion would not prevent a second factfinder from making a different finding, based on his independent weighing of the evidence, in connection with an additional claim.

(e) One comment opposes the revised version of § 725.309, suggesting it represents a revised application of the common law concept of claim preclusion to adjudications under the Act. In fact, however, with one exception in the case of survivors' entitlement, the revised version of section 725.309 functions no differently than the former regulation with respect to this common law doctrine. As the Department observed in its initial proposal, its ''one-element'' rule, allowing a miner to avoid claim preclusion by establishing one of the conditions of entitlement decided against him in the previous adjudication, derives from a series of appellate decisions adopting the Department's interpretation of the former regulation. *See* 62 FR 3351 (Jan. 22, 1997); *see also* 64 FR 54984 (Oct. 8, 1999). The provision requiring the denial of survivors' claims is also substantially the same as the former rule. Like the revised version, the former rule was subject to waiver just as any other affirmative defense would be under common law. *See Clark* v. *Director, OWCP,* 838 F.2d 197, 200 (6th Cir. 1988) (permitting the Director to waive reliance on section 725.309). The provision governing additional survivors' claims has been altered only in order to accommodate revisions to section 725.213, which will explicitly permit a remarried survivor to establish her entitlement to benefits upon ending her marriage. Accordingly, the Department does not agree that it has substantially revised the applicability of the common law doctrine of claim preclusion under the Black Lung Benefits Act.

(f) One comment argues that the one-element test codified by the revised regulation violates the principles of issue preclusion. The commenter suggests that an X-ray that is found not to be credible in an earlier adjudication may not be credited in a subsequent adjudication. Common law principles of issue preclusion, however, do not require such a result. Instead, once a claimant has submitted new evidence in order to establish one of the elements of entitlement previously resolved against him, an administrative law judge must conduct a *de novo* weighing of the evidence relevant to the remaining elements, regardless of whether any of that evidence is newly submitted. The Court of Appeals for the Seventh Circuit discussed this issue at length in *Peabody Coal Co.* v. *Spese,* 117 F.3d 1001 (7th Cir. 1997) (en banc). It held as follows:

> The law of preclusion also bars relitigation of issues between the same parties when those issues were actually litigated and necessary to the decision of the earlier tribunal. *See Astoria Fed. Sav. & Loan Ass'n* v. *Solimino,* 501 U.S. 104, 107, 111 S.Ct. 2166, 2169, 115 L.Ed.2d 96 (1991) (preclusion applies to administrative agency acting in judicial capacity to resolve fact issues properly before it); *United States* v. *Wyatt,* 102 F.3d 241, 245 n. 5 (7th Cir. 1996), cert. denied, __ U.S. __, 117 S.Ct. 1325, 137 L.Ed.2d 486 (1997); *Waid* v. *Merrill Area*

Public Schools, 91 F.3d 857, 866 (7th Cir. 1996) (state agency hearing). * * *

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[The Fourth Circuit, in *Lisa Lee Mines* v. *Director, OWCP,* 86 F.3d 1358 (4th Cir. 1996) (en banc), *cert. denied,* 519 U.S. 1090 (1997)] pointed out, correctly, that a claimant who loses on three possible alternate grounds has no incentive to take an appeal to ''correct'' the agency on grounds 2 and 3, even if he thinks there was error, if ground 1 is unassailable. Assuming that the passage of time has led to a material change in ground 1 and he can demonstrate this to the Director, the question is whether he should be barred from proceeding on a new claim just because he has not also developed new evidence to negate grounds 2 and 3. Under the Director's ''one-element'' approach, as endorsed by the Fourth Circuit and others, * * * the answer is no. This answer is consistent with general principles of issue preclusion, under which holdings in the alternative, either of which would independently be sufficient to support a result, are not conclusive in subsequent litigation with respect to either issue standing alone. *See Lisa Lee Mines,* 86 F.3d at 1363, citing Restatement (Second) of Judgments § 27, comment i (1982); *Comair Rotron, Inc.* v. *Nippon Densan Corp.,* 49 F.3d 1535, 1538 (Fed. Cir. 1995) (issue on which preclusion is sought must have clearly been necessary to judgment); *Baker Elec. Co-op., Inc.* v. *Chaske,* 28 F.3d 1466, 1475 (8th Cir. 1994); *Gelb* v. *Royal Globe Insur. Co.,* 798 F.2d 38, 45 n. 6 (2d Cir. 1986).
117 F.3d at 1008.

The commenter's example, an X-ray that is found not to be credible in the previous adjudication, illustrates the operation of the regulation. If the prior claim was denied solely on the basis that the miner failed to establish the existence of pneumoconiosis, the commenter's concern about a re-weighing of the X-ray evidence submitted in the prior adjudication is simply unfounded. Because this was the only issue resolved against the claimant, he must introduce new evidence that demonstrates the existence of the disease if he is to avoid an automatic denial of an additional claim. Consequently, the factfinder may not award benefits simply by redetermining the credibility of the earlier evidence. In most cases, however, the denial of the prior claim will rest on multiple findings. For example, an administrative law judge may conclude that the claimant has not established either that he suffers from pneumoconiosis or that he suffers from a totally disabling respiratory impairment. In such a case, the Department's regulation, consistent with the principles of issue preclusion set forth in *Spese,* requires that the claimant submit new evidence relevant only to one of the issues. If he submits new evidence that establishes his total disability, the factfinder must weigh the X-ray evidence *de novo.* Far from contravening accepted principles of issue preclusion, the Department's regulation gives those principles full force and effect. The commenter's suggestion, that a party must be bound by a credibility determination that it was unable to overturn on appeal, turns those principles on their head.

(g) One comment suggests that the Department would breach its fiduciary duty to the Black Lung Disability Trust Fund in any case in which it affirmatively waived its right to rely on the automatic denial of an additional survivor's claim. The Department's obligation to the Trust Fund is to ensure that the Fund not be required to pay non-meritorious claims, *i.e.,* that the Trust Fund does not pay benefits to individuals who do not meet the statutory eligibility criteria. Where appropriate, the Department will invoke the automatic denial provision in order to reduce the transaction costs that the Fund would incur in defending a non-meritorious survivor's claim. The Department does not believe, however, that it is obligated to invoke claim preclusion in order to bar a claim in which a surviving spouse meets all of the conditions of entitlement and simply erred in filing a first application while remarried.

(h) One comment suggests that the Department should penalize individuals who file an additional claim without a change in condition. The Department disagrees. In its second notice of proposed rulemaking, the Department announced its desire to reduce the costs associated with non-meritorious claims by providing applicants with a more realistic view of their possible entitlement based on better pulmonary evaluations and better reasoned explanations of the denials of their claims. 64 FR 54968, 54984 (Oct. 8, 1999). The Department also explained, however, that it did not believe that it was appropriate to penalize an applicant simply because he had filed a previous claim for benefits prematurely. *Id.* The complete pulmonary evaluation provided by the Department includes difficult tests, and the Department does not believe that a miner would deliberately subject himself to that testing if he did not truly believe that he met the Act's eligibility criteria. Moreover, preventing a miner from filing an additional claim merely on the grounds that a previous additional claim was denied may result in the denial of benefits to individuals who meet the Act's eligibility requirements. Even requiring miners to wait an additional period of time between additional claims would involve similar risks. The average applicant for benefits is over 60 years old, and any delay in the receipt of benefits may effectively deny them the right to receive benefits and appropriate medical treatment. Accordingly, the Department does not intend to ''penalize'' individuals who file unsuccessful subsequent claims.

(i) A number of comments object that the revisions encourage the repeated relitigation of cases without Congressional authority. The Department has previously explained that section 725.309 does not allow the relitigation of denied claims. 64 FR 54968, 54984–85 (Oct. 8, 1999). Once a claim has been denied, and the one-year time period for modification has passed, a claimant cannot thereafter seek to have that claim reopened. Even if he prevails on a subsequent claim, the miner will be unable to obtain benefits for any period prior to the date on which the earlier denial became final. Thus, rather than encouraging repeated relitigation, the Department is simply effectuating Congressional intent that miners who are totally disabled due to pneumoconiosis receive compensation for their injury. Additional or subsequent claims must be allowed in light of the latent, progressive nature of pneumoconiosis. Thus, the additional claim is a different case, with different facts (if the claimant is correct that his condition has progressed). There is no indication that Congress intended to deny a miner benefits, or otherwise penalize him, for erroneously filing an application before his disease had progressed to the point of total disability.

Moreover, as the Department explained in its second notice of proposed rulemaking, the revised version of § 725.309 does not have a reopening effect equivalent to that of H.R. 2108. 64 FR 54972 (Oct. 8, 1999). The House of Representatives passed H.R. 2108 in 1994, but the Senate adjourned without taking action on the legislation. If enacted, the bill would have required the *de novo* consideration of any claim filed on or after January 1, 1982, without regard to any earlier denials. The Department's regulation does not have that effect. It simply codifies the Department's former rule, as interpreted by the appellate courts, and provides procedures to be followed upon the filing of an additional claim covering later periods of alleged benefit entitlement. Accordingly, the Department is not authorizing the reopening or relitigation of claims in excess of Congressional authority. In addition, as the Department has previously explained, Congress' failure to enact legislation governing additional claims does not prevent the Department

from promulgating regulations on that subject as long as the regulations are issued pursuant to an appropriate grant of statutory authority. *Ibid.*

(j) One comment suggests that the Black Lung Disability Trust Fund should be liable for the payment of any subsequent claims that are approved. The commenter states that imposing the liability for these claims on the insurance industry is fundamentally unfair. The Department disagrees. As revised, section 725.309 does not alter the adjudication of additional claims in any substantive manner. Since 1978, section 725.309 has recognized the need for allowing additional claims and provided the conditions under which such claims could be approved. As the Department has repeatedly emphasized, the revised regulation simply effectuates the gloss given this regulation by the federal courts of appeals. The Department recognizes that additional claims filed after the effective date of these regulatory revisions will be adjudicated under new procedural rules, and under regulations that clarify the entitlement criteria in Part 718 in a manner consistent with appellate interpretations of the existing criteria. The insurance policies purchased by coal mine operators to secure their liability under the Black Lung Benefits Act require the insurer to assume the risk of adverse appellate court interpretations of the statute and regulations as well as the possibility of revision of the statutory criteria. *See* 20 CFR 726.203(b) (1999) (insurance endorsement). Accordingly, the Department does not agree that the insurance industry is entitled to relief from the effect of revising § 725.309.

(k) A number of comments voice their approval of the changes in the Department's second notice of proposed rulemaking. No other comments have been received concerning this section and no other changes have been made to it.

20 CFR 725.310

(a) In its first notice of proposed rulemaking, the Department proposed amending subsection (b) to limit the documentary medical evidence that parties are entitled to submit in connection with a request for modification. 62 FR 3353 (Jan. 22, 1997). The Department amended subsection (c) to reconcile a number of appellate decisions concerning the district director's ability to conduct modification proceedings under the Black Lung Benefits Act and to ensure that any party requesting modification receives a *de novo* adjudication of the existing evidence of record. The Department also revised subsection (d) with the stated purpose of prohibiting the recovery, by either the Trust Fund or a responsible operator, of benefits paid pursuant to a final award of benefits that is later modified. In its second notice of proposed rulemaking, the Department added two provisions to subsection (d). The first would allow the recovery of any benefits that were paid when the claimant was at fault in creating the overpayment. The second provision implemented the Department's intention to bar recovery of overpayments arising from modification of awards where the award was final before initiation of the modification proceedings. 64 FR 54985–86 (Oct. 8, 1999). In addition, the Department proposed revising the evidentiary limitation in subsection (b) to correspond to similar changes in § 725.414. Finally, the Department responded to comments addressing the responsibility of factfinders to reweigh the evidence of record on modification, and the district director's authority to initiate modification in responsible operator cases.

(b) One comment argues that the Department's proposed regulation destroys the effect of claim preclusion and issue preclusion, while another comment suggests that the revised regulation would allow an adjudicator simply to reweigh the evidence of record and reach a conclusion different from the one reached before. Both observations are correct, and both outcomes are mandated by the statutory language that the regulation implements, 33 U.S.C. 922, incorporated into the Black Lung Benefits Act by 30 U.S.C. 932(a). In *Banks* v. *Chicago Grain Trimmers Association*, 390 U.S. 459 (1968), the Supreme Court reversed an appellate court's holding that a claimant's modification request was barred by *res judicata*, or claim preclusion. Instead, the Court held that the statute clearly authorized reopening compensation awards in order to correct factual errors. In *O'Keeffe* v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255 (1972), the Court held that a factfinder was authorized to grant modification under section 22 ''merely on further reflection on the evidence initially submitted.'' *See also Betty B Coal Co.* v. *Director, OWCP (Stanley)*, 194 F.3d 491, 497 (4th Cir. 1999) (modification procedure is extraordinarily broad, especially insofar as it permits the correction of mistaken factual findings); *The Youghiogheny & Ohio Coal Co.* v. *Milliken*, 200 F.3d 942, 954 (6th Cir. 1999) (ALJ has the authority on modification simply to rethink his conclusions). One commenter also objects that the regulation would prohibit an administrative law judge from simply denying a modification request based on the claimant's failure to present additional evidence. In its second notice of proposed rulemaking, the Department observed that the Supreme Court's *O'Keeffe* decision requires this result. 64 FR 54986 (Oct. 8, 1999). Accordingly, the commenters' observations do not provide a basis for altering the Department's proposal.

(c) Two comments renew the argument that the Department should not be able to initiate modification in responsible operator cases. The Department responded to a similar comment in its second notice of proposed rulemaking by citing the clear statutory language providing the district director with the independent authority to initiate modification. (''Upon his own initiative, * * *, on the ground of a change in conditions or because of a mistake in a determination of fact * * * the deputy commissioner may * * * issue a new compensation order. * * * 33 U.S.C. 922(a), as incorporated by 30 U.S.C. 932(a)). The Department also observed that there were awarded cases in which a coal mine operator is nominally liable for the payment of benefits but, because of bankruptcy, dissolution, or other events, can no longer pay. In such cases, the Department noted the district director's need to exercise his modification authority. 64 FR 54986 (Oct. 8, 1999). In response, one commenter requests that the Department limit its authority to initiate modification to those specific cases involving operator bankruptcy. The Department declines to do so. The district director's initiation of modification in any case, whether the defendant is a responsible operator or the Trust Fund, is consistent with Congress's intent. Congress has included in the Black Lung Benefits Act section 22 of the Longshore and Harbor Workers' Compensation Act, a workers' compensation program in which the overwhelming majority of cases represent disputes between an employee and his private employer. Thus, Congress clearly contemplated that the district director would exercise his modification authority in cases involving private employers. The examples provided by the Department in its second notice of proposed rulemaking were not intended to be an exclusive listing of the circumstances in which a district director would be justified in initiating modification in a responsible operator case. Because the

Department does not believe it can readily identify all of the circumstances in which district director-initiated modification would be appropriate, it does not intend to limit the district director's discretion in the initiation of modification proceedings.

(d) One comment argues that an operator seeking to modify a benefits award should not be able to obtain new pulmonary testing, but should instead be limited to the report of one consultant. The commenter also argues, however, that miners should be able to submit the results of additional testing in support of a modification petition seeking to change a denial of benefits to an award. The Department does not agree that opposing parties should be governed by different evidentiary rules. One of the Department's goals in proposing a limitation on the submission of documentary medical evidence, as reflected in § 725.414 and § 725.310, is to ensure that claimant and the responsible operator have an equal opportunity to present the highest quality evidence to the factfinder. That goal would not be served by creating an evidentiary advantage for a claimant who requests modification of a denial of benefits. In such cases, both the claimant and the responsible operator, or Trust Fund in appropriate cases, will be entitled to submit one medical report, and associated testing, as well as appropriate rebuttal evidence, as outlined in the Department's second notice of proposed rulemaking.

(e) One comment argues that in light of the evidentiary limitations imposed by section 725.310 and 725.408, an operator will be deprived of its ability to seek modification of an erroneous responsible operator determination that is discovered after the hearing. The Department disagrees that the regulations will always prevent an operator from seeking modification of a responsible operator determination based on newly discovered evidence. It is true, however, that the regulations limit the types of additional evidence that may be submitted on modification and, as a result, an operator will not always be able to submit new evidence to demonstrate that it is not a potentially liable operator.

The Department explained in its previous notices of proposed rulemaking that the evidentiary limitations of §§ 725.408 and 725.414 are designed to provide the district director with all of the documentary evidence relevant to the determination of the responsible operator liable for the payment of benefits. The regulations recognize, and accord different treatment to, two types of evidence: (1) Documentary evidence relevant to an operator's identification as a potentially liable operator, governed by § 725.408; and (2) documentary evidence relevant to the identity of the responsible operator, governed by § 725.414 and 725.456(b)(1). Under section 725.408, a coal mine operator that has been identified as a potentially liable operator by the district director with respect to a particular claim for benefits must contest that identification within 30 days of the date on which it receives that notification, and must submit certain evidence within 90 days of receipt of notification. § 725.408(a), (b). The specific issues on which the operator must submit all of its documentary evidence within this 90-day period include whether the operator was an operator after June 30, 1973; whether it employed the miner for a cumulative period of not less than one year; whether the miner was exposed to coal mine dust while working for the operator; whether the operator employed the miner for at least one day after December 31, 1969; and whether the operator is financially capable of assuming liability for the payment of benefits. The time period for submitting this evidence may be extended for good cause, § 725.423, but the operator may not thereafter submit any further documentary evidence on these issues. § 725.408(b)(2).

Sections 725.414 and 725.456(b)(1) govern the remaining documentary evidence relevant to the liability issue, *i.e.,* evidence relevant to which of the miner's former employers is the responsible operator according to the criteria set forth in § 725.495. Under § 725.414, an operator may submit documentary evidence to prove that a company that more recently employed the miner should be the responsible operator. This evidence must be submitted to the district director in accordance with a schedule to be established by the district director. § 725.410. Additional documentary evidence may be submitted only upon a showing of extraordinary circumstances. § 725.456(b)(1).

The operator's ability to seek modification based on additional documentary evidence will thus depend on the type of evidence that it seeks to submit. Where the evidence is relevant to the designation of the responsible operator, it may be submitted in a modification proceeding if extraordinary circumstances exist that prevented the operator from submitting the evidence earlier. For example, assume that the miner's most recent employer conceals evidence that establishes that it employed the miner for over a year, and that as a result an earlier employer is designated the responsible operator. If that earlier employer discovers the evidence after the award becomes final, it would be able to demonstrate that extraordinary circumstances justify the admission of the evidence in a modification proceeding.

That same showing, however, will not justify the admission of evidence relevant to the employer's own employment of the claimant. Under § 725.408, all documentary evidence pertaining to the employer's employment of the claimant and its status as a financially capable operator must be submitted to the district director. The comment appears to suggest that there will be cases in which an operator discovers evidence bearing on its own employment of the miner after the period for submitting evidence has closed. The Department does not believe that there are extraordinary circumstances sufficient to justify the admission of this evidence in any further proceedings. The evidence in question is within the control of the operator notified by the district director or, where an insurance company is the real party-in-interest, in the control of a party with whom that insurer has contracted to provide necessary coverage. The time period set forth in section 725.408 is adequate to permit a full investigation and development of this evidence. If the operator or insurer is unable to locate the evidence within that period, it should seek an extension of time from the district director.

A party's ability to seek reconsideration under § 22 of the Longshore and Harbor Workers' Compensation Act is subject to the limitation that reconsideration must ''render justice under the Act.'' *McCord* v. *Cephas,* 532 F.2d 1377, 1380–81 (D.C. Cir. 1976). In *McCord,* an employer declined to supply evidence and participate in the initial adjudication of the claimant's application for benefits under the Longshore and Harbor Workers' Compensation Act. After the award became final, the employer sought reconsideration. The D.C. Circuit held that although the adjudication officer had jurisdiction to consider the employer's request, his consideration should take the interests of justice into account. *See also General Dynamics Corp.* v. *Director, OWCP,* 673 F.2d 23, 25 (1st Cir. 1982). In order to properly administer the Black Lung Benefits Act in accordance with this expression of Congressional intent, S.Rep. No. 588, 73d Cong., 2d Sess., 3–4 (1934); H.R.Rep. No. 1244, 73d Cong., 2d Sess.,

4 (1934), the Department has balanced the desire of operators to request modification against the Department's interest in ensuring that potentially liable operators submit all of the evidence relevant to their employment of the miner while the claim is first pending before the district director. The Department believes that it is appropriate to prohibit an operator's ability to introduce, in a modification proceeding, ''new'' evidence relevant to the operator's employment of the miner or the operator's status as a financially capable operator.

(f) One comment argues that the Department has not taken sufficient steps to prevent the misuse of modification by claimants who file repeated modification petitions. The commenter has supplied no information that suggests there is a widespread problem involving the filing of non-meritorious modification petitions by claimants. Like operators, claimants may only obtain such reconsideration as will render justice under the Act, and operators remain free to assert, on a case-by-case basis, that the application of this standard requires a denial of a claimant's request for modification. The Department does not believe, however, that it should establish numerical or temporal limitations (*e.g.,* limiting claimants to a maximum number of modification requests, or no more than a certain number in a given time period) on a claimant's right to seek modification. Congress's overriding concern in enacting the Black Lung Benefits Act was to ensure that miners who are totally disabled due to pneumoconiosis arising out of coal mine employment, and the survivors of miners who die due to pneumoconiosis, receive compensation. Because any limitation on the right to file modification petitions could deny, or delay, the payment of compensation to eligible claimants, the Department does not believe that such limitations are appropriate.

(g) One comment suggests that the proposal authorizes claimants to petition for modification in order to avoid the repayment of an overpayment. The Department does not believe that the regulation addresses this situation. The Department's current practice, in cases in which payments from the Black Lung Disability Trust Fund have been made based on the district director's initial determination, and benefits have subsequently been denied by a higher tribunal, has been to suspend the collection of any potential overpayment if that denial has been appealed further. The Department currently permits its district directors to exercise discretion as to whether to suspend collection where the original denial has become final and the claimant has filed a request for modification. For example, in cases where the request is based solely on a change in the miner's condition, a district director could reasonably conclude that the overpayment of benefits for a period prior to that change should not be suspended. In both former § 725.547(c) and new § 725.549(a), district directors are permitted to ''issue appropriate orders to protect the rights of the parties.'' The Department anticipates that any disputes over the collection of overpayments will be resolved under that provision. Accordingly, there is no need to address the collection of overpayments in the regulation governing modification.

(h) No other comments have been received concerning this section, and no other changes have been made to it.

20 CFR 725.311

(a) The Department proposed revising § 725.311 in its first notice of proposed rulemaking in order to remove the rule allowing parties an additional 7 days within which to respond to a document that is sent by mail, and to add the birthday of Martin Luther King, Jr., to the list of legal holidays contained in the regulation. 62 FR 3354 (Jan. 22, 1997). The Department also sought to resolve a split between the Courts of Appeals for the Fourth and Tenth Circuits governing the time period for responding to a document which was supposed to be served by certified mail but was not. *Compare Dominion Coal Corp.* v. *Honaker*, 33 F.3d 401, 404 (4th Cir. 1994) with *Big Horn Coal Co.* v. *Director, OWCP*, 55 F.3d 545, 550 (10th Cir. 1995). In a case in which the party actually received the document, notwithstanding improper service, the rule would commence the time period for response upon a party's actual receipt of the document. The Department did not address this regulation in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999).

(b) One comment objects to deletion of the seven-day grace period, formerly applicable to all documents sent by mail, arguing that the Department has no good reason to eliminate it. The commenter also suggests that, if the grace period is not replaced with something else, the regulation will cause unnecessary litigation over deadlines and the unnecessary deprivation of the parties' rights.

When the Department first proposed section 725.311, *see* 43 FR 17743–44 (April 25, 1978), the regulation contained a three-day mailing rule which paralleled the rule in the Federal Rules of Civil Procedure. *Compare* Fed. R. Civ. P. 6(e). In the final rule, the Department changed the time period to seven days ''[i]n view of the difficulties encountered in mail deliveries in many rural coal mining areas.'' 43 FR 36786 (Aug. 18, 1978). The Department's experience in administering the black lung benefits program, however, has suggested that the grace period contained in the former regulation was a source of confusion for the parties as well as for the district directors. For example, it could be argued that the former regulation added an additional seven days to the one-year time limit for filing a modification petition, or the 30-day time limit for filing a response to a proposed decision and order. The federal rule has engendered similar litigation. *See, e.g., FHC Equities* v. *MBL Life Assurance Corp.*, 188 F.3d 678, 681–82 (6th Cir. 1997) (rule does not apply to time periods that begin with entry of an order or judgment).

Accordingly, the Department has eliminated the seven-day grace period insofar as it formerly applied to all documents served by mail. The Department believes that, rather than increasing litigation, the revised regulation will provide the parties with more exact notice of when pleadings are due, and thus will reduce litigation over issues raised by the seven-day grace period. As a general rule, the analogy between the Department's black lung regulations and the federal rules is inexact. The federal rules govern the filing of a variety of pleadings, including responses to complex motions. Rule 6(e) attempts to ensure that a party receives the full amount of time—usually thirty days—allotted by the drafters of the rules for preparing a response. In contrast, the documents whose filing is governed by Part 725 are relatively straightforward and simple. They include responses to a schedule for the submission of evidence issued under § 725.410, which will contain the district director's designation of the responsible operator, and a proposed decision and order issued under § 725.418. The regulations require that a party do no more within the initial 30-day period following the issuance of these documents than indicate its agreement or disagreement with the assertions or findings contained in the document. The Department believes that this 30-day time period, commencing with the date the document is sent, provides ample time for the parties' responses. Deleting the grace period

ensures that all parties to a claim, including claimants who are not represented by an attorney, are able to ascertain their response time from the date of a document.

The Department recognizes that one of the filings governed by Part 725 is more complex. Section 725.408 requires that an operator that has been identified by the district director of its status as a potentially liable operator must accept or contest that identification within 30 days of the date on which it receives notification from the district director. That response requires the operator to address five specific assertions: that the operator was an operator after June 30, 1973; that the operator employed the miner for a cumulative period of not less than one year; that the miner was exposed to coal mine dust while working for the operator; that the miner's employment with the operator included at least one working day after December 31, 1969; and that the operator is capable of assuming liability for the payment of benefits. That response requires more investigation than the others in Part 725. In addition, unlike the other response times governed by Part 725, the operator's response does not begin to run on the date that the notification is mailed, but on the date that it is received. In order to ensure that operators have the full 30 days in which to file their responses, and to allow the Department to assess the timeliness of that response, the Department has added a sentence to subsection (d). This provision will allow the district director to presume, in the absence of evidence to the contrary, that the notice was received seven days after it was mailed.

(c) One comment urges enlarging the number of communications which must be sent by certified mail to include several types of decisional documents issued by the district director. Specifically, the commenter suggests use of certified mail to serve the following documents: initial determination; proposed decision and order; decision on modification; denial by reason of abandonment; notice of conference; and memorandum of conference. The Department's revised regulations ensure that all important documents are served by certified mail. See proposed § 725.407(b) notification of potentially liable operator, § 725.409(b) (denial by reason of abandonment); § 725.410(c) (evidentiary submission schedule); § 725.418(b) (proposed decision and order). The revised regulations eliminate the district director's initial finding and memorandum of conference. The ''initial determination'' is a document, served on all the parties after the issuance of a proposed decision and order, requesting that the designated responsible operator commence the payment of benefits. It does not require a written response. 20 CFR 725.420 (1999). With respect to a case in which a petition for modification is being adjudicated, the district director may issue either a proposed decision and order or a denial by reason of abandonment at the conclusion of the proceedings; both of these documents must be served by certified mail. The Department believes the current requirements provide adequate protection for the parties, and therefore declines to add the notice of conference to the list of documents which must be served by certified mail. Section 724.416, governing the conduct of informal conferences, permits the imposition of sanctions only for a party's unexcused failure to attend. In the case of a claimant, the district director must offer the claimant an opportunity to explain why he did not appear at the conference. *See* § 725.409(b). The Department believes that failure to receive the notice of conference would constitute an adequate explanation for a claimant's failure to appear. Similarly, any employer against whom the district director has imposed sanctions for an unexcused failure to appear at an informal conference may request reconsideration based on its failure to receive the required notice. Obviously, district directors may obviate the need for disputes over whether a party received the notice by sending it via certified mail.

(d) Two comments urge the Department to afford a party either a rebuttable presumption or a conclusive finding of non-receipt of a document if it must be sent by certified mail, the party alleges a failure to receive it, and the Department cannot produce a signed return receipt. The recommended presumption is not necessary. In the foregoing circumstances, an allegation of non-receipt and absence of the signed return receipt is sufficient to impose on the Department the burden to prove by some other evidence that the individual received the document. The lack of the signed receipt itself, however, should not be conclusive if other circumstances demonstrate the individual actually received the document. The Department therefore declines to amend the proposal.

(e) One comment argues that subsection (d) is inconsistent with existing law. The commenter believes subsection (d) requires the response time to commence upon *service* of the document rather than the *date of actual receipt* when a document is served in violation of the certified mail requirement. Subsection (d), however, states that the response time ''shall commence on the date the document was received.'' The provision is therefore clear that only actual receipt of a document served in violation of a certified mail requirement commences the recipient's time for response.

(f) No other comments concerning this section were received, and no changes have been made in it.

Subpart D

20 CFR 725.351

The Department made only technical changes to section 725.351 in its initial notice of proposed rulemaking, and the rule was not open for comment. *See* 62 FR 3340–41 (Jan. 22, 1997). In its second notice of proposed rulemaking, the Department proposed deleting the requirement in subsection (a)(3) that a district director must seek the approval of the Director, OWCP, before issuing a subpoena to compel the production of documents. 64 FR 54986–87 (Oct. 8, 1999). No comments were received concerning this section, and no changes have been made in it.

20 CFR 725.362

In its initial notice of proposed rulemaking, the Department proposed revising section 725.362 in order to conform the regulation to the requirements of 5 U.S.C. 500(b), which allows an attorney to enter an appearance without submitting an authorization signed by the party he represents. The Department also proposed adding a requirement that a notice of appearance, whether by an attorney or by a lay representative, include the OWCP number of the claim. 62 FR 3354 (Jan. 22, 1997). The Department did not discuss the rule in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999). No comments were received concerning this section, and no changes have been made in it.

20 CFR 725.365

The Department received one comment relevant to § 725.365. This section was not open for comment; it was repromulgated without alteration for the convenience of the reader. *See* 62 FR 3341 (Jan. 22, 1997); 64 FR 54970 (Oct. 8, 1999). Therefore no changes are being made in it.

20 CFR 725.366

The Department has received one comment relevant to § 725.366. This

section had only technical revisions made to it and was not open for comment, *see* 62 FR 3341 (Jan. 22, 1997); 64 FR 54970 (Oct. 8, 1999). Therefore no changes are being made in it.

20 CFR 725.367

(a) In its initial notice of proposed rulemaking, the Department proposed a number of revisions to clarify the application of section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 928, as incorporated by 30 U.S.C. 932(a), and made relevant to adjudications under the Black Lung Benefits Act. 62 FR 3354 (Jan. 22, 1997). The regulation provided a non-exclusive list of instances in which an operator could be held liable for the payment of a claimant's attorney's fee, and recognized the Trust Fund's liability for fees by making it coextensive with that of a responsible operator. The Department proposed a substantial revision of this regulation in its second notice of proposed rulemaking. 64 FR 54987–88 (Oct. 8, 1999). Because the evidentiary limitations proposed by the Department make legal representation for claimants advisable at the earliest possible stage of claims adjudication, the Department revised the regulation to require operators or the Trust Fund to pay a reasonable fee for any necessary work done even if the work was performed prior to the date on which the operator controverted the claimant's entitlement to benefits. Thus, although the creation of an adversarial relationship and the ultimately successful prosecution of a claim were still necessary to trigger employer or fund liability for attorneys' fees, the date on which the adversarial relationship commenced no longer served as the starting point for such liability. The Department rejected comments suggesting that lay representatives should be entitled to collect fees from responsible coal mine operators or the fund. The Department also discussed the several appellate court decisions and their impact on responsible operator and fund liability for attorneys' fees.

(b) The Department has revised the first sentence of subsection (a)(1) and the first sentence of subsection (a)(2) in order to reflect changes to §§ 725.410 and 725.412. In place of the former initial finding, the district director will issue a schedule for the submission of additional evidence under § 725.410. This schedule will include the district director's preliminary analysis of the medical evidence of record, and his designation of the responsible operator liable for the payment of benefits. Section 725.412 provides that, following receipt of the schedule, the designated responsible operator may file a statement accepting the claimant's entitlement to benefits. The operator may avoid any liability for attorneys' fees by filing this statement within 30 days of the issuance of the schedule. If it fails to do so, the responsible operator will be considered to have created an adversarial relationship between the operator and the claimant. If the district director exercises his authority under § 725.415 or § 725.417 to issue another schedule for the submission of additional evidence in order to designate a different operator as the responsible operator, and that operator is ultimately determined to be liable for the payment of benefits, that operator will be liable for the payment of attorneys' fees only if it fails to accept the claimant's entitlement within 30 days of the date upon which it is notified of its designation. In cases where there is no operator liable for the payment of benefits, the district director's issuance of a schedule for the submission of additional evidence will create the adversarial relationship between the Black Lung Disability Trust Fund and the claimant, such that the Trust Fund will be liable for attorneys' fees if the claim is successfully prosecuted. Similarly, in subsection (a)(4) the Department has deleted the reference to an operator's ''notice of controversion'' contesting a claimant's request for an increase in the amount of benefits payable. As revised, the regulations do not require a specific notice of controversion to create the adversarial relationship between a claimant and an employer.

The Department has also substituted the phrase ''reasonable fees for necessary services'' for the phrase ''fees for reasonable and necessary services'' in subsection (a), and has substituted the phrase word ''necessary'' for the word ''reasonable'' in subsections (a)(1)–(5). The changes make the regulation consistent with § 725.366(a). The previous wording was not intended to create a different test for gauging the need for an attorney's services, and the revision will eliminate any potential confusion.

(c) Two comments argue that the Department's proposal violates the plain language of the incorporated provision of the Longshore and Harbor Workers' Compensation Act governing the payment of attorneys' fees. Specifically, they argue that section 28 permits employer liability for a claimant's attorney's fees only for services rendered after the employer controverts the applicant's eligibility for benefits. One of the commenters also cites the expectation, created by the statute, that a claimant is responsible for a portion of the fees owed to his attorney and specifically the fee for any service provided before the employer controverts the applicant's entitlement. The commenter suggests that, by removing that responsibility from the claimant, the Department has not properly implemented the statute.

The Department does not agree that the revised regulation violates the plain language of the statute. The only court to have considered this issue is the Court of Appeals for the Fourth Circuit. In *Kemp* v. *Newport News Shipbuilding and Dry Dock Co.,* 805 F.2d 1152 (4th Cir. 1986), the court held that the LHWCA is ambiguous on the issue of whether an employer may be liable for attorneys' fees incurred by a claimant before the employer has controverted the claimant's entitlement. 805 F.2d at 1153. Instead, the statute provides only that an employer will be liable for attorneys' fees after it contests the applicant's entitlement, leaving unresolved the starting point of such liability. The court recently reiterated its interpretation of LHWCA § 28 in *Clinchfield Coal Co.* v. *Harris,* 149 F.3d 307, 310–11 (4th Cir. 1998). In resolving statutory ambiguity through the regulatory process, the Department is entitled to select any reasonable interpretation that is consistent with Congressional intent. *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council,* 467 U.S. 837, 842–3 (1984).

The Department is fundamentally altering the obligations of the parties at the district director level in a manner that will encourage claimants to consult with attorneys much earlier in the process. Among other things, the Department is limiting the quantity of medical evidence that all parties are entitled to submit. In addition, at the claimant's request, the Department will provide his treating physician with the test results obtained during the complete pulmonary evaluation authorized by section 413(b) of the Act, 30 U.S.C. 923(b). Because these revisions will require claimants to make critical decisions at the earliest stage of adjudication, the regulations must also encourage attorneys to represent claimants as early as possible. The Department hopes that claimants will receive advice when that advice is most helpful. Insurance carriers, who are primarily liable in cases in which they provide insurance to the responsible operator, as well as self-insured operators, most commonly have the assistance of experienced attorneys and claims processing agents in the early

stages of claim development, and the Department believes that claimants should have comparable aid. Accordingly, the Department believes that it is justified in adopting a new interpretation as to the starting point of the employer's or the fund's liability for attorneys' fees.

In addition, contrary to the suggestion of the commenter, the Department's proposal does not eliminate all instances in which a claimant may be responsible for his attorney's fees. Section 28(c), 33 U.S.C. 928(c), states that ''[a]n approved attorney's fee, in cases in which the obligation to pay the fee is upon the claimant, may be made a lien upon the compensation due under an award.'' The commenter argues that a claimant will never be liable for attorneys' fees under the Department's proposal, and that the proposal thus contravenes the statutory language. The Department does have the authority to vary incorporated provisions of the Longshore Act for purposes of administering the Black Lung Benefits Act, *see* 30 U.S.C. 932(a). It has not done so in this case, however. Instead, the Department's regulation does contemplate that a claimant may be liable for an attorney's fee. 20 CFR 725.365. For example, in any case in which the liable party, either the Trust Fund or the operator, accepts the claimant's entitlement prior to the expiration of the 30-day period in § 725.412(b) but the claimant has nevertheless retained counsel who has performed services in connection with the claim, the prerequisite for shifting fee liability—the controversion of entitlement—has not been met. A similar case may arise where the operator initially designated the responsible operator by the district director fails to accept the claimant's eligibility, but the finally designated responsible operator does accept the claimant's eligibility. In such a case, the responsible operator would not be liable for the payment of the claimant's attorney's fee. Because the overwhelming majority of coal mine operators contest claimant eligibility at this stage, the Department does not expect this kind of case to arise often. In either case, however, the claimant remains responsible for any reasonable fees approved by the district director for necessary work performed in obtaining the award. Accordingly, the Department's revised attorney fee regulation does not violate any statutory command.

(c) One comment observes that the Department's revisions would expand the availability and award of attorneys' fees, while another argues that the Department's provision may not be applied retroactively. It has consistently been the Department's position that before liability for a claimant's attorney's fee may shift to a responsible operator or the fund, there must be a controversion of entitlement sufficient to create an adversarial relationship followed by the successful prosecution of a claim. Nothing in this regulation alters that requirement. The Department does agree, however, that once these prerequisites are met, the revised regulation could result in the award of higher attorneys' fees. The Department believes that an increase in attorneys' fees is necessary in order to encourage earlier attorney involvement in the adjudicatory process, and that such involvement will be helpful to claimants in light of the evidentiary restrictions imposed by these regulations. The Department also hopes to encourage a larger number of attorneys to represent claimants by allowing the award of higher fees. During the rulemaking hearings, witnesses repeatedly brought to the Department's attention that few attorneys are willing to represent claimants, in part because of the many restrictions on the award of attorneys' fees. Transcript, *Hearing on Proposed Changes to the Black Lung Program Regulations,* (June 19, 1997), p. 22 (testimony of Cecil Roberts); p. 168 (testimony of John Cline); pp. 238–239, 246 (testimony of Grant Crandall). The Department also agrees that the rule should not be applied retroactively, and has changed § 725.2 accordingly.

(d) Several comments agree with the Department's revisions, but two urge the Department to take further steps to increase the participation of attorneys in black lung benefits adjudications by providing additional attorney funding from the Black Lung Disability Trust Fund. Specifically, the commenters urge the Department to make funds available to pay black lung associations and other non-profit groups assisting claimants or to advance fees awarded to claimant attorneys litigating against responsible operators before the award of benefits becomes final. The commenters also urge the Department to repeal the prohibition on receiving fees for time spent preparing a fee petition, and to clarify the right of attorneys to obtain fees for time spent litigating their right to fees.

The Department cannot agree that amounts from the Trust Fund should be made available to pay additional attorneys' fees. In its initial proposal, the Department observed that one of its goals in revising the regulation of attorneys' fees was to ensure that the liability of the Trust Fund for such fees was coextensive with that of a liable coal mine operator. 62 FR 3354 (Jan. 22, 1997). This liability derives from a series of appellate court opinions holding that the Trust Fund must stand in the shoes of a coal mine operator in any case in which no operator may be held liable for the payment of benefits. 62 FR 3354 (Jan. 22, 1997). Those opinions rejected the Department's argument that the Trust Fund could not be held liable for any attorneys' fees. Although the Department's regulations have been revised to acknowledge the Trust Fund's liability under these circumstances, the Department does not believe that the statute can be read in the manner suggested by these commenters to authorize the expenditure of additional amounts of Trust Fund moneys to increase counsel availability for black lung claimants.

With respect to time spent preparing a fee petition and litigating the issue of attorneys' fees, two comments seek the revision of material in § 725.366. Because § 725.366 was not listed among the regulations open for comment, no changes are being made in it. 62 FR 3341 (Jan. 22, 1997); 64 FR 54970 (Oct. 8, 1999). Moreover, the regulation's current language does not prohibit an attorney from receiving a fee for time spent litigating the amount of his attorney's fees, and the Department does not believe that more explicit language is necessary. The Benefits Review Board has held that time spent by an attorney defending a fee represents ''necessary work done,'' so as to entitle the attorney to an additional fee under 20 CFR 802.203(c) (1999), *see Workman* v. *Director, OWCP,* 6 Black Lung Rep. (MB) 1–1281, 1–1283 (Ben Rev. Bd. 1984), and the Department believes that §§ 725.366 and 725.367 require the same result. The prohibition in § 725.366 on fees for time spent filling out a fee application presents an entirely different question from whether it is reasonable to require an employer who unsuccessfully challenges that application to pay a fee for the necessary additional time that the attorney was required to spend defending his fee request. Because the Department believes that the current regulations permit an award of attorneys' fees in the latter case, it is not necessary to change the regulation.

(e) No other comments were received concerning this section, and no changes have been made in it.

Subpart E

20 CFR 725.403

The Department made only technical revisions to § 725.403 in its first notice of proposed rulemaking, and the regulation was not open for comment. 62 FR 3341 (Jan. 22, 1997). In its second notice of proposed rulemaking, the Department proposed deleting § 725.403. 64 FR 54988 (Oct. 8, 1999). Section 725.403 implemented the requirement in 30 U.S.C. 923(c) that claimants who filed applications under the Black Lung Benefits Act between July 1 and December 31, 1973, 30 U.S.C. 925, must file a claim under the workers' compensation law of their state unless such filing would be futile. Because the time period for filing such claims expired over 25 years ago, the Department proposed removing § 725.403, and specifically invited comment on its removal. The Department did not receive any comments on the proposed removal of § 725.403 and therefore has removed it from further publications of the Code of Federal Regulations. The Department has not altered the rules applicable to any claim filed between July 1 and December 31, 1973, however. Parties interested in reviewing § 725.403 may consult 20 CFR 725.403 (1999).

20 CFR 725.404

The Department received one comment relevant to § 725.404. The Department made only technical revisions to this section, and the regulation was not open for comment; *see* 62 FR 3340–41 (Jan. 22, 1997); 64 FR 54970 (Oct. 8, 1999). Therefore no changes are being made in it.

20 CFR 725.405

(a) In its first notice of proposed rulemaking, the Department proposed revising subsection (b) to recognize its practice of refusing to provide a complete pulmonary evaluation to claimants who never worked as a miner. 62 FR 3354 (Jan. 22, 1997). The Department did not discuss § 725.405 in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999).

(b) Two comments argue the regulation is too limited because it does not address the district director's obligation to develop evidence other than medical evidence. The Department disagrees. The specific purpose of this regulation is stated in its title: ''Development of medical evidence; scheduling of medical examinations and tests.'' The development of evidence in general is addressed at § 725.404. In any event, subsection (d) of § 725.405 authorizes the district director to collect ''other evidence'' concerning the miner's employment and ''[a]ll other matters relevant to the determination of the claim.'' This language is sufficiently broad to acknowledge the district director's obligations concerning evidentiary development of a claim as well as the authority to discharge those obligations. No useful purpose would be served by a more specific enumeration of particular areas of inquiry in this provision.

The type of inquiry urged by these commenters is covered in more detail elsewhere in the Secretary's regulations. Section 725.495(b) imposes on the Director, OWCP, the burden of proving that the responsible operator designated liable for the payment of benefits is a potentially liable operator. In addition, § 725.495(d) requires that if the responsible operator designated for the payment of benefits is not the operator that most recently employed the miner, the district director must explain the reasons for his designation. These provisions make necessary the district director's gathering of a miner's employment history, including, in most instances, his Social Security earnings record. Indeed, § 725.404(a) requires each claimant to furnish the district director with a complete and detailed history of coal mine employment and, upon request, supporting documentation. The district director must send to each operator notified of its potential liability for a claim copies of the claimant's application and all evidence obtained by the district director relevant to the miner's employment. § 725.407(b), (c). If the district director concludes that the miner's most recent employer cannot be designated the responsible operator because it is not financially capable of assuming liability for the payment of benefits, the district director must explain his conclusion based on a search of the records maintained by the OWCP. § 725.495(d). Only if the OWCP has no record of insurance or authorization to self-insure for that last employer, and the record so states, may OWCP name an employer other than the miner's most recent as the responsible operator for the claim. Thus, the district director's obligation to develop the evidence of record, other than medical, is set forth elsewhere in the regulations where relevant.

(c) One comment recommends changing the regulatory reference to ''miner'' in paragraph (a) from § 725.202 to § 725.101(a)(19). This recommendation is rejected. While both sections define ''miner,'' § 725.202 provides the more detailed definition as well as the criteria and presumptions which apply to determining whether a particular individual satisfies the definition.

(d) No other comments were received concerning this section, and no changes have been made in it.

20 CFR 725.406

(a) In its first notice of proposed rulemaking, the Department proposed revising § 725.406 to address the relationship between the evidentiary limitations contained in § 725.414 and the complete pulmonary evaluation provided by the Department under 30 U.S.C. 923(b). 62 FR 3354–55 (Jan. 22, 1997). As initially proposed, § 725.406 retained the Department's practice of allowing a claimant to select the physician to perform the complete pulmonary evaluation at the Department's expense. In those cases, however, the report generated by the evaluation would have counted as one of the two reports that the claimant was entitled to submit into evidence. If, on the other hand, the claimant went to a physician selected by the Department, the evaluation would not count against the limitations imposed on the claimant. Instead, in cases in which the Black Lung Disability Trust Fund would bear liability for benefits, such a report would count as one of the two reports that could be offered by the Director. In cases in which a responsible operator was potentially liable for benefits, the complete pulmonary evaluation provided by a doctor of the Department's choosing would not have counted against the evidentiary limit imposed on either the responsible operator or the claimant. The Department also discussed its responsibilities for ensuring that the report, and each component of the evaluation, substantially complied with the Department's quality standards. Finally, the Department clarified the mechanism by which it might seek reimbursement of the cost of the evaluation from an operator that had been finally determined to be liable for the payment of claimant's benefits.

The Department proposed major revisions to § 725.406 in its second notice of proposed rulemaking. 64 FR 54988–990 (Oct. 8, 1999). The Department agreed with commenters who suggested that it placed an unnecessary burden on a claimant to choose whether or not to select a physician to perform his complete pulmonary evaluation. In most cases, such a choice would be made before a claimant obtained representation, and could result in a claimant being limited

thereafter to the submission of only one additional medical report. Accordingly, the Department proposed the creation of a list of physicians, authorized by the Department to perform complete pulmonary evaluations. Miners who applied for benefits would be required to select a physician from that list, but could choose any listed doctor either in their state of residence or from a contiguous state. The resulting evaluation would not be considered one of the two medical reports that a claimant was entitled to submit in support of his claim for benefits.

The Department further stated its intent to develop more rigorous standards for selecting physicians authorized to perform a complete pulmonary evaluation. The Department's suggested standards included: (1) Qualification in internal or pulmonary medicine; (2) ability to perform each of the necessary tests; (3) ability to schedule the claimant for an evaluation promptly; (4) ability to produce a timely, comprehensive report; and (5) willingness to answer follow-up questions and defend his conclusions under cross-examination. The Department specifically sought comment on these and other standards for selecting physicians to be included on its list, 64 FR 54989 (Oct. 8, 1999). In addition, the Department stated its intention to survey clinics and physicians on the fees they charged for these services, with the goal of attracting highly qualified doctors to perform the testing and evaluation required by the Department for the complete pulmonary evaluation. The Department also added subsection (d) to the proposed regulation in order to allow a claimant to have the Department send the objective test results obtained in connection with the complete pulmonary evaluation to his treating physician. The Department noted its intent to make available to each claimant at least one set of legally sufficient objective test results so that no claimant would be hindered by a lack of financial resources in pursuing his application for benefits. 64 FR 54989 (Oct. 8, 1999).

The Department rejected comments suggesting the deletion of subsection (e), permitting the district director to clarify ''unresolved medical issues.'' The Department also discussed comments concerning the district director's ability to determine whether all parts of the complete pulmonary evaluation were in substantial compliance with the Department's quality standards. The Department revised subsection (c) to provide a claimant whose initial tests do not comply with the quality standards due to a lack of effort with one additional opportunity to take those tests. Finally, the Department discussed its treatment of subsequent claims, in which the Department provides a new complete pulmonary evaluation, and modification requests, in which it does not. 64 FR 54989–90 (Oct. 8, 1999).

(b) Several comments continue to oppose subsection (e), observing that if the Department develops a list of highly qualified physicians to perform the complete pulmonary evaluation, it should have no need to seek the opinion of yet another physician at this stage of the adjudication. Another comment objects to the proposed substitution of evidence under subsection (e), calling it the destruction of relevant evidence. In response to the initial proposal, the same commenter objected to subsection (e) because the district director's authority to have the miner retested and reexamined invited piecemeal and protracted evidentiary development. The Department has reconsidered the authority granted by subsection (e), and agrees that the provision should be deleted. The Department has relabeled subsection (f) as subsection (e) to accommodate this revision. The deletion of subsection (e) does not affect the district director's authority under subsection (c) to determine whether the individual components of the complete pulmonary evaluation have been administered and reported in compliance with the Department's quality standards. The Department agrees, however, that the district director should have no need to send the claimant for additional examination and testing after completion of a complete pulmonary evaluation, the components of which are in substantial compliance with the applicable quality standards, § 725.406(a)–(c). Under revised § 725.406, the initial evaluation will be performed by a highly qualified physician who may be asked to clarify and/or supplement an initial report if unresolved medical issues remain.

(c) Two comments state that a miner should be entitled to choose an authorized physician anywhere in the country to perform his complete pulmonary evaluation rather than being limited to one from his state of residence or a contiguous state. The commenters state that claimants would be willing to pay the additional costs incurred as a result of such travel. Although the commenters suggest that there will not be a sufficient supply of physicians in some areas, such as Wyoming and Alabama, the Department has no evidence that would support that contention. Moreover, even if the Department is unable to obtain a sufficient pool of physicians in certain states (a pool that includes physicians in all contiguous states), the Department will simply adjust the procedural rules applicable to claimants who reside in those states. The absence of a sufficient pool of physicians in some limited number of states would not justify a national exception to the policy of requiring claimants to submit to a complete pulmonary evaluation in their own region. In addition, claimants remain free to go to any physician of their choosing for the development of evidence in support of their claims.

(d) One comment argues that claimants should be randomly assigned to physicians on the Department's list rather than allowing claimants their own choice. The Department disagrees. The list that the Department ultimately compiles will contain physicians who are well-qualified to perform complete pulmonary evaluations, and whose opinions the Department is willing to accept in the initial stages of adjudication of the claimant's eligibility. Claimants may already be acquainted with one or more physicians on the list, and requiring that claimant submit to an examination by a different physician, perhaps in a neighboring state, would be inefficient. Accordingly, the Department has not changed the regulation.

The commenter also argues that the mere fact that a physician is included on the Department's approved list by meeting the Department's standards does not guarantee that the physician will provide an impartial opinion, particularly when a claimant has a role in selecting the physician who will perform the complete pulmonary evaluation. The Department does not believe that it is required to provide an absolute guarantee of the impartiality of physicians selected for inclusion on the list. By establishing high standards for the performance of these evaluations, and by ensuring that only highly qualified physicians are included on the approved list, the Department will be taking appropriate steps to ensure impartial opinions. In addition, the Department has revised subsection (c) to limit a miner's choice of the examining physician in two respects. First, the miner may not select a close relative of himself or his spouse. The regulation uses the term ''fourth degree of consanguinity'' to exclude, among others, parents, children, grandchildren, brothers, sisters, nephews, nieces, aunts, uncles, and first cousins from those individuals otherwise qualified to perform a complete pulmonary evaluation. Second, the miner may not select any physician who has examined him or treated him in the year preceding

his application for benefits. The Department believes that it would be inappropriate to allow a miner to select a physician with whom he has an ongoing treatment relationship to perform the complete pulmonary evaluation paid for by the Department. Although the Department does not mean to suggest that a physician would be unable to provide an impartial assessment of the miner's respiratory condition in such a case, his opinion could present at least the appearance of a conflict of interest. In order to ensure the credibility of the Department's pulmonary evaluation, the Department has adopted a bright-line test, in the form of a one-year cutoff, that will be easily understood by miners and their physicians. The Department believes that a physician's examination or treatment of the miner prior to the one-year period preceding the miner's application should not disqualify that physician from performing the complete pulmonary evaluation. The Department reserves the right to delete a physician from the list if he is unable to provide an impartial opinion.

(e) Several comments argue that the Department needs to make public the criteria it will use to select physicians for inclusion on the list. In its second notice of proposed rulemaking, the Department notified interested parties that these criteria will be published in the Department's Black Lung Program Manual which will be available to the public. 64 FR 54989 (Oct. 8, 1999). Interested parties will thus be able to monitor the Department's standards and use of these standards in selecting physicians for inclusion on the list.

In addition, a number of commenters responded to the Department's request for comments on the standards that the Department proposed to use to select physicians. Two commenters emphasized the importance of requiring that the evaluations be performed by a physician board-certified in internal medicine or a physician board-eligible in pulmonary medicine or one with extensive knowledge of pulmonary disease. The Department will make every effort to ensure that its list includes highly qualified physicians. Optimally, the Department will be able to enlist the services of Board-certified internists who have a subspecialty in pulmonary medicine, who are Board-eligible in pulmonary medicine, or who can demonstrate extensive experience in the diagnosis and treatment of pneumoconiosis to perform complete pulmonary evaluations. There may be circumstances, however, in which there will not be a sufficient supply of such highly qualified physicians willing to perform the evaluation. In such areas, the criteria will need to afford the Department enough flexibility to ensure an adequate supply of physicians who meet certain minimum qualifications, such as affiliation with a black lung clinic funded in part by the Department of Health and Human Services.

Two comments urge the Department to rule out physicians who have demonstrated that they do not accept one or more of the basic premises of the Black Lung Benefits Act. These commenters urge the Department to review the opinions and depositions of each physician who seeks to be included on the list, eliminating those with opinions which make it impossible to provide a sound evidentiary basis for the district director's initial decision. Another comment urges the Department to accept any physician who applies for inclusion on the list provided that the physician possesses the necessary professional qualifications. As an initial matter, the Department does not intend to screen physicians who apply for inclusion on the list beyond satisfying itself that the basic requirements for inclusion are met. The Department simply does not have the resources to conduct an intensive review of the medical reports and/or deposition testimony submitted by each physician in previous black lung cases. The Department reserves the right, however, to exclude from its list of approved physicians those who prove unable to provide opinions that are consistent with the premises underlying the statute and the Secretary's regulations. The federal courts of appeals have held that a denial of benefits may not be based on a medical opinion that is fundamentally at odds with the premises of the Black Lung Benefits Act. *See, e.g., Lane Hollow Coal Co.* v. *Director, OWCP,* 137 F.3d 799, 804–5 (4th Cir. 1998); *Penn Allegheny Coal Co.* v. *Mercatell,* 878 F.2d 106, 109–110 (3rd Cir. 1989); *Robbins* v. *Jim Walter Resources, Inc.,* 898 F.2d 1478, 1482 (11th Cir. 1990); *Wetherill* v. *Director, OWCP,* 812 F.2d 376, 382 (7th Cir. 1987); *Kaiser Steel Corp.* v. *Director, OWCP,* 757 F.2d 1078, 1083 (10th Cir. 1985). The Department reserves the right to determine appropriate exclusions from the list on a case-by-case basis.

(f) One comment states that the regulation should require the district director to explain to a claimant the possible consequences of having his test results provided to his treating physician. The Department intends to provide such information to claimants, *see also* 64 FR 54989 (Oct. 8, 1999), but does not believe that the regulation must reflect this intention. The regulation itself does state that a report from the claimant's treating physician, based on the Department's clinical testing, will count as one of the two reports the claimant is entitled to submit into evidence under § 725.414, § 725.406(d).

(g) One comment states that the Department's requirements prevent physicians from exercising their professional judgment by dictating the tests that they are required to perform and by emphasizing promptness and timeliness over completeness and thoroughness. The Department disagrees. The Act authorizes the Department to set minimal quality standards for medical evidence. Reports of physical examination must substantially comply with the applicable quality standards, § 718.104. That regulation requires that a report of physical examination be based on, among other things, a chest X-ray, a pulmonary function test, and a blood gas study, unless medically contraindicated. Because these tests are necessary for a complete pulmonary evaluation, the Department has authorized their performance under § 413(b) of the Act, 30 U.S.C. 923(b), for the last two decades. The Department expects that each physician included on the list will not only be able to administer these tests, but will commit to doing so in substantial compliance with the Department's quality standards, §§ 718.102–.106. The Department does not believe that its requirements prevent a physician from preparing a thorough and complete medical report. In order to process claims expeditiously, however, the Department must also ensure that the examination is scheduled promptly, and the resulting report is prepared in a timely manner. The Department recognizes that, in some cases, the claimant's choice of a physician may result in a slight delay if the physician he has selected is busy. The delay in such a case, however, is solely within the control of the claimant. If he is willing to accept the delay, he may wait for that physician. If not, he may choose another from the Department's approved list.

(h) Several comments approved of the revisions affording the claimant the right to select a doctor to perform the complete pulmonary evaluation from an approved list.

(i) No other comments were received concerning this regulation.

20 CFR 725.407

(a) In its first notice of proposed rulemaking, the Department proposed moving subsections (a) and (c) of 20

CFR 725.407 (1999) to § 725.406 and eliminating subsection (b). *See* preamble to §§ 725.407 and 725.408, 62 FR 3355 (Jan. 22, 1997). In their place, the Department proposed a new regulation governing the identification and notification of ''potentially liable operators,'' a subset of the miner's former employers that might be liable for a given claim. Depending on the complexity of the miner's employment history, section 725.407 would permit the district director initially to notify one or more potentially liable operators, and their insurers, of the existence of a claim and would also allow the notification of additional potentially liable operators at any time prior to referral of the case to the Office of Administrative Law Judges. The proposal placed no time limit on the notification of an operator if that operator fraudulently concealed its identity as an employer of the miner.

In its second notice of proposed rulemaking, the Department proposed revising subsection (d) to permit the district director to notify additional potentially liable operators after an administrative law judge reversed a district director's denial by reason of abandonment pursuant to § 725.409 and remanded the case for further proceedings. 64 FR 54990 (Oct. 8, 1999). The Department observed that without this provision, subsection (d) could have been read to prohibit the notification of additional operators, notwithstanding the fact that the district director had not been able to complete his administrative processing of the claim before its referral to the Office of Administrative Law Judges. In addition, the Department rejected a suggestion that it provide guidelines for district directors to use in determining the cases in which it would be appropriate to name more than one potentially liable operator.

(b) The Department has made two changes to § 725.407 to conform to changes to other regulations in this subpart. The Department has deleted the reference to a district director's initial finding in subsection (a) because the district director will no longer issue initial findings. The Department has replaced the reference to § 725.413 in the first sentence of subsection (d) with a reference to § 725.410(a)(3). This change reflects a move to § 725.410 of the district director's authority to dismiss potentially liable operators that the district director has previously notified.

(c) One comment objects that the Secretary's regulations preclude the dismissal of potentially liable operators who can prove that they were not properly named. This comment is more appropriately addressed under § 725.465, the regulation governing the dismissal of claims and parties.

(d) One comment argues that the revised regulation will raise the litigation costs of responsible operators. The commenter observes that the Department does not dispute the allegation, made in response to the Department's first notice of proposed rulemaking, that the Department's changes will generally increase litigation costs by $6,000 per claim. The commenter states that the revisions in the Department's second notice of proposed rulemaking will result in an additional $6,000 in costs per claim. With regard to the first figure, the commenter appears to have mischaracterized its prior comment. An economic analysis conducted by Milliman & Robertson, Inc., and submitted to the Department in response to the first notice, was based in part on an assumption that ''the average defense costs of $6,000 per claim currently expended by the responsible operators/insurers primarily on claims that are initially awarded or denied and appealed by the claimant (presently, approximately 30% of all claims filed), will be expended on all claims at the earliest stage of adjudication.'' Rulemaking Record, Exhibit 5–174, Appendix 5 at 4. This economic analysis did not assert that costs would rise in all cases, but that operators and insurers would be required to incur the cost of fully developing evidence in cases (70 percent of the claims filed) in which they formerly did not have to do so. The analysis did not assert that the Department's proposal would raise litigation costs in the remaining 30 percent of cases. The Department has no basis on which to dispute the industry's statement that its average defense costs, in cases that proceed beyond an initial denial of benefits by the district director, are $6,000. In fact, the economic analysis prepared for the Department in connection with the Regulatory Flexibility Act adopted the figures provided by the Milliman & Robertson economic analysis with respect to the costs of litigating claims at various levels of adjudication. Rulemaking Record, Exhibit 80 at 42.

The Department's second notice of proposed rulemaking, however, undermined the assumption that all of an employer's defense costs would be expended at the earliest stage of adjudication. Under the Department's first proposal, an employer would have been required to develop all of its evidence regarding both its liability as an operator and the claimant's eligibility while the case was pending before the district director. The Department's second notice of proposed rulemaking, however, proposed a substantial alteration in procedure that would permit parties to maintain their current practice of deferring the development of medical evidence until after a case has been referred to the Office of Administrative Law Judges. 64 FR 54993 (Oct. 8, 1999). The Department has adopted this second proposal in these final regulations. Consequently, while potentially liable operators will be required to develop evidence relevant to their liability while claims are pending before the district directors, they will no longer need to expend money on the development of medical evidence in those cases (70% of cases, according to industry estimates) that do not proceed beyond the district director level. In addition, the Department has further revised its regulations to require that all but one potentially liable operator, the one finally designated as responsible operator, be dismissed as parties to the case upon issuance of the district director's proposed decision and order. *See* § 725.418(d) and explanation accompanying § 725.414. Thus, only one potentially liable operator will incur costs in the adjudication of each claim for benefits beyond the district director level.

Under the revised regulations, potentially liable operators will be required to submit evidence to the district director in each case regarding their employment of the miner. *See* § 725.408. In addition, in the small number of cases in which the Department does not name the miner's most recent employer as the responsible operator, the earlier employer that has been designated the responsible operator may incur additional costs in attempting to establish that a more recent employer should be held liable for the payment of benefits. In comparison to the costs of developing medical evidence, however, the Department believes that the additional costs imposed by the regulations will not be significant.

The industry submitted an additional analysis by Milliman and Robertson to the Department in response to the second notice of proposed rulemaking. Rulemaking Record, Exhibit 89–37, Appendix A. That analysis abandons the assumption that the Department's regulations will cause the expenditure of $6,000 in defense costs in every case, rather than only those that proceed beyond the district director level, and replaces it with an assumption that claims defense costs will rise from their

current level of $6,314 to $12,000 under the new regulations. Rulemaking Record, Exhibit 89–37, Appendix A at 16. It is this analysis, apparently, that gives rise to the statement that the second notice of proposed rulemaking will result in an additional $6,000 in costs per claim. The economic analysis contains no explanation for its assumption that defense costs will double under the new regulations. Because the Department's regulations will actually reduce the quantity of medical evidence a party may submit from former levels, eliminate the need to expend money on developing medical evidence in the majority of cases, and eliminate potentially liable operators other than the designated responsible operator as parties to each case beyond the district director level, the Department believes that the assumption is incorrect.

(e) No other comments have been received concerning this regulation.

20 CFR 725.408

(a) The Department proposed eliminating 20 CFR § 725.408 (1999) in its first notice of proposed rulemaking, and replacing it with a regulation designed to elicit necessary information from a miner's former employers. 62 FR 3355–56 (Jan. 22, 1997). As proposed, § 725.408 required any operator notified of its liability under § 725.407 to file a response within 30 days of its receipt of that notification, indicating its intent to accept or contest its identification as a potentially liable operator. Specifically, an operator that contests its liability was required to admit or deny five assertions relevant to that liability: (1) That it operated a coal mine after June 30, 1973; (2) that it employed the miner for a cumulative period of not less than one year; (3) that the miner was exposed to coal mine dust while employed by the operator; (4) that the miner's employment with the operator included at least one working day after December 31, 1969; and (5) that the operator is financially capable of assuming its liability for the payment of benefits. The regulation required the operator to submit all documentary evidence relevant to these issues while the case was pending before the district director, within 60 days from the date on which the operator received notification.

In its second notice of proposed rulemaking, the Department responded to comments that the 60-day time period was too short by enlarging it to 90 days. 64 FR 54990–91 (Oct. 8, 1999). In addition, the Department observed, the period could be extended by the district director for good cause shown pursuant to § 725.423. The Department also acknowledged that, as proposed, the regulation required potentially liable operators to develop and submit evidence in cases that ultimately did not proceed beyond the earliest stage of adjudication. The Department stated that the district director's receipt of this information was necessary, however, in order to ensure that the correct parties were named in those cases that did proceed to the Office of Administrative Law Judges. The Department stated that it did not believe that the cost of developing this evidence would be significant. Finally, the Department rejected the suggestion that it bifurcate the administrative law judge's resolution of entitlement and liability issues.

(b) The Department has modified subsection (a)(1), and has added the phrase ''any of'' to subsection (a)(3), to clarify the meanings of those sentences.

(c) One comment argues that the Department's revision of this regulation injects additional complexity, adds unnecessary burdens and expense in cases involving multiple operators, and sets traps for unwary litigants. The commenter also argues that the Department's revision is based on the erroneous premise that operators are always better informed as to their employment of the miner. The Department agrees that the revised regulations place additional burdens on coal mine operators who have, in the past, routinely filed form controversions of their liability for benefits and waited until the case was referred to the Office of Administrative Law Judges to develop their defenses. In its first notice of proposed rulemaking, the Department explained its intention to change this practice in order to provide the district director with sufficient information to allow him to identify the proper responsible operator. Requiring the submission to the district director of all evidence relevant to the liability issue has become even more important in the final revision of the Department's rules. As revised, the regulations will permit the district director to refer a case to the Office of Administrative Law Judges with no more than one operator as a party to the claim, the responsible operator as finally designated by the district director. See § 725.418(d) and explanation accompanying § 725.414. The regulations prohibit the remand of cases for the identification of additional potentially liable operators, or to allow the district director to designate a new responsible operator, thereby reducing delay in the adjudication of the merits of a claimant's entitlement. This change also places the risk that the district director has not named the proper operator on the Black Lung Disability Trust Fund, however. 62 FR 3355–56 (Jan. 22, 1997). The Department believes that the additional demands placed upon potentially liable operators are not unreasonable. In addition, the Department does not accept the criticism that the regulation sets traps for unwary litigants. The nature of the evidence required by the Department, and the time limits for submitting that evidence, are clearly set forth in the regulations, and will be communicated to potentially liable operators who are notified of a claim by the district director.

The commenter also argues that the Department's revision is based on the erroneous premise that operators are better able to obtain information about their employment of the miner than is the government. The commenter states that the situation is made more difficult where the employment relationship was remote in time or if the miner worked for many different companies. The Department agrees that, in some cases, it may be more difficult for employers, and particularly for insurers, to readily ascertain the facts of the miner's employment. Clearly, however, operators and insurers are in a better position to ascertain these facts than is the Department of Labor. To the extent that an employer or insurer has difficulty in obtaining evidence in a specific case, it may ask that the time period for developing this evidence be extended. The Department will provide the operators notified of a claim the information that it has, including a copy of the miner's application and all evidence relating to his coal mine employment, § 725.407(c).

(d) One comment argues that the 90-day time limitation for an operator to submit documentary evidence in support of its position as to liability remains inadequate, and that, in any event, it should not commence until the operator receives the claimant's employment history, the Itemized Statement of Earnings obtained from the Social Security Administration, and, where applicable, the policy number of the insurance policy that the Department believes provides appropriate coverage. The Department intends to make every effort to supply a potentially liable operator notified of a claim with all of the information pertinent to that notification. As noted above, this information will include a copy of the employment history provided by the claimant. The Department will also provide the applicable insurance policy number if it has it. Similarly, if the Department has received the Itemized Statement of

Earnings, it will provide a copy to the potentially liable operator. The Department's receipt of that record, however, depends on the speed with which the Department's request is processed by the Social Security Administration. It will not be possible in all cases to supply that record to potentially liable operators at the time they receive notification. The initial information supplied to the operator should nevertheless be sufficient to allow it to accept or reject its notification as a potentially liable operator. If the operator needs additional time to respond to that initial notification, it may request an extension of time for good cause shown pursuant to § 725.423. Operators are not limited to a single extension of time in which to obtain this evidence, although a district director may reasonably expect the operator to demonstrate its diligence prior to requesting an additional extension.

(e) Several comments have misconstrued the requirements of § 725.408. Two comments argue that the proposal would shift the burden to the named responsible operator to investigate the proper responsible operator within 90 days and that the 90-day time period is unrealistic for that purpose. One comment argues that the revised regulations are objectionable because they make a responsible operator responsible not only for its own defense but also for the defense of other potentially liable operators. This statement has never been true with respect to liability determinations, and, under the Department's final regulations, is no longer true of entitlement determinations. Another comment argues that DOL's rationale for imposing this time limit on operators—*i.e.,* that operators have better access to the claimant's entire work record—is flawed. Section 725.408, however, does not govern the introduction of evidence relevant to the liability of other operators that employed the miner. Instead, the evidence required by § 725.408 is limited to evidence relevant to the notified operator's own employment of the miner and that operator's financial status. Documentary evidence relevant to another operator's liability is required later pursuant to the schedule established pursuant to § 725.410(b), and in accordance with the limitations set forth in § 725.414(b). Accordingly, the Department will discuss these comments under §§ 725.410 and 725.414.

(f) One comment argues that by creating adversity among the miner's former employers, the Department's revised regulations will create ethical problems for the limited pool of attorneys who currently represent employers in black lung benefits cases, and will therefore deprive employers of their right to the counsel of their choice. The Department acknowledges that the revised regulations increase the adversity among a miner's former employers in any case in which the district director has designated as the responsible operator an operator other than the operator that most recently employed the miner. In such a case, where the designated responsible operator may seek to develop evidence to show that a more recent employer should be designated the responsible operator, an attorney clearly could not represent both employers. Moreover, to the extent that the attorney has previously represented one of the operators, the applicable ethical rules of the attorney's state bar may prevent the attorney from accepting representation of the other operator. In most cases, however, this problem will be more illusory than real. Most of the cases in which the Department will name more than one potentially liable operator will be cases in which the miner's most recent employer is out of business, and had no insurance, or cannot be located. As a general rule, these employers typically have not participated in the adjudication of earlier black lung benefits claims. Accordingly, there will be few, if any, attorneys who will be unable to represent the designated responsible operator. Moreover, in cases in which the interests of potentially liable operators are not directly adverse, state rules typically permit an attorney to represent a client, even if the attorney has represented another party to the case previously, if the attorney obtains the consent of the previous client.

The Department recognizes that there may be a small minority of cases in which a true conflict is unavoidable. For example, if the miner's most recent employer, ABC Coal Co., denies that it employed the claimant as a miner, the Department may also name the miner's next most recent employer, XYZ Coal Co., as a potentially liable operator. An attorney who represented ABC in previous litigation could not now represent XYZ, whose interests are directly adverse. The possibility of such a conflict, however, is not a limitation on the Department's efforts to revise the regulations implementing the Black Lung Benefits Act. The Administrative Procedure Act does guarantee a party the right to be represented by counsel during an administrative adjudication. 5 U.S.C. 555(b). Contrary to the commenter's suggestion, however, nothing in that Act requires an administrative agency to structure its rules in order to preserve the ability of a limited number of attorneys to represent coal mine operators. Where the state ethics rules require an attorney to decline representation of a client, that client is entitled to seek other counsel. The Department does not believe that coal mine operators will be unable to find competent counsel to represent their interests. In fact, the Department has included two or more coal companies as parties in cases under the former regulations, *see, e.g., Martinez* v. *Clayton Coal Co. et al.,* 10 Black Lung Rep. (MB) 1–24 (Ben. Rev. Bd. 1987) (involving three coal mine operators), and did not receive any reports that the operators encountered problems in obtaining representation.

(g) One comment states that the regulation denies mine operators a reasonable opportunity to develop a record. In its second notice of proposed rulemaking, the Department explained its belief that the 90-day time period, which may be extended for good cause, affords sufficient time for operators to submit evidence relevant to their employment of the miner. 64 FR 54990 (Oct. 8, 1999). It cannot be emphasized too often that the period provided by § 725.408 does not require the development of evidence relevant to the designation of other potentially liable operators as the responsible operator. That evidence will be submitted later, in accordance with the schedule established by the district director pursuant to § 725.410.

(h) One comment argues that the regulation creates an impermissible presumption and thus violates the Supreme Court's decision in *Director, OWCP* v. *Greenwich Collieries,* 512 U.S. 267 (1994). Section 725.408 does not create any presumptions. To the extent that the commenter objects to any other presumption used to establish the identity of the responsible operator liable for the payment of benefits, the Department discussed similar objections in its second notice of proposed rulemaking, *see* 64 FR 54972–74 (Oct. 8, 1999), and its response to comments under § 725.495 of Subpart G of this part.

(i) One comment states the response time given potentially liable operators under § 725.408 should mirror the time period given claimants to submit information in § 725.404. The Department disagrees. Section 725.404 provides that claimants must provide the district director with a complete and detailed employment history as well as proof of age, marriage, death, family relationship, dependency, or other

matters of public record. If the information submitted by the claimant is insufficient, the district director must give the claimant a specified reasonable period of time within which to provide the information. Claimants applying for benefits have a positive incentive to supply this information; without it, the district director is unable to complete processing of the case, and any award of benefits will necessarily be delayed. In contrast, § 725.408 seeks information from the claimant's former employers, who have no similar incentive to provide information to the Department. The regulation thus establishes a presumptively reasonable period of time within which an employer must provide that information, and allows the employer to seek an extension of that period for good cause. Because §§ 725.404 and 725.408 affect different parties with different incentives, and serve different purposes, the Department does not believe that the time periods need be made identical.

(j) One comment urges that operators be given the 60 days originally proposed by the Department to respond to notification of potential liability rather than 90. The Department has retained the 90-day time period, which may be extended for good cause, to accommodate the operator community's general objection to the 60-day period and to provide additional time, as a matter of right, in that small percentage of cases in which the miner's employment history is complex or in the distant past.

(k) No other comments were received concerning this regulation, and no other changes have been made in it.

20 CFR 725.409

(a) The Department proposed revising § 725.409 in its first notice of proposed rulemaking to make explicit one basis for denying a claim by reason of abandonment. The Department observed that the Court of Appeals for the Fourth Circuit had confirmed the Department's use of the authority in subsection (a)(3) to dismiss a claim by reason of abandonment based on a claimant's failure to appear at an informal conference. *Wellmore Coal Co.* v. *Stiltner,* 81 F.3d 490, 497 (4th Cir. 1996). The Department proposed to add subsection (a)(4) to the regulation to clarify that authority. In addition, the Department proposed to clarify the procedures for denying claims by reason of abandonment. 62 FR 3356 (Jan. 22, 1997). In the second notice of proposed rulemaking, the Department explained that, because of the severe effect of a dismissal, it had proposed revising § 725.416, the regulation governing informal conferences, to ensure that the parties to a claim are provided with the district director's reasons for holding an informal conference. Thus, under revised § 725.416, the district director is required to explain why he believes an informal conference will assist in the voluntary resolution of the issues in the case. The Department also rejected a suggestion that an administrative law judge should be permitted to hear the merits of claimant's entitlement in a case in which the claimant has requested a hearing as to the district director's dismissal of the claim, and the ALJ finds error in the district director's denial of the claim by reason of abandonment. In response to this comment, the Department added a sentence to subsection (c) of the regulation, to clarify its intent that an administrative law judge must remand a case for further administrative processing if he finds the district director erred in denying the claim. Finally, the Department rejected a comment that the proposal would increase the number of additional claims filed.

(b) Two comments continue to object to the Department's unwillingness to allow an administrative law judge to consider the merits of a claimant's entitlement to benefits if he finds that the district director improperly denied the claim by reason of abandonment. In its second notice of proposed rulemaking, the Department explained that a denial by reason of abandonment may take place before the administrative processing of the claim has been completed, such as when a claimant unjustifiably refuses to attend a required medical examination. § 725.409(a)(1); 64 FR 54991 (Oct. 8, 1999). The Department has reconsidered its complete prohibition on allowing an administrative law judge to resolve the merits of a claim, however. Where the parties have completed their submission of evidence to the district director, and the district director has completed his analysis of the evidence relevant to the liability of all potentially liable operators, and has made a final designation of the responsible operator liable for the payment of benefits, the Department agrees that it would make no sense to require remand to the district director in the event the administrative law judge overturns his denial by reason of abandonment. Accordingly, the Department has revised subsection (c) to permit the Director, through the Office of the Solicitor, to make a case-by-base determination as to whether remand for further administrative processing is necessary. If further remand would be pointless, the Director's consent, which must be made in writing, would allow the case to proceed on the merits of the claimant's entitlement to benefits. The Department has also added a new sentence to subsection (c) to clarify the effect of a denial of a claim by reason of abandonment on a subsequent claim filed by the same individual.

(c) Several comments state that the Department should refer a claim for a hearing on the merits even if the claim has been denied by reason of abandonment. The Department disagrees. A claimant whose claim has been denied by reason of abandonment has suggested, by his actions, that he no longer wishes to pursue his claim for benefits. Referring all of these cases to an administrative law judge for hearing would be pointless and inefficient. It is true that in some cases, the claimant may have decided that he still desires benefits, but believes that the action required of him by the district director is unreasonable. Requiring these claimants to request an administrative law judge to resolve their dispute does not impose an unreasonable burden. Accordingly, the Department has not altered this requirement in the regulation.

(d) Several comments request that the Department reconsider denying a claim by reason of abandonment as an appropriate sanction. Another comment supports the denial. The Department explained its reason for using a denial by reason of abandonment where a claimant fails to attend an informal conference in its second notice of proposed rulemaking. 64 FR 54991–92 (Oct. 8, 1999). The Department continues to believe that, although a denial is a harsh sanction, it is the only valid sanction that may be imposed for a claimant's failure to participate in the adjudication process. A claimant whose failure to participate is the result of simple negligence may avoid that sanction by indicating his willingness to comply with the district director's initial instructions.

(e) Several comments request that the Department reconsider its use of informal conferences. These comments are more appropriately addressed under § 725.416.

(f) No other comments were received concerning this section.

20 CFR 725.410–725.413

(a) In its first notice of proposed rulemaking, the Department proposed new §§ 725.410–725.413 in order to streamline the investigation and initial adjudication of claims for black lung benefits. 62 FR 3356 (Jan. 22, 1997). The

proposed regulations provided for concurrent investigations into the medical issues surrounding the claimant's eligibility and the identity of the operator liable for the payment of any benefits. Under the proposed regulations, those investigations would have culminated in an initial finding containing the district director's preliminary resolution of both issues. If any party indicated dissatisfaction with the initial finding, the district director would have proceeded to an initial adjudication of the claim and would have established a schedule for the submission of evidence. The proposed regulations included a number of significant changes. For example, the Department stated that it would not honor hearing requests made before the conclusion of administrative proceedings. In addition, the Department provided claimants with up to one year to respond to an initial finding.

In its second notice of proposed rulemaking, the Department did not discuss §§ 725.410, 725.412, or 725.413. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999). The Department did discuss § 725.411, although it did not propose any additional changes to that regulation. Instead, the Department advised all interested parties that it intended to substantially revise the documents used in connection with the issuance of an initial finding under § 725.411. The Department noted its commitment to improve the quality of the information provided to parties to the adjudication of black lung claims. The Department hoped that improved communication would make district office claims processing easier to understand and would also give claimants a clearer picture of the medical evidence developed in connection with their claims. It was hoped that with better information, claimants would be able to make more informed decisions as to how to proceed. In response to a number of comments, the Department stated that a hearing request filed within one year of the initial finding would constitute a request for further adjudication of the claim. The Department also discussed its decision not to honor premature hearing requests, *i.e.*, requests for hearing made before the district director issued a proposed decision and order. Additionally, the Department rejected the suggestion that the one-year response time to an initial finding impermissibly extended a claimant's modification rights. Finally, the Department explained its decision not to permit an extension under § 725.423 of the one-year time period.

(b) A number of comments continue to object to the Department's proposal with respect to the initial adjudication of claimant eligibility and operator liability. Among other things, these commenters criticize the increased formality and complexity of the proposed procedure; the burdensome requirement that operators must respond to initial findings in all cases; and the Department's failure to honor premature hearing requests. In response to these comments, the Department has reconsidered the procedural rules governing district director claims processing, and has altered the proposal in a number of significant respects.

(i) The Department will no longer issue an initial finding of claimant eligibility and operator liability. Instead, following the development of certain medical evidence under § 725.405, including the complete pulmonary evaluation authorized by § 725.406, and the submission of evidence relevant to the employment of the miner by potentially liable operators notified pursuant to § 725.407, the district director will issue a schedule for the submission of additional evidence. § 725.410. This schedule will notify the parties of the district director's preliminary evaluation of the evidence regarding the miner's eligibility, but will not require a formal response as to eligibility from any party. In the event that the district director concludes that the evidence supports an award of benefits, and there is no operator that may be held liable for the payment of benefits, § 725.411 requires the district director to issue immediately a proposed decision and order awarding benefits payable by the Black Lung Disability Trust Fund. In such a case, the district director will not issue a schedule for the submission of additional evidence because no further evidentiary development is needed. In the event the district director's preliminary evaluation of the medical evidence in a Trust Fund case weighs against a benefits award, the district director will issue a schedule allowing the submission of additional medical evidence, but the claimant need not respond. Instead, the claimant may wait until the issuance of the proposed decision and order, which will provide him 30 days within which to request a hearing. Similarly, an operator need not respond to a district director's schedule for the submission of evidence. Silence on an operator's part as to the claimant's entitlement to benefits after issuance of the district director's schedule will be deemed a contest of that entitlement. The revised regulations thus eliminate certain responses that previously would have been required following issuance of the proposed initial findings. In addition, they eliminate the one-year period of time that the proposal would have provided a claimant to respond to the initial finding. Two commenters continued to object to that time period. Instead, all parties will have the statutory period, one year, to file a request for modification after the district director's proposed decision and order becomes effective. The proposed decision and order becomes effective 30 days after issuance, *see* § 725.419.

By replacing the notice of initial finding with a less formal schedule for the submission of additional evidence, the Department hopes to further its goal of providing more easily understood documents. The schedule will summarize the medical evidence developed by the Department, and provide a clear explanation of why that evidence may fail to establish a claimant's entitlement to benefits. In addition, the schedule will provide a clear explanation of the steps remaining in the district director's claim processing. A number of commenters had objected to the complexity of the Department's proposed procedures, and the Department believes that this simplified, revised process will eliminate confusion.

(ii) The schedule will also contain the Department's preliminary designation of the responsible operator liable for the payment of claimant's benefits. Along with the schedule, the district director will supply all potentially liable operators with a copy of the evidence needed to meet the Director's initial burden of proof under § 725.495, if such a showing is necessary. Within 30 days of the date on which the schedule is issued, the designated responsible operator must either agree or disagree with the district director's designation. If it disagrees, it must submit any evidence regarding the liability of other operators in accordance with the district director's schedule. The schedule must provide a minimum of 60 days to submit evidence pertaining to both responsible operator liability and the claimant's entitlement, and an additional 30 days to respond to other parties' evidence. These periods may be extended pursuant to § 725.423 for good cause shown. In addition, the designated responsible operator may, but does not have to, agree that the claimant is entitled to benefits. Silence on this issue for 30 days after the district director issues a schedule will be deemed a decision to contest the claimant's benefit entitlement sufficient

to make the responsible operator liable for a reasonable attorney's fee if the claimant successfully prosecutes his claim.

(iii) The Department has also deleted the language in proposed § 725.411 which would have rendered invalid premature hearing requests. Accordingly, the Department will continue its current practice of following the decision in *Plesh* v. *Director, OWCP*, 71 F.3d 103, 111 (3d Cir. 1995). Under that decision, the Department may complete its administrative processing of the claim, but must forward a claim for a hearing at the conclusion of that processing if the claimant has previously filed a request for a hearing and that request has not been withdrawn. The Department has revised § 725.418 to accomplish this result and to extend similar treatment to operators. *See* response to comments under § 725.418.

(c) Two comments submitted in connection with the Department's first notice of proposed rulemaking, and renewed in connection with the Department's second notice of proposed rulemaking, argue that the Department's proposed § 725.413 improperly transfers adjudication powers from the administrative law judge to the district director in violation of the Administrative Procedure Act. The Department disagrees. The regulations currently permit the district director to issue a proposed decision and order. Any party aggrieved by the proposed decision and order may request a formal hearing before the Office of Administrative Law Judges, making the district director's factual findings irrelevant. If no party objects to the proposed decision and order, however, it becomes final. 20 CFR 725.419 (1999). The revised regulations continue that procedure. They do not deny any party the right to an adjudication of contested issues by an administrative law judge, as provided by both the Administrative Procedure Act, 5 U.S.C. 556, and section 19 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 919, as incorporated by 30 U.S.C. 932(a).

(d) Several comments submitted in connection with the Department's first notice of proposed rulemaking state that the time frames for developing and submitting evidence to the district director are too short. These time frames, which have been moved from proposed § 725.413(c)(2) to § 725.410(b), set only the minimum periods for evidentiary submissions. Section 725.423 allows any party to request additional time within which to take a required action if good cause is shown. In addition, the Department has relaxed the requirements for the development of documentary medical evidence in §§ 725.414 and 725.456, and has increased the opportunities for submitting such evidence outside the periods established by § 725.410. The Department has not modified, however, the requirement contained in the original proposal, that all documentary evidence pertaining to operator liability must be submitted to the district director in the absence of extraordinary circumstances. In a small number of claims, the responsible operator designated by the district director may wish to submit documentary evidence to meet its burden of establishing that another employer of the miner should be the responsible operator. The Department estimates that these cases will represent less than 10 percent of all responsible operator claims. The Department recognizes that, in some of these cases, the initial 60-day period may be insufficient to allow the designated responsible operator to complete its development of the necessary evidence. In such a case, however, the operator may request that the district director grant it additional time. In addition, if the district director finds the evidence submitted by the designated responsible operator persuasive, he may designate a different operator as the responsible operator only after he provides that operator, pursuant to § 725.410, with at least 60 additional days to develop its own evidence relevant to both the liability and eligibility issues. Finally, in a case in which the operator encounters particular difficulty in obtaining the necessary evidence, it may be able to establish the existence of ''extraordinary circumstances'' permitting the introduction of such evidence after the case is referred to the Office of Administrative Law Judges. No changes are necessary in response to these comments.

(e) One comment submitted in connection with the Department's first notice of proposed rulemaking objects to the district director's authority to reinstate an operator which has been dismissed. This authority is necessary to correct erroneous dismissals, especially since an operator can not be named a party to a claim once a case is referred to the Office of Administrative Law Judges for a hearing on the merits, § 725.407(d). The remainder of the commenter's objections pertain more properly to § 725.414, and are addressed under that regulation.

(f) In light of the extensive changes to §§ 725.410–.413, none of the other comments received concerning the proposed revisions to these regulations remain relevant.

20 CFR 725.414

(a) In its first notice of proposed rulemaking, the Department proposed to limit the quantity of documentary medical evidence that parties to a claim would be able to submit. Specifically, the Department's initial proposal would have permitted the claimant and the party opposing the claimant's entitlement each to submit the results of no more than two complete pulmonary examinations or consultative reports, and one review of each of its opponent's diagnostic studies and examinations. Parties could submit additional documentary medical evidence only by demonstrating extraordinary circumstances. In proposing this limitation, the Department acknowledged the concerns of the Court of Appeals for the Sixth Circuit in *Woodward* v. *Director, OWCP,* 991 F.2d 314, 321 (6th Cir. 1993). In that decision, the court noted the superior financial resources of some parties allowed the development of a greater quantity of evidence with the result that the ''truth-seeking function of the administrative process is skewed and directly undermined.'' 991 F.2d at 321. 62 FR 3356–61 (Jan. 22, 1997). In cases in which the Department named more than one potentially liable operator as a party to the claim, the proposal delegated responsibility for the development of documentary medical evidence to the responsible operator designated by the district director. Other operators would be permitted to submit documentary medical evidence, up to the limit of two medical evaluations per side, only by showing that the designated responsible operator had not undertaken a full development of the evidence and that, without it, the potentially liable operator was unable to secure a full and fair litigation of the claimant's eligibility.

The Department also proposed to require that all documentary evidence—evidence relevant to operator liability as well as medical evidence relevant to a claimant's eligibility—be submitted while the case was pending before the district director. Like the limitation on the quantity of medical evidence, the required submission of evidence to the district director was made subject to an extraordinary circumstances exception. The Department observed that this proposal would end parties' current practice of delaying the development of evidence on both issues until a claim was referred to the Office of Administrative Law Judges. It would also provide district directors with a

better evidentiary record on which to adjudicate a claim. The proposal would have required parties to identify all of their witnesses while a case was pending before the district director. Finally, the Department explained that both proposed revisions were permissible exercises of the broad regulatory authority granted the Department under the Black Lung Benefits Act.

The Department proposed several significant revisions in its second notice of proposed rulemaking. 64 FR 54992–96 (Oct. 8, 1999). Responding to numerous comments, the Department withdrew its proposed requirement that all documentary medical evidence be submitted to the district director. Instead, the Department proposed to retain the current procedures, allowing parties to submit documentary medical evidence to the Office of Administrative Law Judges up to 20 days prior to the formal hearing. *See* preamble to § 725.456. The Department did not revise its proposal with respect to documentary evidence relevant to the issue of operator liability, however. Any such evidence that was not submitted to the district director could be submitted to the administrative law judge only upon a showing of extraordinary circumstances. The Department observed that this proposal represented a weighing of the claimant's interest in the prompt adjudication of his entitlement against the interest of the Department in protecting the Black Lung Disability Trust Fund from unwarranted liability. Under the Department's proposal, the Director, OWCP, would be unable to have a case remanded to the district director for the development of additional evidence as to operator liability once a case was referred to the Office of Administrative Law Judges for an adjudication of the merits. This provision helped to ensure the prompt adjudication of the claimant's entitlement. The procedure also subjected the Trust Fund to the risk, however, that a district director would not name the correct operator as a party to the claim before the case was referred to OALJ. Such a risk could be justified only if the district director was able to examine all of the documentary evidence relevant to the issue of operator liability.

Although numerous comments had objected to the Department's limitation on the quantity of medical evidence, the Department did not propose to alter that limitation. In order to accommodate the differing circumstances of individual cases, however, and to ensure that all parties were given due process, the Department proposed revising the standard that would allow a party to exceed that limitation. Accordingly, the Department replaced the ''extraordinary circumstances'' exception with a ''good cause'' standard that would be easier to meet in appropriate cases. The Department also clarified the types of documentary medical evidence that parties would be entitled to submit, in order to resolve some of the ambiguities presented by its original proposal. Specifically, the Department proposed that a party's affirmative case be limited to two chest X-ray interpretations, the results of two pulmonary function studies, two arterial blood gas studies, and two medical reports. In rebuttal, each party would be able to submit one piece of evidence analyzing each piece of evidence submitted by the opposing side. For example, an operator could have each of the claimant's chest X-rays reread once, and could submit one report challenging the validity of each pulmonary function test submitted by the claimant. The Department also provided the parties with an opportunity to rehabilitate the evidence they had submitted in connection with their affirmative case that had been the subject of rebuttal. The second proposal justified the medical evidentiary limitations as applied to multiple potentially liable operators named as parties to the same claim. Finally, the Department clarified the provision in subsection (a)(4) as allowing the submission of hospital records and any other treatment records relating to the mine's respiratory or pulmonary condition without regard to the evidentiary limitations elsewhere in the regulation.

(b) A number of comments continue to object to the proposed requirement that more than one potentially liable operator might be retained as a party to a claim and might have to participate in a joint defense of the claimant's eligibility for benefits subject to the same medical evidentiary limitations as would be present in a case involving only one operator. The Department proposed this requirement in order to ensure that a claimant in a multiple operator case—a case in which the identity of the responsible operator was in doubt—would not have to face more documentary medical evidence than a claimant whose eligibility was opposed by only one potentially liable operator. On further reflection, however, the Department has decided not to retain more than one potentially liable operator as a party to each case after the case is referred to the Office of Administrative Law Judges. The final revisions to the regulations attempt to simplify and streamline the processing of claims at the district director level. For example, the final rules eliminate certain party responses formerly required to be filed with the district director, and thus reduce the parties' transaction costs. Similarly, in these final rules, the Department has simplified the adjudication of claims beyond the district director level by permitting the district director to refer a case to the Office of Administrative Law Judges with only one designated responsible operator as a party to the claim. *See* explanation accompanying §§ 725.415, 725.416, 725.417, 725.418, and 725.421.

The Department recognizes that this solution may slightly increase the Black Lung Disability Trust Fund's liability. In the event the responsible operator designated by the district director is adjudicated not liable for a claim, the Black Lung Disability Trust Fund will pay any benefit award. The Department's proposals, on the other hand, would have subjected the Trust Fund to liability only where the miner was not employed by any operator that met the criteria for a potentially liable operator, or where the district director had not named as a party to the claim the operator ultimately held to be the responsible operator. The Department's final regulations create Trust Fund liability in different circumstances: where the district director's designation of the responsible operator proves to be incorrect. For example, if the miner's most recent employer, ABC Trucking Co., argues that it did not employ the claimant as a miner, the proposal would have permitted the district director to retain, as parties to the claim, the miner's prior employers as fallback potentially liable operators. Under the final regulation, however, if the district director designates ABC as the responsible operator, and the ALJ awards benefits but finds that the miner's next most recent employer, XYZ Coal Co., should have been the responsible operator, benefits will be payable by the Trust Fund. The Department intends that, once a claim is referred to the Office of Administrative Law Judges, the Department shall not be able to impose liability for that claim on any operator other than the one finally designated as responsible operator by the district director, whether through remand by the administrative law judge or through modification of a finally awarded claim. This limitation will eliminate a major source of delays in the adjudication of claims, and prevent a claimant from having to relitigate his entitlement to benefits. To the extent

that a denied claimant files a subsequent claim pursuant to § 725.309, of course, the Department's ability to identify another operator would be limited only by the principles of issue preclusion. For example, where the operator designated as the responsible operator by the district director in a prior claim is no longer financially capable of paying benefits, the district director may designate a different responsible operator. In such a case, where the claimant will have to relitigate his entitlement anyway, the district director should be permitted to reconsider his designation of the responsible operator liable for the payment of the claimant's benefits.

The Department does not believe that the risk of increased Trust Fund liability is significant. Serious disputes about the identity of the responsible operator arise in less than 10 percent of claims. In addition, the regulations still require that all of the documentary evidence relevant to the issue of operator liability be submitted to the district director, and that all of the potential witnesses as to this issue be identified. In fact, the Department's willingness to accept the risk that the district director's designation will be incorrect reinforces the need for both of those requirements. Thus, the district director will be able to make a determination as to the identity of the responsible operator based on the same information that will be available to the administrative law judge. In such circumstances, the Department believes that any additional risk of liability imposed on the Trust Fund is acceptable.

The Department has made extensive revisions to § 725.414 to implement this change. Subsection (a)(3)(iv) and the introductory paragraph of subsection (a)(3) have been deleted, and references to potentially liable operators other than the designated responsible operator have been removed from subsections (a)(2)(ii), (a)(3)(i), (a)(3)(ii), and (c). The Department has revised subsection (a)(3)(iii) to reflect the Trust Fund's right to develop evidence in a case in which the district director has notified one or more potentially liable operators of their liability pursuant to § 725.407, but has subsequently dismissed all of the operators. The revised regulation also recognizes the Trust Fund's right to develop and submit evidence relevant to the compensability of a claimant's medical benefits. The Department has also revised subsections (b)(1) and (b)(2) to clarify the meaning of the regulation.

In addition, the Department has deleted subsection (a)(6). As proposed, subsection (a)(6) would have required the district director to admit into the record all of the evidence submitted while the case was pending before him. As revised, however, the regulation may require the exclusion of some evidence submitted to the district director. In the more than 90 percent of operator cases in which there is no substantial dispute over the identity of the responsible operator, most of the evidence available to the district director will be the medical and liability evidence submitted pursuant to the schedule for the submission of additional evidence, § 725.410. In the remaining cases, however, the district director may alter his designation of the responsible operator after reviewing the liability evidence submitted by the previously designated responsible operator. For example, he may decide that the evidence submitted by ABC Trucking Co. establishes that the claimant did not work as a miner for that company, and may designate the claimant's next most recent employer, XYZ Coal Co., as the responsible operator. In such a case, the regulations require that the district director issue another schedule for the submission of additional evidence in order to give XYZ Coal the opportunity to submit additional evidence bearing on its liability for benefits. If the district director ultimately concludes that XYZ should be designated the responsible operator, the regulation requires him to exclude the medical evidence previously developed by ABC, unless XYZ adopts that evidence as its own, § 725.415(b). The Department has revised § 725.415(b) to defer the development of any additional medical evidence in such a case until after the district director has completed his analysis of all evidence pertaining to operator liability and has made a final responsible operator determination. At that point, the responsible operator will have an opportunity, if it was not the initially designated responsible operator, to develop its own medical evidence or adopt medical evidence submitted by the initially designated responsible operator. Because the district director will not be able to determine which medical evidence belongs in the record until after this period has expired, the Department has revised §§ 725.415(b) and 725.421(b)(4) to ensure that the claimant and the party opposing entitlement are bound by the same evidentiary limitations. Accordingly, the Department has deleted the requirement in § 725.414(a)(6) that the district director admit into the record all of the medical evidence that the parties submit.

The Department does not expect the deletion to have a significant practical effect. Because the Department withdrew its first proposal requiring that all medical evidence be submitted to the district director, *see* paragraph (a), above, the Department expects that parties generally will not undertake the development of medical evidence until the case is pending before the administrative law judge. Certainly, if the designated responsible operator believes itself not to be liable for a given claim, it might defer the development of medical evidence while developing evidence relevant to liability. Accordingly, in the overwhelming majority of cases, there will be no evidence that the district director will be required to exclude from the record. The Department recognizes, however, the theoretical possibility that a claimant may have to undergo additional physical examination and testing. In the example discussed above, if ABC Trucking had submitted the result of its examination and pulmonary testing, XYZ could, if it chose not to use ABC's evidence, require the claimant to submit to an additional examination. The Department does not believe that this is a likely scenario, however, even in cases in which the district director changes his designation of the responsible operator.

(c) Two comments dispute the Department's observation, in its second notice of proposed rulemaking, 64 FR 54996 (Oct. 8, 1999), that autopsy and biopsy reports are generally not developed in connection with a claim, and that those reports need not be addressed in the Department's evidentiary limitations. The Department has reconsidered its earlier proposal allowing the admission of these reports without regard to number, and agrees that the evidentiary limitations of § 725.414 should be revised. Accordingly, the regulation now permits each side to submit, as part of its affirmative case, one report of an autopsy and one report of each biopsy. Subsections (a)(2)(i) and (a)(3)(i) have been revised accordingly. In addition, the Department has revised subsections (a)(2)(ii) and (a)(3)(ii) to allow each side to submit one report in rebuttal of an autopsy report and one report in rebuttal of each biopsy report offered by the opposing side. The Department has also deleted the reference to autopsy and biopsy reports in subsection (a)(4), the catch-all provision permitting the introduction of evidence that is not addressed elsewhere in § 725.414.

(d) Several comments object to the Department's proposed addition of subsection (e). This provision, which tracks the current regulation at 20 CFR 725.414(e)(1) (1999), would have

prohibited the introduction of evidence before an administrative law judge which was obtained by a party while the claim was pending before a district director but which was withheld from the district director or any other party. Another comment states that the subsection is meaningless since it suggests that withheld evidence must be admitted upon the request of a party, even absent a showing of extraordinary circumstances. The Department agrees that this provision should be deleted. *See* preamble to § 725.456, paragraph (b). Accordingly, subsection (e) has been deleted. A corresponding change has been made to § 725.456.

(e) A number of comments argue that the Department should limit the claimant and the party opposing entitlement to one examination and one set of pulmonary testing. Thus, instead of being able to submit the results two pulmonary function studies and two arterial blood gas studies, each party would be entitled to submit only one set of test results. One commenter states that this revision would simply maintain the status quo with respect to testing. The Department disagrees. The former regulations do not limit the number of test results a party may submit, and evidentiary records often contain a substantial number of such tests. The Department recognizes that the testing may be difficult for some claimants. In the absence of good cause, the Department's regulations limit the maximum total number of tests to five in the vast majority of cases involving a designated responsible operator (four in a case in which the Black Lung Disability Trust Fund will be liable for the payment of any benefits), and spread these tests out over time. The first such test will be performed in connection with the complete pulmonary evaluation shortly after the claimant files his application, § 725.406. The last test will most likely be performed shortly before the formal hearing, as parties seek to complete the development of their evidence before the twentieth day prior to the hearing, as required by § 725.456(b)(2). It would not be appropriate to further limit the testing that a claimant must undergo. An operator who wishes to submit the results of two physical examinations performed in accordance with § 718.104 is entitled to have the physicians who perform those examinations administer appropriate testing, *see* § 718.104(a)(6). Accordingly, the Department has not changed the regulation in this respect.

(f) A number of comments continue to object generally to the Department's proposed limitations on the quantity of medical evidence that parties may submit in the adjudication of a black lung claim. Among other things, they argue that the proposed limitations violate § 413(b) of the Black Lung Benefits Act, 30 U.S.C. 923(b), which requires the consideration of ''all relevant evidence,'' and infringe on the rights of coal mine operators under the due process clause of the Constitution. The Department has previously addressed both arguments. In its first notice of proposed rulemaking, the Department explained that § 413(b), which is contained in Part B of the Black Lung Benefits Act, was incorporated into Part C, governing adjudications by the Department of Labor, ''to the extent appropriate.'' 30 U.S.C. 940. The proposed evidentiary limitations thus represent the extent to which the Department believes that medical evidence should be submitted for consideration by the factfinder. In addition, the Department has noted that § 413(b) does not require the admission of all evidence simply because that evidence could be described as relevant, and that the Department was free to prescribe conditions under which evidence would be admissible in black lung adjudications. 62 FR 3358–59 (Jan. 22, 1997). The Department discussed the requirements of the due process clause in its second notice of proposed rulemaking. The Department observed that a due process analysis involves weighing the potentially disparate interests of a number of parties. 64 FR 54994–95 (Oct. 8, 1999). In the Department's view, the regulation achieves the correct balance, particularly in light of the Department's decision to permit parties to exceed the numerical limitations on documentary medical evidence upon a showing of good cause. To the extent that these commenters objected, on due process grounds, to the requirement that potentially liable operators other than the responsible operator defer to the responsible operator's development of medical evidence, those objections have been rendered moot by the Department's revisions permitting only one designated responsible operator to be included as a party to a case before the Office of Administrative Law Judges.

The Department also cannot accept the assertion, made by several commenters, that the numerical limits are fundamentally unfair, and that they will result in inaccurate and incomplete evaluations of the claimant's pulmonary condition. In cases involving a coal mine operator, the record may contain up to five medical reports—two submitted by the claimant, two by the operator, and the results of the complete pulmonary evaluation. Each of these reports may be based on independent medical testing. Accordingly, the Department does not agree that the evaluation of the claimant's medical status will be less than complete and thorough. Moreover, the Department does not agree that requiring the parties to develop medical evidence meeting certain quality standards, §§ 718.102—718.107, will result in an unfair adjudication of the claimant's entitlement to benefits.

(g) One comment suggests that the Department's rationale for its proposed change is insufficient, and that anecdotal evidence of a few cases in which coal mine operators submitted a large volume of evidence does not demonstrate that the current procedure is unfair. The commenter further argues that the former system, developed under the Administrative Procedure Act, is a fair system. The Department agrees that the APA generally provides a fair basis for the adjudication of parties' interests in the administrative context. In its first notice of proposed rulemaking, however, the Department demonstrated that Congress did not explicitly impose the requirements of the APA on adjudications under the Federal Mine Safety and Health Act. *See* 62 FR 3359 (Jan. 22, 1997). In addition, the Department expressed its preference for a bright-line test that allows adjudication officers to resolve issues of eligibility based on the quality of the medical evidence developed by the parties rather than merely the quantity of evidence that parties with superior financial resources may be able to submit. The Department continues to believe that the adjudications that will take place under these revised regulations will result in fairer, more credible evaluations of black lung claims than the former system permitted.

(h) One comment argues that the ''minimum'' number of examinations that may be submitted by the parties is not equal. The commenter also objects that the claimant is entitled to travel a longer distance to obtain his medical evidence than the employer is authorized to send him to obtain its medical evidence. Specifically, the commenter states that a claimant could travel less than one hundred miles away for the complete pulmonary evaluation provided by the Department under § 725.406, but then travel a longer distance to obtain a subsequent examination at his own expense. Because the limitation on the travel an operator can require is tied to the distance traveled for the § 725.406 evaluation, the commenter argues that

the claimant could in fact travel much farther than the operator is permitted to send him in obtaining its evidence. The commenter's emphasis on a ''minimum'' number of medical reports is puzzling; since parties on both sides remain free not to submit any medical evidence, the Department believes that the commenter refers to the maximum permissible number of reports and tests. That limitation is equally balanced. Unless the administrative law judge finds that good cause justifies the admission of additional evidence, each side may submit up to two medical reports, two chest X-ray interpretations, the results of two pulmonary function studies and arterial blood gas studies, one report of each biopsy, and one autopsy report. The Department believes that the limitation applicable to each type of evidence per side represents an inherently fair way of ensuring that the adjudication officer's focus is on the quality of the evidence submitted rather than on its quantity. To the extent that the comment refers to the claimant's ability to select the physician to perform the complete pulmonary evaluation from among those on the Department's list, the Department has responded to that comment under § 725.406. *See* preamble to § 725.406, paragraph (b).

With respect to the travel requirements, the Department believes that a coal mine operator should not be entitled to wait to develop its medical evidence until after the claimant has finished his evidentiary development in order to learn how far it may ask the claimant to travel. The complete pulmonary evaluation offers the claimant the opportunity to travel anywhere in his state or any contiguous state at Departmental expense. The Department does not believe that a claimant will deliberately select a closer physician for this examination and then pay for his own travel to a more distant location for either of the two medical reports that he is entitled to submit. Accordingly, the Department believes that the distance a claimant travels for the complete pulmonary evaluation, or 100 miles, whichever is greater, represents a proper limitation on a coal mine operator's ability to compel the claimant to travel. Moreover, the regulation's proscription on additional travel is not absolute. Like the former regulation, 20 CFR 725.414(a)(1999), which subsection (a)(3)(i) mirrors, subsection 725.414(a)(3)(i) permits an operator to request the district director to authorize a trip of greater distance. Operators who are unable to find a qualified physician within the 100-mile radius thus may seek permission to send the claimant further.

(i) Three comments suggest that the determination as to whether additional evidence would provide only marginal utility should not be made by regulation of the Department of Labor but by administrative law judges on a case-by-case basis. These commenters contend it is up to administrative law judges to determine when evidence is cumulative and that the Department should not micromanage the adjudicatory process. The Department has previously expressed its preference for a ''bright-line'' limitation over the *ad hoc* determinations of individual adjudication officers. 62 FR 3357 (Jan. 22, 1997). Where the circumstances compel a determination of whether additional medical evidence should be allowed, *i.e.,* upon an allegation of good cause for submitting medical evidence in excess of the evidentiary limitation, that determination will be made by administrative law judges. The need for such a determination in some cases, however, does not obviate the more compelling need for a general rule limiting the amount of medical evidence that parties may submit in black lung benefits claims. The Department believes that it should be incumbent on the party seeking to exceed that limit to demonstrate good cause for submitting additional evidence.

(j) One comment argues that the Department should include the ''good cause'' exception in § 725.414 as well as in § 725.456, and that its failure to do so represents a trap for the unwary. The Department does not agree that the ''good cause'' exception needs to be repeated in § 725.414. As a practical matter, the Department's removal of the requirement that parties submit all of their documentary medical evidence before the district director will generally cause parties to delay the development of their evidence until a case reaches the administrative law judge. Thus, the Department does not anticipate that there will be many occasions on which a party would ask the district director, rather than the administrative law judge, to find ''good cause'' to exceed the numerical limitations of § 725.414. In any event, because any finding on this issue by the district director would be subject to *de novo* review by an administrative law judge, the Department does not believe that the absence of an explicitly stated ''good cause'' exception while a case is pending before the district director will impair the parties' development of evidence.

(k) One comment argues that, contrary to the opinion expressed in the Department's second notice of proposed rulemaking, the progressive nature of pneumoconiosis should not constitute ''good cause'' for the submission of additional evidence because it is scientifically unsupported. In its second notice of proposed rulemaking, the Department had suggested that the progressive nature of the disease might justify an administrative law judge's finding of good cause to admit documentary medical evidence in excess of the § 725.414 limitations when both parties had fully developed their evidence prior to the hearing but the hearing had to be rescheduled due to weather conditions. 64 FR 54994–95 (Oct. 8, 1999). The commenter suggests that a claim of regression should be automatic good cause. The Department has discussed the evidence demonstrating the progressive nature of pneumoconiosis in its response to comments under § 725.309. The Department does not agree that a bare claim of ''regression'' should entitle a coal mine operator to exceed the § 725.414 evidentiary limitations. The example provided by the Department was intended to illustrate one of the circumstances in which the ''good cause'' exception might apply; it was not intended to provide an automatic right to submit documentary medical evidence in excess of the limitations in any particular case.

(l) One comment states that the ''good cause'' exception is unnecessarily complex and leaves many unanswered questions. The commenter poses a hypothetical situation involving a claimant's submission of an additional report of examination, and asks what additional evidence the opposing party may submit in response or in rebuttal. The Department does not believe that the regulation or this preamble can explicitly anticipate every conceivable situation that may arise in the adjudication of claims. Instead, the Department fully expects that administrative law judges will be able to fashion a remedy in all cases that both permits the party opposing entitlement to develop such rebuttal evidence as is necessary to ensure a full and fair adjudication of the claim, and retains the principle inherent in these regulations that the fairest adjudication of a claimant's entitlement will occur when the factfinder's attention is focused on the quality of the medical evidence submitted by the parties rather than on its quantity.

(m) One comment argues that the Department's regulations improperly deny a dismissed operator the right to defend itself, in violation of the Black Lung Benefits Act, the Longshore and

Harbor Workers' Compensation Act, and the Administrative Procedure Act. Under the regulations, if an operator is dismissed by the district director, and is not reinstated before a case is referred to the Office of Administrative Law Judges, it may not be held liable for benefits. Such an operator will therefore not need to defend itself. If the district director dismisses an operator and later realizes that he did so incorrectly, he may reinstate that operator but must provide it with an opportunity, under § 725.410, to develop additional evidence. Consequently, the Department does not agree that the regulations limit the rights of dismissed operators.

(n) One comment states that the requirement that a party identify a testifying witness while a claim is pending before the district director is unreasonable and onerous, and that it diminishes the authority of administrative law judges. This comment is more appropriately addressed under § 725.457, governing the use of witnesses before an administrative law judge. *See* preamble to § 725.457, paragraph (b).

(o) A number of comments generally favor the Department's medical evidentiary limitations.

(p) No other comments were received concerning this section, and no other changes have been made in it.

20 CFR 725.415

(a) In its first notice of proposed rulemaking, the Department revised § 725.415 to require the district director to issue a proposed decision and order in each case. Citing the need to strengthen the integrity of the district director's adjudication, the Department proposed removing the district director's authority to refer a claim to the Office of Administrative Law Judges without first issuing a proposed decision and order. 62 FR 3361 (Jan. 22, 1997). The Department did not discuss § 725.415 in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999).

(b) The Department has revised subsection (b) in light of its decision not to allow more than one operator to remain a party to a black lung claim after the conclusion of district director processing. As revised, the regulation recognizes the district director's authority to reconsider his initial designation of a responsible operator following the submission of liability evidence by that initially designated operator. Where the district director believes that that evidence establishes that the first operator is not the proper responsible operator, he may issue another schedule for the submission of additional evidence under § 725.410, designating a new responsible operator and providing that operator with time within which to submit its own evidence relevant to the liability issue. If, after reviewing that operator's evidence, the district director decides that his first designation was correct, he may not allow the second designated responsible operator to develop any additional medical evidence. If, however, he decides that his second designation was correct (or proceeds to a third or fourth designation), he must provide the operator that he finally determines to be the responsible operator with the opportunity to submit medical evidence. That operator may develop its own evidence, or may adopt any evidence previously submitted by an operator. In either case, the finally designated responsible operator is subject to the evidentiary limitations set forth in § 725.414.

(c) The Department has replaced the reference to § 725.413(c)(2) with a reference to § 725.410(b) in order to reflect the new provision governing the time period for submitting documentary evidence to the district director. The Department has also deleted the word ''operator's'' from the title of the regulation. As revised, the Department's regulations do not provide a separate period for the development of an operator's evidence.

(d) One comment submitted in connection with the first notice of proposed rulemaking states that this section affords the district director too much authority, but does not identify which specific powers are objectionable. Without more detail, the Department cannot respond meaningfully to the commenter's concerns. Subsection (b) does enumerate the possible actions a district director may take after reviewing all of the evidence developed in conjunction with the claim. The district director may notify additional potentially liable operators, issue another schedule for the submission of additional evidence, schedule a conference, issue a decision, or take any other action appropriate to the circumstances of the claim. The district director must enjoy some degree of flexibility in determining how to proceed once evidentiary development has concluded. For example, the district director may determine, in light of evidence submitted by the designated responsible operator, that one or more additional potentially liable operators must be notified of the claim, or that a previously notified potentially liable operator should be designated the responsible operator. In such cases, the district director must have sufficient authority to permit the parties to submit additional evidence on the liability issue. Accordingly, the Department does not view the authority provided the district director as excessive.

(e) One comment states that eliminating the requirement in § 725.414, as initially proposed, that all documentary medical evidence be submitted to the district director has also eliminated the need to strengthen the integrity of the district director's adjudication. The Department disagrees. In light of the Department's final revisions, the proposed decision and order will be the only decisional document that the district director issues addressing the claimant's eligibility for benefits and the liability of a responsible operator for the payment of those benefits. A substantial number of claimants currently accept the district director's conclusions regarding their eligibility, and do not seek further review of their claims for benefits. The alternative to issuing proposed decisions and orders—referring all cases to the Office of Administrative Law Judges (OALJs) for a formal hearing on the merits—would represent a considerable and unnecessary expenditure of the resources of the OALJs, the Office of Workers' Compensation Programs, and the coal mine operators who must litigate such cases. Accordingly, the Department does not agree that § 725.415 should be revised to retain the current rule under which district directors may simply forward cases to the OALJs. Also, issuance of some document is necessary to establish the date from which the parties' modification rights begin to run. The Department believes that it will be easier for all parties if there is only one such document in each case.

(f) No other comments were received concerning this section, and no changes have been made in it.

20 CFR 725.416

(a) In its first notice of proposed rulemaking, the Department proposed revising subsection (c) to provide for the imposition of sanctions on any party that failed to appear at a scheduled informal conference and whose absence was not excused. The Department also proposed revising subsection (d) to put parties on notice that those attending the conference would be deemed to have the authority to stipulate to facts or issues or resolve the claim. 62 FR 3361 (Jan. 22, 1997). In its second notice of proposed rulemaking, the Department responded to a number of comments from a variety of sources urging the elimination of informal conferences.

Although the Department declined to eliminate conferences, it proposed revising subsection (b) to require the district director to articulate specific reasons for holding one. In the absence of such a statement, the district director would be prohibited from imposing sanctions for a party's failure to appear. In addition, in order to reduce parties' costs, the Department proposed to recognize the current practice of allowing parties to participate in informal conferences by telephone. 64 FR 54996 (Oct. 8, 1999).

(b) A number of comments generally oppose the use of informal conferences, contending they create additional delay and complexity in district director claims processing. As explained in both its first and second notices of proposed rulemaking, the Department believes that informal conferences may serve useful purposes, including, in appropriate cases, narrowing issues, achieving stipulations, and crystallizing positions. 62 FR 3361 (Jan. 22, 1997); 64 FR 54996 (Oct. 8, 1999). The Department agrees, however, that conferences should not unduly delay the further adjudication of a claim. In addition, they should be held only in appropriate circumstances. Accordingly, the Department has made two major changes to § 725.416. In subsection (a), the Department has added the requirement that a district director conduct any conference within 90 days of the date on which the period for submitting evidence under § 725.410(b) closes, unless one of the parties requests a postponement for good cause. The Department has also deleted the reference in subsection (b) to the district director's discretion to reschedule conferences. Subsection (a) permits the district director to reschedule conferences, but only upon the motion of a party. The Department has also replaced the reference to § 725.413(c)(2) in subsection (a) with a reference to § 725.410(b) in order to reflect a change in those regulations. In addition, in order to further limit the delay caused by informal conferences, the Department will continue to require that the district director issue a decision within 20 days of the close of all conference proceedings, including the time permitted for the submission of any additional evidence. *See* § 725.417.

The Department has made a second major change to § 725.416 to remove any appearance of impropriety in the informal conference process. The district director is a subordinate of the Director, Office of Workers' Compensation Programs, a party in each claim for black lung benefits. The district director is also responsible for the development of evidence on behalf of the Black Lung Disability Trust Fund. These dual roles may affect the degree to which the district director is viewed as a neutral arbiter of the issues before him. An appearance of a conflict of interest is particularly troubling in a case in which there is no operator liable for the payment of benefits, and the claimant lacks representation. In order to minimize any appearance of unfairness, the Department believes that conferences should be held only when all parties are capable of making informed judgments to protect their own interests. Accordingly, in addition to explaining why holding a conference in a particular claim would be beneficial, the Department will inform the parties that no conference will be held if all parties do not have representation. In the event that a claimant is not represented, the district director will not hold a conference. An appointed lay representative is sufficient, however, to allow an informal conference to go forward, 20 CFR 725.362, 725.363 (1999). The regulation extends the same protection to operators that are neither insured nor self-insured. Many self-insured coal mine operators and insurers do not obtain formal representation at this stage of adjudication, but have claims processing personnel, either in their offices or in the claims servicing organizations that they use, who are knowledgeable concerning the entitlement and liability criteria of the Black Lung Benefits Act and its implementing regulations. The Department believes that such personnel should be able to enter into binding stipulations on behalf of the self-insured or insured coal mine operator. The Department has replaced the reference to § 725.362 in subsection (d) with a reference to subsection (b) to accomplish this result. Accordingly, the regulation deems that such operators are represented for purposes of scheduling an informal conference. By contrast, the Department intends that operators that are neither insured nor self-insured—operators that are not often called upon to participate in the adjudication of black lung benefits claims—should not be asked to enter into stipulations without the benefit of a formal representative's advice. Because there will no longer be any conferences involving unrepresented claimants, the Department has deleted the last two sentences of subsection (e). The district director may continue to exercise his discretion, however, to determine whether parties understand any stipulations which they are asked to enter. Exercise of this discretion is particularly important where a claimant is represented by a lay representative.

(c) One comment submitted in connection with the first notice of proposed rulemaking and renewed in connection with the second notice of proposed rulemaking objects to the regulation contending it improperly provides for an adjudication of the claim before the district director that is neither on the record nor under oath. The commenter also objects generally to the discretion given the district director to determine the procedures to be used at the conference. The Department recognizes that the informal conference will not be conducted under oath and on the record, but believes that the changes it has made to the informal conference procedures obviate this objection. As revised, an informal conference will only be held if all parties to a claim are represented or are deemed to be represented. This revision removes the danger that the district director will be able to obtain a stipulation from an unsophisticated party. Moreover, following the termination of the informal conference proceedings, the district director will issue a proposed decision and order. The district director's ''adjudication'' of the claim is thus subject to the consent of the parties. A request for a hearing will require the district director to forward the claim to the Office of Administrative Law Judges for *de novo* adjudication. Consequently, the district director's inability to conduct the informal conference under oath, and to have the conference transcribed, will not affect the substantive rights of any party.

(d) No other comments have been received concerning this section.

20 CFR 725.417

(a) In its first notice of proposed rulemaking, the Department proposed revising subsection (b) to incorporate the limitations on documentary evidence contained in § 725.414. 62 FR 3361 (Jan. 22, 1997). The Department did not discuss § 725.417 in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999).

(b) The Department has revised subsection (b) to clarify the district director's authority to seek additional information on the issue of responsible operator liability even after he has held a conference. The conference may provide the district director with additional information regarding the claimant's employment history. Accordingly, subsection (b) authorizes the district director to issue another

notification of potential operator liability under § 725.407 and/or another schedule for the submission of additional evidence under § 725.410.

(c) One comment objected to the requirement in proposed subsection (d) that parties respond in writing to the district director's memorandum of conference. The Department agrees that this response is unnecessary, and has further streamlined its informal adjudication of claims by eliminating in its entirety the memorandum of conference and the required response that would have followed. Instead, at the conclusion of informal conference proceedings, including the submission of any additional evidence, the district director will issue a proposed decision and order under § 725.418. The Department has also revised subsection (b) in order to clarify the meaning of the sentence.

(d) One comment urges the Department to create a time limit within which the district director must issue a decision after holding a conference. Subsection (c), 20 CFR 725.417(c) (1999), requires the district director to issue a decision within 20 days of the conclusion of the informal conference proceedings. Consequently, no change in the regulation is required.

(e) One comment submitted in connection with the first notice of proposed rulemaking recommended amending subsection (b) to allow submission of post-conference supplementary reports from any physician who has already prepared a report if clarification of the physician's report is needed. No change in the proposed regulation is necessary. A party may request the opportunity to submit additional evidence post-conference which may further support its position or a physician's views. The only restriction imposed by subsection (b) is that such additional evidentiary development cannot circumvent the numerical limitations in § 725.414. To the extent that the comment implies a ''clarifying'' report should be considered an extension of the initial report, the Department disagrees. Excluding supplementary reports from the § 725.414 limitations would create an exception which eviscerates the limitation. A party could invite comment from the physician on almost any aspect of the medical evidence in the record under the guise of ''clarifying'' the physician's views in light of that evidence. In effect, the supplementary report would constitute another medical report. Moreover, any internal ambiguity or omission in the physician's opinion should be apparent upon receipt and review of the report, and can therefore be corrected before submitting the report into the record. If, however, some aspect of a physician's report has been the subject of rebuttal evidence by an opposing party, § 725.414 does allow the rehabilitation of the original report by the submission of a clarifying report from the original doctor. Such rehabilitative evidence is allowed by the evidentiary limitations in § 725.414.

(f) One comment argues that the regulation is questionable in light of the changes made to § 725.414. In the absence of any further explanation by the commenter, the Department is unable to respond.

(g) The Department received no other comments concerning this section.

20 CFR 725.418

(a) The Department proposed revising subsection (a) in its first notice of proposed rulemaking to identify the proposed decision and order as the step which follows a district director's memorandum of conference or, if no conference was held, the period established by the district director for the submission of evidence. The revision was intended to require the issuance of a proposed decision and order in each case, and to eliminate the district director's option of referring the case for a hearing without issuing a proposed decision and order. 62 FR 3361 (Jan. 22, 1997). The Department did not discuss § 725.418 in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999).

(b) The Department has added subsection (d) to provide explicitly that, to the extent he has not done so before, the district director must dismiss, as parties to the claim, all potentially liable operators except one. Moreover, the regulation guarantees that no operator may be the finally designated responsible operator unless it: (1) Was notified of its potential liability pursuant to § 725.407, and thus given the opportunity to submit evidence under § 725.408; and (2) given the opportunity to submit additional evidence relevant to the liability of other potentially liable operators and the claimant's eligibility pursuant to § 725.410.

(c) The Department has deleted the reference in the first sentence of subsection (a) to the parties' responses to the district director's recommendations because a district director will no longer issue a memorandum of conference following the termination of conference proceedings. *See* preamble to § 725.416. In its place, the Department has added a reference to the 20-day time period provided by § 725.417(c) within which the district director must issue a proposed decision and order. In addition, the Department has replaced the reference to § 725.413(c)(2) with a reference to 725.410(b) in order to reflect changes to those regulations. The Department has deleted the words ''to be'' in the first sentence of subsection (a) as unnecessary, and has revised the last sentence of subsection (a) to clarify the meaning of the regulation. The Department has also revised subsection (b) to clarify that the proposed decision and order is the document that must be served on the parties by certified mail.

(d) A number of comments objected to the Department's proposed revision of § 725.411, which would have treated a hearing request filed before the conclusion of district director processing as a request for the further adjudication of the claim. *See* 62 FR 3356 (Jan. 22, 1997). The Department believes that its amended procedures in §§ 725.410 through 725.412, 725.416—725.417, will eliminate much of the confusion that has led parties to file hearing requests before the conclusion of administrative processing. Whereas the Department's original proposal authorized the district director to issue an initial finding, a memorandum of conference, and a proposed decision and order, the revised regulations provide for the issuance of only one decisional document in most cases: A proposed decision and order. The Department does agree, however, that it should honor any hearing request that is filed by a party even if it is filed before the conclusion of a district director's processing. Accordingly, the Department has added subsection (c) to require that the proposed decision and order apprise parties of their right to a hearing. Where a party has previously filed a hearing request, and can reasonably be said to be aggrieved by the proposed decision and order, the district director will inform the party that the case will be referred to the Office of Administrative Law Judges unless the party revokes its previous request. In the case of a claimant who has previously requested a hearing, the district director will forward the case if he has denied benefits. In the case of an operator who has previously requested a hearing on either the claimant's eligibility or its liability for benefits, the district director will forward the case if he has awarded benefits.

(e) One comment submitted in connection with the first notice of proposed rulemaking and renewed in response to the second notice of proposed rulemaking expresses general

dissatisfaction with the issuance of a proposed decision and order calling it an unnecessary procedural step. The issuance of this document, however, is the logical culmination of the claims adjudication process at the district director level. Under the revised procedures adopted by the Department, it will serve as the district director's only attempted resolution of the issues of claimant eligibility and operator liability. The proposed decision and order thus serves either as a final disposition of the claim if the parties accept the decision, or as the conclusion of the initial stage of adjudication if a party aggrieved by the result intends to pursue the case to the hearing stage. The Department therefore rejects the suggestion that a proposed decision and order is unnecessary.

(f) No other comments were received concerning this section.

20 CFR 725.419

The Department received two comments relevant to § 725.419. This section was not open for comment; only technical changes were made to it. *See* 62 FR 3340–41 (Jan. 22, 1997); 64 FR 54970 (Oct. 8, 1999). Therefore no changes are being made in it.

20 CFR 725.421

(a) In its first notice of proposed rulemaking, the Department proposed deleting language in subsection (a) to allow district directors to maintain the files of cases which have been referred to the Office of Administrative Law Judges. Formerly, those files had been sent to the national office of OWCP's Division of Coal Mine Workers' Compensation. 62 FR 3361 (Jan. 22, 1997). The Department did not discuss § 725.421 in its second notice of proposed rulemaking. *See* list of Proposed Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999).

(b) The Department has revised subsection (b)(3) to ensure that the record is sufficient to establish that the district director provided the finally designated responsible operator with notification of its status as a potentially liable operator under § 725.407 as well as its designation as the responsible operator pursuant to § 725.410. In addition, the Department has revised subsection (b)(4) to ensure that the record forwarded to the Office of Administrative Law Judges contains only medical evidence submitted by the claimant and the finally designated responsible operator or fund, as appropriate. *See* explanation accompanying §§ 725.414, 725.415. All evidence relevant to the issue of operator liability shall be made a part of the record.

(c) In subsection (a), the Department has added the word ''evidentiary'' and deleted the phrase ''in the claim'' to clarify the meaning of the sentence.

(d) One comment submitted in connection with the Department's first notice of proposed rulemaking objects to subsection (c) because it requires a party to pay for copies of documents which have previously been provided. The commenter argues that claimants in particular are unaware of the importance of keeping all documents associated with their claims. No change is made in response to this comment. Subsection (c) is a rule of general applicability, and affects responsible operators and insurance carriers as well as claimants. The provision states that the district director shall determine the amount of the copying fee. It therefore allows the district director to consider mitigating factors (the individual's financial condition, the cost of the documents being replaced, etc.) as grounds for reducing or waiving the copying fee. No other comments concerning this section were received, and no changes have been made in it.

20 CFR 725.422

The Department received several comments relevant to § 725.422. This section was not open for comment; it was repromulgated without alteration for the convenience of the reader; *see* 62 FR 3341 (Jan. 22, 1997); 64 FR 54971 (Oct. 8, 1999). Therefore, no changes are being made in it.

20 CFR 725.423

(a) In its first notice of proposed rulemaking, the Department proposed the addition of § 725.423 to consolidate all of the provisions governing extensions of time in subpart E of part 725. With the exception of two time periods, one in § 725.411(a)(1)(i) governing a claimant's response to an unfavorable initial finding and the other in § 725.419 governing responses to a district director's proposed decision and order, the proposed regulation would have allowed any time period to be extended for good cause shown provided a request for an extension was filed before the time period expired. 62 FR 3361 (Jan. 22, 1997). The Department did not discuss § 725.423 in its second notice of proposed rulemaking. *See* list of Proposed Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999).

(b) The Department has eliminated the reference in § 725.423 to the time period set forth in § 725.411(a)(1) because that time period has been eliminated from the regulations. *See* preamble to §§ 725.410–.413.

(c) One comment submitted in connection with the first notice of proposed rulemaking objects to a single regulation governing extensions of time. The commenter would prefer individual provisions in each affected regulation to add clarity to the proceedings. The Department disagrees. In terms of an efficient structure for the program regulations, a single provision with application to the entire Subpart E is more logical than a series of repetitive provisions added to each regulation containing a time frame for action.

(d) One comment submitted in connection with the first notice of proposed rulemaking urges explicit recognition that a request for an extension of time may be honored even if submitted after the time period for taking action has expired. This suggestion cannot be adopted. A ''well-settled'' principle of the black lung program requires the parties to ''strictly adhere to the substantive and procedural requirements of the Black Lung Benefits Act and its implementing regulations.'' *Jordan* v. *Director, OWCP,* 892 F.2d 482, 486 (6th Cir. 1989). Strict adherence to clearly delineated time frames for taking action promotes ''a just, efficient and final resolution'' of claims. 892 F.2d at 487. Any party, however, may ask for additional time to act. The Department believes a requirement that the extension be sought before the time for acting elapses is reasonable. *See generally Fetter* v. *Peabody Coal Co.,* 6 Black Lung Rep. 1–1173, 1–1175 (1984). Each party has notice of when some action must be taken during the adjudication process. Even if the party cannot complete the action itself, it may at least complete the request for additional time. Submitting a timely request for an extension is not an onerous burden.

(e) One comment recommends including proposed § 725.411(a)(1)(i) among the time periods which can be extended. As originally proposed, section 725.411(a)(1)(i) would have afforded a claimant who has been denied benefits one year from the district director's initial finding within which to request further adjudication. The revisions made by the Department to §§ 725.410–.413 have eliminated the time period in § 725.411(a)(1)(i). Accordingly, the comment is no longer relevant.

(f) One comment urges the Department to specify that a party cannot seek an extension of its right to file a request for modification under § 725.310 if that request is not filed before the expiration of the one-year

time period. By its terms, section 725.423 governs the extension of time periods in subpart E of part 725. It thus does not govern section 725.310, which is located in subpart C. The Department does not believe that a catchall provision for the entire part 725 is appropriate, and, in the absence of such a provision, believes that § 725.423 should not include a reference to any regulations outside of subpart E.

(g) One comment argues that the Department should not create a non-statutory jurisdictional bar by refusing to permit an extension of time in the case of a proposed decision and order. The commenter argues that the Department's regulation violates the rights of parties under the Administrative Procedure Act and the Black Lung Benefits Act to obtain a hearing. The Department disagrees. The time limit established by § 715.419 for responding to a proposed decision and order is necessary to create finality in those cases where no party contests the district director's initial adjudication of a claim. In the event that the Department issues a proposed decision and order awarding benefits and the designated responsible operator fails to respond in a timely manner, the Department must be able to enforce the award against the operator. Enforcement of an award under § 21(d) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 921(d), as incorporated by 30 U.S.C. 932(a), and the collection of benefits owed the Black Lung Disability Trust Fund under 30 U.S.C. 934, however, require that the decision and order awarding benefits be final. The time limit in the current version of § 725.419, 20 CFR 725.419 (1999), has been interpreted to be jurisdictional, *Freeman United Coal Mining Co* v. *Benefits Review Board*, 942 F.2d 415, 422 (7th Cir. 1991), and § 725.423 simply recognizes that interpretation. Contrary to the commenter's suggestion, assigning finality to a district director's proposed decision and order awarding benefits in the absence of a timely objection by the designated responsible operator violates no provision in the Administrative Procedure Act or the Black Lung Benefits Act. Nothing in either statute requires the Department to give effect to a party's late request for a hearing following the conclusion of the district director's administrative proceedings.

(h) No other comments were received concerning this section.

Subpart F

20 CFR 725.452

(a) The Department proposed adding subsection (d) in its first notice of proposed rulemaking to prohibit the deciding of a case without holding a hearing unless the administrative law judge believes an oral hearing is not necessary, notifies the parties that he intends to decide the case on the record, and the parties do not object. 62 FR 3361 (Jan. 22, 1997). The Department did not discuss this regulation in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999).

(b) One comment objects to the Department's insistence on an in-person hearing. The commenter states that an administrative law judge should be entitled to decide whether a hearing is necessary in the event that the parties disagree. The regulation reflects the Department's consistent position that any party is entitled to a hearing before an administrative law judge in a case that is not appropriate for summary judgment. Section 19(c) of the Longshore and Harbor Workers' Compensation Act requires a hearing ''upon application of any interested party.'' 33 U.S.C. 919(c), as incorporated by 30 U.S.C. 932(a). In its recent decision in *Robbins* v. *Cyprus Cumberland Coal Co.,* 146 F.3d 425, 430 (6th Cir. 1998), the Sixth Circuit recognized the existence of such a right in a modification proceeding. *See also Cunningham* v. *Island Creek Coal Co.,* 144 F.3d 388, 389–90 (6th Cir. 1998); *Pyro Mining Co.* v. *Slaton,* 879 F.2d 187, 190 (6th Cir. 1989). The *Robbins* court explained several reasons for requiring an in-person hearing:

> The mere fact that parties rarely bring a live expert is immaterial. [The claimant] should have had the opportunity to bring a live expert. Additionally, although the ALJ required any documentary evidence to be introduced in advance, the Director correctly points out that [the claimant] could request and receive permission at a hearing to introduce additional documentary evidence.

146 F.3d at 429. The in-person hearing also allows the parties to offer lay testimony on such issues as the miner's employment and medical history. Finally, the Department believes that guaranteeing the ability of all parties to appear before a highly qualified administrative law judge increases the parties' confidence in the fairness and impartiality of the adjudication process. Contrary to the commenter's suggestion, the Department does not insist that an in-person hearing must be held in every case. The parties remain free to move for summary judgment under subsection (c) in those rare cases where there is no genuine dispute as to a material issue of fact. In all other cases, however, the Department's revised regulation gives each party to a claim the right to insist on an in-person hearing. Permitting the cancellation of a hearing over the objection of even one of the parties, in a case involving disputed facts, would contravene the explicit command of 33 U.S.C. 919, as incorporated by 30 U.S.C. 932(a). No other comments were received concerning this section, and no changes have been made in it.

20 CFR 725.453

Although the Department received comments under this section, the regulation was not open for comment, *see* 62 Fed. Reg. 3341 (Jan. 22, 1997); 64 Fed. Reg. 54970–71 (Oct. 8, 1999). The regulation was repromulgated only for the convenience of readers. Accordingly, no changes are being made in this section.

20 CFR 725.454

(a) In its first notice of proposed rulemaking, the Department proposed eliminating the provision allowing administrative law judges to reopen the record for the receipt of additional evidence for ''good cause.'' 62 FR 3361 (Jan. 22, 1997). The Department's proposal reflected the evidentiary limitations then imposed by § 725.414. The Department did not discuss the regulation in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999).

(b) Several comments submitted in response to both the Department's 1997 proposal and its 1999 reproposal oppose removal from the current regulation of the administrative law judge's authority to reopen the record to receive additional evidence for good cause shown. The Department responded to those objections when it reproposed § 725.414(c), (d) and § 724.456(b) for additional comment. 64 FR 54994–95 (Oct. 8, 1999). At that time, the Department changed the proposed standard for the admission of documentary medical evidence in excess of the regulations' numerical limitations from one of ''extraordinary circumstances'' to ''good cause,'' while leaving the standard for admission of additional evidence relating to operator liability—evidence that was not submitted to the district director—one of extraordinary circumstances. In any event, the standard to be used to govern the introduction of documentary evidence while a case is pending before the Office of Administrative Law Judges

more properly belongs in § 725.456, and it remains there. In that regulation, medical evidence in excess of the limitations contained in § 725.414 may be admitted into the record upon a showing of good cause. No change has been made in § 725.454 in response to these comments.

(c) One comment recommends clarifying subsection (a) to underscore the claimant's right to request a hearing site somewhere outside the 75-mile radius around his residence for the convenience of his representative. No change is made in response to this comment. Subsection (a) specifically provides that a claimant may request an alternate location, and does not limit the site to a specific area or distance from the claimant's residence. A claimant may therefore request the administrative law judge to move the hearing site beyond the 75-mile boundary. Claimants, however, cannot be accorded an unqualified right to determine where hearings should be convened. All matters relating to the conduct of the hearing are ultimately the responsibility of the administrative law judge. He or she must balance the interests and rights of all the parties against the convenience of a particular site for the claimant. Consideration must also be given to administrative convenience and the efficient allocation of human and financial resources in general. An administrative law judge generally schedules several claims for adjudication in one location.

(d) No other comments were received concerning this section, and no changes have been made in it.

20 CFR 725.456

(a) The Department proposed revising section 725.456 in its first notice of proposed rulemaking in order to reflect its original proposal in § 725.414 requiring parties to submit all of their documentary evidence to the district director. As originally proposed, section 725.456 would have prohibited the introduction of any additional evidence before the administrative law judge in the absence of extraordinary circumstances. 62 FR 3361–62 (Jan. 22, 1997). In its second notice of proposed rulemaking, the Department eliminated the requirement in § 725.414 that parties submit all of their documentary medical evidence to the district director in the absence of extraordinary circumstances, although it retained that requirement with respect to documentary evidence relevant to the issue of operator liability. Instead, the Department proposed allowing admission of documentary medical evidence in excess of the § 725.414 numerical limitations upon a showing of good cause. Accordingly, in its second proposal, the Department revised section 725.456, adding subsections from 20 CFR 725.456 (1999) to govern the submission of documentary medical evidence to the administrative law judge. 20 CFR 725.456(b)(1)–(3), (c), (d) (1999). The Department also revised subsection (f), now subsection (e), to reflect changes to § 725.406. 64 FR 54996 (Oct. 8, 1999).

(b) A number of comments object to the Department's addition of proposed subsection (c) to § 725.456, which prohibits parties from introducing documentary evidence at the formal hearing that was in their possession while the case was pending before the district director and was withheld from the district director or any other party. Several of the comments argue under a parallel provision, proposed § 725.414(e), that the provision will most severely affect claimants who are not represented by counsel while the case is pending before the district director, and who may unwittingly fail to provide the district director with evidence that they have developed. Another comment urges the Department to harmonize subsection (c) with section 725.414(e).

Subsection (c) was originally promulgated by the Department in 1978, and was designed to ensure that the district director's initial determination of the claimant's eligibility was based on all of the available evidence regarding the miner's medical condition. The subsection was also designed to ensure that the parties had adequate time to respond to an opponent's evidence. *See* 43 FR 36794, 36798 (Aug. 18, 1978). The revised regulations, however, will significantly alter the adjudication of black lung benefits cases. In particular, the district director will make his initial determination in reliance on a complete pulmonary evaluation performed by a highly qualified physician, and will already have all of the evidence relevant to the identification of the responsible coal mine operator. Moreover, as the commenters point out, an unrepresented claimant who obtains an opinion from his treating physician may inadvertently fail to submit it to the district director, and, under proposed subsection (c), would be prevented from submitting it thereafter to the administrative law judge. In addition, the 20-day requirement in subsection (b)(2) will ensure that parties have an adequate period in which to respond to the opposing party's evidence. Thus, the Department does not believe that subsection (c) remains necessary. Neither of the stated bases for the original adoption of the rule remain. Accordingly, proposed subsection (c) is deleted, and proposed subsections (d), (e), and (f) are redesignated as subsections (c), (d), and (e), respectively. The Department has made a corresponding deletion of proposed section 725.414(e). Since both subsections are now deleted, there is no need to harmonize them.

(c) One comment argues that the Department's revision imposes increased costs on coal mine operators by ''front-loading'' the evidentiary development process in claims where such development is unnecessary or could be delayed. This comment appears to be based on the mistaken belief that the Department's regulations continue to require the parties to submit all of their documentary medical evidence to the district director. The Department revised its proposal in 1999, and § 725.456, as reproposed, will allow both the claimant and the designated responsible operator in a claim to delay their development of documentary medical evidence until shortly before the formal hearing. In the event that a claim does not proceed beyond the district director level, the operator will not have to develop any medical evidence. This is the operators' current practice in many claims.

The Department acknowledges, however, that operators will still be required to submit evidence regarding their potential liability for the claim to the district director while the claim is being adjudicated at this earliest stage. Under the former regulations, an operator did not have to submit any evidence to support its denial of liability until the case was referred to the Office of Administrative Law Judges for a formal hearing. In a number of cases, where no party requested a hearing, the operator did not need to develop or submit this evidence at all. Thus, the commenter's observation that the revised regulations will require the ''up-front'' development of evidence is well-taken with respect to operator liability evidence. In both its initial notice of proposed rulemaking and its second notice of proposed rulemaking, however, the Department explained its intention to require potentially liable operators to submit evidence relevant to their employment of the miner and their financial capability to pay benefits at the earliest possible stage. 62 FR 3355–56 (Jan. 22, 1997); 64 FR 54990–91 (Oct. 8, 1999). In these final regulations, the Department has also required operator development and submission of any evidence relevant to the liability of another party during the district director's claims processing. Evidentiary

development as to other parties will be necessary, however, only in that small percentage of claims in which the identity of the responsible operator is in serious question. *See* § 725.414(b). The Department continues to believe that these requirements are justified by the Department's need to ascertain the positions of potentially liable operators on these issues while the case is pending before the district director, especially given the fact that potentially liable operators other than the designated responsible operator will no longer be parties once a case has been referred to the Office of Administrative Law Judges. In addition, the Department continues to believe that the increased costs that operators will have to bear as a result of this ''front-loading'' will not be significant.

(d) One comment submitted in response to the 1997 proposal and the 1999 reproposal states that the Department's revision eliminates the authority of administrative law judges to perform certain functions. Another comment argues that the revision marginalizes administrative law judges and demeans their powers and duties. Although neither comment offers specific examples of functions, powers, and duties that the Department has eliminated by revising section 725.456, the Department has independently reviewed the provision and does not believe that it eliminates any function currently performed by the administrative law judge, nor any power or duty that administrative law judges currently possess. Under the revised regulations, administrative law judges will retain full authority to decide any issue in respect of a claim, as required by section 19(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 919(a), as incorporated by 30 U.S.C. 932(a). Neither the Longshore Act nor the Administrative Procedure Act gives administrative law judges the right to demand that more evidence be made available for their decision-making. To the extent that they are unpersuaded by the evidence of record, the administrative law judge must decide that issue against the party that bears the burden of producing the evidence on that issue.

(e) One comment argues that the revised regulation denies the rights of all parties to fully cross-examine adverse evidence and witnesses. The Department does not agree that section 725.456 affects the rights of any party to cross-examine adverse evidence. In *Richardson* v. *Perales,* 402 U.S. 388, 409 (1971), the Supreme Court emphasized the importance of preserving the parties' ability to cross-examine the authors of written medical reports, the evidentiary basis of Social Security's disability determinations. Similarly, the Department's regulations provide all parties with a full and fair opportunity to conduct cross-examination. If the author of a report testifies at the hearing, the opposing party may clearly avail itself of the opportunity to conduct live cross-examination. In cases where the documentary medical evidence stands on its own, the opposing party may question the author of the report under conditions determined by the administrative law judge. *See* § 725.459. Finally, the administrative law judge has the authority, in appropriate cases, to issue a subpoena to compel the attendance of a witness at the hearing. In addition, in any case involving documentary medical evidence, the opposing party has the right, under section 725.414, to submit documentary rebuttal evidence of its own. Accordingly, the Department does not agree that its revisions to 725.456 in any way limit the right of parties to conduct an effective cross-examination.

(f) One comment argues that a party should not be required to make an independent showing of ''good cause'' in order to put on its case. The Department does not agree that § 725.456 prohibits a party from putting on its affirmative case. In combination with § 725.414, this provision places reasonable limitations on the number of medical reports and tests that a party may submit into evidence. A showing of ''good cause'' is necessary only in the event that a party seeks to convince the administrative law judge that the particular facts of a case justify the submission of additional medical evidence, either in the form of a documentary report or testimony. The Department believes that in the majority of cases, the quantity of medical evidence permitted by the regulations, even in the absence of a good cause showing, will provide a more than adequate evidentiary basis for an administrative law judge to determine the claimant's eligibility for benefits.

(g) Three comments approve of the Department's reinstatement of the 20-day rule governing the introduction of documentary evidence before the administrative law judge.

(h) One comment argues that § 725.457(d) is invalid in that it prohibits a physician from testifying as to medical evidence relevant to the miner's condition that is not contained in the record. This comment is more appropriately addressed under section 725.457.

(i) No other comments were received concerning this section and no other changes have been made in it.

20 CFR 725.457

(a) In its initial notice of proposed rulemaking, the Department proposed revising subsection (c) to conform the regulation to the requirement then in § 725.414 that a party identify all of its potential witnesses while the claim was pending before the district director. The Department also proposed adding a subsection (d) to address the permissible scope of a medical witness's testimony. 62 FR 3362 (Jan. 22, 1997). In light of changes to § 725.414 in the second notice of proposed rulemaking, the Department proposed altering the witness identification requirement so that it applied only to witnesses who were testifying to the liability of a potentially liable operator or the designation of the responsible operator. Thus, under the reproposal, the testimony of witnesses relevant to the liability of a potentially liable operator and/or the identification of the responsible operator was permissible only if the identity of that witness was disclosed to the district director.

In the second proposal, the Department eliminated the requirement that parties identify their medical witnesses while the case was pending before the district director because, as revised, the regulations allowed parties to forego development of medical evidence until a case was referred to the Office of Administrative Law Judges. In the reproposal, the testimony of medical witnesses was limited by only two considerations. First, the total number of medical reports and medical witnesses offered by a party could not exceed the limitations set forth in § 725.414 except upon a showing of good cause. Second, a party had to provide the other parties to a claim with appropriate notice of a witness' testimony: 10 days notice of any expert witness who would testify at the hearing, or 30 days notice of a deposition. The Department also revised subsection (d) to permit physicians to testify with respect to any medical evidence relevant to the miner's physical condition that was admitted into evidence. 64 FR 54996 (Oct. 8, 1999). The Department has added a clause to subsection (a) to clarify its intent that parties provide 10 days notice of any medical witness that they intend to present at the hearing, including witnesses who have prepared a medical report that has already been submitted into evidence.

(b) One comment argues that it is unreasonable to require a party to

identify a testifying witness while the claim is pending before the district director and that the requirement illegally diminishes the authority of the administrative law judge who conducts the hearing. The Department disagrees. This limitation is a reasonable extension of the requirement, set forth in Subpart E, that parties develop all of the evidence relevant to the liability of potentially liable operators while the case is pending before the district director. In both notices of proposed rulemaking, the Department explained that requiring the submission of evidence relevant to liability was intended to offset the risk that the Black Lung Disability Trust Fund would be required to assume liability in the event that none of the potentially liable operators named by the district director was ultimately determined to be the responsible operator. *See* 62 Fed. Reg. 3355–56 (Jan. 22, 1997); 64 Fed. Reg. 54993 (Oct. 8, 1999). A party should not be able to avoid the required evidentiary development before the district director by submitting its evidence to the administrative law judge in the form of witness testimony. Accordingly, the regulations require that parties identify all such witnesses while the case is pending before the district director. The regulations also recognize, however, that a party may submit additional documentary evidence on the liability issue at the hearing upon a showing of extraordinary circumstances, § 725.456(b)(1), and the regulations should provide the same standard for allowing witnesses' testimony. For example, the Department intends that a party will have shown extraordinary circumstances to present the testimony of a previously unidentified witness whose testimony is relevant to the issue of operator liability when the witness originally identified by the party is no longer available to testify. Accordingly, the Department has revised subsection (c)(1) to reflect this exception. The Department has also revised subsection (c)(1) to reflect its decision to permit the district director to refer the case to the Office of Administrative Law Judges with only one potentially liable operator, the designated responsible operator, as a party to the claim. The Department has also added a clause to subsection (c)(2) to clarify its intent that the combination of physician testimony and documentary medical reports may exceed the numerical limitations of § 725.414 only upon a showing of good cause. The Department has also deleted the last clause of this subsection; the introductory sentence of subsection (c) is sufficient to make clear the Department's intent that the limitations in the subsection are intended to govern testimony at a hearing as well as by deposition or interrogatories.

The Department does not agree, however, that revised § 725.457 diminishes the authority of administrative law judges. Under the procedures incorporated into the Black Lung Benefits Act from the Longshore and Harbor Workers' Compensation Act and the Administrative Procedure Act, administrative law judges are neutral arbiters of the issues presented to them for resolution. Based on the evidence submitted by the parties within the confines of the regulations promulgated by the Secretary, ALJs have ''full power and authority to hear and determine all questions in respect of such claim.'' 33 U.S.C. 919(a), as incorporated by 30 U.S.C. 932(a). The requirement that parties identify witnesses relevant to the issues of operator liability while a case is pending before the district director, and the limitation on expert testimony, are legitimate agency procedural rules designed to ensure the timely presentation of the evidence needed to adjudicate black lung benefits claims.

(c) Two comments state that the notice provision in subsection (a) should be harmonized with section 725.414(c). The Department does not believe that these provisions are in conflict. Subsection 725.414(c) requires the designated responsible operator to identify witnesses whose testimony may be introduced, either at the hearing or by deposition, on the issues relevant to operator liability while the claim is pending before the district director in the absence of extraordinary circumstances. The Department anticipates that the vast majority of these witnesses will be ''fact witnesses,'' *i.e.,* witnesses whose testimony will establish certain facts pertaining to the miner's employment. For example, an operator may present testimony to establish that the claimant did not work as a miner while working for the operator, or that the claimant was not exposed to coal mine dust. Because these witnesses are not ''expert witnesses,'' the 10-day notice requirement of section 725.457(a) is inapplicable. In cases where the witness who will appear at the hearing is an expert witness, such as a witness who will testify to the coal industry's use of certain terms in a coal mine lease, the party offering that witness's testimony must also provide 10 days notice to all other parties to the claim. That time allows the other parties sufficient time to prepare to cross-examine the expert witness at the hearing. If the witness testifies by deposition, the 30-day notice required by § 725.458 provides sufficient time for preparation.

(d) One comment argues that the Department's limitation on the testimony of physicians found in § 725.457(d) is more restrictive than that in the Federal Rules of Evidence and inconsistent with section 23 of the Longshore and Harbor Workers Compensation Act, 33 U.S.C. 923, as incorporated by 30 U.S.C. 932(a). The Department's regulation prohibits a physician who offers testimony from relying on materials relevant to the miner's medical condition that are not part of the record. The commenter contrasts the regulation with the Seventh Circuit's recent decision in *Peabody Coal Co.* v. *Director, OWCP,* 165 F.3d 1126 (7th Cir. 1999). In *Peabody Coal,* the Seventh Circuit reversed an award of benefits because the administrative law judge had discredited a medical opinion that was based on an autopsy review not admitted into the record. The court held that under Rule 703 of the Federal Rules of Evidence, an expert witness may base his opinion on materials that ''need not be admissible, let alone admitted, in evidence, provided that they are the sort of thing on which a responsible expert draws in formulating a professional opinion.'' 165 F.3d at 1128. The court further noted that it could not think of any reason why black lung adjudications should be subject to tighter restrictions on expert testimony, and added that ''[n]either Congress nor the Department of Labor thinks so. Nothing in the statute or regulations applicable to such cases supports the decision of the administrative law judge to impose tighter limits on expert witnesses in black lung cases than the Federal Rules of Evidence impose in ordinary civil and criminal trials.'' 165 F.3d at 1129.

The regulations under which *Peabody Coal* was adjudicated, however, did not contain any limitations on the quantity of medical evidence that a party was entitled to submit to the administrative law judge. Because the Department has now limited the amount of documentary medical evidence in the record, it cannot allow parties to avoid that limitation by presenting an expert witness who will be free to examine additional material that may not be admitted into the record. For example, if the party has already submitted a medical report prepared by one physician, and a consultative report prepared by a second physician, it is not entitled to submit the consultative report of a third physician in the absence of good cause. The regulation ensures that the party is not allowed to

avoid that limitation simply by having the second physician testify, not only about his own conclusions, but also about the conclusions reached by a third doctor. The Department believes that the limitation contained in subsection (d) is an appropriate means of ensuring the parties' adherence to the evidentiary limitations imposed by section 725.414. Like section 725.414, the revised version of section 725.457 will apply only to claims filed after the effective date of these regulations.

Contrary to the commenter's objection, then, the Department's revision does not ''violate'' the Seventh Circuit's decision in *Peabody Coal.* The court did not base its decision on an interpretation of unambiguous statutory language, but by using the Federal Rules of Evidence in a case in which the statute and regulations were silent. 165 F.3d at 1129. By promulgating a regulation that will produce a result contrary to the court's decision in the same circumstances, the Department has simply exercised its authority to fill in a gap identified by the court. ''The power of an administrative agency to administer a congressionally created * * * program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'' *Morton* v. *Ruiz,* 415 U.S. 199, 231 (1974).

Nor does section 725.457 violate section 23 of the Longshore Act. Section 23(a) provides that an administrative law judge ''shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter.'' 33 U.S.C. 923(a), as incorporated by 30 U.S.C. 932(a). Even if this provision could be read as prohibiting the Department from promulgating any regulations under the Longshore Act that govern hearing procedures and the submission of evidence, the Black Lung Benefits Act explicitly authorizes the Secretary of Labor to promulgate regulations that vary incorporated Longshore Act provisions in order to properly administer the black lung benefits program. 30 U.S.C. 932(a); *Director, OWCP* v. *National Mines Corp.,* 554 F.2d 1267, 1274 (4th Cir. 1977). As discussed above, the limitation on the scope of testimony by physicians set forth in § 725.457 is necessary in order to ensure that parties adhere to the limitations on the quantity of medical evidence permitted each side in the adjudication of a claim for black lung benefits. Accordingly, the Department does not agree that the limitation violates section 23 of the Longshore Act.

(e) One comment approves of the Department's revision of the regulation with respect to the testimony of medical witnesses.

(f) No other comments were received concerning this section.

20 CFR 725.458

(a) In its first notice of proposed rulemaking, the Department proposed revising this regulation to ensure that the limitation on the scope of a physician's testimony set forth in § 725.457 was also applicable to testimony offered by deposition and to responses to interrogatories. 62 FR 3362 (Jan. 22, 1997). The Department did not discuss this regulation in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999). The Department did revise § 725.457(d), however, in order to allow a physician who testifies at a hearing to address all of the medical evidence of record. By incorporating § 725.457(d), § 725.458 also incorporated this expansion of the permissible scope of a physician's testimony.

(b) The Department received several comments concerning the cross-reference to § 725.457(d). The reference to § 725.457(d) incorporates into the rule governing depositions and interrogatories the limitations on the scope of physician-witnesses' testimony at hearing. For the reasons expressed in connection with the reproposal of § 725.457, the scope of allowable physician testimony has been broadened to allow a physician to address all of the other medical evidence of record. 64 FR 54996 (Oct. 8, 1999). No response is therefore necessary to comments addressing the operation of § 725.458, with one exception. One commenter suggests that § 725.458 will permit a party to introduce the deposition testimony of physicians who have not previously submitted medical reports, thereby circumventing the evidentiary limitations imposed by § 725.414. In the second notice of proposed rulemaking, the regulation governing witness' testimony generally, § 725.457, was amended to make the Department's intent clear. 64 FR 55044 (Oct. 8, 1999). Subsection (c) specifically prohibits a witness' testimony, even if taken by deposition or interrogatory, unless the witness meets the requirements of § 725.414. Thus, in the absence of a finding of good cause pursuant to § 725.456(b)(1), if a party has submitted the maximum number of documentary medical reports permitted under § 725.414, it may not submit the testimony of a physician-witness at a hearing or by deposition or interrogatory who has not submitted a written medical report. A physician who has not submitted a written report may testify only if the party has not yet reached the maximum number of documentary medical reports allowed. In such a case, the physician's testimony would not exceed the § 725.414 limitations.

(c) One comment urged the Department to replace the 30-day notice requirement in the regulation with a requirement that the parties need only give ''reasonable notice'' of the date, time and place of the deposition, and the name and address of each person to be examined, the current requirement under Fed. R. Civ. P. 30(b)(1). The Department has no reason to believe that the 30-day notice requirement has proved to be unworkable or even has resulted in major inconvenience to the parties in black lung benefits adjudications. Parties remain free under the regulation to agree to less than 30 days' notice when they believe it is reasonable to do so. Many parties to black lung claims do not secure representation until shortly before the hearing, however, and the Department believes that the 30-day notice of deposition, if sent to an unrepresented party, provides an appropriate period of time not only to obtain the necessary representation but also to arrange for participation in a deposition.

(d) One comment submitted in connection with the Department's first notice of proposed rulemaking urges the Department to require parties to identify, while the case is pending before the district director, all physicians that will be deposed. The commenter argues that this requirement would expedite the claims process, eliminate surprise, and require the timely development of positions. In its second notice of proposed rulemaking, the Department eliminated the proposal, contained in the first notice of proposed rulemaking, that parties submit all of their documentary medical evidence while a case is pending before the district director. The Department explained that the revision reflected the wishes of numerous commenters, and was particularly necessary in the case of claimants who might be unable to obtain representation until shortly before the hearing. 64 FR 54992–93 (Oct. 8, 1999). In light of this revision, the Department does not believe that it would be appropriate to require parties to identify all medical witnesses while a case is pending before the district director. This requirement would effectively reinstate the original proposal by requiring parties to

undertake the development of their case as to medical eligibility at the earliest stage of adjudication. The Department believes that this suggestion would adversely affect unrepresented claimants. Section 725.458 provides that all parties must give 30 days notice of any deposition, and section 725.457(a) provides that parties must give 10 days notice of expert witnesses who will testify at the hearing. The commenter has not suggested that these time periods, which were contained in the program's former regulations, have proved to be insufficient.

(e) No other comments were received concerning this section, and no changes have been made in it.

20 CFR 725.459

(a) The Department proposed revising section 725.459 in its first notice of proposed rulemaking in order to require any party who compels a witness to appear at a deposition or hearing or respond to interrogatories for the purpose of cross-examination to pay that witness's costs. The Department also restructured and consolidated the remainder of the regulation. 62 FR 3362 (Jan. 22, 1997). The Department reconsidered how such costs should be assigned in its second notice of proposed rulemaking, and proposed that the party offering the witness's affirmative testimony should also pay any costs associated with his subsequent cross-examination. The sole exception to this rule pertained to indigent claimants and required administrative law judges to apportion the costs of cross-examining a witness offered by such a claimant between the claimant and the party or parties defending the claim. 64 FR 54997 (Oct. 8, 1999). The second proposal also required an administrative law judge to determine the least intrusive and expensive means of cross-examination as appropriate and necessary for a full and true disclosure of the facts. 64 FR 55044 (Oct. 8, 1999).

(b) The Department has substituted the term ''shall'' for the term ''may'' in the fourth and fifth sentences of subsection (b) in order to clarify its intention that the administrative law judge is required, rather than merely permitted, to consider the apportionment of the costs of cross-examination in each case involving a witness offered by an indigent claimant.

(c) Two comments approve of the Department's revision of section 725.459 to impose the costs of producing a witness for cross-examination upon the party relying on the witness's opinion, as well as the provision allowing administrative law judges to apportion costs in cases involving indigent claimants.

(d) One comment argues that the Department's proposal violates section 28 of the Longshore and Harbor Workers' Compensation Act by attempting to shift costs to employers in cases other than those authorized by statute. Section 28(d), 33 U.S.C. 928(d), incorporated into the Black Lung Benefits Act by 30 U.S.C. 932(a), requires an employer to pay the costs, fees, and mileage for necessary witnesses attending the hearing at the request of a claimant in any case in which an attorney's fee is awarded against the employer. Section 28(d) also requires that the necessity for the witness and the reasonableness of an expert witness fee be approved by an administrative law judge, Benefits Review Board, or court. Section 28(a) limits an employer's liability for attorneys' fees to cases in which the claimant successfully prosecutes his claim for benefits after the employer or carrier contests the claimant's entitlement. Accordingly, the commenter argues, the Department cannot shift the cost of cross-examination to employers in cases where the claimant is unsuccessful.

The Department does not agree. The Black Lung Benefits Act incorporates a variety of Longshore Act provisions governing the payment of costs and fees to witnesses. As with all such provisions, the Act explicitly authorizes the Department to vary the terms of those incorporated provisions in order to properly administer the black lung benefits program and effectuate Congress's intent in providing black lung benefits. *See* 30 U.S.C. 932(a) (permitting the Secretary to ''otherwise provide[] * * * by regulations * * *''); *Director, OWCP* v. *National Mines Corp.*, 554 F.2d 1267, 1274 (4th Cir. 1977). In addition to section 28 of the Longshore Act, incorporated section 7 of the Longshore Act also governs the payment of costs by an operator. Section 7(e) provides the Secretary with the power to order an examination of an employee ''[i]n the event that medical questions are raised in any case,'' and to authorize an additional review or reexamination upon the request of any party. 33 U.S.C. 907(e), as incorporated by 30 U.S.C. 932(a). This statutory section further provides that the Secretary may ''charge the cost of examination or review under this subsection to the employer, if he is a self-insurer, or to the insurance company which is carrying the risk, in appropriate cases * * *.'' Thus, by its explicit terms, the cost-shifting mechanism of section 7(e) is not dependent on the miner's successful prosecution of his claim. Rather, Congress, in incorporating section 7(e) into the Black Lung Benefits Act, demonstrated its concern that miners not have to bear all the costs incurred in determining their entitlement to benefits, even in the event that they are ultimately unsuccessful.

In drafting a regulation governing the payment of witnesses' fees and costs, the Department was cognizant of its obligation to provide all parties with the right to conduct appropriate cross-examination of the witnesses offered by opposing parties. In *Richardson* v. *Perales*, 402 U.S. 388, 409 (1971), the Supreme Court recognized that the ability to cross-examine the preparer of an *ex parte* medical report served as an important guarantee of the reliability of such a report. Because the overwhelming majority of medical issues in the adjudication of a black lung benefits claim are decided on the basis of *ex parte* medical reports, rather than on testimony offered at the hearing, the Department must ensure that parties are permitted access to their opposing party's witnesses for the purpose of cross-examination.

At the same time, however, the Department must ensure that parties are not able to prevent an opposing party from offering a particular witness' opinion simply by scheduling a deposition of that witness. This is a particular problem where the claimant is indigent. Such a claimant must initially pay a physician to provide him with a medical opinion. If the operator exercises its right to cross-examine that physician, the claimant may not be able to afford the additional fees and costs necessary to pay the physician for the time he spends answering interrogatories or attending a deposition. Absent a mechanism permitting the apportionment of such costs, the claimant may be faced with the administrative law judge's refusal to consider his doctor's opinion because the doctor was not made available for cross-examination. The Department does not believe that Congress intended this result, and does not believe that a party's right to cross-examination should be used to exclude evidence offered by an opposing party that cannot afford the costs of expert testimony.

In those few cases in which there might be tension, section 725.459 strikes an appropriate balance between the twin goals of guaranteeing the right of cross-examination and ensuring a full and fair adjudication of an indigent claimant's eligibility for benefits. Consistent with incorporated Longshore Act provisions, as varied in order to

accommodate the needs of the black lung benefits program, and based on the Department's inherent to authority fill the statutory gaps left by Congress in the Black Lung Benefits Act, the revised regulation governing witness' fees represents a sensible cost-spreading measure in those relatively few cases in which a claimant is indigent.

(e) One comment suggests that the Department's witness fee regulation violates Supreme Court precedent. Although the commenter does not cite any specific decision, the Court's seminal decisions on cost-shifting, *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), and *West Virginia University Hospitals* v. *Casey*, 499 U.S. 83 (1991), do not prevent the Department from shifting the costs of cross-examination to employers in special circumstances. In *Crawford Fitting*, the Court discussed sections 1920 and 1821 of Title 28 of the United States Code, which authorize shifting witness fees of up to $40 per day. The Court ''held that these provisions define the full extent of a federal court's power to shift litigation costs absent express statutory authority to go further.'' *Casey*, 499 U.S. at 86, explaining the decision in *Crawford Fitting.* As discussed above, the Department believes that the Black Lung Benefits Act, by incorporating various provisions of the Longshore Act and authorizing the Secretary to vary those provisions in order to administer the black lung program, provides ample statutory authority for the Department's cost-shifting regulation. The existence of that authority compels the conclusion that the revised regulation does not violate the Court's decisions in *Crawford Fitting* and *Casey*.

(f) One comment argues that the Administrative Procedure Act does not provide the Department with the authority to limit a party's right to cross-examine an adverse witness. The Department discussed the extent to which the Black Lung Benefits Act incorporates the Administrative Procedure Act and the extent to which the Department may vary that incorporation by regulation in its second notice of proposed rulemaking. 64 FR 54972 (Oct. 8, 1999). In addition, the Administrative Procedure Act requires only that parties be allowed to ''conduct such cross-examination as may be required for a full and true disclosure of the facts.'' 5 U.S.C. 556(d). The Seventh Circuit has recently observed that, under the standard used by the Social Security Administration, a standard identical to the one in the Administrative Procedure Act, '' '[c]ross-examination is * * * not an absolute right in administrative cases.' '' *Butera* v. *Apfel*, 173 F.3d 1049, 1057 (7th Cir. 1999), quoting *Central Freight Lines, Inc.* v. *United States*, 669 F.2d 1063, 1068 (5th Cir. 1982). The Court thus upheld a decision by SSA not to grant a claimant's subpoena to compel the attendance at the hearing by two physicians who had examined the claimant. *See also Copeland* v. *Bowen*, 861 F.2d 536, 539 (9th Cir. 1988) (holding that a disability claimant is ''not entitled to unlimited cross-examination, but is entitled to such cross-examination as may be required for a full and true disclosure of the facts.''); *Yancey* v. *Apfel*, 145 F.3d 106, 113 (6th Cir. 1998) (no absolute right to subpoena reporting physician); *Flatford* v. *Chater*, 93 F.3d 1296, 1305 (6th Cir. 1996) (same). Subsection (b) of the revised regulation meets the APA standard by permitting the ALJ to determine the level of cross-examination that is required for a full and true disclosure of the facts.

(g) No other comments were received concerning this section, and no changes have been made in it.

20 CFR 725.465

(a) The Department made a technical change to section 725.465 in its first notice of proposed rulemaking, but did not open the rule for comment. 62 FR 3341 (Jan. 22, 1997). In its second notice of proposed rulemaking, the Department proposed revising subsection (b) to prohibit administrative law judges from dismissing potentially liable operators previously identified by the district director as parties to the case, except upon the motion or the written agreement of the Director. 64 FR 54997 (Oct. 8, 1999).

(b) One comment argues that the Department's proposed limitation on the ability of administrative law judges to dismiss potentially liable operators as parties to a case impermissibly usurps the authority of administrative law judges and violates the Administrative Procedure Act. The commenter states that the proposal violates the fundamental rights of coal mine operators and forces them to remain in a proceeding after they have been adjudicated not to be a proper party. Finally, the commenter states that the proposal violates section 424(a) of the Act, 30 U.S.C. § 934(a).

The Department does not agree that any party has a fundamental right to be dismissed from a black lung benefits adjudication prior to the final resolution of the issue of operator liability. The Department's final regulations, however, governing the treatment of claims in which more than one company has been named as a potentially liable operator have rendered these objections moot except in one instance. As finally revised, section 725.418 requires the district director to dismiss all but one operator as a party before referring the case to the Office of Administrative Law Judges. The Department has revised § 725.465 accordingly. If the district director erroneously fails to dismiss all operators except the one finally designated responsible pursuant to section 725.418(d), the ALJ may do so at any time. Subsection (b), however, continues to prohibit the ALJ from dismissing the responsible operator designated by the district director except upon the consent of the Director. The Department believes that this regulation remains necessary to prevent the premature dismissal of the designated operator by an administrative law judge. Currently, some administrative law judges resolve the responsible operator issue in a preliminary decision, and may dismiss the responsible operator(s) identified by the district director. In such cases, the Director, as the representative of the Black Lung Disability Trust Fund, must either file an interlocutory appeal with the Benefits Review Board, *cf. Collins* v. *J & L Steel,* 21 Black Lung Rep. (MB) 1–183, 1–1–186 (Ben. Rev. Bd. 1999), and ask that the adjudication of claimant's entitlement be held in abeyance pending the outcome of the appeal, or await the ALJ's resolution of the claimant's entitlement and then file an appeal. Both options are problematic. If the Director files an interlocutory appeal and the Board rejects the Director's arguments and affirms the dismissal, the Director may be unable to seek further review under the stricter standards that the federal appellate courts apply to interlocutory orders. *See, e.g., Redden* v. *Director, OWCP,* 825 F.2d 337, 338 (11th Cir. 1987), citing *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463 (1978). If the Director waits until after the claimant's eligibility is resolved to appeal the responsible operator issue to the Board, the Board may affirm the dismissal solely because the operator did not have an opportunity to participate in the adjudication of the merits of the claim. *Crabtree* v. *Bethlehem Steel Corp.,* 7 Black Lung Rep. (MB) 1–354 (Ben. Rev. Bd. 1984). Neither of these options represents an efficient means of resolving the issue of operator liability in the context of adjudicating a miner's eligibility for benefits.

The revised regulation is intended to eliminate these problems, and ensure that the designated responsible operator and the Director have the opportunity to fully litigate the liability issue at all

levels. Moreover, the regulation does not create any undue hardships. If, after considering all of the evidence relevant to the responsible operator issue, the ALJ finds that the designated responsible operator is not liable for the payment of benefits, but concludes that the claimant is entitled to benefits, the operator merely has to wait until the Director, on behalf of the Trust Fund, files an appeal with the BRB. The operator may then participate in that appeal in defense of the ALJ's liability determination if it wishes. If the Director does not petition for review of the ALJ's liability decision, the operator need not participate in any further adjudication of the case, regardless of whether it is formally included as a party.

Moreover, the revised regulation violates neither section 424 of the Black Lung Benefits Act, 30 U.S.C. 934, nor the Administrative Procedure Act. Section 424 requires coal mine operators who have been determined to be liable for the payment of benefits to a claimant to reimburse the Black Lung Disability Trust Fund for amounts the Trust Fund paid to that claimant on an interim basis. The statute requires, however, that the operator's liability have been ''finally determined'' before the reimbursement obligation may be enforced. 30 U.S.C. 934(b)(4)(B). Under the incorporated provisions of the Longshore and Harbor Workers' Compensation Act, that final determination includes not only an administrative law judge's decision, but also decisions by the Benefits Review Board and the court of appeals. Obviously, an appeal by an aggrieved party, including the Director, OWCP, on an operator liability issue cannot proceed in the absence of all the necessary parties. Thus, it is necessary that the designated responsible operator remain a party to a claim even while it is on appeal. Similarly, nothing in the Administrative Procedure Act gives administrative law judges the authority to issue final decisions on issues. Accordingly, the revised regulation does not violate any statutory provision. As revised, § 725.465 simply ensures that no responsible operator designated by the district director will be dismissed prior to a final determination of claimant eligibility and operator liability except with the approval of the Director.

Finally, the regulation does not preclude the designated responsible operator, in a case in which the district director committed an obvious error, from seeking the written agreement of the Director that it be dismissed as a party. The regulation, rather than giving the Director's representative veto power over an ALJ's decision, as the commenter asserts, simply protects the interests of the Trust Fund, and ensures that the Director, as a party to the litigation, receives a complete adjudication of his interests. The Board has upheld the similar requirement in subsection (d), which prohibits the dismissal of a claim in which the claimant has been paid interim benefits from the Trust Fund, absent the Director's consent. *Boggs* v. *Falcon Coal Co.,* 17 Black Lung Rep. (MB) 1–62, 1–66 (1992).

(c) No other comments have been received concerning this regulation and no changes have been made in it.

20 CFR 725.478

(a) The Department proposed revising this regulation in its initial notice of proposed rulemaking in order to recognize the opinions of three appellate courts and the Benefits Review Board that had rejected the Department's interpretation of the former regulation. The Department had argued that under the former regulation an administrative law judge's decision and order should be considered filed on the date that the ALJ mailed it to the parties. The proposal adopted the view that the date of actual receipt of an administrative law judge's decision and order by the Division of Coal Mine Workers' Compensation (DCMWC) constitutes its filing date and renders the decision effective. Thus, the date of DCMWC's receipt triggers the running of the 30-day period for challenging an administrative law judge's decision. The proposal conformed the regulation to existing caselaw. 62 FR 3362–63 (Jan. 22, 1997). The Department also proposed moving the last two sentences of the former regulation to a more appropriate location in § 725.502. The Department did not discuss this regulation in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999).

(b) One comment stated that the revised regulation would extend the appeal time by several days, presumably because of the time used to send the file from the Office of Administrative Law Judges to DCMWC. The courts, however, rejected the Director's interpretation of the former regulation because it impermissibly shortened the 30-day statutory appeal time. *Trent Coal Co.* v. *Day,* 739 F.2d 116, 118 (1984); *Daugherty* v. *Director, OWCP,* 897 F.2d 740, 742 (1990). Following the reasoning of these decisions, the revision does not lengthen the appeal time, but simply recognizes the appeal time guaranteed by the statute.

(c) No further comments have been received concerning this section, and no changes have been made in it.

20 CFR 725.479

(a) In its first notice of proposed rulemaking, the Department proposed adding subsection (d) to provide that the 30-day period to appeal an administrative law judge's decision and order will commence upon a party's receipt of that document even though it was not served by certified mail or there was some other defect in service. 62 FR 3363 (Jan. 22, 1997). The Department did not discuss this regulation in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999).

(b) Several comments suggest that subsection (d) is unnecessary because strict adherence to the requirement in § 725.478 for service of an administrative law judge's decision by certified mail would eliminate any question as to the date of receipt of that decision. Subsection (d) does not supplant the requirement for serving decisions by certified mail. It simply establishes that actual receipt of a decision overcomes any technical defect in service for purposes of triggering appeal and reconsideration rights. These defects are not limited to cases where service is not made by certified mail. For example, a decision may be mailed to the wrong address but the party to whom it should have been sent later learns of the decision and obtains a copy. The revised regulation would begin the 30-day appeal period upon that party's receipt. The provision thus provides an element of finality to decisions while protecting the parties' rights to pursue litigation in a timely manner.

(c) One comment objects to subsection (d) as too technical and subject to violation by unwary litigants. The Department disagrees with this characterization. Subsection (d) eliminates any doubt that a party must exercise its options for challenging a decision in a timely manner once the party has received the decision and despite any defect in service. This provision therefore protects the litigants' rights and interests by dispelling any confusion as to the effectiveness of any decision which reaches the parties despite technical nonconformance with the service process.

(d) No other comments were received concerning this section, and no changes have been made in it.

Subpart G

20 CFR 725.490

In its first notice of proposed rulemaking, the Department proposed the reorganization and renaming of the rules governing the identification of responsible coal mine operators. Section 725.490 retained its title and much of its language. The Department proposed deleting the last clause of the last sentence of subsection (b), however, in order to reflect a move to part 726 of the regulations governing the obligations of coal mine operators to secure the payment of benefits. 62 FR 3363–65 (Jan. 22, 1997). No comments were received concerning this section, and no changes have been made in it.

20 CFR 725.491

(a) The Department proposed revising section 725.491 in order to clarify the meaning of the statutory term ''operator.'' 62 FR 3363 (Jan. 22, 1997). Section 725.491 retains some material from the Secretary's current regulations, such as the rebuttable presumption of exposure to dust currently found in 20 CFR 725.492(c). Much of section 725.491's language is new, however. In particular, the Department sought to ensure that terms critical to the identification of a company potentially liable for the payment of benefits under the Black Lung Benefits Act, such as ''owner'' and ''independent contractor,'' were defined broadly in keeping with Congress' intent that the coal mining industry bear liability for individual claims to the maximum extent feasible. The Department's goal in proposing these revisions was to insure that any company, partnership, or individual that employed a ''miner'' could be held liable under the Act. The regulation also implements the Department's view that the officers of an uninsured corporate coal mine operator should not be considered coal mine operators in their own right. The Benefits Review Board has recently accepted that view with respect to the Department's current regulations. *Lester* v. *Mack Coal Co.,* 21 Black Lung Rep. (MB) 1–126, 1–130–131 (Ben. Rev. Bd. 1999).

In its second notice of proposed rulemaking, the Department revised subsection (a)(2)(i) in response to one comment to ensure the consistent use of the term ''coal mine dust'' rather than ''coal dust.'' 64 FR 54998 (Oct. 8, 1999). In addition, the Department responded to comments about its definition of independent contractors in subsection (c) and its exclusion of the federal government and state governments as operators in subsection (f). 64 FR 54997–98 (Oct. 8, 1999).

(b) One comment suggests that retroactive application of the Department's revised responsible operator regulations is impermissible. Although these new regulations will apply only to claims filed after the date on which the revisions become effective, *see* § 725.2, the commenter argues that the Department is expanding the scope of the term ''operator,'' and that with respect to refiled claims, the newly amended definition will be applied retroactively. In this regard, the commenter argues that the Department's reliance on the jurisdiction of the Mine Safety and Health Administration to regulate under the Black Lung Benefits Act is inappropriate. We understand the commenter's argument to be that the Department should not have relied on cases decided under the Federal Mine Safety and Health Act (FMSHA) in promulgating its definition of the term ''operator.'' The Department cited such cases in both notices of proposed rulemaking. 62 FR 3364 (Jan. 22, 1997); 64 FR 54997–98 (Oct. 8, 1999). The commenter suggests that the MSHA's jurisdiction is based on an agreement with the Occupational Safety and Health Administration (OSHA) to ensure that all American workplaces are subject to inspection by one of the two agencies, and that the Department's adoption of FMSHA criteria represents an expansion of coverage under the Black Lung Benefits Act.

The Department disagrees with the premise of the argument. The Black Lung Benefits Act, which is subchapter IV of the Federal Mine Safety and Health Act, has incorporated the definition of the term ''operator'' found in section 3(d) of the FMSHA, 30 U.S.C. 802(d), since its enactment in 1969. The Secretary's regulations do not attempt to expand that definition, either by imposing liability on companies that are not currently liable for benefits, or by increasing the number of employees for which a coal mine operator may be held liable. The Black Lung Benefits Act and the Secretary's implementing regulations have consistently contained expansive definitions of terms such as ''operator'' and ''independent contractor,'' *see, e.g.,* 20 CFR 725.491(b)(1)(company need not directly supervise work in order to be considered an operator). In addition, regardless of any agreement between MSHA and OSHA, the definitions set forth in the FMSHA create an outer limit for MSHA's jurisdiction; MSHA simply cannot exercise authority over employers and activities not covered by the FMSHA. These definitional provisions also govern the extent of coverage under the Black Lung Benefits Act. Accordingly, the regulations implementing the Black Lung Benefits Act must recognize and account for the extent of coverage provided by the FMSHA.

(c) One comment argues that even if certain individuals, such as food service workers, may be considered ''miners'' under the BLBA, the Department should not require the employers of such individuals to bear liability for the payment of any benefits to which they become entitled. The commenter suggests that the Department's regulation would require a number of companies with only a tenuous relationship to the mining of coal to purchase insurance in order to cover the risk that they will be liable for the payment of benefits. Adopting the commenter's suggestion that these companies should be exempt from liability, however, would require imposing potential liability for their employees' claims on the Black Lung Disability Trust Fund. In its initial proposal, the Department took note of Congress' intent that the coal mining industry, rather than the Black Lung Disability Trust Fund, bear liability for the payment of individual claims to the maximum extent feasible. *See* 62 FR 3363 (Jan. 22, 1997). Accordingly, if individuals whose work is integral to the extraction or preparation of coal but who may not be considered traditional coal miners are determined to be entitled to benefits under the Act as a result of occupational exposure to coal mine dust, their employers must bear responsibility for the payment of those benefits. For example, individuals who transport coal during the extraction or preparation process, *Norfolk & Western Railway Co.* v. *Roberson,* 918 F.2d 1144, 1149–50 (4th Cir. 1990), *cert. denied,* 500 U.S. 916, and who deliver supplies essential to the extraction or preparation of coal, *Pinkham* v. *Director, OWCP,* 7 Black Lung Rep. (MB) 1–55, 1–57 (Ben. Rev. Bd. 1984), have been determined to be ''miners'' under the Black Lung Benefits Act. The regulatory definition of the term ''operator'' must be broad enough to ensure that the employer of such an individual bears direct liability for any benefits to which the miner is entitled.

(d) One comment objects to the Department's exclusion in subsection (f) of state and federal governments from the term ''operator.'' With respect to state governments, the commenter argues that there is no indication that Congress intended to exempt the states from the Act's broad coverage of coal mine operators. As the Department has previously explained, however, the test

under relevant Supreme Court decisions is not whether Congress indicated its intention to exempt the states from coverage, but whether Congress indicated a clear intention to include the states. *See* 64 FR 54998 (Oct. 8, 1999), discussing *Gregory* v. *Ashcroft,* 501 U.S. 452 (1991). The commenter does not allege that the BLBA meets this test with respect to state governments, noting only that the language of the Act could easily be construed to cover state employees. Although the commenter also objects to the exemption from liability under the Black Lung Benefits Act of the federal government, it argues that federal mine inspectors, the only federal employees who could be potentially covered by the BLBA, should not be considered ''miners.'' The Department agrees, and has taken the same position in litigation.

The commenter's true complaint appears to be that the liability for benefits payable to a claimant who was a miner before he became a coal mine inspector will fall on the operator that employed the claimant as a miner. The Fourth Circuit interpreted the Department's current regulations to require this result in *Eastern Associated Coal Corp.* v. *Director, OWCP,* 791 F.2d 1129, 1131–32 (4th Cir. 1986). Specifically, the court held that to the extent that an individual contracts pneumoconiosis as a result of work as a federal coal mine inspector, his exclusive remedy against the government lies under the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.* If such an individual is also able to obtain benefits under the Black Lung Benefits Act, based on other work as a miner, liability for those benefits rests with the coal mine operator that most recently employed the individual as a miner. *See also Consolidation Coal Co.* v. *Borda,* 171 F.3d 175, 179 (4th Cir. 1999). The commenter has offered no reason for the Department to revise its regulation to produce a different outcome.

(e) No other comments have been received concerning this section, and no changes have been made in it.

20 CFR 725.492

(a) The Department proposed revising section 725.492 to specifically define the term ''successor operator'' and address the issues posed by this category of coal mine operator. 62 FR 3364 (Jan. 22, 1997). The revised regulation largely tracks the language of section 422(i) of the Act, 30 U.S.C. 932(i), and provisions contained in the current version of 20 CFR 725.493. In addition, the Department clarified the definition to give effect to Congress' demonstrated interest in ensuring that a wide variety of commercial transactions was sufficient to give rise to successor liability under the Black Lung Benefits Act. 30 U.S.C. 932(i)(3). The Department did not make any additional revisions to this regulation in its 1999 proposal, 64 FR 54998–99 (Oct. 8, 1999), but did respond to two comments relating to the purchase of coal assets in a corporate reorganization or liquidation and the primary liability of a prior operator's insurance company.

(b) One comment states that subsection (e) exceeds the scope of the Act by suggesting that a purchase of mineral rights alone may be sufficient to attach liability to the purchaser as a successor operator. The commenter argues that the BLBA imposes liability only on operators of coal mines. Subsection (e) defines ''acquisition'' of a coal mine to include any transaction that transfers the right to extract or prepare coal at a mine. This regulation is based on the statutory definition of an ''operator,'' which includes not only the operator of a mine but also the mine's owner. 30 U.S.C. 802(d). In addition, the Department's regulations have long recognized that the lessor of coal mining property may bear liability for the payment of benefits in certain cases. *See* 20 CFR 725.491(b)(2) (1999). The Department does agree, however, that, in order to become liable as a successor operator, the acquirer of mining property must continue to derive an economic benefit from the coal on the property. Thus, the mere acquisition of mineral rights alone, without the actual extraction, preparation, or transportation of coal, or coal mine construction, will not subject the acquirer to successor operator liability.

(c) No other comments have been received concerning this section. The Department has added a comma in subsection (c) and deleted a comma in subsection (d)(1) in order to clarify the punctuation of the regulation.

20 CFR 725.493

(a) In its first notice of proposed rulemaking, the Department proposed revising section 725.493 to define the required relationship between a coal mine operator and a coal miner, the statutory basis for an operator's liability for the miner's claim under the Black Lung Benefits Act. 30 U.S.C. 932(a). 62 FR 3364 (Jan. 22, 1997). The Department made a technical change in its second notice of proposed rulemaking. It also added more specific language to subsection (a)(1) to recognize as sufficient to establish the requisite employment relationship a variety of arrangements between a worker and the entity that supervises that work. 64 FR 54999 (Oct. 8, 1999).

(b) One comment states that the Department's regulation will eliminate the current operator practice of leasing employees. The Department's response to this comment is set forth under section 726.8. No other comments have been received concerning this section, and no changes have been made in it.

20 CFR 725.494

(a) Section 725.494 provides the criteria for the identification of one or more ''potentially liable operators'' with respect to a claim for benefits. 62 FR 3364 (Jan. 22, 1997). For each claim, the group potentially includes all of those operators who meet the criteria currently contained in 20 CFR 725.492 and 725.493 (*e.g.,* employment of the miner for a year, including at least one day after December 31, 1969). This revised regulation also explains the factors used to consider whether a company is financially capable of assuming liability for the payment of benefits. In the second notice of proposed rulemaking, the Department made several technical changes to the regulation to make it easier to read. 64 FR 54999 (Oct. 8, 1999). The Department responded to one comment contending that the presumption in subsection (a) was illegal by citing the broad statutory grant of authority given the Department to create regulatory presumptions and by noting that the presumption appears in the current regulations at 20 CFR 725.493(a)(6). The Department responded to a comment concerning subsection (e) by explaining that subsection (e) did not contain a presumption, but simply recited the evidence needed to support a finding that an operator is financially capable of assuming liability for the payment of benefits. The Department further explained that the criteria in section 725.494 have no effect on a miner's eligibility for benefits.

(b) One comment received in connection with the Department's consideration of alternatives under the Regulatory Flexibility Act urges the Department to identify only the coal mine operator that is most likely to be liable for the payment of benefits as the responsible operator. The commenter does not distinguish between processing the claim at the district director level and the formal adjudication of the claim beyond that level. The commenter's main concern, however, appears to be the transaction costs imposed by the proposed ''joint defense'' requirement. The Department has eliminated the requirement that operators participate in the joint defense of the claimant's

entitlement by prohibiting more than one operator from participating in a case beyond the district director level, and by requiring the district director to exclude from the record any documentary medical evidence submitted by an operator other than the finally designated responsible operator. *See* explanation accompanying §§ 725.414, 725.415, 725.421. This revision does not require any alteration in the text of § 725.494. To the extent that the commenter is objecting to the district director's notification of more than one operator as potentially liable operators, the Department's explanation of the need for this requirement is set forth in the preamble to § 725.407.

In addition, a number of courts have been critical of the length of time it takes to resolve individual black lung benefits claims, *see, e.g., C&K Coal Co.* v. *Taylor,* 165 F.3d 254, 258 (3d Cir. 1999), and have held that the delays may deprive operators of their due process rights. *Lane Hollow Coal Co.* v. *Director, OWCP,* 137 F.3d 799, 807 (4th Cir. 1998). Some of these delays have been caused by remands from the Office of Administrative Law Judges in order to require the identification of additional responsible operators and the development of more evidence on responsible operator issues. The Department's revised regulations governing the identification and adjudication of the liable coal mine operator are intended to prevent such delays from occurring in the future. In all claims filed after the effective date of these revisions, the Department will have only one opportunity, while the case is pending before the district director, to obtain evidence from the operators that employed the miner. To facilitate the district director's resolution of the responsible operator issue, the regulations require the submission of evidence relevant to the criteria in section 725.494 to the district director and enhance the district director's ability to use subpoenas to compel the production of additional documents. Once all of this evidence is forwarded to the Office of Administrative Law Judges for a formal hearing, the administrative law judge assigned to the case will determine, in light of the evidentiary burdens imposed by section 725.495, whether the district director designated the proper responsible operator. If the administrative law judge determines that the district director did not designate the proper responsible operator, liability will fall on the Trust Fund. No remand for further development of the responsible operator issue is permissible.

(c) No comments have been received specifically relating to this section, and no changes have been made in it.

20 CFR 725.495

(a) Section 725.495 contains the criteria for deciding which of the miner's former employers will be the responsible operator liable for the payment of benefits to the miner and/or his survivors. 62 FR 3364–65 (Jan. 22, 1997). From among the employers that meet the criteria in § 725.494 for a potentially liable operator, section 725.495 assigns liability to the company that most recently employed the miner. In addition, the regulation explicitly assigns burdens of proof in the adjudication of the responsible operator issue. The regulation thus fills the regulatory void noted by the Fourth Circuit in *Director, OWCP* v. *Trace Fork Coal Co.,* 67 F.3d 503, 507 (4th Cir. 1995). In its second notice of proposed rulemaking, the Department again addressed this issue, rejecting arguments that the Department's assignment of burdens of proof violated the Fourth Circuit's decision. 64 FR 54999 (Oct. 8, 1999).

(b) The Department has revised the language of the first sentence of subsection (d) to reflect changes in the manner in which the district director will process claims, set forth in §§ 725.410–725.413, as well as the change in § 725.418(d) which prohibits the district director from forwarding a case to the Office of Administrative Law Judges with more than one operator as a party. *See* explanation accompanying § 725.414. The district director will identify the designated responsible operator in a document titled a schedule for the submission of additional evidence rather than in an initial finding. *See* explanation accompanying §§ 725.410–725.413. Moreover, to help ensure that the district director properly identifies the responsible operator, sections 725.415 and 725.417 permit the district director to re-designate the responsible operator, by issuing another schedule for the submission of additional evidence, if he determines that his initial designation may have been erroneous. *See* explanation accompanying §§ 725.415 and 725.417. Accordingly, the Department has replaced the reference in subsection (d) to the operator ''initially found liable'' with a reference to the operator that is ''finally designated'' as the responsible operator.

(c) One comment suggests that a miner's prior employer should not have to bear liability for a claim when the financial inability to pay benefits of another coal mine operator who more recently employed the miner is the responsibility of the Department. For example, the commenter notes, the Department accepted as insurers a number of ''group self-insurance associations'' that are currently unable to make benefit payments because they did not adequately secure the payment of claims for which they were ultimately held liable. Under section 423(a)(2) of the Act, 30 U.S.C. 933(a)(2), however, the Department is obligated to accept insurance coverage from any company, association, person or fund that is authorized under the laws of any State to insure workmen's compensation. *Compare* 33 U.S.C. 932(a)(1)(B) (Longshore and Harbor Workers' Compensation Act provision giving the Department authority to approve insurers under that Act). Accordingly, the Department's ''decision'' to accept these state group associations as insurers was not based on an exercise of discretion but rather on the understanding that they were authorized under the laws of their states to insure workers' compensation. The Department thus did not voluntarily assume the risk that these associations would become insolvent.

By contrast, the Department does have the authority to accept or reject applications for self-insurance and to set the minimum standards applicable for qualifying as a self-insurer. 30 U.S.C. 933(a)(1). To the extent that the security deposited by a self-insured coal mine operator pursuant to § 726.104 proves insufficient to pay individual claims, the Department agrees that the liability for those claims should not be placed on operators that previously employed the miner. Rather, in establishing the amount of security required, the Department voluntarily accepts the risk that self-insured operators will not have deposited sufficient security to pay claims if they are liquidated or become bankrupt.

Accordingly, the Department has added paragraph (a)(4) to section 725.495. The regulation does not affect the liability of any operator that employed the miner after his employment with the self-insured operator ended, even if that latter employment only lasted one day, provided the miner's cumulative period with that employer totalled at least one year. In determining the length of this cumulative period, the factfinder should include any period for which the employer is considered a successor operator to the miner's actual employer, *see C&K Coal Co.* v. *Taylor,* 165 F.3d 254, 257 (3d Cir. 1999). Like the

remainder of section 725.495, this provision shall be applicable only to claims filed after the date upon which these revisions become effective. This provision does not affect the liability of any operator that employed the miner after he left employment with the self-insured operator.

(d) Several comments continue to object to the imposition of a burden of proof on the potentially liable operator that the Department designates as the responsible operator. The regulation imposes on the Department the initial burden of establishing that the designated operator is a potentially liable operator, assisted by a presumption in subsection (b) that the designated operator is financially capable of assuming liability for the payment of benefits. In addition, if the district director designates as the responsible operator any operator other than the miner's most recent employer, he must include in the record a statement explaining the reasons for his finding and, if appropriate, an explanation of the Department's search of its insurance files. The burden then shifts to the designated responsible operator to prove either that it is financially incapable of assuming liability for the payment of benefits or that another potentially liable operator (*i.e.,* an operator that meets the criteria in § 725.494) employed the miner more recently. The Department's rationale for this revision is fully set forth in its explanation of the original proposal. 62 FR 3363–65 (Jan. 22, 1997).

(e) One comment argues that the Department's imposition of the burden of proof on the designated responsible operator violates the Supreme Court's decisions in *Director, OWCP* v. *Greenwich Collieries,* 512 U.S. 267 (1994) and *Metropolitan Stevedore Co.* v. *Rambo,* 117 S. Ct. 1953 (1997), as well as the Administrative Procedure Act. The Department's response to this comment is fully set forth at 64 FR 54972–74 (Oct. 8, 1999). Congress gave the Department particularly broad authority to promulgate regulations governing the identification of the operator responsible for the payment of benefits, 30 U.S.C. 932(h), including the authority to create ''appropriate presumptions'' for determining whether pneumoconiosis arose out of a miner's employment with an individual coal company, and to establish ''standards for apportioning liability among more than one operator, where such apportionment is appropriate.'' This authority has been construed to permit the assignment of liability to a single operator. *See National Independent Coal Operators Association* v. *Brennan,* 372 F. Supp. 16, 24 (D.D.C.), *aff'd,* 419 U.S. 955 (1974). The burdens imposed by section 725.495 are thus fully consistent with the statutory authority granted the Department.

(f) Two comments argue that potentially liable operators should not be required to submit all of their evidence demonstrating the liability of other more recent of the miner's employers within the first 90 days after they receive notice of the claim. As the Department has discussed more fully in its response to comments concerning section 725.408, the 90-day time limit in that regulation is applicable only to the submission of evidence, generally within the control of an operator notified by the Department, which establishes that the operator is not a potentially liable operator in the claim. This includes evidence that the employer was not an operator for any period after June 30, 1973; that the operator did not employ the miner as a miner for a cumulative period of at least one year; that the miner was not exposed to coal mine dust while working for the employer; that the miner's employment did not include at least one working day after December 31, 1969; and that the employer is financially incapable of assuming liability for the payment of benefits. *See* §§ 725.408(a)(2)(i)–(v), 725.494(a)–(e). By contrast, documentary evidence submitted to demonstrate a more recent employer's potential liability is governed by section 725.414, which states that the evidence must be submitted pursuant to a schedule established by the district director after a party has indicated its dissatisfaction with the district director's initial findings of eligibility and liability. The submission of this evidence is therefore not subject to the 90-day time limit.

(g) No other comments have been received concerning this section, and no other changes have been made in it.

20 CFR 725.497

Although the Department received comments relevant to this section, the regulation was not open for comment, *see* 62 Fed. Reg. 3341 (Jan. 22, 1997); 64 Fed. Reg. 54971 (Oct. 8, 1999). It was inadvertently omitted from the list of technical revisions. Accordingly, no changes are being made in this section.

Subpart H

20 CFR 725.502

(a) The Department proposed significant changes to the current § 725.502 in its initial notice of proposed rulemaking. 62 FR 3412–13 (Jan. 22, 1997). The most important changes were designed to make clear to responsible operators their obligations under the terms of an effective award of benefits even though the claim might still be in litigation. By clarifying the obligations of a liable party pursuant to an effective award, the Department hoped to promote operator compliance. 62 FR 3366 (Jan. 22, 1997). The Department therefore proposed that a responsible operator pay all of the benefits due under the terms of an effective award, *i.e.,* both prospective monthly benefits and retroactive benefits. The proposed regulation also defined when benefits become due after the issuance of an ''effective'' decision awarding benefits. 62 FR 3412–13 (Jan. 22, 1997). Coupled with an assessment of an additional twenty-percent of any unpaid compensation (33 U.S.C. 914(f) as incorporated by 30 U.S.C. 932(b), proposed § 725.607), proposed § 725.502 substantially clarified the responsible operator's benefit payment obligations. In its second notice of proposed rulemaking, the Department responded to comments opposing the changes. Without disputing the statutory incorporation of § 14(f), the commenters contended that the addition of twenty-percent of unpaid compensation to late payments was punitive. They also opposed the obligation to pay retroactive benefits while an award was on appeal, arguing such a requirement violated Congressional intent and that recovery of those payments was unlikely in the event the award was overturned. 64 FR 54999–55000 (Oct. 8, 1999). Citing Congressional intent that the coal industry bear primary responsibility for benefits, the Department defended the assessment of an additional twenty-percent of unpaid compensation as a means to promote prompt compliance with effective awards. The Department noted its concern that operators rarely paid benefits while an award was on appeal, thereby shifting the financial burden and ultimate risk of loss to the Trust Fund. Moreover, the Department noted that requiring payment of retroactive benefits during active litigation was consistent with Congressional intent. The liable party is generally required to pay all benefits due the claimant under the terms of an effective award, and the ''benefits due'' include retroactive benefits. Congress enacted one exception: the Trust Fund is authorized to pay only future monthly benefits when it pays on behalf of an operator. 64 FR 55000 (Oct. 8, 1999). In response to another comment, the Department agreed that the law clearly requires the Trust Fund to pay interim benefits if an

operator obtains a stay of payments. The Department also concluded the proposed regulation required the operator to continue to pay benefits despite the pendency of a modification petition until a new effective order is issued pursuant to § 725.310. Finally, the Department reiterated its view that prospective monthly benefits are due and ''shall be paid'' when an administrative law judge's award becomes effective, *i.e.,* when the order is filed in the office of the district director. The Department did propose one change to § 725.502(b)(1) in its second notice. That change made monthly benefits due on the fifteenth day of the month following the month for which the benefits are paid, instead of the first business day of that month as originally proposed. 64 FR 55050 (Oct. 8, 1999). The Department has proposed one minor change in the final rule. Subsection (b)(2) requires the district director to compute the amount of retroactive benefits and interest a responsible operator owes the claimant, and to inform the parties. The Department has added language at the end of the last sentence of subsection (b)(2) to clarify that the district director must attach a current table of applicable interest rates to the computation.

(b) The Department has received one new comment in response to the second notice of proposed rulemaking. The commenter renews the objections stated in its response to the initial notice of proposed rulemaking, contending the Department did not respond adequately to its concerns in the 1999 preamble discussion. The comment cites several objections to requiring payment of retroactive benefits while an award is on appeal, and also objects to the assessment of the twenty-percent additional compensation for failure to pay such benefits. Specifically, the comment argues that use of the twenty-percent additional compensation is inconsistent with Congressional intent because the assessment was intended only to help claimants obtain prompt payment, and not reduce Trust Fund outlays. The comment also contends Congress intended the Fund to pay interim benefits during litigation on behalf of operators, and recoup those payments from operators only after the claimant ultimately prevails. In the commenter's view, Congress intended the Fund to share the risk of unsupportable awards with operators by assuming the operator's liability until litigation concluded and the validity of the award was established. The comment criticizes § 725.502(b)(2) because it will increase operator payments and lead to larger, and more numerous, overpayments. Finally, the comment objects to § 725.502(c), which requires the payment of one month of benefits if the miner-claimant dies in the month when eligibility commences. The comment states that the provision, in effect, allows duplicate benefits for that month in the event the survivor becomes entitled to benefits.

(c) The criticisms leveled at § 725.502(b)(2) rest on one basic premise: Since 1981, Congress has intended for the Trust Fund to pay prospective monthly benefits in all awarded claims remaining in litigation in which there is potential operator liability. Based on this premise, the commenter contends that an operator cannot be compelled by means of the § 14(f) ''penalty'' to pay any benefits—retroactive or prospective—until the award is final because no retroactive benefits are due and the Trust Fund is liable for the prospective benefits pending entry of a final award. The Department disagrees with the comment's premise and the conclusions derived from it.

As an initial matter, the comment does not cite any statutory section, legal authority, legislative history or other evidence for its position as to Congressional intent and the operation of the Trust Fund. It relies, instead, on an ''understanding'' or ''agreement'' between Congress and the members of the public affected by the 1981 amendments to the Black Lung Benefits Act (BLBA). None of the available material, however, supports the comment's views.

First, the expenditures which the Fund may undertake are a matter of statutory mandate. Under the Internal Revenue Code (in which the Trust Fund provisions appear), monies are available if ''the operator liable for the payment of such benefits * * * has not made a payment within 30 days after that payment is due[.]'' 26 U.S.C. 9501(d)(1)(A)(ii). The only limitation prohibits the payment of retroactive benefits by the Fund on behalf of operators in claims filed after the 1981 amendments. 26 U.S.C. 9501(d)(1)(A). The provision is clear: The operator is liable for any benefits which are due, and the Fund will pay only prospective benefits if the operator defaults. Section 9501(d)(1)(A)(ii) does not suggest Congress intended as a routine practice to relieve the operator of the obligation to pay benefits which are due while the claimant's entitlement remains in dispute.

Second, the legislative history of the creation and later-amended operation of the Black Lung Disability Trust Fund supports the Department's position. The historical antecedents are described in detail in *Old Ben Coal Co.* v. *Luker,* 826 F.2d 688, 693–94 (7th Cir. 1987). Briefly, Congress created the Fund in 1978 to relieve the federal government of its *de facto* primary financial responsibility for the Part C program. The Fund assumed responsibility for claims for which no operator was liable or in which the responsible operator defaulted on its payment obligations. Congress intended to ''ensure that individual coal operators rather than the trust fund bear the liability for claims arising out of such operator's mines *to the maximum extent feasible.*'' S. Rep. 95–209, 95th Cong., 1st Sess. 9 (1977), *reprinted in Committee on Education and Labor, House of Representatives, 96th Cong., Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977* at 612 (Comm. Print) (1979) (emphasis supplied). By the conclusion of the 1981 fiscal year, however, the Fund had accumulated a deficit of approximately $1.5 billion. H.R. Rep. 97–406, 97th Cong., 1st Sess. 4 (1981), reprinted in U.S.C. C. & A.N. 2673. Individual responsible operators had also become burdened with unanticipated retroactive liabilities from denied claims which were reopened and approved under the 1978 legislation. Congressional concern over the Trust Fund's deficit prompted changes to the BLBA in 1981; the remedial actions included raising the excise tax on coal that provided revenue for the Fund, increasing the interest rate on operator liabilities to the Fund, and tightening eligibility criteria for claimants. Congress also relieved a limited group of operators from their retroactive liabilities based on the procedural histories of certain claims. These liabilities transferred to the Fund. Finally, Congress limited the Trust Fund to paying only prospective benefits if a responsible operator failed or refused to pay after entry of an initial determination of entitlement. The 1981 Amendments, however, did not disturb the operator's legal obligation to pay all benefits due under an effective award. 127 Cong. Rec. 29,932 (1981).

Against this background, the comment's position is untenable. In 1981, Congress amended the BLBA, in large part because the Fund was in economic crisis. The objective of the amendments was to eliminate the deficit by increasing revenues and revising eligibility criteria. A fiscally-concerned Congress would not then impose on the Fund the operators' collective liability for benefits pending conclusion of entitlement litigation in every claim.

The ability to recoup from the operator the amount paid by the Fund if the award survived litigation, plus interest, would restore only some of the revenues expended on interim benefits. Initial awards which were eventually overturned would become overpayments; recovering overpayments from a largely elderly and unemployed population was problematic at best. Given these circumstances, the Department rejects the argument that Congress intended the Fund to absorb all operators' liabilities as a matter of course until the conclusion of litigation in every approved claim.

The Department also rejects the comment's argument that vigorous use of the payment of additional compensation pursuant to section 14(f) is contrary to Congressional intent. The Department provided a detailed response to this argument in its second notice of proposed rulemaking. 64 FR 54999–55000 (Oct. 8, 1999). The response cited Congress' intention to impose liability on the operators to the maximum feasible extent, together with the provision's purpose to ensure the operator's prompt compliance with its benefit obligations. The only significant concern shown by Congress with respect to the use of section 14(f) was the caveat that the provision not apply until the operator ''has the right to contest the claim.'' 127 Cong. Rec. 19, 645 (1981). This concern is met by the requirement that § 14(f) does not apply until an effective award is in place, and an effective award arises only after the operator has had an opportunity for a hearing. The Department believes § 725.502(b) promotes Congress' overall objective to shift liability for the payment of benefits to those operators who owe the benefits. The significance of this objective has become more obvious since the 1981 amendments. The Fund's indebtedness to the U.S. Treasury at the conclusion of fiscal year 1997 was $ 5.487 billion. OWCP Annual Report to Congress for FY 1997 at 24.

(d) The comment challenges the allowance of one month of benefits if the miner dies in the first month during which all eligibility requirements are established. The comment contends that such a payment is not authorized by statute, and that a duplicate payment occurs if the miner-claimant dies and the survivor establishes entitlement independently because the miner's death was due to pneumoconiosis. The Department rejects this argument as a reason for eliminating the provision. As an initial matter, this provision was first promulgated as part of the original § 725.502. *See* 43 FR 36806 (Aug. 18, 1978). No comments were received then in response to the regulation, nor did the Department receive any comments in response to its initial notice of proposed rulemaking. *See also* 20 CFR 410.226(a). In any event, the payment of benefits twice for the same month of eligibility in these circumstances is proper. The program has always paid benefits for periods during which the miner established (s)he was totally disabled by pneumoconiosis arising out of coal mine employment. 33 U.S.C. 906(a), as incorporated by 30 U.S.C. 932(a), 922(a)(1). Although generally a miner's entitlement terminates in the month before the month of death (§ 725.203(b)(1)), § 725.502(c) creates an exception to that rule to recognize the successful prosecution of a claim, albeit only for one month of benefits. The program also pays survivor's benefits to eligible recipients if a miner dies due to pneumoconiosis, 30 U.S.C. 922(a)(2), and begins such benefit payments with the month of the miner's death, 20 CFR 725.212–725.213. The statute does not prohibit the payment of benefits twice in one month in the rare event a miner entitled to benefits for disability dies due to pneumoconiosis in the first month of his or her eligibility. No change in the regulation is necessary.

(e) No other comments were received concerning this section, and no other changes have been made in it.

20 CFR 725.503

(a) In its initial notice of proposed rulemaking, the Department proposed adding § 725.503(d) to provide specific guidelines for determining the onset date for benefits awarded based on a modification petition. The proposed rule set forth the date from which benefits would be payable based either on a mistake in a determination of fact or on a change in the miner's condition. 62 FR 3366, 3412–13 (Jan. 22, 1997). In the case of a mistaken factual determination, the proposal employed the rules used in a miner's or a survivor's claim. If the award was based on a change in conditions and if the precise month in which the miner became disabled could not be ascertained, the proposed rule pegged the onset date to the earliest evidence supporting an element of entitlement not previously found in the claimant's favor, provided the evidence was developed after the most recent factfinder's denial of benefits. The proposed regulation drew criticism both for setting the onset date too late and for setting it too early, thereby allegedly violating a statutory requirement prohibiting the payment of benefits before the onset of the miner's entitlement. In the second notice of proposed rulemaking, the Department altered § 725.502(d)(2), noting a concern that the regulation as originally proposed would generate too much litigation. 64 FR 55001, 55050 (Oct. 8, 1999). The reproposed version required the actual onset date of entitlement to be determined if possible. If that date could not be ascertained, however, § 725.503(d)(2) set a default onset date using the date the miner filed the modification petition. The Department adopted this approach because the filing date of the application for benefits is the default onset date for approved miners' claims (20 CFR 725.503(b)), and that method had worked well in the adjudication of black lung claims in general. The Department therefore proposed using a similar method in change in conditions cases. 64 FR 55001 (Oct. 8, 1999). Use of a filing date reflects ''the logical premise'' that the miner would file a claim or a modification petition when (s)he believed (s)he is entitled to benefits. In the final rule, the Department has made two minor changes to § 725.503(b) and (c). Each subsection begins with similar language referring to the entitled individual to whom benefits are payable, *i.e.,* the miner entitled to benefits (subsection (b)), and the survivor entitled to benefits (subsection (c)). The purpose of this change is simply to use parallel language in each subsection to identify the individual receiving benefits.

(b) One comment opposes the use of default onset dates for both claims and modification petitions. The comment contends the default date creates a presumption of entitlement to benefits as of the filing date when the claimant has not proven this fact. The commenter believes such a presumption violates the Administrative Procedure Act (APA), 5 U.S.C. 556(d), and the Supreme Court's decision in *Director, OWCP* v. *Greenwich Collieries,* 512 U.S. 267 (1994). The Department disagrees with the general proposition that a default onset date based on a presumption of entitlement as of a certain date violates the APA and *Greenwich Collieries.* The Department addressed this issue at length in its second notice of proposed rulemaking. 64 FR 54972–74 (Oct. 8, 1999). To summarize: the Federal Mine Safety and Health Act (FMSHA), of which the Black Lung Benefits Act (BLBA) is a part, generally is exempt from the provisions of the APA. 30 U.S.C. 956. The BLBA, however, incorporates section 19 of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 919(d), thereby making the APA applicable to the

adjudication of claims. The incorporation of the APA (and 5 U.S.C. 556(d) in particular) is subject to one important constraint: Congress conferred on the Secretary the authority to vary the terms of the incorporated provisions by regulation. 30 U.S.C. 932(a) (provisions of LHWCA apply to BLBA ''except as otherwise provided * * * by regulations of the Secretary''). *See generally Director, OWCP* v. *National Mines Corp.,* 554 F.2d 1267, 1273–74 (4th Cir. 1977); *Patton* v. *Director, OWCP,* 763 F.2d 553, 559–60 (3d Cir. 1985). In *Greenwich Collieries,* the issue before the Court concerned the Department's authority to displace 5 U.S.C. 556(d) via a regulatory presumption (20 CFR 718.3) that required a finding for the claimant if the evidence for and against a particular finding was evenly balanced. The Court considered § 718.3(c) too ambiguous to vary the APA's burden of proof requirements as to the BLBA. It therefore held that the party who bears the burden of persuasion under the APA must prevail by a preponderance of the evidence. In so holding, the Court also acknowledged the Department's regulatory authority, consistent with the APA, to utilize presumptions which ease a party's burden of production. 512 U.S. at 280–81. The Court did not address the Department's argument that it has the authority to override 5 U.S.C. 556(d) by regulation and shift the burden of persuasion as well.

Since *Greenwich Collieries,* three courts have addressed the Department's authority to create presumptions which alter the parties' evidentiary burdens. Although no court has considered the Department's statutory authority to shift a burden of persuasion, all three courts have approved either directly or in dicta the Department's authority to create presumptions which shift the burden of production. In *Glen Coal Co.* v. *Seals*, 147 F.3d 502 (6th Cir. 1998), the Sixth Circuit considered whether a judicially-created presumption of medical benefits coverage for the treatment of pulmonary disorders was consistent with circuit caselaw. *See Doris Coal Co.* v. *Director, OWCP*, 938 F.2d 492 (4th Cir. 1991) (holding miner previously found totally disabled due to pneumoconiosis who receives treatment for pulmonary disorder is presumed to receive treatment for pneumoconiosis for purposes of medical benefits coverage). The majority held that the decisions below erroneously relied on the *Doris Coal* opinion when Sixth Circuit law applied and was inconsistent with Fourth Circuit precedent. 147 F.3d at 514 (Dowd, D.C.J.), 515 (Boggs, J.). Judge Boggs (concurring), however, agreed with Judge Moore (dissenting) ''that it would not necessarily contravene *Greenwich Collieries* for the Secretary to adopt a regulation shifting the burden of production in the manner of *Doris Coal*.'' 147 F.3d at 517. In *Gulf & Western Indus.* v. *Ling*, 176 F.3d 226 (4th Cir. 1999), the Fourth Circuit upheld the validity of the *Doris Coal* presumption under the APA as interpreted by *Greenwich Collieries*. The Court agreed with *Seals* that the presumption shifts the burden of production, not persuasion, and therefore was valid under the APA. 176 F.3d at 233–34. Most recently, the Eighth Circuit considered whether, for purposes of a subsequent claim, a ''material change'' in a miner's condition could be presumed if the miner established one element of entitlement not previously proven in connection with a prior denied claim. *Lovilia Coal Co.* v. *Harvey*, 109 F.3d 445 (8th Cir. 1997); *see* 20 CFR 725.309 (miner must show ''material change in condition'' between denial of one claim and filing of later claim). The Court rejected the operator's argument that the presumption of change violated 5 U.S.C. 556(d) and *Greenwich Collieries*. In so doing, the Court cited *Greenwich Collieries'* explicit approval of burden shifting presumptions which ease a party's obligation to produce evidence in support of its claim. 109 F.3d at 452–53.

Thus, the courts have upheld the Department's authority to shift the burden of production to the party opposing entitlement upon a showing of the predicate facts which support the presumption without violating the APA. Section 725.503 does create a presumption of entitlement to benefits as of the filing date of the claim absent contrary evidence. The presumption rests on a twofold basis: (i) The miner has established he is entitled to benefits; and (ii) the Department's belief that an individual will file a claim when he believes himself entitled to benefits. *See* 43 FR 36828–36829 (Aug. 18, 1978). The presumption, however, shifts only the burden of production to the party opposing benefits. That party may overcome the presumed entitlement date by introducing credible medical evidence that the miner was not disabled for some period of time after he filed his claim. *See Ling*, 176 F.3d at 233 (holding, in context of another black lung presumption which shifts burden of production, party must introduce ''credible'' evidence supporting its position). ''Credible'' evidence means medical opinions which are consistent with the adjudicator's findings in the underlying award of benefits. If the adjudicator has accepted evidence that the miner is totally disabled as of a certain date, then any later medical opinion contradicting this evidence is necessarily not credible. Medical opinions pre-dating the evidence of entitlement, however, may establish the miner was not disabled when he filed his application. *See Rochester & Pittsburgh Coal Co.* v. *Krecota*, 868 F.2d 600, 603 (3d Cir. 1989) (holding ALJ erroneously awarded benefits from filing date when evidence proved miner was not disabled at that time). The burden of *persuasion* remains with the claimant to provide medical evidence sufficient to overcome the opponent's. Similarly, a claimant may also prove he is entitled to benefits commencing before he filed his benefits application. In such a situation, the burden of persuasion remains, as always, with the claimant. The comment does not provide any other rationale for its position that default onset dates violate the APA. The Department therefore declines to abandon its use of such onset dates when the medical evidence fails to establish the date on which the miner became totally disabled due to pneumoconiosis.

(c) The same comment contends that using default dates based on filing dates violates section 6 of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 906, as incorporated by the Black Lung Benefits Act (BLBA), 30 U.S.C. 932(a). The comment suggests using as an alternative default date the date of the earliest medical evidence the adjudicator accepts as sufficient to prove the miner is totally disabled by pneumoconiosis. The Department rejects this position. Section 6(a) of the LHWCA provides in relevant part that ''[n]o compensation shall be allowed for the first three days of the disability * * * Provided, however, That in case the injury results in disability of more than fourteen days, the compensation shall be allowed from the date of the disability.'' 33 U.S.C. 906(a). As discussed above, Congress expressly granted the Secretary the power to tailor incorporated Longshore Act provisions to fit the black lung program: the LHWCA sections apply to the BLBA ''except as otherwise provided * * * by regulations of the Secretary.'' 30 U.S.C. 932(a); *Director, OWCP* v. *National Mines Corp.*, 554 F.2d 1267, 1273–1274 (4th Cir. 1977).

In 1978, the Secretary promulgated 20 CFR 725.503 to implement section 6(a). 43 FR 36806 (Aug. 18, 1978). Like the revised § 725.503, the 1978 regulation

prescribed two alternative means for determining the entitlement date. The adjudicator had to first consider whether the evidence established the month during which the miner became totally disabled due to pneumoconiosis. If the evidence was insufficient to identify the specific month, the adjudicator resorted to the default date: the month in which the miner filed his or her claim. Section 725.503(d)(2) adopts the same general approach for modification petitions, and substitutes the month the claimant filed the modification petition as the default date if the award is premised on a change in the miner's condition. 64 FR 55050 (Oct. 8, 1999). In the comments accompanying the promulgation of 20 CFR 727.302, the Secretary explained the reasoning behind the adoption of a default entitlement date:

> This approach was adopted in view of the great difficulty encountered in establishing a date certain on which pneumoconiosis, often a latent, progressive, and insidious disease, progressed to total disability. The filing date was thought to be fair since proof of onset, which was usually obtained after filing, would likely fix the date of total disability at the time at which the medical tests were administered. The filing date, on the other hand, was likely to be a more accurate measure of onset since it would be the date, or close to the date, on which the claimant felt the need to file for benefits, presumably because disability had become total.

43 FR 36828–36829 (August 18, 1978). The Secretary also emphasized that ''a reasonable effort will always be made to establish the month of onset.'' 43 FR 36806 (August 18, 1978).

Section 725.503 therefore deals with the difficulties inherent in identifying the particular month a miner's lung condition deteriorated to the point he became totally disabled due to pneumoconiosis. As noted above, the Department has long since concluded that pneumoconiosis is a latent and progressive disease which may manifest itself pathologically over a lengthy period of time. *See generally* § 718.201, responses to comments. As a result, detecting the precise month when the deterioration reached the level of compensable disability is problematic at best. In addition, clinical evidence of disability on a particular date does not mean the miner became disabled that day. The test may simply detect a condition which developed sometime earlier. *Green* v. *Director, OWCP*, 790 F.2d 1118, 1119 n.4 (4th Cir. 1986). Notwithstanding these difficulties, however, an award of benefits must set a date from which those benefits are payable. 20 CFR 725.503(f); 64 FR 55050 (Oct. 8, 1999). If the medical evidence in a particular case pinpoints the disability date, that date must be used. In many cases, the evidence is inconclusive or contradictory over time. Even if the earliest positive evidence establishes the miner's entitlement, that evidence only proves the miner was disabled on that date. Such evidence is entirely consistent with a compensable disability antedating the medical testing for some unknown period of time. *See Green,* 790 F.2d at 1119 n. 4. Consequently, the Department has consistently found a default entitlement date necessary, as a rule of administrative convenience, in order to implement the black lung program in an effective manner. *See generally* 30 U.S.C. 936(a) (authorizing Secretary to ''issue such regulations as [she] deems necessary to carry out the provisions of'' title IV). The choice of the filing date reflects the rational assumption that claimants, by and large, file claims or modification petitions when they believe themselves entitled to benefits (although compensable disability may in fact have occurred either prior to, or after, the application date). The Department recognizes claimants may file modification petitions for other reasons as well, *e.g.,* the claimant may secure the services of an attorney, obtain new medical evidence, or intend to prevent the underlying claim from becoming finally denied. These reasons do not detract from the underlying logic of the default onset date; rather, they simply explain why a claimant takes a particular action at a particular time. The natural impetus to pursue benefits at all is the individual's belief that (s)he is entitled to them. Like the default onset date for claims, the same explanation supports a similar approach for awards obtained on modification if the miner's condition has changed to the point of compensable disability and the actual onset date cannot be ascertained.

The Department believes the filing date strikes a reasonable balance between overcompensating and undercompensating the miner. Section 6(a) requires the liable party to pay benefits ''from the date of the disability.'' 33 U.S.C. 906(a), as incorporated. If the medical evidence does not identify that date, the miner might receive either more, or less, compensation than the amount to which (s)he is entitled by using the filing date. Obviously, if the medical evidence proves that the miner became disabled only after he filed, then the filing date is inapplicable; the adjudicator must select some later date to avoid compensating the miner for a period of time when (s)he was not eligible. *See Rochester & Pittsburgh Coal Co.* v. *Krecota*, 868 F.2d 600, 603 (3d Cir. 1989) (holding that ALJ erroneously relied on filing date when medical evidence clearly indicated miner was not disabled until several years later). Absent such evidence, however, the rationale underlying section 725.503 ensures the miner will receive the approximately correct amount of compensation. Accordingly, the Department rejects the comment's position that a default onset date based on a filing date—of either a claim or a modification petition—violates section 6(a).

The same comment also states that the use of default onset dates originated under part B of the BLBA and derives from the Social Security Act. The commenter contends that section 6(a) supersedes the Social Security Act rule for purposes of part C of the BLBA. As discussed above, default onset dates are entirely consistent with section 6(a). Furthermore, the comment does not explain why their origin has any legal relevance. The comment does not state a basis for eliminating default onset dates for part C claims.

(d) One comment opposes using the date the claimant petitioned for modification as the default onset date if benefits are awarded based on a change in the miner's condition. The commenter contends the proper default date should be immediately after the date of the adverse decision which was overturned on modification. For the reasons set out in comment (c), the Department rejects this suggestion. The filing date is the most rational point to begin benefits if the date on which the miner's pulmonary condition changed sufficiently to make him or her entitled to benefits is not established by the evidence of record. If, however, the record contains credible evidence of the miner's entitlement predating the modification petition, the onset date should be the date of that evidence provided no later credible evidence refuting entitlement exists, and the evidence was developed after the date on which the most recent denial by a district director or administrative law judge became effective.

(e) No other comments were received concerning this section, and no changes have been made in it.

20 CFR 725.515

(a) The Department did not open § 725.515 for comment when it issued the initial notice of proposed rulemaking, 62 FR 3341 (Jan. 22, 1997). The Department proposed amending § 725.515 in its second notice of

proposed rulemaking to conform it to changes in federal law which make black lung benefits payable by the Black Lung Disability Trust Fund subject to garnishment for child support and alimony. 64 FR 54971, 55001 (Oct. 8, 1999).

(b) Although one comment has suggested the Department allow claimants and responsible operators to negotiate settlements rather than fully litigate every claim, the Department opposes this suggestion. The Department's principal response to the issue of settlements appears in the Final Regulatory Flexibility Analysis, below. The Department takes the same position with respect to any assignment, release or commutation of benefits except to the extent authorized by the Black Lung Benefits Act (BLBA) or the Secretary's regulation. Such agreements are void. *Norfolk Shipbuilding & Drydock Corp.* v. *Nance,* 858 F.2d 182, 186 (4th Cir. 1988), *cert. den.* 492 U.S. 911 (1989). The BLBA prescribes precisely the amount of monthly benefits to which a claimant is entitled. 30 U.S.C. 922(a). This statutory compensation schedule represents Congress' judgment as to the reasonable level of monthly benefits a totally disabled miner or his or her survivor should receive. By incorporating section 16 regarding releases (and 15 regarding waiver, *see Brown* v. *Forest Oil Corp.,* 29 F.3d 966, 968 (5th Cir. 1994)) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 916, 915, into the BLBA, 30 U.S.C. 932(a), Congress demonstrated its intent to ensure that claimants receive the full amount of benefits to which they become entitled, thereby having less need to resort to other means of support, including public assistance. *See generally* 1 *Larson's Workers' Compensation Law* (MB) § 1.03[2] (1999). Moreover, making agreements to reduce, divert or bargain away benefits absolutely void also provides some level of protection to claimants' rights; no party who negotiates such an agreement can rely on its terms in the event the claimant elects to pursue his or her full rights under a claim. Such protections are especially appropriate given the claimant population most affected by the BLBA, *i.e.,* elderly, disabled and less educated retired workers and their survivors. Prohibiting settlements also recognizes the progressive nature of pneumoconiosis. Because this disease may evolve over a period of years, the availability of settlements may encourage a miner-claimant to forego a future claim for full benefits after the pneumoconiosis has progressed to the point of compensable disability in lieu of the present payment of a lesser amount. The Department therefore considers settlements ill-suited to the BLBA program. Finally, although it incorporated sections 16 and 15 of the LHWCA into the BLBA, Congress did not incorporate section 8 (allowing for district director approval of certain settlements under the LHWCA). The Department does not believe Congress meant to allow settlements to occur under the BLBA in the absence of an express and direct incorporation of such intent.

(c) No comments were received concerning this section, and no further changes have been made in it.

20 CFR 725.522

In its initial notice of proposed rulemaking, the Department proposed a shortened § 725.522, in which subsections (a) and (b) of 20 CFR 725.522 were combined in proposed § 725.522(a). Discussion of when benefit payments are due was moved to a newly expanded § 725.502. These proposed changes were part of a general rewriting of the regulations governing the payment of benefits, Part 725, Subpart H. 62 FR 3365–67 (Jan. 22, 1997). Although no comments were received concerning this section, the Department reiterates that the cost of a miner's complete pulmonary examination at Trust Fund expense—defined as a ''benefit'' under § 725.101(a)(6)—is not a payment included within ''overpayments'' for purposes of subsection (b). *See* 62 FR 3351 (Jan. 22, 1997); 64 FR 54982 (Oct. 8, 1999). No changes have been made in this section.

20 CFR 725.530

(a) In its initial notice of proposed rulemaking, the Department proposed a new § 725.530(a), setting out an operator's or carrier's obligation to pay benefits immediately when they become due pursuant to an effective order, and the consequences of an operator's failure to pay such benefits. 62 FR 3415–16 (Jan. 22, 1997). This proposed change was part of a general rewriting of the regulations governing the payment of benefits, Part 725, Subpart H. 62 FR 3365–67 (Jan. 22, 1997).

(b) Two comments object generally to the imposition of a ''penalty'' for an operator's failure to pay benefits when due, citing comments addressed to § 725.502. For the reasons expressed in the response to those comments, no changes are made to either regulation.

(c)(i) Several comments object to the imposition of a ''penalty'' for failure to pay a benefit within ten days after the payment is due, arguing that ten days is not enough time to calculate correct benefit amounts under the Black Lung Benefits Act (BLBA). The Department disagrees. This regulation does not change existing law in any material manner. The BLBA incorporates § 14 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 914, which governs the payment of compensation under that Act. 30 U.S.C. 932(a). Section 14(f) provides that additional compensation, in the amount of twenty percent of unpaid benefits, shall be paid if an employer fails to pay within ten days after the benefits become due. The twenty-percent additional compensation provision has been an incorporated provision of Part C since the inception of the statute. Consequently, § 725.530 merely restates existing law: failure to pay the full amount of benefits owed the claimant within ten days after the benefits are due shall result in the payment of an additional twenty percent of the unpaid benefits. *See also* § 725.607(a) (twenty-percent additional compensation assessed on unpaid benefits); *Sproull* v. *Director, OWCP,* 86 F.3d 895, 900–01 (9th Cir. 1996), *cert. den. sub nom. Stevedoring Services of America, Inc.* v. *Director, OWCP,* 117 S.Ct. 1333 (1997) (holding twenty percent additional compensation applies to late payment of interest notwithstanding employer timely paid underlying benefits) This assessment is self-executing, and attaches automatically upon the failure to make timely payment regardless of any equitable considerations explaining the untimeliness. *Severin* v. *Exxon Corp.,* 910 F.2d 286, 288 (5th Cir. 1990). The Department also notes that monthly benefit amounts are fixed by law and adjusted only once a year. Most black lung benefits are paid by insurance companies or self-insured coal companies who have ready access to current monthly benefits rates and the expertise to make any necessary computations. Finally, the Department notes that the actual amount of time available to the party liable for benefits to make a timely payment has been enlarged by virtue of changes made in § 725.502(b). That regulation requires the liable party to pay the benefits due, pursuant to an effective order, for any given month by the fifteenth day of the following month. 64 FR 55050 (Oct. 8, 1999). Liability for additional compensation in the amount of twenty-percent for defaulting on a payment cannot be invoked until an additional ten calendar days have passed after the monthly benefit becomes due. *See Pleasant-El* v. *Oil Recovery Co., Inc.,* 148 F.3d 1300, 1303 (11th Cir. 1998); *Burgo*

v. *General Dynamics Corp.,* 122 F.3d 140, 143 (2nd Cir. 1997) *cert. den.* 118 S.Ct. 1839 (1998); *Reid* v. *Universal Maritime Serv. Corp.,* 41 F.3d 200, 202 (4th Cir. 1994); *Irwin* v. *Navy Resale Exchange,* 29 Ben. Rev. Bd. Serv. 77 (1995); *contra Quave* v. *Progress Marine,* 912 F.2d 798, 800 (5th Cir. 1990) (holding ten days means ten business days). With respect to the initial payment after entry of an award, the responsible operator should always have at least 25 days (as shown by the following example) in which to make the computation and make the first payment of monthly benefits. If an award becomes effective on the last day of January, the operator has until February 15th in which to pay the benefits attributable to January; the operator also has an additional ten days to avoid liability for additional compensation. This amount of time should be sufficient to allow the calculation of the benefit amount due and pay the claimant, and therefore to comply fully with the regulatory deadlines. This minimum period of 25 days comes close to the 30 day-period suggested by one comment as ''more reasonable.'' In fact, in cases in which the order awarding benefits becomes effective at the beginning of the month, the operator will have far more than the suggested 30 days in which to issue the check. As for payments subsequent to the initial payment, the operator has ample time to calculate and issue the monthly benefits check before incurring the assessment of additional compensation for untimeliness. Continuing with the previous example: If the operator has made the initial payment on February 15th, the next installment is not due until March 15th; the operator then has an additional ten days until the § 14(f) assessment attaches in which to make the payment. (ii) The more complex computations involve retroactive benefits. Under § 725.502(b)(2), an operator need not pay retroactive benefits until the district director computes this amount, within 30 days after issuance of an effective award, and informs the responsible operator of it. Benefits and interest for periods prior to the effective date of the order are not due until the thirtieth day following issuance of the district director's computation. This time is sufficient to verify the district director's computation, and actually allows the employer considerably more time than the ten days provided by 20 CFR 725.607(a) in which to pay retroactive benefits before liability for twenty-percent additional compensation may be imposed.

(c) One comment contends the proposed changes depart from current departmental practice and penalize operators for appealing awards of benefits. The Department disagrees. Section 14(f), as noted above, is an incorporated statutory provision which has been a part of part C of the BLBA from the beginning. Its incorporation represents a policy determination by Congress to promote the prompt compliance of a responsible operator with the terms of an effective award. The proposed changes to the regulations do not vary the operation of section 14(f). Rather, they simply implement Congress' intent in placing section 14(f) into the BLBA. Whether current administrative practice does not apply section 14(f) to the maximum extent cannot change the plain meaning of the provision. Finally, imposition of additional compensation for failing to pay benefits in a timely manner is not a penalty for pursuing an appeal of an award. Section 14(f) is a tool for ensuring compliance with an operator's benefits obligations once an effective award is in place and regardless of what subsequent litigation strategy the operator chooses to pursue.

(d) No other comments were received concerning this section, and no changes have been made in it.

20 CFR 725.533

The Department did not open § 725.533 for comment when it issued the initial notice of proposed rulemaking, 62 FR 3341 (Jan. 22, 1997). When the Department issued its second notice of proposed rulemaking, it proposed minor changes in the regulation and invited comments from the public. 64 FR 54971, 55001–02 (Oct. 8, 1999). Specifically, the Department proposed deleting provisions concerning section 415 ''transition'' claims, 30 U.S.C. 925, in both the current 20 CFR 725.403 and 725.533. Although the Department does not intend to alter the rules applicable to any section 415 claim that may remain in litigation, parties have adequate access to these rules in earlier editions of the Code of Federal Regulations. In the final rule, the Department has added a comma after the word ''circumstances'' in the first sentence of subsection (a) for grammatical purposes. No comments were received concerning this section, and no other changes have been made in it.

20 CFR 725.537

(a) The Department proposed changing § 725.537 in the initial notice of proposed rulemaking to harmonize the regulation with proposed § 725.212(b), which requires full benefits to be paid to each surviving spouse of a deceased miner if more than one eligible survivor exists. 62 FR 3366, 3417 (Jan. 22, 1997).

(b) Two comments state that the Department cannot retroactively apply the regulation permitting more than one surviving spouse of a deceased miner to receive monthly benefits as a beneficiary without regard to the existence of any other entitled spouse (*see* § 725.212(b)). The comments contain no citation to specific precedent and no further explanation. They do not afford the Department a sufficient basis for any change to the regulation. The Department has also addressed comments concerning the retroactive effect of the regulations in connection with § 725.2, and *see* 64 FR 54981–82 (Oct. 8, 1999).

(c) One comment contends the change permitting full benefits to multiple survivors is grounded on a false premise. The commenter states that the Social Security Administration (SSA) did not grant full benefits to multiple surviving spouses under part B of the Black Lung Benefits Act (BLBA), and ''required'' the Department to use the same rules. The comment does not provide any basis for either proposition. The Department rejects the comment for several reasons. First, the commenter cites no statutory authority, SSA regulation, or other evidence for its description of SSA practice, and thus no conclusions can be drawn about that agency's official practice concerning the issue. Second, SSA administered Part B of the BLBA, but the Department has had sole authority over Part C since January 1, 1974. Whatever SSA's internal views or practice, it cannot bind the Department if the Department concludes the statute requires a different result. Third, the Department believes the law compels what the revised regulation provides. In the initial notice of proposed rulemaking, the Department provided a detailed legal analysis of the pertinent statutory authorities and legislative history, all of which support awarding full monthly benefits to more than one surviving spouse. *See* 62 FR 3350–51 (Jan. 22, 1997). Congress amended the Social Security Act in 1965 to allow benefits to a divorced surviving spouse as a ''widow'' of the miner. Pub. L. No. 89–97, section 308(b)(1), 79 Stat. 286 (1965). The legislative history of the amendment clearly established Congress' intent that payment of benefits to two (or more) ''widows'' would not reduce the benefits paid to either. S. Rep. No. 404, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S.C.C.

& A.N. 1943, 2047. In 1972, Congress amended the BLBA definition of ''widow'' to use the Social Security Act definition. 30 U.S.C. 902(e). The legislative history is equally clear that Congress intended to conform the BLBA definition to the Social Security Act definition. S. Rep. No. 743, 92nd Cong., 2d. Sess., *reprinted in* 1972 U.S.C.C. & A.N. 2305, 2332. The BLBA also reinforces this interpretation because it requires a ''widow'' to receive benefits at prescribed rates and makes no allowance for a reduction based on the existence of more than one widow. 30 U.S.C. 922(a)(2). To date, two courts of appeals and the Benefits Review Board have accepted the Department's position. *Peabody Coal Co.* v. *Director, OWCP [*Ricker*]*, 182 F.3d 637, 642 (8th Cir. 1999); *Mays et al.* v. *Piney Mountain Coal Co.,* 21 Black Lung Rep. 1–59, 1–65/1–66 (1997), *aff'd* 176 F.3d 753, 764–765 (4th Cir. 1999). No court has reached a contrary result, and no comment has addressed the substance of this analysis. Consequently, the Department has no basis for changing the regulation.

(d) No other comments were received concerning this section, and no changes have been made in it.

20 CFR 725.543

(a) The Department did not open § 725.543 for comment when it issued the initial notice of proposed rulemaking, 62 FR 3341 (Jan. 22, 1997). The Department received a number of comments, however, offering general criticisms of the overpayment waiver and adjustment criteria; the program had been using criteria developed by the Social Security Administration (SSA) for waiver of overpayments incurred under Part B of the Black Lung Benefits Act (BLBA). In response, the Department proposed revising § 725.543 to adopt the waiver standards in 20 CFR part 404, which are used by the SSA in administering title II of the Social Security Act. 64 FR 55055 (Oct. 8, 1999). The Department explained that the part 404 criteria better reflect the current law than the part 410 criteria because the part 410 have not been revised since 1972. 64 FR 55002 (Oct. 8, 1999).

(b) One comment generally opposes the extension of the overpayment waiver and recovery procedures to claims involving responsible operators, and incorporates by reference its response to § 725.547. The comment does not specifically address the substance of proposed § 725.543. The Department responds to comments concerning § 725.547 at that provision.

(c) No other comments were received concerning this section, and no changes have been made in it.

20 CFR 725.544

(a) The Department did not open § 725.544 for comment when it issued the initial notice of proposed rulemaking, 62 FR 3341 (Jan. 22, 1997). The Department did receive one comment which noted that the maximum amount subject to compromise had been raised to $100,000. 64 FR 55002 (Oct. 8, 1999). The Department proposed changing § 725.544 to reflect that fact, and to replace the reference to the Federal Claims Collection Act of 1966, now repealed, with a citation to 31 U.S.C. 3711. 64 FR 55055–56 (Oct. 8, 1999).

(b) One comment opposes in general terms the extension of the overpayment waiver and recovery procedures to claims involving responsible operators, and incorporates by reference its response to § 725.547. The comment does not specifically address the substance of proposed § 725.544. In any event, this provision only applies to the compromise of debts owed the United States government. *See* 31 U.S.C. 3711(a).

(c) No other comments were received concerning this section, and no changes have been made in it.

20 CFR 725.547

(a) In the initial notice of proposed rulemaking, the Department proposed amending § 724.547 to extend the waiver and adjustment provisions to overpayments owed by claimants to responsible operators. 62 FR 3366, 3419 (Jan. 22, 1997). Formerly, these protections had applied only to claimants who had been overpaid by the Trust Fund. 20 CFR § 725.547(a). The Department concluded that the opportunity to obtain a waiver or adjustment of the debt should be made available to all claimants regardless of their benefits' source. The Department received numerous comments opposing the proposed change for a variety of reasons. 64 FR 55002–03 (Oct. 8, 1999). Comments urging the Department to limit recoveries to the adjustment of future benefits, and objections based on increased difficulties for operators in recovering overpayments, were rejected based on the policy considerations set forth in the initial notice of proposed rulemaking. 62 FR 3366–67 (Jan. 22, 1997). The Department also rejected the position that waiver of an overpayment owed an operator amounted to the unconstitutional deprivation of property, citing caselaw upholding overpayment recoveries under the more restrictive Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 914(j), 922, as incorporated by 30 U.S.C. § 932(a). Finally, the Department addressed comments urging changes in the legal test for waiver by noting that the test is derived from an incorporated provision of the Social Security Act (SSA). The Department did, however, propose changes to § 725.543, adopting more current criteria for waiver. *See* 64 FR 55055 (Oct. 8, 1999).

(b) Two comments oppose the Department's use of the SSA waiver provisions rather than the LHWCA approach to the problem. The Black Lung Benefits Act (BLBA) incorporates the overpayment provisions of both statutes. 42 U.S.C. 404(b), as incorporated by 30 U.S.C. 923(b), 940 (SSA); 33 U.S.C. 914(j), 922, as incorporated by 30 U.S.C. 932(a) (LHWCA). The SSA requires the agency to obtain reimbursement of overpaid benefits unless the claimant can prove recovery would either deprive him of the financial resources to pay for necessary expenses, or violate equity and good conscience regardless of his financial condition. The LHWCA, however, limits recovery to the adjustment of future benefits; if no benefits will be paid, no overpayment can be recovered. In the initial notice of proposed rulemaking, the Department reviewed the reasons for using the SSA provisions: judicial precedent upholding the Department's authority to recover overpayments under the SSA scheme; adverse financial consequences for the Fund if the Department used the more restrictive Longshore provisions; and the protections afforded claimants by the waiver procedure, which limits recovery to those individuals who can afford to reimburse the overpaid benefits. 62 FR 3366–67 (Jan. 22, 1997). In the second notice of proposed rulemaking, the Department acknowledged the comments advocating use of the LHWCA model but relied on the policy considerations previously advanced. 64 FR 55002 (Oct. 8, 1999). The Department continues to believe that these considerations provide valid reasons for using the SSA provisions as the basis for the Department's overpayment recovery procedures. Moreover, adopting the more current overpayment criteria in 20 CFR part 404 will conform the Department's practice to changes in the law since 1972. *See* 64 FR 55055 (Oct. 8, 1999). The Department therefore disagrees with the commenters who urge that the SSA overpayment procedures be abandoned in favor of the LHWCA model.

(c) One comment states that the Department's response to comments in the second notice of proposed rulemaking, 64 FR 55002–03 (Oct. 8, 1999), failed to answer several concerns raised in the initial round of comments. Specifically, the original comment contended that: the LHWCA provisions supersede the SSA provisions with respect to part C claims, citing *Bracher* v. *Director, OWCP,* 14 F.3d 1157 (7th Cir. 1994); the Department must evaluate the cost of recovering overpayments against the amounts actually recovered; caselaw on waiver issues contradicts the Department's view that the standards will protect claimants from burdensome recoveries; and courts apply inconsistent interpretations of the waiver standards. None of the commenter's arguments warrant changing the basic overpayment recovery procedures. (i) The Seventh Circuit Court of Appeals' decision in *Bracher* does not support the commenter's position. The Court actually declined to address the relationship between the SSA and LHWCA overpayment provisions because the petitioner failed to make the argument in earlier proceedings. 14 F.3d at 1161. The Court also noted, in passing, that the Department has the explicit statutory authority in 30 U.S.C. 932(a) to modify incorporated LHWCA provisions by issuing regulations which vary the terms of those provisions. (ii) With respect to the costs involved in undertaking overpayment proceedings, this factor may be considered in determining whether to pursue individual cases. Cost alone is not a reason to ignore the duty to recover overpayments imposed by the BLBA. (iii) The Department disagrees that the cases cited by the commenter demonstrate that the waiver and recovery procedures provide inadequate protection of claimants' interests. The comment incorrectly states that the Seventh Circuit upheld a $47 difference between a claimant's monthly income and expenses as a sufficient cushion to allow repayment of an overpayment. *Benedict* v. *Director, OWCP,* 29 F.3d 1140 (7th Cir. 1994). The Court actually found that the claimant's monthly income exceeded his expenses by at least $110 (not including interest income), and that the available financial assets would enable the claimant to repay the overpayment without adverse effect on his living standard. The comment also cites *Bracher,* 14 F.3d 1157, as another example of the lack of protection afforded claimants by the waiver procedures. In that decision, the Seventh Circuit held an individual cannot claim reliance on ''erroneous information'' from the agency as a basis for waiver if the ''information'' is a district director's award which is later overturned. The Court correctly noted that characterizing such awards as erroneous agency information would result in waiver for virtually any overturned award, and render meaningless a regulatory provision which makes interim awards ''overpayments.'' 14 F.3d at 1162. *See also McConnell* v. *Director, OWCP,* 993 F.2d 1454, 1458 (10th Cir. 1993); *Weis* v. *Director, OWCP,* 16 Black Lung Rep. 1–56, 1–58 (1990). The comment does not explain in what manner *Bracher* proves the Department has exaggerated the extent to which the waiver and recovery regulations protect claimants' interests. (iv) Finally, the commenter contends that the circuits have reached inconsistent results in determining whether to waive recovery of overpayments, citing *Benedict,* 29 F.3d 1140, and *McConnell,* 993 F.2d 1454. Specifically, the comment expresses concern that one court granted a waiver for the claimant because he spent the benefits on a vacation while another court denied waiver to a claimant who saved the benefits. The results reached in these cases are not inconsistent. In *McConnell,* the Court granted the waiver because the miner relied on the receipt of the benefits to pay for the vacation; his detrimental reliance could be directly linked to the benefits because he would not have taken the vacation without the additional money. The Court concluded that permitting the Department to recoup the amount of benefits spent on the vacation would violate ''equity and conscience.'' 993 F.2d at 1461. With respect to the balance of the overpayment, the Court held that the miner had the financial capacity to repay the benefits because he had a $114 monthly cushion after comparing his income and expenses. 993 F.2d at 1160. Similarly, in *Benedict,* the Court considered a $110 monthly cushion sufficient. The Court rejected the argument that recovery would violate ''equity and good conscience'' because the miner did not relinquish any right or, unlike McConnell, undertake an expense because of the availability of the benefits. The Department therefore rejects the comment's interpretation of these decisions.

(d) One comment focuses on the differences between the LHWCA and BLBA programs as a basis for distinguishing caselaw under the LHWCA holding that limitations on overpayment recovery do not deprive employers of property rights. The comment stresses that LHWCA claimants generally suffer job-related traumatic injuries which are promptly known by the employer, and the claims litigation is resolved quickly. By contrast, the commenter notes that BLBA claimants generally file after retirement and the entitlement litigation is lengthy because the issues are contentious; the protracted litigation therefore causes delays and correspondingly larger overpayments since operators must pay benefits during the litigation. Based on these contrasts, the comment argues that the limitations imposed on the operator's right to recover overpayments by § 725.547 should be abandoned because the operator has no effective means of defending its interests. In effect, the commenter argues that the inherent delays in BLBA claims adjudication raise due process concerns because the delays generate large overpayments which will be uncollectible under § 725.547.

The comment rests on the premise that inherent delays exist in the adjudication of black lung claims, and that the delays amount to *per se* denial of due process. Delay alone, however, is not a due process violation. *C & K Coal Co.* v. *Taylor,* 165 F.3d 254, 259 (3d Cir. 1999). ''It is not the mere fact of the government's delay that violates due process, but rather the prejudice from such delay.'' *Consolidation Coal Co.* v. *Borda,* 171 F.3d 175, 183 (4th Cir. 1999). In the context of black lung entitlement litigation, delays have prompted courts to transfer liability from operators to the Black Lung Disability Trust Fund because agency errors have deprived the operators of the ability to defend themselves in a meaningful manner as required by due process. *Island Creek Coal Co.* v. *Holdman,* 202 F.3d 873, 883–84 (6th Cir. 2000); *Borda,* 171 F.3d at 183–84; *Lane Hollow Coal Co.* v. *Director, OWCP [Lockhart],* 137 F.3d 799, 808 (4th Cir. 1998). In each of those cases, unwarranted delays by the agency precluded the operators from asserting defenses to liability; in effect, the claimant won by default. Accordingly, delay at some point in the opportunity for adjudication of a case may constitute a denial of due process, but a mere allegation of delay without any explanation why the delay is unreasonable does not substantiate a due process violation. *Abbott* v. *Louisiana Ins. Guaranty Assoc.,* 889 F.2d 626, 632–33 (5th Cir. 1989), citing *Cleveland Bd. of Education* v. *Loudermill,* 470 U.S. 532, 547 (1985).

The commenter implies that the prejudice which establishes the denial

of due process is the unrecoverable overpayments generated by the time-consuming litigation over entitlement. The possibility exists that some claims will be approved and require years of litigation before final denial, thereby generating large overpayments that may be waived in overpayment proceedings under § 725.547. Such a possibility, however, does not establish a general violation of due process. First, the Department is not solely responsible for the delays in black lung benefits litigation, and the caselaw is clear that only prejudicial delays caused by the government are the basis for due process concerns. Second, the prejudicial effect of delay must be considered in the factual context of actual cases, and not simply in the abstract. Third, the existence of large overpayments is not necessarily evidence of due process violations. If the underlying entitlement adjudication process works in a fair manner, then due process has been provided and the size of the resulting overpayment is irrelevant. ''The Due Process Clause does not create a right to *win* litigation; it creates a right *not to lose* without a fair opportunity to defend oneself.'' *Lane Hollow Coal Co.,* 137 F.3d at 807 (emphasis in original). Finally, the fact that large overpayments may eventually be waived does not necessarily amount to a due process violation. Section 725.547 provides operators with the opportunity to recover overpayments through an adjudicatory scheme similar to the entitlement process, with rights to evidentiary development, hearing and appeal. The comment does not explain why elimination of the waiver process will enhance the operators' ability to recover overpayments. The comment does not state a sufficient basis for abandoning the regulation.

(e) One comment supports § 725.547.

(f) No other comments were received concerning this section, and no changes have been made in it.

20 CFR 725.548

(a) Formerly, in any case involving an underpayment or an overpayment, § 725.547(c) and (d) empowered district directors to issue orders protecting the parties' interests and to resolve disputes over the orders using the procedures applicable to entitlement issues. 20 CFR 725.547. Based on its title, ''Applicability of overpayment and underpayment provisions to operator or carrier,'' section 725.547 applied only to cases involving responsible operators. The Department intends that these provisions should apply to overpayment and underpayment cases involving both responsible operators and the Black Lung Disability Trust Fund. Accordingly, the Department proposed § 725.548 in the second notice of proposed rulemaking as a regulation of general applicability, and moved § 725.547(c) and (d) to the proposed regulation. 64 FR 55003, 55056–57 (Oct. 8, 1999).

(b) No comments were received concerning this section, and no changes have been made in it.

Subpart I

20 CFR 725.606

(a) In its initial notice of proposed rulemaking, the Department proposed revising § 725.606 in order to require that uninsured operators, including coal mine construction and coal transportation employers, secure the payment of benefits in individual claims that have been awarded and for which they have been determined liable. 62 FR 3367 (Jan. 22, 1997). The regulation establishes a procedure under which such an operator may be compelled to post the necessary security in the absence of evidence demonstrating that the operator has taken other action to secure the benefit payments. In addition, the regulation distinguishes between operators who were required to, but did not, comply with the security requirement in 30 U.S.C. 933, and coal mine construction and coal transportation employers, who are not required to comply with that requirement. An uninsured employer that failed to comply with 30 U.S.C. 933 is required to post security worth no less than $175,000, while an uninsured employer that is either a coal mine construction or transportation employer is entitled to an individualized assessment of the amount of security required based on actuarial projections. That company also must secure the payment of all future benefits, however. The Department corrected a typographical error in subsection (c) in its second notice of proposed rulemaking, and responded to a comment regarding coal mine construction employers. The commenter argued that the proposal inappropriately imposed personal liability on the corporate officers of a coal mine construction employer that fails to comply with the post-award security requirement, and further stated that the proposal was unnecessary with respect to coal mine construction employers, who comply with their obligations to pay benefits. The Department responded by demonstrating the legal basis for its imposition of personal liability on the officers of corporate coal mine construction employers. The Department also observed that, notwithstanding compliance by coal mine construction employers, there was no basis for excluding construction companies from the requirements imposed by the Black Lung Benefits Act. 64 FR 55003 (Oct. 8, 1999).

(b) One comment continues to disagree with the requirement that coal mine construction employers secure the payment of awarded claims, arguing that the Department's experience with construction employers has been satisfactory. In its second notice of proposed rulemaking, the Department discussed a similar comment at length. 64 FR 55003 (Oct. 8, 1999). The Department did not dispute the observation that coal mine construction employers generally complied with their obligations to pay awarded claims. The Department explained, however, that the proposed revision to § 725.606 represented the Department's attempt to fulfill its responsibility to identify all parties' obligations under the Black Lung Benefits Act. The Department also noted that proposed § 725.606 represented an efficient means of enforcing the obligations of all parties.

The commenter now states that the proposal would impose an onerous and punitive burden on coal mine construction employers. The Department disagrees. The regulation does not require an uninsured employer to deposit funds with a Federal Reserve Bank in every case. Instead, such a deposit is required only if the employer cannot satisfy the adjudication officer that the award is otherwise secured. For example, a large, well-established coal mine construction employer may be able to demonstrate that its current size and assets are sufficient to allow it to pay benefits for the lifetime of the claimant. In such a case, the adjudication officer may permit the employer to meet the security requirement in a manner other than depositing funds with a Federal Reserve Bank. An employer, for example, may purchase an indemnity bond, one of the methods specifically listed in subsection (a), or may request that the adjudication officer approve another mechanism that will guarantee the payment of benefits in case the employer ever becomes unable to meet its obligations.

In addition, the Department does not accept the premise that it must allow coal mine construction employers to avoid the security requirement simply because most of them are current in their payment obligations. If even one such employer currently paying benefits seeks bankruptcy protection, all of the awarded claims for which that employer

is responsible, each of which is worth approximately $175,000, could become the responsibility of the Black Lung Disability Trust Fund. The Department has a duty to protect the assets of the Trust Fund, and thus intends to enforce the post-award security provision incorporated into the Black Lung Benefits Act from section 14(i) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 914(i), as incorporated by 30 U.S.C. 932(a).

(c) One comment states that coal transportation employers are generally unaware of their potential liability for black lung benefits, and are surprised when they are identified as a responsible operator in the adjudication of an individual claim for benefits. At that point, the commenter maintains, any insurance that they are able to purchase will not cover benefits owed to the former employee who has already filed a claim. The commenter requests that the proposed regulations prohibit the case-by-case adjudication of issues of coverage involving coal transportation employers.

The Department does not believe that it is necessary to revise the regulations to provide further guidance to coal transportation employers. Neither does the Department deem it advisable to limit the authority of adjudication officers to apply the pertinent statutory and regulatory definitions to claims for benefits filed by employees of transportation employers. Congress amended the Federal Mine Safety and Health Act in 1977 to include ''any independent contractor performing services or construction'' at the Nation's coal mines.'' 30 U.S.C. 802(d); Pub. L. 95–164, 91 Stat. 1290, § 102(b)(2) (1977). When it amended the Black Lung Benefits Act several months later, Congress specifically recognized, in two separate provisions, that coal transportation companies were now liable for the payment of benefits. First, Congress amended the definition of the term ''miner'' to include ''an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.'' 30 U.S.C. 902(d); Pub. L. 95–239, 92 Stat. 95, § 2(b) (1978). In addition, Congress added language to section 422(b) that exempted coal transportation employers, as well as coal mine construction employers, from the requirement that they generally secure the payment of benefits by purchasing insurance or seeking the Department's approval to self-insure their obligations. 30 U.S.C. 932(b); Pub. L. 95–239, 92 Stat. 95, § 7(b) (1978). Congress provided, however, that coal transportation and coal mine construction employers may be required to post a bond or otherwise guarantee the payment of benefits in any awarded claim for which they have been determined liable. *Ibid.* The regulations promulgated by the Department to implement the 1978 amendments also specifically recognized the liability of coal transportation employers. *See* 20 CFR 725.491(a)(1979); 43 FR 36801–02 (Aug. 18, 1978).

Thus, since 1978, both the statute and the regulations have put coal mine transportation employers on notice that they could be held liable for the payment of any benefits owed to their former employees. *See Norfolk & Western Railway Co.* v. *Roberson,* 918 F.2d 1144, 1149–50 (4th Cir. 1990), *cert. denied,* 500 U.S. 916. Accordingly, the Department does not believe that such an employer should be surprised when it receives notification of a claim filed by one of its employees. *Federal Crop Ins. Corp.* v. *Merrill,* 332 U.S. 380, 384–85 (1947) (''Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the **Federal Register** gives legal notice of their contents.'') Finally, even though a transportation employer is not required to obtain insurance to secure its black lung liability, it remains free to purchase such insurance in order to ensure that its assets are not depleted by the defense and payment of black lung claims.

(d) No other comments were received concerning this section. The Department has corrected one error in the proposed regulation, replacing the phrase ''the United States Treasurer'' in subsection (f) with the term ''a Federal Reserve Bank.'' The Department explained in its initial proposal that the funds will be deposited with the appropriate Federal Reserve Bank rather than the United States Treasurer and had changed similar language in subsection (c). *See* 62 FR 3367 (Jan. 22, 1997).

20 CFR 725.608

(a) The Department proposed revising § 725.608 in its initial notice of proposed rulemaking in order to simplify the regulation, and to allow all parties to a claim to ascertain their obligations and rights with respect to the payment of interest. The proposal recognized that black lung beneficiaries were entitled to the payment of interest on retroactive benefits, additional compensation, and medical benefits. Interest on retroactive benefits starts to accrue 30 days after the first date on which the claimant was determined to be entitled to such benefits. Interest on additional compensation starts to accrue on the date that the beneficiary becomes entitled to additional compensation, while interest on medical benefits starts to accrue on the date that the miner received the medical service or 30 days after the date on which the miner was first determined to be generally eligible for black lung benefits, whichever date is later. 62 FR 3368 (Jan. 22, 1997)

In addition, the proposal specifically required the payment of interest by responsible operators on attorneys' fee awards. 62 FR 3368 (Jan. 22, 1997). In some cases, those awards may be issued long before the award of claimant's benefits becomes final, the first point at which the attorney is able to collect his fee under § 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 928, incorporated into the Black Lung Benefits Act by 30 U.S.C. 932(a). The Department did not discuss this regulation in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999).

(b) The Department has replaced the term ''beneficiary'' with the phrase ''beneficiary or medical provider'' in two places in the last sentence of subsection (a)(4). This revision is intended to conform that sentence with the first sentence of subsection (a)(4), which clearly reflects the Department's intention that medical providers as well as beneficiaries are eligible for interest to compensate them for any delays in the payment of medical benefits.

(c) A number of comments oppose the allowance of interest on attorneys' fees in general, and the computation of that interest from the date the fee is awarded until it is paid. In its first notice of proposed rulemaking, 62 FR 3368 (Jan. 22, 1997), the Department explained that the payment of such interest is necessary to buttress the economic value of fees which may take years to become due because of the duration of the underlying litigation of claimant entitlement. Although the Black Lung Disability Trust Fund is not liable for the payment of interest in any event, *Shaffer* v. *Director, OWCP,* 21 Black Lung Rep. (MB) 1–98, 1–99 (Ben. Rev. Bd. 1998), a responsible operator is not obliged to pay attorney's fees until the claimant successfully establishes entitlement to benefits in a final award. Because appeals may delay an award's finality for years, the attorney's fees awarded at earlier stages of the litigation will diminish in real value as a result of inflation. Interest from the date of a fee award, however, will reduce the inroads made by inflation. An award of interest will therefore encourage attorneys to

represent claimants because the value of their fees will be protected, notwithstanding delays in actual payment. The Department wishes to encourage attorney representation of claimants, believing it a means to enhance the fairness of the adjudication process. The Department therefore rejects the commenters' objection to the allowance of interest on attorneys' fees in principle.

With respect to the computation of interest from the date of the attorney fee award, the Department notes that any other date would not afford an attorney maximum protection of the fee's value. Although the operator is under no obligation to pay the fee at the time it is awarded, the primary purpose of subsection (c) is to protect the value of the attorney's fee from its inception. Moreover, an operator who is able to postpone the payment of an attorney's fee by appealing the underlying award of benefits is not entitled to profit from its decision to appeal unless it succeeds in overturning the award. The operator retains the money, and the use of the money, while the appeal is pending. If the award of benefits is ultimately affirmed, the operator should not reasonably expect to be able to retain any of the profits it earned on that money during the appellate proceeding. Instead, those profits, in the form of interest designed to compensate an attorney for delay, rightfully belong to the attorney who had to wait to receive payment of his fee. Consequently, the date of the fee award is the logical date from which to calculate the interest owed.

The same commenters also argue that the Department has no statutory authority to require the payment of interest on attorneys' fees. The award of fees is governed by section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 928, as incorporated by 30 U.S.C. § 932(a). Section 28 authorizes the payment of a ''reasonable'' attorney's fee by an employer if, after the employer controverts a claimant's entitlement, the claimant obtains an award of benefits. No fee must be paid until the award is final. The Supreme Court has held that ''[a]n adjustment for delay in payment is * * * an appropriate factor in the determination of what constitutes a reasonable attorney's fee'' under a fee-shifting statute. *Missouri* v. *Jenkins,* 491 U.S. 274, 284 (1989) (decided under Civil Rights Attorney's Fees Award Act); *see also Pennsylvania* v. *Delaware Valley Citizens' Council,* 483 U.S. 711, 716 (1987) (dicta, decided under Clean Air Act); *Goodloe* v. *Peabody Coal Co.,* 19 Black Lung Rep. 1–91, 1–101–102 (1995), *vac. on other grounds sub nom Peabody Coal Co.* v. *Director, OWCP,* 116 F.3d 207 (7th Cir. 1997) (overruling prior decisions prohibiting augmentation of attorney fee for delay, citing *Jenkins*). Consequently, interest on an attorney's fee may be awarded consistent with section 28 to compensate an attorney for delay in receiving his fees.

The Court of Appeals for the Fourth Circuit recently addressed this issue in *Kerns* v. *Consolidation Coal Co.,* 176 F.3d 802 (4th Cir. 1999). A claimant's attorney was awarded fees by an administrative law judge in 1984, but was not able to collect those fees until the award became final in 1990. He then filed a motion for supplemental attorneys' fees based on the six-year delay between the award and its payment. The ALJ denied the motion, and the Benefits Review Board affirmed. In reversing the Board, the court noted that a 1995 decision of the Board, *Nelson* v. *Stevedoring Services of America,* 29 BRBS 90 (1995), had authorized the enhancement of an attorney's fee for delay under the Longshore and Harbor Workers' Compensation Act. The court concluded that ''current law'' thus required enhancement for delay, and remanded the case to allow the ALJ to consider the merits of the attorney's supplemental fee request. 176 F.3d at 805. Section 725.608 simply provides a mechanism for ensuring that claimants' attorneys receive this enhancement in each case involving a responsible operator.

The interest on a fee award provided by section 725.608, of course, provides compensation only for part of the delay that an attorney may face in collecting his fee, *i.e.,* the time between the fee award and the actual payment. It is not intended to compensate the attorney for any delay between the performance of his work and the award of fees by the appropriate adjudicator. If, for example, a claimant filed his application in 1995, and was not awarded benefits by an administrative law judge until 1999, § 725.608 will require only that interest be paid to the attorney from the date the ALJ approves the fee petition until the date that the attorney collects that amount. It will not provide interest from the date on which the attorney performed the work. In such cases, it is the responsibility of the attorney who submits a fee request to ensure that the request reflects any necessary enhancement for the delay between the performance of the work and the award of the fee. There are several methods by which an attorney may seek enhancement of his fee award to cover this delay. For example, the attorney could request the adjudication officer to use the attorney's current rate (his rate at the time he applies for the fee), rather than his historical rate (the rate at the time he performed the work), to calculate the fee to which he is entitled. Thus, the attorney in the example above, who performed 20 hours of work in 1995 but did not submit his fee petition until benefits were awarded in 1999, might use the $125 hourly rate he customarily charged in 1999 rather than the $100 hourly rate he charged in 1995. Using the current rate would permit the attorney to claim an additional $500, and would compensate him for the delay between the time he performed the work and date of the fee award. Another method of attaining the same result would be to calculate a ''lodestar'' amount by multiplying the number of hours the attorney worked by his historical rate, and then requesting the adjudication officer to augment that figure by an additional amount intended to compensate the attorney for the delay. Thus, the attorney in the example might request that the adjudication officer multiply the lodestar amount by an additional 25 percent. In either case, the fee awarded by the adjudicator, in concert with the interest provided by § 725.608, will ensure that when the attorney finally receives payment, he is fully compensated for the work he performed.

(d) One comment supports the allowance of interest on attorney fees and on medical benefits. No other comments were received concerning this section, and no changes have been made in it.

20 CFR 725.609

(a) The Department proposed revising section 725.609 in its first notice of proposed rulemaking. In the revised regulation, the Department clarified its intent and authority to enforce a final award of benefits against other parties in the event the named operator is no longer capable of assuming its liability for benefits. The revised regulation outlined the other parties against which such an award might be enforced, including corporate officers and successor operators. The regulation also outlined the circumstances under which the Department may impose liability on these parties. In proposing this regulation, the Department relied on Congress' explicit determination that such entities may be held liable for these awards. 62 FR 3368–69 (Jan. 22, 1997). The Department did not discuss the regulation in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999).

(b) One comment objects to subsection (b)'s imposition of personal liability on corporate officers of companies which provide services at mine sites. The commenter suggests that liability is inappropriate because the officers have never had notice that their employees could be considered miners, and have not previously had knowledge of an obligation to obtain insurance to cover their employees' potential benefit entitlement. The Department rejects this suggestion. Congress amended the statutory definition of ''operator'' in 1977 to include ''any independent contractor performing services or construction at such mine[.]'' 30 U.S.C. 802(d). The current regulations also recognize that an independent contractor may be held liable as a ''responsible operator'' with respect to any employee who performs covered services at a coal mine site. 20 CFR 725.491(c)(1). The Black Lung Benefits Act requires an operator to secure its potential benefits liability by obtaining insurance or qualifying as a self-insurer. 30 U.S.C. 932(b), 933(a). Section 423(d)(1) of the Act authorizes the Department to impose personal liability on certain officers of a corporation if the operator is a corporation that has failed to satisfy its insurance obligations. 30 U.S.C. 933(d)(1). The Department therefore disagrees that application of these provisions to employers engaged as independent contractors providing covered services at mine sites is unfair. Such corporate entities are coal mine operators under the Act, and are liable to their employees when covered employment causes them to become totally disabled by pneumoconiosis. Any such entity is required to anticipate its obligations and take adequate measures to satisfy those obligations as a cost of doing business. Moreover, since 1977, the officers of an independent contractor who meets the Act's definition of the term ''operator'' have been subject to the Act's imposition of liability on the officers of a corporation that fails to meet its security obligations. The revised regulation does not alter the obligation of these officers to obtain the appropriate security, nor does it impose any additional consequences for failing to comply with that obligation. Instead, it simply provides more explicit notice of those consequences.

(c) One comment approves in general terms of the enforcement provisions.

(d) No other comments were received concerning this section, and no changes have been made in it.

20 CFR 725.620

(a) In its first notice of proposed rulemaking, the Department proposed amending the cross-reference in subsection (a) from § 725.495 to subpart D of part 726. This amendment reflected a move to part 726 of the regulations governing the obligations of coal mine operators to secure the payment of benefits. 62 FR 3369 (Jan. 22, 1997). The Department did not discuss § 725.620 in its second notice of proposed rulemaking. *See* Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999).

(b) Two comments urge the Department to revise its regulations to allow parties to settle black lung benefits claims. These comments were listed as relevant to § 725.620(d) in the Department's listing of comments by issue. *See, e.g.,* Exhibit 71 in the Rulemaking Record. They do not directly affect § 725.620, however. Subsection (d) of the regulation implements section 15(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 915, as incorporated by 30 U.S.C. 932(a), rather than section 16, 33 U.S.C. 916, as incorporated by 30 U.S.C. 932(a), the statutory provision governing settlements. The Department has responded to the comments concerning settlement of black lung claims in its Final Regulatory Flexibility Analysis.

(c) No other comments were received concerning this section, and no changes have been made in it.

20 CFR 725.621

In its first notice of proposed rulemaking, the Department proposed increasing subsection (d)'s maximum penalty amount from $500 to $550 for failing to file a required report after the date on which the regulations became effective. This revision implements the Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996. 62 FR 3369 (Jan. 22, 1997). The Department did not discuss § 725.621 in its second notice of proposed rulemaking. *See* Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999). No comments were received concerning this section. The Department has removed an unnecessary comma from subsection (b) in order to make the regulation easier to understand, but no other changes have been made in it.

Subpart J

20 CFR 725.701

(a) After a miner has been found totally disabled by pneumoconiosis arising out of coal mine employment, (s)he receives fixed monthly benefits for that condition. The miner is also entitled to medical benefits, *i.e.,* treatment, supplies and other medical services for the disabling pneumoconiosis. In its initial notice of proposed rulemaking, the Department proposed amending § 725.701 to establish a presumption of medical benefits coverage for the treatment of any pulmonary disorder. 62 FR 3423 (Jan. 22, 1997). This presumption derived from a judicially-created presumption first announced by the Court of Appeals for the Fourth Circuit in *Doris Coal Co.* v. *Director, OWCP [Stiltner,]* 938 F.2d 492 (4th Cir. 1991). The Department explained the means by which the presumption could be rebutted, and limited the type of evidence relevant to rebuttal by excluding any medical opinion premised on the absence of disabling pneumoconiosis. The Department based its exclusion of certain medical evidence in rebuttal on the fact that the existence of the miner's totally disabling pneumoconiosis had already been established in the underlying claim for monthly benefits. 62 FR 3369, 3423 (Jan. 22, 1997). The Department received a number of comments critical of the presumption. Some comments alleged the presumption would effectively compensate miners for disorders caused by smoking cigarettes and raise the operators' health care costs. Other comments contended the presumption did not have a sound medical basis. 64 FR 55003 (Oct. 8, 1999).

After considering the public's comments and intervening judicial decisions, the Department proposed additional changes to the regulation in its second notice of proposed rulemaking. 64 FR 55060 (Oct. 8, 1999). The Department reviewed the decisions in *Glen Coal Co.* v. *Seals,* 147 F.3d 502 (6th Cir. 1998), and *Gulf & Western Indus.* v. *Ling,* 176 F.3d 226 (4th Cir. 1999). 64 FR 55003–04 (Oct. 8, 1999). The Department noted both decisions agreed that the *Doris Coal* presumption shifted only the burden of production to the party opposing benefits, and was therefore valid under the Administrative Procedure Act (APA), 5 U.S.C. § 556(d) (proponent of rule bears burden of persuasion) and *Director, OWCP* v. *Greenwich Collieries,* 512 U.S. 267 (1994). The Department also pointed out that the majority in *Seals* rested on a relatively narrow point: that the administrative law judge and Benefits Review Board erroneously applied Fourth Circuit precedent when Sixth Circuit law controlled and was inconsistent with *Doris Coal.* 147 F.3d

at 514 (Dowd, D.C.J), 515 (Boggs, J.). Citing the need for a uniform standard of national applicability, the Department proposed several changes to § 725.701. 64 FR 55004 (Oct. 8, 1999). The Department eliminated the reference to ''ancillary pulmonary conditions'' in subsection (b) because the phrase was unnecessary and arguably confusing. 64 FR 55004 (Oct. 8, 1999). The Department also changed the language of subsection (e) to clarify the specific facts which might rebut the presumption that a particular medical expense is compensable. Subsection (e) contains a rebuttable presumption that a pulmonary disorder for which the miner receives a medical service or supply is caused or aggravated by pneumoconiosis. 64 FR 55060 (Oct. 8, 1999). In the second proposal, the Department also clarified subsection (f) to ensure that the party opposing benefits does not attempt to relitigate established facts by using medical evidence for rebuttal which is premised on the absence of totally disabling pneumoconiosis. Finally, the Department acknowledged the controlling weight a report from a treating physician may receive in determining the compensability of a service or supply. 64 FR 55004 (Oct. 8, 1999).

(b) The Department has revised the rebuttal provisions set forth in § 725.701(e) in light of a decision from the Court of Appeals for the Fourth Circuit issued after the second notice of proposed rulemaking entered the final stage of administrative clearance. In *General Trucking Corp.* v. *Salyers,* 175 F.3d 322 (4th Cir. 1999), the Court reviewed the various means of rebutting the *Doris Coal* presumption as presented in *Ling:*

> It is certainly true that if the treatment at issue is found to be 'beyond that necessary to effectively treat a covered disorder, or is not for a pulmonary disorder at all,' then the presumption 'shall not carry the day.' *Ling,* 176 F3d at 233. It does not follow, however, that proof of these two circumstances is the exclusive means of rebutting the presumption.
>
> An employer contesting an award of medical benefits may also rebut the presumption by adducing sufficient credible evidence that the claimant was treated for 'a pulmonary condition that had not manifested itself, to some degree, at the onset of his disability,' or for 'a preexisting pulmonary condition adjudged not to have contributed to his disability.' *Ling,* 176 F.3d at 232.

175 F.3d at 324. The *Salyers* decision emphasizes the importance of affording the party liable for medical benefits an opportunity to rebut the presumption with evidence that the service provided treated a condition which became manifest after the underlying adjudication of entitlement, or that it treated a preexisting pulmonary condition adjudged not to have contributed to disability. It is the Department's intent merely to codify the Court's coverage presumption and its rebuttal methods as outlined in Fourth Circuit precedent. In light of *Salyers* and *Ling,* the Department has revised § 725.701(e) to conform the regulation's rebuttal provisions to the decisions issued by the Fourth Circuit since *Doris Coal.* Accordingly, the Department has replaced the phrase ''was not for a covered pulmonary disorder as defined in § 718.201 of this subchapter,'' with ''was for a pulmonary disorder apart from those previously associated with the miner's disability[.]'' The foregoing explanation also responds to one comment which faulted the Department for omitting any discussion of *Salyers* in the second notice of proposed rulemaking.

(c) In response to its second notice of rulemaking, the Department received numerous comments opposing the medical benefits program in general or the § 725.701(e) presumption in particular because, in the commenters' view, coal mine operators would be forced to pay for medical treatment unrelated to pneumoconiosis, especially respiratory disorders caused by cigarette smoking. These same objections were made to the version of § 725.701(e) contained in the Department's initial notice of proposed rulemaking. 64 FR 55003 (Oct. 8, 1999). In response, the Department noted that operators may submit ''appropriate medical evidence'' showing the particular medical service or supply relates to the miner's smoking-related disease and not his pneumoconiosis. 64 FR 55004 (Oct. 8, 1999). An operator may still make such a showing, although the Department has revised the rebuttal provisions of § 725.701(e) in the final rule. The nexus between the miner's pneumoconiosis and the disorder under treatment is only presumed, and therefore subject to being disproved. The operator may produce evidence showing the treatment was for a particular pulmonary disorder apart from those conditions previously associated with the miner's disability, or exceeds the effective level of treatment for a covered disorder, or did not involve a pulmonary disorder at all. As with the *Doris Coal* presumption, invocation shifts only the burden of production, not persuasion. The operator must confront the presumption by submitting evidence which, if credited, establishes one of the means of rebuttal. Section 725.701(f), however, does preclude one defense: the operator cannot escape liability by trying to prove the medical service cannot pertain to disabling pneumoconiosis because the miner was disabled *solely* from smoking or some other non-occupational cause. Once the miner establishes (s)he is entitled to disability benefits, no element of entitlement can be relitigated or otherwise questioned via the medical benefits litigation. Consequently, the operator and its physician must accept that the miner has a totally disabling respiratory or pulmonary impairment, and that pneumoconiosis, as defined in § 718.201, is a substantially contributing cause of that impairment. *See Ling,* 176 F.3d at 232 and n.13, *citing Doris Coal,* 938 F.2d at 497 (operator cannot rebut presumption of benefits coverage by showing miner's pneumoconiosis did not at least aggravate pulmonary condition because ''[t]he time for that argument had passed with the prior adjudication of disability'').

(d) Two comments state without explanation that the medical benefits program implemented by these regulations will force the coal industry to ''subsidize'' other private health plans and insurance as well as the Medicare program. The Department interprets this contention to mean that the industry and its insurers will be forced to financially assist other health care programs by paying for treatment expenses which are not actually related to the miner's pneumoconiosis, and should be paid by the other programs. The Department disagrees. Congress created the black lung medical benefits program as the primary payor for the treatment of miners afflicted with disabling pneumoconiosis. The program covers the costs of treatment, services and supplies only for that purpose. Consequently, the operator may avoid liability for any expense which is not for the treatment of totally disabling pneumoconiosis, and which therefore should be paid by some other health care program.

(e) One comment contends the Department misinterpreted *Seals* and *Ling* in its analysis of those cases. 64 FR 55003–04 (Oct. 8, 1999). The commenter also states the Department cannot ''overrule'' *Seals* by regulation because that decision is based on an interpretation of the APA. The Department rejects both arguments. The commenter does not identify any specific mischaracterization or other error in the Department's interpretation of either decision. The Department believes its analysis is correct, and declines to change its position on the meaning of those decisions except to the

extent reflected in changes to the rebuttal provisions contained in § 725.701(e). As for departing from the APA analysis of the majority in *Seals,* the comment is simply incorrect. The specific majority holding of *Seals* reversed the decisions of the administrative law judge and Benefits Review Board because of an incorrect application of Fourth Circuit law to a case arising in the Sixth Circuit. Judge Boggs (concurring), however, agreed with Judge Moore (dissenting) ''that it would not necessarily contravene *Greenwich Collieries* for the Secretary to adopt a regulation shifting the burden of production in the manner of *Doris Coal.*'' 147 F.3d at 517. Consequently, the majority holding does not rest on any APA considerations, and a majority of the panel, albeit in *dicta,* acknowledges the Department's authority under *Greenwich Collieries* (and, by extension, the APA) to promulgate regulatory presumptions which reallocate burdens among parties. The Department therefore rejects this comment.

(f) One comment contends the presumption of coverage for pulmonary treatment is not supported by any scientific or medical information. The commenter relies largely on a report prepared by a physician for purposes of the rulemaking proceedings; the physician addresses several of the regulations from a medical standpoint and reviews the medical literature compiled during the rulemaking. With respect to § 725.701(e), the physician challenges the reasonableness of presuming a connection between the miner's pneumoconiosis and any pulmonary disorder for which (s)he seeks treatment. The physician notes that many pulmonary disorders bear no relationship to pneumoconiosis, and their treatment is unaffected by the presence of pneumoconiosis. The physician further contends that each patient encounter must be amply documented by evidence that the treatment is necessary for the miner's pneumoconiosis, and should include medical testing, physical examinations, etc. The Department acknowledges the concerns expressed by the comment and accompanying medical views, but does not consider any change in the regulation to be necessary.

As an initial matter, the fact that a physician might view the presumption as *medically* unwarranted does not necessarily undermine its validity as a *legal,* or evidentiary, presumption. The Department understands the physician's objection to mean a physician would not rely on such a presumption as a basis for treating a patient. Most of the statutory and regulatory presumptions in the black lung benefits program, however, draw factual inferences from a combination of medical and non-medical facts for purposes other than patient care. *See* 30 U.S.C. § 921(c)(1) (miner's pneumoconiosis presumed caused by coal mine employment if miner worked ten years); (c)(3) (miner who has complicated pneumoconiosis irrebuttably presumed totally disabled); 20 CFR. § 727.203(a)(1)–(4) (proof of one of enumerated medical facts about miner's pulmonary condition invokes presumption of all remaining elements of entitlement); 20 CFR. § 725.309 (material change in miner's medical condition presumed if miner proves one element of entitlement in duplicate claim previously not proven). ''Like all rules of evidence that permit the inference of an ultimate fact from a predicate one, black lung benefits presumptions rest on a judgment that the relationship between the ultimate and the predicate facts has a basis in the logic of common understanding.'' *Mullins Coal Co.* v. *Director, OWCP,* 484 U.S. 135, 157 n. 30 (1987), *reh'g den.* 484 U.S. 1047 (1988). The Department explained the logical basis and administrative purpose for the presumption in the notice of reproposed rulemaking. *See generally* 64 FR 55004 (Oct. 8, 1999). A miner who is entitled to disability benefits has proven three basic medical facts: (s)he has pneumoconiosis as that disease is defined by § 718.201; (s)he has a totally disabling respiratory or pulmonary impairment; and the pneumoconiosis significantly contributes to that respiratory or pulmonary impairment. Consequently, the miner has established a connection between the compensable disease and the disabling lung condition. From those proven facts, § 725.701(e) draws a rational inference that the need for treating the miner's compromised respiratory condition at any given time is necessitated, directly or indirectly, by the presence of pneumoconiosis. This inference is rebuttable, and the operator may submit evidence showing the treatment is for a particular pulmonary disorder apart from those conditions previously associated with the miner's disability, or exceeds the effective level of treatment for a covered disorder, or did not involve a pulmonary disorder at all. The Fourth Circuit endorsed the same general line of reasoning in *Ling* when it upheld the validity of the *Doris Coal* presumption. 176 F.3d at 233–34. The Department therefore disagrees with the commenter that § 725.701(e) does not have a supportable basis which satisfies the legal test for a rational presumption.

The physician-commenter also urges the Department to require rigorous medical documentation for each medical treatment service, including contemporaneous objective testing, examinations, etc., to impose quality controls on the treatment program. The Department indirectly addressed this concern in the notice of reproposed rulemaking. 64 FR 55004 (Oct. 8, 1999). The Department noted that it receives 12,000 to 15,000 bills weekly for treatment services, most of which involve relatively minor amounts in the $25.00 to $75.00 range. The Department cited cost effectiveness and promptness as practical reasons for using a presumption of coverage to expedite the administrative process. The presumption supplants the need for more elaborate medical proof that the particular service or expense involves the miner's pneumoconiosis, at least until the operator challenges the expense with credible medical evidence. The Fourth Circuit reached the same conclusion in *Ling:*

> Hence, rather than compel the miner to exhaustively document his claim for medical benefits, *i.e.,* requiring him to again laboriously obtain all the evidence that he can that his shortness of breath, wheezing, and coughing are *still* the result of his pneumoconiosis, we have fashioned the *Doris Coal* presumption as a shorthand method of proving the same thing. The proof needed is a medical bill for the treatment of a pulmonary or respiratory disorder and/or associated symptoms.

176 F.3d at 233 (emphasis in original). Section 725.701(e) does not eliminate the need for medical documentation for treatment and services. The presumption merely provides a short-hand means of identifying expenses which are likely to be legitimate unless the liable party opposes payment of particular expenses.

(g) One comment states generally that the medical benefits program, as reproposed, will promote fraud. Another comment contends that reliance on the miner's treating physician under § 725.701(f) will promote fraudulent payments because the doctor has a financial incentive to attribute the miner's pulmonary problems to pneumoconiosis. The commenter also alludes to a long-standing pattern of abuse of the black lung program by treating physicians who mix compensable and non-compensable services when billing the Trust Fund and operators as documented in *Doris Coal Co.* v. *Director, OWCP,* 938 F.2d 492, 497–98 (4th Cir. 1991). Finally, the comment

objects to the basic concept of special deference to a treating physician's opinion as proposed in § 718.104(d). With respect to allegations of fraud, the professional integrity of any physician should be accepted until particular acts of malfeasance are established in the appropriate forum. The comment's allegations that particular physicians are motivated by financial incentives can as easily be directed toward any party-affiliated physician, or group of such physicians, who may benefit by tailoring conclusions to fit the interests of the party paying for the medical opinion. As for the commenter's specific suggestion that there is no cost containment in the program and that health care providers routinely seek payment from the program for unrelated charges, the Department accepts the holding in *Doris Coal.* In this decision, the Court refused to sanction the practice of submitting an unitemized bill for multiple services because such a practice could impose liability on the insurer for services unrelated to the treatment of the miner's pneumoconiosis and encourage fraud. 938 F.2d at 497–98. The Court, however, only alluded to the potential for fraud if unitemized billing were permitted. It did not address the practice as an historical reality or beyond the facts involving the one treating physician involved in the case. The Department therefore rejects the position that miners' treating physicians should be viewed with special suspicion as a group because of a motive for fraudulent diagnoses and/or treatment. The Department responds to the objections concerning special deference to the treating physician's opinion, as proposed in § 718.104(d), in the preamble to that subsection.

(h) One comment urges the Department to join the lawsuit filed by the Department of Justice to recover money from the tobacco industry for costs incurred by the black lung program in treating sick cigarette smokers. The comment is not directed to any regulatory proposal, and no response is therefore warranted.

(i) The Department received several comments which approve of § 725.701.

(j) No other comments were received concerning this section, and no other changes have been made in it.

20 CFR 725.706

The Department proposed changing the no-approval dollar amount in § 725.706(b) from $100.00 to $300.00 in the initial notice of proposed rulemaking. 62 FR 3424 (Jan. 22, 1997). No comments were received concerning this section, and no other changes have been made in it.

20 CFR Part 726—Black Lung Benefits; Requirements for Coal Mine Operators' Insurance

The Department has received one comment relevant to Part 726 in its entirety. The Department proposed revising only specific regulations in Part 726, and invited comment only on those regulations, see 62 FR 3340 (Jan. 22, 1997); 64 FR 54970 (Oct. 8, 1999). The Department either made only technical revisions to the remaining regulations in Part 726, or made no changes, *see* 62 FR 3340–41 (Jan. 22, 1997) (lists of technical revisions and unchanged regulations); 64 FR 54970–71 (Oct. 8, 1999) (same). Therefore, no changes are being made to Part 726 in its entirety.

Subpart A

20 CFR 726.2

In its initial notice of proposed rulemaking, the Department proposed adding subsection (e) to this regulation in order to recognize the addition of subpart D, implementing the civil money penalty provision of 30 U.S.C. 933, to part 726. 62 FR 3369 (Jan. 22, 1997). The Department did not discuss the regulation in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999). The Department has capitalized the word ''subpart'' in subsection (b) to be consistent with the use of that word in subparts (c), (d), and (e). In subsection (d), the Department has replaced the phrase ''coal operator'' with the phrase ''coal mine operator'' to be consistent with subsections (c) and (e). No comments were received concerning this section, and no other changes have been made in it.

20 CFR 726.3

This regulation was not opened for comment in the Department's first notice of proposed rulemaking. *See* list of Unchanged Regulations, 62 FR 3341 (Jan. 22, 1997). The Department proposed a revision to subsection (b) in its second notice of proposed rulemaking at the request of the Office of **Federal Register** to clarify the treatment of cases in which the regulations in Part 726 appear to conflict with the regulations incorporated from Part 725. 64 FR 55005 (Oct. 8, 1999). In subsection (a), the Department has replaced the phrase ''coal operator'' with the phrase ''coal mine operator'' to be consistent with subsection (b). No comments were received concerning this section, and no other changes have been made in it.

20 CFR 726.8

(a) The Department proposed adding § 726.8 in its first notice of proposed rulemaking in order to define certain terms including ''employ'' and ''employment.'' The definition of ''employ'' and ''employment'' proposed in subsection (d), was identical to that in proposed § 725.493(a)(1). 62 FR 3369 (Jan. 22, 1997). In its second notice of proposed rulemaking, the Department incorporated into subsection (d) a change to the definition of the term ''employment'' that it had also made to § 725.493. 64 FR 55005 (Oct. 8, 1999). The Department also responded to comments concerning the retroactive effect of the proposal and the scope of the definitions. The Department stated its belief that the proposal was neither improperly retroactive nor an instrument for creating additional insurer liability. Neither did the proposal intrude on insurance functions reserved to the states. The Department noted the Court of Appeals for the Seventh Circuit's holding that the Black Lung Benefits Act ''specifically relates to the business of insurance and therefore does not implicate the McCarran-Ferguson Act,'' 15 U.S.C. 1012, which confers primacy on state law for the regulation of the insurance industry, unless a conflicting federal statute specifically provides otherwise. *Lovilia Coal Co.* v. *Williams,* 143 F.3d 317, 325 (7th Cir. 1998). The Department also justified the scope of the proposed definition as well within the rulemaking authority granted the Department by Congress.

(b) One comment objects to the Department's definitions of the terms ''employ'' and ''employment.'' The commenter argues that the Department is improperly interfering with existing employment relationships by adopting regulations that differ from those provided by state employment and insurance laws. The Department provided a detailed explanation of both its authority and its reasoning for proposing this regulation in its October 8, 1999 proposal. *See* 64 Fed. Reg. 55005 (Oct. 8, 1999). The Department does not agree that the regulations it issues to implement the Black Lung Benefits Act interfere with employment relationships recognized by the various states. The Black Lung Benefits Act requires that a coal mine operator's liability for a miner's black lung benefits be based on that operator's employment of the miner. *See* 30 U.S.C. 932(a) (making the operator of a coal mine liable for benefits based on ''death or total disability due to pneumoconiosis arising out of employment in such

mine''). Congress did not specifically define the term ''employment,'' however. In such cases, an administrative agency is authorized to promulgate regulations to fill the gaps Congress left in the statute. *Morton* v. *Ruiz,* 415 U.S. 199, 231 (1974). In addition, the Department is authorized to promulgate regulations to ensure sufficient insurance coverage for all of the liabilities borne by operators under the Act. 30 U.S.C. 933(b)(3) (permitting the Secretary to promulgate regulations governing the content of insurance policies issued to cover liability under the Black Lung Benefits Act). The Department's definition of the terms ''employ'' and ''employment'' is intended to meet its responsibility to properly administer the Black Lung Benefits Act. The Department does not believe that its definitions will in any way affect the application of state law to the relationships between coal mine operators and the miners they employ.

(c) The same commenter also argues that the Department's regulation will eliminate the ability of a coal mine operator to enter into an employee leasing arrangement with an employee leasing company. The commenter observes that the current model employee leasing rule of the National Association of Insurance Commissioners requires the employee leasing company to provide workers' compensation coverage, including federal black lung benefits coverage, for its employees. According to the commenter, the Department's proposal, which would hold lessors responsible for the insurance of their leased employees, will make employee leasing a less viable option.

The Department does not believe that its proposal will interfere with an employer's economic decision to use leased employees in its coal mine operations. Moreover, the Department does not intend to force coal mine operators to secure the payment of benefits for leased employees when the leasing company has already obtained the necessary insurance. In such cases, the operator will be considered to have met the security requirements of the Act with respect to those employees. Such a practice is sound from the point of view of both the traditional coal mine operator and the employee leasing company. Although the commenter suggests that leasing companies are not mine operators, that is not entirely clear under the Black Lung Benefits Act. Section 423(a) of the Act, 30 U.S.C. § 933(a), requires ''each operator of a coal mine'' to secure the payment of benefits by qualifying as a self-insurer or purchasing insurance. The term ''operator,'' as used in section 423(a), includes ''independent contractors who perform services or construction at such mines.'' 30 U.S.C. § 802(d). This definition of ''operator'' thus includes companies that provide employees under a leasing arrangement. The Department therefore does not agree that employee leasing companies should not be considered ''operators'' under the Black Lung Benefits Act. The Department's ability to monitor the use of temporary contractual arrangements by the coal mining industry, however, is limited. In addition, the commenter's different interpretation of the term ''operator'' suggests that any effort to impose civil money penalties on a leasing company under Part 726, or to assign liability to such an entity under Part 725, would be vigorously contested. Accordingly, the Department has defined the terms ''employ'' and ''employment'' in a manner which maximizes its ability to ensure the insurance coverage of leased employees.

By contrast, the application of both Parts 725 and 726 to traditional coal mine operators is quite clear. The Act authorizes the Department to ensure that all of the individuals performing mining work under that operator's direction are covered by appropriate security. In addition, those coal mine operators who use leased employees are in the best position to ensure that those employees are covered by the necessary insurance. The Department does not intend to require that the traditional coal mine operator purchase insurance when the leasing company has done so, but it does intend the regulations to provide an incentive for the coal mine operator to deal only with those leasing companies that have purchased insurance meeting federal standards for black lung benefits coverage. *See* 20 CFR 726.203 (1999). Contrary to the commenter's suggestion, the rule thus does not make insurers and state funds the enforcement officers of the Department. Rather, the traditional coal mine operator is simply on notice that it may be held liable for the benefits of leased employees if the leasing company fails to procure the necessary insurance coverage, or for any civil money penalties arising as a result of that failure.

(d) Finally, the same comment objects that the Department's regulation is impermissibly retroactive. The Department has discussed the retroactive effect of its regulations in considerable detail in both its first and second notices of proposed rulemaking. *See* discussions of § 725.2 at 62 Fed. Reg. 3347–48 (Jan. 22, 1997) and 64 Fed. Reg. 54981–82 (Oct. 8, 1999). In those discussions, the Department recognized that it lacks the authority to make substantive changes to the regulations in a manner that applies retroactively. For example, if the previous civil money penalty regulation, 20 CFR 725.495 (1999), did not permit the assessment of penalties against an operator for its failure to secure the benefits payable to its leased employees, the Department may not assess a penalty against that operator under the revised regulations for any period prior to the effective date of these regulations. Although the Department believes that the previous regulation is broad enough to permit the assessment of civil money penalties in these cases, it also recognizes that the issue must be resolved on a case-by-case basis in the context of litigating penalty assessments.

It is also important to note that the revised regulation does not affect the liability of insurers for claims filed prior to the effective date of the regulations. Under the insurance endorsement set forth at § 726.203, an insurer is already liable for all of the miners employed by its insured. *See Lovilia Coal Co.* v. *Williams,* 143 F.3d 317, 322 (7th Cir. 1998). An employer's liability, in turn, is determined by the regulations set forth at 20 CFR §§ 725.491–.495. The Department has stated explicitly that the revised version of those regulations will not be applied retroactively. *See* § 725.2. Accordingly, if the prior regulations did not permit the imposition of liability against a coal mine operator for benefits owed to a miner whose services were obtained from a leasing company, they will not permit imposition of liability against that operator's insurer. The Department thus does not agree that the revised regulation is impermissively retroactive.

(e) No other comments were received concerning this section, and no changes have been made in it.

Subpart B

20 CFR 726.101

In its initial notice of proposed rulemaking, the Department proposed revising this regulation to delete the formula used in 1974 to establish the amount and types of security required for an operator to be authorized to self-insure. The proposal also removed the reference in subsection (a) to indemnity bonds and negotiable securities as the only forms of acceptable security. 62 FR 3369 (Jan. 22, 1997). The Department did not discuss the regulation in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999). The Department has revised

subsections (b)(1), (2), and (3), and subsection (c) in order to clarify the meaning of the regulation. No comments were received concerning this section, and no other changes have been made in it.

20 CFR 726.104

In its initial notice of proposed rulemaking, the Department proposed revising subsection (b) to recognize two additional forms of security available to an authorized self-insurer: Letters of credit and tax-exempt trusts. 62 FR 3369 (Jan. 22, 1997). The Department did not discuss the regulation in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999). The Department has revised subsections (a) and (d) to clarify the meaning of those provisions. The Department received one comment concerning this regulation; that comment is addressed under § 726.106. No other comments were received concerning this section, and no other changes have been made in it.

20 CFR 726.105

In its initial notice of proposed rulemaking, the Department proposed deleting the reference to the formula contained in 20 CFR 725.101(1999), in favor of a non-exclusive list of factors to be considered by the Department in determining the appropriate amount of security required to be provided by a self-insured operator. 62 FR 3369 (Jan. 22, 1997). The Department did not discuss the regulation in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999). The Department has revised the first and third sentences of the regulation in order to clarify their meaning. No comments were received concerning this section, and no other changes have been made in it.

20 CFR 726.106

(a) In its initial notice of proposed rulemaking, the Department proposed deleting an incorrect reference to specific sections in Title 31 of the Code of Federal Regulations and replacing the reference with a citation to the appropriate regulatory part governing deposits with the United States. 62 FR 3369 (Jan. 22, 1997). The Department did not discuss the regulation in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999).

(b) One comment urges the Department to include language in this regulation confirming the sole liability of a surety company which writes the most recent indemnity bond for a responsible operator, and the exoneration of all previous sureties. No change in the regulation is necessary. In *United States of America* v. *Insurance Co. of North America,* 83 F.3d 1507 (D.C. Cir. 1996), the Department argued that a surety assumes liability for all of an operator's existing obligations when the bond is written and continuing until the termination of the bond. The Court rejected this argument. It held that a surety is liable only for those obligations which actually accrue to the responsible operator during the lifetime of the bond, and not for all outstanding liabilities of the insured entity. 83 F.3d at 1511. The Court also rejected the notion that each successive bond exonerates any previous surety to which liability has attached. 83 F.3d at 1512–13. The Court based these holdings on its interpretation of the bond language itself. Consequently, the commenter's recommendation can be accomplished only by further specifying in the bond's language, as prescribed by the Department, the scope of the bond's coverage and its terms of release. The Department has yet to determine whether revision of the bond form is appropriate. In any event, the commenter's suggestion does not require changing the language of the regulation.

(c) The Department has revised the first sentences of subsections (b) and (c) to clarify the meaning of these provisions. No other comments were received concerning this section, and no other changes have been made in it.

20 CFR 726.109

In its initial notice of proposed rulemaking, the Department proposed deleting specific references to indemnity bonds and negotiable securities in favor of more general references to the security required to be provided by a self-insured operator. 62 FR 3369 (Jan. 22, 1997). The Department did not discuss the regulation in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999). The Department has revised the second and third sentences of the regulation in order to clarify their meaning. No comments were received concerning this section, and no other changes have been made in it.

20 CFR 726.110

In its initial notice of proposed rulemaking, the Department proposed deleting references to indemnity bonds and negotiable securities in subsections (a)(3) and (b) in favor of more general references to the security required to be provided by a self-insured operator. 62 FR 3369 (Jan. 22, 1997). The Department did not discuss the regulation in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999). The Department has revised the regulation to clarify its meaning. No comments were received concerning this section, and no other changes have been made in it.

20 CFR 726.111

In its initial notice of proposed rulemaking, the Department proposed deleting a reference to indemnity bonds and negotiable securities in favor of a more general reference to the security required to be provided by a self-insured operator. 62 FR 3369 (Jan. 22, 1997). The Department did not discuss the regulation in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999). The Department has revised the regulation to clarify its meaning. No comments were received concerning this section, and no other changes have been made in it.

20 CFR 726.114

In its initial notice of proposed rulemaking, the Department proposed adding subsection (c) to codify the Department's position that self-insured coal mine operators who cease mining coal nevertheless have a continuing responsibility to maintain adequate security to cover their potential liability under the Black Lung Benefits Act. The Department also replaced a specific reference to negotiable securities and indemnity bonds in subsection (b) with a more general reference to the security required to be provided by a self-insured operator. 62 FR 3369 (Jan. 22, 1997). The Department did not discuss the regulation in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999). In the third sentence of subsection (a), the Department has replaced the word ''have'' with the word ''has'' to make the sentence grammatically correct. The Department has also revised subsections (a) and (c) to clarify their meaning. No comments were received concerning this section, and no other changes have been made in it.

Subpart C

20 CFR 726.203

(a) The Department made technical revisions to § 726.203 in its first notice of proposed rulemaking, but did not open the regulation for comment. *See*

list of Technical revisions, 62 FR 3340–41 (Jan. 22, 1997). At the Department's July 22, 1997 hearing in Washington, D.C., however, the Department heard testimony indicating that, since 1984, the insurance industry had used an endorsement for black lung insurance that differed from the endorsement set forth in § 726.203. Transcript, *Hearing on Proposed Changes to the Black Lung Program Regulations,* July 22, 1997, p. 127 (testimony of Robert Dorsey). In its written comments, the industry stated that the Department had approved use of the new endorsement. Because the Department's records contained no document authorizing use of a different endorsement, the Department opened the regulation for comment, and invited the industry to produce proof that the Department had approved the change. In addition, the Department invited comment on the endorsement language that the insurance industry had supplied. 64 FR 55005–06 (Oct. 8, 1999).

(b) In response to the second notice of proposed rulemaking, the insurance industry submitted two affidavits. Rulemaking Record, Exhibit 89–37, Appendix G. One, from a former vice president and general counsel of the National Council on Compensation Insurance (NCCI), states that ''NCCI was informed by officials of the Office of Workers' Compensation Programs, in writing, that the agency had no objection to the changes.'' The affidavit also states that the changes were put into use. The other affidavit, from NCCI's current general counsel, states that NCCI's schedule for the retention of records requires the council to maintain correspondence for 10 years, and that correspondence more than 10 years old is destroyed in accordance with established policy. Accordingly, the affiant stated, NCCI was unable to produce a copy of the Department's ''acknowledgment'' of the revised insurance endorsement.

The Department has conducted a second thorough search of its files, including files in the Office of Workers' Compensation Programs, the Employment Standards Administration, and the Office of the Solicitor. Although the Department's files contain correspondence with NCCI dating back to 1984, the Department's search failed to produce any correspondence in which the Department approved NCCI's revised insurance endorsement. Moreover, the Department does not believe that it would have approved the proposed revision. The revision differs in two material respects from the endorsement set forth in § 726.203. First, the revision limits an insurer's liability for claims that are based on employment that ended before an operator first obtained insurance to secure its liability under the Act. Second, the revision limits an insurer's liability for claims that are approved as a result of amendments to the Black Lung Benefits Act.

The current black lung insurance endorsement obligates an insurer to provide coverage to an operator in two different types of claims. First, the insurer is liable when the miner's last exposure to coal mine dust in the employment of the insured ''occurs during the policy period.'' Thus, if a miner is last employed by XYZ Coal Company on March 1, 1990, and XYZ Coal Company is the coal mine operator responsible for the payment of that miner's benefits, the insurer whose policy covered XYZ on March 1, 1990 will be liable for the payment of those benefits. In addition, however, the endorsement covers a second type of claim. Prior to the Black Lung Benefits Reform Act of 1977, the Black Lung Benefits Act obligated employers to pay benefits to former employees who were totally disabled due to pneumoconiosis arising out of coal mine employment, no matter when their employment ended. *See Usery* v. *Turner Elkhorn Mining Co.,* 428 U.S. 1, 15–16 (1976) (observing that the Act has ''some retrospective effect''). Because operators were not required to purchase insurance until January 1, 1974, however, the endorsement contained a second clause providing coverage if the miner's last exposure in the employment of the insured operator ''occurred prior to (effective date) and claim based on such disease is first filed against the insured during the policy period.'' Thus, if a miner last worked for XYZ Coal Company in 1972, but did not file a claim until July 1, 1978, the insurer whose policy covered XYZ on the 1978 filing date would be liable for the miner's benefits.

The regulations define the term ''effective date'' in the endorsement as the effective date of the operator's first insurance policy providing coverage for the operator's federal black lung benefits liability. 20 CFR 726.203(b) (1999). Thus, if the operator did not obtain its first policy until January 1, 1974, that policy would cover any claims based on employment that ended prior to that date. The revised endorsement offered by the insurance industry replaces the term ''effective date'' with the date ''July 1, 1973.'' Although a number of operators did purchase insurance before January 1, 1974, none did so until after July 1, 1973. Accordingly, the industry's revised endorsement would potentially leave coal mine operators uninsured for certain claims. For example, if an operator did not purchase insurance until November 1, 1973, the revised endorsement would cover the miner's last exposure in the employment of the insured operator only if it ''occurred prior to July 1, 1973,'' and therefore would not cover any claims based on employment that ended between July 1, 1973 and November 1, 1973. If the coal company is still in business, the claim would be the responsibility of that company. If the coal company is no longer in business, the claim would become the responsibility of the Black Lung Disability Trust Fund. Either result is unacceptable. Although the Department recognizes that this change would not affect a significant number of claims, it could materially alter the liability of the insurance industry in some cases. Thus, the Department does not believe that the revision is appropriate.

The second material change in the endorsement is potentially more serious. The current endorsement obligates an insurer for liability that arises under the Black Lung Benefits Act and ''any laws amendatory thereto, or supplementary thereto, which may be or become effective while this policy is in force.'' Following the Black Lung Benefits Reform Act of 1977, several Virginia coal mine operators sued two insurers in federal district court to obtain a declaratory judgment regarding the coverage of claims that were subject to approval under the new criteria. The court agreed with the operators and held that, under the Department's endorsement, a policy was ''in force'' as long as claims could be filed against it. *National Independent Coal Operators Association, Inc.* v. *Old Republic Insurance Co.,* 544 F. Supp. 520, 527–8 (W.D.Va. 1982). The court accordingly rejected the argument of the insurers that the term ''in force'' was synonymous with the term ''policy period,'' and that an insurer was liable only to the extent of amendatory or supplementary laws enacted during the one-year period covered by each policy. *See* 20 CFR 726.206 (a policy shall be issued for the term of one year from the date on which it becomes effective). The court stated that if the insurers had intended that meaning ''it should have been made clear to the plaintiffs [operators] by either using 'policy period' where the words 'in force' appear, or by defining 'in force' somewhere in the contract.'' *National Independent Coal Operators Association* at 528.

The court's decision was issued in 1982, and the insurance industry quickly accepted the court's invitation.

The revised endorsement, apparently submitted to the Department in 1983, replaces the language in the current endorsement that obligates the insurer to cover liability resulting from amendments while the policy is ''in force'' with a phrase obligating the insurer to cover liability resulting from ''any amendment to the law that is in effect during the policy period.'' This altered language would permit the insurance industry to accomplish what it failed to win in the 1982 litigation, *i.e.,* an exemption from liability resulting from any future amendments. Like the other proposed change, this revision would increase the exposure of coal mine operators and the Black Lung Disability Trust Fund, and is therefore unacceptable to the Department.

Because the revised black lung endorsement offered by the insurance industry materially alters the obligations and coverage provided by the insurance industry under the Black Lung Benefits Act, the Department must reject that endorsement. Accordingly, no changes are made to § 726.203.

(c) One comment urges the Department to add a sentence to subsection (d) of the regulation. The sentence, which the commenter states would conform the regulation to state regulatory regimes, would read as follows: ''The requirements of this section shall be construed to the extent possible, harmoniously with the workers' compensation rules and practices of the state is [sic] when the coverage is provided.'' Rulemaking Record, Exhibit 89–37, pp. 177–178. The commenter does not suggest any problem in the current regulations that this sentence is intended to correct, and the Department declines to add a sentence whose intent is unclear. To the extent that this sentence could be interpreted to require a result different from that reached in *Lovilia Coal Co.* v. *Williams,* 143 F.3d 317 (7th Cir. 1998), in which the Court of Appeals for the Seventh Circuit held that the federal black lung insurance endorsement was not subject to exclusions available under state law, the Department also does not believe that it would be appropriate.

The commenter also renews a suggestion, made in response to the first notice of proposed rulemaking, that subsections (b) and (c)(2) of § 726.203 should be eliminated. The commenter's first suggestion is premised on the Department's acceptance of the insurance industry's revised endorsement. As discussed above, the Department does not believe that the revised endorsement provides necessary coverage and therefore has refused to accept it. The commenter's second suggestion states that the addition of subsections (b)(1) and (b)(2) to § 725.493 have created a conflict with § 726.203(c)(2), and made the latter provision redundant. The Department disagrees because the two regulations serve wholly different purposes. Section 725.493(b)(1) governs the liability of prior and successor operators in two cases: (1) Where the miner was employed by the successor after the sale giving rise to successor liability; and (2) where the miner was never employed by the successor operator. Subsection (b)(2) governs the successor liability of companies whose relationship to the prior operator is as a parent company, as members of joint ventures, a partner, or a company that substantially owned or controlled the prior operator. Section 726.203(c)(2) governs the interpretation of the insurance contract in a case where the insured company is liable as a successor operator. Because the sections 725.493 and 726.203 govern different subjects, the Department does not believe that the regulations are in conflict, or that subsection (c)(2) is redundant.

(d) No other comments were received concerning this section, and no changes have been made in it.

20 CFR 726.208

Although the Department received comments under this section, the regulation was not open for comment, *see* 62 Fed. Reg. 3341 (Jan. 22, 1997); 64 Fed. Reg. 54970 (Oct. 8, 1999). The Department made only a technical change to the regulation in the second notice of proposed rulemaking. Accordingly, no changes are being made in this section.

20 CFR 726.211

Although the Department received comments under this section, the regulation was not open for comment, see 62 Fed. Reg. 3341 (Jan. 22, 1997); 64 Fed. Reg. 54970 (Oct. 8, 1999). The Department made only a technical change in the regulation. Accordingly, no changes are being made in this section.

Subpart D

20 CFR 726.300–726.320

(a) In its first notice of proposed rulemaking, the Department proposed a complete revision of the procedural and substantive regulations governing the imposition of civil money penalties against operators that fail to secure the payment of benefits under the Black Lung Benefits Act, 30 U.S.C. 933(d)(1). 62 FR 3370 (Jan. 22, 1997). These revisions included a series of graduated penalties based on the number of the operator's employees, the length of time the operator's uninsured status continues following notification, and its constructive and actual notice of its obligation to secure. In addition, the Department proposed allowing the initial assessment of penalties by the Office of Workers' Compensation Programs to become final if neither the operator nor its officers filed a timely notice of contest. The proposal also subjected decisions of administrative law judges on penalty issues to discretionary review by the Secretary. The Department did not discuss these regulations in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999).

(b) The Department has made several minor changes to the regulations in Subpart D of Part 726. In § 726.302(c)(3) and (4), the Department replaced a reference to subsection (b) with a reference to subsection (c)(2)(i) to correctly identify the applicable provision. In § 726.308, the Department corrected the address of the Black Lung Benefits Division of the Office of the Solicitor and added a reference to § 725.311, which lists federal holidays. In § 726.313(f), the Department replaced the word ''will'' with the word ''shall'' to clarify the Department's intent. The Department has made minor revisions to §§ 726.300, 726.301, 726.302, and 726.305 to clarify their meanings.

(c) One comment is critical of the Department's failure to enforce its current requirement (20 CFR § 725.495 (1999)) that coal mine operators either purchase commercial insurance or qualify as self-insured entities. The commenter argues that if § 725.495 was enforced to its fullest extent, the Department would not find it necessary to alter the methods used to identify responsible operators. The Department provided a detailed explanation of the purpose behind its proposed revision of the civil money penalty regulations in its initial notice of proposed rulemaking. 62 FR 3370–71 (Jan. 22, 1997). Subpart D of part 726 replaces § 725.495 with a comprehensive scheme for the imposition of graduated penalties on those operators who fail to secure their liability for benefits. The previous regulation required only that an administrative law judge levy the maximum penalty possible in the absence of ''mitigating circumstances,'' and provided no guidance or criteria for determining an appropriate assessment. The revised regulations fill this void. The Department thus disagrees with the commenter's view that vigorous enforcement of penalties under 20 CFR

§ 725.495 (1999) would eliminate the need to revisit the Department's method of identifying responsible operators. Consequently, the revised regulations represent a necessary exercise of the Department's rulemaking authority.

(d) One comment generally characterizes this revision as adding ''onerous'' penalties to the current program, but makes no specific criticism of them. The revised Subpart D of part 726 does not add any penalty not specifically authorized by 30 U.S.C. § 933(d), and not contained in the previous regulations. Moreover, the graduated scale of penalties contained in the revision provides specific guidelines for computing penalties and may result in a lesser penalty being imposed than the former regulation would have required. This comment does not provide any other basis for a substantive response by the Department.

(e) One comment observes that the prospect of civil money penalties may encourage an unsecured operator to pass on its liabilities to an insured successor whose carrier has not collected a premium reflecting the additional liability. To the extent that such a possibility exists in cases where the prior operator subsequently becomes unable to pay benefits to its former employees, it implicates business considerations, not legal questions. An insured operator should weigh the potential effect of acquiring an entity with unsecured benefits liability as a factor in the financial soundness of making the acquisition. The possibility of adverse economic effects on some future mergers or acquisitions, however, does not excuse the Department's obligation to enforce compliance with the Act's insurance requirements and to penalize a failure to comply.

(f) Two comments approve of the proposed civil money penalties. No other comments were received concerning this subpart, and no other changes have been made in it.

20 CFR Part 727

(a) In its first notice of proposed rulemaking, the Department proposed deleting Part 727 from title 20 of the Code of Federal Regulations. 62 FR 3371, 3435 (Jan. 22, 1997). The Department explained that the Part 727 regulations, which govern black lung benefits claims filed prior to April 1, 1980, are relevant only to a small minority of the claims currently pending. Because the parties to those claims are already familiar with the standards in Part 727, the Department proposed to discontinue the annual publication of that part. In lieu of continued publication, section 725.4(d), as revised, will refer individuals to the 1999 version of title 20 of the Code of Federal Regulations for a copy of the regulations. *See* discussion of § 725.4, above; 62 FR 3348, 3386 (Jan. 22, 1997). The Department did not discuss Part 727 in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999).

(b) Three comments urge the Department not to discontinue its annual publication of Part 727 because the part governs claims still pending in various stages of adjudication. Although the Department recognizes that the Part 727 regulations are applicable to some pending claims, the Department does not believe that the existence of this relatively small number of cases justifies the continued publication of the part in the Code of Federal Regulations. The parties to these claims are already familiar with the regulations, and have received sufficient notice of the Department's intention to cease publication to allow them to retain their current copies of the Code. Accordingly, the Department has discontinued the annual publication of Part 727.

(c) No other comments were received concerning this part, and no changes have been made in it.

Drafting Information

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Executive Order 12866

The Office of Information and Regulatory Affairs of the Office of Management and Budget has determined that the Department's proposed rule represents a ''significant regulatory action'' under section 3(f)(4) of Executive Order 12866 and has reviewed the rule.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995, this rule does not include any federal mandate that may result in increased expenditures by State, local and tribal governments, or increased expenditures by the private sector of more than $100 million in any one year.

Executive Order 13132

The Department has reviewed this rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have ''federalism implications.'' The rule does not have ''substantial 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.''

Paperwork Reduction Act

The changes establish no new record keeping requirements. Moreover, they reduce the volume of medical examination and consultants' reports which currently are created solely for litigation by limiting the amount of such medical evidence which will be admissible in black lung proceedings.

Regulatory Flexibility Act, as Amended

The Regulatory Flexibility Act (''RFA'') was enacted by Congress in 1980 ''to encourage administrative agencies to consider the potential impact of nascent federal regulations on small businesses.'' *Associated Fisheries of Maine, Inc.* v. *Daley,* 127 F.3d 104, 111 (1st Cir. 1997). The preamble to the RFA provides in part as follows:

> It is the purpose of this Act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.

Pub. L. 96–354, 94 Stat. 1165 (1980).

The RFA outlines in some detail the analysis required for compliance. Unless the agency certifies that the rule will not have ''a significant economic impact on a substantial number of small entities,'' 5 U.S.C. 605, each agency that publishes a notice of proposed rulemaking must prepare an ''initial regulatory flexibility analysis'' describing the impact of the proposed rule on small entities. 5 U.S.C. 603(a). That analysis, or a summary of the analysis, must be published in the **Federal Register** when the notice of proposed rulemaking is published, and a copy of the analysis must be sent to the Chief Counsel for Advocacy of the Small Business Administration.

In its initial notice of proposed rulemaking, the Department certified that the proposed revisions would not have a significant effect on a substantial number of small businesses. 62 FR 3371–73 (Jan. 22, 1997). The Department's certification was criticized by both the coal mining industry and the Small Business Administration's Office of Advocacy. Industry argued that the Department had grossly underestimated the effect of the proposed rule. The Office of Advocacy observed that the Department had not used the size standards established by the Small Business Administration, and that the Department did not provide a factual basis for its certification. In particular, the Office of Advocacy took issue with the Department's interpretation of the term ''significant economic impact.''

In light of the comments the Department received in response to the first notice of proposed rulemaking, the Department included in its second notice of proposed rulemaking an initial regulatory flexibility analysis. That analysis included each of the components identified by the RFA: (1) A statement of the reasons for issuing the proposed rule; (2) a statement of the objectives of, and legal basis for, the proposed rule; (3) a description and, where feasible, an estimate of the number of small businesses to which the rule would apply; (4) a description of projected reporting, recordkeeping, and other compliance requirements of the proposed rule; and (5) an identification of any rules that would overlap, duplicate, or conflict with the proposed rule. 5 U.S.C. 603(b). Finally, as is also required by the RFA, the analysis contained a description of alternatives to the rule. 5 U.S.C. 603(c). 64 FR 55006–09 (Oct. 8, 1999).

The Regulatory Flexibility Act ''plainly does not require economic analysis.'' *Alenco Communications, Inc.* v. *FCC,* 201 F.3d 608, 625 (5th Cir. 2000). Because of the serious concerns raised in the comments to its initial notice of proposed rulemaking, however, the Department undertook an extensive analysis of the effect of its proposed rule on the coal mining industry in general and on small businesses, as defined by the Small Business Administration, in particular. Rulemaking Record, Exhibit 80. That analysis determined that the potential costs of the Department's rule would be imposed on most coal mine operators through higher insurance premiums, and that, in the long term, those insurance premiums could be expected to rise by 39.3 percent. Exhibit 80 at p. 44. The analysis assumed that all coal mine operators purchased insurance to cover their obligations, although it noted that this assumption probably overstated costs with respect to operators that are authorized to self-insure. Logically, operators self-insure only if they may do so at a lower cost. Exhibit 80 at p. 44. The analysis calculated that an increase in premiums of this magnitude would result in a total annual cost to the industry between $32.22 million and $88.32 million, with a point estimate of $57.56 million. Exhibit 80 at p. 46. The Department believes that these figures contain substantial upward biases, and that they therefore overstate, by a considerable amount, the total cost to industry. Specifically, the Department estimated the costs based on the insurance premiums paid by underground coal mine operators. The insurance premiums paid by surface mine operators, which employ a substantial percentage of the people working in coal mine employment, are significantly lower. (See the economic analysis prepared by Milliman & Robertson, Inc., at p. 6, Table 4; Rulemaking Record Exhibit 89–37, Appendix A.) In addition, coal mine operators who self-insure their liabilities under the Black Lung Benefits Act may be assumed to do so because their costs are lower than the costs of commercial insurance. Although it is conservatively high, the Department believes the $57.56 million point estimate to be the most useful indicator of industry costs. The analysis concluded that the effects of this rise in insurance costs would be most heavily felt by underground bituminous coal mine operators with less than 20 employees, who would be in a poorer position to recoup those costs. Some of those operators, the analysis observed, might be forced to suspend operations. Exhibit 80 at pp. 56–59.

The RFA also requires that agencies assure that small businesses have an opportunity to participate in the rulemaking ''through the reasonable use of techniques such as—* * * 3) the direct notification of interested small entities; * * *'' 5 U.S.C. 609(a)(3). Accordingly, the Department mailed a copy of its second notice of proposed rulemaking, including its initial regulatory flexibility analysis, to each coal mine operator identified in a database maintained by the Mine Safety and Health Administration. In addition, the Department made a copy of its economic analysis available to any interested party that requested it and posted it on the Internet. 64 FR 55008 (Oct. 8, 1999). Finally, because the Department did not complete its mailing of the proposal until November 5, 1999, it extended the comment period through January 6, 2000 to ensure that each small business was given no less than 60 days to submit comments, the length of the original comment period in the second notice of proposed rulemaking. 64 FR 62997 (Nov. 18, 1999).

Finally, the Regulatory Flexibility Act requires that when an agency promulgates a final rule after having been required to publish a notice of proposed rulemaking, the agency must prepare a final regulatory flexibility analysis. That analysis must contain:

(1) a succinct statement of the need for, and objectives of, the rule;

(2) a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

(3) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

(4) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and

(5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

5 U.S.C. 604(a). The agency must make a copy of its final regulatory flexibility analysis available to the public, and must publish its analysis or a summary of its analysis in the **Federal Register**. 5 U.S.C. 604(b). The Department's final regulatory flexibility analysis is published below.

Need for, and Objectives of, the Rule

The Department discussed its need to revise the black lung regulations in its initial regulatory flexibility analysis. 64 FR 55006–07 (Oct. 8, 1999). In that analysis, the Department observed that the revisions satisfied a number of different objectives. First, many of the revisions simply updated the regulations implementing the Black

Lung Benefits Act. The Department's initial analysis provided examples of much needed regulatory updates such as those needed to reflect decisions of the courts of appeals and to clarify the Department's original intent when certain regulations were promulgated. Similarly, the Department noted the proposed regulatory revisions reflected changes that had occurred over the previous 20 years in the diagnosis and treatment of pneumoconiosis. Paragraphs (1), (3), (4), and (6) of the section entitled ''Reasons for, and Objectives of, the Proposed Rule,'' discussed areas in which the Department sought to update its regulations.

The black lung program regulations were in need of significant revision to make them current. The Department last made substantive revisions to certain regulations in 1983, *see* 48 FR 24272 (May 31, 1983), and those revisions reflected only substantive changes made to the Black Lung Benefits Act by the Black Lung Benefits Revenue Act of 1981, Pub. L. 97–119, Title I, 95 Stat. 1635 (1981) and the Black Lung Benefits Amendments of 1981, Pub. L. 97–119, Title II, 95 Stat. 1644 (1981), both of which became effective on January 1, 1982. Most of the regulations have not been revised since they were originally promulgated: Part 718 in 1980, Part 722 in 1973, and Parts 725 and 727 in 1978. *See* 45 FR 13678 (Feb. 29, 1980); 38 FR 8328 (March 30, 1973); 43 FR 36772 (Aug. 18, 1978). Some regulations, however, did not reflect the amendments to the Black Lung Benefits Act enacted over the last quarter century. For example, Part 722 sets forth criteria states must meet when seeking certification from the Secretary that their workers' compensation programs provide ''adequate coverage'' for occupational pneumoconiosis. These regulations were never revised in light of either the Black Lung Benefits Reform Act of 1977, Pub. L. 95–239, 92 Stat. 95 (1978), or the Black Lung Benefits Amendments of 1981. Similarly, the Secretary's Part 725 regulations required revision in order to reflect amendments to other statutes. For example, revised § 725.621 reflected the Debt Collection Improvement Act of 1996, Pub. L. 104–334, 110 Stat. 1358 (1996), *see* preamble to first notice of proposed rulemaking, § 725.621, 62 FR 3369 (Jan. 22, 1997). Section 725.515 was revised to reflect amendments to the Social Security Act, *see* preamble to second notice of proposed rulemaking, § 725.515, 64 FR 55001 (Oct. 8, 1999). Section 725.544 was amended to reflect the statutory increase in the dollar amount of claims which may be compromised by the United States and to reflect the repeal of the Federal Claims Collection Act, *see* preamble to second notice of proposed rulemaking, § 725.544, 64 FR 55002 (Oct. 8, 1999).

In addition, over the last two decades, many of the regulations in Parts 718 and 725 have been interpreted by both the Benefits Review Board and the federal appellate courts. The Department strongly believes that, where these interpretations represent a consensus of opinion as to the meaning and correct application of particular regulations, that consensus should be embodied in the Department's regulations. One commenter correctly observes that none of these courts specifically ordered the Department to revise its regulations. The Department believes, however, that the interests of all parties to the adjudication of a claim—coal mine operators and their insurers as well as claimants—will be better served if a judicial consensus is reflected in the explicit language of the Department's regulations. Incorporating such a consensus will allow both the parties and the adjudication officer to use a current version of the regulation that does not require constant recourse to databases of federal case law. Moreover, the black lung program serves a population of applicants—individuals who spent their working lives in the Nation's coal mines—who cannot be expected to be aware of all of the judicial decisions bearing on their eligibility for benefits, and who thus cannot be expected to bring them to the attention of the administrative law judges who conduct formal hearings on applications for benefits under the Act.

For example, the substantive criteria governing a claimant's eligibility for benefits, set forth in Part 718, have been the subject of numerous appellate decisions. The Department's preamble discussion of § 718.201 contains citations to a considerable body of case law recognizing that pneumoconiosis, as defined by the Act and the Department's regulations, includes obstructive lung disease arising from coal mine dust exposure. Similarly, the preamble discussion of § 725.309 references those decisions noting that pneumoconiosis is a latent, progressive disease. *See* preamble to § 718.201, paragraph (f), preamble to § 725.309, paragraph (b). The Department's revised definition of ''pneumoconiosis'' in § 718.201 explicitly incorporates both of these principles. The Department's revisions of §§ 718.204 (criteria for establishing that a miner suffers from total disability due to pneumoconiosis) and 718.205 (criteria for establishing that a miner died due to pneumoconiosis) codify nearly unanimous case law interpreting the Department's prior regulations. *See* preamble to § 718.204, paragraph (d), explaining that the definition of ''total disability'' requires proof of a totally disabling respiratory or pulmonary impairment, preamble to § 718.205, paragraph (d), providing practical meaning to the regulatory standard that death is due to pneumoconiosis when pneumoconiosis is a substantially contributing cause of death; *see also* 62 FR 3345 (Jan. 22, 1997) (citing cases defining when total disability is due to pneumoconiosis under 20 CFR 718.204 (1999)). Similarly, revised sections 725.309, governing subsequent claims filed by the same individual, and 725.310, governing requests for modification of a claim, reflect a body of decisional law that has developed since these regulations were promulgated in 1978. *See* preamble discussions of § 725.309, 62 FR 3351–52 (Jan. 22, 1997), 64 FR 54984–85 (Oct. 8, 1999), and above; and preamble discussions of § 725.310, 62 FR 3353–54 (Jan. 22, 1997), 64 FR 54985–86 (Oct. 8, 1999), and above.

The Department also believes that, where the Board or the appellate courts have identified issues which the regulations do not adequately address, regulatory action is appropriate to correct that omission. Thus, section 725.495 addresses a problem observed by the Fourth Circuit Court of Appeals in *Director, OWCP* v. *Trace Fork Coal Co.*, 67 F.3d 503, 507 (4th Cir. 1995), *viz.*, that ''[t]he Black Lung Benefits Act and its accompanying regulations do not specifically address who has the burden of proving the responsible operator issue.'' Similarly, where the Board or the appellate courts have interpreted a regulation in a manner different from that intended by the Department, the only way to ensure that the Department's intent is fulfilled is to amend the regulations. *See, e.g.*, preamble to first notice of proposed rulemaking, § 718.101, 62 FR 3341 (Jan. 22, 1997) (noting intent that standards for ensuring the quality of medical evidence be made uniformly applicable to all new evidence developed in the claims adjudication process).

Finally, in order to update its regulations, the Department also needed to revise certain provisions in light of its experience administering the program for over 25 years. This experience had demonstrated that the regulations did not adequately address certain issues. For example, the former regulations provided little guidance as to when a claimant could reasonably expect the payment of monthly and retroactive

benefits from coal mine operators, *see* preamble to first notice of proposed rulemaking, § 725.502, 62 FR 3365–66 (Jan. 22, 1997). Similarly, the Department had learned that the rules governing overpayments and their possible waiver varied depending on whether the overpayment was made by the Black Lung Disability Trust Fund or a coal mine operator, *see* preamble to first notice of proposed rulemaking, § 725.547, 62 FR 3366 (Jan. 22, 1997).

In addition to making its regulations current, the Department intended to revise its regulations to streamline the adjudication of claims under the Act. 62 FR 3338 (Jan. 22, 1997). The Department felt this need was critical and hoped to ensure that the resulting process for determining a claimant's eligibility was both simple and equitable. For example, the Department had been widely criticized for delays in the adjudication process. In response, the Department has made considerable changes in the initial processing of claims. The Department's revisions begin with the manner in which each miner who files an application for benefits is afforded a complete pulmonary evaluation, *see* 30 U.S.C. 923(b). The Department's revisions will allow each miner to select a highly qualified physician to perform his evaluation from a list of authorized providers maintained by the Department. *See* preamble discussion of § 725.406, 64 FR 54988–90 (Oct. 8, 1999). The Department hopes thereby to provide each claimant with a realistic appraisal of his condition and to provide each claim with a sound evidentiary basis. The regulations governing the additional development and submission of evidence will ensure that the parties to a claim receive fewer documents to which they need to file a response than was formerly the case. Thus, rather than issue initial findings and a memorandum of conference, formerly provided for in the regulations (20 CFR 725.410, 725.411, 725.417 (1999)), the district director will issue only one decisional document at the conclusion of his processing: a proposed decision and order. *See* preamble discussion of §§ 725.410–725.413. In addition, the revised regulations will allow the Department to generate documents that provide a clearer and better reasoned explanation of any evidentiary evaluation made by the district director and a better understanding by the parties of their rights and responsibilities. Thus, the district director will issue a schedule for the submission of additional evidence which explains his preliminary analysis of the results of the miner's complete pulmonary evaluation. It will notify all parties of their right to submit additional evidence and to obtain further adjudication of the claim. *See* preamble discussion of §§ 725.410–725.413. One of the most important revisions made by the Department will limit the parties' submission of documentary medical evidence. This revision will require that the factfinder evaluate a claimant's eligibility based on the quality of medical evidence that the parties submit, rather than the numerical superiority of the evidence on either side. *See* preamble discussion of § 725.414, 64 FR 54994 (Oct. 8, 1999); 62 FR 3356–57 (Jan. 22, 1997).

Significant Issues Raised by Public Comments in Response to Initial Regulatory Flexibility Analysis

The comments in response to the Department's initial regulatory flexibility analysis fall into three categories: (1) Those comments urging the Department not to promulgate regulations having any adverse economic effect on the coal mining industry, or on one or more segments of that industry; (2) comments contending that the assumptions underlying the economic analysis on which the Department's initial regulatory flexibility analysis was based were flawed, and that the analysis thus underestimates the effect on small businesses subject to regulation by the rule; and (3) comments suggesting regulatory alternatives that the Department allegedly failed to consider in its initial regulatory flexibility analysis. The Department discusses those comments suggesting regulatory alternatives below, in the section entitled ''Description of Steps the Agency has taken to Minimize the Impact on Small Entities Consistent with the Stated Objectives of Applicable Statutes.'' The Department responds to comments in the first two categories in this section.

Several commenters argue that, in light of the costs identified by the Department in its initial regulatory flexibility analysis, the Department should not promulgate any revised regulations. The Department disagrees. The regulations implementing the Black Lung Benefits Act are badly in need of revision to reflect more than two decades of judicial interpretation and administrative experience. In addition, the Department believes that the process used to determine a claimant's eligibility for benefits, and an operator's liability for those benefits, needs to be made faster, fairer, and more credible. No parties have benefitted from the delays that the courts of appeals have identified in the program, *see, e.g., Venicassa* v. *Consolidation Coal Co.,* 137 F.3d 197, 198 n.2 (3d Cir. 1998) (noting ''a disturbing record of delay in processing claims for black lung benefits in prior cases''). The Department's regulations are intended to eliminate that delay by, *inter alia,* reducing the number of steps in the district director's processing of a claim, requiring the timely development of evidence relevant to the issue of operator liability and eliminating the possibility of remands from the Office of Administrative Law Judges for the development of additional evidence as to the identity of the liable party. The Department's revised regulations promote fairness and credibility in claims adjudications by providing each miner with a quality medical evaluation of his pulmonary condition when he first applies, by explaining the Department's initial assessment of that evidence and by informing all parties of their rights to submit additional evidence and to request further adjudication of the claim.

One comment suggests that ''a reasonable interpretation of the Department's own economic analysis leads to the inescapable conclusion that the proposed rule will have a significant economic impact on a substantial number of small entities.'' Rulemaking Record, Exhibit 89–37, p. 24. The Department does not disagree. 64 FR 55008 (Oct. 8, 1999). The Department recognized that the rule will have an economic impact on the coal mining industry, and in particular on underground bituminous coal mine operators that employ less than 20 people. It is for this reason that in its second notice of proposed rulemaking, the Department prepared an initial regulatory flexibility analysis in lieu of its prior certification that the proposed rule would not have a significant economic impact on a substantial number of small entities. 64 FR 55006 (Oct. 8, 1999). The existence of an economic impact, however, does not mean that the Department is foreclosed from promulgating its rule. In *Associated Fisheries,* the First Circuit quoted with approval from the Commerce Department's explanation of its responsibilities under the Regulatory Flexibility Act:

> The intent of the RFA is not to limit regulations having adverse economic impacts on small entities, rather the intent is to have the agency focus special attention on the impacts its proposed actions would have on small entities, to disclose to the public which alternatives it considered to lessen adverse impacts, to require the agency to consider public comments on impacts and

alternatives, and to require the agency to state its reasons for not adopting an alternative having less of an adverse impact on small entities.

127 F.3d at 115–116. The Regulatory Flexibility Act thus vests the Department with the responsibility for determining, in light of the recognized costs, whether the rule should nevertheless be promulgated.

The economic analysis performed in connection with the Department's initial regulatory flexibility analysis described the costs that the rule would impose on the coal mining industry. That analysis was based on a number of conservative assumptions that were designed to establish a cost ceiling, *i.e.,* the maximum additional costs that industry would face as a result of these rules. For example, the analysis assumed that all coal mine operators purchase commercial insurance. The Department did not attempt, however, to estimate precisely the number of mines which would close as a result of these increased costs. Instead, the Department concluded that there was only a significant potential for closures in the very smallest size class of underground bituminous coal mine, those with under 20 employees. Rulemaking Record, Exhibit 80, Exhibits O and Q. These mines will feel the greatest effect of the Department's rule largely because of their operating characteristics. As a group, very small coal mines are far more labor intensive (*i.e.,* much less mechanized) than larger coal mines. Because the rule will raise costs in the form of higher insurance premiums, which in turn are based on each mine's payroll, increased premiums will represent a substantially higher cost increase per ton of coal mined for a very small mine than for a larger mine. Thus, based on its preliminary economic analysis (Rulemaking Record, Exhibit 80, pp. 46–51), the Department found that larger mines—including many mines that meet the definition of a ''small'' business under the definition used by the Small Business Administration—would not face significant impacts from the rule in terms of closures.

In addition to being more labor intensive, very small underground mines also incur the higher insurance premiums associated with underground coal mining. Data contained in comments received by the Department indicate that surface bituminous coal mine insurance rates average $1.57, only 59 percent of the average underground mine insurance rate of $2.64. Similarly, surface mine rates average only 53 percent of underground rates for eastern bituminous mines; and 37 percent of underground rates for a four-state average of Pennsylvania, Kentucky, Virginia, and West Virginia. For anthracite coal, surface mine insurance rates are only 44 percent of underground mine insurance rates. Rulemaking Record, Exhibit 89–37, Appendix A, Table 4. Any increase in insurance rates, then, assuming that all other things are equal, will affect the price per ton of underground coal twice as much as it will the price of coal extracted from surface mines. This distinction renders very small underground coal mines potentially vulnerable to closures in a way that very small surface coal mines are not. Because the insurance rates for surface anthracite mines are also high, very small anthracite strip mines may also be potentially vulnerable to closure.

Additional data provided by commenters, as well as data that has become available from the Department of Energy since publication of the Department's initial regulatory flexibility analysis, allow the Department to forecast the number of potential mine closures in somewhat greater detail. This analysis confirms the Department's preliminary conclusion that, although the regulations will have a significant impact on some mines, the impact on the mining industry as a whole will not be substantial. The Department's additional analysis therefore provides no basis to reconsider the decision to promulgate final regulations.

Mine Safety and Health Administration data are useful in establishing the number of mines that are potentially at risk of closure. The Department emphasizes, however, that this data addresses only the mines that are potentially at risk of closure because of the Department's rulemaking. The actual effects of the rule can be determined only by establishing the ''base case'' of mines that could be expected to close even if the Department does not promulgate its final rule. In 1998, 1,609 mines produced bituminous coal. An additional 743 bituminous mines are listed in the MSHA data but produced no coal during 1998. Of the 1,609 producing mines, 791 were underground mines, and 263 of the underground mines had fewer than 20 employees. Of these 263 mines, 37 produced over 100,000 short tons of coal in 1998. Because mines with fewer than 20 employees that produced over 100,000 short tons have high labor productivity, the Department does not believe that they will be significantly impacted by a rule whose primary effects are felt through increased insurance premiums that are based on labor costs. Subtracting these 37 mines from the 263 very small underground mines leaves 226 mines. The mines are located in Kentucky (81 mines), West Virginia (71 mines), Virginia (52 mines), Pennsylvania (14 mines), Tennessee (5 mines), and Alabama (3 mines). These mines are extremely small, employing a total of only 2,586 people. Median 1998 employment per mine was 11; mean employment was 11.4. Median production was 25,957 short tons of coal; mean production was 34,273 short tons.

The Department's previous economic analysis demonstrated that very small underground mines with first quartile accounting profits (the one-quarter of these mines with lowest profits) might be forced to close as a result of the rule, but that mines with median accounting profits were not in such jeopardy. For purposes of estimating the potential number of mine closures, however, the Department will assume that as many as three-eighths of these mines (the half-way point between .25, representing the first quartile, and .5, representing the second) are at risk. Multiplying this figure (.375) by the total number of very small underground bituminous mines (226) yields a total of 85 mines. According to MSHA data, these 85 underground bituminous mines represent 5.3 percent of all producing bituminous coal mines, employed 1.3 percent of the miners engaged in bituminous coal mine employment, and accounted for 0.3 percent of bituminous coal production.

MSHA data indicate that 117 mines produced anthracite in 1998. An additional 87 anthracite mines are listed in the MSHA data but produced no coal during 1998. Of the 117 producing mines, 60 were strip mines, 39 were underground mines, and 18 were culm bank/refuse pile operations. Of the 117 mines, 12 (10 strip mines, 1 underground mine, and 1 culm bank operation) had 20 or more employees, and only 3 had more than 50 employees. An additional 6 mines (3 strip mines and 3 culm bank operations) produced over 100,000 short tons in 1998. Culm bank operations and mines with 20 or more employees or over 100,000 tons output do not appear to be at risk of closure. Culm banks are discussed in detail below in response to a comment regarding the Department's assumptions about price elasticity. Thus, the population of very small anthracite mines consists of 85 mines. This total includes 47 strip mines (60 total strip mines minus 10 strip mines with 20 or more employees minus 3 strip mines that produced more than 100,000 short tons of coal in 1998) and 38

underground mines (39 underground mines minus 1 mine with 20 or more employees). These mines are extremely small. They had a total of 411 employees (220 in strip mines and 191 in underground mines). Median 1998 employment was 3; mean employment was 4.8. Median production of these anthracite mines was 4,500 short tons (7,484 for strip mines and 2,598 for underground mines); mean production was 12,173 short tons (17,116 for strip mines and 6,060 for underground mines).

Profit data for anthracite mines are not available. It appears reasonable to assume, however, that very small anthracite strip mines will be potentially subject to closure because their insurance premiums are high, and that very small underground anthracite mines will be even more heavily impacted. The Department will therefore assume that three-eighths of very small anthracite strip mines (the same figure used for bituminous mines) and five-eighths of very small anthracite underground mines (a higher figure to take into account the possibility of a heavier impact on these mines) are potentially in jeopardy of closure because of costs of the rule. Thus, an estimated 42 very small anthracite mines (18 strip mines (.375 times 47 mines) and 24 underground mines (.625 times 38 mines)) are potentially in jeopardy of closing as a result of the rule.

The next step in forecasting the number of mines that may close as a result of the rule is establishing the ''base case,'' *i.e.,* the number of mines that would close regardless of whether the Department promulgated new regulations. This is particularly important for an industry such as coal mining, where the number of small mines has been declining for decades, and where a continued sharp decline is likely in the foreseeable future. Only after establishing the base case can the Department estimate the extent to which the rule may result in additional closures.

The current and predicted decline in the number of small coal mines is the result of a variety of market factors. They include electricity deregulation, reduction in coal reserves, the use of on-time delivery by coal company customers, equipment upgrades, increased use of low sulfate coals, and the reduction in the number of small mining firms due to industry consolidation over the last two decades. All of these factors put very small coal mines, particularly underground mines, in an increasingly disadvantageous competitive position. Because of their size, very small coal mines have difficulty increasing productivity. They lack the physical scale to take advantage of new, high-productivity equipment, most of which is very large, or to adopt more productive techniques, such as continuous miner operations or longwall mining. Restricted space, of course, is a greater constraint in underground coal mines than surface mines.

Many very small coal mines are also characterized by unfavorable geological conditions. These may include thin coal veins, splitting coal beds, fractures or offsets due to faulting, interruptions in coal deposits or coal quality due to sandstone-or clay-filled channels, and unstable roof rock. Such geologic conditions may well be the reason the mine is small to begin with. They also make it costly to extract coal and difficult to improve productivity. Mines with such geological problems are therefore especially vulnerable to price competition. The economic suitability of coal beds for mining is reflected in changes in committed active reserves as the price of coal changes. Culling reserves to eliminate hard-to-mine reserves, or ''high-grading'' of reserve blocks, is a logical adaptation to low coal prices. From 1991 to 1996, as coal prices fell, the reserves of small mines (annual production of 10,000 to 100,000 short tons) fell by 61.6 percent, compared with a 12.9 percent decline for the coal mining industry as a whole. U.S. Department of Energy, Energy Information Administration, ''The U.S. Coal Industry in the 1990's: Low Prices and Record Production,'' (October, 1999) p. 6 (hereafter, ''U.S. Coal Industry'').

In addition, the shift in demand to low-sulfur western coal, which has occurred in response to the Clean Air Act Amendments of 1990 and the resulting regulations of the Environmental Protection Agency, puts very small coal mines at a severe disadvantage. Very small coal mines are concentrated in areas where coal has a relatively high sulfur content. Low-sulfur coal is found predominantly in the west, particularly in the Powder River Basin. The large strip mines that produce low sulfur coal have easy geology (thin overburden and thick coal beds), and their large scale results in labor productivity approximately three times as high as that of eastern mines. This productivity differential continues to grow. Moreover, recent investments in track by western railroads are further lowering the power-plant price of Powder River Basin coal.

Finally, many very small coal mines have management that may not be well equipped with tools such as computers. Such mines are in a poor position to adapt to practices such as on-time delivery or to utilize other risk management techniques that utility deregulation is making increasingly important in coal mine operation. Independent very small coal mines are also, by virtue of their size, in a relatively poor position to participate in strategic inter-fuel alliances, an increasingly common result of utility deregulation.

Because of all of these market factors, the outlook for independent very small mines is extremely bleak. The Department's preliminary economic analysis, in fact, was based on the observation that the base case already includes extensive closures of very small mines. Over the last 15 or 20 years, the market forces discussed above have eliminated a large majority of very small mines. Data collected by the Energy Information Administration (EIA) indicate that in the 11 years between 1986 and 1997 the number of coal mines with annual production of less than 10,000 short tons decreased from 1,069 to 281 (a total of 74 percent), while production of mines of this size decreased from 4.4 million short tons to 1.2 million tons, or by 73 percent. In the same period, the number of coal mines with annual production of 10,000 to 100,000 short tons decreased from 1,956 to 638 (a 67 percent decrease), while production of mines of this size decreased from 82.8 million short tons to 27.8 million short tons, or by 66 percent. EIA, U.S. Coal Industry, p. 3, Table 1.

To estimate both baseline closures and closures that may be considered impacts of the rule, two regression models were created using EIA data for 1986 through 1998. Both used the log of the number of underground bituminous coal mines with production in the range of 10,000 to 99,999 short tons. Both models used the log of the national price of coal as an independent variable, and one also included time as an independent variable. Both models had high statistical significance by any measure. Using EIA projections of coal price changes (*see* Department of Energy, Energy Information Administration, ''Challenges of Electric Power Industry Restructuring for Fuel Suppliers'' (September 1998) (hereafter, ''Challenges,''), Table ES1, p. 13), the models were used to forecast the percentage decrease in the number of coal mines in the base case in the years 2005 and 2015, and the decreases that may result from the Department's rule during the same interval.

The log-log model with no time variable predicted a baseline decrease in underground bituminous mines of 32 percent from the year 1998 to the year 2005 and a baseline decrease in underground bituminous mines of 61 percent from 1998 to 2015. Of the 85 bituminous mines identified as in jeopardy of closure, therefore, this model forecast that 27 would close by 2005 and 52 would close by 2015, even without the costs of the rule. When costs of the rule for the very small class of mines was added, the predicted decreases in the number of mines were 39 percent (or 33 mines) between 1998 and 2005 and 66 percent (or 56 mines) between 1998 and 2015. Thus the model predicts that the costs of the rule would result in the additional closure of 6 mines (33 mines minus 27 mines) as of 2005 but only 4 more mine closures (56 mines minus 52 mines) than the baseline as of 2015.

The model with a time variable predicted much sharper baseline decreases in the number of mines (43 percent decrease by 2005 and 86 percent by 2015) and impacts of the rule of about 0.4 mine closures by both years. It should also be noted that, because complete data were not available, neither model included mines producing less than 10,000 short tons, which have been closing at a faster rate than the mines that were included in the model. Thus, use of results from the model without a time variable represents a conservatively low choice of estimate of baseline closures.

A similar procedure was used for anthracite mines, with some modifications. Separate models were estimated for underground mines and strip mines, but total mines were used for the dependent variable. The log-log form without a time variable is reported. For the 24 at-risk underground anthracite mines, the model forecasts a base-case decrease in the number of mines of 21 percent as of 2005 (5 mines) and 43 percent as of 2015 (10 mines). Considering the additional costs imposed by the rule, the forecasts were decreases of 29 percent as of 2005 (1.92 additional mines) and 48 percent as of 2015 (1.2 additional mines). For the 18 at-risk surface anthracite mines, the model forecasts a base-case decrease in the number of mines of 8 percent as of 2005 (1 mine) and 20 percent as of 2015 (4 mines). Considering the additional costs imposed by the rule, the forecasts were decreases of 10 percent as of 2005 (.36 additional mines) and 21 percent as of 2015 (.18 additional mines).

The Regulatory Flexibility Act does not require the Department to extrapolate its projection of the cost of its rulemaking activity in order to determine the rule's collateral effects, *i.e.,* the extent to which the mining industry will absorb the costs of compliance by reducing either employment or output. It is possible, however, to make a rough estimate of these effects. The number of incremental closures of bituminous mines due to the rule (rather than the base case), was projected to be 6 mines as of 2005 and 4 mines as of 2015. This conclusion is consistent with the Department's previous analysis, which observed that the largest impact of the rule would be to close some mines sooner than they would have closed in the base case. Estimated employment impacts related to closures would be 70 jobs as of 2005 and 45 jobs as of 2015. Estimated production impacts related to closures would be 208,880 short tons of bituminous coal annually as of 2005 and 133,736 short tons as of 2015. Since the mines which may close presumably have relatively low productivity, the overall effect would be to raise industry productivity. The estimated level of impacts—about one-eighth of the baseline closure rate as of 2005 and one tenth the baseline closure rate as of 2015—is much too small to have a meaningful impact on the competitive structure of the industry.

The Department projected the number of incremental closures of anthracite mines due to the rule (rather than the base case) to be 2.28 mines as of 2005 and 1.38 mines as of 2015. Under this projection, the estimated maximum employment loss related to closures would be 10 jobs as of 2005 and 7 jobs as of 2015. This projected job loss assumes that no additional jobs are created elsewhere in the anthracite industry. Estimated production loss related to closures would be 14,564 short tons of bituminous coal annually as of 2005 and 11,058 short tons as of 2015. Since the mines which may close presumably have relatively low productivity, the overall effect would be to raise industry productivity. Closure of 1 or 2 mines is not expected to have a meaningful impact on the competitive structure of the industry.

It is also possible to assess the impact of the rule on mining communities using the counties in which such operations are located. Very small underground bituminous coal mines are found in 46 counties. If closures are randomly distributed, 22 of these counties have less than a 5 percent chance of any mine closure, 13 more have less than a 20 percent chance, 5 more have less than a 30 percent chance, and 3 more have less than a 50 percent chance of any mine closing. Thus, each of the possibly affected counties can expect to lose no more than 6 jobs and have very little chance of losing more than a dozen. Nearly half (42 percent) of very small underground bituminous coal mines are located in three counties (in three separate states). Of these counties, one can be expected (as of 2005) to have one mine closure, and the other two less than one mine closure each. A majority (65 percent) of anthracite underground and strip mines are located in one Pennsylvania county. This county can expect one mine closure as a result of the rule, and the other six counties with anthracite mines can expect one closure of a very small mine among them. Closure of one very small anthracite mine would have an impact of approximately 5 jobs. Overall, then, only two counties are likely to experience community impacts as great as one very small mine closing in any given year, and in neither of those counties is the impact likely to be greater than two very small mines closing.

The nature of the rule also makes it quite unlikely that there will be significant impacts on coal mine employment or output beyond those instances where mines close. The regulation has no direct effect on mining operations. The principal effect of the rule will be a very small increase in the cost of labor. This increased cost provides an incentive to substitute capital for labor, and to increase labor productivity and production generally to provide a broader base over which to spread the costs. This substitution, like any other measure designed to increase labor productivity, will enhance rather than restrict improvements in productivity. The Department's analysis already demonstrates a strong trend of increasing productivity in the coal mining industry, and any impacts of the rule will simply reinforce this trend.

In addition, recent history and available forecasts indicate that the use of coal in generating electricity will continue to increase. Any price pass-through will be small because the costs of the rule are (for the industry as a whole) not significant. There is no other plausible mechanism (except for closure of mines) by which the rule could induce reductions in production. Enhancement of productivity, for which there are incentives, will tend to increase production. Thus, aside from mine closures, the rule will not have adverse impacts on coal production.

Finally, there is a slight possibility that the rule may result in a decreased workforce in mines that continue to operate. The principal mechanism for such an impact is the incentive to

substitute capital for labor. A number of factors, however, make any such impact minimal in its significance. Because the costs of the rule are generally not significant, the incentive itself will be quite small. Increases in production will tend to mitigate job loss. By itself, any impact of the rule on employment is almost certainly small enough to be handled by attrition in an industry with an annual labor turnover rate of approximately 7 percent. Because the base case trend toward labor saving innovation in the coal mining industry is so strong, any adverse effect on employment will be a temporary acceleration of job loss, rather than a net long-term impact. Moreover, in the current strong employment market, any unemployment effects will generally be transitory, so that their significance will be minimal. For these reasons, aside from mine closures, the rule will not have significant adverse impacts on employment.

The Department's initial regulatory flexibility analysis, as supplemented by the additional study undertaken in the final regulatory flexibility analysis, demonstrates that the Department's final rule is being promulgated following examination of the potential effects of the rule on small coal mine operators. The Regulatory Flexibility Act does not dictate substantive results, or prevent the Department from acting in such a case. *See A.M.L. International, Inc.* v. *Daley,* 107 F. Supp. 2d 90, 105 (D. Mass. 2000) (''The intent of the RFA is not to limit regulations having adverse economic impacts on small entities.''). Because the Department believes that a revision of the regulations implementing the Black Lung Benefits Act is long overdue, the Department has decided to proceed with this final rule.

The Department also received comments on its economic analysis. In its initial regulatory flexibility analysis, the Department specifically invited comment on the assumptions used in developing its economic analysis, including the relationship between increases in the claims approval rate and increases in insurance premiums; the relationship between increased medical costs and increases in insurance premiums; and the extent to which promulgation of these revisions will result in an increase in the number of claims filed. 64 FR 55008 (Oct. 8, 1999). One of the comments received by the Department, whose conclusions were endorsed by a number of other commenters, contained an economic analysis by Milliman & Robertson, Inc. (M&R). Rulemaking Record, Exhibit 89–37, Appendix A.

As an initial matter, the M&R analysis criticizes the assumption in the Department's economic analysis that the approval rate for claims paid by responsible operators and their insurers under the revised regulations will not exceed the approval rate for claims paid by the Black Lung Disability Trust Fund under the former regulations. The Department's economic analysis had assumed that the overall approval rate for responsible operator claims (currently 7.33 percent) would not exceed 12.18 percent, the overall approval rate for Trust Fund claims. Rulemaking Record, Exhibit 80, p. 38. The M&R analysis states that ''DOL has offered no support for this assertion.'' M&R at p. 17, *see also* Rulemaking Record, Exhibit 89–37, pp. 31–32.

The Department's analysis explicitly stated, however, that ''[t]he proposed regulations represent the Department's past and current practice in Trust Fund cases,'' and that ''several factors make the Trust Fund approval rate substantially higher than the responsible operator approval rate.'' Exhibit 80 at p. 38. These factors include the age of applicants whose claims are payable by the Trust Fund and the fact that most of their exposure to coal mine dust predated the 1969 federal dust standards. Thus, the Department believes that the approval rate for Trust Fund cases will remain the same, and that the approval rate for responsible operator cases will rise, but not to the level of Trust Fund approvals. The Department's assumption is based on its more than 15 years' experience in adjudicating claims for black lung benefits under the prior regulations, and its detailed knowledge of the evidentiary showings required for those claims' approval.

The National Mining Association, whose comment incorporates the M&R analysis, suggests that the Department's revised definition of the term ''pneumoconiosis'' represents a considerable departure from past practice. Specifically, the commenter takes issue with the Department's preliminary economic analysis which refused to assign costs to the amended definition of pneumoconiosis because inclusion of chronic obstructive pulmonary disease arising from coal mine employment as pneumoconiosis simply clarified the regulation and made it consistent with past practice. Rulemaking Record, Exhibit 89–37 at 29; Rulemaking Record, Exhibit 80 at 29. In the preamble to § 718.201, the Department has cited 14 decisions from six federal appellate courts with jurisdiction over the vast majority of claims filed under the Act (the Third, Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits). These courts recognize that pneumoconiosis, as it is defined in the Act and was defined in the prior regulations, includes obstructive lung disease arising from coal mine dust exposure. Similarly, in the preamble to § 725.309, the Department has cited 44 decisions from seven federal appellate courts (the six listed above plus the Tenth Circuit). These courts recognize the progressive, latent nature of pneumoconiosis. All of these decisions reflect longstanding positions of the Department. Because of these positions, the Department has not attempted to deny claims because the miner's disabling lung disease was obstructive in nature, provided that condition was shown to have arisen out of coal mine employment, or because the miner's condition was alleged to have progressed. The Department, therefore, does not expect that any additional Trust Fund claims will be approved as a result of the revised definition of pneumoconiosis. Similarly, there is simply no reason to believe that the revised definition of pneumoconiosis will result in a higher approval rate in responsible operator claims than in Trust Fund claims.

The same commenter states that the limitation on documentary medical evidence tilts the playing field toward claimants by allowing a claimant three examinations (his choice of an approved physician to conduct the complete pulmonary evaluation plus two more) as opposed to the operator's two examinations. The commenter argues that this evidentiary imbalance will increase the number of approved claims payable by responsible operators. Rulemaking Record, Exhibit 89–37, p. 29. Again, however, the Department's Trust Fund experience forms a reasonable upper bound of the approval rate expected under the revised regulations. That experience demonstrates that the Department seldom develops more than two medical reports in any individual claim for which the Trust Fund is liable. In addition, claimants under the former regulations had the ability to choose *any* physician to conduct their initial evaluation, 20 CFR 725.406(a) (1999), subject only to a district director's approval, which was seldom refused. Claimants generally submitted no more than one additional medical report in support of their applications. Thus, once again, the rate of Trust Fund awards forms a reasonable upper boundary of the approval rate expected in responsible operator cases under the revised regulations.

Finally, the commenter argues that the provision requiring that ''controlling weight'' be given to the opinion of a treating physician will result in ''numerous'' claims being approved that previously would have been denied. The Department does not accept this assessment. The revisions to § 718.104 require only that an adjudication officer evaluate certain criteria to determine whether a treating physician may have developed an in-depth knowledge of the miner's pulmonary condition. As the Department has repeatedly emphasized, the regulation does not require that the adjudication officer credit the opinion of the treating physician where there is contrary evidence in the record. To the contrary, the rule is designed to force a careful and thorough assessment of the treatment relationship. 64 FR 54976–77 (Oct. 8, 1999); *see also* preamble to § 718.104, paragraph (f). Accordingly, the Department does not agree that this revision will result in the approval of ''numerous'' additional claims. The Department stands by its assumption in the initial regulatory flexibility analysis that any increase in the approval rate of claims due to this regulation will be ''very small.'' Exhibit 80 at p. 34. The Department reiterates that ''[i]t is difficult to see how this provision would lead to an increase in approval of weak or non-meritorious claims.'' Exhibit 80 at p. 27. The commenter's assertions have thus failed to undermine the Department's assumption that the approval rate for Trust Fund claims represents an appropriate upper bound for estimating the approval rate applicable to operator claims under the revised regulations.

The M&R analysis also arrives at a higher overall approval rate for Trust Fund claims (20 percent rather than 12.18 percent) by analyzing Trust Fund claims involving only post-1981 coal mine employment and by eliminating claims filed by individuals with less than 10 years of coal mine employment. M&R at p. 17 n. 41. The Department does not agree that manipulating the data in this fashion produces a more accurate result. First, responsible operators are also liable for claims involving pre-1982 coal mine employment, so it is appropriate to include that group. Second, exclusion of all claims based on less than 10 years of coal mine employment clearly will not create a true picture of the overall claims experience. A number of miners who are employed in the mines for less than 10 years ultimately are determined to be eligible for benefits. Although the M&R analysis includes claims filed by such miners in determining the number of approved claims, Transcript, *Hearing on Proposed Changes to the Black Lung Program Regulations* (July 22, 1997), p. 106 (testimony of Robert Briscoe), it excludes denied claims filed by such miners from the total number of filed claims. In its prior analysis, M&R stated that this exclusion was justified because claims filed by miners with less than 10 years of coal mine employment will not be ''present in the population of coal miners recently leaving the coal workforce.'' Rulemaking Record, Exhibit 5–160, Appendix 5, p. 28. The Department's database of claim filing information, however, does not support the inference that this group should not be counted in determining the approval rate for claims that are being filed currently. Indeed, throughout the last decade, claims filed by miners with less than 10 years of coal mine employment have represented approximately one-quarter of the total number of responsible operator claims. Because these claims continue to represent a significant number of responsible operator claims, the Department believes that both approved and denied claims from this group should be counted. Accordingly, the Department does not agree that its approval rate must be ''corrected'' by excluding these claims.

The M&R analysis also exaggerates the effect of the Department's rule on insurance rates. M&R criticizes the Department because its analysis ''fails to test the current federal black lung insurance rates being charged to determine if they are a reasonable base from which to project future cost changes * * *.'' M&R at p. 2. M&R suggests, for example, that the rate in Kentucky is ''too low,'' M&R at p. 7, and concludes that the corrected rate for underground bituminous mines, when combined with the effects of the Department's regulatory revision, will increase premiums by at least 1,075 percent. M&R at p. 8, Table 6. The impact of the Department's regulatory revision, however, does not include the correction of inadequate rates; such correction must be factored in independently, not assigned as a cost of the regulations. Moreover, M&R states that the premiums in the three other large Eastern coal states (Pennsylvania, Virginia, and West Virginia) are ''redundant'' (and rates are ''generally redundant in the other 23 coal mining states), suggesting that insurance companies (or in West Virginia's case, its state-administered fund) are making excess profits from these markets. M&R at p. 7. In this case, correcting redundant rates should not be assigned as a benefit of the revisions. In addition, the insurance rates used by M&R, M&R at p. 6, Table 4, whose source is not identified, are generally lower than the rates used by the Department by about one percentage point (*i.e.,* by $1.00 per $100 of payroll). Because the Department's analysis of the rule's cost was based on a percentage increase of existing rates, use of the M&R figures would result in a substantially lower estimate of total dollar costs. The substantial difference between the Department's analysis of insurance rate increases and M&R's prediction derives primarily from different assumptions about the approval rate for claims filed after the regulations go into effect. Because the Department does not believe that the approval rate for responsible operator claims will exceed the approval rate for Trust Fund claims, the Department does not believe that M&R's predictions concerning insurance rates are accurate. In any event, insurance rate increases are subject to approval by state authorities.

The Department also requested comment on a possible increase in the number of claims filed as a result of this regulatory revision. The Department's economic analysis was based on the assumption that, although the revisions will not produce a significantly greater number of approved claims, expectations created by the mere issuance of regulatory revisions will cause a temporary increase in the number of claims filed, an additional 3,440 responsible operator claims over a two-year period. Rulemaking Record, Exhibit 80, pp. 39, 42. The M&R analysis did not specifically address this assumption. Instead, the M&R analysis is simply based on its own, wholly different assumption regarding the number of claims that are likely to be filed once the revised regulations take effect. M&R posits that ''the application of the reproposed regulations to the large number of denied claims from all past years will in effect rewrite the history of approvals.'' M&R, p. 21. M&R uses an actuarial model to estimate the ''number of ultimate claim filings that are likely to be received'' under the former regulations and under the newly revised regulations. M&R, p. 21. From the data provided in Table 12 of the M&R analysis, it appears that M&R estimates that 2,567 additional claims will be filed by miners whose last coal mine employment was during the years 1982 to 1999. However, the Department was unable to determine what assumptions M&R made to generate this estimate. In any case, M&R's estimate cannot be compared with the

Department's, because M&R excludes claimants with less than 10 years of coal mine employment. The Department believes that it is not necessary to change the methodology used in the initial regulatory flexibility analysis to estimate the likely increase in claims resulting from the revised regulations.

The Department also received comments disputing its assumption that coal mine operators could pass on to coal consumers by price increases the increased costs caused by the Department's rule. Rulemaking Record, Exhibit 80, p. 52. The Department agrees that it is difficult to determine with precision the ability of small coal mine operators to pass on costs to coal consumers. Indeed, the Department acknowledged in its initial economic analysis that some small coal mine operators would be unable to pass on these costs, and that this inability might represent the difference between being able to continue mining operations and suspending them. Interpreting current profit rates that are unsustainably low or negative, however, must be done carefully, because there are two distinct types of firms that may have such profit rates at any one point in time. Some firms may have such rates for a short time, because of industry cycles or the firm's unique circumstances. These firms will rebound and may or may not experience significant impacts from a regulation. Other firms will have negative profits because they are already in the process of failing.

These two cases have very different implications in the analysis of the economic impact of the Department's revisions. If a firm is in the process of failing in any event, the impact of the revised regulations will be small or non-existent. At most, the impact will hasten the firm's failure by a short period of time. Neither the failure itself, however, nor any loss of jobs, should be considered an impact of the regulations. If a firm is about to rebound, the situation is considerably more complicated. The issue is whether the firm will rebound to the level that it can absorb the economic impact. It is perfectly correct in such cases to say, as one commenter points out, that ''additional costs imposed by regulations are certainly relevant since the added cost of regulations will make it that much more difficult for the firm to achieve profitability.'' Rulemaking Record, Exhibit 89–37, p. 33. The problem is that it is extremely difficult to predict from a negative profit rate how far a firm may rebound. One reasonable assumption (given the very limited data) is that a rebounding firm will achieve median profits. If that is the case, then, as the Department's initial analysis indicated, the firm will not fail even given the economic impact of the regulations. See Rulemaking Record, Exhibit 80, Exhibit P.

The Department's analysis, moreover, is based on the assumption that coal mine operators (other than culm-bank operations, discussed below) will be unable to pass through any of the costs associated with the Department's rule. That assumption is based on a worst-case scenario for analytical purposes, and it does not necessarily reflect the current state of the energy industry. Although the recent deregulation of electric utilities has led to considerable reorganization, the use of coal is both extensive and increasing. In general, electric utilities currently are taking advantage of the opportunities presented by deregulation to deal with expanding demand by management, rather than by making major investments in new generating capacity. In this environment, natural gas and oil are attractive, in part, because they are used to meet on-peak demand for electricity. As a result, most generation capacity, now in use and currently planned, is gas-fired. The relatively low capital cost of gas- or oil-fired generation capacity (despite the relatively high fuel cost) makes these fuels cost-effective for the low capacity utilization associated with on-peak power production. Coal, however, is the mainstay of off-peak, baseline electricity generation. The different use pattern is reflected by different capacity utilization rates. In 1996, for example, capacity utilization was 63 percent for coal-fired power plants but only 20 percent for natural gas power plants and 11 percent for oil-fired plants. (EIA, ''Challenges,'' Chapter 1, p. I–4). In baseline power generation, coal faces less competitive pressure and more opportunities for investment in new capacity. Run-of-stream hydroelectric power is limited, as is the potential for its expansion. Nuclear generation capacity is declining because old plants are coming off line, and no new ones are being built. As a consequence, utilities are burning more coal—not less—and this trend is expected to continue.

It is certainly true that long-term high-price contracts for coal are giving way to shorter term contracts with more flexibility. Yet even here there are mitigating factors. Only about half of current contracts will expire by 2005. The impetus for the shift away from long-term contracts was stimulated by stabilization of other fuel prices at moderate levels, but quite recently oil prices have shot up again. The point is that the current market still offers considerable opportunities for passing costs to consumers.

Available information indicates that most of the downward pressure on coal prices is flowing from developments within the coal industry and intra-industry competition. Coal producers as a whole have increased their productivity and lowered their costs. Cost reduction has resulted from improved management of mining operations and delivery, introduction of new technology (*e.g.,* longwall mining), investment in more productive equipment, consolidation to achieve economies of scale, closure of high-cost mines, and takeover and restructuring of high cost mines to operate them more economically. The EIA has observed that ''the relationship between coal prices and productivity gains is circular: Productivity gains allow coal prices to be lowered and price declines induce actions by coal producers that raise productivity and cut costs' (EIA, ''Challenges,'' Chapter 1, p. I–12). The problem that small coal mines face is that they are less able than large mines to implement such productivity enhancing measures. As a result, small inefficient coal mine operators are being squeezed by larger more efficient mine operators.

Rapidly increasing productivity, however, does not preclude the coal industry as a whole from increasing its prices in the short run to recoup regulatory compliance costs. These costs are small. Based on West Virginia insurance rates, the increase in insurance rates would translate into a one-time increase in labor costs of 1.2 percent a year. By contrast, labor productivity (tons per miner hour) increased by an average of 6.9 percent each year from 1980 to 1996 (EIA, ''Challenges,'' Chapter 1, p. I–12). This annual productivity increase—five or six times as large as the estimated impact of the regulation—would allow the coal industry to pass through costs of the rule without raising prices at all. Only a small one-time diminution in the reduction of the price of coal would be needed.

It is true that small mines cannot increase prices beyond those of larger counterparts and stay competitive. The analysis of relative impacts indicates that very small, underground coal mines may be able to pass through one quarter to one half of their costs of the rule to consumers under the cover of larger mines passing all of their costs of the rule through to consumers. The Department's preliminary economic analysis treated pass-through of costs of the rule essentially as a factor that could mitigate to some extent—not prevent—

impacts on profits. *See* Rulemaking Record, Exhibit 80, pp. 52–56. For the reasons outlined above, the Department continues to believe that this is the case. Because of the difficulty of quantifying these effects, however, the quantitative analysis will continue to assume zero cost pass-through. The uncertainty as to the extent to which costs can be passed through does not mean that the Department is unable to estimate impacts, however. Rather, the assumptions that the analysis made to deal with the uncertainty result in estimates of impacts on profits and closures that are known to be biased upward—as is appropriate for a conservative analysis of impacts.

The market for anthracite coal is significantly more sheltered from price competition than the market for bituminous coal. Since 1996, a majority of anthracite production has been accounted for by culm bank operations. These operations salvage previously-mined anthracite from old mine tailings on the surface. The market for these operations (and potentially for other anthracite mines) is nearby power plants. Most of these plants are cogeneration plants, which produce heat or steam for industrial use as their principal output, and then generate electric power as a byproduct. Some, however, are small power plants built solely to use anthracite from culm banks. The Public Utility Regulatory Policies Act of 1978, Pub. L. 95–617, 92 Stat. 3117(1978), requires electric utilities to purchase electric energy from cogeneration facilities and other qualifying small power production facilities. The Act goes on to stipulate that the price at which utilities purchase electric energy may not exceed ''the incremental cost to the electric utility of alternative electric energy.'' 16 U.S.C. 824a–3(b). Since most of the electricity generated with the anthracite is a byproduct of steam and heat produced for other purposes and the capacity is already installed, the incremental cost of power to utilities is virtually certain to provide sufficient revenue to make these anthracite operations economically viable, despite the costs of the rule. If anything, anthracite from culm banks is likely to become more competitive as the prices of other fuels used to generate electricity rise. Indeed, anthracite culm banks are the only part of the coal mining industry in which both the number of very small operations and the number of employees have expanded substantially over the last 10 to 15 years.

The broader market for anthracite includes metallurgical uses and other specialty markets. This provides anthracite with a degree of product differentiation that bituminous coal does not have. The economic forces in the anthracite mining industry are significantly different from those in the bituminous coal mining industry. In anthracite, there are no large mines, no high-productivity mines, and generally not the geological conditions that are favorable to large-scale equipment or techniques that would allow increases in productivity. Instead of a steady increase in output, anthracite production (exclusive of culm banks) fell by 19 percent between 1986 and 1997. Together with the rise of anthracite salvage operations, this decline appears to reflect exhaustion of anthracite deposits that can be mined economically, rather than the sort of fierce competition characterized by highly elastic demand.

One comment argues that the Department's initial regulatory flexibility analysis did not properly analyze the effect of its rule on coal mine construction and transportation contractors, as well as on other small businesses performing services at mine sites. The Department acknowledged that its rule would have an effect on entities in the ''Coal Mining Services'' industry, and estimated that of 275 firms listed in data available from the Small Business Administration, no more than 209 were small businesses within the SBA's definition (less than $5 million in annual receipts). The Department recognized, however, that this number might understate the number of coal mine construction and coal transportation companies. 64 FR 55008 (Oct. 8, 1999).

The RFA does not require, however, that the Department determine precisely the economic effect on small businesses where it is not feasible to do so. Instead, it requires only that the initial regulatory flexibility analysis ''describe the impact of the rule on small entities.'' 5 U.S.C. 603(a). The Department's initial regulatory flexibility analysis described the impact of its proposed regulations based on an economic analysis. The economic analysis projected an increase in the approval rate of black lung claims payable by responsible operators and a temporary increase in the number of claims filed. To the extent that coal mine contractors obtain insurance to spread the risk of potential liability under the Act, the Department's initial regulatory flexibility analysis of the resulting increase in insurance premiums was also relevant to those entities. In the absence of a more precise estimate of the number of entities involved, however, and the manner in which those entities currently absorb the costs imposed by the Black Lung Benefits Act, the Department's initial regulatory flexibility analysis fulfilled the requirements of the RFA by identifying a potential impact on the coal mine contracting industry.

Thus, the Department does not believe the comments undermine the validity of its initial regulatory flexibility analysis, or of the economic analysis that the Department used in preparing it. Both analyses describe the impact that the revised regulations are likely to have on small coal mine operators, and both analyses acknowledge that this impact may be sufficient to make the mining of coal uneconomical for some. 64 FR 55008–09 (Oct. 8, 1999); Rulemaking Record, Exhibit 80, pp. 44–46, 52. The Department's proposal, and its discussion of possible alternatives intended to mitigate the impact of the proposal on small businesses, were made with full knowledge of the projected economic impact. Accordingly, although the Department has committed to the revision of the Part 722 regulations, *see* discussion of alternatives, below, and preamble to Part 722, the Department has not altered its proposal in response to any of the comments it received in response to the initial regulatory flexibility analysis.

Small Businesses to Which the Rule Will Apply

The revised regulations implementing the Black Lung Benefits Act will apply, like the Act itself, to coal mine operators. *See, e.g.,* 30 U.S.C. 932(b) (''each such operator shall be liable for and shall secure the payment of benefits * * * ''). The term ''operator'' includes not only traditional coal mining companies, but also employers who provide services to such companies, including coal mine construction and coal transportation companies. 30 U.S.C. 802(d). In the initial regulatory flexibility analysis published in its second notice of proposed rulemaking, the Department observed that the Regulatory Flexibility Act requires an administrative agency to use the definition of a ''small business'' promulgated by the Small Business Administration unless the agency, after consulting with the SBA's Office of Advocacy and providing an opportunity for public comment, establishes its own definition. 5 U.S.C. 601(3). (The Department's regulations do not apply to any small organizations or small governmental jurisdictions; accordingly, the Department's analysis is limited to small businesses.) The Department therefore announced its intention to use the SBA definition, which establishes

criteria for different industries, arranged by the Standard Industrial Codes (SICs) used by the Bureau of the Census. SBA's regulations define a small business in the coal mining industry (SIC Codes 1220, 1221, 1222, 1230, and 1231) as one with fewer than 500 employees. A small business in the coal mining services industry (SIC Codes 1240 and 1241) is one with less than $5 million in annual receipts. 64 FR 55007–08 (Oct. 8, 1999).

Based on 1995 data, the Department determined that of 2,822 establishments in the coal mining industry, 2,811 employed less than 500 people. Of those, 1,581 were surface bituminous mining companies, 1009 were underground bituminous mining companies, and 221 were anthracite mining companies. The Department estimated that no more than 209 of the 275 firms in the coal mining services industry would be considered small businesses. The Department observed, however, that its estimate did not necessarily include all coal mine construction and coal transportation companies, and that the precise number of such businesses could not be estimated with precision. 64 FR 55007–08 (Oct. 8, 1999).

More recent data available from the Mine Safety and Health Administration suggest that the composition of the coal industry has not changed significantly. In 1997, 2,568 of 2,578 establishments in the coal mining industry employed less than 500 people. Of these, 1,441 were surface bituminous mining companies, 913 were underground bituminous mining companies, and 214 were anthracite mining companies. Census figures available from the Small Business Administration do not allow the Department to calculate how many of the 317 firms in the coal mining services industry would be considered small businesses, because those figures do not contain sufficient information on the revenues of those firms.

Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule

In its initial regulatory flexibility analysis, the Department observed that its proposed revisions would not impose any additional reporting or recordkeeping requirements on small businesses. The Department stated that the compliance requirements of the rule were largely economic in impact. The Department projected its regulatory revisions would increase the cost of commercial insurance (through increased premiums) purchased by coal mine operators to secure their benefits liability under the Act. The Department also projected an increase in the potential exposure of operators who are authorized to self-insure their liability under the Act. A summary of these additional costs was published in the Department's initial regulatory flexibility analysis. 64 FR 55008–09 (Oct. 8, 1999). In addition, the Department observed that coal mine operators that did not purchase insurance, either because they were self-insured, or because they were not required to secure benefits, or because they had ignored the Act's security requirement, would face additional burdens. These burdens included responding more promptly to notice from the Department that a claim had been filed by one of their former employees, and posting security in the event that they were held liable for the payment of benefits on an individual claim. Operators that had been authorized to self-insure their liability under the Act would be required to maintain security for claims filed against them, even after they ceased mining coal. Finally, the Department observed that the regulatory revisions enhanced its ability to enforce civil money penalties against operators that failed to comply with the Act's security requirements. 64 FR 55008–09 (Oct. 8, 1999).

The regulatory revisions in the Department's final rule do not significantly change the costs identified by the Department's initial regulatory flexibility analysis. Specifically, only one of the changes that the Department has adopted in this final rule in response to public comments has cost implications. The Department has eliminated the notice of initial finding, a document that the Department currently uses to deny claims informally before the district director. Both the first and second notices of proposed rulemaking proposed the continued use of this document. Eliminating issuance of initial findings will decrease operator costs in all cases by reducing the numbers of responses that coal mine operators have to file with the Department. Eliminating this document, however, will also require that coal mine operators undertake the development of responsible operator evidence (evidence showing that another entity that employed the miner should be the responsible operator) in a number of additional cases. Under the Department's second notice of proposed rulemaking, coal mine operators would not have been required to develop responsible operator evidence in cases in which the claimant failed to respond to the Department's notice of initial finding denying their claims. Under the final rule, a coal mine operator may not know whether the claimant is interested in pursuing his claim (unless the claimant withdraws his application under § 725.306) until after that operator has developed its responsible operator evidence.

The Department believes that the costs resulting from this revision will have only a minor impact on its previous estimate of the costs of the rule. As an initial matter, the Department estimates that this revision will affect less than 10 percent of all responsible operator cases. In FY 1999, a total of 5,724 cases were filed. The Department estimates that just over 75 percent of these claims, or 4,293, were claims involving potential responsible operator liability. Ten percent of this number is 429. The Department's economic analysis assumed that an additional 1,720 operator cases will be filed each year for two years following issuance of the Department's final rules. Ten percent of this number is 172. In each of the next two years, then, the revision will cause the additional development of responsible operator evidence in only 601 claims. Under the proposed rule in the Department's second notice, however, operators would also have had to develop such evidence in the 30 percent of such cases that proceed beyond adjudication by the district director. Consequently, the Department's final rule will require additional evidentiary development in only the remaining 70 percent of cases, or 421 cases. The Department has no way of accurately estimating the costs of developing such evidence. However, a rough estimate can be made using information in M&R's first analysis. M&R estimated that the total cost to operators in defending claims that were resolved at the district director level was approximately $3,000. Rulemaking Record, Exhibit 5–160, Appendix 5, p. 24. This figure included not only the development of responsible operator evidence but, under the Department's first proposal (to which M&R was responding), of all medical evidence as well. Although the cost of developing medical evidence is typically much higher than the cost of operator evidence, because it involves payments to expert witnesses, the Department will assume that half of these defense costs represent the cost of developing responsible operator evidence. Accordingly, the total additional costs imposed by this revision are not likely to exceed $631,050 (70 percent of 601 claims times $1,500) in each of the first two years, and will drop to no more

than $450,450 (70 percent of 429 claims times $1,500) for each year thereafter. In light of the point estimate of $57.56 million in annual costs identified by the Department's economic analysis of the proposed rule, these additional costs are not significant. In any event, these additional costs will be at least partially offset by the savings realized in all cases from the reduced number of required operator responses. In addition, the Department's decision to permit the district director to refer a case to the Office of Administrative Law Judges with no more than one operator as a party to the claim will result in additional savings to coal mine operators in some cases.

Description of Steps the Agency has Taken to Minimize the Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes; Discussion of Alternatives

The primary objective of the Black Lung Benefits Act is set forth in § 901 of the Act:

> It is, therefore, the purpose of this subchapter to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.

30 U.S.C. 901. The statute also seeks to ensure, however, that liability for a miner's benefits is borne by the entity most responsible for the development of that miner's totally disabling pneumoconiosis. Prior to 1978, claims that were not paid by individual coal mine operators were paid by the federal government from general revenues. In 1978, Congress created the Black Lung Disability Trust Fund, financed by an excise tax on coal production, to assume the payment of benefits in cases for which no individual operator bore liability. Congress clearly indicated its preference that the Trust Fund should be considered a payment source of last resort. In discussing the successor operator provisions of the Black Lung Benefits Reform Act of 1977, enacted in 1978, the Senate Committee on Human Resources, whose bill contained the provisions ultimately included in the Act, stated: ''It is further the intention of this section, with respect to claims [in] which the miner worked on or after January 1, 1970, to ensure that individual coal mine operators rather than the trust fund bear the liability for claims arising out of such operator's mine, to the maximum extent feasible.'' S. Rep. 95–209, 95th Cong., 1st Sess. 9 (1977), reprinted in House Comm. On Educ. And Labor, 96th Cong., Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977, 612 (Comm. Print).

In its initial regulatory flexibility analysis, the Department observed that these two principles severely constrained its ability to select alternatives that the Department had identified as potentially providing relief for small coal mine operators. The Department discussed several alternatives, including adjusting a miner's entitlement criteria according to the size of the operator that would be considered the responsible operator under the Department's regulations. A second alternative would have limited the liability of certain employers. These employers might include those that met either the SBA definition of a small business (over 90 percent of the industry) or those employers with fewer than 20 employees, companies that the Department's economic analysis had identified as most vulnerable. In such cases, the Department considered imposing liability on larger operators or on the Black Lung Disability Trust Fund. The Department rejected both alternatives, however, as contrary to the intent of Congress as expressed in the Black Lung Benefits Act. 64 FR 55009 (Oct. 8, 1999). The Department did provide relief to small mining companies in its revised regulations governing the assessment of civil money penalties for an operator's failure to secure the payment of benefits, 20 CFR Part 726, Subpart D. These regulations specifically assess a smaller base penalty amount on a smaller employer, *i.e.,* one with few miner-employees. Finally, the Department invited comment from interested parties as to other alternatives that would reduce the financial impact of the rules on the small business community.

A number of comments suggest that by inviting comments as to other alternatives, the Department abdicated its responsibilities under the Regulatory Flexibility Act. The Department does not agree. Nothing in the RFA requires an agency to forego rulemaking because the regulated community is unhappy with the alternatives that the agency considered in its initial regulatory flexibility analysis, or because that community has proposed additional alternatives. On the contrary, the RFA encourages agencies to notify small businesses of proposed rulemaking activities precisely so that those small businesses may participate in the identification of additional alternatives that might reduce the impact of the rule. *See* 5 U.S.C. 609(a).

The National Mining Association (NMA), endorsed by a number of other commenters, has identified six alternatives that it believes the Department should have considered: (1) establish a fund to insure coal mine operators for federal black lung claims on a first dollar basis under the authority granted the Department by 30 U.S.C. 943; (2) establish a fund to reinsure coal mine operators for federal black lung claims on a specific or aggregate of loss basis, also under the authority granted the Department by 30 U.S.C. 943; (3) name only the most likely responsible operator; (4) establish criteria to determine when a state black lung program is sufficient to end the federal program in that state; (5) allow settlement of federal black lung claims; and (6) establish cost-containment mechanisms for health care providers. Rulemaking Record, Exhibit 89–37, p. 31. The M&R analysis similarly suggests the first four alternatives, although it would apply the third alternative (naming the most likely operator) only where that operator is a small coal mine operator. In addition, the M&R analysis suggests that the Department establish a formal, ongoing review of state workers' compensation programs to determine whether they are sufficient to permit the Secretary to declare the federal program inapplicable to miners in particular states. Rulemaking Record, Exhibit 89–37, Appendix A, M&R at pp. 17–18. The Department will consider these alternatives in order.

1. *Exercising the authority of 30 U.S.C. 943* (NMA alternatives 1 and 2, M&R alternatives 1 and 2). Section 933 of the Black Lung Benefits Act, 30 U.S.C. 943, authorizes the Secretary of Labor to establish a Black Lung Compensation Insurance Fund to allow coal mine operators to purchase insurance to secure their obligations under the Act. The Fund may be used to insure coal mine operators directly, 30 U.S.C. 943(c)(1), or to enter into reinsurance agreements with one or more insurers or pools of insurers, 30 U.S.C. 943(c)(2). The Act provides an important limitation on the Secretary's authority, however: ''The Secretary may exercise his or her authority under this section *only if, and to the extent that, insurance coverage is not otherwise available, at reasonable cost, to operators of coal mines.*'' 30 U.S.C. 943(b) (emphasis added). The record contains no evidence that would allow the Secretary to determine, under subsection (b), that insurance coverage is not currently available at reasonable cost to operators of coal mines.

Consequently, the statute does not permit the ''alternative'' suggested by the commenters. Projections provided by the mining and insurance industries, however, predict significantly higher percentage increases in the cost of commercial black lung insurance if these rules become final. The Department disagrees with these projections and has explained its reasoning above. The Department also recognizes its obligation, however, to closely monitor insurance rates, especially any increase in rates that may result from the final promulgation of the Department's regulations. To the extent that rates do increase, the Department will have to determine whether those increases have resulted in insurance becoming unavailable at a reasonable cost to coal mine operators, the statutory prerequisite for the Secretary's authority under 30 U.S.C. 943(b).

2. *Naming only the most likely responsible operator* (NMA Alternative 3, M&R alternative 3). The NMA suggests that the Department name only the most likely responsible operator, which the NMA asserts was the Department's practice under its former regulations. The M&R analysis states that the Department could form an insurance fund to reimburse the Black Lung Disability Trust Fund for claims in which the most likely responsible operator is ultimately determined not to be liable for the payment of benefits, thereby imposing an unwarranted liability on the Fund. The Department does not agree that it formerly named only the most likely responsible operator. In its discussion of § 725.408, the Department observed that, where necessary, it made more than one operator a party to a claim under the prior regulations. *See* preamble to § 725.408, paragraph (f). In addition, M&R's solution to the problem of imposing additional risk on the Trust Fund—that the Department use an ''insurance fund'' to reimburse the Trust Fund for such claims—is flawed on two counts: 1) for the reasons described above, the Department cannot establish an insurance fund absent a finding that insurance is not available at reasonable cost; and 2) reimbursement of the Trust Fund for such claims is not among the statutorily-prescribed uses for monies in an insurance fund, *see* 30 U.S.C. 943(g)(1)(A)–(C).

The Department notes, however, the continued objection of a number of commenters to the Department's proposal that operators be forced to participate in a joint defense of the claimant's eligibility, *see* preamble to § 725.414. The Department has therefore reconsidered its administrative processing of cases in which the identity of the responsible operator is in doubt. As revised, the regulations permit the district director to refer a case to the Office of Administrative Law Judges with no more than one operator included as a party to the claim. *See* preamble to § 725.418. The Department recognizes that this approach imposes additional risk on the Black Lung Disability Trust Fund. *See* preamble to § 725.414. The Department has concluded that this risk is acceptable, however, because all the potentially liable operators will be required to submit evidence relevant to the issue of operator liability while the case is pending before the district director. The district director will thus have available all of the relevant evidence when he finally designates the operator responsible for payment of a claim. That one operator will remain a party in further proceedings.

The Department does not believe that this alternative is a truly significant one—*i.e.,* one which will provide the affected small business community with significant relief from the costs of the Department's regulatory revisions. First, it will apply in only a small percentage of cases. The Department estimates that less than 10 percent of responsible operator cases involve substantial questions as to the identity of the operator that should be liable for the payment of benefits. In addition, only 33 percent of all cases filed are referred to the Office of Administrative Law Judges. Accordingly, the Department's revision will likely affect only 3 percent of responsible operator cases. Second, the additional cost that would have been required by continued operator participation is relatively small. It is true that operators will no longer have to defend against an effort by the designated responsible operator to shift liability to them beyond the district director level. Instead, once a case is referred to the Office of Administrative Law Judges, if the designated responsible operator shows that it does not meet the criteria for a responsible operator, § 725.495, liability will shift to the Trust Fund. The costs associated with an operator's continued participation in a claim before the Office of Administrative Law Judges would have been small, however, because the operator would already have had to develop and submit all evidence relevant to the liability issue while the case was pending before the district director. The final regulations do not alter that requirement. A second set of costs eliminated by the Department's revision are those associated with monitoring the designated responsible operator's litigation of the claimant's eligibility while the case is pending before the Office of Administrative Law Judges. The Department's proposal would have permitted a potentially liable operator to submit its own documentary medical evidence upon establishing that the designated responsible operator had not undertaken a full development of the evidence. The Department does not believe that this situation would have arisen often, and thus believes that the overall costs associated with exercising this right were not significant. The costs relevant to both of these issues were thus largely the costs associated with hiring an attorney to monitor the litigation and, as appropriate, attend the hearing or file a brief to argue on the operator's behalf. In preparing its economic analysis, the Department used the industry's estimate of $6,000 as the current average cost for defending a claim that proceeds beyond the district director level. See preamble to § 725.407. This cost includes not only attorneys' fees, but also the development of evidence relevant to operator liability and claimant eligibility. The Department does not believe that the fees charged by an attorney to monitor the litigation and present argument represent a large component of the estimated costs. Accordingly, in light of both the small number of affected cases and the minimal expenses involved, the Department does not consider that its adoption of this alternative will result in significant savings to small coal mine operators.

3. *Establish criteria to determine when a state's workers' compensation program provides ''adequate coverage'' for totally disabling pneumoconiosis* (NMA alternative 4, M&R alternative 4). Section 421 of the Black Lung Benefits Act, 30 U.S.C. 931, requires the Secretary to publish in the **Federal Register** a list of all states whose workers' compensation laws provide ''adequate coverage'' for occupational pneumoconiosis. The Secretary's certification that a state provides adequate coverage prevents any claim for benefits arising in that state from being adjudicated under the Black Lung Benefits Act.

The Act provides certain criteria states must meet in order to gain Secretarial certification, 30 U.S.C. 921(b)(2)(A)—(E). It also provides that the Secretary may, by regulation, establish additional criteria. 30 U.S.C. 921(b)(2)(F). In its first notice of proposed rulemaking, the Department observed that the applicable regulations, 20 CFR Part 722 (1999), had not been

amended since 1973, and that, in light of statutory amendments in 1978 and 1981, those regulations were obsolete. 62 FR 3347 (Jan. 22, 1997). Accordingly, the Department proposed to delete the specific criteria contained in Part 722. The Department proposed replacing them with a general statement that it would review any state's application for certification in light of the provisions of the then-current Act, and the principle that the state law would be certified only if it guaranteed at least the same compensation, to the same individuals, as was provided by the Act.

The NMA and M&R urge the Department to develop specific criteria that would allow a state to determine what steps it needs to take to allow the Secretary to certify its law as providing adequate coverage for occupational pneumoconiosis. M&R states that ''[n]o single alternative would be more helpful to small coal operations than to be required to provide compensation under only one mechanism.'' M&R at p. 18. This suggestion would require the Department to update the criteria previously set forth in Part 722. Although no state has sought the Secretary's certification since 1973, the Department accepts the commenters' suggestion that a revision of the Part 722 criteria will encourage states to seek the certification permitted by the Act. Publication of a current set of criteria, however, will require considerable study and additional drafting, and would needlessly delay final promulgation of the remaining regulations in the Department's proposal. Following completion of that work, the Department will issue a new notice of proposed rulemaking in order to ensure that interested parties have an opportunity to comment upon possible Secretarial certification criteria. The Department believes that, in the interim, the revised Part 722 will accommodate any state seeking certification.

M&R also suggests that the Department establish a formal and ongoing Departmental review of state laws to determine whether they provide adequate coverage. The Department does not believe that it would be productive to engage in such a review. States that revise their workers' compensation laws to meet the Department's criteria will do so in order to preempt the application of the Black Lung Benefits Act. Those states will have a clear incentive to submit an application to the Department for the appropriate certification. Relying on states to initiate the certification process thus makes the most efficient use of government resources at both the state and federal levels.

4. *Permit the settlement of black lung claims* (NMA Alternative 5). The NMA suggests, without further explanation, that permitting the settlement of black lung claims will reduce the impact of the Department's regulatory revisions on small coal mine operators. The Department believes that the Black Lung Benefits Act does not allow the settlement of claims, and that permitting the settlement of claims would be contrary to the objectives of the Act in any event.

The Black Lung Benefits Act incorporates two provisions of the Longshore and Harbor Workers' Compensation Act relevant to settlements, and specifically excludes a third provision. Section 15(b) of the LHWCA, 33 U.S.C. 915(b), renders invalid any ''agreement by an employee to waive his right to compensation under this chapter.'' Section 16, 33 U.S.C. 916, invalidates any ''release * * * of compensation or benefits due or payable under this chapter, except as provided in this chapter.'' Together, these provisions, which have been part of the LHWCA since its 1927 enactment, have been interpreted to ''prevent[] any private settlement of a claim between the employer and the employee.'' *American Mutual Liability Ins. Co. of Boston* v. *Lowe,* 85 F.2d 625, 628 (3d Cir. 1936); *see also Lumber Mutual Casualty Ins. Co. of New York* v. *Locke,* 60 F.2d 35, 37 (2d Cir. 1932).

In 1938, Congress amended section 8 of the Longshore Act to specifically provide a settlement procedure in cases in which the injured employee sought compensation for permanent or temporary partial disability. *See* Act of June 25, 1938, c. 685, § 5, 52 Stat. 1166. The federal courts have long interpreted the section 8 procedure as the only means by which an injured employee could validly settle a claim for compensation. *See, e.g., Norfolk Shipbuilding & Drydock Corp.* v. *Nance,* 858 F.2d 182, 185–6 (4th Cir. 1988), *cert. denied,* 492 U.S. 911 (1989); *Oceanic Butler* v. *Nordahl,* 842 F.2d 773, 776 n. 3 (5th Cir. 1988). In incorporating certain procedures of the LHWCA into the Black Lung Benefits Act, however, Congress specifically excluded LHWCA § 8. *See* list of excluded provisions in 30 U.S.C. 932(a). Moreover, although Congress authorized the Secretary to vary the terms of incorporated LHWCA provisions in order to administer the Black Lung Benefits Act, it forbade the Department from promulgating provisions that were ''inconsistent with those specifically excluded * * *.'' By this language, Congress expressed its intention that the Secretary not use the broad powers granted her by the Black Lung Benefits Act to provide by regulation the substance of provisions that Congress had explicitly declined to incorporate. *See* Senate Conference Committee Report, reprinted in Committee Print, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969 at 1624 (''The Secretary of Labor is also authorized to publish additional provisions by regulation, together with all or part of the applicable provisions of said Act other than those specifically excluded * * *.''), quoted in *Director, OWCP* v. *National Mines Corp.,* 554 F.2d 1267, 1274 n. 31 (4th Cir. 1977).

Congress's decision to exclude the settlement provisions of LHWCA section 8 when it incorporated other LHWCA provisions makes sense. When Congress enacted the Black Lung Benefits Act in 1969, and when it amended the list of excluded sections in 1972, section 8 permitted only the settlement of claims for partial disability. Because benefits under the Black Lung Benefits Act are available only to miners who are totally disabled due to pneumoconiosis, and to the survivors of miners who die from that disease, there was no reason to incorporate section 8. Congress amended section 8 in 1972 to allow settlement of claims for total disability, and again in 1984 to permit the settlement of survivors' claims. Pub. L. 92–576, § 20, 86 Stat. 1264 (1972); Pub. L. 98–426, § 8(f), 98 Stat. 1646 (1984). Congress did not revisit its exclusion of Longshore Act provisions from the Black Lung Benefits Act on either occasion, even though Congress specifically amended the relevant statutory section in the Black Lung Benefits Act, 30 U.S.C. 932(a), in the course of amending the LHWCA in 1984. *See* Pub. L. 98–426, § 28(h)(i), 98 Stat. 1655 (1984).

The Department thus believes that Congress has expressed its intent not to permit the settlement of claims for black lung benefits. Moreover, the Department believes that this decision is supported by sound policy considerations. The Black Lung Benefits Act is intended to provide benefits (37 and 1/2 percent of the monthly pay for a federal employee in grade GS–2, step 1, augmented for additional dependents) to miners who are totally disabled due to pneumoconiosis and to the survivors of miners who die due to the disease. 30 U.S.C. 922(a). ''Providing a minimum level of income for eligible miners disabled by black lung is at the heart of the statute.'' *Harman Mining Co.* v. *Stewart,* 826 F.2d 1388, 1390 (4th Cir. 1987). Interpreting the Act so as to

permit a totally disabled miner to accept a settlement that reduces that minimum level of benefits would thus contravene one of the basic objectives of the Act. Former coal miners tend to apply for black lung benefits shortly after they leave employment in the coal industry or when they retire, usually at the same time they file an application for Social Security benefits, rather than in response to a specific diagnosis or injury. The population of claimants thus tends to be significantly different than is the case with the population of claims under other workers' compensation programs, including the LHWCA. Because of the latent, progressive nature of pneumoconiosis, *see* preamble to § 725.309, a substantial number of applicants whose initial claims are denied are ultimately determined to be eligible for black lung benefits. In its second notice of proposed rulemaking, the Department observed that the approval rate for subsequent claims filed by miners whose initial claims were denied (10.56 percent) is higher than the approval rate for first-time applicants (7.47 percent). 64 FR 54984 (Oct. 8, 1999). These statistics demonstrate that first-time applicants may not fully appreciate the extent to which they may be affected by pneumoconiosis later in life. As a result, the Department believes that it would be inappropriate to encourage or permit such applicants to bargain away the minimum level of benefits guaranteed them by Congress. Accordingly, the Department does not accept the suggestion that permitting settlement, even if it were not forbidden by the Act, represents an alternative to the Department's rule that is consistent with the objectives of the Black Lung Benefits Act.

5. *Establish cost-containment mechanisms for health care providers* (NMA alternative 6).

Through the incorporation of LHWCA § 7, the Black Lung Benefits Act requires responsible coal mine operators and the Black Lung Disability Trust Fund to provide medical benefits to miners who meet the Act's eligibility criteria. 33 U.S.C. 907, as incorporated into the Black Lung Benefits Act by 30 U.S.C. 932(a). The Department's regulations require that a miner be provided ''such medical, surgical, and other attendance and treatment, nursing and hospital services, medicine and apparatus, and any other medical service or supply, for such periods as the nature of the miner's pneumoconiosis * * * and disability require.'' 20 CFR 725.701(b) (1999). In Fiscal Year 1998, the Trust Fund paid approximately $82.1 million for the medical treatment of eligible miners, processing approximately 620,000 bills. OWCP Annual Report to Congress, FY 1998, p. 18.

The Department has already adopted a variety of cost-containment measures to reduce medical treatment costs paid by the Trust Fund. The Department's guidelines for the payment of medication expenses were derived from the system used by the United Mine Workers of America Health and Retirement Funds in light of the similar populations served by the UMWA Funds and the Trust Fund. The Department updates its list of allowable charges for various drugs on a monthly basis and for treatment procedures on a periodic basis to ensure that it does not reimburse miners and their medical providers an amount above what is usual and customary for the beneficiary population. The Medical Director of the Department's Office of Workers' Compensation Programs reviews medications that have not previously been approved for inclusion on the Department's list.

The Department also carefully screens inpatient service bills for both an acceptable diagnosis and an ''appropriate'' treatment based upon the diagnosis and procedure codes present on the Universal Billing Form. These diagnoses and treatments are compared to a set of algorithms that take into account whether the diagnoses are related to pneumoconiosis, the severity of covered and non-covered conditions, and the character of the procedures. The program then makes a determination as to whether a bill should be paid in full, paid in part, denied in full, or made subject to review by the Department's staff. Bills that are considered payable are subject to a series of edits to determine if specific types of services should be paid, denied, or reviewed before reimbursement. For example, the Department will deny a bill for a private room during a hospitalization in the absence of adequate justification and pay only the cost of a non-private room.

The cost-containment measures adopted by the Department have reduced the Trust Fund's expenditures for medical treatment. Operators and their insurers, organizations with considerable experience in cost-containment, are similarly free to adopt measures that ensure that they pay no more than the usual and customary amounts for necessary services. Under the Secretary's regulations, eligible miners present bills for medical services directly to the responsible operator liable for the payment of their benefits, its insurer, or its claims servicing agent. 20 CFR 725.704(a)(2) (1999). Any dispute between the miner and the operator over payment of the bill is subject to informal resolution by the district director. If that resolution is unsuccessful, either the miner or the operator may obtain an expedited hearing before the Office of Administrative Law Judges. 20 CFR 725.707 (a), (b) (1999). Similarly, an operator may request a hearing with respect to any bill which was paid from the Black Lung Disability Trust Fund while the operator was contesting the miner's eligibility for benefits. ''Though framed as contests between the particular Operator and the Fund over reimbursement, these determinations provide the means by which an Operator may challenge the validity of all or part of the miner's initial claim, including each medical expense, even though it has already been paid by the Fund.'' *BethEnergy Mines, Inc.* v. *Director, OWCP,* 32 F.3d 843, 847 (3d Cir. 1994). Thus, the statute and its implementing regulations afford an operator ample opportunity to challenge the reasonableness of any amount that a claimant seeks as payment for medical services. Although the Department will continue to refine its cost-containment procedures, it does not believe that these procedures represent an ''alternative'' to its rulemaking activities. Rather, cost-containment must take place simultaneously with any revision of the Department's regulations to ensure that the revisions do not produce any unreasonable changes in health care expenditures.

In summary, the Department does not believe that any of the alternatives suggested by the NMA and M&R offer relief to small business that is consistent with the stated objectives of the Black Lung Benefits Act. Although the Department does intend to revise the Part 722 criteria in light of the commenters' suggestion, the failure of any state to seek certification of its laws over the last quarter century indicates that this effort will not result in any quick relief to the small business community from the economic impact of the Department's regulations. With the exception of graduated civil money penalties, the requirements of the Black Lung Benefits Act simply do not permit the Department to adjudicate the issues of claimant eligibility and operator liability differently depending on the size of the coal mine operator that may be liable for the payment of those benefits. Because the Department believes that the ''no action'' alternative, discussed in detail above, would also be inappropriate, the Department has published a final rule implementing its proposed revisions.

Conclusion

The Department's final rule revising the regulations implementing the Black Lung Benefits Act will result in the increase of premiums paid by the coal mining industry to insure their obligations under the Act. The economic analysis prepared in connection with the Department's initial regulatory flexibility analysis demonstrated that this premium increase would result in additional annual costs to the industry with a point estimate of $57.56 million. The Department's revised rule will not result in any significantly higher costs. In light of the need for the revised regulations identified above, the Department believes that it is appropriate to finalize the rule.

List of Subjects in 20 CFR Parts 718, 722, 725, 726, 727

Black lung benefits, Lung disease, Miners, Mines, Workers' compensation, X-rays.

Signed at Washington D.C., this first day of December, 2000.

Bernard E. Anderson,

Assistant Secretary for Employment Standards.

1. The authority citation for part 718 continues to read as follows:

Authority: 5 U.S.C. 301, Reorganization Plan No. 6 of 1950, 15 FR 3174, 30 U.S.C. 901 *et seq.*, 902(f), 934, 936, 945, 33 U.S.C. 901 *et seq.*, 42 U.S.C. 405, Secretary's Order 7–87, 52 FR 48466, Employment Standards Order No. 90–02.

§§ 718.401–718.404 [Removed]

2. Part 718 is amended by removing subpart E (§§ 718.401–718.404), revising subparts A through D, revising Appendices A and C, and revising the text of Appendix B (the tables, B1 through B6, in Appendix B remain unchanged):

PART 718—STANDARDS FOR DETERMINING COAL MINERS' TOTAL DISABILITY OR DEATH DUE TO PNEUMOCONIOSIS

Subpart A—General

Sec.
718.1 Statutory provisions.
718.2 Applicability of this part.
718.3 Scope and intent of this part.
718.4 Definitions and use of terms.

Subpart B—Criteria for the Development of Medical Evidence

718.101 General.
718.102 Chest roentgenograms (X-rays).
718.103 Pulmonary function tests.
718.104 Report of physical examinations.
718.105 Arterial blood-gas studies.
718.106 Autopsy; biopsy.
718.107 Other medical evidence.

Subpart C—Determining Entitlement to Benefits

718.201 Definition of pneumoconiosis.
718.202 Determining the existence of pneumoconiosis.
718.203 Establishing relationship of pneumoconiosis to coal mine employment.
718.204 Total disability and disability causation defined; criteria for determining total disability and total disability due to pneumoconiosis.
718.205 Death due to pneumoconiosis.
718.206 Effect of findings by persons or agencies.

Subpart D—Presumptions Applicable to Eligibility Determinations

718.301 Establishing length of employment as a miner.
718.302 Relationship of pneumoconiosis to coal mine employment.
718.303 Death from a respirable disease.
718.304 Irrebuttable presumption of total disability or death due to pneumoconiosis.
718.305 Presumption of pneumoconiosis.
718.306 Presumption of entitlement applicable to certain death claims.

Appendix A to Part 718—Standards for Administration and Interpretation of Chest Roentgenograms (X-rays)

Appendix B to Part 718—Standards for Administration and Interpretation of Pulmonary Function Tests. Tables B1, B2, B3, B4, B5, B6

Appendix C to Part 718—Blood–Gas Tables

Subpart A—General

§ 718.1 Statutory provisions.

(a) Under title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, the Federal Mine Safety and Health Amendments Act of 1977, the Black Lung Benefits Reform Act of 1977, the Black Lung Benefits Revenue Act of 1977, the Black Lung Benefits Amendments of 1981, and the Black Lung Benefits Revenue Act of 1981, benefits are provided to miners who are totally disabled due to pneumoconiosis and to certain survivors of a miner who died due to or while totally or partially disabled by pneumoconiosis. However, unless the miner was found entitled to benefits as a result of a claim filed prior to January 1, 1982, benefits are payable on survivors' claims filed on or after January 1, 1982, only when the miner's death was due to pneumoconiosis, except where the survivor's entitlement is established pursuant to § 718.306 on a claim filed prior to June 30, 1982. Before the enactment of the Black Lung Benefits Reform Act of 1977, the authority for establishing standards of eligibility for miners and their survivors was placed with the Secretary of Health, Education, and Welfare. These standards were set forth by the Secretary of Health, Education, and Welfare in subpart D of part 410 of this title, and adopted by the Secretary of Labor for application to all claims filed with the Secretary of Labor (see 20 CFR 718.2, contained in the 20 CFR, Part 500 to end, edition, revised as of April 1, 1979.) Amendments made to section 402(f) of the Act by the Black Lung Benefits Reform Act of 1977 authorize the Secretary of Labor to establish criteria for determining total or partial disability or death due to pneumoconiosis to be applied in the processing and adjudication of claims filed under part C of title IV of the Act. Section 402(f) of the Act further authorizes the Secretary of Labor, in consultation with the National Institute for Occupational Safety and Health, to establish criteria for all appropriate medical tests administered in connection with a claim for benefits. Section 413(b) of the Act authorizes the Secretary of Labor to establish criteria for the techniques to be used to take chest roentgenograms (X-rays) in connection with a claim for benefits under the Act.

(b) The Black Lung Benefits Reform Act of 1977 provided that with respect to a claim filed prior to April 1, 1980, or reviewed under section 435 of the Act, the standards to be applied in the adjudication of such claim shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, with the Social Security Administration, whether or not the final disposition of the claim occurs after March 31, 1980. All such claims shall be reviewed under the criteria set forth in part 727 of this title (see 20 CFR 725.4(d)).

§ 718.2 Applicability of this part.

This part is applicable to the adjudication of all claims filed after March 31, 1980, and considered by the Secretary of Labor under section 422 of the Act and part 725 of this subchapter. If a claim subject to the provisions of section 435 of the Act and subpart C of part 727 of this subchapter (see 20 CFR 725.4(d)) cannot be approved under that subpart, such claim may be approved, if appropriate, under the provisions contained in this part. The provisions of this part shall, to the extent appropriate, be construed together in the adjudication of all claims.

§ 718.3 Scope and intent of this part.

(a) This part sets forth the standards to be applied in determining whether a coal miner is or was totally, or in the case of a claim subject to § 718.306 partially, disabled due to

pneumoconiosis or died due to pneumoconiosis. It also specifies the procedures and requirements to be followed in conducting medical examinations and in administering various tests relevant to such determinations.

(b) This part is designed to interpret the presumptions contained in section 411(c) of the Act, evidentiary standards and criteria contained in section 413(b) of the Act and definitional requirements and standards contained in section 402(f) of the Act within a coherent framework for the adjudication of claims. It is intended that these enumerated provisions of the Act be construed as provided in this part.

§ 718.4 Definitions and use of terms.

Except as is otherwise provided by this part, the definitions and usages of terms contained in § 725.101 of subpart A of part 725 of this title shall be applicable to this part.

Subpart B—Criteria for the Development of Medical Evidence

§ 718.101 General.

(a) The Office of Workers' Compensation Programs (hereinafter OWCP or the Office) shall develop the medical evidence necessary for a determination with respect to each claimant's entitlement to benefits. Each miner who files a claim for benefits under the Act shall be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation including, but not limited to, a chest roentgenogram (X-ray), physical examination, pulmonary function tests and a blood-gas study.

(b) The standards for the administration of clinical tests and examinations contained in this subpart shall apply to all evidence developed by any party after January 19, 2001 in connection with a claim governed by this part (see §§ 725.406(b), 725.414(a), 725.456(d)). These standards shall also apply to claims governed by part 727 (see 20 CFR 725.4(d)), but only for clinical tests or examinations conducted after January 19, 2001. Any clinical test or examination subject to these standards shall be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered. Unless otherwise provided, any evidence which is not in substantial compliance with the applicable standard is insufficient to establish the fact for which it is proffered.

§ 718.102 Chest roentgenograms (X-rays).

(a) A chest roentgenogram (X-ray) shall be of suitable quality for proper classification of pneumoconiosis and shall conform to the standards for administration and interpretation of chest X-rays as described in Appendix A.

(b) A chest X-ray to establish the existence of pneumoconiosis shall be classified as Category 1, 2, 3, A, B, or C, according to the International Labour Organization Union Internationale Contra Cancer/Cincinnati (1971) International Classification of Radiographs of the Pneumoconioses (ILO–U/C 1971), or subsequent revisions thereof. This document is available from the Division of Coal Mine Workers' Compensation in the U.S. Department of Labor, Washington, D.C., telephone (202) 693–0046, and from the National Institute for Occupational Safety and Health (NIOSH), located in Cincinnati, Ohio, telephone (513) 841–4428) and Morgantown, West Virginia, telephone (304) 285–5749. A chest X-ray classified as Category Z under the ILO Classification (1958) or Short Form (1968) shall be reclassified as Category 0 or Category 1 as appropriate, and only the latter accepted as evidence of pneumoconiosis. A chest X-ray classified under any of the foregoing classifications as Category 0, including sub-categories 0—, 0/0, or 0/1 under the UICC/Cincinnati (1968) Classification or the ILO–U/C 1971 Classification does not constitute evidence of pneumoconiosis.

(c) A description and interpretation of the findings in terms of the classifications described in paragraph (b) of this section shall be submitted by the examining physician along with the film. The report shall specify the name and qualifications of the person who took the film and the name and qualifications of the physician interpreting the film. If the physician interpreting the film is a Board-certified or Board-eligible radiologist or a certified ''B'' reader (see § 718.202), he or she shall so indicate. The report shall further specify that the film was interpreted in compliance with this paragraph.

(d) The original film on which the X-ray report is based shall be supplied to the Office, unless prohibited by law, in which event the report shall be considered as evidence only if the original film is otherwise available to the Office and other parties. Where the chest X-ray of a deceased miner has been lost, destroyed or is otherwise unavailable, a report of a chest X-ray submitted by any party shall be considered in connection with the claim.

(e) Except as provided in this paragraph, no chest X-ray shall constitute evidence of the presence or absence of pneumoconiosis unless it is conducted and reported in accordance with the requirements of this section and Appendix A. In the absence of evidence to the contrary, compliance with the requirements of Appendix A shall be presumed. In the case of a deceased miner where the only available X-ray does not substantially comply with paragraphs (a) through (d), such X-ray may form the basis for a finding of the presence or absence of pneumoconiosis if it is of sufficient quality for determining the presence or absence of pneumoconiosis and such X-ray was interpreted by a Board-certified or Board-eligible radiologist or a certified ''B'' reader (see § 718.202).

§ 718.103 Pulmonary function tests.

(a) Any report of pulmonary function tests submitted in connection with a claim for benefits shall record the results of flow versus volume (flow-volume loop). The instrument shall simultaneously provide records of volume versus time (spirometric tracing). The report shall provide the results of the forced expiratory volume in one second (FEV1) and the forced vital capacity (FVC). The report shall also provide the FEV1/FVC ratio, expressed as a percentage. If the maximum voluntary ventilation (MVV) is reported, the results of such test shall be obtained independently rather than calculated from the results of the FEV1.

(b) All pulmonary function test results submitted in connection with a claim for benefits shall be accompanied by three tracings of the flow versus volume and the electronically derived volume versus time tracings. If the MVV is reported, two tracings of the MVV whose values are within 10% of each other shall be sufficient. Pulmonary function test results developed in connection with a claim for benefits shall also include a statement signed by the physician or technician conducting the test setting forth the following:

(1) Date and time of test;

(2) Name, DOL claim number, age, height, and weight of claimant at the time of the test;

(3) Name of technician;

(4) Name and signature of physician supervising the test;

(5) Claimant's ability to understand the instructions, ability to follow directions and degree of cooperation in performing the tests. If the claimant is unable to complete the test, the person

executing the report shall set forth the reasons for such failure;

(6) Paper speed of the instrument used;

(7) Name of the instrument used;

(8) Whether a bronchodilator was administered. If a bronchodilator is administered, the physician's report must detail values obtained both before and after administration of the bronchodilator and explain the significance of the results obtained; and

(9) That the requirements of paragraphs (b) and (c) of this section have been complied with.

(c) Except as provided in this paragraph, no results of a pulmonary function study shall constitute evidence of the presence or absence of a respiratory or pulmonary impairment unless it is conducted and reported in accordance with the requirements of this section and Appendix B to this part. In the absence of evidence to the contrary, compliance with the requirements of Appendix B shall be presumed. In the case of a deceased miner, where no pulmonary function tests are in substantial compliance with paragraphs (a) and (b) and Appendix B, noncomplying tests may form the basis for a finding if, in the opinion of the adjudication officer, the tests demonstrate technically valid results obtained with good cooperation of the miner.

§ 718.104 Report of physical examinations.

(a) A report of any physical examination conducted in connection with a claim shall be prepared on a medical report form supplied by the Office or in a manner containing substantially the same information. Any such report shall include the following information and test results:

(1) The miner's medical and employment history;

(2) All manifestations of chronic respiratory disease;

(3) Any pertinent findings not specifically listed on the form;

(4) If heart disease secondary to lung disease is found, all symptoms and significant findings;

(5) The results of a chest X-ray conducted and interpreted as required by § 718.102; and

(6) The results of a pulmonary function test conducted and reported as required by § 718.103. If the miner is physically unable to perform a pulmonary function test or if the test is medically contraindicated, in the absence of evidence establishing total disability pursuant to § 718.304, the report must be based on other medically acceptable clinical and laboratory diagnostic techniques, such as a blood gas study.

(b) In addition to the requirements of paragraph (a), a report of physical examination may be based on any other procedures such as electrocardiogram, blood-gas studies conducted and reported as required by § 718.105, and other blood analyses which, in the physician's opinion, aid in his or her evaluation of the miner.

(c) In the case of a deceased miner, where no report is in substantial compliance with paragraphs (a) and (b), a report prepared by a physician who is unavailable may nevertheless form the basis for a finding if, in the opinion of the adjudication officer, it is accompanied by sufficient indicia of reliability in light of all relevant evidence.

(d) *Treating physician.* In weighing the medical evidence of record relevant to whether the miner suffers, or suffered, from pneumoconiosis, whether the pneumoconiosis arose out of coal mine employment, and whether the miner is, or was, totally disabled by pneumoconiosis or died due to pneumoconiosis, the adjudication officer must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. Specifically, the adjudication officer shall take into consideration the following factors in weighing the opinion of the miner's treating physician:

(1) *Nature of relationship.* The opinion of a physician who has treated the miner for respiratory or pulmonary conditions is entitled to more weight than a physician who has treated the miner for non-respiratory conditions;

(2) *Duration of relationship.* The length of the treatment relationship demonstrates whether the physician has observed the miner long enough to obtain a superior understanding of his or her condition;

(3) *Frequency of treatment.* The frequency of physician-patient visits demonstrates whether the physician has observed the miner often enough to obtain a superior understanding of his or her condition; and

(4) *Extent of treatment.* The types of testing and examinations conducted during the treatment relationship demonstrate whether the physician has obtained superior and relevant information concerning the miner's condition.

(5) In the absence of contrary probative evidence, the adjudication officer shall accept the statement of a physician with regard to the factors listed in paragraphs (d)(1) through (4) of this section. In appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight, provided that the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole.

§ 718.105 Arterial blood-gas studies.

(a) Blood-gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. No blood-gas study shall be performed if medically contraindicated.

(b) A blood-gas study shall initially be administered at rest and in a sitting position. If the results of the blood-gas test at rest do not satisfy the requirements of Appendix C to this part, an exercise blood-gas test shall be offered to the miner unless medically contraindicated. If an exercise blood-gas test is administered, blood shall be drawn during exercise.

(c) Any report of a blood-gas study submitted in connection with a claim shall specify:

(1) Date and time of test;

(2) Altitude and barometric pressure at which the test was conducted;

(3) Name and DOL claim number of the claimant;

(4) Name of technician;

(5) Name and signature of physician supervising the study;

(6) The recorded values for PC02, P02, and PH, which have been collected simultaneously (specify values at rest and, if performed, during exercise);

(7) Duration and type of exercise;

(8) Pulse rate at the time the blood sample was drawn;

(9) Time between drawing of sample and analysis of sample; and

(10) Whether equipment was calibrated before and after each test.

(d) If one or more blood-gas studies producing results which meet the appropriate table in Appendix C is administered during a hospitalization which ends in the miner's death, then any such study must be accompanied by a physician's report establishing that the test results were produced by a chronic respiratory or pulmonary condition. Failure to produce such a report will prevent reliance on the blood-gas study as evidence that the miner was totally disabled at death. (e) In the case of a deceased miner, where no blood gas tests are in substantial compliance with

paragraphs (a), (b), and (c), noncomplying tests may form the basis for a finding if, in the opinion of the adjudication officer, the only available tests demonstrate technically valid results. This provision shall not excuse compliance with the requirements in paragraph (d) for any blood gas study administered during a hospitalization which ends in the miner's death.

§ 718.106 Autopsy; biopsy.

(a) A report of an autopsy or biopsy submitted in connection with a claim shall include a detailed gross macroscopic and microscopic description of the lungs or visualized portion of a lung. If a surgical procedure has been performed to obtain a portion of a lung, the evidence shall include a copy of the surgical note and the pathology report of the gross and microscopic examination of the surgical specimen. If an autopsy has been performed, a complete copy of the autopsy report shall be submitted to the Office.

(b) In the case of a miner who died prior to March 31, 1980, an autopsy or biopsy report shall be considered even when the report does not substantially comply with the requirements of this section. A noncomplying report concerning a miner who died prior to March 31, 1980, shall be accorded the appropriate weight in light of all relevant evidence.

(c) A negative biopsy is not conclusive evidence that the miner does not have pneumoconiosis. However, where positive findings are obtained on biopsy, the results will constitute evidence of the presence of pneumoconiosis.

§ 718.107 Other medical evidence.

(a) The results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis, the sequelae of pneumoconiosis or a respiratory or pulmonary impairment, may be submitted in connection with a claim and shall be given appropriate consideration.

(b) The party submitting the test or procedure pursuant to this section bears the burden to demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits.

Subpart C—Determining Entitlement to Benefits

§ 718.201 Definition of pneumoconiosis.

(a) For the purpose of the Act, ''pneumoconiosis'' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or ''clinical'', pneumoconiosis and statutory, or ''legal'', pneumoconiosis.

(1) *Clinical Pneumoconiosis.* ''Clinical pneumoconiosis'' consists of those diseases recognized by the medical community as pneumoconioses, *i.e.,* the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) *Legal Pneumoconiosis.* ''Legal pneumoconiosis'' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a disease ''arising out of coal mine employment'' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, ''pneumoconiosis'' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

§ 718.202 Determining the existence of pneumoconiosis.

(a) A finding of the existence of pneumoconiosis may be made as follows:

(1) A chest X-ray conducted and classified in accordance with § 718.102 may form the basis for a finding of the existence of pneumoconiosis. Except as otherwise provided in this section, where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays.

(i) In all claims filed before January 1, 1982, where there is other evidence of pulmonary or respiratory impairment, a Board-certified or Board-eligible radiologist's interpretation of a chest X-ray shall be accepted by the Office if the X-ray is in compliance with the requirements of § 718.102 and if such X-ray has been taken by a radiologist or qualified radiologic technologist or technician and there is no evidence that the claim has been fraudulently represented. However, these limitations shall not apply to any claim filed on or after January 1, 1982.

(ii) The following definitions shall apply when making a finding in accordance with this paragraph.

(A) The term *other evidence* means medical tests such as blood-gas studies, pulmonary function studies or physical examinations or medical histories which establish the presence of a chronic pulmonary, respiratory or cardio-pulmonary condition, and in the case of a deceased miner, in the absence of medical evidence to the contrary, affidavits of persons with knowledge of the miner's physical condition.

(B) *Pulmonary or respiratory impairment* means inability of the human respiratory apparatus to perform in a normal manner one or more of the three components of respiration, namely, ventilation, perfusion and diffusion.

(C) *Board-certified* means certification in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Osteopathic Association.

(D) *Board-eligible* means the successful completion of a formal accredited residency program in radiology or diagnostic roentgenology.

(E) *Certified 'B' reader* or *'B' reader* means a physician who has demonstrated proficiency in evaluating chest roentgenograms for roentgenographic quality and in the use of the ILO–U/C classification for interpreting chest roentgenograms for pneumoconiosis and other diseases by taking and passing a specially designed proficiency examination given on behalf of or by the Appalachian Laboratory for Occupational Safety and Health. See 42 CFR 37.51(b)(2).

(F) *Qualified radiologic technologist or technician* means an individual who is either certified as a registered technologist by the American Registry of Radiologic Technologists or licensed as a radiologic technologist by a state licensing board.

(2) A biopsy or autopsy conducted and reported in compliance with § 718.106 may be the basis for a finding of the existence of pneumoconiosis. A finding in an autopsy or biopsy of anthracotic pigmentation, however, shall not be sufficient, by itself, to establish the existence of pneumoconiosis. A report of autopsy shall be accepted unless there is evidence that the report is not accurate

or that the claim has been fraudulently represented.

(3) If the presumptions described in §§ 718.304, 718.305 or § 718.306 are applicable, it shall be presumed that the miner is or was suffering from pneumoconiosis.

(4) A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

(b) No claim for benefits shall be denied solely on the basis of a negative chest X-ray.

(c) A determination of the existence of pneumoconiosis shall not be made solely on the basis of a living miner's statements or testimony. Nor shall such a determination be made upon a claim involving a deceased miner filed on or after January 1, 1982, solely based upon the affidavit(s) (or equivalent sworn testimony) of the claimant and/or his or her dependents who would be eligible for augmentation of the claimant's benefits if the claim were approved.

§ 718.203 Establishing relationship of pneumoconiosis to coal mine employment.

(a) In order for a claimant to be found eligible for benefits under the Act, it must be determined that the miner's pneumoconiosis arose at least in part out of coal mine employment. The provisions in this section set forth the criteria to be applied in making such a determination.

(b) If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment.

(c) If a miner who is suffering or suffered from pneumoconiosis was employed less than ten years in the nation's coal mines, it shall be determined that such pneumoconiosis arose out of that employment only if competent evidence establishes such a relationship.

§ 718.204 Total disability and disability causation defined; criteria for determining total disability and total disability due to pneumoconiosis.

(a) *General.* Benefits are provided under the Act for or on behalf of miners who are totally disabled due to pneumoconiosis, or who were totally disabled due to pneumoconiosis at the time of death. For purposes of this section, any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. If, however, a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis.

(b)(1) *Total disability defined.* A miner shall be considered totally disabled if the irrebuttable presumption described in § 718.304 applies. If that presumption does not apply, a miner shall be considered totally disabled if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner:

(i) From performing his or her usual coal mine work; and

(ii) From engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time.

(2) *Medical criteria.* In the absence of contrary probative evidence, evidence which meets the standards of either paragraphs (b)(2)(i), (ii), (iii), or (iv) of this section shall establish a miner's total disability:

(i) Pulmonary function tests showing values equal to or less than those listed in Table B1 (Males) or Table B2 (Females) in Appendix B to this part for an individual of the miner's age, sex, and height for the FEV1 test; if, in addition, such tests also reveal the values specified in either paragraph (b)(2)(i)(A) or (B) or (C) of this section:

(A) Values equal to or less than those listed in Table B3 (Males) or Table B4 (Females) in Appendix B of this part, for an individual of the miner's age, sex, and height for the FVC test, or

(B) Values equal to or less than those listed in Table B5 (Males) or Table B6 (Females) in Appendix B to this part, for an individual of the miner's age, sex, and height for the MVV test, or

(C) A percentage of 55 or less when the results of the FEV1 test are divided by the results of the FVC test (FEV1/FVC equal to or less than 55%), or

(ii) Arterial blood-gas tests show the values listed in Appendix C to this part, or

(iii) The miner has pneumoconiosis and has been shown by the medical evidence to be suffering from cor pulmonale with right-sided congestive heart failure, or

(iv) Where total disability cannot be shown under paragraphs (b)(2)(i), (ii), or (iii) of this section, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment as described in paragraph (b)(1) of this section.

(c)(1) *Total disability due to pneumoconiosis defined.* A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in § 718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a ''substantially contributing cause'' of the miner's disability if it:

(i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or

(ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

(2) Except as provided in § 718.305 and paragraph (b)(2)(iii) of this section, proof that the miner suffers or suffered from a totally disabling respiratory or pulmonary impairment as defined in paragraphs (b)(2)(i), (b)(2)(ii), (b)(2)(iv) and (d) of this section shall not, by itself, be sufficient to establish that the miner's impairment is or was due to pneumoconiosis. Except as provided in paragraph (d), the cause or causes of a miner's total disability shall be established by means of a physician's documented and reasoned medical report.

(d) *Lay evidence.* In establishing total disability, lay evidence may be used in the following cases:

(1) In a case involving a deceased miner in which the claim was filed prior to January 1, 1982, affidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition shall be sufficient to establish total (or under § 718.306 partial) disability due to pneumoconiosis if no medical or other relevant evidence exists which

addresses the miner's pulmonary or respiratory condition.

(2) In a case involving a survivor's claim filed on or after January 1, 1982, but prior to June 30, 1982, which is subject to § 718.306, affidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition shall be sufficient to establish total or partial disability due to pneumoconiosis if no medical or other relevant evidence exists which addresses the miner's pulmonary or respiratory condition; however, such a determination shall not be based solely upon the affidavits or testimony of the claimant and/or his or her dependents who would be eligible for augmentation of the claimant's benefits if the claim were approved.

(3) In a case involving a deceased miner whose claim was filed on or after January 1, 1982, affidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition shall be sufficient to establish total disability due to pneumoconiosis if no medical or other relevant evidence exists which addresses the miner's pulmonary or respiratory condition; however, such a determination shall not be based solely upon the affidavits or testimony of any person who would be eligible for benefits (including augmented benefits) if the claim were approved.

(4) Statements made before death by a deceased miner about his or her physical condition are relevant and shall be considered in making a determination as to whether the miner was totally disabled at the time of death.

(5) In the case of a living miner's claim, a finding of total disability due to pneumoconiosis shall not be made solely on the miner's statements or testimony.

(e) In determining total disability to perform usual coal mine work, the following shall apply in evaluating the miner's employment activities:

(1) In the case of a deceased miner, employment in a mine at the time of death shall not be conclusive evidence that the miner was not totally disabled. To disprove total disability, it must be shown that at the time the miner died, there were no changed circumstances of employment indicative of his or her reduced ability to perform his or her usual coal mine work.

(2) In the case of a living miner, proof of current employment in a coal mine shall not be conclusive evidence that the miner is not totally disabled unless it can be shown that there are no changed circumstances of employment indicative of his or her reduced ability to perform his or her usual coal mine work.

(3) Changed circumstances of employment indicative of a miner's reduced ability to perform his or her usual coal mine work may include but are not limited to:

(i) The miner's reduced ability to perform his or her customary duties without help; or

(ii) The miner's reduced ability to perform his or her customary duties at his or her usual levels of rapidity, continuity or efficiency; or

(iii) The miner's transfer by request or assignment to less vigorous duties or to duties in a less dusty part of the mine.

§ 718.205 Death due to pneumoconiosis.

(a) Benefits are provided to eligible survivors of a miner whose death was due to pneumoconiosis. In order to receive benefits, the claimant must prove that:

(1) The miner had pneumoconiosis (*see* § 718.202);

(2) The miner's pneumoconiosis arose out of coal mine employment (*see* § 718.203); and

(3) The miner's death was due to pneumoconiosis as provided by this section.

(b) For the purpose of adjudicating survivors' claims filed prior to January 1, 1982, death will be considered due to pneumoconiosis if any of the following criteria is met:

(1) Where competent medical evidence established that the miner's death was due to pneumoconiosis, or

(2) Where death was due to multiple causes including pneumoconiosis and it is not medically feasible to distinguish which disease caused death or the extent to which pneumoconiosis contributed to the cause of death, or

(3) Where the presumption set forth at § 718.304 is applicable, or

(4) Where either of the presumptions set forth at § 718.303 or § 718.305 is applicable and has not been rebutted.

(5) Where the cause of death is significantly related to or aggravated by pneumoconiosis.

(c) For the purpose of adjudicating survivors' claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if any of the following criteria is met:

(1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or

(2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or

(3) Where the presumption set forth at § 718.304 is applicable.

(4) However, survivors are not eligible for benefits where the miner's death was caused by a traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.

(5) Pneumoconiosis is a ''substantially contributing cause'' of a miner's death if it hastens the miner's death.

(d) To minimize the hardships to potentially entitled survivors due to the disruption of benefits upon the miner's death, survivors' claims filed on or after January 1, 1982, shall be adjudicated on an expedited basis in accordance with the following procedures. The initial burden is upon the claimant, with the assistance of the district director, to develop evidence which meets the requirements of paragraph (c) of this section. Where the initial medical evidence appears to establish that death was due to pneumoconiosis, the survivor will receive benefits unless the weight of the evidence as subsequently developed by the Department or the responsible operator establishes that the miner's death was not due to pneumoconiosis as defined in paragraph (c). However, no such benefits shall be found payable before the party responsible for the payment of such benefits shall have had a reasonable opportunity for the development of rebuttal evidence. *See* § 725.414 concerning the operator's opportunity to develop evidence prior to an initial determination.

§ 718.206 Effect of findings by persons or agencies.

Decisions, statements, reports, opinions, or the like, of agencies, organizations, physicians or other individuals, about the existence, cause, and extent of a miner's disability, or the cause of a miner's death, are admissible. If properly submitted, such evidence shall be considered and given the weight to which it is entitled as evidence under all the facts before the adjudication officer in the claim.

Subpart D—Presumptions Applicable to Eligibility Determinations

§ 718.301 Establishing length of employment as a miner.

The presumptions set forth in §§ 718.302, 718.303, 718.305 and 718.306 apply only if a miner worked in one or more coal mines for the number of years required to invoke the presumption. The length of the miner's coal mine work history must be

computed as provided by 20 CFR 725.101(a)(32).

§ 718.302 Relationship of pneumoconiosis to coal mine employment.

If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment. (See § 718.203.)

§ 718.303 Death from a respirable disease.

(a)(1) If a deceased miner was employed for ten or more years in one or more coal mines and died from a respirable disease, there shall be a rebuttable presumption that his or her death was due to pneumoconiosis.

(2) Under this presumption, death shall be found due to a respirable disease in any case in which the evidence establishes that death was due to multiple causes, including a respirable disease, and it is not medically feasible to distinguish which disease caused death or the extent to which the respirable disease contributed to the cause of death.

(b) The presumption of paragraph (a) of this section may be rebutted by a showing that the deceased miner did not have pneumoconiosis, that his or her death was not due to pneumoconiosis or that pneumoconiosis did not contribute to his or her death.

(c) This section is not applicable to any claim filed on or after January 1, 1982.

§ 718.304 Irrebuttable presumption of total disability or death due to pneumoconiosis.

There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis, that a miner's death was due to pneumoconiosis or that a miner was totally disabled due to pneumoconiosis at the time of death, if such miner is suffering or suffered from a chronic dust disease of the lung which:

(a) When diagnosed by chest X-ray (see § 718.202 concerning the standards for X-rays and the effect of interpretations of X-rays by physicians) yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C in:

(1) The ILO–U/C International Classification of Radiographs of the Pneumoconioses, 1971, or subsequent revisions thereto; or

(2) The International Classification of the Radiographs of the Pneumoconioses of the International Labour Office, Extended Classification (1968) (which may be referred to as the ''ILO Classification (1968)''); or

(3) The Classification of the Pneumoconioses of the Union Internationale Contra Cancer/Cincinnati (1968) (which may be referred to as the ''UICC/Cincinnati (1968) Classification''); or

(b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or

(c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided*, *however*, That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

§ 718.305 Presumption of pneumoconiosis.

(a) If a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest X-ray submitted in connection with such miner's or his or her survivor's claim and it is interpreted as negative with respect to the requirements of § 718.304, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that such miner's death was due to pneumoconiosis, or that at the time of death such miner was totally disabled by pneumoconiosis. In the case of a living miner's claim, a spouse's affidavit or testimony may not be used by itself to establish the applicability of the presumption. The Secretary shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine where it is determined that conditions of the miner's employment in a coal mine were substantially similar to conditions in an underground mine. The presumption may be rebutted only by establishing that the miner does not, or did not have pneumoconiosis, or that his or her respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

(b) In the case of a deceased miner, where there is no medical or other relevant evidence, affidavits of persons having knowledge of the miner's condition shall be considered to be sufficient to establish the existence of a totally disabling respiratory or pulmonary impairment for purposes of this section.

(c) The determination of the existence of a totally disabling respiratory or pulmonary impairment, for purposes of applying the presumption described in this section, shall be made in accordance with § 718.204.

(d) Where the cause of death or total disability did not arise in whole or in part out of dust exposure in the miner's coal mine employment or the evidence establishes that the miner does not or did not have pneumoconiosis, the presumption will be considered rebutted. However, in no case shall the presumption be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of unknown origin.

(e) This section is not applicable to any claim filed on or after January 1, 1982.

§ 718.306 Presumption of entitlement applicable to certain death claims.

(a) In the case of a miner who died on or before March 1, 1978, who was employed for 25 or more years in one or more coal mines prior to June 30, 1971, the eligible survivors of such miner whose claims have been filed prior to June 30, 1982, shall be entitled to the payment of benefits, unless it is established that at the time of death such miner was not partially or totally disabled due to pneumoconiosis. Eligible survivors shall, upon request, furnish such evidence as is available with respect to the health of the miner at the time of death, and the nature and duration of the miner's coal mine employment.

(b) For the purpose of this section, a miner will be considered to have been ''partially disabled'' if he or she had reduced ability to engage in work as defined in § 718.204(b).

(c) In order to rebut this presumption the evidence must demonstrate that the miner's ability to perform work as defined in § 718.204(b) was not reduced at the time of his or her death or that the miner did not have pneumoconiosis.

(d) None of the following items, by itself, shall be sufficient to rebut the presumption:

(1) Evidence that a deceased miner was employed in a coal mine at the time of death;

(2) Evidence pertaining to a deceased miner's level of earnings prior to death;

(3) A chest X-ray interpreted as negative for the existence of pneumoconiosis;

(4) A death certificate which makes no mention of pneumoconiosis.

Appendix A To Part 718—Standards for Administration and Interpretation of Chest Roentgenograms (X-Rays)

The following standards are established in accordance with sections 402(f)(1)(D) and

413(b) of the Act. They were developed in consultation with the National Institute for Occupational Safety and Health. These standards are promulgated for the guidance of physicians and medical technicians to insure that uniform procedures are used in administering and interpreting X-rays and that the best available medical evidence will be submitted in connection with a claim for black lung benefits. If it is established that one or more standards have not been met, the claims adjudicator may consider such fact in determining the evidentiary weight to be assigned to the physician's report of an X-ray.

(1) Every chest roentgenogram shall be a single postero-anterior projection at full inspiration on a 14 by 17 inch film. Additional chest films or views shall be obtained if they are necessary for clarification and classification. The film and cassette shall be capable of being positioned both vertically and horizontally so that the chest roentgenogram will include both apices and costophrenic angles. If a miner is too large to permit the above requirements, then a projection with minimum loss of costophrenic angle shall be made.

(2) Miners shall be disrobed from the waist up at the time the roentgenogram is given. The facility shall provide a dressing area and, for those miners who wish to use one, the facility shall provide a clean gown. Facilities shall be heated to a comfortable temperature.

(3) Roentgenograms shall be made only with a diagnostic X-ray machine having a rotating anode tube with a maximum of a 2 mm source (focal spot).

(4) Except as provided in paragraph (5), roentgenograms shall be made with units having generators which comply with the following: (a) the generators of existing roentgenographic units acquired by the examining facility prior to July 27, 1973, shall have a minimum rating of 200 mA at 100 kVp; (b) generators of units acquired subsequent to that date shall have a minimum rating of 300 mA at 125 kVp.

Note: A generator with a rating of 150 kVp is recommended.

(5) Roentgenograms made with battery-powered mobile or portable equipment shall be made with units having a minimum rating of 100 mA at 110 kVp at 500 Hz, or 200 mA at 110 kVp at 60 Hz.

(6) Capacitor discharge, and field emission units may be used.

(7) Roentgenograms shall be given only with equipment having a beam-limiting device which does not cause large unexposed boundaries. The use of such a device shall be discernible from an examination of the roentgenogram.

(8) To insure high quality chest roentgenograms:

(i) The maximum exposure time shall not exceed 1/20 of a second except that with single phase units with a rating less than 300 mA at 125 kVp and subjects with chest over 28 cm postero-anterior, the exposure may be increased to not more than 1/10 of a second;

(ii) The source or focal spot to film distance shall be at least 6 feet;

(iii) Only medium-speed film and medium-speed intensifying screens shall be used;

(iv) Film-screen contact shall be maintained and verified at 6-month or shorter intervals;

(v) Intensifying screens shall be inspected at least once a month and cleaned when necessary by the method recommended by the manufacturer;

(vi) All intensifying screens in a cassette shall be of the same type and made by the same manufacturer;

(vii) When using over 90 kV, a suitable grid or other means of reducing scattered radiation shall be used;

(viii) The geometry of the radiographic system shall insure that the central axis (ray) of the primary beam is perpendicular to the plane of the film surface and impinges on the center of the film.

(9) Radiographic processing:

(i) Either automatic or manual film processing is acceptable. A constant time-temperature technique shall be meticulously employed for manual processing.

(ii) If mineral or other impurities in the processing water introduce difficulty in obtaining a high-quality roentgenogram, a suitable filter or purification system shall be used.

(10) Before the miner is advised that the examination is concluded, the roentgenogram shall be processed and inspected and accepted for quality by the physician, or if the physician is not available, acceptance may be made by the radiologic technologist. In a case of a substandard roentgenogram, another shall be made immediately.

(11) An electric power supply shall be used which complies with the voltage, current, and regulation specified by the manufacturer of the machine.

(12) A densitometric test object may be required on each roentgenogram for an objective evaluation of film quality at the discretion of the Department of Labor.

(13) Each roentgenogram made under this Appendix shall be permanently and legibly marked with the name and address of the facility at which it is made, the miner's DOL claim number, the date of the roentgenogram, and left and right side of film. No other identifying markings shall be recorded on the roentgenogram.

Appendix B to Part 718–Standards for Administration and Interpretation of Pulmonary Function Tests. Tables B1, B2, B3, B4, B5, B6.

The following standards are established in accordance with section 402(f)(1)(D) of the Act. They were developed in consultation with the National Institute for Occupational Safety and Health (NIOSH). These standards are promulgated for the guidance of physicians and medical technicians to insure that uniform procedures are used in administering and interpreting ventilatory function tests and that the best available medical evidence will be submitted in support of a claim for black lung benefits. If it is established that one or more standards have not been met, the claims adjudicator may consider such fact in determining the evidentiary weight to be given to the results of the ventilatory function tests.

(1) Instruments to be used for the administration of pulmonary function tests shall be approved by NIOSH and shall conform to the following criteria:

(i) The instrument shall be accurate within +/−50 ml or within +/−3 percent of reading, whichever is greater.

(ii) The instrument shall be capable of measuring vital capacity from 0 to 7 liters BTPS.

(iii) The instrument shall have a low inertia and offer low resistance to airflow such that the resistance to airflow at 12 liters per second must be less than 1.5 cm H20/liter/sec.

(iv) The instrument or user of the instrument must have a means of correcting volumes to body temperature saturated with water vapor (BTPS) under conditions of varying ambient spirometer temperatures and barometric pressures.

(v) The instrument used shall provide a tracing of flow versus volume (flow-volume loop) which displays the entire maximum inspiration and the entire maximum forced expiration. The instrument shall, in addition, provide tracings of the volume versus time tracing (spirogram) derived electronically from the flow-volume loop. Tracings are necessary to determine whether maximum inspiratory and expiratory efforts have been obtained during the FVC maneuver. If maximum voluntary ventilation is measured, the tracing shall record the individual breaths volumes versus time.

(vi) The instrument shall be capable of accumulating volume for a minimum of 10 seconds after the onset of exhalation.

(vii) The instrument must be capable of being calibrated in the field with respect to the FEV1. The volume calibration shall be accomplished with a 3 L calibrating syringe and should agree to within 1 percent of a 3 L calibrating volume. The linearity of the instrument must be documented by a record of volume calibrations at three different flow rates of approximately 3 L/6 sec, 3 L/3 sec, and 3 L/sec.

(viii) For measuring maximum voluntary ventilation (MVV) the instrument shall have a response which is flat within +/−10 percent up to 4 Hz at flow rates up to 12 liters per second over the volume range.

(ix) The spirogram shall be recorded at a speed of at least 20 mm/sec and a volume excursion of at least 10mm/L. Calculation of the FEVl from the flow-volume loop is not acceptable. Original tracings shall be submitted.

(2) The administration of pulmonary function tests shall conform to the following criteria:

(i) Tests shall not be performed during or soon after an acute respiratory illness.

(ii) For the FEV1 and FVC, use of a nose clip is required. The procedures shall be explained in simple terms to the patient who shall be instructed to loosen any tight clothing and stand in front of the apparatus. The subject may sit, or stand, but care should be taken on repeat testing that the same position be used. Particular attention shall be given to insure that the chin is slightly elevated with the neck slightly extended. The subject shall be instructed to expire completely, momentarily hold his breath, place the mouthpiece in his mouth and close the mouth firmly about the mouthpiece to ensure no air leak. The subject will than make a maximum inspiration from the

instrument and when maximum inspiration has been attained, without interruption, blow as hard, fast and completely as possible for at least 7 seconds or until a plateau has been attained in the volume-time curve with no detectable change in the expired volume during the last 2 seconds of maximal expiratory effort. A minimum of three flow-volume loops and derived spirometric tracings shall be carried out. The patient shall be observed throughout the study for compliance with instructions. Inspiration and expiration shall be checked visually for reproducibility. The effort shall be judged unacceptable when the patient:

(A) Has not reached full inspiration preceding the forced expiration; or

(B) Has not used maximal effort during the entire forced expiration; or

(C) Has not continued the expiration for least 7 sec. or until an obvious plateau for at least 2 sec. in the volume-time curve has occurred; or

(D) Has coughed or closed his glottis; or

(E) Has an obstructed mouthpiece or a leak around the mouthpiece (obstruction due to tongue being placed in front of mouthpiece, false teeth falling in front of mouthpiece, etc.); or

(F) Has an unsatisfactory start of expiration, one characterized by excessive hesitation (or false starts). Peak flow should be attained at the start of expiration and the volume-time tracing (spirogram) should have a smooth contour revealing gradually decreasing flow throughout expiration; or

(G) Has an excessive variability between the three acceptable curves. The variation between the two largest FEV1's of the three acceptable tracings should not exceed 5 percent of the largest FEV1 or 100 ml, whichever is greater. As individuals with obstructive disease or rapid decline in lung function will be less likely to achieve this degree of reproducibility, tests not meeting this criterion may still be submitted for consideration in support of a claim for black lung benefits. Failure to meet this standard should be clearly noted in the test report by the physician conducting or reviewing the test.

(iii) For the MVV, the subject shall be instructed before beginning the test that he or she will be asked to breathe as deeply and as rapidly as possible for approximately 15 seconds. The test shall be performed with the subject in the standing position, if possible. Care shall be taken on repeat testing that the same position be used. The subject shall breathe normally into the mouthpiece of the apparatus for 10 to 15 seconds to become accustomed to the system. The subject shall then be instructed to breathe as deeply and as rapidly as possible, and shall be continually encouraged during the remainder of the maneuver. Subject shall continue the maneuver for 15 seconds. At least 5 minutes of rest shall be allowed between maneuvers. At least three MVV's shall be carried out. (*But see* § 718.103(b).) During the maneuvers the patient shall be observed for compliance with instructions. The effort shall be judged unacceptable when the patient:

(A) Has not maintained consistent effort for at least 12 to 15 seconds; or

(B) Has coughed or closed his glottis; or

(C) Has an obstructed mouthpiece or a leak around the mouthpiece (obstruction due to tongue being placed in front of mouthpiece, false teeth falling in front of mouthpiece, etc.); or

(D) Has an excessive variability between the three acceptable curves. The variation between the two largest MVVs of the three satisfactory tracings shall not exceed 10 percent.

(iv) A calibration check shall be performed on the instrument each day before use, using a volume source of at least three liters, accurate to within +/−1 percent of full scale. The volume calibration shall be performed in accordance with the method described in paragraph (1)(vii) of this Appendix. Accuracy of the time measurement used in determining the FEV1 shall be checked using the manufacturer's stated procedure and shall be within +/−3 percent of actual. The procedure described in the Appendix shall be performed as well as any other procedures suggested by the manufacturer of the spirometer being used.

(v)(A) The first step in evaluating a spirogram for the FVC and FEV1 shall be to determine whether or not the patient has performed the test properly or as described in (2)(ii) of this Appendix. The largest recorded FVC and FEV1, corrected to BTPS, shall be used in the analysis.

(B) Only MVV maneuvers which demonstrate consistent effort for at least 12 seconds shall be considered acceptable. The largest accumulated volume for a 12 second period corrected to BTPS and multiplied by five or the largest accumulated volume for a 15 second period corrected to BTPS and multiplied by four is to be reported as the MVV.

* * * * *

Appendix C to Part 718—Blood-Gas Tables

The following tables set forth the values to be applied in determining whether total disability may be established in accordance with §§ 718.204(b)(2)(ii) and 718.305(a), (c). The values contained in the tables are indicative of impairment only. They do not establish a degree of disability except as provided in §§ 718.204(b)(2)(ii) and 718.305(a), (c) of this subchapter, nor do they establish standards for determining normal alveolar gas exchange values for any particular individual. Tests shall not be performed during or soon after an acute respiratory or cardiac illness. A miner who meets the following medical specifications shall be found to be totally disabled, in the absence of rebutting evidence, if the values specified in one of the following tables are met:

(1) For arterial blood-gas studies performed at test sites up to 2,999 feet above sea level:

Arterial PCO2 (mm Hg)	Arterial PO2 equal to or less than (mm Hg)
25 or below	75
26	74
27	73
28	72
29	71
30	70
31	69
32	68
33	67
34	66
35	65
36	64
37	63
38	62
39	61
40–49	60
Above 50	(1)

[1] Any value.

(2) For arterial blood-gas studies performed at test sites 3,000 to 5,999 feet above sea level:

Arterial PCO2 (mm Hg)	Arterial PO2 equal to or less than (mm Hg)
25 or below	70
26	69
27	68
28	67
29	66
30	65
31	64
32	63
33	62
34	61
35	60
36	59
37	58
38	57
39	56
40–49	55
Above 50	(2)

[2] Any value.

(3) For arterial blood-gas studies performed at test sites 6,000 feet or more above sea level:

Arterial PCO2 (mm Hg)	Arterial PO2 equal to or less than (mm Hg)
25 or below	65
26	64
27	63
28	62
29	61
30	60
31	59
32	58
33	57
34	56
35	55
36	54
37	53
38	52
39	51
40–49	50
Above 50	(3)

[3] Any value.

3. Part 722 is revised as follows:

PART 722—CRITERIA FOR DETERMINING WHETHER STATE WORKERS' COMPENSATION LAWS PROVIDE ADEQUATE COVERAGE FOR PNEUMOCONIOSIS AND LISTING OF APPROVED STATE LAWS

Sec.
722.1 Purpose.
722.2 Definitions.
722.3 General criteria; inclusion in and removal from the Secretary's list.
722.4 The Secretary's list.

Authority: 5 U.S.C. 301, Reorganization Plan No. 6 of 1950, 15 FR 3174, 30 U.S.C. 901 *et seq.*, 921, 932, 936; 33 U.S.C. 901 *et seq.*, Secretary's Order 7–87, 52 FR 48466, Employment Standards Order No. 90–02.

§ 722.1 Purpose.

Section 421 of the Black Lung Benefits Act provides that a claim for benefits based on the total disability or death of a coal miner due to pneumoconiosis must be filed under a State workers' compensation law where such law provides adequate coverage for pneumoconiosis. A State workers' compensation law may be deemed to provide adequate coverage only when it is included on a list of such laws maintained by the Secretary. The purpose of this part is to set forth the procedures and criteria for inclusion on that list, and to provide that list.

§ 722.2 Definitions.

(a) The definitions and use of terms contained in subpart A of part 725 of this title shall be applicable to this part.

(b) For purposes of this part, the following definitions apply:

(1) *State agency* means, with respect to any State, the agency, department or officer designated by the workers' compensation law of the State to administer such law. In any case in which more than one agency participates in the administration of a State workers' compensation law, the Governor of the State may designate which of the agencies shall be the State agency for purposes of this part.

(2) *The Secretary's list* means the list published by the Secretary of Labor in the **Federal Register** (see § 722.4) containing the names of those States which have in effect a workers' compensation law which provides adequate coverage for death or total disability due to pneumoconiosis.

§ 722.3 General criteria; inclusion in and removal from the Secretary's list.

(a) The Governor of any State or any duly authorized State agency may, at any time, request that the Secretary include such State's workers' compensation law on his list of those State workers' compensation laws providing adequate coverage for total disability or death due to pneumoconiosis. Each such request shall include a copy of the State workers' compensation law and any other pertinent State laws; a copy of any regulations, either proposed or promulgated, implementing such laws; and a copy of any relevant administrative or court decision interpreting such laws or regulations, or, if such decisions are published in a readily available report, a citation to such decision.

(b) Upon receipt of a request that a State be included on the Secretary's list, the Secretary shall include the State on the list if he finds that the State's workers' compensation law guarantees the payment of monthly and medical benefits to all persons who would be entitled to such benefits under the Black Lung Benefits Act at the time of the request, at a rate no less than that provided by the Black Lung Benefits Act. The criteria used by the Secretary in making such determination shall include, but shall not be limited to, the criteria set forth in section 421(b)(2) of the Act.

(c) The Secretary may require each State included on the list to submit reports detailing the extent to which the State's workers' compensation laws, as reflected by statute, regulation, or administrative or court decision, continues to meet the requirements of paragraph (b) of this section. If the Secretary concludes that the State's workers' compensation law does not provide adequate coverage at any time, either because of changes to the State workers' compensation law or the Black Lung Benefits Act, he shall remove the State from the Secretary's list after providing the State with notice of such removal and an opportunity to be heard.

§ 722.4 The Secretary's list.

(a) The Secretary has determined that publication of the Secretary's list in the Code of Federal Regulations is appropriate. Accordingly, in addition to its publication in the **Federal Register** as required by section 421 of the Black Lung Benefits Act, the list shall also appear in paragraph (b) of this section.

(b) Upon review of all requests filed with the Secretary under section 421 of the Black Lung Benefits Act and this part, and examination of the workers' compensation laws of the States making such requests, the Secretary has determined that the workers' compensation law of each of the following listed States, for the period from the date shown in the list until such date as the Secretary may make a contrary determination, provides adequate coverage for pneumoconiosis.

State	Period commencing
None	

4. Part 725 is revised as follows:

PART 725—CLAIMS FOR BENEFITS UNDER PART C OF TITLE IV OF THE FEDERAL MINE SAFETY AND HEALTH ACT, AS AMENDED

Subpart A—General

Sec.
725.1 Statutory provisions.
725.2 Purpose and applicability of this part.
725.3 Contents of this part.
725.4 Applicability of other parts in this title.
725.101 Definitions and use of terms.
725.102 Disclosure of program information.
725.103 Burden of proof.

Subpart B—Persons Entitled to Benefits, Conditions, and Duration of Entitlement

725.201 Who is entitled to benefits; contents of this subpart.

Conditions and Duration of Entitlement: Miner

725.202 Miner defined; conditions of entitlement, miner.
725.203 Duration and cessation of entitlement, miner.

Conditions and Duration of Entitlement: Miner's Dependents (Augmented Benefits)

725.204 Determination of relationship; spouse.
725.205 Determination of dependency; spouse.
725.206 Determination of relationship; divorced spouse.
725.207 Determination of dependency; divorced spouse.
725.208 Determination of relationship; child.
725.209 Determination of dependency; child.
725.210 Duration of augmented benefits.
725.211 Time of determination of relationship and dependency of spouse or child for purposes of augmentation of benefits.

Conditions and Duration of Entitlement: Miner's Survivors

725.212 Conditions of entitlement; surviving spouse or surviving divorced spouse.
725.213 Duration of entitlement; surviving spouse or surviving divorced spouse.
725.214 Determination of relationship; surviving spouse.
725.215 Determination of dependency; surviving spouse.
725.216 Determination of relationship; surviving divorced spouse.
725.217 Determination of dependency; surviving divorced spouse.
725.218 Conditions of entitlement; child.
725.219 Duration of entitlement; child.

725.220 Determination of relationship; child.
725.221 Determination of dependency; child.
725.222 Conditions of entitlement; parent, brother or sister.
725.223 Duration of entitlement; parent, brother or sister.
725.224 Determination of relationship; parent, brother or sister.
725.225 Determination of dependency; parent, brother or sister.
725.226 ''Good cause'' for delayed filing of proof of support.
725.227 Time of determination of relationship and dependency of survivors.
725.228 Effect of conviction of felonious and intentional homicide on entitlement to benefits.

Terms Used in this Subpart

725.229 Intestate personal property.
725.230 Legal impediment.
725.231 Domicile.
725.232 Member of the same household—''living with,'' ''living in the same household,'' and ''living in the miner's household,'' defined.
725.233 Support and contributions.

Subpart C—Filing of Claims

725.301 Who may file a claim.
725.302 Evidence of authority to file a claim on behalf of another.
725.303 Date and place of filing of claims.
725.304 Forms and initial processing.
725.305 When a written statement is considered a claim.
725.306 Withdrawal of a claim.
725.307 Cancellation of a request for withdrawal.
725.308 Time limits for filing claims.
725.309 Additional claims; effect of a prior denial of benefits.
725.310 Modification of awards and denials.
725.311 Communications with respect to claims; time computations.

Subpart D—Adjudication Officers; Parties and Representatives

725.350 Who are the adjudication officers?
725.351 Powers of adjudication officers.
725.352 Disqualification of adjudication officer.
725.360 Parties to proceedings
725.361 Party amicus curiae.
725.362 Representation of parties.
725.363 Qualification of representative.
725.364 Authority of representative.
725.365 Approval of representative's fees; lien against benefits.
725.366 Fees for representatives.
725.367 Payment of a claimant's attorney's fee by responsible operator or fund.

Subpart E—Adjudication of Claims by the District Director

725.401 Claims development—general.
725.402 Approved State workers' compensation law.
725.403 [Reserved].
725.404 Development of evidence—general
725.405 Development of medical evidence; scheduling of medical examinations and tests.
725.406 Medical examinations and tests.
725.407 Identification and notification of responsible operator.
725.408 Operator's response to notification.
725.409 Denial of a claim by reason of abandonment.
725.410 Submission of additional evidence.
725.411 Initial adjudication in Trust Fund cases.
725.412 Operator's response.
725.413 [Reserved].
725.414 Development of evidence.
725.415 Action by the district director after development of evidence.
725.416 Conferences.
725.417 Action at the conclusion of conference.
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725.423 Extensions of time.

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725.463 Issues to be resolved at hearing; new issues.
725.464 Record of hearing.
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725.476 Issuance of decision and order.
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725.478 Filing and service of decision and order.
725.479 Finality of decisions and orders.
725.480 Modification of decisions and orders.
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725.492 Successor operator defined.
725.493 Employment relationship defined.
725.494 Potentially liable operators.
725.495 Criteria for determining a responsible operator.
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725.538 Reductions; effect of augmentation of benefits based on subsequent qualification of individual.
725.539 More than one reduction event.

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725.540 Overpayments.
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725.542 When waiver of adjustment or recovery may be applied.
725.543 Standards for waiver of adjustment or recovery.
725.544 Collection and compromise of claims for overpayment.
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725.710 Objective of vocational rehabilitation.
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Authority: 5 U.S.C. 301, Reorganization Plan No. 6 of 1950, 15 FR 3174, 30 U.S.C. 901 et seq., 921, 932, 936; 33 U.S.C. 901 et seq., 42 U.S.C. 405, Secretary's Order 7–87, 52 FR 48466, Employment Standards Order No. 90–02.

Subpart A—General

§ 725.1 Statutory provisions.

(a) *General.* Title IV of the Federal Mine Safety and Health Act of 1977, as amended by the Black Lung Benefits Reform Act of 1977, the Black Lung Benefits Revenue Act of 1977, the Black Lung Benefits Revenue Act of 1981 and the Black Lung Benefits Amendments of 1981, provides for the payment of benefits to a coal miner who is totally disabled due to pneumoconiosis (black lung disease) and to certain survivors of a miner who dies due to pneumoconiosis. For claims filed prior to January 1, 1982, certain survivors could receive benefits if the miner was totally (or for claims filed prior to June 30, 1982, in accordance with section 411(c)(5) of the Act, partially) disabled due to pneumoconiosis, or if the miner died due to pneumoconiosis.

(b) *Part B.* Part B of title IV of the Act provided that all claims filed between December 30, 1969, and June 30, 1973, are to be filed with, processed, and paid by the Secretary of Health, Education, and Welfare through the Social Security Administration; claims filed by the survivor of a miner before January 1, 1974, or within 6 months of the miner's death if death occurred before January 1, 1974, and claims filed by the survivor of a miner who was receiving benefits under part B of title IV of the Act at the time of death, if filed within 6 months of the miner's death, are also adjudicated and paid by the Social Security Administration.

(c) *Section 415.* Claims filed by a miner between July 1 and December 31, 1973, are adjudicated and paid under section 415. Section 415 provides that a claim filed between the appropriate dates shall be filed with and adjudicated by the Secretary of Labor under certain incorporated provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901 et seq.). A claim approved under section 415 is paid under part B of title IV of the Act for periods of eligibility occurring between July 1 and December 31, 1973, by the Secretary of Labor and for periods of eligibility thereafter, is paid by a coal mine operator which is determined liable for the claim or the Black Lung Disability Trust Fund if no operator is identified or if the miner's last coal mine employment terminated prior to January 1, 1970. An operator which may be found liable for a section 415 claim is notified of the claim and allowed to participate fully in the adjudication of such claim. A claim filed under section 415 is for all purposes considered as if it were a part C claim (see paragraph (d) of this section) and the provisions of part C of title IV of the Act are fully applicable to a section 415 claim except as is otherwise provided in section 415.

(d) *Part C.* Claims filed by a miner or survivor on or after January 1, 1974, are filed, adjudicated, and paid under the provisions of part C of title IV of the Act. Part C requires that a claim filed on or after January 1, 1974, shall be filed under an applicable approved State workers' compensation law, or if no such law has been approved by the Secretary of Labor, the claim may be filed with the Secretary of Labor under section 422 of the Act. Claims filed with the Secretary of Labor under part C are processed and adjudicated by the Secretary and paid by a coal mine operator. If the miner's last coal mine employment terminated before January 1, 1970, or if no responsible operator can be identified, benefits are paid by the Black Lung Disability Trust Fund. Claims adjudicated under part C are subject to certain incorporated provisions of the Longshoremen's and Harbor Workers' Compensation Act.

(e) *Section 435.* Section 435 of the Act affords each person who filed a claim for benefits under part B, section 415, or part C, and whose claim had been denied or was still pending as of March 1, 1978, the effective date of the Black Lung Benefits Reform Act of 1977, the right to have his or her claim reviewed on the basis of the 1977 amendments to the Act, and under certain circumstances to submit new evidence in support of the claim.

(f) *Changes made by the Black Lung Benefits Reform Act of 1977.* In addition to those changes which are reflected in paragraphs (a) through (e) of this section, the Black Lung Benefits Reform Act of 1977 contains a number of significant amendments to the Act's standards for determining eligibility for benefits. Among these are:

(1) A provision which clarifies the definition of ''pneumoconiosis'' to include any ''chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment'';

(2) A provision which defines ''miner'' to include any person who works or has worked in or around a coal mine or coal preparation facility, and in coal mine construction or coal transportation under certain circumstances;

(3) A provision which limits the denial of a claim solely on the basis of employment in a coal mine;

(4) A provision which authorizes the Secretary of Labor to establish standards and develop criteria for determining total disability or death due to pneumoconiosis with respect to a part C claim;

(5) A new presumption which requires the payment of benefits to the survivors of a miner who was employed for 25 or more years in the mines under certain conditions;

(6) Provisions relating to the treatment to be accorded a survivor's affidavit, certain X-ray interpretations, and certain autopsy reports in the development of a claim; and

(7) Other clarifying, procedural, and technical amendments.

(g) *Changes made by the Black Lung Benefits Revenue Act of 1977.* The Black Lung Benefits Revenue Act of 1977 established the Black Lung Disability Trust Fund which is financed by a specified tax imposed upon each ton of coal (except lignite) produced and sold or used in the United States after March 31, 1978. The Secretary of the Treasury is the managing trustee of the fund and benefits are paid from the fund upon the direction of the Secretary of Labor. The fund was made liable for the payment of all claims approved under section 415, part C and section 435 of the Act for all periods of eligibility occurring on or after January 1, 1974, with respect to claims where the miner's last coal mine employment terminated before January

1, 1970, or where individual liability can not be assessed against a coal mine operator due to bankruptcy, insolvency, or the like. The fund was also authorized to pay certain claims which a responsible operator has refused to pay within a reasonable time, and to seek reimbursement from such operator. The purpose of the fund and the Black Lung Benefits Revenue Act of 1977 was to insure that coal mine operators, or the coal industry, will fully bear the cost of black lung disease for the present time and in the future. The Black Lung Benefits Revenue Act of 1977 also contained other provisions relating to the fund and authorized a coal mine operator to establish its own trust fund for the payment of certain claims.

(h) *Changes made by the Black Lung Benefits Amendments of 1981.* In addition to the change reflected in paragraph (a) of this section, the Black Lung Benefits Amendments of 1981 made a number of significant changes in the Act's standards for determining eligibility for benefits and concerning the payment of such benefits. The following changes are all applicable to claims filed on or after January 1, 1982:

(1) The Secretary of Labor may re-read any X-ray submitted in support of a claim and may rely upon a second opinion concerning such an X-ray as a means of auditing the validity of the claim;

(2) The rebuttable presumption that the death of a miner with ten or more years employment in the coal mines, who died of a respirable disease, was due to pneumoconiosis is no longer applicable;

(3) The rebuttable presumption that the total disability of a miner with fifteen or more years employment in the coal mines, who has demonstrated a totally disabling respiratory or pulmonary impairment, is due to pneumoconiosis is no longer applicable;

(4) In the case of deceased miners, where no medical or other relevant evidence is available, only affidavits from persons not eligible to receive benefits as a result of the adjudication of the claim will be considered sufficient to establish entitlement to benefits;

(5) Unless the miner was found entitled to benefits as a result of a claim filed prior to January 1, 1982, benefits are payable on survivors' claims filed on and after January 1, 1982, only when the miner's death was due to pneumoconiosis;

(6) Benefits payable under this part are subject to an offset on account of excess earnings by the miner; and

(7) Other technical amendments.

(i) *Changes made by the Black Lung Benefits Revenue Act of 1981.* The Black Lung Benefits Revenue Act of 1981 temporarily doubles the amount of the tax upon coal until the fund shall have repaid all advances received from the United States Treasury and the interest on all such advances. The fund is also made liable for the payment of certain claims previously denied under the 1972 version of the Act and subsequently approved under section 435 and for the reimbursement of operators and insurers for benefits previously paid by them on such claims. With respect to claims filed on or after January 1, 1982, the fund's authorization for the payment of interim benefits is limited to the payment of prospective benefits only. These changes also define the rates of interest to be paid to and by the fund.

(j) *Longshoremen's Act provisions.* The adjudication of claims filed under sections 415, 422 and 435 of the Act is governed by various procedural and other provisions contained in the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), as amended from time to time, which are incorporated within the Act by sections 415 and 422. The incorporated LHWCA provisions are applicable under the Act except as is otherwise provided by the Act or as provided by regulations of the Secretary. Although occupational disease benefits are also payable under the LHWCA, the primary focus of the procedures set forth in that Act is upon a time definite of traumatic injury or death. Because of this and other significant differences between a black lung and longshore claim, it is determined, in accordance with the authority set forth in section 422 of the Act, that certain of the incorporated procedures prescribed by the LHWCA must be altered to fit the circumstances ordinarily confronted in the adjudication of a black lung claim. The changes made are based upon the Department's experience in processing black lung claims since July 1, 1973, and all such changes are specified in this part or part 727 of this subchapter (see § 725.4(d)). No other departure from the incorporated provisions of the LHWCA is intended.

(k) *Social Security Act provisions.* Section 402 of Part A of the Act incorporates certain definitional provisions from the Social Security Act, 42 U.S.C. 301 *et seq.* Section 430 provides that the 1972, 1977 and 1981 amendments to part B of the Act shall also apply to part C ''to the extent appropriate.'' Sections 412 and 413 incorporate various provisions of the Social Security Act into part B of the Act. To the extent appropriate, therefore, these provisions also apply to part C. In certain cases, the Department has varied the terms of the Social Security Act provisions to accommodate the unique needs of the black lung benefits program. Parts of the Longshore and Harbor Workers' Compensation Act are also incorporated into part C. Where the incorporated provisions of the two acts are inconsistent, the Department has exercised its broad regulatory powers to choose the extent to which each incorporation is appropriate. Finally, Section 422(g), contained in part C of the Act, incorporates 42 U.S.C. 403(b)–(l).

§ 725.2 Purpose and applicability of this part.

(a) This part sets forth the procedures to be followed and standards to be applied in filing, processing, adjudicating, and paying claims filed under part C of title IV of the Act.

(b) This part applies to all claims filed under part C of title IV of the Act on or after August 18, 1978 and shall also apply to claims that were pending on August 18, 1978.

(c) The provisions of this part reflect revisions that became effective on Janaury 19, 2001. This part applies to all claims filed, and all benefits payments made, after January 19, 2001. With the exception of the following sections, this part shall also apply to the adjudication of claims that were pending on January 19, 2001: §§ 725.309, 725.310, 725.351, 725.360, 725.367, 725.406, 725.407, 725.408, 725.409, 725.410, 725.411, 725.412, 725.414, 725.415, 725.416, 725.417, 725.418, 725.421(b), 725.423, 725.454, 725.456, 725.457, 725.458, 725.459, 725.465, 725.491, 725.492, 725.493, 725.494, 725.495, 725.547. The version of those sections set forth in 20 CFR, parts 500 to end, edition revised as of April 1, 1999, apply to the adjudications of claims that were pending on January 19, 2001. For purposes of construing the provisions of this section, a claim shall be considered pending on January 19, 2001 if it was not finally denied more than one year prior to that date.

§ 725.3 Contents of this part.

(a) This subpart describes the statutory provisions which relate to claims considered under this part, the purpose and scope of this part, definitions and usages of terms applicable to this part, and matters relating to the availability of information collected by the Department of Labor in connection with the processing of claims.

(b) Subpart B contains criteria for determining who may be found entitled to benefits under this part and other provisions relating to the conditions and duration of eligibility of a particular individual.

(c) Subpart C describes the procedures to be followed and action to be taken in connection with the filing of a claim under this part.

(d) Subpart D sets forth the duties and powers of the persons designated by the Secretary of Labor to adjudicate claims and provisions relating to the rights of parties and representatives of parties.

(e) Subpart E contains the procedures for developing evidence and adjudicating entitlement and liability issues by the district director.

(f) Subpart F describes the procedures to be followed if a hearing before the Office of Administrative Law Judges is required.

(g) Subpart G contains provisions governing the identification of a coal mine operator which may be liable for the payment of a claim.

(h) Subpart H contains provisions governing the payment of benefits with respect to an approved claim.

(i) Subpart I describes the statutory mechanisms provided for the enforcement of a coal mine operator's liability, sets forth the penalties which may be applied in the case of a defaulting coal mine operator, and describes the obligation of coal operators and their insurance carriers to file certain reports.

(j) Subpart J describes the right of certain beneficiaries to receive medical treatment benefits and vocational rehabilitation under the Act.

§ 725.4 Applicability of other parts in this title.

(a) Part 718. Part 718 of this subchapter, which contains the criteria and standards to be applied in determining whether a miner is or was totally disabled due to pneumoconiosis, or whether a miner died due to pneumoconiosis, shall be applicable to the determination of claims under this part. Claims filed after March 31, 1980, are subject to part 718 as promulgated by the Secretary in accordance with section 402(f)(1) of the Act on February 29, 1980 (see § 725.2(c)). The criteria contained in subpart C of part 727 of this subchapter are applicable in determining claims filed prior to April 1, 1980, under this part, and such criteria shall be applicable at all times with respect to claims filed under this part and under section 11 of the Black Lung Benefits Reform Act of 1977.

(b) *Parts 715, 717, and 720.* Pertinent and significant provisions of Parts 715, 717, and 720 of this subchapter (formerly contained in 20 CFR, parts 500 to end, edition revised as of April 1, 1978), which established the procedures for the filing, processing, and payment of claims filed under section 415 of the Act, are included within this part as appropriate.

(c) *Part 726.* Part 726 of this subchapter, which sets forth the obligations imposed upon a coal operator to insure or self-insure its liability for the payment of benefits to certain eligible claimants, is applicable to this part as appropriate.

(d) *Part 727.* Part 727 of this subchapter, which governs the review, adjudication and payment of pending and denied claims under section 435 of the Act, is applicable with respect to such claims. The criteria contained in subpart C of part 727 for determining a claimant's eligibility for benefits are applicable under this part with respect to all claims filed before April 1, 1980, and to all claims filed under this part and under section 11 of the Black Lung Benefits Reform Act of 1977. Because the part 727 regulations affect an increasingly smaller number of claims, however, the Department has discontinued publication of the criteria in the Code of Federal Regulations. The part 727 criteria may be found at 43 FR 36818, Aug. 18, 1978 or 20 CFR, parts 500 to end, edition revised as of April 1, 1999.

(e) *Part 410.* Part 410 of this title, which sets forth provisions relating to a claim for black lung benefits under part B of title IV of the Act, is inapplicable to this part except as is provided in this part, or in part 718 of this subchapter.

§ 725.101 Definition and use of terms.

(a) *Definitions.* For purposes of this subchapter, except where the content clearly indicates otherwise, the following definitions apply:

(1) The *Act* means the Federal Coal Mine Health and Safety Act, Public Law 91–173, 83 Stat. 742, 30 U.S.C. 801–960, as amended by the Black Lung Benefits Act of 1972, the Mine Safety and Health Act of 1977, the Black Lung Benefits Reform Act of 1977, the Black Lung Benefits Revenue Act of 1977, the Black Lung Benefits Revenue Act of 1981, and the Black Lung Benefits Amendments of 1981.

(2) The *Longshoremen's Act* or LHWCA means the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, c. 509, 44 Stat. 1424, 33 U.S.C. 901–950, as amended from time to time.

(3) The *Social Security Act* means the Social Security Act, Act of August 14, 1935, c. 531, 49 Stat. 620, 42 U.S.C. 301–431, as amended from time to time.

(4) *Administrative law judge* means a person qualified under 5 U.S.C. 3105 to conduct hearings and adjudicate claims for benefits filed pursuant to section 415 and part C of the Act. Until March 1, 1979, it shall also mean an individual appointed to conduct such hearings and adjudicate such claims under Public Law 94–504.

(5) *Beneficiary* means a miner or any surviving spouse, divorced spouse, child, parent, brother or sister, who is entitled to benefits under either section 415 or part C of title IV of the Act.

(6) *Benefits* means all money or other benefits paid or payable under section 415 or part C of title IV of the Act on account of disability or death due to pneumoconiosis, including augmented benefits (see § 725.520(c)). The term also includes any expenses related to the medical examination and testing authorized by the district director pursuant to § 725.406.

(7) *Benefits Review Board* or *Board* means the Benefits Review Board, U.S. Department of Labor, an appellate tribunal appointed by the Secretary of Labor pursuant to the provisions of section 21(b)(1) of the LHWCA. See parts 801 and 802 of this title.

(8) *Black Lung Disability Trust Fund* or the *fund* means the Black Lung Disability Trust Fund established by the Black Lung Benefits Revenue Act of 1977, as amended by the Black Lung Benefits Revenue Act of 1981, for the payment of certain claims adjudicated under this part (see subpart G of this part).

(9) *Chief Administrative Law Judge* means the Chief Administrative Law Judge of the Office of Administrative Law Judges, U.S. Department of Labor, 800 K Street, NW., suite 400, Washington, DC 20001–8002.

(10) *Claim* means a written assertion of entitlement to benefits under section 415 or part C of title IV of the Act, submitted in a form and manner authorized by the provisions of this subchapter.

(11) *Claimant* means an individual who files a claim for benefits under this part.

(12) *Coal mine* means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, placed upon, under or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite or anthracite from its natural deposits in the earth by any means or method, and in the work of preparing the coal so extracted, and

includes custom coal preparation facilities.

(13) *Coal preparation* means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of bituminous coal, lignite or anthracite, and such other work of preparing coal as is usually done by the operator of a coal mine.

(14) *Department* means the United States Department of Labor.

(15) *Director* means the Director, OWCP, or his or her designee.

(16) *District Director* means a person appointed as provided in sections 39 and 40 of the LHWCA, or his or her designee, who is authorized to develop and adjudicate claims as provided in this subchapter (see § 725.350). The term District Director is substituted for the term Deputy Commissioner wherever that term appears in the regulations. This substitution is for administrative purposes only and in no way affects the power or authority of the position as established in the statute. Any action taken by a person under the authority of a district director will be considered the action of a deputy commissioner.

(17) *Division* or *DCMWC* means the Division of Coal Mine Workers' Compensation in the OWCP, Employment Standards Administration, United States Department of Labor.

(18) *Insurer* or *carrier* means any private company, corporation, mutual association, reciprocal or interinsurance exchange, or any other person or fund, including any State fund, authorized under the laws of a State to insure employers' liability under workers' compensation laws. The term also includes the Secretary of Labor in the exercise of his or her authority under section 433 of the Act.

(19) *Miner* or *coal miner* means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. The term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal mine dust as a result of such employment (see § 725.202). For purposes of this definition, the term does not include coke oven workers.

(20) *The Nation's coal mines* means all coal mines located in any State.

(21) *Office* or *OWCP* means the Office of Workers' Compensation Programs, United States Department of Labor.

(22) *Office of Administrative Law Judges* means the Office of Administrative Law Judges, U.S. Department of Labor.

(23) *Operator* means any owner, lessee, or other person who operates, controls or supervises a coal mine, including a prior or successor operator as defined in section 422 of the Act and certain transportation and construction employers (see subpart G of this part).

(24) *Person* means an individual, partnership, association, corporation, firm, subsidiary or parent of a corporation, or other organization or business entity.

(25) *Pneumoconiosis* means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment (see part 718 of this subchapter).

(26) *Responsible operator* means an operator which has been determined to be liable for the payment of benefits to a claimant for periods of eligibility after December 31, 1973, with respect to a claim filed under section 415 or part C of title IV of the Act or reviewed under section 435 of the Act.

(27) *Secretary* means the Secretary of Labor, United States Department of Labor, or a person, authorized by him or her to perform his or her functions under title IV of the Act.

(28) *State* includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, and prior to January 3, 1959, and August 21, 1959, respectively, the territories of Alaska and Hawaii.

(29) *Total disability* and *partial disability*, for purposes of this part, have the meaning given them as provided in part 718 of this subchapter.

(30) *Underground coal mine* means a coal mine in which the earth and other materials which lie above and around the natural deposit of coal (i.e., overburden) are not removed in mining; including all land, structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, appurtenant thereto.

(31) A *workers' compensation law* means a law providing for payment of benefits to employees, and their dependents and survivors, for disability on account of injury, including occupational disease, or death, suffered in connection with their employment. A payment funded wholly out of general revenues shall not be considered a payment under a workers' compensation law.

(32) *Year* means a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 ''working days.'' A ''working day'' means any day or part of a day for which a miner received pay for work as a miner, but shall not include any day for which the miner received pay while on an approved absence, such as vacation or sick leave. In determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year.

(i) If the evidence establishes that the miner worked in or around coal mines at least 125 working days during a calendar year or partial periods totaling one year, then the miner has worked one year in coal mine employment for all purposes under the Act. If a miner worked fewer than 125 working days in a year, he or she has worked a fractional year based on the ratio of the actual number of days worked to 125. Proof that the miner worked more than 125 working days in a calendar year or partial periods totaling a year, shall not establish more than one year.

(ii) To the extent the evidence permits, the beginning and ending dates of all periods of coal mine employment shall be ascertained. The dates and length of employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony. If the evidence establishes that the miner's employment lasted for a calendar year or partial periods totaling a 365-day period amounting to one year, it shall be presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment.

(iii) If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). A copy of the BLS table shall be made a part of the record if the adjudication officer uses this method to establish the length of the miner's work history.

(iv) No periods of coal mine employment occurring outside the United States shall be considered in computing the miner's work history.

(b) *Statutory terms.* The definitions contained in this section shall not be

construed in derogation of terms of the Act.

(c) *Dependents and survivors.* Dependents and survivors are those persons described in subpart B of this part.

§ 725.102 Disclosure of program information.

(a) All reports, records, or other documents filed with the OWCP with respect to claims are the records of the OWCP. The Director or his or her designee shall be the official custodian of those records maintained by the OWCP at its national office. The District Director shall be the official custodian of those records maintained at a district office.

(b) The official custodian of any record sought to be inspected shall permit or deny inspection in accordance with the Department of Labor's regulations pertaining thereto (see 29 CFR Part 70). The original record in any such case shall not be removed from the Office of the custodian for such inspection. The custodian may, in his or her discretion, deny inspection of any record or part thereof which is of a character specified in 5 U.S.C. 552(b) if in his or her opinion such inspection may result in damage, harm, or harassment to the beneficiary or to any other person. For special provisions concerning release of information regarding injured employees undergoing vocational rehabilitation, see § 702.508 of this chapter.

(c) Any person may request copies of records he or she has been permitted to inspect. Such requests shall be addressed to the official custodian of the records sought to be copied. The official custodian shall provide the requested copies under the terms and conditions specified in the Department of Labor's regulations relating thereto (see 29 CFR Part 70).

(d) Any party to a claim (§ 725.360) or his or her duly authorized representative shall be permitted upon request to inspect the file which has been compiled in connection with such claim. Any party to a claim or representative of such party shall upon request be provided with a copy of any or all material contained in such claim file. A request for information by a party or representative made under this paragraph shall be answered within a reasonable time after receipt by the Office. Internal documents prepared by the district director which do not constitute evidence of a fact which must be established in connection with a claim shall not be routinely provided or presented for inspection in accordance with a request made under this paragraph.

§ 725.103 Burden of proof.

Except as otherwise provided in this part and part 718, the burden of proving a fact alleged in connection with any provision shall rest with the party making such allegation.

Subpart B—Persons Entitled to Benefits, Conditions, and Duration of Entitlement

§ 725.201 Who is entitled to benefits; contents of this subpart.

(a) Section 415 and part C of the Act provide for the payment of periodic benefits in accordance with this part to:

(1) A miner (see § 725.202) who is determined to be totally disabled due to pneumoconiosis; or

(2) The surviving spouse or surviving divorced spouse or, where neither exists, the child of a deceased miner, where the deceased miner:

(i) Was receiving benefits under section 415 or part C of title IV of the Act as a result of a claim filed prior to January 1, 1982; or

(ii) Is determined as a result of a claim filed prior to January 1, 1982, to have been totally disabled due to pneumoconiosis at the time of death, or to have died due to pneumoconiosis. Survivors of miners whose claims are filed on or after January 1, 1982, must establish that the deceased miner's death was due to pneumoconiosis in order to establish their entitlement to benefits, except where entitlement is established under § 718.306 of this subchapter on a survivor's claim filed prior to June 30, 1982, or;

(3) The child of a miner's surviving spouse who was receiving benefits under section 415 or part C of title IV of the Act at the time of such spouse's death; or

(4) The surviving dependent parents, where there is no surviving spouse or child, or the surviving dependent brothers or sisters, where there is no surviving spouse, child, or parent, of a miner, where the deceased miner;

(i) Was receiving benefits under section 415 or part C of title IV of the Act as a result of a claim filed prior to January 1, 1982; or

(ii) Is determined as a result of a claim filed prior to January 1, 1982, to have been totally disabled due to pneumoconiosis at the time of death, or to have died due to pneumoconiosis. Survivors of miners whose claims are filed on or after January 1, 1982, must establish that the deceased miner's death was due to pneumoconiosis in order to establish their entitlement to benefits, except where entitlement is established under § 718.306 of this subchapter on a survivor's claim filed prior to June 30, 1982.

(b) Section 411(c)(5) of the Act provides for the payment of benefits to the eligible survivors of a miner employed for 25 or more years in the mines prior to June 30, 1971, if the miner's death occurred on or before March 1, 1978, and if the claim was filed prior to June 30, 1982, unless it is established that at the time of death, the miner was not totally or partially disabled due to pneumoconiosis. For the purposes of this part the term ''total disability'' shall mean partial disability with respect to a claim for which eligibility is established under section 411(c)(5) of the Act. See § 718.306 of this subchapter which implements this provision of the Act.

(c) The provisions contained in this subpart describe the conditions of entitlement to benefits applicable to a miner, or a surviving spouse, child, parent, brother, or sister, and the events which establish or terminate entitlement to benefits.

(d) In order for an entitled miner or surviving spouse to qualify for augmented benefits because of one or more dependents, such dependents must meet relationship and dependency requirements with respect to such beneficiary prescribed by or pursuant to the Act. Such requirements are also set forth in this subpart.

Conditions and Duration of Entitlement: Miner

§ 725.202 Miner defined; condition of entitlement, miner.

(a) *Miner defined.* A ''miner'' for the purposes of this part is any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. There shall be a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner. This presumption may be rebutted by proof that:

(1) The person was not engaged in the extraction, preparation or transportation of coal while working at the mine site, or in maintenance or construction of the mine site; or

(2) The individual was not regularly employed in or around a coal mine or coal preparation facility.

(b) *Coal mine construction and transportation workers; special*

provisions. A coal mine construction or transportation worker shall be considered a miner to the extent such individual is or was exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility. A transportation worker shall be considered a miner to the extent that his or her work is integral to the extraction or preparation of coal. A construction worker shall be considered a miner to the extent that his or her work is integral to the building of a coal or underground mine (see § 725.101(a)(12), (30)).

(1) There shall be a rebuttable presumption that such individual was exposed to coal mine dust during all periods of such employment occurring in or around a coal mine or coal preparation facility for purposes of:

(i) Determining whether such individual is or was a miner;

(ii) Establishing the applicability of any of the presumptions described in section 411(c) of the Act and part 718 of this subchapter; and

(iii) Determining the identity of a coal mine operator liable for the payment of benefits in accordance with § 725.495.

(2) The presumption may be rebutted by evidence which demonstrates that:

(i) The individual was not regularly exposed to coal mine dust during his or her work in or around a coal mine or coal preparation facility; or

(ii) The individual did not work regularly in or around a coal mine or coal preparation facility.

(c) A person who is or was a self-employed miner or independent contractor, and who otherwise meets the requirements of this paragraph, shall be considered a miner for the purposes of this part.

(d) *Conditions of entitlement; miner.* An individual is eligible for benefits under this subchapter if the individual:

(1) Is a miner as defined in this section; and

(2) Has met the requirements for entitlement to benefits by establishing that he or she:

(i) Has pneumoconiosis (see § 718.202), and

(ii) The pneumoconiosis arose out of coal mine employment (see § 718.203), and

(iii) Is totally disabled (see § 718.204(c)), and

(iv) The pneumoconiosis contributes to the total disability (see § 718.204(c)); and

(3) Has filed a claim for benefits in accordance with the provisions of this part.

§ 725.203 Duration and cessation of entitlement; miner.

(a) An individual is entitled to benefits as a miner for each month beginning with the first month on or after January 1, 1974, in which the miner is totally disabled due to pneumoconiosis arising out of coal mine employment.

(b) The last month for which such individual is entitled to benefits is the month before the month during which either of the following events first occurs:

(1) The miner dies; or

(2) The miner's total disability ceases (see § 725.504).

(c) An individual who has been finally adjudged to be totally disabled due to pneumoconiosis and is receiving benefits under the Act shall promptly notify the Office and the responsible coal mine operator, if any, if he or she engages in his or her usual coal mine work or comparable and gainful work.

(d) Upon reasonable notice, an individual who has been finally adjudged entitled to benefits shall submit to any additional tests or examinations the Office deems appropriate, and shall submit medical reports and other relevant evidence the Office deems necessary, if an issue arises pertaining to the validity of the original award.

Conditions and Duration of Entitlement: Miner's Dependents (Augmented Benefits)

§ 725.204 Determination of relationship; spouse.

(a) For the purpose of augmenting benefits, an individual will be considered to be the spouse of a miner if:

(1) The courts of the State in which the miner is domiciled would find that such individual and the miner validly married; or

(2) The courts of the State in which the miner is domiciled would find, under the law they would apply in determining the devolution of the miner's intestate personal property, that the individual is the miner's spouse; or

(3) Under State law, such individual would have the right of a spouse to share in the miner's intestate personal property; or

(4) Such individual went through a marriage ceremony with the miner resulting in a purported marriage between them and which, but for a legal impediment, would have been a valid marriage, unless the individual entered into the purported marriage with knowledge that it was not a valid marriage, or if such individual and the miner were not living in the same household in the month in which a request is filed that the miner's benefits be augmented because such individual qualifies as the miner's spouse.

(b) The qualification of an individual for augmentation purposes under this section shall end with the month before the month in which:

(1) The individual dies, or

(2) The individual who previously qualified as a spouse for purposes of § 725.520(c), entered into a valid marriage without regard to this section, with a person other than the miner.

§ 725.205 Determination of dependency; spouse.

For the purposes of augmenting benefits, an individual who is the miner's spouse (see § 725.204) will be determined to be dependent upon the miner if:

(a) The individual is a member of the same household as the miner (see § 725.232); or

(b) The individual is receiving regular contributions from the miner for support (see § 725.233(c)); or

(c) The miner has been ordered by a court to contribute to such individual's support (see § 725.233(e)); or

(d) The individual is the natural parent of the son or daughter of the miner; or

(e) The individual was married to the miner (see § 725.204) for a period of not less than 1 year.

§ 725.206 Determination of relationship; divorced spouse.

For the purposes of augmenting benefits with respect to any claim considered or reviewed under this part or part 727 of this subchapter (see § 725.4(d)), an individual will be considered to be the divorced spouse of a miner if the individual's marriage to the miner has been terminated by a final divorce on or after the 10th anniversary of the marriage unless, if such individual was married to and divorced from the miner more than once, such individual was married to the miner in each calendar year of the period beginning 10 years immediately before the date on which any divorce became final.

§ 725.207 Determination of dependency; divorced spouse.

For the purpose of augmenting benefits, an individual who is the miner's divorced spouse (§ 725.206) will be determined to be dependent upon the miner if:

(a) The individual is receiving at least one-half of his or her support from the miner (see § 725.233(g)); or

(b) The individual is receiving substantial contributions from the miner pursuant to a written agreement (see § 725.233(c) and (f)); or

(c) A court order requires the miner to furnish substantial contributions to the individual's support (see § 725.233(c) and (e)).

§ 725.208 Determination of relationship; child.

As used in this section, the term ''beneficiary'' means only a surviving spouse entitled to benefits at the time of death (see § 725.212), or a miner. An individual will be considered to be the child of a beneficiary if:

(a) The courts of the State in which the beneficiary is domiciled (see § 725.231) would find, under the law they would apply, that the individual is the beneficiary's child; or

(b) The individual is the legally adopted child of such beneficiary; or

(c) The individual is the stepchild of such beneficiary by reason of a valid marriage of the individual's parent or adopting parent to such beneficiary; or

(d) The individual does not bear the relationship of child to such beneficiary under paragraph (a), (b), or (c) of this section, but would, under State law, have the same right as a child to share in the beneficiary's intestate personal property; or

(e) The individual is the natural son or daughter of a beneficiary but is not a child under paragraph (a), (b), or (c) of this section, and is not considered to be the child of the beneficiary under paragraph (d) of this section if the beneficiary and the mother or the father, as the case may be, of the individual went through a marriage ceremony resulting in a purported marriage between them which but for a legal impediment (see § 725.230) would have been a valid marriage; or

(f) The individual is the natural son or daughter of a beneficiary but is not a child under paragraph (a), (b), or (c) of this section, and is not considered to be the child of the beneficiary under paragraph (d) or (e) of this section, such individual shall nevertheless be considered to be the child of the beneficiary if:

(1) The beneficiary, prior to his or her entitlement to benefits, has acknowledged in writing that the individual is his or her son or daughter, or has been decreed by a court to be the parent of the individual, or has been ordered by a court to contribute to the support of the individual (see § 725.233(e)) because the individual is his or her son or daughter; or

(2) Such beneficiary is shown by satisfactory evidence to be the father or mother of the individual and was living with or contributing to the support of the individual at the time the beneficiary became entitled to benefits.

§ 725.209 Determination of dependency; child.

(a) For purposes of augmenting the benefits of a miner or surviving spouse, the term ''beneficiary'' as used in this section means only a miner or surviving spouse entitled to benefits (see § 725.202 and § 725.212). An individual who is the beneficiary's child (§ 725.208) will be determined to be, or to have been, dependent on the beneficiary, if the child:

(1) Is unmarried; and

(2)(i) Is under 18 years of age; or

(ii) Is under a disability as defined in section 223(d) of the Social Security Act, 42 U.S.C. 423(d); or

(iii) Is 18 years of age or older and is a student.

(b)(1) The term ''student'' means a ''full-time student'' as defined in section 202(d)(7) of the Social Security Act, 42 U.S.C. 402(d)(7) (see §§ 404.367—404.369 of this title), or an individual under 23 years of age who has not completed 4 years of education beyond the high school level and who is regularly pursuing a full-time course of study or training at an institution which is:

(i) A school, college, or university operated or directly supported by the United States, or by a State or local government or political subdivision thereof; or

(ii) A school, college, or university which has been accredited by a State or by a State-recognized or nationally-recognized accrediting agency or body; or

(iii) A school, college, or university not so accredited but whose credits are accepted, on transfer, by at least three institutions which are so accredited; or

(iv) A technical, trade, vocational, business, or professional school accredited or licensed by the Federal or a State government or any political subdivision thereof, providing courses of not less than 3 months' duration that prepare the student for a livelihood in a trade, industry, vocation, or profession.

(2) A student will be considered to be ''pursuing a full-time course of study or training at an institution'' if the student is enrolled in a noncorrespondence course of at least 13 weeks duration and is carrying a subject load which is considered full-time for day students under the institution's standards and practices. A student beginning or ending a full-time course of study or training in part of any month will be considered to be pursuing such course for the entire month.

(3) A child is considered not to have ceased to be a student:

(i) During any interim between school years, if the interim does not exceed 4 months and the child shows to the satisfaction of the Office that he or she has a bona fide intention of continuing to pursue a full-time course of study or training; or

(ii) During periods of reasonable duration in which, in the judgment of the Office, the child is prevented by factors beyond the child's control from pursuing his or her education.

(4) A student whose 23rd birthday occurs during a semester or the enrollment period in which such student is pursuing a full-time course of study or training shall continue to be considered a student until the end of such period, unless eligibility is otherwise terminated.

§ 725.210 Duration of augmented benefits.

Augmented benefits payable on behalf of a spouse or divorced spouse, or a child, shall begin with the first month in which the dependent satisfies the conditions of relationship and dependency set forth in this subpart. Augmentation of benefits on account of a dependent continues through the month before the month in which the dependent ceases to satisfy these conditions, except in the case of a child who qualifies as a dependent because such child is a student. In the latter case, benefits continue to be augmented through the month before the first month during no part of which such child qualifies as a student.

§ 725.211 Time of determination of relationship and dependency of spouse or child for purposes of augmentation of benefits.

With respect to the spouse or child of a miner entitled to benefits, and with respect to the child of a surviving spouse entitled to benefits, the determination as to whether an individual purporting to be a spouse or child is related to or dependent upon such miner or surviving spouse shall be based on the facts and circumstances present in each case, at the appropriate time.

Conditions and Duration of Entitlement: Miner's Survivors

§ 725.212 Conditions of entitlement; surviving spouse or surviving divorced spouse.

(a) An individual who is the surviving spouse or surviving divorced spouse of a miner is eligible for benefits if such individual:

(1) Is not married;

(2) Was dependent on the miner at the pertinent time; and

(3) The deceased miner either:

(i) Was receiving benefits under section 415 or part C of title IV of the Act at the time of death as a result of a claim filed prior to January 1, 1982; or

(ii) Is determined as a result of a claim filed prior to January 1, 1982, to have been totally disabled due to pneumoconiosis at the time of death or to have died due to pneumoconiosis. A surviving spouse or surviving divorced spouse of a miner whose claim is filed on or after January 1, 1982, must establish that the deceased miner's death was due to pneumoconiosis in order to establish entitlement to benefits, except where entitlement is established under § 718.306 of part 718 on a claim filed prior to June 30, 1982.

(b) If more than one spouse meets the conditions of entitlement prescribed in paragraph (a), then each spouse will be considered a beneficiary for purposes of section 412(a)(2) of the Act without regard to the existence of any other entitled spouse or spouses.

§ 725.213 Duration of entitlement; surviving spouse or surviving divorced spouse.

(a) An individual is entitled to benefits as a surviving spouse, or as a surviving divorced spouse, for each month beginning with the first month in which all of the conditions of entitlement prescribed in § 725.212 are satisfied.

(b) The last month for which such individual is entitled to such benefits is the month before the month in which either of the following events first occurs:

(1) The surviving spouse or surviving divorced spouse marries; or

(2) The surviving spouse or surviving divorced spouse dies.

(c) A surviving spouse or surviving divorced spouse whose entitlement to benefits has been terminated pursuant to § 725.213(b)(1) may thereafter again become entitled to such benefits upon filing application for such reentitlement, beginning with the first month after the marriage ends and such individual meets the requirements of § 725.212. The individual shall not be required to reestablish the miner's entitlement to benefits (§ 725.212(a)(3)(i)) or the miner's death due to pneumoconiosis (§ 725.212(a)(3)(ii)).

§ 725.214 Determination of relationship; surviving spouse.

An individual shall be considered to be the surviving spouse of a miner if:

(a) The courts of the State in which the miner was domiciled (see § 725.231) at the time of his or her death would find that the individual and the miner were validly married; or

(b) The courts of the State in which the miner was domiciled (see § 725.231) at the time of the miner's death would find that the individual was the miner's surviving spouse; or

(c) Under State law, such individual would have the right of the spouse to share in the miner's intestate personal property; or

(d) Such individual went through a marriage ceremony with the miner, resulting in a purported marriage between them which, but for a legal impediment (see § 725.230), would have been a valid marriage, unless such individual entered into the purported marriage with knowledge that it was not a valid marriage, or if such individual and the miner were not living in the same household at the time of the miner's death.

§ 725.215 Determination of dependency; surviving spouse.

An individual who is the miner's surviving spouse (see § 725.214) shall be determined to have been dependent on the miner if, at the time of the miner's death:

(a) The individual was living with the miner (see § 725.232); or

(b) The individual was dependent upon the miner for support or the miner has been ordered by a court to contribute to such individual's support (see § 725.233); or

(c) The individual was living apart from the miner because of the miner's desertion or other reasonable cause; or

(d) The individual is the natural parent of the miner's son or daughter; or

(e) The individual had legally adopted the miner's son or daughter while the individual was married to the miner and while such son or daughter was under the age of 18; or

(f) The individual was married to the miner at the time both of them legally adopted a child under the age of 18; or

(g)(1) The individual was married to the miner for a period of not less than 9 months immediately before the day on which the miner died, unless the miner's death:

(i) Is accidental (as defined in paragraph (g)(2) of this section), or

(ii) Occurs in line of duty while the miner is a member of a uniformed service serving on active duty (as defined in § 404.1019 of this title), and the surviving spouse was married to the miner for a period of not less than 3 months immediately prior to the day on which such miner died.

(2) For purposes of paragraph (g)(1)(i) of this section, the death of a miner is accidental if such individual received bodily injuries solely through violent, external, and accidental means, and as a direct result of the bodily injuries and independently of all other causes, dies not later than 3 months after the day on which such miner receives such bodily injuries. The term ''accident'' means an event that was unpremeditated and unforeseen from the standpoint of the deceased individual. To determine whether the death of an individual did, in fact, result from an accident the adjudication officer will consider all the circumstances surrounding the casualty. An intentional and voluntary suicide will not be considered to be death by accident; however, suicide by an individual who is so incompetent as to be incapable of acting intentionally and voluntarily will be considered to be a death by accident. In no event will the death of an individual resulting from violent and external causes be considered a suicide unless there is direct proof that the fatal injury was self-inflicted.

(3) The provisions of paragraph (g) shall not apply if the adjudication officer determines that at the time of the marriage involved, the miner would not reasonably have been expected to live for 9 months.

§ 725.216 Determination of relationship; surviving divorced spouse.

An individual will be considered to be the surviving divorced spouse of a deceased miner in a claim considered under this part or reviewed under part 727 of this subchapter (see § 725.4(d)), if such individual's marriage to the miner had been terminated by a final divorce on or after the 10th anniversary of the marriage unless, if such individual was married to and divorced from the miner more than once, such individual was married to such miner in each calendar year of the period beginning 10 years immediately before the date on which any divorce became final and ending with the year in which the divorce became final.

§ 725.217 Determination of dependency; surviving divorced spouse.

An individual who is the miner's surviving divorced spouse (see § 725.216) shall be determined to have been dependent on the miner if, for the month before the month in which the miner died:

(a) The individual was receiving at least one-half of his or her support from the miner (see § 725.233(g)); or

(b) The individual was receiving substantial contributions from the miner pursuant to a written agreement (see § 725.233(c) and (f)); or

(c) A court order required the miner to furnish substantial contributions to the individual's support (see § 725.233(c) and (e)).

§ 725.218 Conditions of entitlement; child.

(a) An individual is entitled to benefits where he or she meets the required standards of relationship and dependency under this subpart (see § 725.220 and § 725.221) and is the child of a deceased miner who:

(1) Was receiving benefits under section 415 or part C of title IV of the Act as a result of a claim filed prior to January 1, 1982, or

(2) Is determined as a result of a claim filed prior to January 1, 1982, to have been totally disabled due to pneumoconiosis at the time of death, or to have died due to pneumoconiosis. A surviving dependent child of a miner whose claim is filed on or after January 1, 1982, must establish that the miner's death was due to pneumoconiosis in order to establish entitlement to benefits, except where entitlement is established under § 718.306 of this subchapter on a claim filed prior to June 30, 1982.

(b) A child is not entitled to benefits for any month for which a miner, or the surviving spouse or surviving divorced spouse of a miner, establishes entitlement to benefits.

§ 725.219 Duration of entitlement; child.

(a) An individual is entitled to benefits as a child for each month beginning with the first month in which all of the conditions of entitlement prescribed in § 725.218 are satisfied.

(b) The last month for which such individual is entitled to such benefits is the month before the month in which any one of the following events first occurs:

(1) The child dies;

(2) The child marries;

(3) The child attains age 18; and

(i) Is not a student (as defined in § 725.209(b)) during any part of the month in which the child attains age 18; and

(ii) Is not under a disability (as defined in § 725.209(a)(2)(ii)) at that time;

(4) If the child's entitlement beyond age 18 is based on his or her status as a student, the earlier of:

(i) The first month during no part of which the child is a student; or

(ii) The month in which the child attains age 23 and is not under a disability (as defined in § 725.209(a)(2)(ii)) at that time;

(5) If the child's entitlement beyond age 18 is based on disability, the first month in no part of which such individual is under a disability.

(c) A child whose entitlement to benefits terminated with the month before the month in which the child attained age 18, or later, may thereafter (provided such individual is not married) again become entitled to such benefits upon filing application for such reentitlement, beginning with the first month after termination of benefits in which such individual is a student and has not attained the age of 23.

(d) A child whose entitlement to benefits has been terminated pursuant to § 725.219(b)(2) may thereafter again become entitled to such benefits upon filing application for such reentitlement, beginning with the first month after the marriage ends and such individual meets the requirements of § 725.218. The individual shall not be required to reestablish the miner's entitlement to benefits (§ 725.218(a)(1)) or the miner's death due to pneumoconiosis (§ 725.212(a)(2)).

§ 725.220 Determination of relationship; child.

For purposes of determining whether an individual may qualify for benefits as the child of a deceased miner, the provisions of § 725.208 shall be applicable. As used in this section, the term ''beneficiary'' means only a surviving spouse entitled to benefits at the time of such surviving spouse's death (see § 725.212), or a miner. For purposes of a survivor's claim, an individual will be considered to be a child of a beneficiary if:

(a) The courts of the State in which such beneficiary is domiciled (see § 725.231) would find, under the law they would apply in determining the devolution of the beneficiary's intestate personal property, that the individual is the beneficiary's child; or

(b) Such individual is the legally adopted child of such beneficiary; or

(c) Such individual is the stepchild of such beneficiary by reason of a valid marriage of such individual's parent or adopting parent to such beneficiary; or

(d) Such individual does not bear the relationship of child to such beneficiary under paragraph (a), (b), or (c) of this section, but would, under State law, have the same right as a child to share in the beneficiary's intestate personal property; or

(e) Such individual is the natural son or daughter of a beneficiary but does not bear the relationship of child to such beneficiary under paragraph (a), (b), or (c) of this section, and is not considered to be the child of the beneficiary under paragraph (d) of this section, such individual shall nevertheless be considered to be the child of such beneficiary if the beneficiary and the mother or father, as the case may be, of such individual went through a marriage ceremony resulting in a purported marriage between them which but for a legal impediment (see § 725.230) would have been a valid marriage; or

(f) Such individual is the natural son or daughter of a beneficiary but does not have the relationship of child to such beneficiary under paragraph (a), (b), or (c) of this section, and is not considered to be the child of the beneficiary under paragraph (d) or (e) of this section, such individual shall nevertheless be considered to be the child of such beneficiary if:

(1) Such beneficiary, prior to his or her entitlement to benefits, has acknowledged in writing that the individual is his or her son or daughter, or has been decreed by a court to be the father or mother of the individual, or has been ordered by a court to contribute to the support of the individual (see § 725.233(a)) because the individual is a son or daughter; or

(2) Such beneficiary is shown by satisfactory evidence to be the father or mother of the individual and was living with or contributing to the support of the individual at the time such beneficiary became entitled to benefits.

§ 725.221 Determination of dependency; child.

For the purposes of determining whether a child was dependent upon a deceased miner, the provisions of § 725.209 shall be applicable, except that for purposes of determining the eligibility of a child who is under a disability as defined in section 223(d) of the Social Security Act, such disability must have begun before the child attained age 22, or in the case of a student, before the child ceased to be a student.

§ 725.222 Conditions of entitlement; parent, brother, or sister.

(a) An individual is eligible for benefits as a surviving parent, brother or sister if all of the following requirements are met:

(1) The individual is the parent, brother, or sister of a deceased miner;

(2) The individual was dependent on the miner at the pertinent time;

(3) Proof of support is filed within 2 years after the miner's death, unless the time is extended for good cause (§ 725.226);

(4) In the case of a brother or sister, such individual also:

(i) Is under 18 years of age; or

(ii) Is under a disability as defined in section 223(d) of the Social Security Act, 42 U.S.C. 423(d), which began

before such individual attained age 22, or in the case of a student, before the student ceased to be a student; or

(iii) Is a student (see § 725.209(b)); or

(iv) Is under a disability as defined in section 223(d) of the Social Security Act, 42 U.S.C. 423(d), at the time of the miner's death;

(5) The deceased miner:

(i) Was entitled to benefits under section 415 or part C of title IV of the Act as a result of a claim filed prior to January 1, 1982; or

(ii) Is determined as a result of a claim filed prior to January 1, 1982, to have been totally disabled due to pneumoconiosis at the time of death or to have died due to pneumoconiosis. A surviving dependent parent, brother or sister of a miner whose claim is filed on or after January 1, 1982, must establish that the miner's death was due to pneumoconiosis in order to establish entitlement to benefits, except where entitlement is established under § 718.306 of part 718 on a claim filed prior to June 30, 1982.

(b)(1) A parent is not entitled to benefits if the deceased miner was survived by a spouse or child at the time of such miner's death.

(2) A brother or sister is not entitled to benefits if the deceased miner was survived by a spouse, child, or parent at the time of such miner's death.

§ 725.223 Duration of entitlement; parent, brother, or sister.

(a) A parent, sister, or brother is entitled to benefits beginning with the month all the conditions of entitlement described in § 725.222 are met.

(b) The last month for which such parent is entitled to benefits is the month in which the parent dies.

(c) The last month for which such brother or sister is entitled to benefits is the month before the month in which any of the following events first occurs:

(1) The individual dies;

(2)(i) The individual marries or remarries; or

(ii) If already married, the individual received support in any amount from his or her spouse;

(3) The individual attains age 18; and

(i) Is not a student (as defined in § 725.209(b)) during any part of the month in which the individual attains age 18; and

(ii) Is not under a disability (as defined in § 725.209(a)(2)(ii)) at that time;

(4) If the individual's entitlement beyond age 18 is based on his or her status as a student, the earlier of:

(i) The first month during no part of which the individual is a student; or

(ii) The month in which the individual attains age 23 and is not under a disability (as defined in § 725.209(a)(2)(ii)) at that time;

(5) If the individual's entitlement beyond age 18 is based on disability, the first month in no part of which such individual is under a disability.

§ 725.224 Determination of relationship; parent, brother, or sister.

(a) An individual will be considered to be the parent, brother, or sister of a miner if the courts of the State in which the miner was domiciled (see § 225.231) at the time of death would find, under the law they would apply, that the individual is the miner's parent, brother, or sister.

(b) Where, under State law, the individual is not the miner's parent, brother, or sister, but would, under State law, have the same status (*i.e.,* right to share in the miner's intestate personal property) as a parent, brother, or sister, the individual will be considered to be the parent, brother, or sister as appropriate.

§ 725.225 Determination of dependency; parent, brother, or sister.

An individual who is the miner's parent, brother, or sister will be determined to have been dependent on the miner if, during the 1–year period immediately prior to the miner's death:

(a) The individual and the miner were living in the same household (see § 725.232); and

(b) The individual was totally dependent on the miner for support (see § 725.233(h)).

§ 725.226 ''Good cause'' for delayed filing of proof of support.

(a) *What constitutes ''good cause.''* ''Good cause'' may be found for failure to file timely proof of support where the parent, brother, or sister establishes to the satisfaction of the Office that such failure to file was due to:

(1) Circumstances beyond the individual's control, such as extended illness, mental, or physical incapacity, or communication difficulties; or

(2) Incorrect or incomplete information furnished the individual by the Office; or

(3) Efforts by the individual to secure supporting evidence without a realization that such evidence could be submitted after filing proof of support.

(b) *What does not constitute ''good cause.''* ''Good cause'' for failure to file timely proof of support (see § 725.222(a)(3)) does not exist when there is evidence of record in the Office that the individual was informed that he or she should file within the prescribed period and he or she failed to do so deliberately or through negligence.

§ 725.227 Time of determination of relationship and dependency of survivors.

The determination as to whether an individual purporting to be an entitled survivor of a miner or beneficiary was related to, or dependent upon, the miner is made after such individual files a claim for benefits as a survivor. Such determination is based on the facts and circumstances with respect to a reasonable period of time ending with the miner's death. A prior determination that such individual was, or was not, a dependent for the purposes of augmenting the miner's benefits for a certain period, is not determinative of the issue of whether the individual is a dependent survivor of such miner.

§ 725.228 Effect of conviction of felonious and intentional homicide on entitlement to benefits.

An individual who has been convicted of the felonious and intentional homicide of a miner or other beneficiary shall not be entitled to receive any benefits payable because of the death of such miner or other beneficiary, and such person shall be considered nonexistent in determining the entitlement to benefits of other individuals.

Terms Used in This Subpart

§ 725.229 Intestate personal property.

References in this subpart to the ''same right to share in the intestate personal property'' of a deceased miner (or surviving spouse) refer to the right of an individual to share in such distribution in the individual's own right and not the right of representation.

§ 725.230 Legal impediment.

For purposes of this subpart, ''legal impediment'' means an impediment resulting from the lack of dissolution of a previous marriage or otherwise arising out of such previous marriage or its dissolution or resulting from a defect in the procedure followed in connection with the purported marriage ceremony—for example, the solemnization of a marriage only through a religious ceremony in a country which requires a civil ceremony for a valid marriage.

§ 725.231 Domicile.

(a) For purposes of this subpart, the term ''domicile'' means the place of an individual's true, fixed, and permanent home.

(b) The domicile of a deceased miner or surviving spouse is determined as of the time of death.

(c) If an individual was not domiciled in any State at the pertinent time, the

law of the District of Columbia is applied.

§ 725.232 Member of the same household—''living with,'' ''living in the same household,'' and ''living in the miner's household,'' defined.

(a) *Defined.* (1) The term ''member of the same household'' as used in section 402(a)(2) of the Act (with respect to a spouse); the term ''living with'' as used in section 402(e) of the Act (with respect to a surviving spouse); and the term ''living in the same household'' as used in this subpart, means that a husband and wife were customarily living together as husband and wife in the same place.

(2) The term ''living in the miner's household'' as used in section 412(a)(5) of the Act (with respect to a parent, brother, or sister) means that the miner and such parent, brother, or sister were sharing the same residence.

(b) *Temporary absence.* The temporary absence from the same residence of either the miner, or the miner's spouse, parent, brother, or sister (as the case may be), does not preclude a finding that one was ''living with'' the other, or that they were ''members of the same household.'' The absence of one such individual from the residence in which both had customarily lived shall, in the absence of evidence to the contrary, be considered temporary:

(1) If such absence was due to service in the Armed Forces of the United States; or

(2) If the period of absence from his or her residence did not exceed 6 months and the absence was due to business or employment reasons, or because of confinement in a penal institution or in a hospital, nursing home, or other curative institution; or

(3) In any other case, if the evidence establishes that despite such absence they nevertheless reasonably expected to resume physically living together.

(c) *Relevant period of time.* (1) The determination as to whether a surviving spouse had been ''living with'' the miner shall be based upon the facts and circumstances as of the time of the death of the miner.

(2) The determination as to whether a spouse is a ''member of the same household'' as the miner shall be based upon the facts and circumstances with respect to the period or periods of time as to which the issue of membership in the same household is material.

(3) The determination as to whether a parent, brother, or sister was ''living in the miner's household'' shall take account of the 1-year period immediately prior to the miner's death.

§ 725.233 Support and contributions.

(a) *Support* defined. The term ''support'' includes food, shelter, clothing, ordinary medical expenses, and other ordinary and customary items for the maintenance of the person supported.

(b) *Contributions* defined. The term ''contributions'' refers to contributions actually provided by the contributor from such individual's property, or the use thereof, or by the use of such individual's own credit.

(c) *Regular contributions* and *substantial contributions* defined. The terms ''regular contributions'' and ''substantial contributions'' mean contributions that are customary and sufficient to constitute a material factor in the cost of the individual's support.

(d) *Contributions and community property.* When a spouse receives and uses for his or her support income from services or property, and such income, under applicable State law, is the community property of the wife and her husband, no part of such income is a ''contribution'' by one spouse to the other's support regardless of the legal interest of the donor. However, when a spouse receives and uses for support, income from the services and the property of the other spouse and, under applicable State law, such income is community property, all of such income is considered to be a contribution by the donor to the spouse's support.

(e) *Court order for support* defined. References to a support order in this subpart means any court order, judgment, or decree of a court of competent jurisdiction which requires regular contributions that are a material factor in the cost of the individual's support and which is in effect at the applicable time. If such contributions are required by a court order, this condition is met whether or not the contributions were actually made.

(f) *Written agreement* defined. The term ''written agreement'' in the phrase ''substantial contributions pursuant to a written agreement'', as used in this subpart means an agreement signed by the miner providing for substantial contributions by the miner for the individual's support. It must be in effect at the applicable time but it need not be legally enforceable.

(g) *One-half support* defined. The term ''one-half support'' means that the miner made regular contributions, in cash or in kind, to the support of a divorced spouse at the specified time or for the specified period, and that the amount of such contributions equalled or exceeded one-half the total cost of such individual's support at such time or during such period.

(h) *Totally dependent for support* defined. The term ''totally dependent for support'' as used in § 725.225(b) means that the miner made regular contributions to the support of the miner's parents, brother, or sister, as the case may be, and that the amount of such contributions at least equalled the total cost of such individual's support.

Subpart C—Filing of Claims

§ 725.301 Who may file a claim.

(a) Any person who believes he or she may be entitled to benefits under the Act may file a claim in accordance with this subpart.

(b) A claimant who has attained the age of 18, is mentally competent and physically able, may file a claim on his or her own behalf.

(c) If a claimant is unable to file a claim on his or her behalf because of a legal or physical impairment, the following rules shall apply:

(1) A claimant between the ages of 16 and 18 years who is mentally competent and not under the legal custody or care of another person, or a committee or institution, may upon filing a statement to the effect, file a claim on his or her own behalf. In any other case where the claimant is under 18 years of age, only a person, or the manager or principal officer of an institution having legal custody or care of the claimant may file a claim on his or her behalf.

(2) If a claimant over 18 years of age has a legally appointed guardian or committee, only the guardian or committee may file a claim on his or her behalf.

(3) If a claimant over 18 years of age is mentally incompetent or physically unable to file a claim and is under the care of another person, or an institution, only the person, or the manager or principal officer of the institution responsible for the care of the claimant, may file a claim on his or her behalf.

(4) For good cause shown, the Office may accept a claim executed by a person other than one described in paragraphs (c)(2) or (3) of this section.

(d) Except as provided in § 725.305, in order for a claim to be considered, the claimant must be alive at the time the claim is filed.

§ 725.302 Evidence of authority to file a claim on behalf of another.

A person filing a claim on behalf of a claimant shall submit evidence of his or her authority to so act at the time of filing or at a reasonable time thereafter in accordance with the following:

(a) A legally appointed guardian or committee shall provide the Office with certification of appointment by a proper official of the court.

(b) Any other person shall provide a statement describing his or her relationship to the claimant, the extent to which he or she has care of the claimant, or his or her position as an officer of the institution of which the claimant is an inmate. The Office may, at any time, require additional evidence to establish the authority of any such person.

§ 725.303 Date and place of filing of claims.

(a)(1) Claims for benefits shall be delivered, mailed to, or presented at, any of the various district offices of the Social Security Administration, or any of the various offices of the Department of Labor authorized to accept claims, or, in the case of a claim filed by or on behalf of a claimant residing outside the United States, mailed or presented to any office maintained by the Foreign Service of the United States. A claim shall be considered filed on the day it is received by the office in which it is first filed.

(2) A claim submitted to a Foreign Service Office or any other agency or subdivision of the U.S. Government shall be forwarded to the Office and considered filed as of the date it was received at the Foreign Service Office or other governmental agency or unit.

(b) A claim submitted by mail shall be considered filed as of the date of delivery unless a loss or impairment of benefit rights would result, in which case a claim shall be considered filed as of the date of its postmark. In the absence of a legible postmark, other evidence may be used to establish the mailing date.

§ 725.304 Forms and initial processing.

(a) Claims shall be filed on forms prescribed and approved by the Office. The district office at which the claim is filed will assist claimants in completing their forms.

(b) If the place at which a claim is filed is an office of the Social Security Administration, such office shall forward the completed claim form to an office of the DCMWC, which is authorized to process the claim.

§ 725.305 When a written statement is considered a claim.

(a) The filing of a statement signed by an individual indicating an intention to claim benefits shall be considered to be the filing of a claim for the purposes of this part under the following circumstances:

(1) The claimant or a proper person on his or her behalf (see § 725.301) executes and files a prescribed claim form with the Office during the claimant's lifetime within the period specified in paragraph (b) of this section.

(2) Where the claimant dies within the period specified in paragraph (b) of this section without filing a prescribed claim form, and a person acting on behalf of the deceased claimant's estate executes and files a prescribed claim form within the period specified in paragraph (c) of this section.

(b) Upon receipt of a written statement indicating an intention to claim benefits, the Office shall notify the signer in writing that to be considered the claim must be executed by the claimant or a proper party on his or her behalf on the prescribed form and filed with the Office within six months from the date of mailing of the notice.

(c) If before the notice specified in paragraph (b) of this section is sent, or within six months after such notice is sent, the claimant dies without having executed and filed a prescribed form, or without having had one executed and filed in his or her behalf, the Office shall upon receipt of notice of the claimant's death advise his or her estate, or those living at his or her last known address, in writing that for the claim to be considered, a prescribed claim form must be executed and filed by a person authorized to do so on behalf of the claimant's estate within six months of the date of the later notice.

(d) Claims based upon written statements indicating an intention to claim benefits not perfected in accordance with this section shall not be processed.

§ 725.306 Withdrawal of a claim.

(a) A claimant or an individual authorized to execute a claim on a claimant's behalf or on behalf of claimant's estate under § 725.305, may withdraw a previously filed claim provided that:

(1) He or she files a written request with the appropriate adjudication officer indicating the reasons for seeking withdrawal of the claim;

(2) The appropriate adjudication officer approves the request for withdrawal on the grounds that it is in the best interests of the claimant or his or her estate, and;

(3) Any payments made to the claimant in accordance with § 725.522 are reimbursed.

(b) When a claim has been withdrawn under paragraph (a) of this section, the claim will be considered not to have been filed.

§ 725.307 Cancellation of a request for withdrawal.

At any time prior to approval, a request for withdrawal may be canceled by a written request of the claimant or a person authorized to act on the claimant's behalf or on behalf of the claimant's estate.

§ 725.308 Time limits for filing claims.

(a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Reform Act of 1977, whichever is later. There is no time limit on the filing of a claim by the survivor of a miner.

(b) A miner who is receiving benefits under part B of title IV of the Act and who is notified by HEW of the right to seek medical benefits may file a claim for medical benefits under part C of title IV of the Act and this part. The Secretary of Health, Education, and Welfare is required to notify each miner receiving benefits under part B of this right. Notwithstanding the provisions of paragraph (a) of this section, a miner notified of his or her rights under this paragraph may file a claim under this part on or before December 31, 1980. Any claim filed after that date shall be untimely unless the time for filing has been enlarged for good cause shown.

(c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, except as provided in paragraph (b) of this section, the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

§ 725.309 Additional claims; effect of a prior denial of benefits.

(a) A claimant whose claim for benefits was previously approved under part B of title IV of the Act may file a claim for benefits under this part as provided in §§ 725.308(b) and 725.702.

(b) If a claimant files a claim under this part while another claim filed by the claimant under this part is still pending, the later claim shall be merged with the earlier claim for all purposes. For purposes of this section, a claim shall be considered pending if it has not yet been finally denied.

(c) If a claimant files a claim under this part within one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see § 725.502(a)(2)), the later claim shall be considered a request for modification of the prior denial and shall be processed and adjudicated under § 725.310.

(d) If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see § 725.502(a)(2)), the later claim shall be considered a subsequent claim for benefits. A subsequent claim shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part, except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see §§ 725.202(d) (miner), 725.212 (spouse), 725.218 (child), and 725.222 (parent, brother, or sister)) has changed since the date upon which the order denying the prior claim became final. The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:

(1) Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.

(2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based. For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as a miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.

(3) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement. A subsequent claim filed by a surviving spouse, child, parent, brother, or sister shall be denied unless the applicable conditions of entitlement in such claim include at least one condition unrelated to the miner's physical condition at the time of his death.

(4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim.

(5) In any case in which a subsequent claim is awarded, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final.

(e) Notwithstanding any other provision of this part or part 727 of this subchapter (see § 725.4(d)), a person may exercise the right of review provided in paragraph (c) of § 727.103 at the same time such person is pursuing an appeal of a previously denied part B claim under the law as it existed prior to March 1, 1978. If the part B claim is ultimately approved as a result of the appeal, the claimant must immediately notify the Secretary of Labor and, where appropriate, the coal mine operator, and all duplicate payments made under part C shall be considered an overpayment and arrangements shall be made to insure the repayment of such overpayments to the fund or an operator, as appropriate.

(f) In any case involving more than one claim filed by the same claimant, under no circumstances are duplicate benefits payable for concurrent periods of eligibility. Any duplicate benefits paid shall be subject to collection or offset under subpart H of this part.

§ 725.310 Modification of awards and denials.

(a) Upon his or her own initiative, or upon the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the district director may, at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits.

(b) Modification proceedings shall be conducted in accordance with the provisions of this part as appropriate, except that the claimant and the operator, or group of operators or the fund, as appropriate, shall each be entitled to submit no more than one additional chest X-ray interpretation, one additional pulmonary function test, one additional arterial blood gas study, and one additional medical report in support of its affirmative case along with such rebuttal evidence and additional statements as are authorized by paragraphs (a)(2)(ii) and (a)(3)(ii) of § 725.414. Modification proceedings shall not be initiated before an administrative law judge or the Benefits Review Board.

(c) At the conclusion of modification proceedings before the district director, the district director may issue a proposed decision and order (§ 725.418) or, if appropriate, deny the claim by reason of abandonment (§ 725.409). In any case in which the district director has initiated modification proceedings on his own initiative to alter the terms of an award or denial of benefits issued by an administrative law judge, the district director shall, at the conclusion of modification proceedings, forward the claim for a hearing (§ 725.421). In any case forwarded for a hearing, the administrative law judge assigned to hear such case shall consider whether any additional evidence submitted by the parties demonstrates a change in condition and, regardless of whether the parties have submitted new evidence, whether the evidence of record demonstrates a mistake in a determination of fact.

(d) An order issued following the conclusion of modification proceedings may terminate, continue, reinstate, increase or decrease benefit payments or award benefits. Such order shall not affect any benefits previously paid, except that an order increasing the amount of benefits payable based on a finding of a mistake in a determination of fact may be made effective on the date from which benefits were determined payable by the terms of an earlier award. In the case of an award which is decreased, no payment made in excess of the decreased rate prior to the date upon which the party requested reconsideration under paragraph (a) of this section shall be subject to collection or offset under subpart H of this part, provided the claimant is without fault as defined by § 725.543. In the case of an award which is decreased following the initiation of modification by the district director, no payment made in excess of the decreased rate prior to the date upon which the district director initiated modification proceedings under paragraph (a) shall be subject to collection or offset under subpart H of this part, provided the claimant is without fault as defined by § 725.543. In the case of an award which has become final and is thereafter terminated, no payment made prior to the date upon which the party requested reconsideration under paragraph (a) shall be subject to collection or offset under subpart H of this part. In the case of an award which has become final and is thereafter terminated following the initiation of modification by the district director, no payment made prior to the date upon which the district director initiated modification proceedings

under paragraph (a) shall be subject to collection or offset under subpart H of this part.

§ 725.311 Communications with respect to claims; time computations.

(a) Unless otherwise specified by this part, all requests, responses, notices, decisions, orders, or other communications required or permitted by this part shall be in writing.

(b) If required by this part, any document, brief, or other statement submitted in connection with the adjudication of a claim under this part shall be sent to each party to the claim by the submitting party. If proof of service is required with respect to any communication, such proof of service shall be submitted to the appropriate adjudication officer and filed as part of the claim record.

(c) In computing any period of time described in this part, by any applicable statute, or by the order of any adjudication officer, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period shall be included unless it is a Saturday, Sunday, or legal holiday, in which event the period extends until the next day which is not a Saturday, Sunday, or legal holiday. ''Legal holiday'' includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day and any other day appointed as a holiday by the President or the Congress of the United States.

(d) In computing any period of time described in this part in which the period within which to file a response commences upon receipt of a document, it shall be presumed, in the absence of evidence to the contrary, that the document was received on the seventh day after it was mailed. In any case in which a provision of this part requires a document to be sent to a person or party by certified mail, and the document is not sent by certified mail, but the person or party actually received the document, the document shall be deemed to have been sent in compliance with the provisions of this part. In such a case, any time period which commences upon the service of the document shall commence on the date the document was received.

Subpart D—Adjudication Officers; Parties and Representatives

§ 725.350 Who are the adjudication officers?

(a) *General.* The persons authorized by the Secretary of Labor to accept evidence and decide claims on the basis of such evidence are called ''adjudication officers.'' This section describes the status of black lung claims adjudication officers.

(b) *District Director.* The district director is that official of the DCMWC or his designee who is authorized to perform functions with respect to the development, processing, and adjudication of claims in accordance with this part.

(c) *Administrative law judge.* An administrative law judge is that official appointed pursuant to 5 U.S.C. 3105 (or Public Law 94–504) who is qualified to preside at hearings under 5 U.S.C. 557 and is empowered by the Secretary to conduct formal hearings with respect to, and adjudicate, claims in accordance with this part. A person appointed under Public Law 94–504 shall not be considered an administrative law judge for purposes of this part for any period after March 1, 1979.

§ 725.351 Powers of adjudication officers.

(a) *District Director.* The district director is authorized to:

(1) Make determinations with respect to claims as is provided in this part;

(2) Conduct conferences and informal discovery proceedings as provided in this part;

(3) Compel the production of documents by the issuance of a subpoena;

(4) Prepare documents for the signature of parties;

(5) Issue appropriate orders as provided in this part; and

(6) Do all other things necessary to enable him or her to discharge the duties of the office.

(b) Administrative Law Judge. An administrative law judge is authorized to:

(1) Conduct formal hearings in accordance with the provisions of this part;

(2) Administer oaths and examine witnesses;

(3) Compel the production of documents and appearance of witnesses by the issuance of subpoenas;

(4) Issue decisions and orders with respect to claims as provided in this part; and

(5) Do all other things necessary to enable him or her to discharge the duties of the office.

(c) If any person in proceedings before an adjudication officer disobeys or resists any lawful order or process, or misbehaves during a hearing or so near the place thereof as to obstruct the same, or neglects to produce, after having been ordered to do so, any pertinent book, paper or document, or refuses to appear after having been subpoenaed, or upon appearing refuses to take the oath as a witness, or after having taken the oath refuses to be examined according to law, the district director, or the administrative law judge responsible for the adjudication of the claim, shall certify the facts to the Federal district court having jurisdiction in the place in which he or she is sitting (or to the U.S. District Court for the District of Columbia if he or she is sitting in the District) which shall thereupon in a summary manner hear the evidence as to the acts complained of, and, if the evidence so warrants, punish such person in the same manner and to the same extent as for a contempt committed before the court, or commit such person upon the same condition as if the doing of the forbidden act had occurred with reference to the process or in the presence of the court.

§ 725.352 Disqualification of adjudication officer.

(a) No adjudication officer shall conduct any proceedings in a claim in which he or she is prejudiced or partial, or where he or she has any interest in the matter pending for decision. A decision to withdraw from the consideration of a claim shall be within the discretion of the adjudication officer. If that adjudication officer withdraws, another officer shall be designated by the Director or the Chief Administrative Law Judge, as the case may be, to complete the adjudication of the claim.

(b) No adjudication officer shall be permitted to appear or act as a representative of a party under this part while such individual is employed as an adjudication officer. No adjudication officer shall be permitted at any time to appear or act as a representative in connection with any case or claim in which he or she was personally involved. No fee or reimbursement shall be awarded under this part to an individual who acts in violation of this paragraph.

(c) No adjudication officer shall act in any claim involving a party which employed such adjudication officer within one year before the adjudication of such claim.

(d) Notwithstanding paragraph (a) of this section, no adjudication officer shall be permitted to act in any claim involving a party who is related to the adjudication officer by consanguinity or affinity within the third degree as determined by the law of the place where such party is domiciled. Any action taken by an adjudication officer in knowing violation of this paragraph shall be void.

§ 725.360 Parties to proceedings.

(a) Except as provided in § 725.361, no person other than the Secretary of Labor and authorized personnel of the Department of Labor shall participate at any stage in the adjudication of a claim for benefits under this part, unless such person is determined by the appropriate adjudication officer to qualify under the provisions of this section as a party to the claim. The following persons shall be parties:

(1) The claimant;

(2) A person other than a claimant, authorized to execute a claim on such claimant's behalf under § 725.301;

(3) Any coal mine operator notified under § 725.407 of its possible liability for the claim;

(4) Any insurance carrier of such operator; and

(5) The Director in all proceedings relating to a claim for benefits under this part.

(b) A widow, child, parent, brother, or sister, or the representative of a decedent's estate, who makes a showing in writing that his or her rights with respect to benefits may be prejudiced by a decision of an adjudication officer, may be made a party.

(c) Any coal mine operator or prior operator or insurance carrier which has not been notified under § 725.407 and which makes a showing in writing that its rights may be prejudiced by a decision of an adjudication officer may be made a party.

(d) Any other individual may be made a party if that individual's rights with respect to benefits may be prejudiced by a decision to be made.

§ 725.361 Party amicus curiae.

At the discretion of the Chief Administrative Law Judge or the administrative law judge assigned to the case, a person or entity which is not a party may be allowed to participate amicus curiae in a formal hearing only as to an issue of law. A person may participate amicus curiae in a formal hearing upon written request submitted with supporting arguments prior to the hearing. If the request is granted, the administrative law judge hearing the case will inform the party of the extent to which participation will be permitted. The request may, however, be denied summarily and without explanation.

§ 725.362 Representation of parties.

(a) Except for the Secretary of Labor, whose interests shall be represented by the Solicitor of Labor or his or her designee, each of the parties may appoint an individual to represent his or her interest in any proceeding for determination of a claim under this part. Such appointment shall be made in writing or on the record at the hearing. An attorney qualified in accordance with § 725.363(a) shall file a written declaration that he or she is authorized to represent a party, or declare his or her representation on the record at a formal hearing. Any other person (see § 725.363(b)) shall file a written notice of appointment signed by the party or his or her legal guardian, or enter his or her appearance on the record at a formal hearing if the party he or she seeks to represent is present and consents to the representation. Any written declaration or notice required by this section shall include the OWCP number assigned by the Office and shall be sent to the Office or, for representation at a formal hearing, to the Chief Administrative Law Judge. In any case, such representative must be qualified under § 725.363. No authorization for representation or agreement between a claimant and representative as to the amount of a fee, filed with the Social Security Administration in connection with a claim under part B of title IV of the Act, shall be valid under this part. A claimant who has previously authorized a person to represent him or her in connection with a claim originally filed under part B of title IV may renew such authorization by filing a statement to such effect with the Office or appropriate adjudication officer.

(b) Any party may waive his or her right to be represented in the adjudication of a claim. If an adjudication officer determines, after an appropriate inquiry has been made, that a claimant who has been informed of his or her right to representation does not wish to obtain the services of a representative, such adjudication officer shall proceed to consider the claim in accordance with this part, unless it is apparent that the claimant is, for any reason, unable to continue without the help of a representative. However, it shall not be necessary for an adjudication officer to inquire as to the ability of a claimant to proceed without representation in any adjudication taking place without a hearing. The failure of a claimant to obtain representation in an adjudication taking place without a hearing shall be considered a waiver of the claimant's right to representation. However, at any time during the processing or adjudication of a claim, any claimant may revoke such waiver and obtain a representative.

§ 725.363 Qualification of representative.

(a) *Attorney*. Any attorney in good standing who is admitted to practice before a court of a State, territory, district, or insular possession, or before the Supreme Court of the United States or other Federal court and is not, pursuant to any provision of law, prohibited from acting as a representative, may be appointed as a representative.

(b) Other person. With the approval of the adjudication officer, any other person may be appointed as a representative so long as that person is not, pursuant to any provision of law, prohibited from acting as a representative.

§ 725.364 Authority of representative.

A representative, appointed and qualified as provided in §§ 725.362 and 725.363, may make or give on behalf of the party he or she represents, any request or notice relative to any proceeding before an adjudication officer, including formal hearing and review, except that such representative may not execute a claim for benefits, unless he or she is a person designated in § 725.301 as authorized to execute a claim. A representative shall be entitled to present or elicit evidence and make allegations as to facts and law in any proceeding affecting the party represented and to obtain information with respect to the claim of such party to the same extent as such party. Notice given to any party of any administrative action, determination, or decision, or request to any party for the production of evidence shall be sent to the representative of such party and such notice or request shall have the same force and effect as if it had been sent to the party represented.

§ 725.365 Approval of representative's fees; lien against benefits.

No fee charged for representation services rendered to a claimant with respect to any claim under this part shall be valid unless approved under this subpart. No contract or prior agreement for a fee shall be valid. In cases where the obligation to pay the attorney's fee is upon the claimant, the amount of the fee awarded may be made a lien upon the benefits due under an award and the adjudication officer shall fix, in the award approving the fee, such lien and the manner of payment of the fee. Any representative who is not an attorney may be awarded a fee for services under this subpart, except that no lien may be imposed with respect to such representative's fee.

§ 725.366 Fees for representatives.

(a) A representative seeking a fee for services performed on behalf of a claimant shall make application therefor to the district director, administrative law judge, or appropriate appellate tribunal, as the case may be, before whom the services were performed. The application shall be filed and served upon the claimant and all other parties within the time limits allowed by the district director, administrative law judge, or appropriate appellate tribunal. The application shall be supported by a complete statement of the extent and character of the necessary work done, and shall indicate the professional status (*e.g.,* attorney, paralegal, law clerk, lay representative or clerical) of the person performing such work, and the customary billing rate for each such person. The application shall also include a listing of reasonable unreimbursed expenses, including those for travel, incurred by the representative or an employee of a representative in establishing the claimant's case. Any fee requested under this paragraph shall also contain a description of any fee requested, charged, or received for services rendered to the claimant before any State or Federal court or agency in connection with a related matter.

(b) Any fee approved under paragraph (a) of this section shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of fee requested. No fee approved shall include payment for time spent in preparation of a fee application. No fee shall be approved for work done on claims filed between December 30, 1969, and June 30, 1973, under part B of title IV of the Act, except for services rendered on behalf of the claimant in regard to the review of the claim under section 435 of the Act and part 727 of this subchapter (see § 725.4(d)).

(c) In awarding a fee, the appropriate adjudication officer shall consider, and shall add to the fee, the amount of reasonable and unreimbursed expenses incurred in establishing the claimant's case. Reimbursement for travel expenses incurred by an attorney shall be determined in accordance with the provisions of § 725.459(a). No reimbursement shall be permitted for expenses incurred in obtaining medical or other evidence which has previously been submitted to the Office in connection with the claim.

(d) Upon receipt of a request for approval of a fee, such request shall be reviewed and evaluated by the appropriate adjudication officer and a fee award issued. Any party may request reconsideration of a fee awarded by the adjudication officer. A revised or modified fee award may then be issued, if appropriate.

(e) Each request for reconsideration or review of a fee award shall be in writing and shall contain supporting statements or information pertinent to any increase or decrease requested. If a fee awarded by a district director is disputed, such award shall be appealable directly to the Benefits Review Board. In such a fee dispute case, the record before the Board shall consist of the order of the district director awarding or denying the fee, the application for a fee, any written statement in opposition to the fee and the documentary evidence contained in the file which verifies or refutes any item claimed in the fee application.

§ 725.367 Payment of a claimant's attorney's fee by responsible operator or fund.

(a) An attorney who represents a claimant in the successful prosecution of a claim for benefits may be entitled to collect a reasonable attorney's fee from the responsible operator that is ultimately found liable for the payment of benefits, or, in a case in which there is no operator who is liable for the payment of benefits, from the fund. Generally, the operator or fund liable for the payment of benefits shall be liable for the payment of the claimant's attorney's fees where the operator or fund, as appropriate, took action, or acquiesced in action, that created an adversarial relationship between itself and the claimant. The fees payable under this section shall include reasonable fees for necessary services performed prior to the creation of the adversarial relationship. Circumstances in which a successful attorney's fees shall be payable by the responsible operator or the fund include, but are not limited to, the following:

(1) The responsible operator designated by the district director (see § 725.410(a)(3)) fails to accept the claimant's entitlement to benefits within the 30-day period provided by § 725.412(b) and is ultimately determined to be liable for benefits. The operator shall be liable for an attorney's fee with respect to all necessary services performed by the claimant's attorney;

(2) There is no operator that may be held liable for the payment of benefits, and the district director issues a schedule for the submission of additional evidence under § 725.410. The fund shall be liable for an attorney's fee with respect to all necessary services performed by the claimant's attorney;

(3) The claimant submits a bill for medical treatment, and the party liable for the payment of benefits declines to pay the bill on the grounds that the treatment is unreasonable, or is for a condition that is not compensable. The responsible operator or fund, as appropriate, shall be liable for an attorney's fee with respect to all necessary services performed by the claimant's attorney;

(4) A beneficiary seeks an increase in the amount of benefits payable, and the responsible operator or fund contests the claimant's right to that increase. If the beneficiary is successful in securing an increase in the amount of benefits payable, the operator or fund shall be liable for an attorney's fee with respect to all necessary services performed by the beneficiary's attorney;

(5) The responsible operator or fund seeks a decrease in the amount of benefits payable. If the beneficiary is successful in resisting the request for a decrease in the amount of benefits payable, the operator or fund shall be liable for an attorney's fee with respect to all necessary services performed by the beneficiary's attorney. A request for information clarifying the amount of benefits payable shall not be considered a request to decrease that amount.

(b) Any fee awarded under this section shall be in addition to the award of benefits, and shall be awarded, in an order, by the district director, administrative law judge, Board or court, before whom the work was performed. The operator or fund shall pay such fee promptly and directly to the claimant's attorney in a lump sum after the award of benefits becomes final.

(c) Section 205(a) of the Black Lung Benefits Amendments of 1981, Public Law 97–119, amended section 422 of the Act and relieved operators and carriers from liability for the payment of benefits on certain claims. Payment of benefits on those claims was made the responsibility of the fund. The claims subject to this transfer of liability are described in § 725.496. On claims subject to the transfer of liability described in this paragraph the fund will pay all fees and costs which have been or will be awarded to claimant's attorneys which were or would have become the liability of an operator or carrier but for the enactment of the 1981 Amendments and which have not already been paid by such operator or carrier. Section 9501(d)(7) of the

Internal Revenue Code (26 U.S.C.), which was also enacted as a part of the 1981 Amendments to the Act, expressly prohibits the fund from reimbursing an operator or carrier for any attorney fees or costs which it has paid on cases subject to the transfer of liability provisions.

Subpart E—Adjudication of Claims by the District Director

§ 725.401 Claims development—general.

After a claim has been received by the district director, the district director shall take such action as is necessary to develop, process, and make determinations with respect to the claim as provided in this subpart.

§ 725.402 Approved State workers' compensation law.

If a district director determines that any claim filed under this part is one subject to adjudication under a workers' compensation law approved under part 722 of this subchapter, he or she shall advise the claimant of this determination and of the Act's requirement that the claim must be filed under the applicable State workers' compensation law. The district director shall then prepare a proposed decision and order dismissing the claim for lack of jurisdiction pursuant to § 725.418 and proceed as appropriate.

§ 725.403 [Reserved]

§ 725.404 Development of evidence—general.

(a) *Employment history.* Each claimant shall furnish the district director with a complete and detailed history of the coal miner's employment and, upon request, supporting documentation.

(b) *Matters of record.* Where it is necessary to obtain proof of age, marriage or termination of marriage, death, family relationship, dependency (see subpart B of this part), or any other fact which may be proven as a matter of public record, the claimant shall furnish such proof to the district director upon request.

(c) *Documentary evidence.* If a claimant is required to submit documents to the district director, the claimant shall submit either the original, a certified copy or a clear readable copy thereof. The district director or administrative law judge may require the submission of an original document or certified copy thereof, if necessary.

(d) *Submission of insufficient evidence.* In the event a claimant submits insufficient evidence regarding any matter, the district director shall inform the claimant of what further evidence is necessary and request that such evidence be submitted within a specified reasonable time which may, upon request, be extended for good cause.

§ 725.405 Development of medical evidence; scheduling of medical examinations and tests.

(a) Upon receipt of a claim, the district director shall ascertain whether the claim was filed by or on account of a miner as defined in § 725.202, and in the case of a claim filed on account of a deceased miner, whether the claim was filed by an eligible survivor of such miner as defined in subpart B of this part.

(b) In the case of a claim filed by or on behalf of a miner, the district director shall, where necessary, schedule the miner for a medical examination and testing under § 725.406.

(c) In the case of a claim filed by or on behalf of a survivor of a miner, the district director shall obtain whatever medical evidence is necessary and available for the development and evaluation of the claim.

(d) The district director shall, where appropriate, collect other evidence necessary to establish:

(1) The nature and duration of the miner's employment; and

(2) All other matters relevant to the determination of the claim.

(e) If at any time during the processing of the claim by the district director, the evidence establishes that the claimant is not entitled to benefits under the Act, the district director may terminate evidentiary development of the claim and proceed as appropriate.

§ 725.406 Medical examinations and tests.

(a) The Act requires the Department to provide each miner who applies for benefits with the opportunity to undergo a complete pulmonary evaluation at no expense to the miner. A complete pulmonary evaluation includes a report of physical examination, a pulmonary function study, a chest roentgenogram and, unless medically contraindicated, a blood gas study.

(b) As soon as possible after a miner files an application for benefits, the district director will provide the miner with a list of medical facilities and physicians in the state of the miner's residence and states contiguous to the state of the miner's residence that the Office has authorized to perform complete pulmonary evaluations. The miner shall select one of the facilities or physicians on the list, *provided* that the miner may not select any physician to whom the miner or the miner's spouse is related to the fourth degree of consanguinity, and the miner may not select any physician who has examined or provided medical treatment to the miner within the twelve months preceding the date of the miner's application. The district director will make arrangements for the miner to be given a complete pulmonary evaluation by that facility or physician. The results of the complete pulmonary evaluation shall not be counted as evidence submitted by the miner under § 725.414.

(c) If any medical examination or test conducted under paragraph (a) of this section is not administered or reported in substantial compliance with the provisions of part 718 of this subchapter, or does not provide sufficient information to allow the district director to decide whether the miner is eligible for benefits, the district director shall schedule the miner for further examination and testing. Where the deficiencies in the report are the result of a lack of effort on the part of the miner, the miner will be afforded one additional opportunity to produce a satisfactory result. In order to determine whether any medical examination or test was administered and reported in substantial compliance with the provisions of part 718 of this subchapter, the district director may have any component of such examination or test reviewed by a physician selected by the district director.

(d) After the physician completes the report authorized by paragraph (a), the district director will inform the miner that he may elect to have the results of the objective testing sent to his treating physician for use in preparing a medical opinion. The district director will also inform the claimant that any medical opinion submitted by his treating physician will count as one of the two medical opinions that the miner may submit under § 725.414 of this part.

(e) The cost of any medical examination or test authorized under this section, including the cost of travel to and from the examination, shall be paid by the fund. No reimbursement for overnight accommodations shall be authorized unless the district director determines that an adequate testing facility is unavailable within one day's round trip travel by automobile from the miner's residence. The fund shall be reimbursed for such payments by an operator, if any, found liable for the payment of benefits to the claimant. If an operator fails to repay such expenses, with interest, upon request of the Office, the entire amount may be collected in

an action brought under section 424 of the Act and § 725.603 of this part.

§ 725.407 Identification and notification of responsible operator.

(a) Upon receipt of the miner's employment history, the district director shall investigate whether any operator may be held liable for the payment of benefits as a responsible operator in accordance with the criteria contained in Subpart G of this part.

(b) The district director may identify one or more operators potentially liable for the payment of benefits in accordance with the criteria set forth in § 725.495 of this part. The district director shall notify each such operator of the existence of the claim. Where the records maintained by the Office pursuant to part 726 of this subchapter indicate that the operator had obtained a policy of insurance, and the claim falls within such policy, the notice provided pursuant to this section shall also be sent to the operator's carrier. Any operator or carrier notified of the claim shall thereafter be considered a party to the claim in accordance with § 725.360 of this part unless it is dismissed by an adjudication officer and is not thereafter notified again of its potential liability.

(c) The notification issued pursuant to this section shall include a copy of the claimant's application and a copy of all evidence obtained by the district director relating to the miner's employment. The district director may request the operator to answer specific questions, including, but not limited to, questions related to the nature of its operations, its relationship with the miner, its financial status, including any insurance obtained to secure its obligations under the Act, and its relationship with other potentially liable operators. A copy of any notification issued pursuant to this section shall be sent to the claimant by regular mail.

(d) If at any time before a case is referred to the Office of Administrative Law Judges, the district director determines that an operator which may be liable for the payment of benefits has not been notified under this section or has been incorrectly dismissed pursuant to § 725.410(a)(3), the district director shall give such operator notice of its potential liability in accordance with this section. The adjudication officer shall then take such further action on the claim as may be appropriate. There shall be no time limit applicable to a later identification of an operator under this paragraph if the operator fraudulently concealed its identity as an employer of the miner. The district director may not notify additional operators of their potential liability after a case has been referred to the Office of Administrative Law Judges, unless the case was referred for a hearing to determine whether the claim was properly denied as abandoned pursuant to § 725.409.

§ 725.408 Operator's response to notification.

(a)(1) An operator which receives notification under § 725.407 shall, within 30 days of receipt, file a response indicating its intent to accept or contest its identification as a potentially liable operator. The operator's response shall also be sent to the claimant by regular mail.

(2) If the operator contests its identification, it shall, on a form supplied by the district director, state the precise nature of its disagreement by admitting or denying each of the following assertions. In answering these assertions, the term ''operator'' shall include any operator for which the identified operator may be considered a successor operator pursuant to § 725.492.

(i) That the named operator was an operator for any period after June 30, 1973;

(ii) That the operator employed the miner as a miner for a cumulative period of not less than one year;

(iii) That the miner was exposed to coal mine dust while working for the operator;

(iv) That the miner's employment with the operator included at least one working day after December 31, 1969; and

(v) That the operator is capable of assuming liability for the payment of benefits.

(3) An operator which receives notification under § 725.407, and which fails to file a response within the time limit provided by this section, shall not be allowed to contest its liability for the payment of benefits on any of the grounds set forth in paragraph (a)(2).

(b)(1) Within 90 days of the date on which it receives notification under § 725.407, an operator may submit documentary evidence in support of its position.

(2) No documentary evidence relevant to the grounds set forth in paragraph (a)(2) may be admitted in any further proceedings unless it is submitted within the time limits set forth in this section.

§ 725.409 Denial of a claim by reason of abandonment.

(a) A claim may be denied at any time by the district director by reason of abandonment where the claimant fails:

(1) To undergo a required medical examination without good cause; or,

(2) To submit evidence sufficient to make a determination of the claim; or,

(3) To pursue the claim with reasonable diligence; or,

(4) To attend an informal conference without good cause.

(b)(1) If the district director determines that a denial by reason of abandonment under paragraphs (a)(1) through (3) of this section is appropriate, he or she shall notify the claimant of the reasons for such denial and of the action which must be taken to avoid a denial by reason of abandonment. If the claimant completes the action requested within the time allowed, the claim shall be developed, processed and adjudicated as specified in this part. If the claimant does not fully comply with the action requested by the district director, the district director shall notify the claimant that the claim has been denied by reason of abandonment. Such notification shall be served on the claimant and all other parties to the claim by certified mail.

(2) In any case in which a claimant has failed to attend an informal conference and has not provided the district director with his reasons for failing to attend, the district director shall ask the claimant to explain his absence. In considering whether the claimant had good cause for his failure to attend the conference, the district director shall consider all relevant circumstances, including the age, education, and health of the claimant, as well as the distance between the claimant's residence and the location of the conference. If the district director concludes that the claimant had good cause for failing to attend the conference, he may continue processing the claim, including, where appropriate under § 725.416, the scheduling of an informal conference. If the claimant does not supply the district director with his reasons for failing to attend the conference within 30 days of the date of the district director's request, or the district director concludes that the reasons supplied by the claimant do not establish good cause, the district director shall notify the claimant that the claim has been denied by reason of abandonment. Such notification shall be served on the claimant and all other parties to the claim by certified mail.

(c) The denial of a claim by reason of abandonment shall become effective and final unless, within 30 days after the denial is issued, the claimant requests a hearing. Following the expiration of the 30-day period, a new claim may be filed at any time pursuant to § 725.309. For purposes of § 725.309,

a denial by reason of abandonment shall be deemed a finding that the claimant has not established any applicable condition of entitlement. If the claimant timely requests a hearing, the district director shall refer the case to the Office of Administrative Law Judges in accordance with § 725.421. Except upon the motion or written agreement of the Director, the hearing will be limited to the issue of whether the claim was properly denied by reason of abandonment. If the hearing is limited to the issue of abandonment and the administrative law judge determines that the claim was not properly denied by reason of abandonment, he shall remand the claim to the district director for the completion of administrative processing.

§ 725.410 Submission of additional evidence.

(a) After the district director completes the development of medical evidence under § 725.405 of this part, including the complete pulmonary evaluation authorized by § 725.406, and receives the responses and evidence submitted pursuant to § 725.408, he shall issue a schedule for the submission of additional evidence. The schedule shall contain the following information:

(1) If the claim was filed by, or on behalf of, a miner, the schedule shall contain a summary of the complete pulmonary evaluation administered pursuant to § 725.406. If the claim was filed by, or on behalf of, a survivor, the schedule shall contain a summary of any medical evidence developed by the district director pursuant to § 725.405(c).

(2) The schedule shall contain the district director's preliminary analysis of the medical evidence. If the district director believes that the evidence fails to establish any necessary element of entitlement, he shall inform the claimant of the element of entitlement not established and the reasons for his conclusions and advise the claimant that, unless he submits additional evidence, the district director will issue a proposed decision and order denying the claim.

(3) The schedule shall contain the district director's designation of a responsible operator liable for the payment of benefits. In the event that the district director has designated as the responsible operator an employer other than the employer who last employed the claimant as a miner, the district director shall include, with the schedule, a copy of the statements required by § 725.495(d) of this part. The district director may, in his discretion, dismiss as parties any of the operators notified of their potential liability pursuant to § 725.407. If the district director thereafter determines that the participation of a party dismissed pursuant to this section is required, he may once again notify the operator in accordance with § 725.407(d).

(4) The schedule shall notify the claimant and the designated responsible operator that they have the right to obtain further adjudication of the claim in accordance with this subpart, and that they have the right to submit additional evidence in accordance with this subpart. The schedule shall also notify the claimant that he has the right to obtain representation, under the terms set forth in subpart D, in order to assist him. In a case in which the district director has designated a responsible operator pursuant to paragraph (a)(3), the schedule shall further notify the claimant that if the operator fails to accept the claimant's entitlement to benefits within the time limit provided by § 725.412, the cost of obtaining additional medical and other necessary evidence, along with a reasonable attorney's fee, shall be reimbursed by the responsible operator in the event that the claimant establishes his entitlement to benefits payable by that operator. In a case in which there is no operator liable for the payment of benefits, the schedule shall notify the claimant that the cost of obtaining additional medical and other necessary evidence, along with a reasonable attorney's fee, shall be reimbursed by the fund.

(b) The schedule shall allow all parties not less than 60 days within which to submit additional evidence, including evidence relevant to the claimant's eligibility for benefits and evidence relevant to the liability of the designated responsible operator, and shall provide not less than an additional 30 days within which the parties may respond to evidence submitted by other parties. Any such evidence must meet the requirements set forth in § 725.414 in order to be admitted into the record.

(c) The district director shall serve a copy of the schedule, together with a copy of all of the evidence developed, on the claimant, the designated responsible operator, and all other operators which received notification pursuant to § 725.407. The schedule shall be served on each party by certified mail.

§ 725.411 Initial adjudication in Trust Fund cases.

Notwithstanding the requirements of § 725.410 of this part, if the district director concludes that the results of the complete pulmonary evaluation support a finding of eligibility, and that there is no operator responsible for the payment of benefits, the district director shall issue a proposed decision and order in accordance with § 725.418 of this part.

§ 725.412 Operator's response.

(a)(1) Within 30 days after the district director issues a schedule pursuant to § 725.410 of this part containing a designation of the responsible operator liable for the payment of benefits, that operator shall file a response with regard to its liability. The response shall specifically indicate whether the operator agrees or disagrees with the district director's designation.

(2) If the responsible operator designated by the district director does not file a timely response, it shall be deemed to have accepted the district director's designation with respect to its liability, and to have waived its right to contest its liability in any further proceeding conducted with respect to the claim.

(b) The responsible operator designated by the district director may also file a statement accepting claimant's entitlement to benefits. If that operator fails to file a timely response to the district director's designation, the district director shall, upon receipt of such a statement, issue a proposed decision and order in accordance with § 725.418 of this part. If the operator fails to file a statement accepting the claimant's entitlement to benefits within 30 days after the district director issues a schedule pursuant to § 725.410 of this part, the operator shall be deemed to have contested the claimant's entitlement.

§ 725.413 [Reserved].

§ 725.414 Development of evidence.

(a) *Medical evidence.*

(1) For purposes of this section, a medical report shall consist of a physician's written assessment of the miner's respiratory or pulmonary condition. A medical report may be prepared by a physician who examined the miner and/or reviewed the available admissible evidence. A physician's written assessment of a single objective test, such as a chest X-ray or a pulmonary function test, shall not be considered a medical report for purposes of this section.

(2)(i) The claimant shall be entitled to submit, in support of his affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial

blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports. Any chest X-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report, and physicians' opinions that appear in a medical report must each be admissible under this paragraph or paragraph (a)(4) of this section.

(ii) The claimant shall be entitled to submit, in rebuttal of the case presented by the party opposing entitlement, no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by the designated responsible operator or the fund, as appropriate, under paragraph (a)(3)(i) or (a)(3)(iii) of this section and by the Director pursuant to § 725.406. In any case in which the party opposing entitlement has submitted the results of other testing pursuant to § 718.107, the claimant shall be entitled to submit one physician's assessment of each piece of such evidence in rebuttal. In addition, where the responsible operator or fund has submitted rebuttal evidence under paragraph (a)(3)(ii) or (a)(3)(iii) of this section with respect to medical testing submitted by the claimant, the claimant shall be entitled to submit an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing. Where the rebuttal evidence tends to undermine the conclusion of a physician who prepared a medical report submitted by the claimant, the claimant shall be entitled to submit an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence.

(3)(i) The responsible operator designated pursuant to § 725.410 shall be entitled to obtain and submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports. Any chest X-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report, and physicians' opinions that appear in a medical report must each be admissible under this paragraph or paragraph (a)(4) of this section. In obtaining such evidence, the responsible operator may not require the miner to travel more than 100 miles from his or her place of residence, or the distance traveled by the miner in obtaining the complete pulmonary evaluation provided by § 725.406 of this part, whichever is greater, unless a trip of greater distance is authorized in writing by the district director. If a miner unreasonably refuses—

(A) To provide the Office or the designated responsible operator with a complete statement of his or her medical history and/or to authorize access to his or her medical records, or

(B) To submit to an evaluation or test requested by the district director or the designated responsible operator, the miner's claim may be denied by reason of abandonment. (See § 725.409 of this part).

(ii) The responsible operator shall be entitled to submit, in rebuttal of the case presented by the claimant, no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by the claimant under paragraph (a)(2)(i) of this section and by the Director pursuant to § 725.406. In any case in which the claimant has submitted the results of other testing pursuant to § 718.107, the responsible operator shall be entitled to submit one physician's assessment of each piece of such evidence in rebuttal. In addition, where the claimant has submitted rebuttal evidence under paragraph (a)(2)(ii) of this section, the responsible operator shall be entitled to submit an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing. Where the rebuttal evidence tends to undermine the conclusion of a physician who prepared a medical report submitted by the responsible operator, the responsible operator shall be entitled to submit an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence.

(iii) In a case in which the district director has not identified any potentially liable operators, or has dismissed all potentially liable operators under § 725.410(a)(3), the district director shall be entitled to exercise the rights of a responsible operator under this section, except that the evidence obtained in connection with the complete pulmonary evaluation performed pursuant to § 725.406 shall be considered evidence obtained and submitted by the Director, OWCP, for purposes of paragraph (a)(3)(i) of this section. In a case involving a dispute concerning medical benefits under § 725.708 of this part, the district director shall be entitled to develop medical evidence to determine whether the medical bill is compensable under the standard set forth in § 725.701 of this part.

(4) Notwithstanding the limitations in paragraphs (a)(2) and (a)(3) of this section, any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence.

(5) A copy of any documentary evidence submitted by a party must be served on all other parties to the claim. If the claimant is not represented by an attorney, the district director shall mail a copy of all documentary evidence submitted by the claimant to all other parties to the claim. Following the development and submission of affirmative medical evidence, the parties may submit rebuttal evidence in accordance with the schedule issued by the district director.

(b) *Evidence pertaining to liability.* (1) Except as provided by § 725.408(b)(2), the designated responsible operator may submit evidence to demonstrate that it is not the potentially liable operator that most recently employed the claimant.

(2) Any other party may submit evidence regarding the liability of the designated responsible operator or any other operator.

(3) A copy of any documentary evidence submitted under this paragraph must be mailed to all other parties to the claim. Following the submission of affirmative evidence, the parties may submit rebuttal evidence in accordance with the schedule issued by the district director.

(c) *Testimony.* A physician who prepared a medical report admitted under this section may testify with respect to the claim at any formal hearing conducted in accordance with subpart F of this part, or by deposition. If a party has submitted fewer than two medical reports as part of that party's affirmative case under this section, a physician who did not prepare a medical report may testify in lieu of such a medical report. The testimony of such a physician shall be considered a medical report for purposes of the limitations provided by this section. A party may offer the testimony of no more than two physicians under the provisions of this section unless the adjudication officer finds good cause under paragraph (b)(1) of § 725.456 of this part. In accordance with the schedule issued by the district director, all parties shall notify the district director of the name and current address of any potential witness whose testimony pertains to the liability of a potentially liable operator or the

designated responsible operator. Absent such notice, the testimony of a witness relevant to the liability of a potentially liable operator or the designated responsible operator shall not be admitted in any hearing conducted with respect to the claim unless the administrative law judge finds that the lack of notice should be excused due to extraordinary circumstances.

(d) Except to the extent permitted by § 725.456 and § 725.310(b), the limitations set forth in this section shall apply to all proceedings conducted with respect to a claim, and no documentary evidence pertaining to liability shall be admitted in any further proceeding conducted with respect to a claim unless it is submitted to the district director in accordance with this section.

§ 725.415 Action by the district director after development of evidence.

(a) At the end of the period permitted under § 725.410(b) for the submission of evidence, the district director shall review the claim on the basis of all evidence submitted in accordance with § 725.414.

(b) After review of all evidence submitted, the district director may issue another schedule for the submission of additional evidence pursuant to § 725.410, identifying another potentially liable operator as the responsible operator liable for the payment of benefits. In such a case, the district director shall not permit the development or submission of any additional medical evidence until after he has made a final determination of the identity of the responsible operator liable for the payment of benefits. If the operator who is finally determined to be the responsible operator has not had the opportunity to submit medical evidence pursuant to § 725.410, the district director shall allow the designated responsible operator and the claimant not less than 60 days within which to submit evidence relevant to the claimant's eligibility for benefits. The designated responsible operator may elect to adopt any medical evidence previously submitted by another operator as its own evidence, subject to the limitations of § 725.414. The district director may also schedule a conference in accordance with § 725.416, issue a proposed decision and order in accordance with § 725.418, or take such other action as the district director considers appropriate.

§ 725.416 Conferences.

(a) At the conclusion of the period permitted by § 725.410(b) of this part for the submission of evidence, the district director may conduct an informal conference in any claim where it appears that such conference will assist in the voluntary resolution of any issue raised with respect to the claim. The conference proceedings shall not be stenographically reported and sworn testimony shall not be taken. Any conference conducted pursuant to this paragraph shall be held no later than 90 days after the conclusion of the period permitted by § 725.410(b) of this part for the submission of evidence, unless one of the parties requests that the time period be extended for good cause shown. If the district director is unable to hold the conference within the time period permitted by this paragraph, he shall proceed to issue a proposed decision and order under § 725.418 of this part.

(b) The district director shall notify the parties of a definite time and place for the conference. The district director shall advise the parties that they have a right to representation at the conference, by an attorney or a lay representative, and that no conference shall take place unless the parties are represented. A coal mine operator which is self-insured, or which is covered by a policy of insurance for the claim for which a conference is scheduled, shall be deemed to be represented. The notification shall set forth the specific reasons why the district director believes that a conference will assist in the voluntary resolution of any issue raised with respect to the claim. No sanction may be imposed under paragraph (c) of this section unless the record contains a notification that meets the requirements of this section. The district director may in his or her discretion, or on the motion of any party, cancel a conference or allow any or all of the parties to participate by telephone.

(c) The unexcused failure of any party to appear at an informal conference shall be grounds for the imposition of sanctions. If the claimant fails to appear, the district director may take such steps as are authorized by § 725.409(b)(2) to deny the claim by reason of abandonment. If the responsible operator fails to appear, it shall be deemed to have waived its right to contest its potential liability for an award of benefits and, in the discretion of the district director, its right to contest any issue related to the claimant's eligibility.

(d) Any representative of an operator, of an operator's insurance carrier, or of a claimant, authorized to represent such party in accordance with paragraph (b), shall be deemed to have sufficient authority to stipulate facts or issues or agree to a final disposition of the claim.

(e) Procedures to be followed at a conference shall be within the discretion of the district director.

§ 725.417 Action at the conclusion of conference.

(a) At the conclusion of a conference, the district director shall prepare a stipulation of contested and uncontested issues which shall be signed by the parties and the district director. If a hearing is conducted with respect to the claim, this stipulation shall be submitted to the Office of Administrative Law Judges and placed in the claim record.

(b) In appropriate cases, the district director may permit a reasonable time for the submission of additional evidence following a conference, provided that such evidence does not exceed the limits set forth in § 725.414. The district director may also notify additional operators of their potential liability pursuant to § 725.407, or issue another schedule for the submission of additional evidence pursuant to § 725.410, designating another potentially liable operator as the responsible operator liable for the payment of benefits, in order to allow that operator an opportunity to submit evidence relevant to its liability for benefits as well as the claimant's eligibility for benefits.

(c) Within 20 days after the termination of all conference proceedings, the district director shall prepare and send to the parties a proposed decision and order pursuant to § 725.418 of this part.

§ 725.418 Proposed decision and order.

(a) Within 20 days after the termination of all informal conference proceedings, or, if no informal conference is held, at the conclusion of the period permitted by § 725.410(b) for the submission of evidence, the district director shall issue a proposed decision and order. A proposed decision and order is a document, issued by the district director after the evidentiary development of the claim is completed and all contested issues, if any, are joined, which purports to resolve a claim on the basis of the evidence submitted to or obtained by the district director. A proposed decision and order shall be considered a final adjudication of a claim only as provided in § 725.419. A proposed decision and order may be issued by the district director at any time during the adjudication of any claim if:

(1) Issuance is authorized or required by this part; or,

(2) The district director determines that its issuance will expedite the adjudication of the claim.

(b) A proposed decision and order shall contain findings of fact and conclusions of law. It shall be served on all parties to the claim by certified mail.

(c) The proposed decision and order shall contain a notice of the right of any interested party to request a formal hearing before the Office of Administrative Law Judges. If the proposed decision and order is a denial of benefits, and the claimant has previously filed a request for a hearing, the proposed decision and order shall notify the claimant that the case will be referred for a hearing pursuant to the previous request unless the claimant notifies the district director that he no longer desires a hearing. If the proposed decision and order is an award of benefits, and the designated responsible operator has previously filed a request for a hearing, the proposed decision and order shall notify the operator that the case will be referred for a hearing pursuant to the previous request unless the operator notifies the district director that it no longer desires a hearing.

(d) The proposed decision and order shall reflect the district director's final designation of the responsible operator liable for the payment of benefits. No operator may be finally designated as the responsible operator unless it has received notification of its potential liability pursuant to § 725.407, and the opportunity to submit additional evidence pursuant to § 725.410. The district director shall dismiss, as parties to the claim, all other potentially liable operators that received notification pursuant to § 725.407 and that were not previously dismissed pursuant to § 725.410(a)(3).

§ 725.419 Response to proposed decision and order.

(a) Within 30 days after the date of issuance of a proposed decision and order, any party may, in writing, request a revision of the proposed decision and order or a hearing. If a hearing is requested, the district director shall refer the claim to the Office of Administrative Law Judges (see § 725.421).

(b) Any response made by a party to a proposed decision and order shall specify the findings and conclusions with which the responding party disagrees, and shall be served on the district director and all other parties to the claim.

(c) If a timely request for revision of a proposed decision and order is made, the district director may amend the proposed decision and order, as circumstances require, and serve the revised proposed decision and order on all parties or take such other action as is appropriate. If a revised proposed decision and order is issued, each party to the claim shall have 30 days from the date of issuance of that revised proposed decision and order within which to request a hearing.

(d) If no response to a proposed decision and order is sent to the district director within the period described in paragraph (a) of this section, or if no response to a revised proposed decision and order is sent to the district director within the period described in paragraph (c) of this section, the proposed decision and order shall become a final decision and order, which is effective upon the expiration of the applicable 30-day period. Once a proposed decision and order or revised proposed decision and order becomes final and effective, all rights to further proceedings with respect to the claim shall be considered waived, except as provided in § 725.310.

§ 725.420 Initial determinations.

(a) Section 9501(d)(1)(A)(1) of the Internal Revenue Code (26 U.S.C.) provides that the Black Lung Disability Trust Fund shall begin the payment of benefits on behalf of an operator in any case in which the operator liable for such payments has not commenced payment of such benefits within 30 days after the date of an initial determination of eligibility by the Secretary. For claims filed on or after January 1, 1982, the payment of such interim benefits from the fund is limited to benefits accruing after the date of such initial determination.

(b) Except as provided in § 725.415, after the district director has determined that a claimant is eligible for benefits, on the basis of all evidence submitted by a claimant and operator, and has determined that a hearing will be necessary to resolve the claim, the district director shall in writing so inform the parties and direct the operator to begin the payment of benefits to the claimant in accordance with § 725.522. The date on which this writing is sent to the parties shall be considered the date of initial determination of the claim.

(c) If a notified operator refuses to commence payment of a claim within 30 days from the date on which an initial determination is made under this section, benefits shall be paid by the fund to the claimant in accordance with § 725.522, and the operator shall be liable to the fund, if such operator is determined liable for the claim, for all benefits paid by the fund on behalf of such operator, and, in addition, such penalties and interest as are appropriate.

§ 725.421 Referral of a claim to the Office of Administrative Law Judges.

(a) In any claim for which a formal hearing is requested or ordered, and with respect to which the district director has completed evidentiary development and adjudication without having resolved all contested issues, the district director shall refer the claim to the Office of Administrative Law Judges for a hearing.

(b) In any case referred to the Office of Administrative Law Judges under this section, the district director shall transmit to that office the following documents, which shall be placed in the record at the hearing subject to the objection of any party:

(1) Copies of the claim form or forms;

(2) Any statement, document, or pleading submitted by a party to the claim;

(3) A copy of the notification to an operator of its possible liability for the claim, and any schedule for the submission of additional evidence issued pursuant to § 725.410 designating a potentially liable operator as the responsible operator;

(4) All medical evidence submitted to the district director under this part by the claimant and the potentially liable operator designated as the responsible operator in the proposed decision and order issued pursuant to § 725.418, or the fund, as appropriate, subject to the limitations of § 725.414 of this part; this evidence shall include the results of any medical examination or test conducted pursuant to § 725.406, and all evidence relevant to the liability of the responsible operator submitted to the district director under this part;

(5) Any written stipulation of law or fact or stipulation of contested and uncontested issues entered into by the parties;

(6) Any pertinent forms submitted to the district director;

(7) The statement by the district director of contested and uncontested issues in the claim; and

(8) The district director's initial determination of eligibility or other documents necessary to establish the right of the fund to reimbursement, if appropriate. Copies of the transmittal notice shall also be sent to all parties to the claim by regular mail.

(c) A party may at any time request and obtain from the district director copies of documents transmitted to the Office of Administrative Law Judges under paragraph (b) of this section. If the party has previously been provided with such documents, additional copies

may be sent to the party upon the payment of a copying fee to be determined by the district director.

§ 725.422 Legal assistance.

The Secretary or his or her designee may, upon request, provide a claimant with legal assistance in processing a claim under the Act. Such assistance may be made available to a claimant in the discretion of the Solicitor of Labor or his or her designee at any time prior to or during the time in which the claim is being adjudicated and shall be furnished without charge to the claimant. Representation of a claimant in adjudicatory proceedings shall not be provided by the Department of Labor unless it is determined by the Solicitor of Labor that such representation is in the best interests of the black lung benefits program. In no event shall representation be provided to a claimant in a claim with respect to which the claimant's interests are adverse to those of the Secretary of Labor or the fund.

§ 725.423 Extensions of time.

Except for the 30-day time limit set forth in § 725.419, any of the time periods set forth in this subpart may be extended, for good cause shown, by filing a request for an extension with the district director prior to the expiration of the time period.

Subpart F—Hearings

§ 725.450 Right to a hearing.

Any party to a claim (see § 725.360) shall have a right to a hearing concerning any contested issue of fact or law unresolved by the district director. There shall be no right to a hearing until the processing and adjudication of the claim by the district director has been completed. There shall be no right to a hearing in a claim with respect to which a determination of the claim made by the district director has become final and effective in accordance with this part.

§ 725.451 Request for hearing.

After the completion of proceedings before the district director, or as is otherwise indicated in this part, any party may in writing request a hearing on any contested issue of fact or law (see § 725.419). A district director may on his or her own initiative refer a case for hearing. If a hearing is requested, or if a district director determines that a hearing is necessary to the resolution of any issue, the claim shall be referred to the Chief Administrative Law Judge for a hearing under § 725.421.

§ 725.452 Type of hearing; parties.

(a) A hearing held under this part shall be conducted by an administrative law judge designated by the Chief Administrative Law Judge. Except as otherwise provided by this part, all hearings shall be conducted in accordance with the provisions of 5 U.S.C. 554 *et seq.*

(b) All parties to a claim shall be permitted to participate fully at a hearing held in connection with such claim.

(c) A full evidentiary hearing need not be conducted if a party moves for summary judgment and the administrative law judge determines that there is no genuine issue as to any material fact and that the moving party is entitled to the relief requested as a matter of law. All parties shall be entitled to respond to the motion for summary judgment prior to decision thereon.

(d) If the administrative law judge believes that an oral hearing is not necessary (for any reason other than on motion for summary judgment), the judge shall notify the parties by written order and allow at least 30 days for the parties to respond. The administrative law judge shall hold the oral hearing if any party makes a timely request in response to the order.

§ 725.453 Notice of hearing.

All parties shall be given at least 30 days written notice of the date and place of a hearing and the issues to be resolved at the hearing. Such notice shall be sent to each party or representative by certified mail.

§ 725.454 Time and place of hearing; transfer of cases.

(a) The Chief Administrative Law Judge shall assign a definite time and place for a formal hearing, and shall, where possible, schedule the hearing to be held at a place within 75 miles of the claimant's residence unless an alternate location is requested by the claimant.

(b) If the claimant's residence is not in any State, the Chief Administrative Law Judge may, in his or her discretion, schedule the hearing in the country of the claimant's residence.

(c) The Chief Administrative Law Judge or the administrative law judge assigned the case may in his or her discretion direct that a hearing with respect to a claim shall begin at one location and then later be reconvened at another date and place.

(d) The Chief Administrative Law Judge or administrative law judge assigned the case may change the time and place for a hearing, either on his or her own motion or for good cause shown by a party. The administrative law judge may adjourn or postpone the hearing for good cause shown, at any time prior to the mailing to the parties of the decision in the case. Unless otherwise agreed, at least 10 days notice shall be given to the parties of any change in the time or place of hearing.

(e) The Chief Administrative Law Judge may for good cause shown transfer a case from one administrative law judge to another.

§ 725.455 Hearing procedures; generally.

(a) *General.* The purpose of any hearing conducted under this subpart shall be to resolve contested issues of fact or law. Except as provided in § 725.421(b)(8), any findings or determinations made with respect to a claim by a district director shall not be considered by the administrative law judge.

(b) *Evidence.* The administrative law judge shall at the hearing inquire fully into all matters at issue, and shall not be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, except as provided by 5 U.S.C. 554 and this subpart. The administrative law judge shall receive into evidence the testimony of the witnesses and parties, the evidence submitted to the Office of Administrative Law Judges by the district director under § 725.421, and such additional evidence as may be submitted in accordance with the provisions of this subpart. The administrative law judge may entertain the objections of any party to the evidence submitted under this section.

(c) *Procedure.* The conduct of the hearing and the order in which allegations and evidence shall be presented shall be within the discretion of the administrative law judge and shall afford the parties an opportunity for a fair hearing.

(d) *Oral argument and written allegations.* The parties, upon request, may be allowed a reasonable time for the presentation of oral argument at the hearing. Briefs or other written statements or allegations as to facts or law may be filed by any party with the permission of the administrative law judge. Copies of any brief or other written statement shall be filed with the administrative law judge and served on all parties by the submitting party.

§ 725.456 Introduction of documentary evidence.

(a) All documents transmitted to the Office of Administrative Law Judges under § 725.421 shall be placed into evidence by the administrative law judge, subject to objection by any party.

(b)(1) Documentary evidence pertaining to the liability of a potentially liable operator and/or the identification of a responsible operator which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances. Medical evidence in excess of the limitations contained in § 725.414 shall not be admitted into the hearing record in the absence of good cause.

(2) Subject to the limitations in paragraph (b)(1) of this section, any other documentary material, including medical reports, which was not submitted to the district director, may be received in evidence subject to the objection of any party, if such evidence is sent to all other parties at least 20 days before a hearing is held in connection with the claim.

(3) Documentary evidence, which is not exchanged with the parties in accordance with this paragraph, may be admitted at the hearing with the written consent of the parties or on the record at the hearing, or upon a showing of good cause why such evidence was not exchanged in accordance with this paragraph. If documentary evidence is not exchanged in accordance with paragraph (b)(2) of this section and the parties do not waive the 20-day requirement or good cause is not shown, the administrative law judge shall either exclude the late evidence from the record or remand the claim to the district director for consideration of such evidence.

(4) A medical report which is not made available to the parties in accordance with paragraph (b)(2) of this section shall not be admitted into evidence in any case unless the hearing record is kept open for at least 30 days after the hearing to permit the parties to take such action as each considers appropriate in response to such evidence. If, in the opinion of the administrative law judge, evidence is withheld from the parties for the purpose of delaying the adjudication of the claim, the administrative law judge may exclude such evidence from the hearing record and close the record at the conclusion of the hearing.

(c) Subject to paragraph (b) of this section, documentary evidence which the district director excludes from the record, and the objections to such evidence, may be submitted by the parties to the administrative law judge, who shall independently determine whether the evidence shall be admitted.

(1) If the evidence is admitted, the administrative law judge may, in his or her discretion, remand the claim to the district director for further consideration.

(2) If the evidence is admitted, the administrative law judge shall afford the opposing party or parties the opportunity to develop such additional documentary evidence as is necessary to protect the right of cross-examination.

(d) All medical records and reports submitted by any party shall be considered by the administrative law judge in accordance with the quality standards contained in part 718 of this subchapter.

(e) If the administrative law judge concludes that the complete pulmonary evaluation provided pursuant to § 725.406, or any part thereof, fails to comply with the applicable quality standards, or fails to address the relevant conditions of entitlement (see § 725.202(d)(2)(i) through (iv)) in a manner which permits resolution of the claim, the administrative law judge shall, in his or her discretion, remand the claim to the district director with instructions to develop only such additional evidence as is required, or allow the parties a reasonable time to obtain and submit such evidence, before the termination of the hearing.

§ 725.457 Witnesses.

(a) Witnesses at the hearing shall testify under oath or affirmation. The administrative law judge and the parties may question witnesses with respect to any matters relevant and material to any contested issue. Any party who intends to present the testimony of an expert witness at a hearing, including any physician, regardless of whether the physician has previously prepared a medical report, shall so notify all other parties to the claim at least 10 days before the hearing. The failure to give notice of the appearance of an expert witness in accordance with this paragraph, unless notice is waived by all parties, shall preclude the presentation of testimony by such expert witness.

(b) No person shall be required to appear as a witness in any proceeding before an administrative law judge at a place more than 100 miles from his or her place of residence, unless the lawful mileage and witness fee for 1 day's attendance is paid in advance of the hearing date.

(c) No person shall be permitted to testify as a witness at the hearing, or pursuant to deposition or interrogatory under § 725.458, unless that person meets the requirements of § 725.414(c).

(1) In the case of a witness offering testimony relevant to the liability of the responsible operator, in the absence of extraordinary circumstances, the witness must have been identified as a potential hearing witness while the claim was pending before the district director.

(2) In the case of a physician offering testimony relevant to the physical condition of the miner, such physician must have prepared a medical report. Alternatively, in the absence of a showing of good cause under § 725.456(b)(1) of this part, a physician may offer testimony relevant to the physical condition of the miner only to the extent that the party offering the physician's testimony has submitted fewer medical reports than permitted by § 725.414. Such physician's opinion shall be considered a medical report subject to the limitations of § 725.414.

(d) A physician whose testimony is permitted under this section may testify as to any other medical evidence of record, but shall not be permitted to testify as to any medical evidence relevant to the miner's condition that is not admissible.

§ 725.458 Depositions; interrogatories.

The testimony of any witness or party may be taken by deposition or interrogatory according to the rules of practice of the Federal district court for the judicial district in which the case is pending (or of the U.S. District Court for the District of Columbia if the case is pending in the District or outside the United States), except that at least 30 days prior notice of any deposition shall be given to all parties unless such notice is waived. No post-hearing deposition or interrogatory shall be permitted unless authorized by the administrative law judge upon the motion of a party to the claim. The testimony of any physician which is taken by deposition shall be subject to the limitations on the scope of the testimony contained in § 725.457(d).

§ 725.459 Witness fees.

(a) A witness testifying at a hearing before an administrative law judge, or whose deposition is taken, shall receive the same fees and mileage as witnesses in courts of the United States. If the witness is an expert, he or she shall be entitled to an expert witness fee. Except as provided in paragraphs (b) and (c) of this section, such fees shall be paid by the proponent of the witness.

(b) If the witness' proponent does not intend to call the witness to appear at a hearing or deposition, any other party may subpoena the witness for cross-examination. The administrative law judge shall authorize the least intrusive and expensive means of cross-examination as he deems appropriate and necessary to the full and true

disclosure of facts. If such witness is required to attend the hearing, give a deposition or respond to interrogatories for cross-examination purposes, the proponent of the witness shall pay the witness' fee. If the claimant is the proponent of the witness whose cross-examination is sought, and demonstrates, within time limits established by the administrative law judge, that he would be deprived of ordinary and necessary living expenses if required to pay the witness fee and mileage necessary to produce that witness for cross-examination, the administrative law judge shall apportion the costs of such cross-examination among the parties to the case. The administrative law judge shall not apportion any costs against the fund in a case in which the district director has designated a responsible operator, except that the fund shall remain liable for any costs associated with the cross-examination of the physician who performed the complete pulmonary evaluation pursuant to § 725.406.

(c) If a claimant is determined entitled to benefits, there may be assessed as costs against a responsible operator, if any, or the fund, fees and mileage for necessary witnesses attending the hearing at the request of the claimant. Both the necessity for the witness and the reasonableness of the fees of any expert witness shall be approved by the administrative law judge. The amounts awarded against a responsible operator or the fund as attorney's fees, or costs, fees and mileage for witnesses, shall not in any respect affect or diminish benefits payable under the Act.

(d) A claimant shall be considered to be deprived of funds required for ordinary and necessary living expenses for purposes of paragraph (b) of this section where payment of the projected fee and mileage would meet the standards set forth at 20 CFR 404.508.

§ 725.460 Consolidated hearings.

When two or more hearings are to be held, and the same or substantially similar evidence is relevant and material to the matters at issue at each such hearing, the Chief Administrative Law Judge may, upon motion by any party or on his or her own motion, order that a consolidated hearing be conducted. Where consolidated hearings are held, a single record of the proceedings shall be made and the evidence introduced in one claim may be considered as introduced in the others, and a separate or joint decision shall be made, as appropriate.

§ 725.461 Waiver of right to appear and present evidence.

(a) If all parties waive their right to appear before the administrative law judge, it shall not be necessary for the administrative law judge to give notice of, or conduct, an oral hearing. A waiver of the right to appear shall be made in writing and filed with the Chief Administrative Law Judge or the administrative law judge assigned to hear the case. Such waiver may be withdrawn by a party for good cause shown at any time prior to the mailing of the decision in the claim. Even though all of the parties have filed a waiver of the right to appear, the administrative law judge may, nevertheless, after giving notice of the time and place, conduct a hearing if he or she believes that the personal appearance and testimony of the party or parties would assist in ascertaining the facts in issue in the claim. Where a waiver has been filed by all parties, and they do not appear before the administrative law judge personally or by representative, the administrative law judge shall make a record of the relevant documentary evidence submitted in accordance with this part and any further written stipulations of the parties. Such documents and stipulations shall be considered the evidence of record in the case and the decision shall be based upon such evidence.

(b) Except as provided in § 725.456(a), the unexcused failure of any party to attend a hearing shall constitute a waiver of such party's right to present evidence at the hearing, and may result in a dismissal of the claim (see § 725.465).

§ 725.462 Withdrawal of controversion of issues set for formal hearing; effect.

A party may, on the record, withdraw his or her controversion of any or all issues set for hearing. If a party withdraws his or her controversion of all issues, the administrative law judge shall remand the case to the district director for the issuance of an appropriate order.

§ 725.463 Issues to be resolved at hearing; new issues.

(a) Except as otherwise provided in this section, the hearing shall be confined to those contested issues which have been identified by the district director (see § 725.421) or any other issue raised in writing before the district director.

(b) An administrative law judge may consider a new issue only if such issue was not reasonably ascertainable by the parties at the time the claim was before the district director. Such new issue may be raised upon application of any party, or upon an administrative law judge's own motion, with notice to all parties, at any time after a claim has been transmitted by the district director to the Office of Administrative Law Judges and prior to decision by an administrative law judge. If a new issue is raised, the administrative law judge may, in his or her discretion, either remand the case to the district director with instructions for further proceedings, hear and resolve the new issue, or refuse to consider such new issue.

(c) If a new issue is to be considered by the administrative law judge, a party may, upon request, be granted an appropriate continuance.

§ 725.464 Record of hearing.

All hearings shall be open to the public and shall be mechanically or stenographically reported. All evidence upon which the administrative law judge relies for decision shall be contained in the transcript of testimony, either directly or by appropriate reference. All medical reports, exhibits, and any other pertinent document or record, either in whole or in material part, introduced as evidence, shall be marked for identification and incorporated into the record.

§ 725.465 Dismissals for cause.

(a) The administrative law judge may, at the request of any party, or on his or her own motion, dismiss a claim:

(1) Upon the failure of the claimant or his or her representative to attend a hearing without good cause;

(2) Upon the failure of the claimant to comply with a lawful order of the administrative law judge; or

(3) Where there has been a prior final adjudication of the claim or defense to the claim under the provisions of this subchapter and no new evidence is submitted (except as provided in part 727 of this subchapter; see § 725.4(d)).

(b) A party who is not a proper party to the claim (see § 725.360) shall be dismissed by the administrative law judge. The administrative law judge shall not dismiss the operator designated as the responsible operator by the district director, except upon the motion or written agreement of the Director.

(c) In any case where a dismissal of a claim, defense, or party is sought, the administrative law judge shall issue an order to show cause why the dismissal should not be granted and afford all parties a reasonable time to respond to such order. After the time for response has expired, the administrative law

judge shall take such action as is appropriate to rule on the dismissal, which may include an order dismissing the claim, defense or party.

(d) No claim shall be dismissed in a case with respect to which payments prior to final adjudication have been made to the claimant in accordance with § 725.522, except upon the motion or written agreement of the Director.

§ 725.466 Order of dismissal.

(a) An order dismissing a claim shall be served on the parties in accordance with § 725.478. The dismissal of a claim shall have the same effect as a decision and order disposing of the claim on its merits, except as provided in paragraph (b) of this section. Such order shall advise the parties of their right to request review by the Benefits Review Board.

(b) Where the Chief Administrative Law Judge or the presiding administrative law judge issues a decision and order dismissing the claim after a show cause proceeding, the district director shall terminate any payments being made to the claimant under § 725.522, and the order of dismissal shall, if appropriate, order the claimant to reimburse the fund for all benefits paid to the claimant.

§ 725.475 Termination of hearings.

Hearings are officially terminated when all the evidence has been received, witnesses heard, pleadings and briefs submitted to the administrative law judge, and the transcript of the proceedings has been printed and delivered to the administrative law judge.

§ 725.476 Issuance of decision and order.

Within 20 days after the official termination of the hearing (see § 725.475), the administrative law judge shall issue a decision and order with respect to the claim making an award to the claimant, rejecting the claim, or taking such other action as is appropriate.

§ 725.477 Form and contents of decision and order.

(a) Orders adjudicating claims for benefits shall be designated by the term ''decision and order'' or ''supplemental decision and order'' as appropriate, followed by a descriptive phrase designating the particular type of order, such as ''award of benefits,'' ''rejection of claim,'' ''suspension of benefits,'' ''modification of award.''

(b) A decision and order shall contain a statement of the basis of the order, the names of the parties, findings of fact, conclusions of law, and an award, rejection or other appropriate paragraph containing the action of the administrative law judge, his or her signature and the date of issuance. A decision and order shall be based upon the record made before the administrative law judge.

§ 725.478 Filing and service of decision and order.

On the date of issuance of a decision and order under § 725.477, the administrative law judge shall serve the decision and order on all parties to the claim by certified mail. On the same date, the original record of the claim shall be sent to the DCMWC in Washington, D.C. Upon receipt by the DCMWC, the decision and order shall be considered to be filed in the office of the district director, and shall become effective on that date.

§ 725.479 Finality of decisions and orders.

(a) A decision and order shall become effective when filed in the office of the district director (see § 725.478), and unless proceedings for suspension or setting aside of such order are instituted within 30 days of such filing, the order shall become final at the expiration of the 30th day after such filing (see § 725.481).

(b) Any party may, within 30 days after the filing of a decision and order under § 725.478, request a reconsideration of such decision and order by the administrative law judge. The procedures to be followed in the reconsideration of a decision and order shall be determined by the administrative law judge.

(c) The time for appeal to the Benefits Review Board shall be suspended during the consideration of a request for reconsideration. After the administrative law judge has issued and filed a denial of the request for reconsideration, or a revised decision and order in accordance with this part, any dissatisfied party shall have 30 days within which to institute proceedings to set aside the decision and order on reconsideration.

(d) Regardless of any defect in service, actual receipt of the decision is sufficient to commence the 30-day period for requesting reconsideration or appealing the decision.

§ 725.480 Modification of decisions and orders.

A party who is dissatisfied with a decision and order which has become final in accordance with § 725.479 may request a modification of the decision and order if the conditions set forth in § 725.310 are met.

§ 725.481 Right to appeal to the Benefits Review Board.

Any party dissatisfied with a decision and order issued by an administrative law judge may, before the decision and order becomes final (see § 725.479), appeal the decision and order to the Benefits Review Board. A notice of appeal shall be filed with the Board. Proceedings before the Board shall be conducted in accordance with part 802 of this title.

§ 725.482 Judicial review.

(a) Any person adversely affected or aggrieved by a final order of the Benefits Review Board may obtain a review of that order in the U.S. court of appeals for the circuit in which the injury occurred by filing in such court within 60 days following the issuance of such Board order a written petition praying that the order be modified or set aside. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless the court finds that irreparable injury would otherwise ensue to an operator or carrier.

(b) The Director, Office of Workers' Compensation Program, as designee of the Secretary of Labor responsible for the administration and enforcement of the Act, shall be considered the proper party to appear and present argument on behalf of the Secretary of Labor in all review proceedings conducted pursuant to this part and the Act, either as petitioner or respondent.

§ 725.483 Costs in proceedings brought without reasonable grounds.

If a United States court having jurisdiction of proceedings regarding any claim or final decision and order, determines that the proceedings have been instituted or continued before such court without reasonable ground, the costs of such proceedings shall be assessed against the party who has so instituted or continued such proceedings.

Subpart G—Responsible Coal Mine Operators

§ 725.490 Statutory provisions and scope.

(a) One of the major purposes of the black lung benefits amendments of 1977 was to provide a more effective means of transferring the responsibility for the payment of benefits from the Federal government to the coal industry with respect to claims filed under this part. In furtherance of this goal, a Black Lung Disability Trust Fund financed by the coal industry was established by the Black Lung Benefits Revenue Act of 1977. The primary purpose of the Fund

is to pay benefits with respect to all claims in which the last coal mine employment of the miner on whose account the claim was filed occurred before January 1, 1970. With respect to most claims in which the miner's last coal mine employment occurred after January 1, 1970, individual coal mine operators will be liable for the payment of benefits. The 1981 amendments to the Act relieved individual coal mine operators from the liability for payment of certain special claims involving coal mine employment on or after January 1, 1970, where the claim was previously denied and subsequently approved under section 435 of the Act. See § 725.496 for a detailed description of these special claims. Where no such operator exists or the operator determined to be liable is in default in any case, the fund shall pay the benefits due and seek reimbursement as is appropriate. See also § 725.420 for the fund's role in the payment of interim benefits in certain contested cases. In addition, the Black Lung Benefits Reform Act of 1977 amended certain provisions affecting the scope of coverage under the Act and describing the effects of particular corporate transactions on the liability of operators.

(b) The provisions of this subpart define the term ''operator'' and prescribe the manner in which the identity of an operator which may be liable for the payment of benefits—referred to herein as a ''responsible operator''—will be determined.

§ 725.491 Operator defined.

(a) For purposes of this part, the term ''operator'' shall include:

(1) Any owner, lessee, or other person who operates, controls, or supervises a coal mine, or any independent contractor performing services or construction at such mine; or

(2) Any other person who:

(i) Employs an individual in the transportation of coal or in coal mine construction in or around a coal mine, to the extent such individual was exposed to coal mine dust as a result of such employment (see § 725.202);

(ii) In accordance with the provisions of § 725.492, may be considered a successor operator; or

(iii) Paid wages or a salary, or provided other benefits, to an individual in exchange for work as a miner (see § 725.202).

(b) The terms ''owner,'' ''lessee,'' and ''person'' shall include any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization, as appropriate, except that an officer of a corporation shall not be considered an ''operator'' for purposes of this part. Following the issuance of an order awarding benefits against a corporation that has not secured its liability for benefits in accordance with section 423 of the Act and § 726.4, such order may be enforced against the president, secretary, or treasurer of the corporation in accordance with subpart I of this part.

(c) The term ''independent contractor'' shall include any person who contracts to perform services. Such contractor's status as an operator shall not be contingent upon the amount or percentage of its work or business related to activities in or around a mine, nor upon the number or percentage of its employees engaged in such activities.

(d) For the purposes of determining whether a person is or was an operator that may be found liable for the payment of benefits under this part, there shall be a rebuttable presumption that during the course of an individual's employment with such employer, such individual was regularly and continuously exposed to coal mine dust during the course of employment. The presumption may be rebutted by a showing that the employee was not exposed to coal mine dust for significant periods during such employment.

(e) The operation, control, or supervision referred to in paragraph (a)(1) of this section may be exercised directly or indirectly. Thus, for example, where a coal mine is leased, and the lease empowers the lessor to make decisions with respect to the terms and conditions under which coal is to be extracted or prepared, such as, but not limited to, the manner of extraction or preparation or the amount of coal to be produced, the lessor may be considered an operator. Similarly, any parent entity or other controlling business entity may be considered an operator for purposes of this part, regardless of the nature of its business activities.

(f) Neither the United States, nor any State, nor any instrumentality or agency of the United States or any State, shall be considered an operator.

§ 725.492 Successor operator defined.

(a) Any person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such prior operator, or substantially all of the assets thereof, shall be considered a ''successor operator'' with respect to any miners previously employed by such prior operator.

(b) The following transactions shall also be deemed to create successor operator liability:

(1) If an operator ceases to exist by reason of a reorganization which involves a change in identity, form, or place of business or organization, however effected;

(2) If an operator ceases to exist by reason of a liquidation into a parent or successor corporation; or

(3) If an operator ceases to exist by reason of a sale of substantially all its assets, or as a result of merger, consolidation, or division.

(c) In any case in which a transaction specified in paragraph (b), or substantially similar to a transaction specified in paragraph (b), took place, the resulting entity shall be considered a ''successor operator'' with respect to any miners previously employed by such prior operator.

(d) This section shall not be construed to relieve a prior operator of any liability if such prior operator meets the conditions set forth in § 725.494. If the prior operator does not meet the conditions set forth in § 725.494, the following provisions shall apply:

(1) In any case in which a prior operator transferred a mine or mines, or substantially all of the assets thereof, to a successor operator, or sold its coal mining business or substantially all of the assets thereof, to a successor operator, and then ceased to exist within the terms of paragraph (b), the successor operator as identified in paragraph (a) shall be primarily liable for the payment of benefits to any miners previously employed by such prior operator.

(2) In any case in which a prior operator transferred mines, or substantially all of the assets thereof, to more than one successor operator, the successor operator that most recently acquired a mine or mines or assets from the prior operator shall be primarily liable for the payment of benefits to any miners previously employed by such prior operator.

(3) In any case in which a mine or mines, or substantially all the assets thereof, have been transferred more than once, the successor operator that most recently acquired such mine or mines or assets shall be primarily liable for the payment of benefits to any miners previously employed by the original prior operator. If the most recent successor operator does not meet the criteria for a potentially liable operator set forth in § 725.494, the next most recent successor operator shall be liable.

(e) An ''acquisition,'' for purposes of this section, shall include any transaction by which title to the mine or mines, or substantially all of the assets thereof, or the right to extract or prepare coal at such mine or mines, becomes

vested in a person other than the prior operator.

725.493 Employment relationship defined.

(a)(1) In determining the identity of a responsible operator under this part, the terms ''employ'' and ''employment'' shall be construed as broadly as possible, and shall include any relationship under which an operator retains the right to direct, control, or supervise the work performed by a miner, or any other relationship under which an operator derives a benefit from the work performed by a miner. Any individuals who participate with one or more persons in the mining of coal, such as owners, proprietors, partners, and joint venturers, whether they are compensated by wages, salaries, piece rates, shares, profits, or by any other means, shall be deemed employees. It is the specific intention of this paragraph to disregard any financial arrangement or business entity devised by the actual owners or operators of a coal mine or coal mine-related enterprise to avoid the payment of benefits to miners who, based upon the economic reality of their relationship to this enterprise, are, in fact, employees of the enterprise.

(2) The payment of wages or salary shall be prima facie evidence of the right to direct, control, or supervise an individual's work. The Department intends that where the operator who paid a miner's wages or salary meets the criteria for a potentially liable operator set forth in § 725.494, that operator shall be primarily liable for the payment of any benefits due the miner as a result of such employment. The absence of such payment, however, will not negate the existence of an employment relationship. Thus, the Department also intends that where the person who paid a miner's wages may not be considered a potentially liable operator, any other operator who retained the right to direct, control or supervise the work performed by the miner, or who benefitted from such work, may be considered a potentially liable operator.

(b) This paragraph contains examples of relationships that shall be considered employment relationships for purposes of this part. The list is not intended to be exclusive.

(1) In any case in which an operator may be considered a successor operator, as determined in accordance with § 725.492, any employment with a prior operator shall also be deemed to be employment with the successor operator. In a case in which the miner was not independently employed by the successor operator, the prior operator shall remain primarily liable for the payment of any benefits based on the miner's employment with the prior operator. In a case in which the miner was independently employed by the successor operator after the transaction giving rise to successor operator liability, the successor operator shall be primarily liable for the payment of any benefits.

(2) In any case in which the operator which directed, controlled or supervised the miner is no longer in business and such operator was a subsidiary of a parent company, a member of a joint venture, a partner in a partnership, or was substantially owned or controlled by another business entity, such parent entity or other member of a joint venture or partner or controlling business entity may be considered the employer of any employees of such operator.

(3) In any claim in which the operator which directed, controlled or supervised the miner is a lessee, the lessee shall be considered primarily liable for the claim. The liability of the lessor may be established only after it has been determined that the lessee is unable to provide for the payment of benefits to a successful claimant. In any case involving the liability of a lessor for a claim arising out of employment with a lessee, any determination of lessor liability shall be made on the basis of the facts present in the case in accordance with the following considerations:

(i) Where a coal mine is leased, and the lease empowers the lessor to make decisions with respect to the terms and conditions under which coal is to be extracted or prepared, such as, but not limited to, the manner of extraction or preparation or the amount of coal to be produced, the lessor shall be considered the employer of any employees of the lessee.

(ii) Where a coal mine is leased to a self-employed operator, the lessor shall be considered the employer of such self-employed operator and its employees if the lease or agreement is executed or renewed after August 18, 1978 and such lease or agreement does not require the lessee to guarantee the payment of benefits which may be required under this part and part 726 of this subchapter.

(iii) Where a lessor previously operated a coal mine, it may be considered an operator with respect to employees of any lessee of such mine, particularly where the leasing arrangement was executed or renewed after August 18, 1978 and does not require the lessee to secure benefits provided by the Act.

(4) A self-employed operator, depending upon the facts of the case, may be considered an employee of any other operator, person, or business entity which substantially controls, supervises, or is financially responsible for the activities of the self-employed operator.

§ 725.494 Potentially liable operators.

An operator may be considered a ''potentially liable operator'' with respect to a claim for benefits under this part if each of the following conditions is met:

(a) The miner's disability or death arose at least in part out of employment in or around a mine or other facility during a period when the mine or facility was operated by such operator, or by a person with respect to which the operator may be considered a successor operator. For purposes of this section, there shall be a rebuttable presumption that the miner's disability or death arose in whole or in part out of his or her employment with such operator. Unless this presumption is rebutted, the responsible operator shall be liable to pay benefits to the claimant on account of the disability or death of the miner in accordance with this part. A miner's pneumoconiosis, or disability or death therefrom, shall be considered to have arisen in whole or in part out of work in or around a mine if such work caused, contributed to or aggravated the progression or advancement of a miner's loss of ability to perform his or her regular coal mine employment or comparable employment.

(b) The operator, or any person with respect to which the operator may be considered a successor operator, was an operator for any period after June 30, 1973.

(c) The miner was employed by the operator, or any person with respect to which the operator may be considered a successor operator, for a cumulative period of not less than one year (§ 725.101(a)(32)).

(d) The miner's employment with the operator, or any person with respect to which the operator may be considered a successor operator, included at least one working day (§ 725.101(a)(32)) after December 31, 1969.

(e) The operator is capable of assuming its liability for the payment of continuing benefits under this part. An operator will be deemed capable of assuming its liability for a claim if one of the following three conditions is met:

(1) The operator obtained a policy or contract of insurance under section 423 of the Act and part 726 of this subchapter that covers the claim, except that such policy shall not be considered sufficient to establish the operator's capability of assuming liability if the insurance company has been declared

insolvent and its obligations for the claim are not otherwise guaranteed;

(2) The operator qualified as a self-insurer under section 423 of the Act and part 726 of this subchapter during the period in which the miner was last employed by the operator, provided that the operator still qualifies as a self-insurer or the security given by the operator pursuant to § 726.104(b) is sufficient to secure the payment of benefits in the event the claim is awarded; or

(3) The operator possesses sufficient assets to secure the payment of benefits in the event the claim is awarded in accordance with § 725.606.

§ 725.495 Criteria for determining a responsible operator.

(a)(1) The operator responsible for the payment of benefits in a claim adjudicated under this part (the ''responsible operator'') shall be the potentially liable operator, as determined in accordance with § 725.494, that most recently employed the miner.

(2) If more than one potentially liable operator may be deemed to have employed the miner most recently, then the liability for any benefits payable as a result of such employment shall be assigned as follows:

(i) First, to the potentially liable operator that directed, controlled, or supervised the miner;

(ii) Second, to any potentially liable operator that may be considered a successor operator with respect to miners employed by the operator identified in paragraph (a)(2)(i) of this section; and

(iii) Third, to any other potentially liable operator which may be deemed to have been the miner's most recent employer pursuant to § 725.493.

(3) If the operator that most recently employed the miner may not be considered a potentially liable operator, as determined in accordance with § 725.494, the responsible operator shall be the potentially liable operator that next most recently employed the miner. Any potentially liable operator that employed the miner for at least one day after December 31, 1969 may be deemed the responsible operator if no more recent employer may be considered a potentially liable operator.

(4) If the miner's most recent employment by an operator ended while the operator was authorized to self-insure its liability under part 726 of this title, and that operator no longer possesses sufficient assets to secure the payment of benefits, the provisions of paragraph (a)(3) shall be inapplicable with respect to any operator that employed the miner only before he was employed by such self-insured operator. If no operator that employed the miner after his employment with the self-insured operator meets the conditions of § 725.494, the claim of the miner or his survivor shall be the responsibility of the Black Lung Disability Trust Fund.

(b) Except as provided in this section and § 725.408(a)(3), with respect to the adjudication of the identity of a responsible operator, the Director shall bear the burden of proving that the responsible operator initially found liable for the payment of benefits pursuant to § 725.410 (the ''designated responsible operator'') is a potentially liable operator. It shall be presumed, in the absence of evidence to the contrary, that the designated responsible operator is capable of assuming liability for the payment of benefits in accordance with § 725.494(e).

(c) The designated responsible operator shall bear the burden of proving either:

(1) That it does not possess sufficient assets to secure the payment of benefits in accordance with § 725.606; or

(2) That it is not the potentially liable operator that most recently employed the miner. Such proof must include evidence that the miner was employed as a miner after he or she stopped working for the designated responsible operator and that the person by whom he or she was employed is a potentially liable operator within the meaning of § 725.494. In order to establish that a more recent employer is a potentially liable operator, the designated responsible operator must demonstrate that the more recent employer possesses sufficient assets to secure the payment of benefits in accordance with § 725.606. The designated responsible operator may satisfy its burden by presenting evidence that the owner, if the more recent employer is a sole proprietorship; the partners, if the more recent employer is a partnership; or the president, secretary, and treasurer, if the more recent employer is a corporation that failed to secure the payment of benefits pursuant to part 726 of this subchapter, possess assets sufficient to secure the payment of benefits, provided such assets may be reached in a proceeding brought under subpart I of this part.

(d) In any case referred to the Office of Administrative Law Judges pursuant to § 725.421 in which the operator finally designated as responsible pursuant to § 725.418(d) is not the operator that most recently employed the miner, the record shall contain a statement from the district director explaining the reasons for such designation. If the reasons include the most recent employer's failure to meet the conditions of § 725.494(e), the record shall also contain a statement that the Office has searched the files it maintains pursuant to part 726, and that the Office has no record of insurance coverage for that employer, or of authorization to self-insure, that meets the conditions of § 725.494(e)(1) or (e)(2). Such a statement shall be prima facie evidence that the most recent employer is not financially capable of assuming its liability for a claim. In the absence of such a statement, it shall be presumed that the most recent employer is financially capable of assuming its liability for a claim.

§ 725.496 Special claims transferred to the fund.

(a) The 1981 amendments to the Act amended section 422 of the Act and transferred liability for payment of certain special claims from operators and carriers to the fund. These provisions apply to claims which were denied before March 1, 1978, and which have been or will be approved in accordance with section 435 of the Act.

(b) Section 402(i) of the Act defines three classes of denied claims subject to the transfer provisions:

(1) Claims filed with and denied by the Social Security Administration before March 1, 1978;

(2) Claims filed with the Department of Labor in which the claimant was notified by the Department of an administrative or informal denial before March 1, 1977, and in which the claimant did not within one year of such notification either:

(i) Request a hearing; or

(ii) Present additional evidence; or

(iii) Indicate an intention to present additional evidence; or

(iv) Request a modification or reconsideration of the denial on the ground of a change in conditions or because of a mistake in a determination of fact;

(3) Claims filed with the Department of Labor and denied under the law in effect prior to the enactment of the Black Lung Benefits Reform Act of 1977, that is, before March 1, 1978, following a formal hearing before an administrative law judge or administrative review before the Benefits Review Board or review before a United States Court of Appeals.

(c) Where more than one claim was filed with the Social Security Administration and/or the Department of Labor prior to March 1, 1978, by or on behalf of a miner or a surviving dependent of a miner, unless such claims were required to be merged by

the agency's regulations, the procedural history of each such claim must be considered separately to determine whether the claim is subject to the transfer of liability provisions.

(d) For a claim filed with and denied by the Social Security Administration prior to March 1, 1978, to come within the transfer provisions, such claim must have been or must be approved under the provisions of section 435 of the Act. No claim filed with and denied by the Social Security Administration is subject to the transfer of liability provisions unless a request was made by or on behalf of the claimant for review of such denied claim under section 435. Such review must have been requested by the filing of a valid election card or other equivalent document with the Social Security Administration in accordance with section 435(a) and its implementing regulations at 20 CFR 410.700 through 410.707.

(e) Where a claim filed with the Department of Labor prior to March 1, 1977, was subjected to repeated administrative or informal denials, the last such denial issued during the pendency of the claim determines whether the claim is subject to the transfer of liability provisions.

(f) Where a miner's claim comes within the transfer of liability provisions of the 1981 amendments the fund is also liable for the payment of any benefits to which the miner's dependent survivors are entitled after the miner's death. However, if the survivor's entitlement was established on a separate claim not subject to the transfer of liability provisions prior to approval of the miner's claim under section 435, the party responsible for the payment of such survivors' benefits shall not be relieved of that responsibility because the miner's claim was ultimately approved and found subject to the transfer of liability provisions.

§ 725.497 Procedures in special claims transferred to the fund.

(a) *General.* It is the purpose of this section to define procedures to expedite the handling and disposition of claims affected by the benefit liability transfer provisions of Section 205 of the Black Lung Benefits Amendments of 1981.

(b) *Action by the Department.* The OWCP shall, in accordance with the criteria contained in § 725.496, review each claim which is or may be affected by the provisions of Section 205 of the Black Lung Benefits Amendments of 1981. Any party to a claim, adjudication officer, or adjudicative body may request that such a review be conducted and that the record be supplemented with any additional documentation necessary for an informed consideration of the transferability of the claim. Where the issue of the transferability of the claim can not be resolved by agreement of the parties and the evidence of record is not sufficient for a resolution of the issue, the hearing record may be reopened or the case remanded for the development of the additional evidence concerning the procedural history of the claim necessary to such resolution. Such determinations shall be made on an expedited basis.

(c) *Dismissal of operators.* If it is determined that a coal mine operator or insurance carrier which previously participated in the consideration or adjudication of any claim, may no longer be found liable for the payment of benefits to the claimant by reason of section 205 of the Black Lung Benefits Amendments of 1981, such operator or carrier shall be promptly dismissed as a party to the claim. The dismissal of an operator or carrier shall be concluded at the earliest possible time and in no event shall an operator or carrier participate as a necessary party in any claim for which only the fund may be liable.

(d) *Procedure following dismissal of an operator.* After it has been determined that an operator or carrier must be dismissed as a party in any claim in accordance with this section, the Director shall take such action as is authorized by the Act to bring about the proper and expeditious resolution of the claim in light of all relevant medical and other evidence. Action to be taken in this regard by the Director may include, but is not limited to, the assignment of the claim to the Black Lung Disability Trust Fund for the payment of benefits, the reimbursement of benefits previously paid by an operator or carrier if appropriate, the defense of the claim on behalf of the fund, or proceedings authorized by § 725.310.

(e) Any claimant whose claim has been subsequently denied in a modification proceeding will be entitled to expedited review of the modification decision. Where a formal hearing was previously held, the claimant may waive his right to a further hearing and ask that a decision be made on the record of the prior hearing, as supplemented by any additional documentary evidence which the parties wish to introduce and briefs of the parties, if desired. In any case in which the claimant waives his right to a second hearing, a decision and order must be issued within 30 days of the date upon which the parties agree the record has been completed.

Subpart H—Payment of Benefits General Provisions

§ 725.501 Payment provisions generally.

The provisions of this subpart govern the payment of benefits to claimants whose claims are approved for payment under section 415 and part C of title IV of the Act or approved after review under section 435 of the Act and part 727 of this subchapter (see § 725.4(d)).

§ 725.502 When benefit payments are due; manner of payment.

(a)(1) Except with respect to benefits paid by the fund pursuant to an initial determination issued in accordance with § 725.418 (see § 725.522), benefits under the Act shall be paid when they become due. Benefits shall be considered due after the issuance of an effective order requiring the payment of benefits by a district director, administrative law judge, Benefits Review Board, or court, notwithstanding the pendency of a motion for reconsideration before an administrative law judge or an appeal to the Board or court, except that benefits shall not be considered due where the payment of such benefits has been stayed by the Benefits Review Board or appropriate court. An effective order shall remain in effect unless it is vacated by an administrative law judge on reconsideration, or, upon review under section 21 of the LHWCA, by the Benefits Review Board or an appropriate court, or is superseded by an effective order issued pursuant to § 725.310.

(2) A proposed order issued by a district director pursuant to § 725.418 becomes effective at the expiration of the thirtieth day thereafter if no party timely requests revision of the proposed decision and order or a hearing (see § 725.419). An order issued by an administrative law judge becomes effective when it is filed in the office of the district director (see § 725.479). An order issued by the Benefits Review Board shall become effective when it is issued. An order issued by a court shall become effective in accordance with the rules of the court.

(b)(1) While an effective order requiring the payment of benefits remains in effect, monthly benefits, at the rates set forth in § 725.520, shall be due on the fifteenth day of the month following the month for which the benefits are payable. For example, benefits payable for the month of January shall be due on the fifteenth day of February.

(2) Within 30 days after the issuance of an effective order requiring the payment of benefits, the district director shall compute the amount of benefits

payable for periods prior to the effective date of the order, in addition to any interest payable for such periods (see § 725.608), and shall so notify the parties. Any computation made by the district director under this paragraph shall strictly observe the terms of the order. Benefits and interest payable for such periods shall be due on the thirtieth day following issuance of the district director's computation. A copy of the current table of applicable interest rates shall be attached to the computation.

(c) Benefits are payable for monthly periods and shall be paid directly to an eligible claimant or his or her representative payee (see § 725.510) beginning with the month during which eligibility begins. Benefit payments shall terminate with the month before the month during which eligibility terminates. If a claimant dies in the first month during which all requirements for eligibility are met, benefits shall be paid for that month.

§ 725.503 Date from which benefits are payable.

(a) In accordance with the provisions of section 6(a) of the Longshore Act as incorporated by section 422(a) of the Act, and except as provided in § 725.504, the provisions of this section shall be applicable in determining the date from which benefits are payable to an eligible claimant for any claim filed after March 31, 1980. Except as provided in paragraph (d) of this section, the date from which benefits are payable for any claim approved under part 727 shall be determined in accordance with § 727.302 (see § 725.4(d)).

(b) *Miner's claim.* Benefits are payable to a miner who is entitled beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment. Where the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed. In the case of a miner who filed a claim before January 1, 1982, benefits shall be payable to the miner's eligible survivor (if any) beginning with the month in which the miner died.

(c) *Survivor's claim.* Benefits are payable to a survivor who is entitled beginning with the month of the miner's death, or January 1, 1974, whichever is later.

(d) If a claim is awarded pursuant to section 22 of the Longshore Act and § 725.310, then the date from which benefits are payable shall be determined as follows:

(1) *Mistake in fact.* The provisions of paragraphs (b) or (c) of this section, as applicable, shall govern the determination of the date from which benefits are payable.

(2) *Change in conditions.* Benefits are payable to a miner beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment, provided that no benefits shall be payable for any month prior to the effective date of the most recent denial of the claim by a district director or administrative law judge. Where the evidence does not establish the month of onset, benefits shall be payable to such miner from the month in which the claimant requested modification.

(e) In the case of a claim filed between July 1, 1973, and December 31, 1973, benefits shall be payable as provided by this section, except to the extent prohibited by § 727.303 (see § 725.4(d)).

(f) No benefits shall be payable with respect to a claim filed after December 31, 1973 (a part C claim), for any period of eligibility occurring before January 1, 1974.

(g) Each decision and order awarding benefits shall indicate the month from which benefits are payable to the eligible claimant.

§ 725.504 Payments to a claimant employed as a miner.

(a) In the case of a claimant who is employed as a miner (see § 725.202) at the time of a final determination of such miner's eligibility for benefits, no benefits shall be payable unless:

(1) The miner's eligibility is established under section 411(c)(3) of the Act; or

(2) the miner terminates his or her coal mine employment within 1 year from the date of the final determination of the claim.

(b) If the eligibility of a working miner is established under section 411(c)(3) of the Act, benefits shall be payable as is otherwise provided in this part. If eligibility cannot be established under section 411(c)(3), and the miner continues to be employed as a miner in any capacity for a period of less than 1 year after a final determination of the claim, benefits shall be payable beginning with the month during which the miner ends his or her coal mine employment. If the miner's employment continues for more than 1 year after a final determination of eligibility, such determination shall be considered a denial of benefits on the basis of the miner's continued employment, and the miner may seek benefits only as provided in § 725.310, if applicable, or by filing a new claim under this part. The provisions of Subparts E and F of this part shall be applicable to claims considered under this section as is appropriate.

(c) In any case where the miner returns to coal mine or comparable and gainful work, the payments to such miner shall be suspended and no benefits shall be payable (except as provided in section 411(c)(3) of the Act) for the period during which the miner continues to work. If the miner again terminates employment, the district director may require the miner to submit to further medical examination before authorizing the payment of benefits.

§ 725.505 Payees.

Benefits may be paid, as appropriate, to a beneficiary, to a qualified dependent, or to a representative authorized under this subpart to receive payments on behalf of such beneficiary or dependent.

§ 725.506 Payment on behalf of another; "legal guardian" defined.

Benefits are paid only to the beneficiary, his or her representative payee (see § 725.510) or his or her legal guardian. As used in this section, "legal guardian" means an individual who has been appointed by a court of competent jurisdiction or otherwise appointed pursuant to law to assume control of and responsibility for the care of the beneficiary, the management of his or her estate, or both.

§ 725.507 Guardian for minor or incompetent.

An adjudication officer may require that a legal guardian or representative be appointed to receive benefit payments payable to any person who is mentally incompetent or a minor and to exercise the powers granted to, or to perform the duties otherwise required of such person under the Act.

§ 725.510 Representative payee.

(a) If the district director determines that the best interests of a beneficiary are served thereby, the district director may certify the payment of such beneficiary's benefits to a representative payee.

(b) Before any amount shall be certified for payment to any representative payee for or on behalf of a beneficiary, such representative payee shall submit to the district director such evidence as may be required of his or her relationship to, or his or her responsibility for the care of, the beneficiary on whose behalf payment is to be made, or of his or her authority to receive such a payment. The district director may, at any time thereafter, require evidence of the continued

existence of such relationship, responsibility, or authority. If a person requesting representative payee status fails to submit the required evidence within a reasonable period of time after it is requested, no further payments shall be certified to him or her on behalf of the beneficiary unless the required evidence is thereafter submitted.

(c) All benefit payments made to a representative payee shall be available only for the use and benefit of the beneficiary, as defined in § 725.511.

§ 725.511 Use and benefit defined.

(a) Payments certified to a representative payee shall be considered as having been applied for the use and benefit of the beneficiary when they are used for the beneficiary's current maintenance—*i.e.,* to replace current income lost because of the disability of the beneficiary. Where a beneficiary is receiving care in an institution, current maintenance shall include the customary charges made by the institution and charges made for the current and foreseeable needs of the beneficiary which are not met by the institution.

(b) Payments certified to a representative payee which are not needed for the current maintenance of the beneficiary, except as they may be used under § 725.512, shall be conserved or invested on the beneficiary's behalf. Preferred investments are U.S. savings bonds which shall be purchased in accordance with applicable regulations of the U.S. Treasury Department (31 CFR part 315). Surplus funds may also be invested in accordance with the rules applicable to investment of trust estates by trustees. For example, surplus funds may be deposited in an interest or dividend bearing account in a bank or trust company or in a savings and loan association if the account is either federally insured or is otherwise insured in accordance with State law requirements. Surplus funds deposited in an interest or dividend bearing account in a bank or trust company or in a savings and loan association must be in a form of account which clearly shows that the representative payee has only a fiduciary, and not a personal, interest in the funds. The preferred forms of such accounts are as follows:

Name of beneficiary _____
by (Name of representative payee)
representative payee,
or (Name of beneficiary)
by (Name of representative payee) trustee,

U.S. savings bonds purchased with surplus funds by a representative payee for an incapacitated adult beneficiary should be registered as follows: (Name of beneficiary) (Social Security No.), for whom (Name of payee) is representative payee for black lung benefits.

§ 725.512 Support of legally dependent spouse, child, or parent.

If current maintenance needs of a beneficiary are being reasonably met, a relative or other person to whom payments are certified as representative payee on behalf of the beneficiary may use part of the payments so certified for the support of the legally dependent spouse, a legally dependent child, or a legally dependent parent of the beneficiary.

§ 725.513 Accountability; transfer.

(a) The district director may require a representative payee to submit periodic reports including a full accounting of the use of all benefit payments certified to a representative payee. If a requested report or accounting is not submitted within the time allowed, the district director shall terminate the certification of the representative payee and thereafter payments shall be made directly to the beneficiary. A certification which is terminated under this section may be reinstated for good cause, provided that all required reports are supplied to the district director.

(b) A representative payee who has conserved or invested funds from payments under this part shall, upon the direction of the district director, transfer any such funds (including interest) to a successor payee appointed by the district director or, at the option of the district director, shall transfer such funds to the Office for recertification to a successor payee or the beneficiary.

§ 725.514 Certification to dependent of augmentation portion of benefit.

(a) If the basic benefit of a miner or of a surviving spouse is augmented because of one or more dependents, and it appears to the district director that the best interests of such dependent would be served thereby, or that the augmented benefit is not being used for the use and benefit (as defined in this subpart) of the augmentee, the district director may certify payment of the amount of such augmentation (to the extent attributable to such dependent) to such dependent directly, or to a legal guardian or a representative payee for the use and benefit of such dependent.

(b) Any request to the district director to certify separate payment of the amount of an augmentation in accordance with paragraph (a) of this section shall be in writing on such form and in accordance with such instructions as are prescribed by the Office.

(c) The district director shall specify the terms and conditions of any certification authorized under this section and may terminate any such certification where appropriate.

(d) Any payment made under this section, if otherwise valid under the Act, is a complete settlement and satisfaction of all claims, rights, and interests in and to such payment, except that such payment shall not be construed to abridge the rights of any party to recoup any overpayment made.

§ 725.515 Assignment and exemption from claims of creditors.

(a) Except as provided by the Act and this part, no assignment, release, or commutation of benefits due or payable under this part by a responsible operator shall be valid, and all benefits shall be exempt from claims of creditors and from levy, execution, and attachment or other remedy or recovery or collection of a debt, which exemption may not be waived.

(b) Notwithstanding any other provision of law, benefits due from, or payable by, the Black Lung Disability Trust Fund under the Act and this part to a claimant shall be subject to legal process brought for the enforcement against the claimant of his or her legal obligations to provide child support or make alimony payments to the same extent as if the fund was a private person.

Benefit Rates

§ 725.520 Computation of benefits.

(a) *Basic rate.* The amount of benefits payable to a beneficiary for a month is determined, in the first instance, by computing the ''basic rate.'' The basic rate is equal to 37½ percent of the monthly pay rate for Federal employees in GS–2, step 1. That rate for a month is determined by:

(1) Ascertaining the lowest annual rate of pay (step 1) for Grade GS–2 of the General Schedule applicable to such month (see 5 U.S.C. 5332);

(2) Ascertaining the monthly rate thereof by dividing the amount determined in paragraph (a)(1) of this section by 12; and

(3) Ascertaining the basic rate under the Act by multiplying the amount determined in paragraph (a)(2) of this section by 0.375 (that is, by 37½ percent).

(b) *Basic benefit.* When a miner or surviving spouse is entitled to benefits for a month for which he or she has no dependents who qualify under this part and when a surviving child of a miner or spouse, or a parent, brother, or sister of a miner, is entitled to benefits for a month for which he or she is the only

beneficiary entitled to benefits, the amount of benefits to which such beneficiary is entitled is equal to the basic rate as computed in accordance with this section (raised, if not a multiple of 10 cents, to the next high multiple of 10 cents). This amount is referred to as the ''basic benefit.''

(c) *Augmented benefit.* (1) When a miner or surviving spouse is entitled to benefits for a month for which he or she has one or more dependents who qualify under this part, the amount of benefits to which such miner or surviving spouse is entitled is increased. This increase is referred to as an ''augmentation.''

(2) The benefits of a miner or surviving spouse are augmented to take account of a particular dependent beginning with the first month in which such dependent satisfies the conditions set forth in this part, and continues to be augmented through the month before the month in which such dependent ceases to satisfy the conditions set forth in this part, except in the case of a child who qualifies as a dependent because he or she is a student. In the latter case, such benefits continue to be augmented through the month before the first month during no part of which he or she qualifies as a student.

(3) The basic rate is augmented by 50 percent for one such dependent, 75 percent for two such dependents, and 100 percent for three or more such dependents.

(d) *Survivor benefits.* As used in this section, ''survivor'' means a surviving child of a miner or surviving spouse, or a surviving parent, brother, or sister of a miner, who establishes entitlement to benefits under this part.

(e) *Computation and rounding.* (1) Any computation prescribed by this section is made to the third decimal place.

(2) Monthly benefits are payable in multiples of 10 cents. Therefore, a monthly payment of amounts derived under paragraph (c)(3) of this section which is not a multiple of 10 cents is increased to the next higher multiple of 10 cents.

(3) Since a fraction of a cent is not a multiple of 10 cents, such an amount which contains a fraction in the third decimal place is raised to the next higher multiple of 10 cents.

(f) *Eligibility based on the coal mine employment of more than one miner.* Where an individual, for any month, is entitled (and/or qualifies as a dependent for purposes of augmentation of benefits) based on the disability or death due to pneumoconiosis arising out of the coal mine employment of more than one miner, the benefit payable to or on behalf of such individual shall be at a rate equal to the highest rate of benefits for which entitlement is established by reason of eligibility as a beneficiary, or by reason of his or her qualification as a dependent for augmentation of benefit purposes.

§ 725.521 Commutation of payments; lump sum awards.

(a) Whenever the district director determines that it is in the interest of justice, the liability for benefits or any part thereof as determined by a final adjudication, may, with the approval of the Director, be discharged by the payment of a lump sum equal to the present value of future benefit payments commuted, computed at 4 percent true discount compounded annually.

(b) Applications for commutation of future payments of benefits shall be made to the district director in the manner prescribed by the district director. If the district director determines that an award of a lump sum payment of such benefits would be in the interest of justice, he or she shall refer such application, together with the reasons in support of such determination, to the Director for consideration.

(c) The Director shall, in his or her discretion, grant or deny the application for commutation of payments. Such decision may be appealed to the Benefits Review Board.

(d) The computation of all commutations of such benefits shall be made by the OWCP. For this purpose the file shall contain the date of birth of the person on whose behalf commutation is sought, as well as the date upon which such commutation shall be effective.

(e) For purposes of determining the amount of any lump sum award, the probability of the death of the disabled miner and/or other persons entitled to benefits before the expiration of the period during which he or she is entitled to benefits, shall be determined in accordance with the most current United States Life Tables, as developed by the Department of Health, Education, and Welfare, and the probability of the remarriage of a surviving spouse shall be determined in accordance with the remarriage tables of the Dutch Royal Insurance Institution. The probability of the happening of any other contingency affecting the amount or duration of the compensation shall be disregarded.

(f) In the event that an operator or carrier is adjudicated liable for the payment of benefits, such operator or carrier shall be notified of and given an opportunity to participate in the proceedings to determine whether a lump sum award shall be made. Such operator or carrier shall, in the event a lump sum award is made, tender full and prompt payment of such award to the claimant as though such award were a final payment of monthly benefits. Except as provided in paragraph (g) of this section, such lump sum award shall forever discharge such operator or carrier from its responsibility to make monthly benefit payments under the Act to the person who has requested such lump-sum award. In the event that an operator or carrier is adjudicated liable for the payment of benefits, such operator or carrier shall not be liable for any portion of a commuted or lump sum award predicated upon benefits due any claimant prior to January 1, 1974.

(g) In the event a lump-sum award is approved under this section, such award shall not operate to discharge an operator carrier, or the fund from any responsibility imposed by the Act for the payment of medical benefits to an eligible miner.

§ 725.522 Payments prior to final adjudication.

(a) If an operator or carrier fails or refuses to commence the payment of benefits within 30 days of issuance of an initial determination of eligibility by the district director (see § 725.420), or fails or refuses to commence the payment of any benefits due pursuant to an effective order by a district director, administrative law judge, Benefits Review Board, or court, the fund shall commence the payment of such benefits and shall continue such payments as appropriate. In the event that the fund undertakes the payment of benefits on behalf of an operator or carrier, the provisions of §§ 725.601 through 725.609 shall be applicable to such operator or carrier.

(b) If benefit payments are commenced prior to the final adjudication of the claim and it is later determined by an administrative law judge, the Board, or court that the claimant was ineligible to receive such payments, such payments shall be considered overpayments pursuant to § 725.540 and may be recovered in accordance with the provisions of this subpart.

Special Provisions for Operator Payments

§ 725.530 Operator payments; generally.

(a) Benefits payable by an operator or carrier pursuant to an effective order issued by a district director, administrative law judge, Benefits Review Board, or court, or by an operator that has agreed that it is liable for the payment of benefits to a

claimant, shall be paid by the operator or carrier immediately when they become due (see § 725.502(b)). An operator that fails to pay any benefits that are due, with interest, shall be considered in default with respect to those benefits, and the provisions of § 725.605 of this part shall be applicable. In addition, a claimant who does not receive any benefits within 10 days of the date they become due is entitled to additional compensation equal to twenty percent of those benefits (see § 725.607). Arrangements for the payment of medical costs shall be made by such operator or carrier in accordance with the provisions of subpart J of this part.

(b) Benefit payments made by an operator or carrier shall be made directly to the person entitled thereto or a representative payee if authorized by the district director. The payment of a claimant's attorney's fee, if any is awarded, shall be made directly to such attorney. Reimbursement of the fund, including interest, shall be paid directly to the Secretary on behalf of the fund.

§ 725.531 Receipt for payment.

Any individual receiving benefits under the Act in his or her own right, or as a representative payee, or as the duly appointed agent for the estate of a deceased beneficiary, shall execute receipts for benefits paid by any operator which shall be produced by such operator for inspection whenever the district director requires. A canceled check shall be considered adequate receipt of payment for purposes of this section. No operator or carrier shall be required to retain receipts for payments made for more than 5 years after the date on which such receipt was executed.

§ 725.532 Suspension, reduction, or termination of payments.

(a) No suspension, reduction, or termination in the payment of benefits is permitted unless authorized by the district director, administrative law judge, Board, or court. No suspension, reduction, or termination shall be authorized except upon the occurrence of an event which terminates a claimant's eligibility for benefits (see subpart B of this part) or as is otherwise provided in subpart C of this part, §§ 725.306 and 725.310, or this subpart (see also §§ 725.533 through 725.546).

(b) Any unauthorized suspension in the payment of benefits by an operator or carrier shall be treated as provided in subpart I.

(c) Unless suspension, reduction, or termination of benefits payments is required by an administrative law judge, the Benefits Review Board or a court, the district director, after receiving notification of the occurrence of an event that would require the suspension, reduction, or termination of benefits, shall follow the procedures for the determination of claims set forth in subparts E and F.

Increases and Reductions of Benefits

§ 725.533 Modification of benefits amounts; general.

(a) Under certain circumstances, the amount of monthly benefits as computed in § 725.520 or lump-sum award (§ 725.521) shall be modified to determine the amount actually to be paid to a beneficiary. With respect to any benefits payable for all periods of eligibility after January 1, 1974, a reduction of the amount of benefits payable shall be required on account of:

(1) Any compensation or benefits received under any State workers' compensation law because of death or partial or total disability due to pneumoconiosis; or

(2) Any compensation or benefits received under or pursuant to any Federal law including part B of title IV of the Act because of death or partial or total disability due to pneumoconiosis; or

(3) In the case of benefits to a parent, brother, or sister as a result of a claim filed at any time or benefits payable on a miner's claim which was filed on or after January 1, 1982, the excess earnings from wages and from net earnings from self-employment (see § 410.530 of this title) of such parent, brother, sister, or miner, respectively; or

(4) The fact that a claim for benefits from an additional beneficiary is filed, or that such claim is effective for a payment during the month of filing, or a dependent qualifies under this part for an augmentation portion of a benefit of a miner or widow for a period in which another dependent has previously qualified for an augmentation.

(b) An adjustment in a beneficiary's monthly benefit may be required because an overpayment or underpayment has been made to such beneficiary (see §§ 725.540–725.546).

(c) A suspension of a beneficiary's monthly benefits may be required when the Office has information indicating that reductions on account of excess earnings may reasonably be expected.

(d) Monthly benefit rates are payable in multiples of 10 cents. Any monthly benefit rate which, after the applicable computations, augmentations, and reductions is not a multiple of 10 cents, is increased to the next higher multiple of 10 cents. Since a fraction of a cent is not a multiple of 10 cents, a benefit rate which contains such a fraction in the third decimal is raised to the next higher multiple of 10 cents.

(e) Any individual entitled to a benefit, who is aware of any circumstances which could affect entitlement to benefits, eligibility for payment, or the amount of benefits, or result in the termination, suspension, or reduction of benefits, shall promptly report these circumstances to the Office. The Office may at any time require an individual receiving, or claiming entitlement to, benefits, either on his or her own behalf or on behalf of another, to submit a written statement giving pertinent information bearing upon the issue of whether or not an event has occurred which would cause such benefit to be terminated, or which would subject such benefit to reductions or suspension under the provisions of the Act. The failure of an individual to submit any such report or statement, properly executed, to the Office shall subject such benefit to reductions, suspension, or termination as the case may be.

§ 725.534 Reduction of State benefits.

No benefits under section 415 of part B of title IV of the Act shall be payable to the residents of a State which, after December 31, 1969, reduces the benefits payable to persons eligible to receive benefits under section 415 of the Act under State laws applicable to its general work force with regard to workers' compensation (including compensation for occupational disease), unemployment compensation, or disability insurance benefits which are funded in whole or in part out of employer contributions.

§ 725.535 Reductions; receipt of State or Federal benefit.

(a) As used in this section the term ''State or Federal benefit'' means a payment to an individual on account of total or partial disability or death due to pneumoconiosis only under State or Federal laws relating to workers' compensation. With respect to a claim for which benefits are payable for any month between July 1 and December 31, 1973, ''State benefit'' means a payment to a beneficiary made on account of disability or death due to pneumoconiosis under State laws relating to workers' compensation (including compensation for occupational disease), unemployment compensation, or disability insurance.

(b) Benefit payments to a beneficiary for any month are reduced (but not below zero) by an amount equal to any payments of State or Federal benefits

received by such beneficiary for such month.

(c) Where a State or Federal benefit is paid periodically but not monthly, or in a lump sum as a commutation of or a substitution for periodic benefits, the reduction under this section is made at such time or times and in such amounts as the Office determines will approximate as nearly as practicable the reduction required under paragraph (b) of this section. In making such a determination, a weekly State or Federal benefit is multiplied by 4⅓ and a biweekly benefit is multiplied by 2⅙ to ascertain the monthly equivalent for reduction purposes.

(d) Amounts paid or incurred or to be incurred by the individual for medical, legal, or related expenses in connection with this claim for State or Federal benefits (defined in paragraph (a) of this section) are excluded in computing the reduction under paragraph (b) of this section, to the extent that they are consistent with State or Federal Law. Such medical, legal, or related expenses may be evidenced by the State or Federal benefit awards, compromise agreement, or court order in the State or Federal benefit proceedings, or by such other evidence as the Office may require. Such other evidence may consist of:

(1) A detailed statement by the individual's attorney, physician, or the employer's insurance carrier; or

(2) Bills, receipts, or canceled checks; or

(3) Other evidence indicating the amount of such expenses; or

(4) Any combination of the foregoing evidence from which the amount of such expenses may be determinable. Such expenses shall not be excluded unless established by evidence as required by the Office.

§ 725.536 Reductions; excess earnings.

In the case of a surviving parent, brother, or sister, whose claim was filed at any time, or of a miner whose claim was filed on or after January 1, 1982, benefit payments are reduced as appropriate by an amount equal to the deduction which would be made with respect to excess earnings under the provisions of sections 203 (b), (f), (g), (h), (j), and (l) of the Social Security Act (42 U.S.C. 403 (b), (f), (g), (h), (j), and (l)), as if such benefit payments were benefits payable under section 202 of the Social Security Act (42 U.S.C. 402) (see §§ 404.428 through 404.456 of this title).

§ 725.537 Reductions; retroactive effect of an additional claim for benefits.

Except as provided in § 725.212(b), beginning with the month in which a person other than a miner files a claim and becomes entitled to benefits, the benefits of other persons entitled to benefits with respect to the same miner, are adjusted downward, if necessary, so that no more than the permissible amount of benefits (the maximum amount for the number of beneficiaries involved) will be paid.

§ 725.538 Reductions; effect of augmentation of benefits based on subsequent qualification of individual.

(a) Ordinarily, a written request that the benefits of a miner or surviving spouse be augmented on account of a qualified dependent is made as part of the claim for benefits. However, it may also be made thereafter.

(b) In the latter case, beginning with the month in which such a request is filed on account of a particular dependent and in which such dependent qualifies for augmentation purposes under this part, the augmented benefits attributable to other qualified dependents (with respect to the same miner or surviving spouse), if any, are adjusted downward, if necessary, so that the permissible amount of augmented benefits (the maximum amount for the number of dependents involved) will not be exceeded.

(c) Where, based on the entitlement to benefits of a miner or surviving spouse, a dependent would have qualified for augmentation purposes for a prior month of such miner's or surviving spouse's entitlement had such request been filed in such prior month, such request is effective for such prior month. For any month before the month of filing such request, however, otherwise correct benefits previously certified by the Office may not be changed. Rather the amount of the augmented benefit attributable to the dependent filing such request in the later month is reduced for each month of the retroactive period to the extent that may be necessary. This means that for each month of the retroactive period, the amount payable to the dependent filing the later augmentation request is the difference, if any, between:

(1) The total amount of augmented benefits certified for payment for other dependents for that month, and

(2) The permissible amount of augmented benefits (the maximum amount for the number of dependents involved) payable for the month for all dependents, including the dependent filing later.

§ 725.539 More than one reduction event.

If a reduction for receipt of State or Federal benefits and a reduction on account of excess earnings are chargeable to the same month, the benefit for such month is first reduced (but not below zero) by the amount of the State or Federal benefits, and the remainder of the benefit for such month, if any, is then reduced (but not below zero) by the amount of excess earnings chargeable to such month.

Overpayments; Underpayments

§ 725.540 Overpayments.

(a) *General.* As used in this subpart, the term ''overpayment'' includes:

(1) Payment where no amount is payable under this part;

(2) Payment in excess of the amount payable under this part;

(3) A payment under this part which has not been reduced by the amounts required by the Act (see § 725.533);

(4) A payment under this part made to a resident of a State whose residents are not entitled to benefits (see §§ 725.402 and 725.403);

(5) Payment resulting from failure to terminate benefits to an individual no longer entitled thereto;

(6) Duplicate benefits paid to a claimant on account of concurrent eligibility under this part and parts 410 or 727 (see § 725.4(d)) of this title or as provided in § 725.309.

(b) *Overpaid beneficiary is living.* If the beneficiary to whom an overpayment was made is living at the time of a determination of such overpayment, is entitled to benefits at the time of the overpayment, or at any time thereafter becomes so entitled, no benefit for any month is payable to such individual, except as provided in paragraph (c) of this section, until an amount equal to the amount of the overpayment has been withheld or refunded.

(c) *Adjustment by withholding part of a monthly benefit.* Adjustment under paragraph (b) of this section may be effected by withholding a part of the monthly benefit payable to a beneficiary where it is determined that:

(1) Withholding the full amount each month would deprive the beneficiary of income required for ordinary and necessary living expenses;

(2) The overpayment was not caused by the beneficiary's intentionally false statement or representation, or willful concealment of, or deliberate failure to furnish, material information; and

(3) Recoupment can be effected in an amount of not less than $ 10 a month and at a rate which would not unreasonably extend the period of adjustment.

(d) *Overpaid beneficiary dies before adjustment.* If an overpaid beneficiary dies before adjustment is completed under the provisions of paragraph (b) of this section, recovery of the overpayment shall be effected through repayment by the estate of the deceased overpaid beneficiary, or by withholding of amounts due the estate of such deceased beneficiary, or both.

§ 725.541 Notice of waiver of adjustment or recovery of overpayment.

Whenever a determination is made that more than the correct amount of payment has been made, notice of the provisions of section 204(b) of the Social Security Act regarding waiver of adjustment or recovery shall be sent to the overpaid individual, to any other individual against whom adjustment or recovery of the overpayment is to be effected, and to any operator or carrier which may be liable to such overpaid individual.

§ 725.542 When waiver of adjustment or recovery may be applied.

There shall be no adjustment or recovery of an overpayment in any case where an incorrect payment has been made with respect to an individual:

(a) Who is without fault, and where

(b) Adjustment or recovery would either:

(1) Defeat the purpose of title IV of the Act, or

(2) Be against equity and good conscience.

§ 725.543 Standards for waiver of adjustment or recovery.

The standards for determining the applicability of the criteria listed in § 725.542 shall be the same as those applied by the Social Security Administration under §§ 404.506 through 404.512 of this title.

§ 725.544 Collection and compromise of claims for overpayment.

(a) *General effect of 31 U.S.C. 3711.* In accordance with 31 U.S.C. 3711 and applicable regulations, claims by the Office against an individual for recovery of an overpayment under this part not exceeding the sum of $100,000, exclusive of interest, may be compromised, or collection suspended or terminated, where such individual or his or her estate does not have the present or prospective ability to pay the full amount of the claim within a reasonable time (see paragraph (c) of this section), or the cost of collection is likely to exceed the amount of recovery (see paragraph (d) of this section), except as provided under paragraph (b) of this section.

(b) *When there will be no compromise, suspension, or termination of collection of a claim for overpayment.* (1) In any case where the overpaid individual is alive, a claim for overpayment will not be compromised, nor will there be suspension or termination of collection of the claim by the Office, if there is an indication of fraud, the filing of a false claim, or misrepresentation on the part of such individual or on the part of any other party having any interest in the claim.

(2) In any case where the overpaid individual is deceased:

(i) A claim for overpayment in excess of $ 5,000 will not be compromised, nor will there be suspension or termination of collection of the claim by the Office if there is an indication of fraud, the filing of a false claim, or misrepresentation on the part of such deceased individual; and

(ii) A claim for overpayment, regardless of the amount, will not be compromised, nor will there be suspension or termination of collection of the claim by the Office if there is an indication that any person other than the deceased overpaid individual had a part in the fraudulent action which resulted in the overpayment.

(c) *Inability to pay claim for recovery of overpayment.* In determining whether the overpaid individual is unable to pay a claim for recovery of an overpayment under this part, the Office shall consider the individual's age, health, present and potential income (including inheritance prospects), assets (*e.g.,* real property, savings account), possible concealment or improper transfer of assets, and assets or income of such individual which may be available in enforced collection proceedings. The Office will also consider exemptions available to such individual under the pertinent State or Federal law in such proceedings. In the event the overpaid individual is deceased, the Office shall consider the available assets of the estate, taking into account any liens or superior claims against the estate.

(d) *Cost of collection or litigative probabilities.* Where the probable costs of recovering an overpayment under this part would not justify enforced collection proceedings for the full amount of the claim, or where there is doubt concerning the Office's ability to establish its claim as well as the time which it will take to effect such collection, a compromise or settlement for less than the full amount may be considered.

(e) *Amount of compromise.* The amount to be accepted in compromise of a claim for overpayment under this part shall bear a reasonable relationship to the amount which can be recovered by enforced collection proceedings, giving due consideration to the exemption available to the overpaid individual under State or Federal law and the time which collection will take.

(f) *Payment.* Payment of the amount the Office has agreed to accept as a compromise in full settlement of a claim for recovery of an overpayment under this part shall be made within the time and in the manner set by the Office. A claim for the overpayment shall not be considered compromised or settled until the full payment of the compromised amount has been made within the time and manner set by the Office. Failure of the overpaid individual or his or her estate to make such payment as provided shall result in reinstatement of the full amount of the overpayment less any amounts paid prior to such default.

§ 725.545 Underpayments.

(a) *General.* As used in this subpart, the term ''underpayment'' includes a payment in an amount less than the amount of the benefit due for such month, and nonpayment where some amount of such benefits is payable.

(b) *Underpaid individual is living.* If an individual to whom an underpayment was made is living, the deficit represented by such underpayment shall be paid to such individual either in a single payment (if he or she is not entitled to a monthly benefit or if a single payment is requested by the claimant in writing) or by increasing one or more monthly benefit payments to which such individual becomes entitled.

(c) *Underpaid individual dies before adjustment of underpayment.* If an individual to whom an underpayment was made dies before receiving payment of the deficit or negotiating the check or checks representing payment of the deficit, such payment shall be distributed to the living person (or persons) in the highest order of priority as follows:

(1) The deceased individual's surviving spouse who was either:

(i) Living in the same household with the deceased individual at the time of such individual's death; or

(ii) In the case of a deceased miner, entitled for the month of death to black lung benefits as his or her surviving spouse or surviving divorced spouse.

(2) In the case of a deceased miner or spouse his or her child entitled to benefits as the surviving child of such miner or surviving spouse for the month in which such miner or spouse died (if more than one such child, in equal shares to each such child).

(3) In the case of a deceased miner, his parent entitled to benefits as the surviving parent of such miner for the month in which such miner died (if more than one such parent, in equal shares to each such parent).

(4) The surviving spouse of the deceased individual who does not qualify under paragraph (c)(1) of this section.

(5) The child or children of the deceased individual who do not qualify under paragraph (c)(2) of this section (if more than one such child, in equal shares to each such child).

(6) The parent or parents of the deceased individual who do not qualify under paragraph (c)(3) of this section (if more than one such parent, in equal shares to each such parent).

(7) The legal representative of the estate of the deceased individual as defined in paragraph (e) of this section.

(d) *Deceased beneficiary.* In the event that a person, who is otherwise qualified to receive payments as the result of a deficit caused by an underpayment under the provisions of paragraph (c) of this section, dies before receiving payment or before negotiating the check or checks representing such payment, his or her share of the underpayment shall be divided among the remaining living person(s) in the same order or priority. In the event that there is (are) no other such person(s), the underpayment shall be paid to the living person(s) in the next lower order of priority under paragraph (c) of this section.

(e) *Definition of legal representative.* The term ''legal representative,'' for the purpose of qualifying for receipt of an underpayment, generally means the executor or the administrator of the estate of the deceased beneficiary. However, it may also include an individual, institution or organization acting on behalf of an unadministered estate, provided the person can give the Office good acquittance (as defined in paragraph (f) of this section). The following persons may qualify as legal representative for purposes of this section, provided they can give the Office good acquittance:

(1) A person who qualifies under a State's ''small estate'' statute; or

(2) A person resident in a foreign country who under the laws and customs of that country, has the right to receive assets of the estate; or

(3) A public administrator; or

(4) A person who has the authority under applicable law to collect the assets of the estate of the deceased beneficiary.

(f) *Definition of ''good acquittance.''* A person is considered to give the Office ''good acquittance'' when payment to that person will release the Office from further liability for such payment.

§ 725.546 Relation to provisions for reductions or increases.

The amount of an overpayment or an underpayment is the difference between the amount to which the beneficiary was actually entitled and the amount paid. Overpayment and underpayment simultaneously outstanding against the same beneficiary shall first be adjusted against one another before adjustment pursuant to the other provisions of this subpart.

§ 725.547 Applicability of overpayment and underpayment provisions to operator or carrier.

(a) The provisions of this subpart relating to overpayments and underpayments shall be applicable to overpayments and underpayments made by responsible operators or their insurance carriers, as appropriate.

(b) No operator or carrier may recover, or make an adjustment of, an overpayment without prior application to, and approval by, the Office which shall exercise full supervisory authority over the recovery or adjustment of all overpayments.

§ 725.548 Procedures applicable to overpayments and underpayments.

(a) In any case involving either overpayments or underpayments, the Office may take any necessary action, and district directors may issue appropriate orders to protect the rights of the parties.

(b) Disputes arising out of orders so issued shall be resolved by the procedures set out in subpart F of this part.

Subpart I—Enforcement of Liability; Reports

§ 725.601 Enforcement generally.

(a) The Act, together with certain incorporated provisions from the Longshoremen's and Harbor Workers' Compensation Act, contains a number of provisions which subject an operator or other employer, claimants and others to penalties for failure to comply with certain provisions of the Act, or failure to commence and continue prompt periodic payments to a beneficiary.

(b) It is the policy and intent of the Department to vigorously enforce the provisions of this part through the use of the remedies provided by the Act. Accordingly, if an operator refuses to pay benefits with respect to a claim for which the operator has been adjudicated liable, the Director shall invoke and execute the lien on the property of the operator as described in § 725.603. Enforcement of this lien shall be pursued in an appropriate U.S. district court. If the Director determines that the remedy provided by § 725.603 may not be sufficient to guarantee the continued compliance with the terms of an award or awards against the operator, the Director shall in addition seek an injunction in the U.S. district court to prohibit future noncompliance by the operator and such other relief as the court considers appropriate (see § 725.604). If an operator unlawfully suspends or terminates the payment of benefits to a claimant, the district director shall declare the award in default and proceed in accordance with § 725.605. In all cases payments in addition to compensation (see § 725.607) and interest (see § 725.608) shall be sought by the Director or awarded by the district director.

(c) In certain instances the remedies provided by the Act are concurrent; that is, more than one remedy might be appropriate in any given case. In such a case, the Director shall select the remedy or remedies appropriate for the enforcement action. In making this selection, the Director shall consider the best interests of the claimant as well as those of the fund.

§ 725.602 Reimbursement of the fund.

(a) In any case in which the fund has paid benefits, including medical benefits, on behalf of an operator or other employer which is determined liable therefore, or liable for a part thereof, such operator or other employer shall simultaneously with the first payment of benefits made to the beneficiary, reimburse the fund (with interest) for the full amount of all benefit payments made by the fund with respect to the claim.

(b) In any case where benefit payments have been made by the fund, the fund shall be subrogated to the rights of the beneficiary. The Secretary of Labor may, as appropriate, exercise such subrogation rights.

§ 725.603 Payments by the fund on behalf of an operator; liens.

(a) If an amount is paid out of the fund to an individual entitled to benefits under this part or part 727 of this subchapter (see § 725.4(d)) on behalf of an operator or other employer which is or was required to pay or secure the payment of all or a portion of such amount (see § 725.522), the operator or other employer shall be liable to the United States for repayment to the fund of the amount of benefits properly attributable to such operator or other employer.

(b) If an operator or other employer liable to the fund refuses to pay, after demand, the amount of such liability, there shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such operator or other employer. The lien arises on the date on which such liability is finally determined, and continues until it is satisfied or becomes unenforceable by reason of lapse of time.

(c)(1) Except as otherwise provided under this section, the priority of the lien shall be determined in the same manner as under section 6323 of the Internal Revenue Code (26 U.S.C.).

(2) In the case of a bankruptcy or insolvency proceeding, the lien imposed under this section shall be treated in the same manner as a lien for taxes due and owing to the United States for purposes of the Bankruptcy Act or section 3466 of the Revised Statutes (31 U.S.C. 191).

(3) For purposes of applying section 6323(a) of the Internal Revenue Code (26 U.S.C.) to determine the priority between the lien imposed under this section and the Federal tax lien, each lien shall be treated as a judgment lien arising as of the time notice of such lien is filed.

(4) For purposes of the section, notice of the lien imposed hereunder shall be filed in the same manner as under section 6323(f) (disregarding paragraph (4) thereof) and (g) of the Internal Revenue Code (26 U.S.C.).

(5) In any case where there has been a refusal or neglect to pay the liability imposed under this section, the Secretary of Labor may bring a civil action in a district court of the United States to enforce the lien of the United States under this section with respect to such liability or to subject any property, of whatever nature, of the operator, or in which it has any right, title, or interest, to the payment of such liability.

(6) The liability imposed by this paragraph may be collected at a proceeding in court if the proceeding is commenced within 6 years after the date upon which the liability was finally determined, or prior to the expiration of any period for collection agreed upon in writing by the operator and the United States before the expiration of such 6-year period. This period of limitation shall be suspended for any period during which the assets of the operator are in the custody or control of any court of the United States, or of any State, or the District of Columbia, and for 6 months thereafter, and for any period during which the operator is outside the United States if such period of absence is for a continuous period of at least 6 months.

§ 725.604 Enforcement of final awards.

Notwithstanding the provisions of § 725.603, if an operator or other employer or its officers or agents fails to comply with an order awarding benefits that has become final, any beneficiary of such award or the district director may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the U.S. District Court for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such operator or other employer or its officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such operator or other employer and its officers or agents compliance with the order.

§ 725.605 Defaults.

(a) Except as is otherwise provided in this part, no suspension, termination or other failure to pay benefits awarded to a claimant is permitted. If an employer found liable for the payment of such benefits fails to make such payments within 30 days after any date on which such benefits are due and payable, the person to whom such benefits are payable may, within one year after such default, make application to the district director for a supplementary order declaring the amount of the default.

(b) If after investigation, notice and hearing as provided in subparts E and F of this part, a default is found, the district director or the administrative law judge, if a hearing is requested, shall issue a supplementary order declaring the amount of the default, if any. In cases where a lump-sum award has been made, if the payment in default is an installment, the district director or administrative law judge, may, in his or her discretion, declare the whole of the award as the amount in default. The applicant may file a certified copy of such supplementary order with the clerk of the Federal district court for the judicial district in which the operator has its principal place of business or maintains an office or for the judicial district in which the injury occurred. In case such principal place of business or office is in the District of Columbia, a copy of such supplementary order may be filed with the clerk of the U.S. District Court for the District of Columbia. Such supplementary order shall be final and the court shall, upon the filing of the copy, enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with law. Review of the judgment may be had as in civil suits for damages at common law. Final proceedings to execute the judgment may be had by writ of execution in the form used by the court in suits at common law in actions of assumpsit. No fee shall be required for filing the supplementary order nor for entry of judgment thereon, and the applicant shall not be liable for costs in a proceeding for review of the judgment unless the court shall otherwise direct. The court shall modify such judgment to conform to any later benefits order upon presentation of a certified copy thereof to the court.

(c) In cases where judgment cannot be satisfied by reason of the employer's insolvency or other circumstances precluding payment, the district director shall make payment from the fund, and in addition, provide any necessary medical, surgical, and other treatment required by subpart J of this part. A defaulting employer shall be liable to the fund for payment of the amounts paid by the fund under this section; and for the purpose of enforcing this liability, the fund shall be subrogated to all the rights of the person receiving such payments or benefits.

§ 725.606 Security for the payment of benefits.

(a) Following the issuance of an effective order by a district director (see § 725.418), administrative law judge (see § 725.479), Benefits Review Board, or court that requires the payment of benefits by an operator that has failed to secure the payment of benefits in accordance with section 423 of the Act and § 726.4 of this subchapter, or by a coal mine construction or transportation employer, the Director may request that the operator secure the payment of all benefits ultimately payable on the claim. Such operator or other employer shall thereafter immediately secure the payment of benefits in accordance with the provisions of this section, and provide proof of such security to the Director. Such security may take the form of an indemnity bond, a deposit of cash or negotiable securities in compliance with §§ 726.106(c) and 726.107 of this subchapter, or any other form acceptable to the Director.

(b) The amount of security initially required by this section shall be determined as follows:

(1) In a case involving an operator subject to section 423 of the Act and § 726.4 of this subchapter, the amount of the security shall not be less than $175,000, and may be a higher amount as determined by the Director, taking

into account the life expectancies of the claimant and any dependents using the most recent life expectancy tables published by the Social Security Administration; or

(2) In a case involving a coal mine construction or transportation employer, the amount of the security shall be determined by the Director, taking into account the life expectancies of the claimant and any dependents using the most recent life expectancy tables published by the Social Security Administration.

(c) If the operator or other employer fails to provide proof of such security to the Director within 30 days of its receipt of the Director's request to secure the payment of benefits issued under paragraph (a) of this section, the appropriate adjudication officer shall issue an order requiring the operator or other employer to make a deposit of negotiable securities with a Federal Reserve Bank in the amount required by paragraph (b). Such securities shall comply with the requirements of §§ 726.106(c) and 726.107 of this subchapter. In a case in which the effective order was issued by a district director, the district director shall be considered the appropriate adjudication officer. In any other case, the administrative law judge who issued the most recent decision in the case, or such other administrative law judge as the Chief Administrative Law Judge shall designate, shall be considered the appropriate adjudication officer, and shall issue an order under this paragraph on motion of the Director. The administrative law judge shall have jurisdiction to issue an order under this paragraph notwithstanding the pendency of an appeal of the award of benefits with the Benefits Review Board or court.

(d) An order issued under this section shall be considered effective when issued. Disputes regarding such orders shall be resolved in accordance with subpart F of this part.

(e) Notwithstanding any further review of the order in accordance with subpart F of this part, if an operator or other employer subject to an order issued under this section fails to comply with such order, the appropriate adjudication officer shall certify such non-compliance to the appropriate United States district court in accordance with § 725.351(c).

(f) Security posted in accordance with this section may be used to make payment of benefits that become due with respect to the claim in accordance with § 725.502. In the event that either the order awarding compensation or the order issued under this section is vacated or reversed, the operator or other employer may apply to the appropriate adjudication officer for an order authorizing the return of any amounts deposited with a Federal Reserve Bank and not yet disbursed, and such application shall be granted. If at any time the Director determines that additional security is required beyond that initially required by paragraph (b) of this section, he may request the operator or other employer to increase the amount. Such request shall be treated as if it were issued under paragraph (a) of this section.

(g) If a coal mine construction or transportation employer fails to comply with an order issued under paragraph (c), and such employer is a corporation, the provisions of § 725.609 shall be applicable to the president, secretary, and treasurer of such employer.

§ 725.607 Payments in addition to compensation.

(a) If any benefits payable under the terms of an award by a district director (§ 725.419(d)), a decision and order filed and served by an administrative law judge (§ 725.478), or a decision filed by the Board or a U.S. court of appeals, are not paid by an operator or other employer ordered to make such payments within 10 days after such payments become due, there shall be added to such unpaid benefits an amount equal to 20 percent thereof, which shall be paid to the claimant at the same time as, but in addition to, such benefits, unless review of the order making such award is sought as provided in section 21 of the LHWCA and an order staying payments has been issued.

(b) If, on account of an operator's or other employer's failure to pay benefits as provided in paragraph (a) of this section, benefit payments are made by the fund, the eligible claimant shall nevertheless be entitled to receive such additional compensation to which he or she may be eligible under paragraph (a) of this section, with respect to all amounts paid by the fund on behalf of such operator or other employer.

(c) The fund shall not be liable for payments in addition to compensation under any circumstances.

§ 725.608 Interest.

(a)(1) In any case in which an operator fails to pay benefits that are due (§ 725.502), the beneficiary shall also be entitled to simple annual interest, computed from the date on which the benefits were due. The interest shall be computed through the date on which the operator paid the benefits, except that the beneficiary shall not be entitled to interest for any period following the date on which the beneficiary received payment of any benefits from the fund pursuant to § 725.522.

(2) In any case in which an operator is liable for the payment of retroactive benefits, the beneficiary shall also be entitled to simple annual interest on such benefits, computed from 30 days after the date of the first determination that such an award should be made. The first determination that such an award should be made may be a district director's initial determination of entitlement, an award made by an administrative law judge or a decision by the Board or a court, whichever is the first such determination of entitlement made upon the claim.

(3) In any case in which an operator is liable for the payment of additional compensation (§ 725.607), the beneficiary shall also be entitled to simple annual interest computed from the date upon which the beneficiary's right to additional compensation first arose.

(4) In any case in which an operator is liable for the payment of medical benefits, the beneficiary or medical provider to whom such benefits are owed shall also be entitled to simple annual interest, computed from the date upon which the services were rendered, or from 30 days after the date of the first determination that the miner is generally entitled to medical benefits, whichever is later. The first determination that the miner is generally entitled to medical benefits may be a district director's initial determination of entitlement, an award made by an administrative law judge or a decision by the Board or a court, whichever is the first such determination of general entitlement made upon the claim. The interest shall be computed through the date on which the operator paid the benefits, except that the beneficiary or medical provider shall not be entitled to interest for any period following the date on which the beneficiary or medical provider received payment of any benefits from the fund pursuant to § 725.522 or Subpart I of this part.

(b) If an operator or other employer fails or refuses to pay any or all benefits due pursuant to an award of benefits or an initial determination of eligibility made by the district director and the fund undertakes such payments, such operator or other employer shall be liable to the fund for simple annual interest on all payments made by the fund for which such operator is determined liable, computed from the first date on which such benefits are paid by the fund, in addition to such

operator's liability to the fund, as is otherwise provided in this part. Interest payments owed pursuant to this paragraph shall be paid directly to the fund.

(c) In any case in which an operator is liable for the payment of an attorney's fee pursuant to § 725.367, and the attorney's fee is payable because the award of benefits has become final, the attorney shall also be entitled to simple annual interest, computed from the date on which the attorney's fee was awarded. The interest shall be computed through the date on which the operator paid the attorney's fee.

(d) The rates of interest applicable to paragraphs (a), (b), and (c) of this section shall be computed as follows:

(1) For all amounts outstanding prior to January 1, 1982, the rate shall be 6% simple annual interest;

(2) For all amounts outstanding for any period during calendar year 1982, the rate shall be 15% simple annual interest; and

(3) For all amounts outstanding during any period after calendar year 1982, the rate shall be simple annual interest at the rate established by section 6621 of the Internal Revenue Code (26 U.S.C.) which is in effect for such period.

(e) The fund shall not be liable for the payment of interest under any circumstances, other than the payment of interest on advances from the United States Treasury as provided by section 9501(c) of the Internal Revenue Code (26 U.S.C.).

§ 725.609 Enforcement against other persons.

In any case in which an award of benefits creates obligations on the part of an operator or insurer that may be enforced under the provisions of this subpart, such obligations may also be enforced, in the discretion of the Secretary or district director, as follows:

(a) In a case in which the operator is a sole proprietorship or partnership, against any person who owned, or was a partner in, such operator during any period commencing on or after the date on which the miner was last employed by the operator;

(b) In a case in which the operator is a corporation that failed to secure its liability for benefits in accordance with section 423 of the Act and § 726.4, and the operator has not secured its liability for the claim in accordance with § 725.606, against any person who served as the president, secretary, or treasurer of such corporation during any period commencing on or after the date on which the miner was last employed by the operator;

(c) In a case in which the operator is no longer capable of assuming its liability for the payment of benefits (§ 725.494(e)), against any operator which became a successor operator with respect to the liable operator (§ 725.492) after the date on which the claim was filed, beginning with the most recent such successor operator;

(d) In a case in which the operator is no longer capable of assuming its liability for the payment of benefits (§ 725.494(e)), and such operator was a subsidiary of a parent company or a product of a joint venture, or was substantially owned or controlled by another business entity, against such parent entity, any member of such joint venture, or such controlling business entity; or

(e) Against any other person who has assumed or succeeded to the obligations of the operator or insurer by operation of any state or federal law, or by any other means.

§ 725.620 Failure to secure benefits; other penalties.

(a) If an operator fails to discharge its insurance obligations under the Act, the provisions of subpart D of part 726 of this subchapter shall apply.

(b) Any employer who knowingly transfers, sells, encumbers, assigns, or in any manner disposes of, conceals, secrets, or destroys any property belonging to such employer, after one of its employees has been injured within the purview of the Act, and with intent to avoid the payment of benefits under the Act to such miner or his or her dependents, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than $1,000, or by imprisonment for not more than one year, or by both. In any case where such employer is a corporation, the president, secretary, and treasurer thereof shall be also severally liable for such penalty or imprisonment as well as jointly liable with such corporation for such fine.

(c) No agreement by a miner to pay any portion of a premium paid to a carrier by such miner's employer or to contribute to a benefit fund or department maintained by such employer for the purpose of providing benefits or medical services and supplies as required by this part shall be valid; and any employer who makes a deduction for such purpose from the pay of a miner entitled to benefits under the Act shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $1,000.

(d) No agreement by a miner to waive his or her right to benefits under the Act and the provisions of this part shall be valid.

(e) This section shall not affect any other liability of the employer under this part.

§ 725.621 Reports.

(a) Upon making the first payment of benefits and upon suspension, reduction, or increase of payments, the operator or other employer responsible for making payments shall immediately notify the district director of the action taken, in accordance with a form prescribed by the Office.

(b) Within 16 days after final payment of benefits has been made by an employer, such employer shall so notify the district director, in accordance with a form prescribed by the Office, stating that such final payment, has been made, the total amount of benefits paid, the name of the beneficiary, and such other information as the Office deems pertinent.

(c) The Director may from time to time prescribe such additional reports to be made by operators, other employers, or carriers as the Director may consider necessary for the efficient administration of the Act.

(d) Any employer who fails or refuses to file any report required of such employer under this section shall be subject to a civil penalty not to exceed $500 for each failure or refusal, which penalty shall be determined in accordance with the procedures set forth in subpart D of part 726 of this subchapter, as appropriate. The maximum penalty applicable to any violation of this paragraph that takes place after January 19, 2001 shall be $550.

(e) No request for information or response to such request shall be considered a report for purposes of this section or the Act, unless it is so designated by the Director or by this section.

Subpart J—Medical Benefits and Vocational Rehabilitation

§ 725.701 Availability of medical benefits.

(a) A miner who is determined to be eligible for benefits under this part or part 727 of this subchapter (see § 725.4(d)) is entitled to medical benefits as set forth in this subpart as of the date of his or her claim, but in no event before January 1, 1974. No medical benefits shall be provided to the survivor or dependent of a miner under this part.

(b) A responsible operator, other employer, or where there is neither, the fund, shall furnish a miner entitled to benefits under this part with such

medical, surgical, and other attendance and treatment, nursing and hospital services, medicine and apparatus, and any other medical service or supply, for such periods as the nature of the miner's pneumoconiosis and disability requires.

(c) The medical benefits referred to in paragraphs (a) and (b) of this section shall include palliative measures useful only to prevent pain or discomfort associated with the miner's pneumoconiosis or attendant disability.

(d) The costs recoverable under this subpart shall include the reasonable cost of travel necessary for medical treatment (to be determined in accordance with prevailing United States government mileage rates) and the reasonable documented cost to the miner or medical provider incurred in communicating with the employer, carrier, or district director on matters connected with medical benefits.

(e) If a miner receives a medical service or supply, as described in this section, for any pulmonary disorder, there shall be a rebuttable presumption that the disorder is caused or aggravated by the miner's pneumoconiosis. The party liable for the payment of benefits may rebut the presumption by producing credible evidence that the medical service or supply provided was for a pulmonary disorder apart from those previously associated with the miner's disability, or was beyond that necessary to effectively treat a covered disorder, or was not for a pulmonary disorder at all.

(f) Evidence that the miner does not have pneumoconiosis or is not totally disabled by pneumoconiosis arising out of coal mine employment is insufficient to defeat a request for coverage of any medical service or supply under this subpart. In determining whether the treatment is compensable, the opinion of the miner's treating physician may be entitled to controlling weight pursuant to § 718.104(d). A finding that a medical service or supply is not covered under this subpart shall not otherwise affect the miner's entitlement to benefits.

§ 725.702 Claims for medical benefits only under section 11 of the Reform Act.

(a) Section 11 of the Reform Act directs the Secretary of Health, Education and Welfare to notify each miner receiving benefits under part B of title IV of the Act that he or she may file a claim for medical treatment benefits described in this subpart. Section 725.308(b) provides that a claim for medical treatment benefits shall be filed on or before December 31, 1980, unless the period is enlarged for good cause shown. This section sets forth the rules governing the processing, adjudication, and payment of claims filed under section 11.

(b)(1) A claim filed pursuant to the notice described in paragraph (a) of this section shall be considered a claim for medical benefits only, and shall be filed, processed, and adjudicated in accordance with the provisions of this part, except as provided in this section. While a claim for medical benefits must be treated as any other claim filed under part C of title IV of the Act, the Department shall accept the Social Security Administration's finding of entitlement as its initial determination.

(2) In the case of a part B beneficiary whose coal mine employment terminated before January 1, 1970, the Secretary shall make an immediate award of medical benefits. Where the part B beneficiary's coal mine employment terminated on or after January 1, 1970, the Secretary shall immediately authorize the payment of medical benefits and thereafter inform the responsible operator, if any, of the operator's right to contest the claimant's entitlement for medical benefits.

(c) A miner on whose behalf a claim is filed under this section (see § 725.301) must have been alive on March 1, 1978, in order for the claim to be considered.

(d) The criteria contained in subpart C of part 727 of this subchapter (see § 725.4(d)) are applicable to claims for medical benefits filed under this section.

(e) No determination made with respect to a claim filed under this section shall affect any determination previously made by the Social Security Administration. The Social Security Administration may, however, reopen a previously approved claim if the conditions set forth in § 410.672(c) of this chapter are present. These conditions are generally limited to fraud or concealment.

(f) If medical benefits are awarded under this section, such benefits shall be payable by a responsible coal mine operator (see subpart G of this part), if the miner's last employment occurred on or after January 1, 1970, and in all other cases by the fund. An operator which may be required to provide medical treatment benefits to a miner under this section shall have the right to participate in the adjudication of the claim as is otherwise provided in this part.

(g) Any miner whose coal mine employment terminated after January 1, 1970, may be required to submit to a medical examination requested by an identified operator. The unreasonable refusal to submit to such an examination shall have the same consequences as are provided under § 725.414.

(h) If a miner is determined eligible for medical benefits in accordance with this section, such benefits shall be provided from the date of filing, except that such benefits may also include payments for any unreimbursed medical treatment costs incurred personally by such miner during the period from January 1, 1974, to the date of filing which are attributable to medical care required as a result of the miner's total disability due to pneumoconiosis. No reimbursement for health insurance premiums, taxes attributable to any public health insurance coverage, or other deduction or payments made for the purpose of securing third party liability for medical care costs is authorized by this section. If a miner seeks reimbursement for medical care costs personally incurred before the filing of a claim under this section, the district director shall require documented proof of the nature of the medical service provided, the identity of the medical provider, the cost of the service, and the fact that the cost was paid by the miner, before reimbursement for such cost may be awarded.

§ 725.703 Physician defined.

The term ''physician'' includes only doctors of medicine (MD) and osteopathic practitioners within the scope of their practices as defined by State law. No treatment or medical services performed by any other practitioner of the healing arts is authorized by this part, unless such treatment or service is authorized and supervised both by a physician as defined in this section and the district director.

§ 725.704 Notification of right to medical benefits; authorization of treatment.

(a) Upon notification to a miner of such miner's entitlement to benefits, the Office shall provide the miner with a list of authorized treating physicians and medical facilities in the area of the miner's residence. The miner may select a physician from this list or may select another physician with approval of the Office. Where emergency services are necessary and appropriate, authorization by the Office shall not be required.

(b) The Office may, on its own initiative, or at the request of a responsible operator, order a change of physicians or facilities, but only where it has been determined that the change is desirable or necessary in the best interest of the miner. The miner may

change physicians or facilities subject to the approval of the Office.

(c) If adequate treatment cannot be obtained in the area of the claimant's residence, the Office may authorize the use of physicians or medical facilities outside such area as well as reimbursement for travel expenses and overnight accommodations.

§ 725.705 Arrangements for medical care.

(a) *Operator liability.* If an operator has been determined liable for the payment of benefits to a miner, the Office shall notify such operator or insurer of the names, addresses, and telephone numbers of the authorized providers of medical benefits chosen by an entitled miner, and shall require the operator or insurer to:

(1) Notify the miner and the providers chosen that such operator will be responsible for the cost of medical services provided to the miner on account of the miner's total disability due to pneumoconiosis;

(2) Designate a person or persons with decisionmaking authority with whom the Office, the miner and authorized providers may communicate on matters involving medical benefits provided under this subpart and notify the Office, miner and providers of such designation;

(3) Make arrangements for the direct reimbursement of providers for their services.

(b) *Fund liability.* If there is no operator found liable for the payment of benefits, the Office shall make necessary arrangements to provide medical care to the miner, notify the miner and medical care facility selected of the liability of the fund, designate a person or persons with whom the miner or provider may communicate on matters relating to medical care, and make arrangements for the direct reimbursement of the medical provider.

§ 725.706 Authorization to provide medical services.

(a) Except as provided in paragraph (b) of this section, medical services from an authorized provider which are payable under § 725.701 shall not require prior approval of the Office or the responsible operator.

(b) Except where emergency treatment is required, prior approval of the Office or the responsible operator shall be obtained before any hospitalization or surgery, or before ordering an apparatus for treatment where the purchase price exceeds $300. A request for approval of non-emergency hospitalization or surgery shall be acted upon expeditiously, and approval or disapproval will be given by telephone if a written response cannot be given within 7 days following the request. No employee of the Department of Labor, other than a district director or the Chief, Branch of Medical Analysis and Services, DCMWC, is authorized to approve a request for hospitalization or surgery by telephone.

(c) Payment for medical services, treatment, or an apparatus shall be made at no more than the rate prevailing in the community in which the providing physician, medical facility or supplier is located.

§ 725.707 Reports of physicians and supervision of medical care.

(a) Within 30 days following the first medical or surgical treatment provided under § 725.701, the treating physician or facility shall furnish to the Office and the responsible operator, if any, a report of such treatment.

(b) In order to permit continuing supervision of the medical care provided to the miner with respect to the necessity, character and sufficiency of any medical care furnished or to be furnished, the treating physician, facility, employer or carrier shall provide such reports in addition to those required by paragraph (a) of this section as the Office may from time to time require. Within the discretion of the district director, payment may be refused to any medical provider who fails to submit any report required by this section.

§ 725.708 Disputes concerning medical benefits.

(a) Whenever a dispute develops concerning medical services under this part, the district director shall attempt to informally resolve such dispute. In this regard the district director may, on his or her own initiative or at the request of the responsible operator order the claimant to submit to an examination by a physician selected by the district director.

(b) If no informal resolution is accomplished, the district director shall refer the case to the Office of Administrative Law Judges for hearing in accordance with this part. Any such hearing shall be scheduled at the earliest possible time and shall take precedence over all other requests for hearing except for prior requests for hearing arising under this section and as provided by § 727.405 of this subchapter (see § 725.4(d)). During the pendency of such adjudication, the Director may order the payment of medical benefits prior to final adjudication under the same conditions applicable to benefits awarded under § 725.522.

(c) In the development or adjudication of a dispute over medical benefits, the adjudication officer is authorized to take whatever action may be necessary to protect the health of a totally disabled miner.

(d) Any interested medical provider may, if appropriate, be made a party to a dispute over medical benefits.

§ 725.710 Objective of vocational rehabilitation.

The objective of vocational rehabilitation is the return of a miner who is totally disabled for work in or around a coal mine and who is unable to utilize those skills which were employed in the miner's coal mine employment to gainful employment commensurate with such miner's physical impairment. This objective may be achieved through a program of re-evaluation and redirection of the miner's abilities, or retraining in another occupation, and selective job placement assistance.

§ 725.711 Requests for referral to vocational rehabilitation assistance.

Each miner who has been determined entitled to receive benefits under part C of title IV of the Act shall be informed by the OWCP of the availability and advisability of vocational rehabilitation services. If such miner chooses to avail himself or herself of vocational rehabilitation, his or her request shall be processed and referred by OWCP vocational rehabilitation advisors pursuant to the provisions of §§ 702.501 through 702.508 of this chapter as is appropriate.

5. Part 726 is revised as follows:

PART 726—BLACK LUNG BENEFITS; REQUIREMENTS FOR COAL MINE OPERATOR'S INSURANCE

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726.2 Purpose and scope of this part.
726.3 Relationship of this part to other parts in this subchapter.
726.4 Who must obtain insurance coverage.
726.5 Effective date of insurance coverage.
726.6 The Office of Workers' Compensation Programs.
726.7 Forms, submission of information.
726.8 Definitions.

Subpart B—Authorization of Self-Insurers

726.101 Who may be authorized to self-insure.
726.102 Application for authority to become a self-insurer; how filed; information to be submitted.
726.103 Application for authority to self-insure; effect of regulations contained in this part.

726.104 Action by the Office upon application of operator.
726.105 Fixing the amount of security.
726.106 Type of security.
726.107 Deposits of negotiable securities with Federal Reserve banks or the Treasurer of the United States; authority to sell such securities; interest thereon.
726.108 Withdrawal of negotiable securities.
726.109 Increase or reduction in the amount of security.
726.110 Filing of agreement and undertaking.
726.111 Notice of authorization to self-insure.
726.112 Reports required of self-insurer; examination of accounts of self-insurer.
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Subpart C—Insurance Contracts

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726.202 Who may underwrite an operator's liability.
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726.316 Filing and service.
726.317 Discretionary review.
726.318 Final decision of the Secretary.
726.319 Retention of official record.
726.320 Collection and recovery of penalty.

Authority: 5 U.S.C. 301, Reorganization Plan No. 6 of 1950, 15 FR 3174, 30 U.S.C. 901 *et seq.*, 902(f), 925, 932, 933, 934, 936, 945; 33 U.S.C. 901 *et seq.*, Secretary's Order 7–87, 52 FR 48466, Employment Standards Order No. 90–02.

Subpart A—General

§ 726.1 Statutory insurance requirements for coal mine operators.

Section 423 of title IV of the Federal Coal Mine Health and Safety Act as amended (hereinafter the Act) requires each coal mine operator who is operating or has operated a coal mine in a State which is not included in the list published by the Secretary (see part 722 of this subchapter) to secure the payment of benefits for which he may be found liable under section 422 of the Act and the provisions of this subchapter by either:

(a) Qualifying as a self-insurer, or

(b) By subscribing to and maintaining in force a commercial insurance contract (including a policy or contract procured from a State agency).

§ 726.2 Purpose and scope of this part.

(a) This part provides rules directing and controlling the circumstances under which a coal mine operator shall fulfill his insurance obligations under the Act.

(b) This Subpart A sets forth the scope and purpose of this part and generally describes the statutory framework within which this part is operative.

(c) Subpart B of this part sets forth the criteria a coal mine operator must meet in order to qualify as a self-insurer.

(d) Subpart C of this part sets forth the rules and regulations of the Secretary governing contracts of insurance entered into by coal mine operators and commercial insurance sources for the payment of black lung benefits under part C of the Act.

(e) Subpart D of this part sets forth the rules governing the imposition of civil money penalties on coal mine operators that fail to secure their liability under the Act.

§ 726.3 Relationship of this part to other parts in this subchapter.

(a) This part 726 implements and effectuates responsibilities for the payment of black lung benefits placed upon coal mine operators by sections 415 and 422 of the Act and the regulations of the Secretary in this subchapter, particularly those set forth in part 725 of this subchapter. All definitions, usages, procedures, and other rules affecting the responsibilities of coal mine operators prescribed in part 725 of this subchapter are hereby made applicable, as appropriate, to this part 726.

(b) If the provisions of this part appear to conflict with any provision of any other part in this subchapter, the apparently conflicting provisions should be read harmoniously to the fullest extent possible. If a harmonious interpretation is not possible, the provisions of this part should be applied to govern the responsibilities and obligations of coal mine operators to secure the payment of black lung benefits as prescribed by the Act. The provisions of this part do not apply to matters falling outside the scope of this part.

§ 726.4 Who must obtain insurance coverage.

(a) Section 423 of part C of title IV of the Act requires each operator of a coal mine or former operator in any State which does meet the requirements prescribed by the Secretary pursuant to section 411 of part C of title IV of the Act to self-insure or obtain a policy or contract of insurance to guarantee the payment of benefits for which such operator may be adjudicated liable under section 422 of the Act. In enacting sections 422 and 423 of the Act Congress has unambiguously expressed its intent that coal mine operators bear the cost of providing the benefits established by part C of title IV of the Act. Section 3 of the Act defines an ''operator'' as any owner, lessee, or other person who operates, controls, or supervises a coal mine.

(b) Section 422(i) of the Act clearly recognizes that any individual or business entity who is or was a coal mine operator may be found liable for the payment of pneumoconiosis benefits after December 31, 1973. Within this framework it is clear that the Secretary has wide latitude for determining which operator shall be liable for the payment of part C benefits. Comprehensive standards have been promulgated in subpart G of part 725 of this subchapter for the purpose of guiding the Secretary in making such determination. It must be noted that pursuant to these standards any parent or subsidiary corporation, any individual or corporate partner, or partnership, any lessee or lessor of a coal mine, any joint venture or participant in a joint venture, any transferee or transferor of a corporation or other business entity, any former, current, or future operator or any other form of business entity which has had or will have a substantial and reasonably direct interest in the operation of a coal mine may be determined liable for the payment of pneumoconiosis benefits after December 31, 1973. The failure of any such business entity to self-insure or obtain a

policy or contract of insurance shall in no way relieve such business entity of its obligation to pay pneumoconiosis benefits in respect of any case in which such business entity's responsibility for such payments has been properly adjudicated. Any business entity described in this section shall take appropriate steps to insure that any liability imposed by part C of the Act on such business entity shall be dischargeable.

§ 726.5 Effective date of insurance coverage.

Pursuant to section 422(c) of part C of title IV of the Act, no coal mine operator shall be responsible for the payment of any benefits whatsoever for any period prior to January 1, 1974. However, coal mine operators shall be liable as of January 1, 1974, for the payment of benefits in respect of claims which were filed under section 415 of part B of title IV of the Act after July 1, 1973. Section 415(a)(3) requires the Secretary to notify any operator who may be liable for the payment of benefits under part C of title IV beginning on January 1, 1974, of the pendency of a section 415 claim. Section 415(a)(5) declares that any operator who has been notified of the pendency of a section 415 claim shall be bound by the determination of the Secretary as to such operator's liability and as to the claimant's entitlement to benefits as if the claim were filed under part C of title IV of the Act and section 422 thereof had been applicable to such operator. Therefore, even though no benefit payments shall be required of an operator prior to January 1, 1974, the liability for these payments may be finally adjudicated at any time after July 1, 1973. Neither the failure of an operator to exercise his right to participate in the adjudication of such a claim nor the failure of an operator to obtain insurance coverage in respect of claims filed after June 30, 1973, but before January 1, 1974, shall excuse such operator from his liability for the payment of benefits to such claimants under part C of title IV of the Act.

§ 726.6 The Office of Workers' Compensation Programs.

The Office of Workers' Compensation Programs (hereinafter the Office or OWCP) is that subdivision of the Employment Standards Administration of the U.S. Department of Labor which has been empowered by the Secretary of Labor to carry out his functions under section 415 and part C of title IV of the Act. As noted throughout this part 726 the Office shall perform a number of functions with respect to the regulation of both the self-insurance and commercial insurance programs. All correspondence with or submissions to the Office should be addressed as follows:

Division of Coal Mine Workers' Compensation, Office of Workers' Compensation Programs, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210

§ 726.7 Forms, submission of information.

Any information required by this part 726 to be submitted to the Office of Workmen's Compensation Programs or any other office or official of the Department of Labor, shall be submitted on such forms or in such manner as the Secretary deems appropriate and has authorized from time to time for such purposes.

§ 726.8 Definitions.

In addition to the definitions provided in part 725 of this subchapter, the following definitions apply to this part:

(a) *Director* means the Director, Office of Workers' Compensation Programs, and includes any official of the Office of Workers' Compensation Programs authorized by the Director to perform any of the functions of the Director under this part and part 725 of this subchapter.

(b) *Person* includes any individual, partnership, corporation, association, business trust, legal representative, or organized group of persons.

(c) *Secretary* means the Secretary of Labor or such other official as the Secretary shall designate to carry out any responsibility under this part.

(d) The terms *employ* and *employment* shall be construed as broadly as possible, and shall include any relationship under which an operator retains the right to direct, control, or supervise the work performed by a miner, or any other relationship under which an operator derives a benefit from the work performed by a miner. Any individuals who participate with one or more persons in the mining of coal, such as owners, proprietors, partners, and joint venturers, whether they are compensated by wages, salaries, piece rates, shares, profits, or by any other means, shall be deemed employees. It is the specific intention of this paragraph to disregard any financial arrangement or business entity devised by the actual owners or operators of a coal mine or coal mine-related enterprise to avoid the payment of benefits to miners who, based upon the economic reality of their relationship to this enterprise, are, in fact, employees of the enterprise.

Subpart B—Authorization of Self-Insurers

§ 726.101 Who may be authorized to self-insure.

(a) Pursuant to section 423 of part C of title IV of the Act, authorization to self-insure against liability incurred by coal mine operators on account of the total disability or death of miners due to pneumoconiosis may be granted or denied in the discretion of the Secretary. The provisions of this subpart describe the minimum requirements established by the Secretary for determining whether any particular coal mine operator shall be authorized as a self-insurer.

(b) The minimum requirements which must be met by any operator seeking authorization to self-insure are as follows:

(1) The operator must, at the time of application, have been in the business of mining coal for at least the 3 consecutive years prior to such application; and,

(2) The operator must demonstrate the administrative capacity to fully service such claims as may be filed against him; and,

(3) The operator's average current assets over the preceding 3 years (in computing average current assets such operator shall not include the amount of any negotiable securities which he may be required to deposit to secure his obligations under the Act) must exceed current liabilities by the sum of—

(i) The estimated aggregate amount of black lung benefits (including medical benefits) which such operator may expect to be required to pay during the ensuing year; and,

(ii) The annual premium cost for any indemnity bond purchased; and

(4) Such operator must obtain security, in a form approved by the Office (see § 726.104) and in an amount to be determined by the Office (see § 726.105); and

(5) No operator with fewer than 5 full-time employee-miners shall be permitted to self-insure.

(c) No operator who is unable to meet the requirements of this section should apply for authorization to self-insure and no application for self-insurance shall be approved by the Office until such time as the amount prescribed by the Office has been secured in accordance with this subpart.

§ 726.102 Application for authority to become a self-insurer; how filed; information to be submitted.

(a) *How filed.* Application for authority to become a self-insurer shall be addressed to the Office and be made

on a form provided by the Office. Such application shall be signed by the applicant over his typewritten name and if the applicant is not an individual, by the principal officer of the applicant duly authorized to make such application over his typewritten name and official designation and shall be sworn to by him. If the applicant is a corporation, the corporate seal shall be affixed. The application shall be filed with the Office in Washington, D.C.

(b) *Information to be submitted.* Each application for authority to self-insure shall contain:

(1) A statement of the employer's payroll report for each of the preceding 3 years;

(2) A statement of the average number of employees engaged in employment within the purview of the Act for each of the preceding 3 years;

(3) A list of the mine or mines to be covered by any particular self-insurance agreement. Each such mine or mines listed shall be described by name and reference shall be made to the Federal Identification Number assigned such mine by the Bureau of Mines, U.S. Department of the Interior;

(4) A certified itemized statement of the gross and net assets and liabilities of the operator for each of the 3 preceding years in such manner as prescribed by the Office;

(5) A statement demonstrating the applicant's administrative capacity to provide or procure adequate servicing for a claim including both medical and dollar claims; and

(6) In addition to the aforementioned, the Office may in its discretion, require the applicant to submit such further information or such evidence as the Office may deem necessary to have in order to enable it to give adequate consideration to such application.

(c) *Who may file.* An application for authorization to self-insure may be filed by any parent or subsidiary corporation, partner or partnership, party to a joint venture or joint venture, individual, or other business entity which may be determined liable for the payment of black lung benefits under part C of title IV of the Act, regardless of whether such applicant is directly engaged in the business of mining coal. However, in each case for which authorization to self-insure is granted, the agreement and undertaking filed pursuant to § 726.110 and the security deposit shall be respectively filed by and deposited in the name of the applicant only.

§ 726.103 Application for authority to self-insure; effect of regulations contained in this part.

As appropriate, each of the regulations, interpretations and requirements contained in this part 726 including those described in subpart C of this part shall be binding upon each applicant under this subpart, and the applicant's consent to be bound by all requirements of the said regulations shall be deemed to be included in and a part of the application, as fully as though written therein.

§ 726.104 Action by the Office upon application of operator.

(a) Upon receipt of a completed application for authorization to self-insure, the Office shall, after examination of the information contained in the application, either deny the request or determine the amount of security which must be given by the applicant to guarantee the payment of benefits and the discharge of all other obligations which may be required of such applicant under the Act.

(b) The applicant shall thereafter be notified that he may give security in the amount fixed by the Office (see § 726.105):

(1) In the form of an indemnity bond with sureties satisfactory to the Office;

(2) By a deposit of negotiable securities with a Federal Reserve Bank in compliance with §§ 726.106(c) and 726.107;

(3) In the form of a letter of credit issued by a financial institution satisfactory to the Office (except that a letter of credit shall not be sufficient by itself to satisfy a self-insurer's obligations under this part); or

(4) By funding a trust pursuant to section 501(c)(21) of the Internal Revenue Code (26 U.S.C.).

(c) Any applicant who cannot meet the security deposit requirements imposed by the Office should proceed to obtain a commercial policy or contract of insurance. Any applicant for authorization to self-insure whose application has been rejected or who believes that the security deposit requirements imposed by the Office are excessive may, in writing, request that the Office review its determination. A request for review should contain such information as may be necessary to support the request that the amount of security required be reduced.

(d) Upon receipt of any such request, the Office shall review its previous determination in light of any new or additional information submitted and inform the applicant whether or not a reduction in the amount of security initially required is warranted.

§ 726.105 Fixing the amount of security.

The Office shall require the amount of security which it deems necessary and sufficient to secure the performance by the applicant of all obligations imposed upon him as an operator by the Act. In determining the amount of security required, the factors that the Office will consider include, but are not limited to, the operator's net worth, the existence of a guarantee by a parent corporation, and the operator's existing liability for benefits. The Office shall also consider such other factors as it considers relevant to any particular case. The amount of security which shall be required may be increased or decreased when experience or changed conditions so warrant.

§ 726.106 Type of security.

(a) The Office shall determine the type or types of security which an applicant shall or may procure. (See § 726.104(b).)

(b) In the event the indemnity bond option is selected, the bond shall be in such form and contain such provisions as the Office may prescribe: *Provided,* That only corporations may act as sureties on such indemnity bonds. In each case in which the surety on any such bond is a surety company, such company must be one approved by the U.S. Treasury Department under the laws of the United States and the applicable rules and regulations governing bonding companies (see Department of Treasury's Circular—570).

(c) An applicant for authorization to self-insure based on a deposit of negotiable securities, in the amount fixed by the Office, shall deposit any negotiable securities acceptable as security for the deposit of public moneys of the United States under regulations issued by the Secretary of the Treasury. (See 31 CFR Part 225.) The approval, valuation, acceptance, and custody of such securities is hereby committed to the several Federal Reserve Banks and the Treasurer of the United States.

§ 726.107 Deposits of negotiable securities with Federal Reserve banks or the Treasurer of the United States; authority to sell such securities; interest thereon.

Deposits of securities provided for by the regulations in this part shall be made with any Federal Reserve bank or any branch of a Federal Reserve bank designated by the Office, or the Treasurer of the United States, and shall be held subject to the order of the Office with power in the Office, in its

discretion in the event of default by the said self-insurer, to collect the interest as it may become due, to sell the securities or any of them as may be required to discharge the obligations of the self-insurer under the Act and to apply the proceeds to the payment of any benefits or medical expenses for which the self-insurer may be liable. The Office may, however, whenever it deems it unnecessary to resort to such securities for the payment of benefits, authorize the self-insurer to collect interest on the securities deposited by him.

§ 726.108 Withdrawal of negotiable securities.

No withdrawal of negotiable securities deposited by a self-insurer, shall be made except upon authorization by the Office. A self-insurer discontinuing business, or discontinuing operations within the purview of the Act, or providing security for the payment of benefits by commercial insurance under the provisions of the Act may apply to the Office for the withdrawal of securities deposited under the regulations in this part. With such application shall be filed a sworn statement setting forth:

(a) A list of all outstanding cases in which benefits are being paid, with the names of the miners and other beneficiaries, giving a statement of the amounts of benefits paid and the periods for which such benefits have been paid; and

(b) A similar list of all pending cases in which no benefits have as yet been paid. In such cases withdrawals may be authorized by the Office of such securities as in the opinion of the Office may not be necessary to provide adequate security for the payment of outstanding and potential liabilities of such self-insurer under the Act.

§ 726.109 Increase or reduction in the amount of security.

Whenever in the opinion of the Office the amount of security given by the self-insurer is insufficient to afford adequate security for the payment of benefits and medical expenses under the Act, the self-insurer shall, upon demand by the Office, file such additional security as the Office may require. The Office may reduce the amount of security at any time on its own initiative, or upon the application of a self-insurer, when it believes the facts warrant a reduction. A self-insurer seeking a reduction shall furnish such information as the Office may request relative to his current affairs, the nature and hazard of the work of his employees, the amount of the payroll of his employees engaged in coal mine employment within the purview of the Act, his financial condition, and such other evidence as may be deemed material, including a record of benefit payments he has made.

§ 726.110 Filing of agreement and undertaking.

(a) In addition to the requirement that adequate security be procured as set forth in this subpart, the applicant for the authorization to self-insure shall, as a condition precedent to receiving such authorization, execute and file with the Office an agreement and undertaking in a form prescribed and provided by the Office in which the applicant shall agree:

(1) To pay when due, as required by the Act, all benefits payable on account of total disability or death of any of its employee-miners;

(2) To furnish medical, surgical, hospital, and other attendance, treatment, and care as required by the Act;

(3) To provide security in a form approved by the Office (see § 726.104) and in an amount established by the Office (see § 726.105), as elected in the application;

(4) To authorize the Office to sell any negotiable securities so deposited or any part thereof, and to pay from the proceeds thereof such benefits, medical, and other expenses and any accrued penalties imposed by law as the Office may find to be due and payable.

(b) When an applicant has provided the requisite security, he shall send to the Office in Washington, D.C. a completed agreement and undertaking, together with satisfactory proof that his obligations and liabilities under the Act have been secured.

§ 726.111 Notice of authorization to self-insure.

Upon receipt of a completed agreement and undertaking and satisfactory proof that adequate security has been provided, an applicant for authorization to self-insure shall be notified by the Office in writing that he is authorized to self-insure to meet the obligations imposed upon him by section 415 and part C of title IV of the Act.

§ 726.112 Reports required of self-insurer; examination of accounts of self-insurer.

(a) Each operator who has been authorized to self-insure under this part shall submit to the Office reports containing such information as the Office may from time to time require or prescribe.

(b) Whenever it deems it to be necessary, the Office may inspect or examine the books of account, records, and other papers of a self-insurer for the purpose of verifying any financial statement submitted to the Office by the self-insurer or verifying any information furnished to the Office in any report required by this section, or any other section of the regulations in this part, and such self-insurer shall permit the Office or its duly authorized representative to make such an inspection or examination as the Office shall require. In lieu of this requirement the Office may in its discretion accept an adequate report of a certified public accountant.

(c) Failure to submit or make available any report or information requested by the Office from an authorized self-insurer pursuant to this section may, in appropriate circumstances result in a revocation of the authorization to self-insure.

§ 726.113 Disclosure of confidential information.

Any financial information or records, or other information relating to the business of an authorized self-insurer or applicant for the authorization of self-insurance obtained by the Office shall be exempt from public disclosure to the extent provided in 5 U.S.C. 552(b) and the applicable regulations of the Department of Labor promulgated thereunder. (See 29 CFR part 70.)

§ 726.114 Period of authorization as self-insurer; reauthorization.

(a) No initial authorization to self-insure shall be granted for a period in excess of 18 months. A self-insurer who has made an adequate deposit of negotiable securities in compliance with §§ 726.106(c) and 726.107 will be reauthorized for the ensuing fiscal year without additional security if the Office finds that his experience as a self-insurer warrants such action. If the Office determines that such self-insurer's experience indicates a need for the deposit of additional security, no reauthorization shall be issued for the ensuing fiscal year until the Office receives satisfactory proof that the requisite amount of additional securities has been deposited. A self-insurer who currently has on file an indemnity bond will receive from the Office each year a bond form for execution in contemplation of reauthorization, and the submission of such bond duly executed in the amount indicated by the Office will be deemed and treated as such self-insurer's application for reauthorization for the ensuing fiscal year.

(b) In each case for which there is an approved change in the amount of

security provided, a new agreement and undertaking shall be executed.

(c) Each operator authorized to self-insure under this part shall apply for reauthorization for any period during which it engages in the operation of a coal mine and for additional periods after it ceases operating a coal mine. Upon application by the operator, accompanied by proof that the security it has posted is sufficient to secure all benefits potentially payable to miners formerly employed by the operator, the Office shall issue a certification that the operator is exempt from the requirements of this part based on its prior operation of a coal mine. The provisions of subpart D of this part shall be applicable to any operator that fails to apply for reauthorization in accordance with the provisions of this section.

§ 726.115 Revocation of authorization to self-insure.

The Office may for good cause shown suspend or revoke the authorization of any self-insurer. Failure by a self-insurer to comply with any provision or requirement of law or of the regulations in this part, or with any lawful order or communication of the Office, or the failure or insolvency of the surety on his indemnity bond, or impairment of financial responsibility of such self-insurer, may be deemed good cause for such suspension or revocation.

Subpart C—Insurance Contracts

§ 726.201 Insurance contracts—generally.

Each operator of a coal mine who has not obtained authorization as a self-insurer shall purchase a policy or enter into a contract with a commercial insurance carrier or State agency. Pursuant to authority contained in sections 422(a) and 423(b) and (c) of part C of title IV of the Act, this subpart describes a number of provisions which are required to be incorporated in a policy or contract of insurance obtained by a coal mine operator for the purpose of meeting the responsibility imposed upon such operator by the Act in respect of the total disability or death of miners due to pneumoconiosis.

§ 726.202 Who may underwrite an operator's liability.

Each coal mine operator who is not authorized to self-insure shall insure and keep insured the payment of benefits as required by the Act with any stock company or mutual company or association, or with any other person, or fund, including any State fund while such company, association, person, or fund is authorized under the law of any State to insure workmen's compensation.

§ 726.203 Federal Coal Mine Health and Safety Act endorsement.

(a) The following form of endorsement shall be attached and applicable to the standard workmen's compensation and employer's liability policy prepared by the National Council on Compensation Insurance affording coverage under the Federal Coal Mine Health and Safety Act of 1969, as amended:

It is agreed that: (1) With respect to operations in a State designated in item 3 of the declarations, the unqualified term ''workmen's compensation law'' includes part C of title IV of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. section 931–936, and any laws amendatory thereto, or supplementary thereto, which may be or become effective while this policy is in force, and definition (a) of Insuring Agreement III is amended accordingly; (2) with respect to such insurance as is afforded by this endorsement, (a) the States, if any, named below, shall be deemed to be designated in item 3 of the declaration; (b) Insuring Agreement IV(2) is amended to read ''by disease caused or aggravated by exposure of which the last day of the last exposure, in the employment of the insured, to conditions causing the disease occurs during the policy period, or occurred prior to (effective date) and claim based on such disease is first filed against the insured during the policy period.''

(b) The term ''effective date'' as used in paragraph (a) of this section shall be construed to mean the effective date of the first policy or contract of insurance procured by an operator for purposes of meeting the obligations imposed on such operator by section 423 of part C of title IV of the Act.

(c) The Act contains a number of provisions and imposes a number of requirements on operators which differ in varying degrees from traditional workmen's compensation concepts. To avoid unnecessary administrative delays and expense which might be occasioned by the drafting of an entirely new standard workmen's compensation policy specially tailored to the Act, the Office has determined that the existing standard workmen's compensation policy subject to the endorsement provisions contained in paragraph (a) of this section shall be acceptable for purposes of writing commercial insurance coverage under the Act. However, to avoid undue disputes over the meaning of certain policy provisions and in accordance with the authority contained in section 423(b)(3) of the Act, the Office has determined that the following requirements shall be applicable to all commercial insurance policies obtained by an operator for the purpose of insuring any liability incurred pursuant to the Act:

(1) *Operator liability.* (i) Section 415 and part C of title IV of the Act provide coverage for total disability or death due to pneumoconiosis to all claimants who meet the eligibility requirements imposed by the Act. Section 422 of the Act and the regulations duly promulgated thereunder (part 725 of this subchapter) set forth the conditions under which a coal mine operator may be adjudicated liable for the payment of benefits to an eligible claimant for any period subsequent to December 31, 1973.

(ii) Section 422(c) of the Act prescribes that except as provided in 422(i) (see paragraph (c)(2) of this section) an operator may be adjudicated liable for the payment of benefits in any case if the total disability or death due to pneumoconiosis upon which the claim is predicated arose at least in part out of employment in a mine in any period during which it was operated by such operator. The Act does not require that such employment which contributed to or caused the total disability or death due to pneumoconiosis occur subsequent to any particular date in time. The Secretary in establishing a formula for determining the operator liable for the payment of benefits (see subpart D of part 725 of this subchapter) in respect of any particular claim, must therefore, within the framework and intent of title IV of the Act find in appropriate cases that an operator is liable for the payment of benefits for some period after December 31, 1973, even though the employment upon which an operator's liability is based occurred prior to July 1, 1973, or prior to the effective date of the Act or the effective date of any amendments thereto, or prior to the effective date of any policy or contract of insurance obtained by such operator. The endorsement provisions contained in paragraph (a) of this section shall be construed to incorporate these requirements in any policy or contract of insurance obtained by an operator to meet the obligations imposed on such operator by section 423 of the Act.

(2) *Successor liability.* Section 422(i) of part C of title IV of the Act requires that a coal mine operator who after December 30, 1969, acquired his mine or substantially all of the assets thereof from a person who was an operator of such mine on or after December 30, 1969, shall be liable for and shall secure the payment of benefits which would have been payable by the prior operator with respect to miners previously employed in such mine if the

acquisition had not occurred and the prior operator had continued to operate such mine. In the case of an operator who is determined liable for the payment of benefits under section 422(i) of the Act and part 725 of this subchapter, such liability shall accrue to such operator regardless of the fact that the miner on whose total disability or death the claim is predicated was never employed by such operator in any capacity. The endorsement provisions contained in paragraph (a) of this section shall be construed to incorporate this requirement in any policy or contract of insurance obtained by an operator to meet the obligations imposed on such operator by section 423 of the Act.

(3) *Medical eligibility.* Pursuant to section 422(h) of part C of title IV of the Act and the regulations described therein (see subpart D of part 410 of this title) benefits shall be paid to eligible claimants on account of total disability or death due to pneumoconiosis and in cases where the miner on whose death a claim is predicated was totally disabled by pneumoconiosis at the time of his death regardless of the cause of such death. The endorsement provisions contained in paragraph (a) of this section shall be construed to incorporate these requirements in any policy or contract of insurance obtained by an operator to meet the obligations imposed on such operator by section 423 of the Act.

(4) *Payment of benefits, rates.* Section 422(c) of the Act by incorporating section 412(a) of the Act requires the payment of benefits at a rate equal to 50 per centum of the minimum monthly payment to which a Federal employee in grade GS–2, who is totally disabled is entitled at the time of payment under Chapter 81 of title 5, United States Code. These benefits are augmented on account of eligible dependents as appropriate (see section 412(a) of part B of title IV of the Act). Since the dollar amount of benefits payable to any beneficiary is required to be computed at the time of payment such amounts may be expected to increase from time to time as changes in the GS–2 grade are enacted into law. The endorsement provisions contained in paragraph (a) of this section shall be construed to incorporate in any policy or contract of insurance obtained by an operator to meet the obligations imposed on such operator by section 423 of the Act, the requirement that the payment of benefits to eligible beneficiaries shall be made in such dollar amounts as are prescribed by section 412(a) of the Act computed at the time of payment.

(5) *Compromise and waiver of benefits.* Section 422(a) of part C of title IV of the Act by incorporating sections 15(b) and 16 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 915(b) and 916) prohibits the compromise and/or waiver of claims for benefits filed or benefits payable under section 415 and part C of title IV of the Act. The endorsement provisions contained in paragraph (a) of this section shall be construed to incorporate these prohibitions in any policy or contract of insurance obtained by an operator to meet the obligations imposed on such operator by section 423 of the Act.

(6) *Additional requirements.* In addition to the requirements described in paragraph (c)(1) through (5) of this section, the endorsement provisions contained in paragraph (a) of this section shall, to the fullest extent possible, be construed to bring any policy or contract of insurance entered into by an operator for the purpose of insuring such operator's liability under part C of title IV of the Act into conformity with the legal requirements placed upon such operator by section 415 and part C of title IV of the Act and parts 720 and 725 of this subchapter.

(d) Nothing in this section shall relieve any operator or carrier of the duty to comply with any State workmen's compensation law, except insofar as such State law is in conflict with the provisions of this section.

§ 726.204 Statutory policy provisions.

Pursuant to section 423(b) of part C of title IV of the Act each policy or contract of insurance obtained to comply with the requirements of section 423(a) of the Act must contain or shall be construed to contain—

(a) A provision to pay benefits required under section 422 of the Act, notwithstanding the provisions of the State workmen's compensation law which may provide for lesser payments; and,

(b) A provision that insolvency or bankruptcy of the operator or discharge therein (or both) shall not relieve the carrier from liability for such payments.

§ 726.205 Other forms of endorsement and policies.

Forms of endorsement or policies other than that described in § 726.203 may be entered into by operators to insure their liability under the Act. However, any form of endorsement or policy which materially alters or attempts to materially alter an operator's liability for the payment of any benefits under the Act shall be deemed insufficient to discharge such operator's duties and responsibilities as prescribed in part C of title IV of the Act. In any event, the failure of an operator to obtain an adequate policy or contract of insurance shall not affect such operator's liability for the payment of any benefits for which he is determined liable.

§ 726.206 Terms of policies.

A policy or contract of insurance shall be issued for the term of 1 year from the date that it becomes effective, but if such insurance be not needed except for a particular contract or operation, the term of the policy may be limited to the period of such contract or operation.

§ 726.207 Discharge by the carrier of obligations and duties of operator.

Every obligation and duty in respect of payment of benefits, the providing of medical and other treatment and care, the payment or furnishing of any other benefit required by the Act and in respect of the carrying out of the administrative procedure required or imposed by the Act or the regulations in this part or part 725 of this subchapter upon an operator shall be discharged and carried out by the carrier as appropriate. Notice to or knowledge of an operator of the occurrence of total disability or death due to pneumoconiosis shall be notice to or knowledge of such carrier. Jurisdiction of the operator by a district director, administrative law judge, the Office, or appropriate appellate authority under the Act shall be jurisdiction of such carrier. Any requirement under any benefits order, finding, or decision shall be binding upon such carrier in the same manner and to the same extent as upon the operator.

Reports by Carrier

§ 726.208 Report by carrier of issuance of policy or endorsement.

Each carrier shall report to the Office each policy and endorsement issued, canceled, or renewed by it to an operator. The report shall be made in such manner and on such form as the Office may require.

§ 726.209 Report; by whom sent.

The report of issuance, cancellation, or renewal of a policy and endorsement provided for in § 726.208 shall be sent by the home office of the carrier, except that any carrier may authorize its agency or agencies to make such reports to the Office.

§ 726.210 Agreement to be bound by report.

Every carrier seeking to write insurance under the provisions of the

Act shall be deemed to have agreed that the acceptance by the Office of a report of the issuance or renewal of a policy of insurance, as provided for by § 726.208 shall bind the carrier to full liability for the obligations under the Act of the operator named in said report. It shall be no defense to this agreement that the carrier failed or delayed to issue, cancel, or renew the policy to the operator covered by this report.

§ 726.211 Name of one employer only shall be given in each report.

A separate report of the issuance or renewal of a policy and endorsement, provided for by § 726.208, shall be made for each operator covered by a policy. If a policy is issued or renewed insuring more than one operator, a separate report for each operator so covered shall be sent to the Office with the name of only one operator on each such report.

§ 726.212 Notice of cancellation.

Cancellation of a contract or policy of insurance issued under authority of the Act shall not become effective otherwise than as provided by 33 U.S.C. 936(b); and notice of a proposed cancellation shall be given to the Office and to the operator in accordance with the provisions of 33 U.S.C. 912(c), 30 days before such cancellation is intended to be effective (see section 422(a) of part C of title IV of the Act).

§ 726.213 Reports by carriers concerning the payment of benefits.

Pursuant to 33 U.S.C. 914(c) as incorporated by section 422(a) of part C of title IV of the Act and § 726.207 each carrier issuing a policy or contract of insurance under the Act shall upon making the first payment of benefits and upon the suspension of any payment in any case, immediately notify the Office in accordance with a form prescribed by the Office that payment of benefit has begun or has been suspended as the case may be. In addition, each such carrier shall at the request of the Office submit to the Office such additional information concerning policies or contracts of insurance issued to guarantee the payment of benefits under the Act and any benefits paid thereunder, as the Office may from time to time require to carry out its responsibilities under the Act.

Subpart D—Civil Money Penalties

§ 726.300 Purpose and scope.

Any operator which is required to secure the payment of benefits under section 423 of the Act and § 726.4 and which fails to secure such benefits, shall be subject to a civil penalty of not more than $1,000 for each day during which such failure occurs. If the operator is a corporation, the president, secretary, and treasurer of the operator shall also be severally liable for the penalty based on the operator's failure to secure the payment of benefits. This subpart defines those terms necessary for administration of the civil money penalty provisions, describes the criteria for determining the amount of penalty to be assessed, and sets forth applicable procedures for the assessment and contest of penalties.

§ 726.301 Definitions.

In addition to the definitions provided in part 725 of this subchapter and § 726.8, the following definitions apply to this subpart:

(a) *Division Director* means the Director, Division of Coal Mine Workers' Compensation, Office of Workers' Compensation Programs, Employment Standards Administration, or such other official authorized by the Division Director to perform any of the functions of the Division Director under this subpart.

(b) *President, secretary, or treasurer* means the officers of a corporation as designated pursuant to the laws and regulations of the state in which the corporation is incorporated or, if that state does not require the designation of such officers, the employees of a company who are performing the work usually performed by such officers in the state in which the corporation's principal place of business is located.

(c) *Principal* means any person who has an ownership interest in an operator that is not a corporation, and shall include, but is not limited to, partners, sole proprietors, and any other person who exercises control over the operation of a coal mine.

§ 726.302 Determination of penalty.

(a) The following method shall be used for determining the amount of any penalty assessed under this subpart.

(b) The penalty shall be determined by multiplying the daily base penalty amount or amounts, determined in accordance with the formula set forth in this section, by the number of days in the period during which the operator is subject to the security requirements of section 423 of the Act and § 726.4, and fails to secure its obligations under the Act. The period during which an operator is subject to liability for a penalty for failure to secure its obligations shall be deemed to commence on the first day on which the operator met the definition of the term ''operator'' as set forth in § 725.101 of this subchapter. The period shall be deemed to continue even where the operator has ceased coal mining and any related activity, unless the operator secured its liability for all previous periods through a policy or policies of insurance obtained in accordance with subpart C of this part or has obtained a certification of exemption in accordance with the provisions of § 726.114.

(c)(1) A daily base penalty amount shall be determined for all periods up to and including the 10th day after the operator's receipt of the notification sent by the Director pursuant to § 726.303, during which the operator failed to secure its obligations under section 423 of the Act and § 726.4.

(2)(i) The daily base penalty amount shall be determined based on the number of persons employed in coal mine employment by the operator, or engaged in coal mine employment on behalf of the operator, on each day of the period defined by this section, and shall be computed as follows:

Employees	Penalty (per day)
Less than 25	$100
25–50	200
51–100	300
More than 100	400

(ii) For any period after the operator has ceased coal mining and any related activity, the daily penalty amount shall be computed based on the largest number of persons employed in coal mine employment by the operator, or engaged in coal mine employment on behalf of the operator, on any day while the operator was engaged in coal mining or any related activity. For purposes of this section, it shall be presumed, in the absence of evidence to the contrary, that any person employed by an operator is employed in coal mine employment.

(3) In any case in which the operator had prior notice of the applicability of the Black Lung Benefits Act to its operations, the daily base penalty amounts set forth in paragraph (c)(2)(i) of this section shall be doubled. Prior notice may be inferred where the operator, or an entity in which the operator or any of its principals had an ownership interest, or an entity in which the operator's president, secretary, or treasurer were employed:

(i) Previously complied with section 423 of the Act and § 726.4;

(ii) Was notified of its obligation to comply with section 423 of the Act and § 726.4; or

(iii) Was notified of its potential liability for a claim filed under the Black Lung Benefits Act pursuant to § 725.407 of this subchapter.

(4) Commencing with the 11th day after the operator's receipt of the

notification sent by the Director pursuant to § 726.303, the daily base penalty amounts set forth in paragraph (c)(2)(i) shall be increased by $100.

(5) In any case in which the operator, or any of its principals, or an entity in which the operator's president, secretary, or treasurer were employed, has been the subject of a previous penalty assessment under this part, the daily base penalty amounts shall be increased by $300, up to a maximum daily base penalty amount of $1,000. The maximum daily base penalty amount applicable to any violation of § 726.4 that takes place after January 19, 2001 shall be $1,100.

(d) The penalty shall be subject to reduction for any period during which the operator had a reasonable belief that it was not required to comply with section 423 of the Act and § 726.4 or a reasonable belief that it had obtained insurance coverage to comply with section 423 of the Act and § 726.4. A notice of contest filed in accordance with § 726.307 shall not be sufficient to establish a reasonable belief that the operator was not required to comply with the Act and regulations.

§ 726.303 Notification; investigation.

(a) If the Director determines that an operator has violated the provisions of section 423 of the Act and § 726.4, he or she shall notify the operator of its violation and request that the operator immediately secure the payment of benefits. Such notice shall be sent by certified mail.

(b) The Director shall also direct the operator to supply information relevant to the assessment of a penalty. Such information, which shall be supplied within 30 days of the Director's request, may include:

(1) The date on which the operator commenced its operation of a coal mine;

(2) The number of persons employed by the operator since it began operating a coal mine and the dates of their employment; and

(3) The identity and last known address:

(i) In the case of a corporation, of all persons who served as president, secretary, and treasurer of the operator since it began operating a coal mine; or

(ii) In the case of an operator which is not incorporated, of all persons who were principals of the operator since it began operating a coal mine;

(c) In conducting any investigation of an operator under this subpart, the Division Director shall have all of the powers of a district director, as set forth at § 725.351(a) of this subchapter. For purposes of § 725.351(c), the Division Director shall be considered to sit in the District of Columbia.

§ 726.304 Notice of initial assessment.

(a) After an operator receives notification under § 726.303 and fails to secure its obligations for the period defined in § 726.302(b), and following the completion of any investigation, the Director may issue a notice of initial penalty assessment in accordance with the criteria set forth in § 726.302.

(b)(1) A copy of such notice shall be sent by certified mail to the operator. If the operator is a corporation, a copy shall also be sent by certified mail to each of the persons who served as president, secretary, or treasurer of the operator during any period in which the operator was in violation of section 423 of the Act and § 726.4.

(2) Where service by certified mail is not accepted by any person, the notice shall be deemed received by that person on the date of attempted delivery. Where service is not accepted, the Director may exercise discretion to serve the notice by regular mail.

§ 726.305 Contents of notice.

The notice required by § 726.304 shall:

(a) Identify the operator against whom the penalty is assessed, as well as the name of any other person severally liable for such penalty;

(b) Set forth the determination of the Director as to the amount of the penalty and the reason or reasons therefor;

(c) Set forth the right of each person identified in paragraph (a) of this section to contest the notice and request a hearing before the Office of Administrative Law Judges;

(d) Set forth the method for each person identified in paragraph (a) to contest the notice and request a hearing before the Office of Administrative Law Judges; and

(e) Inform any affected person that in the absence of a timely contest and request for hearing received within 30 days of the date of receipt of the notice, the Director's assessment will become final and unappealable as to that person.

§ 726.306 Finality of administrative assessment.

Except as provided in § 726.307(c), if any person identified as potentially liable for the assessment does not, within 30 days after receipt of notice, contest the assessment, the Director's assessment shall be deemed final as to that person, and collection and recovery of the penalty may be instituted pursuant to § 726.320.

§ 726.307 Form of notice of contest and request for hearing.

(a) Any person desiring to contest the Director's notice of initial assessment shall request an administrative hearing pursuant to this part. The notice of contest shall be made in writing to the Director, Division of Coal Mine Workers' Compensation, Office of Workers' Compensation Programs, Employment Standards Administration, United States Department of Labor. The notice of contest must be received no later than 30 days after the date of receipt of the notice issued under § 726.304. No additional time shall be added where service of the notice is made by mail.

(b) The notice of contest shall:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) State the specific issues to be contested. In particular, the person must indicate his agreement or disagreement with:

(i) The Director's determination that the person against whom the penalty is assessed is an operator subject to the requirements of section 423 of the Act and § 726.4, or is the president, secretary, or treasurer of an operator, if the operator is a corporation.

(ii) The Director's determination that the operator violated section 423 of the Act and § 726.4 for the time period in question; and

(iii) The Director's determination of the amount of penalty owed;

(4) Be signed by the person making the request or an authorized representative of such person; and

(5) Include the address at which such person or authorized representative desires to receive further communications relating thereto.

(c) A notice of contest filed by the operator shall be deemed a notice of contest on behalf of all other persons to the Director's determinations that the operator is subject to section 423 of the Act and § 726.4 and that the operator violated those provisions for the time period in question, and to the Director's determination of the amount of penalty owed. An operator may not contest the Director's determination that a person against whom the penalty is assessed is the president, secretary, or treasurer of the operator.

(d) Failure to specifically identify an issue as contested pursuant to paragraph (b)(3) of this section shall be deemed a waiver of the right to contest that issue.

§ 726.308 Service and computation of time.

(a) Service of documents under this part shall be made by delivery to the person, an officer of a corporation, or

attorney of record, or by mailing the document to the last known address of the person, officer, or attorney. If service is made by mail, it shall be considered complete upon mailing. Unless otherwise provided in this subpart, service need not be made by certified mail. If service is made by delivery, it shall be considered complete upon actual receipt by the person, officer, or attorney; upon leaving it at the person's, officer's or attorney's office with a clerk or person in charge; upon leaving it at a conspicuous place in the office if no one is in charge; or by leaving it at the person's or attorney's residence.

(b) If a complaint has been filed pursuant to § 726.309, two copies of all documents filed in any administrative proceeding under this subpart shall be served on the attorneys for the Department of Labor. One copy shall be served on the Associate Solicitor, Black Lung Benefits Division, Room N–2117, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210, and one copy on the attorney representing the Department in the proceeding.

(c) The time allowed a party to file any response under this subpart shall be computed beginning with the day following the action requiring a response, and shall include the last day of the period, unless it is a Saturday, Sunday, or federally-observed holiday, *see* § 725.311 of Part 725 of this subchapter, in which case the time period shall include the next business day.

§ 726.309 Referral to the Office of Administrative Law Judges.

(a) Upon receipt of a timely notice of contest filed in accordance with § 726.307, the Director, by the Associate Solicitor for Black Lung Benefits or the Regional Solicitor for the Region in which the violation occurred, may file a complaint with the Office of Administrative Law Judges. The Director may, in the complaint, reduce the total penalty amount requested. A copy of the notice of initial assessment issued by the Director and all notices of contest filed in accordance with § 726.307 shall be attached. A notice of contest shall be given the effect of an answer to the complaint for purposes of the administrative proceeding, subject to any amendment that may be permitted under this subpart and 29 CFR part 18.

(b) A copy of the complaint and attachments thereto shall be served by counsel for the Director on the person who filed the notice of contest.

(c) The Director, by counsel, may withdraw a complaint filed under this section at any time prior to the date upon which the decision of the Department becomes final by filing a motion with the Office of Administrative Law Judges or the Secretary, as appropriate. If the Director makes such a motion prior to the date on which an administrative law judge renders a decision in accordance § 726.313, the dismissal shall be without prejudice to further assessment against the operator for the period in question.

§ 726.310 Appointment of Administrative Law Judge and notification of hearing date.

Upon receipt from the Director of a complaint filed pursuant to § 726.309, the Chief Administrative Law Judge shall appoint an Administrative Law Judge to hear the case. The Administrative Law Judge shall notify all interested parties of the time and place of the hearing.

§ 726.311 Evidence.

(a) Except as specifically provided in this subpart, and to the extent they do not conflict with the provisions of this subpart, the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings under this subpart.

(b) Notwithstanding 29 CFR 18.1101(b)(2), subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges shall apply to administrative proceedings under this part, except that documents contained in Department of Labor files and offered on behalf of the Director shall be admissible in proceedings under this subpart without regard to their compliance with the Rules of Practice and Procedure.

§ 726.312 Burdens of proof.

(a) The Director shall bear the burden of proving the existence of a violation, and the time period for which the violation occurred. To prove a violation, the Director must establish:

(1) That the person against whom the penalty is assessed is an operator, or is the president, secretary, or treasurer of an operator, if such operator is a corporation.

(2) That the operator violated section 423 of the Act and § 726.4. The filing of a complaint shall be considered *prima facie* evidence that the Director has searched the records maintained by OWCP and has determined that the operator was not authorized to self-insure its liability under the Act for the time period in question, and that no insurance carrier reported coverage of the operator for the time period in question.

(b) The Director need not produce further evidence in support of his burden of proof with respect to the issues set forth in paragraph (a) if no party contested them pursuant to § 726.307(b)(3).

(c) The Director shall bear the burden of proving the size of the operator as required by § 726.302, except that if the Director has requested the operator to supply information with respect to its size under § 726.303 and the operator has not fully complied with that request, it shall be presumed that the operator has more than 100 employees engaged in coal mine employment. The person or persons liable for the assessment shall thereafter bear the burden of proving the actual number of employees engaged in coal mine employment.

(d) The Director shall bear the burden of proving the operator's receipt of the notification required by § 726.303, the operator's prior notice of the applicability of the Black Lung Benefits Act to its operations, and the existence of any previous assessment against the operator, the operator's principals, or the operator's officers.

(e) The person or persons liable for an assessment shall bear the burden of proving the applicability of the mitigating factors listed in § 726.302(d).

§ 726.313 Decision and order of Administrative Law Judge.

(a) The Administrative Law Judge shall render a decision on the issues referred by the Director.

(b) The decision of the Administrative Law Judge shall be limited to determining, where such issues are properly before him or her:

(1) Whether the operator has violated section 423 of the Act and § 726.4;

(2) Whether other persons identified by the Director as potentially severally liable for the penalty were the president, treasurer, or secretary of the corporation during the time period in question; and

(3) The appropriateness of the penalty assessed by the Director in light of the factors set forth in § 726.302. The Administrative Law Judge shall not render determinations on the legality of a regulatory provision or the constitutionality of a statutory provision.

(c) The decision of the Administrative Law Judge shall include a statement of findings and conclusions, with reasons and bases therefor, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm,

reverse, or modify, in whole or in part, the determination of the Director.

(d) The Administrative Law Judge shall serve copies of the decision on each of the parties by certified mail.

(e) The decision of the Administrative Law Judge shall be deemed to have been issued on the date that it is rendered, and shall constitute the final order of the Secretary unless there is a request for reconsideration by the Administrative Law Judge pursuant to paragraph (f) of this section or a petition for review filed pursuant to § 726.314.

(f) Any party may request that the Administrative Law Judge reconsider his or her decision by filing a motion within 30 days of the date upon which the decision of the Administrative Law Judge is issued. A timely motion for reconsideration shall suspend the running of the time for any party to file a petition for review pursuant to § 726.314.

(g) Following issuance of the decision and order, the Chief Administrative Law Judge shall promptly forward the complete hearing record to the Director.

§ 726.314 Review by the Secretary.

(a) The Director or any party aggrieved by a decision of the Administrative Law Judge may petition the Secretary for review of the decision by filing a petition within 30 days of the date on which the decision was issued. Any other party may file a cross-petition for review within 15 days of its receipt of a petition for review or within 30 days of the date on which the decision was issued, whichever is later. Copies of any petition or cross-petition shall be served on all parties and on the Chief Administrative Law Judge.

(b) A petition filed by one party shall not affect the finality of the decision with respect to other parties.

(c) If any party files a timely motion for reconsideration, any petition for review, whether filed prior to or subsequent to the filing of the timely motion for reconsideration, shall be dismissed without prejudice as premature. The 30-day time limit for filing a petition for review by any party shall commence upon issuance of a decision on reconsideration.

§ 726.315 Contents.

Any petition or cross-petition for review shall:

(a) Be dated;

(b) Be typewritten or legibly written;

(c) State the specific reason or reasons why the party petitioning for review believes the Administrative Law Judge's decision is in error;

(d) Be signed by the party filing the petition or an authorized representative of such party; and

(e) Attach copies of the Administrative Law Judge's decision and any other documents admitted into the record by the Administrative Law Judge which would assist the Secretary in determining whether review is warranted.

§ 726.316 Filing and service.

(a) *Filing.* All documents submitted to the Secretary shall be filed with the Secretary of Labor, U.S. Department of Labor, 200 Constitution Ave., N.W., Washington, DC 20210.

(b) *Number of copies.* An original and four copies of all documents shall be filed.

(c) *Computation of time for delivery by mail.* Documents are not deemed filed with the Secretary until actually received by the Secretary either on or before the due date. No additional time shall be added where service of a document requiring action within a prescribed time was made by mail.

(d) *Manner and proof of service.* A copy of each document filed with the Secretary shall be served upon all other parties involved in the proceeding. Service under this section shall be by personal delivery or by mail. Service by mail is deemed effected at the time of mailing to the last known address.

§ 726.317 Discretionary review.

(a) Following receipt of a timely petition for review, the Secretary shall determine whether the decision warrants review, and shall send a notice of such determination to the parties and the Chief Administrative Law Judge. If the Secretary declines to review the decision, the Administrative Law Judge's decision shall be considered the final decision of the agency. The Secretary's determination to review a decision by an Administrative Law Judge under this subpart is solely within the discretion of the Secretary.

(b) The Secretary's notice shall specify:

(1) The issue or issues to be reviewed; and

(2) The schedule for submitting arguments, in the form of briefs or such other pleadings as the Secretary deems appropriate.

(c) Upon receipt of the Secretary's notice, the Director shall forward the record to the Secretary.

§ 726.318 Final decision of the Secretary.

The Secretary's review shall be based upon the hearing record. The findings of fact in the decision under review shall be conclusive if supported by substantial evidence in the record as a whole. The Secretary's review of conclusions of law shall be *de novo*. Upon review of the decision, the Secretary may affirm, reverse, modify, or vacate the decision, and may remand the case to the Office of Administrative Law Judges for further proceedings. The Secretary's final decision shall be served upon all parties and the Chief Administrative Law Judge, in person or by mail to the last known address.

§ 726.319 Retention of official record.

The official record of every completed administrative hearing held pursuant to this part shall be maintained and filed under the custody and control of the Director.

§ 726.320 Collection and recovery of penalty.

(a) When the determination of the amount of any civil money penalty provided for in this part becomes final, in accordance with the administrative assessment thereof, or pursuant to the decision and order of an Administrative Law Judge, or following the decision of the Secretary, the amount of the penalty as thus determined is immediately due and payable to the U.S. Department of Labor on behalf of the Black Lung Disability Trust Fund. The person against whom such penalty has been assessed or imposed shall promptly remit the amount thereof, as finally determined, to the Secretary by certified check or by money order, made payable to the order of U.S. Department of Labor, Black Lung Program. Such remittance shall be delivered or mailed to the Director.

(b) If such remittance is not received within 30 days after it becomes due and payable, it may be recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor.

PART 727—[REMOVED]

6. Under the authority of sections 422 and 426 of the Black Lung Benefits Act, 30 U.S.C. 932, 936, part 727 is removed.

[FR Doc. 00–31166 Filed 12–19–00; 8:45 am]

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Part III

Department of Labor

Employment and Training Administration

20 CFR Parts 655 and 656

Temporary Employment in the United States of Nonimmigrants under H–1B Visas; Final Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Parts 655 and 656

RIN 1215–AB09

Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States

AGENCY: Employment and Training Administration, Labor, in concurrence with the Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Interim final rule; request for comments.

SUMMARY: This document contains interim final regulations implementing recent legislation and clarifying existing Departmental rules relating to the temporary employment in the United States of nonimmigrants under H–1B visas. On January 5, 1999, the Department published a notice of proposed rulemaking (64 FR 628) seeking public comment on issues to be addressed in regulations to implement changes made to the Immigration and Nationality Act (INA) by the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA). In particular, the ACWIA requires H–1B-dependent employers and willful violators to comply with certain additional attestations regarding anti-displacement and recruitment obligations. The Department also sought further comment on certain proposals which were previously published for comment as a Proposed Rule on October 31, 1995 (60 FR 55339), and on certain interpretations of the statutes and its existing regulations which the Department proposed to incorporate in the regulations.

DATES: *Effective Dates:* These regulations are effective January 19, 2001, with the exception of §§ 655.731(a)(2) and 656.40, (c) and (d) which are effective December 20, 2000.

Applicabililty Date: Sections 655.731(a)(2) and 656.40 apply retroactively to any prevailing wage determinations thereunder which were not final as of October 21, 1998. Sections 655.720 and 655.721 are applicable to Labor Condition Applications filed on or after February 5, 2001.

Comment Date: Written comments on these regulations and issues raised in the preamble may be submitted by February 20, 2001, with the exception of any comments on Form WH–4, which must be submitted by January 19, 2001.

ADDRESSES: Submit written comments concerning Part 655 to Deputy Administrator, Wage and Hour Division, ATTN: Immigration Team, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Commenters who wish to receive notification of receipt of comments are requested to include a self-addressed, stamped post card. Comments may also be transmitted by facsimile (''FAX'') machine to (202) 693–1432. This is not a toll-free number.

Submit written comments concerning Part 656 to the Assistant Secretary for Employment and Training, ATTN: Division of Foreign Labor Certifications, U.S. Employment Service, Employment and Training Administration, Department of Labor, Room C–4318, 200 Constitution Avenue, NW., Washington, DC 20210. Commenters who wish to receive notification of receipt of comments are requested to include a self-addressed, stamped post card. Comments may also be transmitted by facsimile (''FAX'') machine to (202) 693–2769. This is not a toll-free number.

FOR FURTHER INFORMATION CONTACT: Michael Ginley, Director, Office of Enforcement Policy, Wage and Hour Division, Employment Standards Administration, Department of Labor, Room S–3510, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone: (202) 693–0745 (this is not a toll-free number).

James Norris, Chief, Division of Foreign Labor Certifications, U.S. Employment Service, Employment and Training Administration, Department of Labor, Room C–4318, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone: (202) 693–3010 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act

The H–1B nonimmigrant program is a voluntary program that allows employers to temporarily import and employ nonimmigrants admitted under H-1B visas to fill specialized jobs not filled by U.S. workers. (Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(15)(H)(I)(b), 1182(n), 1184(c)). The statute, among other things, requires that an employer pay an H–1B worker the higher of the actual wage or the prevailing wage, to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers.

Under the Immigration and Nationality Act (INA), as amended by the Immigration Act of 1990 (Act), and as amended by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, an employer seeking to employ an alien in a specialty occupation or as a fashion model of distinguished merit and ability on an H–1B visa is required to file a labor condition application with and receive certification from DOL before the Immigration and Naturalization Service (INS) may approve an H–1B petition. The labor condition application process is administered by ETA; complaints and investigations regarding labor condition applications are the responsibility of ESA.

On January 5, 1999, the Department of Labor (DOL) published a proposed rule which would implement statutory changes in the H–1B program made to the INA by the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) (Title IV, Pub. L. 105–277). The ACWIA, as amended by the American Competitiveness in the Twenty-First Century Act of 2000 (Pub. L. 106–313), among other things, temporarily (until October 2003) increases the maximum number of H–1B visas permitted each year; temporarily requires new non-displacement (layoff) and recruitment attestations by ''H–1B dependent'' employers (as defined by the ACWIA) and willfully violating employers; and requires employers to offer the same fringe benefits to H–1B workers on the same basis as it offers fringe benefits to U.S. workers. The public was invited to comment on the proposed rule, including the information collection requirements noted below. In addition, pursuant to the Paperwork Reduction Act of 1990, DOL submitted a paperwork package to the Office of Management and Budget (OMB), requesting review and approval of the information collection requirements included in the proposed rule.

Since publication of the NPRM, additional amendments to the H–1B provisions were enacted by the American Competitiveness in the Twenty-first Century Act of 2000 (Pub. L. 106–313, 114 Stat. 1251, October 17, 2000), the Immigration and Nationality Act—Amendments (Pub. L. 106–311, 114 Stat. 1247, October 17, 2000), and section 401 of the Visa Waiver Permanent Program Act (Pub. L. 106–396, 114 Stat. 1637, October 30, 2000) (collectively, the October 2000 Amendments). Most pertinent to these regulations were provisions that raised the ceiling on the number of H–1B visas that may be issued and extended the

period of effectiveness of the additional attestations applicable only to H–1B-dependent employers and willful violators.

Comments were received from members of Congress, OMB, law firms, information technology industry associations, other industry associations, information technology firms, research firms, other employers of H–1B workers, Federal agencies and individuals. Commenters questioned DOL authority under the ACWIA and/or the Immigration and Nationality Act to impose the paperwork requirements contained in the proposed rule. Further, commenters questioned the DOL burden estimates for these information collections, indicating that the estimates were much too low. Many commenters contended DOL should only require the production of records in an investigation context. One commenter suggested for clarity that DOL provide a check list for H–1B employers indicating which records must be kept, which records are required by other statutes or regulations and where these records must be kept.

Many commenters have fundamental misunderstandings of the nature of the reporting and disclosure requirements proposed in the NPRM. The Department has made every effort in the NPRM and in the Interim Final Rule to limit recordkeeping requirements to documents which are necessary for the Department to ensure compliance, and to documents which are already required by other statutes and regulations or would ordinarily be kept by a prudent businessperson. As a general matter, when reviewing the recordkeeping and disclosure obligations set forth in the regulations, employers should be aware that the regulations distinguish between a requirement to ''preserve'' or ''retain'' records if they otherwise exist, and a requirement to ''maintain'' records whether or not they already exist. A requirement that employers retain, for example, ''any'' documentation on a particular subject requires only that any such documents be retained if they otherwise exist, but does not require creation of any documents. In addition, the Department points out that where the regulations do not explicitly require public access, the records may be kept in the employer's files in any manner desired; they do not need to be segregated by labor condition application (LCA) or establishment and do not need to be segregated from the records of non-H–1B workers, provided they are promptly made available to the Department upon request in the conduct of an investigation. The Department considers it important to require that such records be maintained, as in other enforcement programs, so that in the event of an investigation, the Department is able to determine compliance or, in the event of violations, to determine the nature and extent of the violations. This can only be accomplished with adequate, accurate records since it is only the employer who is in a position to know and produce the most probative underlying facts. *See Anderson* v. *Mt. Clemens Pottery Co.,* 328 U.S. 680, 687 (1946).

In addition, in the regulations, the Department has limited the documents that must be disclosed to the public to those which the Department has concluded are necessary for a member of the public to be able to determine the employer's obligations and the general contours of how it will comply with its attestation obligations. The regulations on public access files do not require that there be a separate public access file for each LCA or for each worker. Thus, for example, an employer might choose to keep a single public access file with one copy of each of the required documents which are applicable to all LCAs (such as the description of the employer's pay system), and separately clip together those documents which are specific to each LCA.

Nothing in the ACWIA suggests that it intends to deny the Department the usual authority to require recordkeeping as a means of ensuring compliance with an employer's statutory obligations. To the contrary, Section 212(n)(1) specifically requires employers to make the LCA ''and such accompanying documents as are necessary'' available for public examination. The Department believes that this provision clearly permits the Department to determine what documents must be created or retained by employers to support the LCA. In the absence of such records, the Department is unable to ascertain whether an employer in fact is in compliance or the extent of violations.

In an effort to fully educate the public regarding the H–1B program and its requirements (including paperwork), DOL intends to prepare and make available pamphlets, fact sheets and a small business compliance guide. Further compliance assistance material will be made available on the DOL website. See Section IV.B, below, for an extensive discussion of this public outreach effort. The following is a brief discussion of the paperwork requirements contained in the proposed rule, the public comments on those requirements, the DOL response and the paperwork requirements imposed by this interim final rule. A much more extensive discussion of the issues, including the paperwork requirements, is contained in Section IV of the preamble.

A. Labor Condition Application (§ 655.700)

The process of protecting U.S. workers begins with a requirement that employers file a labor condition application (LCA) (Form ETA 9035) with the Department. In this application the employer is required to attest: (1) That it will pay H–1B aliens prevailing wages or actual wages, whichever are greater—including, pursuant to the ACWIA, the requirement to pay for certain nonproductive time and to provide benefits on the same basis as they are provided to U.S. workers; (2) that it will provide working conditions that will not adversely affect the working conditions of U.S. workers similarly employed; (3) that there is no strike or lockout at the place of employment; and (4) that it has publicly notified the bargaining representative or, if there is no bargaining representative, the employees, by posting at the place of employment or by electronic notification—and will provide copies of the LCA to each H–1B nonimmigrant employed under the LCA. In addition, the employer must provide the information required in the application about the number of aliens sought, occupational classification, wage rate, the prevailing wage rate and the source of the wage rate, and period of employment. Pursuant to the ACWIA, additional attestation requirements become applicable to H–1B-dependent employers and willful violators after promulgation of these regulations. This form, currently approved by OMB under OMB No. 1205–0310, was revised in the NPRM to identify H–1B dependent employers and provide for their attestation to the new requirements. The ACWIA increased the number of H–1B nonimmigrants from 65,000 to 115,000 in fiscal years 1999 and 2000 and to 107,500 in fiscal year 2002. Besides the increase in LCAs filed for these additional workers, by regulation H–1B-dependent employers are required to file new LCAs if they wish to file petitions for new H–1B nonimmigrants or to seek extensions of status for existing workers. The Department estimated in the proposal that 249,500 LCAs are filed annually by 50,000 H–1B employers (dependent and nondependent). The only added LCA burden proposed in the NPRM was for H–1B-dependent employers and willful violators to indicate on the LCA their status and their agreement to the

additional attestation requirements. (The time required for an estimated 50 H–1B employers to make the mathematical calculation to determine if they must make the additional attestations required of an H–1B employer is separately set out in C. of this section, below.) Since it was estimated that only 50 H–1B employers will find it necessary to make this calculation, out of a total of 50,000 H–1B employers, the estimate of time necessary to complete the form remained at 1 hour. Total annual burden was estimated at 249,500 hours.

Since promulgation of the NPRM, the 2000 Amendments to the INA further increase the ceiling on the number of H–1B visas that may be issued annually for 2001, 2002 and 2003, to 195,000 annually, with an additional unspecified number who may be admitted if they will be employed by a school, a related non-profit entity, a State or local government research organization, or a nonprofit research organization.

Commenters generally objected to the one hour estimate for completing the LCA, pointing out that the revised LCA is four pages long, whereas the current LCA is only one page for an estimated burden of one and one-quarter hour per LCA.

OMB suggested asked whether the conditions in a, b and c in section 8 capture the requirements for H–1B dependent employers. They also suggested amending the end of the sentence following the second box to read ''* * * unless the exemption requirement in the NOTE below is met.''

A commenter stated that DOL had failed to consider that many employers will now be forced to file two LCAs where previously they only filed one. Several of its member employers who previously filed an LCA for multiple openings indicated that they may file separate LCAs for each opening rather than take the risk that of INS making a determination that one H–1B nonimmigrant is not exempt, thus invalidating the entire LCA.

As discussed in Section IV.B.4 below, the ETA Form 9035 has been amended to provide that every employer is required to indicate whether it is or is not H–1B-dependent or a willful violator. Since all employers are required to determine whether or not they are H–1B dependent—although for most employers, as discussed below, their status will be readily apparent and no actual computation will be necessary—the additional box for non-dependent employers should require no additional time. There is no other information required which is not contained on the current form other than to check a box indicating the agreement of H–1B-dependent employers and willful violators to the additional attestation requirements. The longer form is not due to the requirement to furnish additional information, but to the new format required for the FAXback, which is designed to decrease significantly the processing time. See Section IV.5, below. The Department also notes that the 1¼ hour estimate on the current ETA Form 9035 includes the 15 minutes estimated to file a complaint with the Wage and Hour Division

Upon review, the Department sees no reason to change its estimate of an average of one hour per form, including both reading the instructions and filling out the form (estimated to take no more than one-half hour per form), as well as taking the actions that are subsumed in filling out the form (obtain the prevailing wage and providing notice). Based upon current data, and considering the regulatory change deleting the necessity for filing a new LCA when an employer's corporate identity changes (*see* B. of this section, below) as well as the requirement that H–1B-dependent employers with current LCAs file new LCAs if they wish to file new H–1B petitions or requests for extension of status, DOL estimates that 637,000 LCAs will be submitted annually by 63,500 H–1B employers (dependent and nondependent). Total annual burden for the LCA is estimated to be 637,000 hours (637,000 LCAs × 1 hour).

B. Documentation of Corporate Identity (§ 655.760)

Currently, the regulatory requirement is that a new LCA must be filed when an employer's corporate identity changes and a new Employer Identification Number (EIN) is obtained. Under the proposed rule, an employer who merely changes corporate identity through acquisition or spin-off could merely document the change in the public file (including an express acknowledgment of all LCA obligations on the part of the successor entity), provided it satisfied the Internal Revenue Code definition of a single employer. The proposed regulation was designed to eliminate a burden on businesses to file a new LCA, while at the same time ensuring that the public is aware of the changes and that the employer will continue to follow its LCA obligations. It was estimated in the proposal that 500 H–1B employers would be required to file the subject documentation annually. It was estimated that the recording and filing of each such document would take 15 minutes for a total annual burden of 125 hours.

One commenter asked how DOL's rulemaking affected the INS interpretation that any ''material change in employment'' necessitates the filing of an amended petition. Another commenter asked what opinion an employer is to follow when current DOL opinion is that any change to an approved LCA requires an amendment to the H–1B petition and the view of INS is that a change in company name or EIN does not require a new LCA, just that the change be documented at the time of amendment or extension. Another commenter stated that the burden for this requirement is significantly higher than DOL estimated.

Upon reconsideration, DOL's Interim Final Rule provides that a new LCA will not be required merely because a corporate reorganization results in a change of corporate identity, regardless of whether there is a change in the EIN and regardless of whether the IRS definition of single employer is satisfied, provided that the successor entity, prior to the continued employment of the H–1B nonimmigrant, agrees to assume the predecessor entity's obligations and liabilities under the LCA. The agreement to comply with the LCA for the future and to any liability of the predecessor under the LCA must be documented with a memorandum in the public access file.

With these changes, and based on the Department's experience, it is now estimated that 1000 H–1B employers (an increase from the 500 employers estimated in the NPRM) will be required to file the documentation annually and that the recording and filing of each such document will take approximately 30 minutes for a total annual burden of 500 hours. The Department also estimates that employers who file this memorandum will file 10,000 fewer LCAs, for a net saving of 9,500 hours.

INS requirements for the filing of an amended petition are separate from DOL requirements for the filing of LCAs.

C. Determination of H–1B Dependency (§ 655.736)

An H–1B employer must calculate the ratio between its H–1B workers and the number of full-time equivalent employees (FTEs) to determine whether it meets the statutory definition of an H–1B-dependent employer (8 U.S.C. 1182 (n)(3)(A)). The NPRM provided that when it is a close question, the determination would ordinarily be made by examination of an employer's quarterly tax statement and last payroll (or last quarter of payrolls if more

representative) or other evidence as to average hours worked by part-time employees to aggregate their hours into FTEs, together with a count of the number of workers under H–1B petitions. Documentation of this determination would be required where non-dependent status is not readily apparent and a mathematical determination must be made. A copy of this determination would be placed in the public disclosure file. In addition, if an employer changed from dependent to non-dependent status, or vice-versa, a simple statement of the change in status would be placed in the public disclosure file. The NPRM explained that documentation of a determination of H–1B dependency where it is a close question is necessary to determine employer compliance with H–1B requirements, and to advise the public of an employer's status. It was estimated in the proposal that approximately 50 H–1B employers would need to make the determination with 25 employers who are found not to be dependent employers would be required to document this determination annually. The making and documentation of each such determination was estimated to take approximately 15 minutes, and occur at least twice annually for a total annual burden of 12.5 hours.

Several commenters expressed the view that the DOL burden estimate for this requirement was severely underestimated. They remarked that large employers who hire H–1B employees will have to create systems of verification of H–1B dependency and that the determination will be difficult where employees are located in multiple locations and departments and the data needed to make the determination are maintained in different databases. Some commenters questioned the connection DOL made between the use of blanket LCAs and the likelihood of H–1B dependency and how frequently the determination would need to be made. Some also commented that it appeared that whenever the determination is made, a copy of the calculation must be placed in the public access file, making it a requirement for all H–1B employers, not just those who are borderline H–1B dependent. OMB commented that the 15-minute burden for the dependency determination seemed low and asked if the estimate just includes the assurance (how it is written) or does it also include documentation of the assurance.

Having taken into consideration all of the comments pertaining to the determination of dependency status, DOL has decided modification these requirements is appropriate to achieve the purposes of the ACWIA and avoid unnecessary burden on employers. First, the Interim Final Rule provides that all employers must retain copies of the I–129 petitions or requests for extensions of status filed with INS. These documents are critical to several provisions in the regulations, including in particular the determination of dependency and the number of hours that must be compensated if employees are ''benched.'' The Department believes that prudent businessmen would retain copies of these documents in any event. (See also the discussion in D. of this section, below.)

The Interim Final Rule also significantly reduces the burden to employers in making the computations of dependency. The Rule will permit employers to use a ''snap shot'' test to determine if dependency status is readily apparent and requires a full computation only if the number of H–1B workers exceeds 15 percent of the total number of full-time workers of the employer. Furthermore, the Rule provides employers an option of considering all part-time workers to be one-half FTE, rather than make the full computation. If the full computation (where required because the dependency status is not readily apparent) indicates that the employer is not H–1B dependent, the employer must retain a copy of this computation. Further, the employer must retain a copy of the full computation in specified circumstances which the Department believes will very rarely occur. The full computation must be maintained if the employer changes status from dependent to non-dependent. If the employer uses the Internal Revenue Code single employer test to determine dependency, it must maintain records documenting what entities are included in the single employer, as well as the computation performed, showing the number of workers employed by each entity who is included in the calculation. Finally, if the employer includes workers who do not appear on the payroll, a record of the computation must be kept. The Department has concluded that the computations or summary of the computations need not be kept in the public access file.

Although DOL has made several changes to simplify the determination of dependency status and its documentation, upon reconsideration DOL has increased its estimate of burden from 15 to 30 minutes, thus increasing the annual burden for an estimated 25 employers who must make and document such calculations twice annually from 12.5 to 25 hours. The Department also estimates that no more than 5 percent of employers will be required to retain copies of H–1B petitions and extensions who do not currently retain these documents, for an average of 3 minutes per petition, and a total of 159 hours (3,175 employers × 3 minutes ÷ 60). Total annual burden for this item is estimated to be 184 hours.

D. List of Exempt H–1B Employees in Public Access File (§ 655.737(a)(1))

The ACWIA provisions regarding non-displacement and recruitment of U.S. workers do not apply where the LCA is used only for petitions for exempt H–1B workers. The NPRM provided that where the INS determines a worker is exempt, employers would be required to maintain a copy of such documentation in the public access file. Determinations as to whether or not H–1B workers meet the education requirements to be classified as exempt H–1B nonimmigrants would be made initially by the INS in the course of adjudicating the petitions filed on behalf of H–1B nonimmigrants by dependent employers. In the event of an investigation, it was anticipated that considerable weight would be given to the INS determination that H–1B nonimmigrants were exempt, based on the educational attainments of the workers, since INS has considerable experience in evaluating the educational qualifications of aliens. Retention of copies of such determinations would aid DOL in determining compliance with the H–1B requirements and provide the public with notice as well. It was estimated in the proposal that 28,125 such documents would need to be filed annually. Each such filing would take approximately one minute for an annual burden of approximately 468.8 hours.

One commenter indicated that the one minute to physically complete the form may be correct but that the estimate ignores the analysis and review required to determine if they are exempt. Another commenter asked what documentation must be copied and maintained in the file, *i.e.,* would INS issue a separate determination or would Form I–797, Notice of Approval of H–1B Petition suffice? They also believed it was unclear how DOL estimated only 28,125 documents would be filed annually when the number of H–1B petition approvals for the current fiscal year is 115,000.

On further consideration, because of privacy considerations, DOL has concluded that the H–1B petitions with the INS determinations of workers' exempt status need not be included in the public access file. However, DOL

believes the public should know which workers are not covered by the new attestation elements so they can challenge a determination of exempt status where they believe the basis for the exemption is invalid. Therefore, under the interim final rule employers will be required to include in their public access file a list of the H–1B nonimmigrants supported by any LCA attesting that it will be used only for exempt workers, or in the alternative, a statement that the employer employs only exempt H–1B workers. DOL estimates that each list or statement will take approximately 15 minutes and that 200 H–1B employers will prepare one such list or statement annually for a total burden of 50 hours.

E. Record of Assurance of Non-displacement of U.S. Workers at Second Employer's Worksite (§ 655.738(e))

Section 212(n)(F)(ii) of the INA, 8 U.S.C. 1182(n)(F)(ii), prohibits an H–1B-dependent employer from placing H–1B nonimmigrant with another employer unless the dependent employer makes a bona fide inquiry as to the secondary employer's intent regarding displacement of U.S. workers by H–1B workers. The proposed regulation would require an employer seeking to place an H–1B nonimmigrant with another employer to secure and retain either a written assurance from the second employer, a contemporaneous written record of the second employer's oral statements regarding non-displacement, or a prohibition in the contract between the H–1B employer and the second employer. Pursuant to the ACWIA, an H–1B employer may be debarred for a secondary displacement ''only if the Secretary of Labor found that such placing employer * * * knew or had reason to know of such displacement at the time of the placement of the nonimmigrant with the other employer.'' Congress clearly intended that the employer make a reasonable inquiry and give due regard to available information. In order to assure that the purposes of the statute are achieved, the Department developed a regulatory provision to require that the H–1B employer make a reasonable effort to inquire about potential secondary displacement and to document those inquiries. It was estimated that approximately 150 employers would place H–1B nonimmigrants with secondary employers where assurances are required. It was estimated that each such assurance will take approximately 5 minutes and each such employer would obtain such assurances 5 times annually for an annual burden of 62.5 hours.

Commenters stated that DOL grossly underestimated the amount of time necessary to persuade and obtain from the secondary employer the necessary assurances, create a verification form or revise a contract and the annual frequency of the assurances. Further, some commenters felt that DOL had failed to consider the additional burden on the secondary employer to document their compliance with the assurance.

The paperwork burden estimate, properly, does not include the time necessary to persuade a secondary employer to provide such an assurance but does include the development of the verification form or contract clause and its execution. DOL believes that once the form or contract clause is created, this form or contract clause will be used uniformly for subsequent assurances making the average burden per occurrence minimal. There is no burden on the secondary employer to document its compliance with the assurance, since it is solely the responsibility of the primary H–1B employer to comply with the attestation that no U.S. worker will be displaced by an H–1B worker. DOL estimates an average burden of 10 minutes per attestation or statement, and that 150 H–1B employers will document such assurance 5 times annually, for a total annual burden of 125 hours.

F. Offers of Employment to Displaced U.S. Workers (§ 655.738(e))

The ACWIA prohibits H–1B dependent employers and willful violators from hiring H–1B nonimmigrants if their doing so would displace similar U.S. workers from an essentially equivalent job in the same area of employment. The proposed regulations would require H–1B-dependent employers to keep certain documentation with respect to each former worker in the same locality and same occupation as any H–1B worker who left its employ in the period from 90 days before to 90 days after an employer's petition for an H–1B worker. For all such employees, the Department proposed that covered H–1B employers maintain the last-known mailing address, occupational title and job description, any documentation concerning the employee's experience and qualifications, and principal assignments. Further, the employer would be required to keep all documents concerning the departure of such employees and the terms of any offers of similar employment to such U.S. workers and responses to those offers. These records are necessary for the Department to determine whether the H–1B employer has displaced similar U.S. workers with H–1B nonimmigrants. The Department stated that no records need be created to comply with these requirements, since the Equal Employment Opportunity Commission (EEOC) already requires under its regulations that the records described above be maintained.

Commenters stated that they were unaware of the EEOC regulation that required this documentation and requested that DOL recite rather than just refer to the EEOC regulations.

As discussed in Section IV.F.8 below, commenters are generally correct that the EEOC regulation cited in the NPRM, 29 CFR 1620.14, does not establish a general requirement that employers create the records encompassed by the Department's displacement proposal. Rather, it requires an employer to preserve all personnel or employment records which the employer ''made or kept''. Furthermore, EEOC requires the preservation of the same or similar records under other statutes it administers, such as the Age Discrimination in Employment Act (ADEA). Under this Interim Final Regulation, DOL is not requiring employers to create any documents other than basic payroll information, with one noted exception. If the employer offers the U.S. worker another employment opportunity, and does not otherwise do so in writing, by the provisions of section 655.738(e)(1) of these regulations, the employer must document and retain the offer and the response to such offer.

It is estimated that 10 H–1B employers will make such offers of employment 5 times annually (50) and that 5 of those offers and responses would not otherwise be committed to writing without this paperwork requirement. Each such documentation is estimated to take 30 minutes for a total annual burden of 2.5 hours.

G. Documentation of U.S. Worker Recruitment (§ 655.739(i)

Pursuant to the ACWIA, H–1B-dependent employers are required to make good faith efforts to recruit U.S. workers before hiring H–1B workers. Under the proposed regulations, H–1B-dependent employers would be required to retain documentation of the recruiting methods used, including the places and dates of the advertisements and postings or other recruitment method used, the content of the advertisements or postings, and the compensation terms. Further, the employer would be required to retain any documentation concerning consideration of applications of U.S. workers, such as copies of applications

and related documents, rating forms, job offers, etc. The proposed rule also would require the employer to place either documentation or a simple list of the places and dates of the advertisements and postings of other recruitment methods used. Comments were requested regarding how employers should determine industry-wide standards and make this determination available for public disclosure. The documentation noted above is necessary for the Department of Labor to determine whether the employer has made a good faith effort to recruit U.S. workers and for the public to be aware of the recruiting methods used. It was estimated that annually 200 H–1B dependent employers would need to document their good faith efforts to recruit U.S. workers. The filing of such records was estimated to take approximately twenty minutes per employer for an annual burden of approximately 66.7 hours.

Commenters felt the burden for this item was underestimated, *i.e.,* that DOL should recognize that employers file more than one LCA each year and that DOL should recite rather than just refer to the EEOC regulation requiring this documentation.

As noted in F. above and as discussed at some length in Section IV.G.5 of the preamble, DOL believes that employers are required to preserve the records required under current EEOC requirements. With the exception of the list to be included in the public access file (and here too employers have the option of putting the actual records in the file), DOL is not requiring employers to create any documents, but rather to preserve those documents which are created or received. Further, DOL, upon further review, has determined that employers will not be required to maintain evidence of industry practice for recruitment. The only additional recordkeeping burden required by these regulation is that the public disclosure file contain a summary of the principal recruitment methods used and the time frames in which they were used. This recordkeeping requirement may be satisfied by creating a memorandum to the file or the filing of pertinent documents. It is estimated that 200 H–1B employers will file such documents or memorandum 5 times annually and that each recordkeeping will take 20 minutes, for an annual burden of approximately 333 hours.

H. Documentation of Fringe Benefits (§ 655.731(b))

Pursuant to the ACWIA, all employers of H–1B workers are required to offer benefits to H–1B workers on the same basis and under the same criteria as offered to similarly employed U.S. workers. The proposed regulations would require employers to retain copies of all fringe benefit plans and summary plan descriptions, including all rules regarding eligibility and benefits, evidence of what benefits are actually provided to individual workers and how costs are shared between employers and employees. These records are necessary for the Department to determine whether the H–1B nonimmigrants are offered the same fringe benefits as similarly employed U.S. workers. Copies of most fringe benefit programs are required to be maintained by Internal Revenue Service and Pension and Welfare Benefits Administration regulations; thus there would not ordinarily be an additional recordkeeping burden from these requirements. The Department estimated that 2,500 employers would spend approximately 15 minutes each documenting unwritten plans, for an annual burden of 625 hours.

The Department in the proposed rule also inquired as to whether it would be possible to require multinational employers to keep H–1B workers on ''home country'' benefit plans in lieu of those provided to U.S. workers and what records would need to be kept to demonstrate the value of the ''home-country'' benefits and those provided to U. S. workers.

A commenter said that DOL should recite, rather than just refer to the PWBA and IRS regulations. Another commenter stated it was unclear whether in fact these regulations governing retention of benefits information meet the DOL requirements for the H–1B program, since the DOL regulations require specific documentation of the comparative benefits offered and received by H–1B employees and their U.S. counterparts, including the need to determine the appropriate comparison group and then require the maintenance of all the information in the public inspection file for each H–1B worker. Another comment stated that DOL has failed to consider the additional burden of comparing fringe benefits offered by similar employers in the area which DOL is proposing to require. Commenters questioned the need for the documentation of fringe benefits to be placed in each public access file, with others suggesting more flexibility in how the documentation should be provided. One commenter suggested that employers be allowed to select equivalent but different valued benefits as long as employers can show that all similarly situated workers were offered the same array of benefits.

It is believed that almost all employers of H–1B workers would, absent the regulation, have already created an employee handbook or have a summary description plan required by ERISA regulations which would satisfy the H–1B regulatory requirement. The provision being considered to require a comparison of fringe benefits offered by similar employers in the area is not included in this interim final rule. DOL is not requiring that detailed records of fringe benefits be maintained in each public access file. These records may be kept in a master file or in any other manner the employer desires. The public access file need only contain a summary of the benefits offered to U.S. workers in the same occupation as H–1B workers, including a statement of how employees are differentiated, if at all. Ordinarily this would be satisfied with the employee handbook or summary description discussed above. Where an employer is providing home country benefits, the employer need only place a notation to that effect in the public access file.

There are an estimated 10 percent of H–1B employers, or 6,350 who provide fringe benefits, such as bonuses, vacations and holidays, not required by ERISA regulations to be documented. It is estimated to document these plans would take 15 minutes per employer, for an annual burden of 1,588 hours (6,350 × 15 minutes). It is further estimated that 25 percent of H–1B employers (15,875) are multinational employers and that a note to the file that these workers receive ''home country'' benefits would take 5 minutes per employer for an annual burden of 1,323 hours. The total estimated burden for this item is 2,911 hours.

I. Wage Recordkeeping Requirements Applicable to Employers of H–1B Nonimmigrants

The Department republished and asked for comment on several provisions of the December 20, 1994 Final Rule (59 FR 65646) which were published for notice and comment on October 31, 1995 (60 FR 55339). Existing regulations require all H–1B employers to document their actual wage system to be applied to the H–1B nonimmigrants and U.S. workers. They are also required to keep payroll records for non-FLSA exempt H–1B workers and other employees for the specific employment in question. The proposed rule would decrease the burden on employers of keeping hourly pay records for U.S. workers, requiring such records only if either the worker is not

paid on a salary basis, or the actual wage is stated as an hourly wage. For H–1B workers, such records must also be kept if the prevailing wage is expressed as an hourly rate. The statute requires that the employer pay H–1B nonimmigrants the higher of the actual or prevailing wage. The Department explained that in order to determine if the employer is paying the required wage, it must be able to ascertain the system an employer uses to determine the wages of non-H–1B workers. The Department also stated that it is essential to require the employer to maintain payroll records for the employer's employees in the specific employment in question at the place of employment to ensure that H–1B nonimmigrants are being paid at least the actual wage being paid to non-H–1B workers or the prevailing wage, whichever is higher. The Department estimated that approximately 50,000 employers employ H–1B nonimmigrants. The documentation would have to be done only one time for each employer. Hourly pay records would have to be prepared with respect to all affected employees each pay period. The Department estimated that the public burden wold be approximately 1 hour per employer per year to document the actual wage system for a total burden to the regulated community of 50,000 hours in a year.

The payroll recordkeeping requirements are virtually the same as those required by the Fair Labor Standards Act (FLSA) and any burden required is subsumed in the OMB Approval No. 1215–0017 for those regulations at 29 CFR Parts 516, except with respect to records of hours worked for exempt employees. There would be no burden for U.S. workers since as a practical matter, hours worked records would be required for U.S. workers only if they are not exempt from FLSA, or if they are exempt but paid on an hourly basis (certain computer professionals), and therefore would keep hourly records in any event. The Department estimates that 55,000 H–1B workers will be paid on a salary basis. Hours worked records would be required for these workers only if the prevailing wage is expressed as an hourly rate—estimated to 17 percent of all cases. The Department estimated a burden of 2.5 hours per worker per year, for 9,350 workers and a total of 23,375 hours.

Several commenters stated that DOL had grossly underestimated the burden of documenting the objective wage system. Some indicated that it was ludicrous to estimate that the documentation is done only once, since wage systems continually change, documentation will need be done, at a minimum, each time a new LCA is prepared and employers do not hire H–1B nonimmigrants only for one position in the organization. Thus, DOL must calculate how many different job categories are filled by H–1B nonimmigrants on average for each employer to estimate how many times the burden of documenting the objective wage system occurs annually. Further, the documentation must be sufficiently detailed to allow a third party to determine the actual wage, making the burden higher than estimated. Some commented that the proposed regulation requires the actual wage be determined and documented anew for each H–B hire, along with periodic adjustments to the actual wage system.

The Department has deleted the provisions suggesting that the employer's wage system must be objective, as well as the statement that it must be described in the public disclosure file with detail sufficient for a third party to determine the actual wage rate for an H–1B nonimmigrant. As stated above, the requirement that a description of the actual wage system be included in the public access file is already contained in the regulations at section 655.760(a)(3). Therefore these regulations create no additional burden for this requirement.

Some commenters stated that while DOL estimated that only 17 percent of the prevailing wages provided to employers by State Employment Security Agencies (SESAs) are expressed as hourly rates, their experience was that SESAs regularly provides employers and attorneys with the prevailing wage stated as an hourly rate.

With respect to the concern expressed that SESA more frequently issues hourly rates, the modification to section 655.731(a)(2) in the interim final rule will provide that employer shall convert the prevailing wage determination into the form which accurately reflects the wages which it will pay.

The Department has also concluded that a revision of the regulation is appropriate to remove the requirement that the employer keep hourly wage records for its full-time H–1B employees paid on a salary basis. The regulation continues to require employers to keep hours worked records for employees who are not paid on a salary basis and for part-time H–1B workers, regardless of how paid. The additional burden of keeping records for salaried H–1B workers who are exempt from the FLSA is estimated at 2.5 hours per worker for 10,500 workers (1.5 percent of total H–1B workers), for a total annual burden of 26,250 hours.

J. Information Form Alleging H–1B Violations

The ACWIA requires DOL to develop a procedure so that a person, other than an aggrieved party, can provide, in writing on a form developed by DOL, information alleging H–1B program violations. The Department proposes that a single form be used by any party alleging violations, to the Wage and Hour Division of the U.S. Department of Labor, whether a complainant or another source. The H–1B Nonimmigrant Information Form, WH–4, is included in this Interim Final Rule for public review and comment. It is estimated that 200 such responses will be received annually and that each response will take approximately 20 minutes, for a total burden of 67 hours.

Total Annual Hours Burden for all Information Collections—667,423 Hours

Retention of Records: The current regulations provide at section 655.760 that copies of the LCAs and its documentation are to be kept for a period of one year beyond the end of the period of employment specified on the LCA or one year from the date the LCA was withdrawn, except that if an enforcement action is commenced, these records must be kept until the enforcement procedure is completed as set forth in part 655, subpart I. The payroll records for the H–1B employees and others employees in the same occupational classification must be retained for a period of three years from the date(s) of the creation of the record(s), except that if an enforcement proceeding is commenced, all payroll records shall be retained until the enforcement proceeding is completed. These record retention requirements have been approved by OMB under OMB No. 1205–0310.

After consideration of comments raised in response to the NPRM, the Department has clarified the record retention requirements to provide that where there is no enforcement action, the employer shall retain required records for a period of one year beyond the last date on which any H–1B nonimmigrant is employed under the labor condition application or, if no nonimmigrants were employed under the labor condition application, one year from the date the labor condition application expired or was withdrawn.

H–1B employers may be from a wide variety of industries. Salaries for employers and/or their employees who perform the reporting and

recordkeeping functions required by this regulation may range from several hundred dollars to several hundred thousand dollars where the corporate executive office of a large company performs some or all of these functions themselves. Absent specific wage data regarding such employers and employees, respondent costs were estimated in the proposed rule at $25 an hour. Total annual respondent hour costs for all information collections were estimated to be $8,105,887.50 ($25.00 × 324,235.5 hours).

Some commenters questioned the $25 per hour estimate for respondent costs, indicating that in order to comply with the information requirements, H–1B employers must employ high-level compensation professionals and human resource professionals. The Department recognizes that some employers may employ highly-paid professionals to advise them on how to comply with the H–1B program requirements. However, it is believed that such a need will be short-lived and that once a system is in place, compliance can be maintained without this highly paid professional assistance. The $25 an hour respondent cost is an average cost, which recognizes higher initial cost to effect compliance, as well as the low cost of performing the clerical filing functions. Further, as noted above, in addition to the guidance provided in this regulation and its preamble, the Department intends to provide non-technical guidance printed material and information in electronic format which should greatly assist employers and employees in understanding the H–1B program requirements. Total annual respondent hour costs for all information collections are estimated at $16,685,575 ($25.00 × 667,423).

The paperwork requirements discussed above will not become effective until OMB has reviewed and approved these requirements and assigned an OMB approval number.

II. Background

On November 29, 1990, the Immigration and Nationality Act was amended by the Immigration Act of 1990 (IMMACT 90) (Pub. L. 101–649, 104 Stat. 4978) to create the ''H–1B visa program'' for the temporary employment in the United States (U.S.) of nonimmigrants in ''specialty occupations'' and as ''fashion models of distinguished merit and ability.'' The H–1B provisions of the INA were amended on December 12, 1991, by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA) (Pub. L. 102–232, 105 Stat. 1733). Further amendments were made to the H–1B provisions of the INA on October 21, 1998, by enactment of the American Competitiveness and Workforce Improvement Act (ACWIA) (Title IV of Pub. L. 105–277, 112 Stat. 2681). In addition, the H–1B provisions of the INA were amended in October, 2000 by enactment of the American Competitiveness in the Twenty-first Century Act of 2000 (Pub. L. 106–313, 114 Stat. 1251, October 17, 2000), the Immigration and Nationality Act—Amendments (Pub. L. 106–311, 114 Stat. 1247, October 17, 2000), and section 401 of the Visa Waiver Permanent Program Act (Pub. L. 106–396, 114 Stat. 1637, October 30, 2000) (collectively, the October 2000 Amendments).

These cumulative amendments of the INA assigned certain responsibility to the Department of Labor (Department or DOL) for implementing several provisions of the Act relating to the temporary employment of certain nonimmigrants. The H–1B provisions of the INA govern the temporary entry of foreign ''professionals'' to work in ''specialty occupations'' in the United States under H–1B visas. 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and 1184(c). The H–1B category of specialty occupations consists of occupations requiring the theoretical and practical application of a body of highly specialized knowledge and the attainment of a Bachelor's or higher degree in the specific specialty as a minimum for entry into the occupation in the United States. 8 U.S.C. 1184(i)(1). In addition, an H–1B nonimmigrant in a specialty occupation must possess full State licensure to practice in the occupation (if required), completion of the required degree, or experience equivalent to the degree and recognition of expertise in the specialty. 8 U.S.C. 1184(i)(2). The category of ''fashion model'' requires that the nonimmigrant be of distinguished merit and ability. 8 U.S.C. 1101(a)(15)(H)(i)(b).

A. Changes Made by the ACWIA and the October 2000 Amendments

The ACWIA made numerous significant changes in the H–1B provisions. One was the temporary increase in the maximum number of H–1B visas over the three fiscal years following ACWIA's enactment: For fiscal years 1999 and 2000, the cap would be 115,000; for fiscal year 2001, the cap would be 107,500; and for fiscal year 2002 (and thereafter), the cap would return to the original 65,000. Another significant change was the imposition of additional attestation requirements for certain employers to provide better protections to U.S. workers. The additional attestation requirements apply to ''H–1B-dependent employers'' and to employers who have been found to have committed a willful failure or misrepresentation with respect to the H–1B requirements (hereafter referred to as ''willful violators''). H–1B-dependent employers and willful violators must attest that they: (1) Have not displaced and will not displace a U.S. worker within the period beginning 90 days before and ending 90 days after the filing of an H–1B petition; (2) will not place an H–1B worker with another employer with indicia of an employment relationship without making an inquiry to assure displacement has not and will not take place within the period beginning 90 days before and ending 90 days after the placement; and (3) have taken good faith steps to recruit U.S. workers for the job for which the H–1B workers are sought, and will offer the job to any equally or better qualified U.S. worker. The recruitment provision does not apply to an LCA for an H–1B worker who is ''exceptional,'' an ''outstanding professor or researcher,'' or a ''multinational manager or executive'' within the meaning of section 203(b)(1) of the INA. The ACWIA specified that both the displacement and recruitment/hiring protections become effective upon the date of the Department's final regulation and apply only to LCAs filed before October 1, 2001. An H–1B-dependent employer or willful violator filing an LCA which will be used only for ''exempt'' H–1B workers is not required to comply with the new attestation requirements for that LCA.

The ACWIA also instituted a filing fee of $500, to be collected by INS, for initial petitions and first extensions filed on or after December 1, 1998, and before October 1, 2001. Institutions of higher education and related or affiliated nonprofit entities, nonprofit research organizations, and Governmental research organizations are exempt from the new fee. The fees are to be used for job training, low-income scholarships, and program administration/enforcement.

The ACWIA included other generally applicable worker protections, specifically: whistleblower protection, prohibitions against reimbursement of the $500 filing fee and against penalizing an H–1B worker who terminates employment prior to a date agreed with the employer, and a requirement that the employer pay wages during nonproductive time if such time is not due to reasons occasioned by the worker. The ACWIA

also required employers to offer H–1B workers fringe benefits on the same basis and in accordance with the same criteria as U.S. workers.

The ACWIA specified new civil money penalties ranging from $1,000 to $35,000 per violation, along with debarment. New investigative procedures were created, authorizing the Department to conduct ''random'' investigations of willful violators during the five-year period after the finding of such violation, and establishing an alternative investigation protocol based on information indicating potential violations obtained from sources other than aggrieved parties. Enforcement of the requirement that employers hire U.S. workers if they are equally or better qualified than the H–1B workers is carried out by the Attorney General through arbitration.

The ACWIA mandated a particular method of computation of the local prevailing wage for purposes of the requirements of the H–1B program and the permanent immigrant worker program with respect to employees of institutions of higher education and related or affiliated nonprofit entities, nonprofit research organizations, and Governmental research organizations. Under the ACWIA provision, the prevailing wage level is to take into account only employees at such institutions and organizations.

The ACWIA became law on October 21, 1998. With one exception, its provisions took effect at that time, and apply both to existing LCAs and to LCAs filed in the future. Pursuant to section 412(d) of the ACWIA and section 212(n)(1)(E)(ii) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(1)(E)(ii), the special attestation provisions regarding displacement and recruitment are applicable only to LCAs filed by H–1B-dependent employers and willful violators on or after the date this Interim Final Rule becomes effective and until October 21, 2001.

In addition, section 415(b) of the ACWIA provided that the amendments to section 212(p) of the INA, 8 U.S.C. 1182(p)—relating to computing the prevailing wage level for employees of an institution of higher education or a related or affiliated nonprofit entity, for employees of a nonprofit research organization or Governmental research organization, or for professional athletes—apply to prevailing wage computations for LCAs filed before October 21, 1998, ''but only to the extent that the computation is subject to an administrative or judicial determination that is not final as of such date.'' Therefore, the regulations in parts 655 and 656 to implement section 212(p) apply retroactively to any prevailing wage determinations thereunder which were not final as of October 21, 1998.

Two other ACWIA's provisions contained temporal qualifications, relating to the Department's authority to conduct random investigations and other source investigations (INA, sections 212(n)(2)(F), 212(n)(2)(G), respectively). The Act specified that the Department's authority, pursuant to section 212(n)(2)(F) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(2)(F), to conduct random investigations of employers who have committed a willful failure to meet a condition of their LCAs or who have made a willful misrepresentation of material fact applies only where such a finding has been made by the Secretary on or after October 21, 1998. The Act also specified that the Department's authority, pursuant to section 212(n)(2)(G), 8 U.S.C. 1182(n)(2)(G), to conduct investigations based on credible information from a source other than an aggrieved person would ''sunset,'' *i.e.*, expire, on September 30, 2001.

The October 2000 Amendments made substantial increases in the numbers of H–1B visas available for the employment of nonimmigrants: 195,000 each year for fiscal years 2001, 2002, and 2003 (with the number thereafter to revert to the original 65,000 per fiscal year); an unspecified additional number for fiscal year 1999 to cover nonimmigrants issued visas above the authorized number for that year; an unspecified additional number for fiscal year 2000 to cover petitions filed before September 1, 2000; and an unlimited number for nonimmigrants employed by institutions of higher education, by their related or affiliated nonprofit entities, by nonprofit research organizations, or by governmental research organizations (*i.e.*, visas for employees of such entities are not counted against the annual limits). The Amendments extended the effective periods for two ACWIA provisions: The additional attestation elements for H–1B-dependent employers and willful violator employers were extended until October 1, 2003; the Department's authority to conduct investigations based on sources other than aggrieved parties was extended through September 30, 2003. In addition, the Amendments created a ''portability'' option for H–1B nonimmigrants, by authorizing their change of employers (from one H–1B employer to another) ''upon the filing by the prospective employer of a new petition on behalf of such nonimmigrant'' (*i.e.*, eliminating the need to await the INS adjudication of the petition). Further, the Amendments authorized the extension of H–1B status for nonimmigrants in cases of delayed INS adjudications of petitions for employment-based immigration or applications for adjustment of status for permanent residence; the extensions of H–1B status are to be made by the INS in one-year increments. The Amendments doubled the ACWIA-created petition fee (from $500 to $1,000) and extended the effective period of the fee provision to October 1, 2003. The Amendments broadened the ACWIA's exemption of certain employers from payment of the filing fee (to include nonprofit entities engaging in established curriculum-related clinical training of students registered at such institutions). In addition, the Amendments made some changes in the ACWIA allocations of fee monies for various training programs, increased the ACWIA allocation of fee monies to the INS for processing of LCAs, and reduced the ACWIA allocation of fee monies to the Department for processing and enforcement of LCAs (*i.e.*, reduced from 6 percent to 5 percent, to be divided equally between processing and enforcement). Finally, the Amendments directed that an amended H–1B petition was not required to be filed by an employer that was involved in a corporate restructuring, where the nonimmigrant's terms and conditions of employment remained the same.

The Department notes that the ACWIA was the product of extensive negotiations between the Administration and the House and the Senate. See 144 Cong. Rec. H8584 (Sept. 24, 1998); 144. Cong. Rec. S10877 (Sept. 24, 1998). Earlier in the year both the House and the Senate had issued very different bills to address the H–1B program (*see* S. Rep. No. 105–186, 105th Cong., 2d Sess. (1998); H.R. Rep. No. 105–657, 105th Cong., 2d Sess. (1998)). The resulting legislation was a compromise, and there was no conference committee report or joint statement by the negotiators that would provide clear legislative history as to its intent. Although Senator Abraham and Congressman Lamar Smith, as well as other individual Congressman, made remarks in the *Congressional Record*, their views as to the meaning and effect of the legislation are dramatically different.

The Department further notes that the October 2000 Amendments were also the product of extensive negotiations, but that there is very little legislative history concerning the limited

provisions that were actually enacted by Congress.

Keeping in mind the difficulty with construing legislation under these circumstances, the Department has—in the Preamble of this Interim Final Rule—cited to the legislative history of ACWIA in both the House and the Senate, and to the extensive remarks of both Senator Abraham and Congressman Smith.

B. Summary of Comments on the January 5, 1999 NPRM

To obtain public input to assist in the development of interim final regulations, the Department published a Notice of Proposed Rulemaking (NPRM) and invited public comment in the **Federal Register** on January 5, 1999. The NPRM also stated that the Department was re-publishing for notice and further comment certain provisions of the Final Rule promulgated in December 1994. These provisions had been proposed for comment on October 31, 1995, during the pendency of the litigation in *National Association of Manufacturers* v. *Reich,* 1996 WL 420868 (D.D.C. 1996) (NAM), which resulted in an injunction against the Department's enforcement of some of the provisions on Administrative Procedure Act (APA) procedural grounds. In addition, the Department sought comment on a number of interpretive issues arising under the existing regulations, set forth in proposed Appendix B. The thirty-day comment period set forth in the January 5, 1999 NPRM was extended until February 19, 1999.

The Department has, in this Interim Final Rule, carefully considered comments received in response to the October 31, 1995 Proposed Rule in conjunction with the comments received in response to the January 5, 1999 NPRM. The 1995 Proposed Rule elicited comments from 13 commenters, including one from a trade association, one from an association representing immigration attorneys, one from an association representing firms which provide international personnel to American businesses, five from information technology companies, one from an accounting and auditing firm, two from universities and two from law firms. The proposals which then elicited the greatest number of comments concerned the actual wage system (Appendix A), workplace notice, the 90-day short-term placement option for H–1B workers who move to worksite(s) not covered by LCA(s), and the use of the Government *per diem* schedule for travel expenses for those workers. All but two of these commenters objected to the Department's proposal that the actual wage be based on a system utilizing objective criteria. Seven of the commenters objected to the Department's proposals on the posting of notices at worksites not controlled by the employer, while eight of the commenters objected to the Department's proposals with regard to the 90-day option. Five of the commenters objected to the use of the Government *per diem* schedule for reimbursement of travel expenses under this option.

The Department received 92 comments in response to the January 5, 1999 NPRM, including comments which were received late but which were included in the rulemaking record and fully considered. The commenters included individuals, a union, employee associations, lawyers or law firms, businesses, trade and business associations, educational and research facilities and associations, U.S. Government agencies, and Members of Congress (one comment from two Senators and one comment signed by 23 Members of Congress (hereafter referred to as ''Congressional commenters'')).

The proposals eliciting the greatest numbers of comments were those regarding non-productive time (or ''benching''), the information required on the LCA regarding the employer's status as H–1B-dependent, recruitment, displacement, and the posting of notices. Individual commenters were critical of the H–1B program generally, describing it as particularly detrimental to the job security of older Americans, and sought more guidance from the Department with regard to procedures which American workers may follow to prove displacement. These commenters also urged the Department to strictly enforce the ACWIA ''no benching'' provisions; include a requirement that all employers check the H–1B dependency box on Form ETA 9035, with the imposition of heavy fines for noncompliance; and require the physical posting of all notices at the place of employment or worksite.

The union and employee association commenters generally endorsed the Department's proposed regulations. Educational and research facilities primarily addressed and supported the Department's proposals regarding determination of prevailing wages for employees of those institutions. These commenters also urged the Department and the INS to be consistent in their application of the definitions contained in the regulatory provisions.

Two associations, one representing the interests of immigration lawyers and the other representing the interests of firms which provide international personnel to American businesses, commented on virtually every proposal made by the Department in the NPRM. Lawyers and law firms particularly addressed the proposal that all fees and costs connected with the filing of the LCA and H–1B petition, including attorney and INS fees, are to be borne by the employer. The Department's proposal addressing the timing of the H–1B dependency determination also drew a strong response from commenters representing business interests. Senator Abraham, one of the ACWIA's Congressional sponsors, submitted his October 21, 1998 *Congressional Record* remarks to be included in the rulemaking record. Senator Abraham, along with Senator Bob Graham, further commented on a number of NPRM provisions they believed to be inconsistent with Congressional intent. The Department also received a letter signed by 23 Congressmen and Senators, including Senators Abraham and Graham. These commenters expressed concerns on a number of provisions, including proposed paperwork requirements, the requirement that the actual wage be based on an objective system, and the 90-day short-term placement option.

III. General Issues Applicable to the Rule

In the review of the comments and the development of this rule, the Department realized that there are a number of general issues which affect the entire rule. The following discussion addresses these issues.

A. The Administrative Procedure Act

On January 5, 1999, the Department of Labor published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** (64 FR 628). The Department published the NPRM to obtain public comment and assistance in the development of regulations to implement changes made to the INA by the ACWIA, and to provide an additional opportunity for comment on certain provisions which were previously published for comment as a Proposed Rule in 1995 (60 FR 55339). In addition, the Department sought comments on various interpretations of the existing regulations, published as proposed Appendix B.

The Department's NPRM set forth specific regulatory language for comment on some, but not all, of the issues arising from the provisions of the ACWIA. For those issues with no specific regulatory language, the Department identified concerns, and set out its proposed approach to addressing

them or described alternative approaches. The Department sought comment on all of these issues and proposals.

The Department was mindful of Congress' intent that the ACWIA implementing regulations be promulgated in a ''timely manner;'' the legislation allowed a public comment period of ''not less than 30 days.'' Accordingly, the Department set a 30-day comment period, to close on February 4, 1999. Upon petition by the American Council on International Personnel (ACIP), the Department extended the comment period another 15 days, until February 19, 1999. After consideration of the comments received, the Department now issues this Interim Final Rule and invites further comment on the regulatory provisions set forth in Part IV.A through N of this preamble and the accompanying regulatory text. After reviewing any comments received, the Department will issue a Final Rule.

The Department received 13 comments on its regulatory process.

The comments focused primarily on the length of the comment period and the NPRM's lack of regulatory text on various issues. Nine commenters generally objected to the length of the comment period in combination with the lack of regulatory text, variously contending that the requirements of the Administrative Procedure Act (APA) were violated in that the bulk of the proposals together with the lack of regulatory text, definitions, and clear explanations prohibited meaningful comment even within the extended period allowed. The American Immigration Lawyers Association (AILA) recommended that the Department withdraw the NPRM and issue an Advance Notice of Proposed Rulemaking (ANPR). ACIP and Senators Abraham and Graham suggested that the Department publish a proposed rule with request for comment prior to implementing an interim final or final rule. ACIP also expressed concern about the inclusion of the outstanding issues in the 1995 NPRM in the proposed rule. In the alternative, ACIP and the American Council on Education (ACE) requested the Department to defer enforcement of the interim final rule during an employer education period of at least 60 days following its promulgation.

The Department has concluded that the delay inherent in the publication of an ANPRM or a new NPRM with full regulatory text would not be warranted. The new attestation requirements for H–1B-dependent employers and willful violators created by the ACWIA do not take effect until these regulations are promulgated and will terminate on October 1, 2003 (with the extended ''sunset'' date specified by the October 2000 Amendments). Congress specifically allowed a comment period of 30 days. The Department obliged commenters by extending this period an additional 15 days. The analysis of the comments and the preparation of this Interim Final Rule have been a complex and time-consuming process. The Department is of the view that there should be no further delay of key ACWIA provisions. The Department is now providing an additional opportunity for comment on the provisions of the Interim Final Rule. Also, the Department seeks comments on additional proposals presented for the first time; these proposals are not included in the Interim Final Rule but are presented for comment for possible inclusion in the Final Rule.

The Department is of the view that the procedure followed on this Rule is in full compliance with the notice and comment provisions of the APA. The APA requires that an agency include in its notice of proposed rulemaking ''either the terms or substance of the proposed rule or a description of the subjects and issues involved.'' 5 U.S.C. 553(b)(3); *see Kooritzky* v. *Reich,* 17 F.3d 1509, 1513 (D.C. Cir. 1994). Furthermore, the agency must give ''interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments.'' 5 U.S.C. 553(c). Thus, under the plain language of the APA, the absence of complete regulatory text in the NPRM does not compromise the Department's compliance with the notice and comment requirements of the APA.

The lengthy and detailed preamble to the NPRM, setting forth the Department's proposals and concerns on each of the issues, struck a balance between the need to promulgate regulations expeditiously (created by the ACWIA provision that its new attestation requirements would not take effect until regulations are issued and will terminate on October 1, 2001 (now extended until October 1, 2003), as well as the need to give regulatory guidance with regard to those ACWIA provisions which took effect immediately), and the opportunity to provide meaningful public comments. Certainly the public has a right to have a sufficient description of the subjects and issues involved to offer meaningful comment. The Department believes that it has fully accommodated this need with its detailed discussion in the NPRM preamble. Furthermore, in addition to describing the provisions it proposed to promulgate where regulatory text was not included in the NPRM, the Department discussed and sought comments on numerous additional alternatives it was considering, in an attempt to ensure that there would be no surprises to the public if, after a review of the comments, it determined that an alternative was appropriate for the Interim Final Rule. The NPRM preamble is sufficiently detailed to ''inform the reader, who is not an expert in the subject area, of the basis and purpose for the * * * proposal[s].'' Federal Register Act, 44 U.S.C. 1501–1511 and regulations thereunder, 1 CFR 1812(a).

The Department has carefully considered the request for a delay in enforcement for 60 days after the effective date of the regulations. The Department notes that the new law was extensively negotiated with stakeholders for nearly a year before it was enacted, that stakeholders have been aware of the Department's proposed approach to the issues for more than a year, that a number of the provisions will be in effect for only a limited period of time, and that several provisions that are the subject of this rulemaking relate to applications of the law that have been in effect for nearly a decade and have been addressed in prior rulemaking. Furthermore, the Department plans to undertake extensive education efforts, as discussed below. The Department has therefore concluded that it is inappropriate to administratively declare a period in which civil money penalties and debarment would not be imposed. However, we would point out that in all cases the Department's enforcement and the penalties imposed take into consideration the full circumstances of any violations found, within the constraints of the statutory requirements. See INA, section 212(n)(2)(C), 8 U.S.C. 1182(n)(2)(C), and § 655.810 of this Rule. Furthermore, with regard to the recordkeeping requirements in particular, as discussed in IV.M.5 below, the Department will issue CMP assessments for violations only where it finds that the violation impedes the ability of the Administrator to determine whether a violation of the H–1B requirements has occurred, or the ability of members of the public to have information needed to file a complaint or information regarding alleged violations of the Act.

Finally, the Department notes that the changes to the method of making prevailing wage determinations for academic institutions and related nonprofit entities, nonprofit research organizations, and Governmental research organizations, set forth at

§§ 655.731(a)(2) and 656.40, are effective immediately and apply retroactively to all LCAs filed on or after October 21, 1998, as well as to all LCAs filed earlier to the extent that the prevailing wage determination was subject to an administrative or judicial determination that was not final as of October 21, 1998. Pursuant to 5 U.S.C. 553(d), the Department finds good cause to make these provisions effective immediately in light of the statutory provisions at Section 415(b) of the ACWIA, expressly making the changes in the prevailing wage determinations apply retroactively.

B. Dissemination of Information to the Public

A significant concern expressed by a large number of commenters is the need to ensure that both U.S. and H–1B workers, as well as employers, are well-informed about their rights and obligations under the H–1B program in general, and the new provisions of the ACWIA in particular. The Department appreciates the importance of such education and intends to undertake active efforts to educate the public about the H–1B program. Specifically, the Department intends to prepare and make available pamphlets, fact sheets and a small business compliance guide in both written and electronic formats. These resources will explain the obligations of employers, the rights of H–1B and U.S. workers, and the roles of the Department of Labor and the other government agencies involved in the program (the INS, the Departments of Justice and State). The resources will also reference materials available from these agencies that bear on the employment of H–1B nonimmigrants. The Department also plans to work with the INS and the State Department to develop a pamphlet to be provided to visa applicants and posted electronically that will explain rights and responsibilities under the H–1B program.

The electronic compliance material will be available through the Department's web page at *http://www.dol.gov,* which will provide electronic links to other sources of information that bear on the employment of nonimmigrants. From the home page, the material will be accessible either by going to DOL Agencies: Employment Standards Administration, Wage and Hour Division (WHD), then to Laws and Regulations, and then to Compliance Assistance Information: Wage and Hour Division, or by going directly to *http://www2.dol.gov/dol/esa/public/regs/compliance/whd/whdcomp.htm.*

The Department also intends to add an ''H–1B Advisor'' to its Internet ''Employment Laws Assistance for Workers and Small Businesses'' (ELAWS) system (located at the bottom of the home page). The H–1B ELAWS Advisor will be an interactive program that helps employers, employees, and other interested parties determine their H–1B rights and responsibilities, 24 hours-a-day, 7 days-a-week. The Advisor imitates the interaction an individual may have with a DOL expert—it asks questions, provides information, and directs the user to the appropriate resolution based on the responses given.

This information may also be obtained from the Wage and Hour Division's national and local offices. Mail requests should be addressed to the Wage and Hour Division Immigration Team, Room S–3510, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone requests should be made of the Wage and Hour Division Immigration Team at (202) 693–0071.

The addresses and phone numbers for Wage-Hour's district offices may be found on the Department's website at *http://www.dol.gov/dol/esa/public/contacts/whd/america2.htm,* and in the Federal government section of local telephone directories. Additionally, the Interim Final Rule refers to three electronic resources: America's Job Bank, O*NET, and the Occupational Outlook Handbook . The job bank may be accessed at *http://www.ajb.dni.us.* The O*NET may be downloaded for free or ordered through the Government Printing Office, which can be reached through the Department's weblink at *http://www.doleta.gov/programs/onet.* The Occupational Outlook Handbook, published by the Department/s Bureau of Labor Statistics, may be found at *http://stats.bls.gov/ocohome.htm.*

Finally, the Department will continue its practice of making available speakers for groups affected by the Department's administration of the H–1B program. The Department will also furnish information and copies of its resource materials to both employee and industry organizations to facilitate distribution to their member organizations.

IV. Discussion of Provisions of Interim Final Rule and Comments

Issues arising under the Proposed Rule, including the Department's response to comments thereon are discussed below. For the convenience of the public, the numbering in this part of the Preamble remains the same as in the Proposed Rule unless otherwise indicated.

The Department notes that, in a few instances, it is requesting comments in the Interim Final Rule on a regulation or an approach to a regulation on which it has not previously sought comment. These provisions are not included in the Interim Final Rule, but rather will be considered when the Department promulgates the Final Rule after review of any comments. These issues are highlighted in the preamble.

The Department also notes that the new regulatory text published here generally includes all of the surrounding regulatory text in order to provide context to the reader. However, the only provisions which are open for comment are the issues discussed in the Preamble.

Further, the Department notes that the Interim Final Rule includes changes in the regulations to implement the October 2000 Amendments. These matters are discussed in the appropriate sections of the Preamble, and comments on the provisions are invited.

The Department has been working with the INS to coordinate our respective rulemaking efforts under the Act and to achieve consistency in the implementation of the ACWIA provisions and the October 2000 Amendments.

A. What Constitutes an ''Employer'' for Purposes of the ACWIA Provisions? (§ 655.736(b) and § 655.730(e))

Section 212(n)(3)(C)(ii) of the INA as amended by the ACWIA directs that ''any group treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as a single employer'' for purposes of defining an ''H–1B–-dependent employer.'' These provisions, found at 26 U.S.C. 414(b), (c), (m) and (o), concern the circumstances in which ostensibly separate businesses are treated by the Internal Revenue Code (IRC) as a single employer for purposes of pension and other deferred compensation plans.

Section 414(b), (c), and (m) of the IRC, respectively, define ''controlled group of corporations,'' ''partnerships, proprietorships, etc., which are under common control,'' and ''affiliated service group.'' Section 414(o) provides that the Department of the Treasury may issue regulations addressing other business arrangements, including employee leasing, in which a group of employees are treated as employed by the same employer. However, the Department of the Treasury has not issued any regulations under this provision; therefore Section 414(o) will not be taken into account in determining who is treated as a single

employer for ACWIA purposes unless regulations are issued by the Department of the Treasury during the period the H–1B-dependency provisions of the ACWIA are effective.

Section 414(b) of the IRC provides that all employees within a ''controlled group of corporations'' (within the meaning of section 1563(a) of the Code, determined without regard to sections 1563(a)(4) and (e)(3)(C)) are treated as employed by a single employer. Under section 1563(a) and the related Treasury regulations, a controlled group of corporations is a parent-subsidiary-controlled group, a brother-sister-controlled group, or a combined group. 26 U.S.C. 1563(a); 26 CFR 1.414(b)–1(a). A parent-subsidiary is, generally, one or more chains of corporations connected through stock ownership with a common parent corporation where at least 80 percent of the stock (by voting rights or value) of each subsidiary corporation is owned by one or more of the other corporations (either another subsidiary or the parent corporation), and the common parent corporation owns at least 80 percent of the stock of at least one subsidiary. In general terms, a brother-sister controlled group is a group of corporations in which five or fewer persons (individuals, estates or trusts) own 80 percent or more of the stock of the corporations and certain other ownership criteria are satisfied. A combined group is a group of three or more corporations, each of which is a member of a parent-subsidiary controlled group or a brother-sister controlled group and one of which is a common parent corporation of a parent-subsidiary controlled group and is also included in a brother-sister controlled group.

Section 414(c) of the IRC and the related Treasury regulations state that all employees of trades or businesses (whether or not incorporated) that are under common control are treated as employed by a single employer. 26 U.S.C. 414(c); 26 CFR 1.414(c)–2. Trades or businesses include sole proprietorships, partnerships, estates, trusts and corporations. Trades or businesses are under common control if they are included in a parent-subsidiary group of trades or businesses, a brother-sister group of trades or businesses, or a combined group of trades or businesses. Generally, the standards for determining whether trades or businesses are under common control are similar to the standards that apply to controlled groups of corporations. However, for these purposes, pursuant to 26 CFR 1.414(c)–2(b)(2), ownership of at least an 80 percent interest in the profits or capital interest of a partnership or the actuarial value of a trust or estate constitutes a controlling interest in a trade or business.

Section 414(m) of the IRC provides that all employees of the members of an ''affiliated service group'' are treated as employed by a single employer. 26 U.S.C. 414(m). In general terms, an affiliated service group is a group consisting of a service organization (the ''first organization''), such as a health care organization, a law firm or an accounting firm, and one or more of the following: (a) A second service organization that is a shareholder or partner in the first organization and that regularly performs services for the first organization (or is regularly associated with the first organization in performing services for third persons), or (b) any other organization if (i) a significant portion of the second organization's business is the performance of services for the first organization (or an organization described in clause (a) of this sentence or for both) of a type historically performed in such service field by employees, and (ii) ten percent or more of the interest in the second organization is held by persons who are highly compensated employees of the first organization (or an organization described in clause (a) of this sentence). IRS has issued proposed regulations at 52 FR 32502 (Aug. 27, 1987), which may be consulted to ascertain IRS's interpretation of these provisions.

In the event of an H–1B investigation involving the issue of what entity or entities constitute a single employer for purposes of the ACWIA dependency provisions, an employer will be required to provide documentation necessary to enable the Department to apply these IRC provisions. The Department emphasizes that if an employer wishes to use the definitions in section 414(b), (c) or (m) of the IRC, it will be the employer's burden to establish that it meets the requirements of the IRC and the regulations thereunder.

In the NPRM, the Department stated that it was considering the effect and implications of adopting this single definition of ''employer,'' as set forth in these IRC sections for all purposes under this program, to the extent it may serve to accommodate business activities and facilitate administration and enforcement of the H–1B program. Specifically, the Department sought comment on the consequences of a regulation which would provide that where an ''employer'' files an LCA and thereafter undergoes some change of structure (*e.g.,* buy-out by a successor corporation; corporate restructuring or ''spin-off'' of subsidiaries), the employer for LCA purposes would be the entity which satisfies the IRC definition of a single employer. The Department sought comment on whether and how it may be able to modify its current position that a new LCA must be filed when the employer's corporate identity changes and a new Employer Identification Number (EIN) is obtained. Thus, the Department raised the possibility an employer which changes its corporate identity through acquisition or spin-off would be allowed to forego the filing of new LCAs if it documented this change in its public access file, provided that it satisfies the IRC definition of a single employer and that the documentation includes an express acknowledgment of all LCA obligations on the part of the ''new'' entity. The Department also sought comments on whether another approach should be used to address corporate restructuring.

The Department received 17 comments on its proposals with regard to defining an employer for purposes of the H–1B program.

ACIP, AILA and the Information Technology Association of America (ITAA) strongly opposed using the relatively broad IRC definition of ''single employer'' for any purpose other than determining whether an employer is H–1B-dependent as provided in the ACWIA. These organizations generally asserted that there was no basis to infer that Congress intended to expand this extraordinarily broad definition to the entire H–1B law and that expanded use of this definition would not facilitate corporate concerns in administering an employer's obligations in the H–1B program.

AILA further asserted that the IRC ''single employer'' concept is designed to prevent the avoidance of employee benefit requirements through the use of separate organizations, employee leasing, or other arrangements. Therefore, AILA observed, to prevent discrimination in employee benefits in favor of highly compensated employees, the ''single employer'' encompasses all entities that are related by financial interest (ownership or transactional). In contrast, AILA averred, the H–1B program seeks to protect U.S. workers and, to promote this purpose, an ''employer,'' at a minimum, should have an employment relationship with respect to covered workers, as defined by the ability to hire, fire, pay and other indications of control. Thus, AILA concludes, to depart from the longstanding definition of ''employer'' in the H–1B program, without explicit statutory authority, would be improper.

Nine commenters (AILA, Cowan & Miller, ITAA, Rubin & Dornbaum, the

Small Business Survival Committee (SBSC), the U.S. Chamber of Commerce, White Consolidated Industries, Network Appliance, and the Fred Hutchinson Cancer Research Center (FHCRC)) stated their view that extending the use of the definition of ''single employer'' would serve no useful purpose in facilitating corporate restructuring and efficient H–1B administration. In fact, they asserted, broader application would have the opposite effect by requiring multi-entity corporations to coordinate many functions among the various entities, including benefits, wages, movement of H–1B employees among the entities, lay-offs, and other purposes, every time an H–1B worker is hired, promoted, or moved. The Chamber of Commerce, however, suggested that if a single employer analysis is required outside the H–1B-dependent employer context, the Department should adopt the four-factor test developed by the National Labor Relations Board and approved by the Supreme Court in single employer labor law cases, rather than the analyses required by IRC Section 414.

ITAA sought clarification on the calculation of H–1B dependency given the ACWIA's definition of ''employer.'' For instance, ITAA noted, a controlled group could consist of parent A and subsidiaries B, C and D. If subsidiary B were to file an LCA, would the H–1B dependency calculation be made using all employees of A, B, C, and D, or only the employees of B? The Department believes that, under the IRC definition of ''controlled group,'' all of the employees of A, B, C, and D would be included in the dependency calculation if any of the subsidiaries or the parent company filed the LCA.

Many employers and their representatives supported the Department's proposal to modify its current requirement for filing of a new LCA upon a change in the EIN. AILA, ACIP, Intel Corporation (Intel), ITAA and the Society for Human Resource Management (SHRM) urged a rule that a new or amended LCA and H–1B petition not be required upon an acquisition, merger, spin-off, transfer or other corporate reorganization regardless of whether there is a change in the EIN. ACIP further urged that no new or amended LCA and H–1B petition be required whether or not the new entity meets the IRC definition of ''single employer.'' Essentially, these groups endorsed a position that they stated is similar to the I–9 provisions of the INA, 8 CFR 274a.2(b)(1)(viii)(A)(6) & (7), whereby the new employer has the option of assuming the immigration-related liabilities of the old employer regardless of whether the employer assumes any other liabilities in the transaction. Similarly, AILA suggested application of established successor-in-interest rules. Two other commenters (Kirkpatrick & Lockhart, Jose E. Latour and Associates (Latour)) also urged consistency between INS and DOL rules.

ACIP elaborated on this issue, suggesting that continued corporate compliance responsibility in the event of restructuring could be accomplished via a simple memorandum placed in the public access file, rather than a new LCA, except where there is a material change in the worker's job duties or the worker is relocated to a site not covered by an LCA, or the new entity hires a new H–1B worker. ACIP stated that an employer should not be able to use positions on the previous entity's LCA to hire a new H–1B nonimmigrant.

The AFL–CIO opposed the Department's proposed modification to the current LCA filing requirements because, in its view, it could create the substantial risk that employers, through acquisition or spin-off, could in fact create an H–1B-dependent workforce and yet avoid the concomitant recruitment and non-displacement obligations of H–1B-dependent employers. The AFL–CIO pointed out that the governing IRS regulations use the ''common control'' test to determine whether a parent-subsidiary group of corporations or brother-sister trades or business satisfy the Code's definition of single employer. The AFL–CIO suggested that under the Department's proposal, a non-H–1B-dependent corporation that has filed an LCA, but has yet to hire any H–1B workers under that application, could create an H–1B-dependent subsidiary corporation that meets the ''common control'' test, but avoid filing a new LCA. The parent could then acquire the requested or remaining number of H–1B workers on its outstanding LCA, and place them in the subsidiary workforce without applying any of the new attestation requirements for H–1B-dependent employers.

The Department believes that the AFL–CIO's legitimate concerns are related to the statutory definition of ''dependent employer'' and not to the proposal to eliminate the requirement to file a new LCA when an employer, as defined by the ACWIA, undergoes a change in corporate structure. Thus, given the scenario presented by the AFL–CIO, under the ACWIA-imposed definition of ''employer'' the parent corporation and its subsidiaries (if they meet the ''common control test'') are a ''single employer'' whose entire, combined work force is assessed to determine dependency. Under the IRC definition, the H–1B employees of the ''subsidiary'' are considered part of the larger work force of the ''parent'' corporation, which then may or may not be a dependent employer required to comply with the ACWIA attestation requirements.

Based on a careful review of all the comments submitted on this issue, the Department agrees that the use of the IRC definition of ''employer'' should be limited to determining H–1B-dependent employer status, as set forth in section 212(n)(3)(C)(ii). The IRC rules do not appear useful to facilitate the resolution of issues involving changes in corporate status.

However, as urged by the commenters, the Department has concluded that it is appropriate to change its current requirement that a new LCA (and, as a result, a new H–1B petition) be filed when corporate identity changes result in a change in the employer's EIN number. In the past, the Department has taken the position that a new LCA must be filed to assure continued compliance responsibility by the ''new'' employer—a corporate entity other than the one that filed the LCA in the first place. The Department understands, however, that when a corporate identity changes, it is common for the H–1B worker(s) to continue to perform the same job duties in the same location for the new, restructured entity, and for the new entity to assume the obligations of the previous entity. In such circumstances, where the obligations are assumed and there is no real change in the H–1B worker's job and his/her ''new'' employer's responsibilities, filing a new LCA and H–1B petition solely because of the change in corporate structure would be an unnecessary and burdensome exercise for the employer, the State Employment Service Agency (SESA) responsible for a prevailing wage determination, the Department in reviewing the LCA, and the INS in adjudicating the H–1B petition.

Further support for the Department's position is found in the October 2000 Amendments, in which Congress specified:

> An amended H–1B petition shall not be required where the petitioning employer is involved in a corporate restructuring, including but not limited to a merger, acquisition, or consolidation, where a new corporate entity succeeds to the interests and obligations of the original petitioning employer and where the terms and conditions of employment remain the same but for the identity of the petitioner.

Section 314(c)(10) of the INA, 8 U.S.C. 1184(c)(10), as enacted by section 401 of

the Visa Waiver Permanent Program Act. While this new INA provision is directed to the INA's processing and adjudication of petitions, we consider it to be instructive as to Congress' intent that a restructured ''new'' corporate employer be authorized to continue the employment of existing H–1B nonimmigrants on the same terms and conditions as the ''original'' employer.

Therefore, the Department's Interim Final Rule, at § 655.730(e), provides that a new LCA will not be required merely because a corporate reorganization results in a change in corporate identity, regardless of whether there is a change in the EIN, provided that the new employing entity, prior to the continued employment of the H–1B nonimmigrant, agrees to assume the predecessor entity's obligations and liabilities under the LCA. The agreement to comply with the LCA for the future and assumption of liability for any past violations must be documented with a memorandum in the public access file, specifically identifying the affected LCAs and the EIN of the new employing entity, and describing the new employing entity's actual wage system (see IV.O.3, below). In addition, the employer will be required to retain in its records a list of the name and job title of each H–1B worker transferred to the new employer. It should be noted that the employer's status as a new employing entity which is not required to file a new LCA is not determined by traditional principles of successorship (although we anticipate that the new entity will commonly be a successor employer), but rather by the new entity's agreement to undertake the obligations and liabilities of the predecessor under the LCA. This position is consistent with the assumption of liability under the INA, 8 CFR 274a.2(b)(1)(viii)(A)(6) and (7), whereby a new employer may either assume liability for the old I–9 forms or prepare new ones, and provides the employer with flexibility to deal with the circumstances surrounding the particular corporate reorganization. These principles apply whether the reorganization is as a result of an acquisition, merger, sale of stock or assets (''spin-off''), or similar change in corporate structure. The Department cautions that an employer which undergoes a change in structure and EIN, but chooses not to insert the required memorandum in the public access file, is required to file new LCAs.

A new LCA (and H–1B petition) will be required if the H–1B worker changes jobs or where the new entity/employer seeks to hire a new H–1B worker or to extend an existing H–1B petition. Thus the ''new'' employer may not utilize H–1B ''slots'' left over from the previous entity's LCA for a worker hired after a reorganization or restructuring. The Department also understands that where there is a material change in duties (whether or not there is a change in occupation), INS may require the filing of a new H–1B petition.

The Department emphasizes that a change in a corporation's H–1B-dependency status as a result of a change in the corporate structure would have no effect on the employer's obligations with respect to its current H-1B workers. In other words, a corporation which was H–1B-dependent, and as a result of a change in structure becomes non-dependent, would be required to continue to comply with the secondary displacement attestation unless it chooses to file a new LCA and H–1B petition(s) for any H–1B worker(s) employed pursuant to the ''dependent'' LCA. Similarly, a non-dependent corporation which becomes dependent as a result of corporate restructuring would not be required to comply with the H–1B-dependent employer obligations for H–1B workers employed pursuant to a pre-existing LCA, provided the employer has assumed the obligations and liabilities of that LCA. Furthermore, as discussed, a new LCA (attesting to the newly acquired H–1B-dependent or non-dependent status) would have to be filed for all future H–1B petitions and extensions of status.

B. What Is an H–1B Dependent Employer or a Willful Violator? (§ 655.736(a) and (f))

The ACWIA requires non-displacement and recruitment attestations by ''H-1B dependent employers'' and by employers found, after the date of ACWIA's enactment, to have committed a willful violation or a misrepresentation of a material fact on an LCA during the five-year period preceding the filing of an LCA.

The ACWIA definition of ''H–1B-dependent employer'' provides a formula for comparing the number of H–1B nonimmigrants employed to the total number of full-time equivalent employees (FTEs) in the employer's workforce. The Act provides that an H–1B-dependent employer is one that employs in the United States:

- 25 or fewer FTEs, and more than seven H–1B nonimmigrants; or
- At least 26 but not more than 50 FTEs, and more than 12 H–1B nonimmigrants; or,
- At least 51 FTEs, and H–1B nonimmigrants in a number that is equal to at least 15 percent of the number of such FTEs.

Thus, the H–1B-dependency formula for all employers uses two dissimilar numbers: the number of H–1B nonimmigrants employed (a ''head count'' of all H–1B workers, both full-time and part-time) and the number of FTEs (including both H–1B workers and other employees). For larger employers (*i.e.,* those with 51 or more FTEs), the computation is made with the number of H–1B workers as the numerator and the number of FTEs as the denominator; if the ratio is greater than 15 percent, then the employer is H–1B-dependent.

The structure and application of this statutory definition was addressed by one commenter (Tata Consultancy Services (TCS)), which urged the Department to focus on the perceived purpose rather than the language of the statutory test. TCS described itself as the largest and oldest software consulting and development firm in Asia, employing some 12,000 workers hired and trained in India, and conducting business in the U.S. through contracts to provide services both at client locations and at TCS locations. TCS expressed concern that ''the Act and the Department's proposals literally include TCS as an H–1B dependent employer, since the number of TCS employees on H–1B visas is more than 15 percent of TCS' employees in the United States.'' While acknowledging that it is an H–1B-dependent employer under the literal language of the statute (and thus subject to the additional attestation obligations for such employers), TCS urged the Department to issue a regulation which focused not on the express statutory provision but rather on the intention of Congress to impose the new obligations on ''job shops.'' In TCS's view, its own operation should not be included in the definition of H–1B-dependent employer because its operation does not constitute a ''job shop,'' which it defines as companies which ''seek only to make money from the temporary placement of foreign personnel with respect to whom the job shoppers have no real employer/employee relationship.''

The Department has considered the TCS suggestion but has concluded that the regulation must reflect the express language of the ACWIA definition. There being no ambiguity in this provision, the Department has no authority to promulgate a regulation defining a ''job shop'' and substituting that definition for the mathematical computation prescribed in the statutory definition of ''H–1B-dependent employer.''

The ACWIA specifies that ''exempt H–1B nonimmigrants'' are not to be included in the employer's determination of its H–1B dependency

status during a certain period after enactment of the Act (*i.e.,* six months from the date of enactment (thus, until April 21, 1999), or until the date of the Department's final rule on this provision is issued (thus, the date of this Interim Final Rule)).

None of the comments on the H–1B-dependent employer issues addressed the limited exclusion of ''exempt'' H–1B workers from the determination of H–1B-dependency. The prescribed period for this limited exclusion expires with the issuance of this Rule, and all ''exempt'' H–1B workers are henceforth to be included in the employer's determination of H–1B-dependency status. Therefore, the Department has determined that it is not necessary or appropriate to include in this section of the regulation any language concerning this now moot limited exclusion for ''exempt'' H–1B workers.

As stated above, the new non-displacement provisions and recruitment requirements contained in the ACWIA also apply to employers found, after the date of ACWIA's enactment, to have committed a willful violation or misrepresentation during the five-year period preceding the filing of an LCA. Section 655.736(f) of the Rule provides that an employer who is a ''willful violator'' is one who is found in either a Department of Labor proceeding pursuant to these regulations, or a Department of Justice proceeding pursuant to section 212(n)(5) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(5), to have committed either a willful failure to comply with the requirements of Section 212(n) or a misrepresentation of material fact during the five-year period preceding the filing of the LCA in question. Furthermore, the final decision in the proceeding finding willful violation or a misrepresentation must have been entered on or after the date of enactment of the ACWIA. ''Willful failure'' is defined in accordance with the existing regulations at § 655.805(b).

The following discussion addresses the other matters raised in the NPRM and in the comments, including the meaning of ''FTE,'' the manner and time of determining H–1B-dependency status, documentation of the determination, and the designation(s) to be made on the LCA regarding an employer's status as an H–1B-dependent employer or a willful violator.

1. What Is a ''Full-Time Equivalent Employee''? (§ 655.736(a)(2))

The ACWIA definition of ''H–1B-dependent employer'' includes the term ''full-time equivalent employees'' (FTEs) as a critical part of the calculation to determine an employer's H–1B-dependency status. The term is not defined in the Act.

The NPRM explained that the Department considered various interpretations of the term ''full-time equivalent,'' some of which would significantly increase an employer's paperwork burden. The NPRM recognized that an employer's FTEs would include only its employees (both H–1B nonimmigrants and U.S. workers) and would not include *bona fide* consultants and independent contractors who do not meet the employment relationship test under the common law. The NPRM also recognized that the determination of the number of FTEs would need to include consideration of both the employer's full-time employees and its part-time employees (if any).

The Department pointed out that one possible approach to the FTE determination—presumably the most burdensome approach, from the employer's perspective—would be to maintain records of all hours of work by all employees (both hourly-paid and salaried workers, both full-time and part-time workers) during a certain period of time (*e.g.,* a year, a work week), and to divide that total by a number of hours constituting a full-time employee standard.

The Department proposed a less onerous approach, in which FTEs could be determined in a two-step process. First, the number of employees would be determined through the employer's quarterly tax statement (or similar document) (assuming there is no issue as to whether all employees are listed on the tax statement). Second, the employer would count its full-time workers using some standard threshold; each full-time worker would constitute one FTE. The employer's standard for full-time employment would be accepted, provided it was no less than 35 hours per week (or, where the employer has no standard, 40 hours per week). Third, the employer would aggregate its part-time employees into FTEs by identifying the workers' average number of hours of work per week, then aggregating these average weekly hours, and finally dividing that total by the employer's standard for full-time employment. The aggregation of the average hours of the part-time workers into FTEs would be made through an examination of the last payroll (or the payrolls over the previous quarter if the last payroll is not representative) or through other evidence as to average hours worked by part-time employees (such as evidence of their standard work schedule).

Thirteen commenters responded to the Department's proposal and offered alternatives for determining FTEs.

Four commenters addressed issues concerning the identification of ''employees.'' Three commenters (ACIP, AILA, SHRM) expressed concern at what they viewed as the NPRM's inappropriate inclusion of consultant and contractor personnel in the determination of FTEs based on ''indicia of an employment relationship'' with the employer. The commenters asserted that this approach was inconsistent with the statute, that the determination of FTEs should include only those persons whom the employer considered to be its employees, and that the application of an ''indicia'' test to all personnel including consultants and contractors would be burdensome. ACIP stated that the application of the test would be inconsistent with the NPRM proposal that FTEs be calculated by examining the employer's quarterly tax statements to determine the number of employees on the payroll; ACIP noted that consultants and contractors would not appear on these tax statements. The commenters suggested that the identification of ''employees'' for purposes of the determination of FTEs should be a simple head count of workers on the employer's payroll (*i.e.,* persons identified by the employer on these records as its employees).

On the related matter of the proposed sources of information as to the number of employees—the employer's payrolls and tax statements—the AFL–CIO recommended that the FTE determination use an average of the number of employees shown on the employer's last three quarterly tax returns, and not the last quarterly return and the last payroll period, because this averaging process would prevent employers from timing the filing of LCAs to coincide with a greater ratio of FTEs to H–1B workers so as to avoid H–1B-dependency status.

It appears to the Department that some commenters' assertions regarding ''indicia of employment'' are based on a misapprehension of one aspect of the proposal. The NPRM did not propose that an ''indicia of employment'' test would be applied in this context; the ''indicia'' test was created in the ACWIA for purposes of the secondary displacement prohibition. The NPRM stated that the common law test of ''employment relationship'' would be used in identifying the persons to be included as ''employees'' in the FTE computation, and that *bona fide* consultants and independent contractors would be excluded from the count. The Department is of the view

that it is not necessary for the employer to do a detailed analysis of application of the common law test to every worker in order to identify ''employees'' for purposes of FTE determinations. Instead, as indicated in the NPRM and supported by the commenters, the employer's existing identifications of workers as ''employees'' (as opposed to consultants or contractor personnel) will ordinarily be sufficient for this purpose and no additional analysis will be needed.

Thus, the Interim Final Rule, at § 655.736(a)(2)(i), provides that the determination of FTEs is to include those persons who are consistently treated by the employer as ''employees'' for all purposes, including payroll records and Internal Revenue Service statements. The determination of FTEs is not to include those persons who are consistently treated by the employer as consultants or independent contractors for all such purposes, and for whom the employer fills out IRS Form 1099, provided there is no issue as to whether this treatment is *bona fide.* For any persons who are not consistently treated as either employees or consultants/contractors, the facts and circumstances must be examined in accordance with the common law test for an employment relationship with the employer. The common law test is the required standard for this analysis, since the Act does not prescribe a standard and, as a matter of law, the common law test applies. See, *Nationwide Mutual Insurance Co.* v. *Darden,* 503 U.S. 318 (1992); *Community for Creative Non-Violence* v. *Reid,* 490 U.S. 730 (1989). The Department notes that all H–1B workers are necessarily employees within the meaning of the INA, and therefore must be included in both the numerator and the denominator of the dependency determination.

Similarly, the Department is of the view that it is not necessary for an employer to compute an average number of ''employees'' based on a series of quarterly tax statements. The Department agrees with the AFL–CIO that it would be desirable to foreclose the possibility of potential abuse of the program by employers who have significant fluctuations in the numbers of ''employees'' and who might time their LCA submissions based on tax statements with ''employee'' numbers supporting non-H–1B-dependency status. However, the Department has concluded that the imposition of an averaging/computation burden on all employers would be an inappropriate means of foreclosing the possibility of an unknown—but presumably very small—number of abusive filings. The Department cautions that, where it appears that an employer has manipulated its employment numbers to avoid dependency just prior to filing LCAs or H–1B petitions, the Department will examine the situation closely and utilize an employer's normal payroll. Further, with regard to the use of quarterly tax statements, the Interim Final Rule also clarifies that after determining which workers are ''employees,'' it will be necessary in determining FTEs to separate those employees who are part-time, do a separate FTE determination for those workers, and then add those FTEs to the number of full-time workers to determine total FTEs.

One commenter (ITAA) objected to the Department's proposal to count all H–1B nonimmigrants (both full-time and part-time) in the numerator of the equation to calculate H–1B-dependency. ITAA suggested that, for fairness and mathematical accuracy, the regulation should be written so that part-time H–1B workers are counted in the numerator in the same manner as part-time employees are counted in the denominator. Similarly, AILA argued that whether the regulation uses a simple head count or a calculation of FTE taking into consideration part-time hours, there should be consistency in counting workers for both the numerator and the denominator.

The Department has considered these suggestions, but has concluded that they cannot be accepted because the statutory language requires the difference in counting as described in the NPRM. The ACWIA prescribes the computation of ''full-time equivalent employees'' for the entire workforce, and explicitly requires that the number of FTEs be compared to the number of ''H–1B-nonimmigrants'' (with no distinctions as to full-time or part-time status).

Nine commenters addressed the matter of determining what constitutes a full-time worker for purposes of computing the employer's FTEs. Three commenters (AILA, Hammond & Associates (Hammond), and Latour) recommended that ''full-time'' be determined by individual employers consistent with their standards and business practices. Five commenters (ACIP, Intel Corporation (Intel), Kirkpatrick & Lockhart (Kirkpatrick), Rapidigm Immigration Services (Rapidigm), and American Occupational Therapy Association (AOTA)) supported the NPRM proposal that the employer should use its payroll and tax records to count the number of workers it employs on a full-time basis, using some standard. However, these comments differed with regard to the appropriate benchmark for full-time hours (*e.g.,* 35 hours per week, 32 hours or more per week, 21 hours or more per week). Two commenters (AILA and Hammond) asserted that employers may be able to document that full-time work is a figure less than the 35 hours per week suggested in the NPRM. Two commenters (AOTA and American Physical Therapy Association (APTA)) suggested that the Department set a numerical standard for part-time employment and that all employees with hours above that standard be considered full-time.

After fully considering the comments, the Department has concluded that the NPRM proposed definition of full-time will be adopted since it provides considerable flexibility for employers while incorporating a reasonable and appropriate baseline standard. Thus, the Interim Final Rule, at § 655.736(a)(2)(iii)(A), provides that the employer may use its own standard for full-time employment, which the Department will accept provided that the standard is no less than 35 hours of work per week. The Department believes that this is a reasonable approach, that it is easily understood and applied, and that 35 hours as the minimum for full-time employment is a well-established labor standard, utilized by the Bureau of Labor Statistics for survey purposes. See, *e.g.,* the definitions of the terms utilized in U.S. Bureau of Labor Statistics, Employment and Earnings. This standard is the equivalent of seven hours of work per day, five days per week, with non-working time for lunch each day. The Rule also provides that, where the employer has no standard for full-time employment, the Department in an enforcement action will use the standard of 40 hours of work per week (the Fair Labor Standards Act standard).

Four commenters (ITAA, ACIP, AILA and SHRM) expressed concerns as to the need for and the methodology of aggregating part-time workers into FTEs for purposes of determining the employer's H–1B-dependency status. ACIP and SHRM suggested that no such aggregation or ''conversion'' should be required, and stated that the method proposed by the Department was burdensome, complex and unworkable. ITAA stated that the proposal would be burdensome because many part-time workers are salaried with no records of hours of work. AILA considered the proposed method to be burdensome, and offered its own proposed formula for calculation of FTEs—each full-time worker, each FLSA-exempt worker, and each part-time worker working more

than 20 hours per week would equal one FTE; part-time workers who work fewer than 20 hours per week and are not FLSA-exempt would be aggregated through an average of hours as proposed in the NPRM.

The Department recognizes that, for some employers, the aggregation of part-time workers into FTEs may be somewhat burdensome. However, in light of the clear statutory language, the Department is unable to dispense with the concept of ''full-time equivalent employees,'' which is not a mere head-count of workers in the workforce (number of employees) but instead is a calculation of the number of full-time workers needed to perform the total work done by the total workforce (number of ''equivalents'' of full-time workers). Congress explicitly prescribed the use of the FTE concept at three points in the ACWIA, and must be presumed to have used the concept with an understanding of its established meaning. The concept of ''full-time equivalent employees'' is well-known to Congress. For example, Congress considers FTEs each year in the enactment of the appropriations of operating funds for the Federal agencies, which submit their budget requests based on the Office of Management and Budget definition of FTEs:

''* * * the total number of regular straight-time hours (*i.e.,* not including overtime or holiday hours) worked by employees divided by the number of compensable hours applicable to each fiscal year. Annual leave, sick leave, compensatory time off and other approved leave categories are considered to be ''hours worked'' for purposes of defining full-time equivalent employment that is reported in the personnel summary.''

Office of Management and Budget, Circular No. A–11 (1998), p. 31. As stated in the NPRM, the Department considered but rejected the comprehensive computation that would be required under the OMB definition (*i.e.,* totaling all hours worked by all workers, and dividing by the normal standard of hours of work for a full-time worker); this approach could be extremely burdensome to employers. But the Department recognizes that some computation of FTEs—including a computation regarding part-time workers—was mandated by the ACWIA and must be reflected in the dependency computation.

In an effort to minimize the burden to employers, as suggested by SHRM and other commenters, the Department has modified its proposed method for the aggregation or conversion of part-time workers into FTEs. The Interim Final Rule, at § 655.736(a)(2)(iii)(B), provides the employer a choice between two methods. First, the employer may count each part-time worker (*i.e.,* each employee working less than a full-time schedule) as one-half of an FTE. This method requires no records of hours of work and no complex calculations; the employer simply counts the number of part-time workers and divides by two to arrive at the number of FTEs represented by its part-time workers. In the alternative, the employer may total the hours worked by all the part-time workers in a work week and divide that total by the standard hours for full-time employment (*e.g.,* 40 hours). The Department notes that the use of this alternative does not require the employer to have hours-worked records for its part-time workers; rather, the employer may use any reasonable method of approximating the average hours worked by its part-time workers, such as their standard work schedule.

One commenter (AILA) suggested that the regulations enable employers to avoid any complicated calculation whatsoever where it is ''readily apparent'' that an employer is not H–1B dependent based on the make-up of its work force. AILA stated that an employer should be allowed a ''safe harbor'' when a quick, simple and straightforward calculation shows non-dependency. It suggested a calculation: the number of H–1B workers would be divided by the number of full-time employees; if the result is less than 15 percent, no further or detailed computation would be necessary, but if the result is greater than 15 percent, the employer would calculate its FTEs to determine its H–1B-dependency status. Rapidigm and ACIP agreed that a test should be provided for ''readily apparent'' status.

The Department agrees with the suggestion that there should be a simple method for determining whether the employer's status as either H–1B-dependent or non-dependent is ''readily apparent.'' The NPRM stated the Department's belief that, for most employers, dependency status would be ''readily apparent'' and, therefore, they would not need to make a calculation of their FTEs in order to be able to attest to their status. The Department, in § 655.736(c)(1) and (2) of this Interim Final Rule, is adopting a provision which requires no computations by the employer with ''readily apparent'' status, and is also adopting the AILA-recommended 15 percent ''snap shot'' test as the means for an employer with borderline status to determine whether it must engage in the full computation of the number of FTEs in its work force in order to determine its H–1B-dependency status. The ''snap shot'' test allows small employers (*i.e.,* those with 50 or fewer employees in the U.S.) to simply compare their work forces to the definition for H–1B-dependent employer, counting all employees rather than computing FTEs. If such an employer appears to be H–1B-dependent based on the snap shot test, then the employer which believes itself to be non-dependent should make a complete computation. The snap shot test provides that large employers (*i.e.* those with 51 or more employees in the U.S.) may make a quick appraisal of the proportion of H–1B nonimmigrants in their work force. Where the number of H–1B workers divided by the number of full-time employees is greater than 0.15, any employer which has reason to believe it may not be H–1B-dependent (for example, because of the number of part-time workers in its work force), must calculate its FTEs. The employer whose ''snap shot'' clearly shows it is not H–1B-dependent, as well as any employer which admits it is dependent, may file its LCA(s) reflecting that status (as described in the following discussion), without engaging in further computations. In the event of an enforcement action, the employer may be required to verify its ''snap shot'' results and its H–1B-dependency status through available records (as discussed in IV.B.3 below).

2. When Must an Employer Determine H–1B Dependency? (§ 655.736(g))

The ACWIA definition of ''H–1B-dependent employer'' and the new LCA attestation elements that are required of such an employer do not clearly define the timing of the dependency determination. The questions therefore arise: When must a new LCA be filed and what obligations, if any, does an employer have if its dependency status changes?

The Department, in the NPRM, expressed concern that if H–1B-dependent employers are permitted to continue to use LCAs certified before this Rule is effective, they could avoid any application of the law's new attestation provisions (which are applicable only to LCAs filed after the issuance of this Rule and before October 1, 2003 (the ''sunset'' date as extended by the October 2000 Amendments). An LCA is ordinarily valid for up to three years from its date of certification by ETA and can provide for numerous H–1B nonimmigrants to be hired during that period. Thus an employer could use a previously-certified LCA to bridge the entire period during which the new LCA attestation elements would be required. H–1B-dependent employers could, in effect, disregard all of the new

worker protection provisions, with the potential effect of nullifying these provisions.

The Department proposed that, by operation of the regulation, any current LCA(s) would become invalid for an employer that is or becomes H–1B-dependent, for purposes of any future H–1B petitions (including extensions). The employer's previously certified LCA(s) would continue to be valid, however, and the obligations under that LCA(s) would continue with respect to any petitions filed before the effective date of these regulations (*i.e.,* pending petitions would not be affected). Thus, the Department proposed that the regulation would require that all H–1B-dependent employers with existing LCAs file new LCAs if they wish to petition for any new H–1B nonimmigrants or seek extensions of any existing H–1B visas on or after the effective date of the Rule. Likewise, the Department proposed that the regulation would require all non-dependent employers that experience a change of status (becoming H–1B-dependent) to file new LCAs if they wish to petition for new H–1B nonimmigrants or seek extension of existing H–1B visas after the date they become H–1B-dependent. The proposal contemplated that non-H–1B-dependent employers whose status remained unchanged would not be required to file new LCAs.

The NPRM discussed the timing and frequency of employers' determinations of their H–1B-dependency or non-dependency status. The Department recognized that the make-up of an employer's workforce—and, thus, its H–1B-dependency status—could change significantly over time. The Department therefore suggested that an employer's status would need to be redetermined at appropriate times, and reflected in the employer's actions, in order for the new LCA obligations to be appropriately implemented. The Department proposed that an employer would be required to make a determination of its status not just prior to or on the effective date of the regulation, but also when it files any new LCA or H–1B petition (including extensions) after that date. Thus a non-dependent employer (*i.e.,* one which is not H–1B-dependent on the effective date of the Interim Final Rule or at the time an LCA is filed) would have a continuing obligation to ensure that, if it later becomes dependent and wishes to file new H–1B petitions (or seek extensions), it takes steps necessary to comply with the requirements of the law and the regulation. The NPRM further stated that an employer which is H–1B-dependent and files an LCA indicating that status, but later becomes non-dependent, would not be required to comply with the attestation elements applicable to dependent employers with respect to any H–1B workers during any period in which it is not dependent.

The Department also described alternative approaches to the proposed timing of dependency determinations, such as having the dependency update determined on a set, regular basis (*e.g.,* each calendar quarter) or limiting the LCA's validity period to some period shorter than the current three years (*e.g.,* 90 or 180 days), with a new dependency status determination made in connection with each new LCA.

The NPRM explained that the Department believed that, as a practical matter, the continuing obligation of the non-dependent employer to ensure that its dependency status has not changed would not place an undue burden on employers. For most program users, their status as non-dependent would be readily apparent and they would have no obligations to perform the full computations or to file new LCAs. (*See* discussion of ''readily apparent'' status in IV.B.1, above).

The statements by Senator Abraham and Congressman Smith in the *Congressional Record* are silent regarding the effect of the ACWIA provisions on existing LCAs. Both Senator Abraham and Congressman Smith simply state, regarding the effective date, that the provisions are effective on the date the Secretary issues final regulations to carry them out. 144 Cong. Rec. S12752 (Oct. 21, 1998); 144 Cong. Rec. E2325 (Nov. 14, 1998).

Sixteen commenters responded to various aspects of these NRPM proposals.

Eleven commenters addressed the Department's proposal to invalidate the LCAs of H–1B-dependent employers for purposes of petitions for new or extended visas. Four commenters (Senators Abraham and Graham, AILA, ITAA, and Baton Rouge International, Inc. (BRI)) challenged the Department's authority to invalidate LCAs already in effect. Senator Abraham stated that Congress specified in ACWIA that the new attestation requirements would apply only to LCAs filed on or after the date of the Department's final regulations. Three of these commenters (BRI, AILA and ITAA) also asserted that the proposed rule would be invalid as retroactive rulemaking.

An attorney (Hammond) acknowledged the Department's reasons for its proposal as legitimate and did not challenge the Department's authority to invalidate existing LCAs; but questioned the proposal because of the paperwork and processing burden on the Department and the INS. Hammond recommended that, instead of invalidating the previously-certified LCA, the Department and INS should require an affidavit, mirroring the dependent employer attestations, on any new petitions filed using ''old'' LCA forms. Hammond further recommended that the proposed invalidation of existing LCAs be phased in over a six-month period. Another attorney (Latour) acknowledged that while the proposal was burdensome, there seemed to be no attractive alternative to requiring H–1B-dependent employers with existing LCAs to file new LCAs for the purpose of filing new H–1B nonimmigrant petitions. Another commenter (Simmons, Ungar, Helbush, Steinburg & Bright (Simmons, Ungar)) also recommended a phase-in period and suggested a three- to six-month window for filing new LCAs; this commenter expressed concern that the requirement of immediate new LCAs would lead to significant disruptions in ongoing critical projects.

The Department has carefully considered the views of the commenters who asserted that the proposed rule would be contrary to the meaning of the statute or invalid as retroactive rulemaking, but disagrees with their conclusions. To the contrary, the proposed rule is not inconsistent with the language of the ACWIA. The Act makes the new attestation elements apply to ''an application filed on or after the date final regulations are first promulgated to carry out this [provision], and before October 1, 200[3]'' (the ''sunset'' date having been extended from 2001 until 2003 by the October 2000 Amendments). The ACWIA is silent regarding the timing of the employer's determination of its dependency status or the effect of the ACWIA on previously certified LCAs, leaving a gap to be filled by these rules. *See Chevron* v. *Natural Resources Development Council,* 467 U.S. 837, 842–43 (1984). The proposed rule would require an employer to make that determination when and if it seeks access to new H–1B workers or wishes to extend their stay in the United States; if the employer then determines it is H–1B-dependent, it would be required to file a new LCA. Under the ACWIA language, such new LCAs would be subject to the new attestation elements.

Given the significance of the new attestation requirements in the ACWIA, we believe it is reasonable for the Department to avoid the nullification of these requirements by issuing regulations which require employers to make dependency determinations if they choose to file new H–1B petitions

or apply to extend existing visas after the effective date of these regulations. *B–West Imports, Inc.* v. *U.S.,* 880 F. Supp. 853, 863 (Ct. Int'l Trade 1995), aff'd, 75 F.3d 633 (Fed. Cir. 1996). In this connection, the Department notes that it has reviewed LCAs filed since the effective date of the ACWIA, and found that many employers filed LCAs for numerous H–1B workers. A list of the 20 users in each region which filed LCAs for the greatest number of aliens in the period October 1, 1998 through May 31, 1999, showed the average number of workers per LCA ranging from one worker per LCA to more than 500 per LCA. Out of the top 20 users in Region I (Boston), for example, only three employers averaged less than 10 workers per LCA, while eight averaged 50 or more per LCA, of whom four averaged 100 or more. This data supports the Department's view that—given the limited time these recruitment and non-displacement obligations will be in effect and the three-year validity period of the LCAs—this requirement is necessary to effectuate the worker protection provisions applicable to H–1B-dependent employers and willful violators.

It is also the Department's view that the regulation would not be invalid as retroactive rulemaking. The rule does not create a new obligation, impose a new duty or attach a new disability with respect to transactions already taken. *See, Landgraf* v. *USI Film Products,* 511 U.S. 244, 269 (1994). The regulation does not change the standards or consequences, or require adjustments or corrections, for completed transactions. The H–1B visas under previously certified LCAs remain valid and in effect, and the prevailing wage and other obligations under that LCA continue to apply to those visas. New LCAs are required only for H–1B-dependent employers and willful violators filing new H–1B petitions or applications for extension of existing visas. *See Association of Accredited Cosmetology Schools* v. *Alexander,* 979 F.2d 859, 865 (D.C. Cir. 1992). Nor does the rule impair vested rights. *See Landgraf* v. *USI Film Products,* 511 U.S. at 269–71. Furthermore, the LCA itself is only the first step by an employer in applying for H–1B visas, and for workers in seeking to enter the United States. Even after the LCA is certified, the employer has no vested right to hire H–1B nonimmigrants; the nonimmigrant in turn has no vested right, once the petition is granted, to obtain a visa or to enter the country. *Joseph* v. *Landon,* 679 F.2d 113, 115 (7th Cir. 1982). See *Pine Tree Medical Associates* v. *Secretary of Health and Human Services,* 127 F.3d 118, 122 (1st Cir. 1997).

The Department wishes to emphasize that an LCA certified prior to this Rule will continue in effect for the vast majority of program users who are not H–1B-dependent. Furthermore, such LCAs will remain in effect for H–1B-dependent employers and willful violators except that they may not be used to support new H–1B petitions or applications for extension of status. Thus, for example, the prevailing wage rate and obligation under the ''old'' LCA would remain in effect even for H–1B-dependent employers and willful violators with respect to any H–1B workers supported by the ''old'' LCA. A new LCA (and new wage rate) would be necessary only where an H–1B-dependent employer wants to petition for new workers or request extensions for existing workers (who would typically require a new LCA in any event).

The Department has also considered the suggestion by some commenters that the requirement of new LCAs be phased in over some period of weeks or months following the issuance of this rule. However, the Department is confined by the ACWIA language prescribing that the obligations are effective for LCAs that are filed on or after the date this rule is promulgated. Further, the Department is aware that the new attestation elements will be effective only with respect to LCAs that are filed during a relatively short period (*i.e.,* until October 1, 2003, the ''sunset'' date as extended by the October 2000 Amendments). We have, therefore, concluded that it would be contrary to the language and purposes of the legislation to provide an additional phase-in period which would have the effect of restricting an already limited period for the application of the new attestation elements. The Department notes that employers have already had considerable time to prepare for the ACWIA provisions since their enactment on October 21, 1998, and the publication of the NPRM on January 5, 1999.

The Department understands that INS plans to modify its petition form to obtain information about a petitioner's H–1B-dependency status, and in its adjudication of H–1B petitions, will review LCAs filed by dependent employers to ensure that the LCA reflects the employer's status as set forth on the petition. Thus, it is the Department's expectation that if a dependent employer seeks to support an H–1B petition with an LCA which does not identify itself as H–1B-dependent and attest to the new attestation elements for dependent employers, INS will advise the employer that it must obtain a new LCA.

Nine commenters addressed the Department's proposal concerning the timing or frequency of the employer's determination of its H–1B dependency status.

One commenter (AILA) supported the Department's proposal that the dependency determination be made each time an LCA is used by the employer in support of an H–1B petition. Four commenters (AFL–CIO, AOTA, APTA, and AILA) supported requiring that employers determine dependency when filing an LCA.

Five commenters (Intel, Computec International Resources (Computec), ACIP, SemiConductor Industry Association (SIA), and ITAA) objected to the Department's proposal requiring employers to make dependency determinations when filing an LCA or H–1B petition; they viewed the requirement as unrealistic and burdensome. SIA and ITAA suggested annual dependency determinations. ACIP suggested that determinations be made annually or at the time there is a large increase in H–1B staff. Intel and Computec suggested that dependency be determined on a quarterly basis, and Intel stated its view that an employer's dependency will not change from one filing to another.

Having considered the varying views of the commenters, the Department has concluded that the proposed approach is appropriate in that it achieves the purposes of the Act while not imposing an unreasonable burden. No employer will be required to make a determination of its dependency status unless it wishes to file petitions for new workers or to seek extension on the visas of existing workers (*i.e.,* the determination is required only when an employer seeks access to H–1B workers, on either new visas or extended visas—which typically require a new LCA in any event). The Department believes that the vast majority of the employers using the H–1B program are non-dependent and that for both dependent and non-dependent employers, their status would be readily apparent (see discussion of ''snap shot'' determination in IV.B.1, above). Further, the Department anticipates that the status of most employers would be unlikely to change, whether that status be dependent or non-dependent. At the same time, however, the Department considers the new attestation provisions to be important and believes the purposes of these provisions cannot be satisfied if an employer is permitted to continue to use an LCA for non-

dependent employers if its status changes.

Three commenters responded to the Department's alternative suggestion that the validity period of an LCA might be shortened from the current rule's maximum period of three years. The AFL-CIO recommended that the LCA validity period be shortened to six months. AOTA recommended a quarterly (three-month) filing requirement. BRI opposed the reduction of the LCA validity period, asserting that quarterly or semi-annual LCAs would overburden and backlog administering agencies.

The Department considered the comments pertaining to the possibility of reducing the validity period of the LCA. However, we see no advantage that would outweigh the significant increase in the burden on employers and government agencies due to the repeated submissions of new LCAs upon the expiration of short-lived LCAs. Therefore, the Interim Final Rule does not make any reduction of the LCA validity period of three years.

After consideration of all these comments, the Interim Final Rule, at § 655.736(c) and (g), adopts the proposal that H–1B-dependent employers be required to file a new LCA if they wish to file new H–1B petitions, or extensions of status, after the effective date of the regulations. In addition, if a non-dependent employer becomes dependent after the effective date of the regulations and wishes to file new H–1B petitions or extensions of status, it must file a new LCA attesting that it is dependent and agreeing to the new attestation requirements for H–1B-dependent employers. Thus an employer must consider and attest to its dependency status each time it files a new LCA; similarly, as discussed below, an employer seeking to file a new H–1B petition, or seeking an extension of status, must use an LCA in support of the petition that accurately attests as to its dependency status at the time it files the petition. An H–1B employer that changes its status to non-dependent but wishes to petition for additional H–1B nonimmigrants or extensions of stay using an approved ''dependent'' LCA continues to be bound by the dependent-employer attestation requirements unless it files a new LCA attesting to its non-dependency.

3. What Kind of Records are Required Concerning the H–1B Dependency Determination? (§ 655.736(d))

The Department, in the NPRM, discussed the issue of what records, if any, the employer would be required to create and retain concerning its dependency determination(s). The Department proposed that documentation be created and retained only when an employer's non-dependent status is not readily apparent. On the other hand, the Department also proposed that if the employer's dependency status is ''readily apparent'' (either dependent or not dependent), no records would need to be made or retained. The Department sought comments on whether there should be an explicit standard for when the employer's status is ''readily apparent.'' (See discussion of ''snap shot'' determination in IV.B.1, above). Further, the Department proposed that if the employer's dependency status changes, the employer should retain records in the public access file reflecting the change and, if the change of status is from dependent to non-dependent, the public access file must show the underlying computation. Finally, the Department requested comments on the feasibility and appropriateness of the regulation specifying that no records are required if the dependency determination could be made from publicly available records and, if so, what public records are generally available for this purpose.

The Department received 13 comments on these proposals.

Kirkpatrick & Lockhart, Latour and AOTA supported the NPRM proposals. The AFL-CIO, Rubin & Dornbaum, and White Consolidated Industries suggested that all employers be required to document not only their status but also the underlying mathematical computations. AILA stated that the Department should not require recordkeeping of the calculation by any employer, but especially it should not require non-dependent employers to retain dependency documentation and keep it in public access files. Intel and ACE agreed with the proposal that no record needs to be kept where the employer's non-dependent status is readily apparent. ITAA suggested that the regulation should prescribe a bright line test to show when employers are required to create and maintain records, and that no records at all should be required of employers that concede that they are H–1B-dependent. ACIP suggested that the Department should advise employers how long they are to keep records and should allow employers five working days to produce their dependency status records in the event of an investigation. Rapidigm suggested that the records used to make the dependency determination should be made accessible to the Department on a quarterly basis. Computec suggested that an employer be required to keep dependency records in only one location (apparently based on the misunderstanding that public access files must be maintained in numerous locations).

Having taken into consideration all of the commenters' varied views pertaining to the creation and retention of documentation regarding the determination of dependency status, the Department has concluded that modification of the proposal is appropriate to achieve the purposes of the ACWIA while avoiding unnecessary burdens on employers. The Department first notes that for the vast majority of employers using the H–1B program, their dependency status (either non-dependent or H–1B-dependent) will be obvious and stable and they, therefore, will have no documentation burden; a small number of employers with ''borderline'' status or changing status will be required to document their determinations of status and/or their changes of status, but the documentation burden will be minimal.

The Interim Final Rule requires that employers determine their dependency status the first time after the Rule is in effect that they file an LCA or an H–1B petition or extension under an existing LCA. Employers may use the ''snap shot'' test to determine if their dependency status is readily apparent, but must do the full computation if the number of H–1B workers divided by the number of full-time workers in their workforce is more than 0.15, and must retain a copy of the full computation if they then conclude that they are not H–1B-dependent. The regulations do not require that an employer do the computation, but do require that the employer consider its status, each time thereafter that an LCA or H–1B petition is filed; the employer must attest as to its status on each LCA, and may not use a non-dependent LCA to support new H–1B petitions or requests for extensions if its status changes from non-dependent to dependent. Furthermore, we understand that employers will be required to indicate their status on each H–1B petition or extension filed with INS. Thus it is important that employers remain cognizant of their dependency and do a recheck of their dependency status if the make-up of their work force changes sufficiently that their status might possibly change.

If an employer changes status from dependent to non-dependent, the employer will be required to retain a copy of the full computation of its status. The Interim Final Rule also requires a recheck of dependency (whether the ''snap shot'' test or the full

computation) if there is a change in corporate status, as discussed in IV.A, above. In addition, the Rule provides that if an employer utilizes the IRC single-employer test to determine dependency, it must maintain records documenting what entities are included in the single employer, as well as the computation performed (whether the ''snap shot'' or full computation), showing the number of workers employed by each entity who are included in the numerator and denominator of the equation. It is important that such employer retain copies of the records necessary to support the computation or be able to provide such records in the event of an investigation, since the records may not all be under its control. Finally, if an employer includes workers in its computation who do not appear as employees on its payroll, the employer must keep a record of its computation (whether the ''snap shot'' or the full computation) and be able to substantiate its determination that the workers are its employees.

The Department has concluded that it is not necessary, however, to include either the computations or a summary of the computations in the public access file. The Department believes that the notation on the LCAs as to dependency status constitutes the information necessary for the public. In addition, the Interim Final Rule, at § 655.736(d)(7), requires the employer to include a notation in the public access file listing any other entities which are considered to be part of a ''single employer'' for purposes of the dependency determination. Further, all employers are required to retain copies of H–1B petitions and requests for extensions filed with INS and to make petitions and payroll records available to the Department in the event of an investigation.

The current regulation contains guidance that meets the concerns of some commenters pertaining to location of public access files and the length of time that records must be retained. Section 655.760(a) directs the employer to make a public access file available in either of two locations (its principal place of business in the U.S. or at the worksite) and describes the required contents of the file. The regulation does not mandate a separate file for each H–1B worker or for each LCA. If the employer maintains one public access file for all of its LCAs, documentation specific to an LCA should be attached to the respective LCAs in the file; where documentation is common to all LCAs, only one document need be retained in the file. The record retention period is set forth in § 655.760(c), which has been clarified to require that records be retained for one year beyond the last date on which any H–1B nonimmigrant is employed under the LCA or, if no nonimmigrants were employed under the LCA, one year from the date the LCA expired or was withdrawn. The regulation further requires that payroll records be retained for a period of three years from the date(s) of the creation of the record(s). If there is an enforcement action, records shall be retained until the enforcement proceeding is completed.

With respect to the suggestion that the regulations allow employers five working days to produce records as to dependency status, the Department believes that such a provision in the regulations is unnecessary. Wage-Hour district offices commonly make appointments with employers before an investigation commences, thereby allowing employers time to produce necessary records. For employers who are required to make and retain computations of their dependency status, the Department would anticipate that the computations would be provided promptly to Wage-Hour. Wage-Hour will allow employers reasonable time to gather back-up documentation needed to support the computation, or for Wage-Hour to make the computation if none has been made by the employer, taking into consideration the fact that the statute provides that the investigation is to be completed within 30 days.

4. What Information Will Be Required on the LCA Regarding an Employer's Status as H–1B Dependent? (§ 655.736(e))

The Department proposed in the NPRM that the revised attestation form (LCA), at a minimum, would require that every employer which is H–1B-dependent at the time it files an LCA, affirmatively acknowledge its status and obligations by checking a box on the LCA attesting to its dependency and its compliance with the additional attestation requirements concerning non-displacement and recruitment of U.S. workers. With respect to an employer which is not H–1B-dependent at the time it files an LCA, the NPRM set out three alternatives for the LCA form:

1. The employer would expressly attest that it is not H–1B-dependent and that if it later becomes dependent, it will comply with the additional attestation requirements; or

2. The employer would not have to attest that it is not dependent, but the LCA would clearly state—and by signing the form the employer would agree—that the employer is required to comply with the additional attestation requirements if it does become dependent; or

3. The employer would not have to attest that it is not dependent, but the LCA would clearly state that it could not be used in support of any H–1B petition filed after the employer became dependent.

The NPRM included a draft revision of the LCA form, which included a ''box'' for the employer's acknowledgment of H–1B-dependent status but no ''box'' regarding non-dependent status. The draft also included a ''box'' for the employer to indicate that the LCA would be used only for ''exempt'' H–1B workers, as well as a ''box'' for the employer's acknowledgment of a finding of a willful violation or misrepresentation of material fact.

Thirty-two commenters, including 20 members of the general public, responded to the Department's proposals. The majority of commenters endorsed the ''check box'' approach for the LCA and favored the use of an LCA form which clearly reflects the employer's status and obligations. For example, Intel stated that ''[b]y checking a box, it will clearly be evident whether an employer is dependent or non-dependent.'' The majority of commenters (each of the 20 individuals, the AFL–CIO, Kirkpatrick & Lockhart, Latour, the Institute of Electrical and Electronics Engineers (IEEE), and the American Engineering Association (AEA)) suggested that all employers be required explicitly to attest to their status as dependent or non-dependent when filing LCAs. Three commenters (APTA, ITAA, and Cooley Godward) endorsed NPRM proposed alternative 2. BRI favored either option 1 or option 2. ITAA suggested that non-dependent employers should not be required to check any boxes, but should be given separate LCA forms. AILA suggested that an employer intending to use the LCA only for ''exempt'' H–1B workers should be allowed to check a single box indicating that intention and not be required to take any action with regard to determining H–1B-dependency or marking any boxes on the LCA as to dependency status. Several other commenters supported the proposal that the LCA should have a method by which the employer could explicitly designate that the LCA will be used exclusively for exempt H–1B workers. Two commenters (Intel) recommended that employers check one of three boxes, but suggested different approaches than those offered in the NPRM. Intel

suggested that employers be given three ''boxes'': (1) Non-dependent; (2) Dependent filing for exempt workers; and (3) Dependent filing for non-exempt workers. AILA suggested three different ''boxes'': (1) The LCA is used only for exempt workers and no additional attestations are made; (2) The employer is non-dependent and no additional attestations are required; and (3) The employer is H–1B-dependent, the workers sought are non-exempt, and the employer makes the additional attestations. ACIP suggested that separate LCAs be developed: one for non-dependent employers and dependent employers hiring exempt workers, and another for dependent employers and willful violators. With regard to the employer's history concerning finding(s) of willful violations or misrepresentations of material fact, the IEEE urged that there be an additional ''box'' by which the employer could attest to the absence of such finding(s) (the draft form having only a ''box'' to show that there was such a finding).

The Department has reviewed all of the comments and has determined that the proposed regulation and LCA revision will be modified along the lines recommended by Intel. In light of the strong views of the majority of the commenters, the LCA will require that every employer mark a ''box'' to explicitly designate its status as either H–1B dependent or non-dependent. The LCA will also provide a ''box'' by which an H–1B-dependent employer can designate that it will use the LCA only for exempt workers. It is our understanding that if the latter ''box'' is marked, the INS will examine each petition supported by the LCA to determine whether the beneficiary is ''exempt'' (see discussion in IV.C, below). After careful consideration, the Department has concluded that it would not be appropriate or feasible to allow all employers to mark only a ''box'' for exempt workers and then make no further determinations or designations as to dependent status as suggested by AILA and ITAA, because such an approach would impose an unreasonable administrative burden on the INS in examining the exempt status of workers employed by the vast majority of employers which are non-dependent. The Department believes that the burden of determining dependent status under the Interim Final Rule is minimal, especially for the vast majority of employers whose status is readily apparent, and that it is not unreasonable to require such employers to attest as to their non-dependent status.

In the event that an employer's dependency status changes (either to dependent or to non-dependent) after the LCA is filed and the LCA therefore no longer accurately reflects that status, a new LCA designating the new status would have to be filed if the employer wants to seek access to H–1B workers through either new petitions or requests for extensions (see discussion in IV.B.2, above). Similarly, an employer which attests that it will use an LCA only for exempt workers may not use the LCA for non-exempt workers. However, the LCA will provide that in the event an employer violates these provisions—by utilizing an LCA attesting that it is non-dependent when in fact it is dependent, or by utilizing an LCA for non-exempt workers where it has attested that it will only be used for exempt workers—the employer will be bound by the attestation requirements for dependent employers.

5. What Changes Are Being Implemented on the Labor Condition Application Form and the Department's Processing Procedures? (§ 655.720 and § 655.730)

In the NPRM, the Department provided advance public notice of an anticipated change in the existing system for processing LCAs. Such applications were previously required to be submitted by U.S. mail, FAX, or private carrier, to one of 10 ETA regional offices, as delineated in § 655.720. Since March of 1999, the Department has been operating a pilot program involving the automated processing of LCAs. Although the Department encountered a number of technical problems throughout the operation of the national pilot, we believe that these problems have been resolved. Despite these temporary setbacks, the program thus far has generally proven to be successful. Therefore, the Department intends to fully implement the automated processing of all LCAs submitted by employers of H–1B nonimmigrants.

The transition to the automated system will occur on February 5, 2001, the date on which the relevant sections of this Rule (§§ 655.720 and 655.721) become applicable as stated in the DATES provision of this Preamble. Because the new system requires ETA to create appropriate software, obtain necessary hardware (including telephone lines, scanners, and other facilities), and obtain and train new staff, as well as conduct field trials to verify the reliability of the system once it is in place, the Department has concluded that it will not be feasible for the system to be operable before February 5, 2001. This delay in the applicability of the new system will also enable ETA to process all ''old'' LCAs which may be in queue in the current system (including the current FAX-back system) on the effective date of the Interim Final Rule. During the interval between the effective date of the Interim Final Rule (January 19, 2001) and the applicability date of the new system (February 5, 2001), LCAs will not be accepted by FAX but must, instead, be submitted in hard copy. The Department recognizes that this hard copy filing will be an inconvenience to employers, but we anticipate that this short-term inconvenience will be fully offset by the increased efficiency and reliability of the automated system which will be available after February 5, 2001.

On the effective date of this Interim Final Rule, January 19, 2001, the revised version of Form ETA 9035 will become the sole form for use by employers and their attorneys; thereafter, prior versions of the Form ETA 9035 will not be accepted for processing. The redesigned Form ETA 9035 is being published as an appendix to this Rule. Note that Form ETA 9035 no longer contains the full statements of the attestations required by the Act and the regulations. Rather, these statements, together with the instructions for filling out the form, are contained in the new cover pages, Form ETA 9035CP, and incorporated by reference in Form ETA 9035. The employer, through its designated official, is required to read the attestation statements set forth in the cover pages and indicate on the Form ETA 9035 its concurrence with the statements in Form ETA 9035CP.

The revised form is to be completed with a program that will be made available for download from the Department's World Wide Web site at *http://ows.doleta.gov.* For those employers who are unable to or choose not to use the form-fill program to complete the form, a blank hard copy of the form will also be available from any ETA regional office. The hard-copy forms may still be typewritten or completed by hand.

During the interim period as described above, the LCA may be submitted in hard copy by U.S. mail or private carrier. After February 5, 2001, the LCA may be submitted in hard copy by U.S. mail to the ETA Application Processing Center at the P.O. Box address identified in § 655.720(b) of the Interim Final Rule; delivery by private carrier will no longer be allowed because such carriers cannot deliver

items to U.S. Post Office boxes such as the address of the Processing Center. Alternatively, after the automated processing system becomes applicable on February 5, 2001, the LCA may be submitted by FAX transmission to a toll-free 1–800 number (1–800–397–0478), which will route incoming FAXes to an automated servicing center.

The automated processing system will electronically scan the incoming facsimile, extract the information contained in the application, record the information in a database, and make the appropriate determination to certify or to reject the application. LCAs that are mailed to ETA will be electronically scanned and entered into the automated processing system. As under the current manually-operated system, the application will be certified and FAXed (or mailed) back to the submitter if the appropriate boxes are checked, the required information is provided on the form, and the form has been signed and dated by the employer. If the form is incomplete or contains obvious inaccuracies, it will be rejected and sent back to the submitter with an addendum that identifies the deficiencies in the application.

At the present time, the ETA Web Site at *http://ows.doleta.gov* lists the submission date of the LCAs that the computer is currently processing. If the employer has submitted an LCA and has not received a response after a reasonable period of time has elapsed (*e.g.,* seven working days), it is suggested that the employer check the ETA Web Site, and if it indicates a current processing date which is later than the date on which the employer submitted the LCA, either re-submit the application (if using the automated system after February 5, 2001, re-FAXing to the 1–800 number identified above) or call the information number listed on the Web Site. The employer should not, however, submit unnecessary duplicates of an original application (*e.g.,* by FAXing the application to the LCAFAX system and also mailing a hard copy of the application, or by re-FAXing the application before seven days have passed). The Department will provide user support in the form of a help line for employers to call to verify that the system is up and running, and to obtain other information such as the date of receipt of LCAs that are currently being processed by ETA staff designated for the H–1B program. However, given the architecture of the LCAFAX system, it will be technologically infeasible for ETA to verify receipt of a particular LCA.

The Department received 10 comments on the proposed form and automated processing system. Most commenters generally favored the Department's proposal but expressed the desire that it be thoroughly tested before being implemented on a nationwide basis. We believe that the system has had an extensive pilot test. In Fiscal Year 2000 alone (October 1, 1999 through September 30, 2000), the Department processed nearly 300,000 applications using the automated system. Since the inception of the system in March of 1999, each of the two nodes of the system has processed over 200,000 applications. While a number of technical problems have been encountered, the Department is confident that the system should be fully implemented.

Six commenters were critical of the Department for not producing a version of the form-fill program that will run on the Apple Macintosh operating system. The program that was utilized during the pilot test was a Windows-based program that ran only on computers with a Windows operating system. These commenters urged the Department to develop a version of the program that will run on Macintosh computers or, alternatively, to use a platform-neutral format such as Adobe Acrobat. The Department agrees with these commenters and has developed a program to be used to complete the form in a platform-neutral format, Adobe Acrobat. This software will be widely distributed and, as previously stated, will be available for download from multiple locations on the World Wide Web.

One commenter (ACIP) expressed concern that since much of the print on the form is in such a small font, the form may be rendered illegible in the FAX transmission process from the attorney to the employer to the automated processing system.

The Department is aware of this potential problem and has identified technologies that would allow the form to be transmitted via electronic mail which will be included as part of the program. Under this scenario, after the employer's attorney or agent completes the form using the program, the form could then be e-mailed to the employer and printed out for the employer's signature and subsequent FAX transmittal to the automated processing system. Thus, the form FAXed by the employer to the Department would still be an original document. The pilot test has shown that documents other than an original (*e.g.,* a FAX of a FAX) are often unable to be read properly by the system and their submission usually results in either a rejection of the application or a notification that the form was not able to be read by the automated system.

Intel and ACIP stated that the proposed four-page form is impractical to ''post'' to satisfy the employer's obligation of notice to workers. These commenters suggested that the form be redesigned so that all of the information that is required to be contained in the notice (set forth at § 655.734(a)(1)(ii)) appear on the same page.

The Department does not believe this to be practical, given the amount of information that is required to be contained in the notice and the amount of space taken up by those items on the form. However, the Department has modified the proposed LCA form, compressing it to three pages rather than four pages as proposed. The Department is exploring technologies that would allow an employer, in addition to printing the pages of the form itself, print a separate page with those data elements from the form that are required to be contained in the notice. The employer will have a choice of posting the three-page form or another notice containing the required information. Should the Department's efforts to modify the software to enable an employer to print a one-page posting addendum with the requisite data elements from the form prove successful, posting the addendum would also satisfy the notice requirement. The Department notes, however, that the employer is required by the current regulations at § 655.734(a)(2) to provide the entire certified LCA to the H–1B workers no later than when they report to work.

One commenter (ACIP) inquired as to whether the pages of the form may be stapled together or whether the pages must be posted side-by-side. The Department believes that a posting consisting of the pages stapled together would satisfy the notice requirement, provided of course that it is done in such a fashion as to permit interested parties to readily view each page of the form.

Another commenter expressed concern that the proposed form would not permit an employer readily to take advantage of the new provision which permits an employer to satisfy the notice requirement electronically. Notwithstanding the fact that the form itself does not need to be posted electronically—only certain data contained therein—the Department has also identified technologies that allow an employer to directly notify its employees by sending a copy of the application by electronic mail to

similarly employed employees at the place of employment.

The Department has also made a slight modification to the proposed form to allow employers to continue to have the option of expressing the rate of pay as a pay range. This option was omitted from the draft form which appeared with the proposed rule published in the **Federal Register** on January 5, 1999 (64 FR 673). Since 1992, the H–1B regulations have provided that ''[w]here a range of wages is paid by the employer * * *, a range is considered to meet the prevailing wage requirement so long as the bottom of the wage range is at least the prevailing wage rate.'' (57 FR 1316) This provision, now at § 655.731(a)(2)(vi), remains in effect. Thus, the LCA form that appears with this Interim Final Rule has been modified accordingly.

Several commenters expressed concern that the Department would not devote adequate resources, including personnel and infrastructure, to support the automated processing system. The Department notes that the new system will be supported by the monies allocated to the Department to reduce the processing time of LCAs as part of the $1,000 fee imposed upon employers of H–1B nonimmigrants (*i.e.*, the $500 fee enacted by ACWIA, increased to $1,000 by the October 2000 Amendments). The Department believes that with the supplemental resources it receives as part of that fee account, it will be able to operate the program in an efficient and timely manner, once the system becomes applicable.

The regulations have been modified at §§ 655.720 and 655.730 to reflect the changes in the processing of the LCA, and to require that the revised Form 9035 be either FAXed to the 1–800 number identified above or transmitted by U.S. mail to the ETA Application Processing Center at the address specified in the regulation and on the Form. Revised § 655.720, along with new § 655.721, becomes applicable on February 5, 2001.

The Department cautions employers that the changes being made in the LCA form and the LCA filing and processing system do not modify the substantive obligations of employers concerning their attestations (*e.g.*, wages, notices, strike/lockout) or the necessity for obtaining ETA certification of the LCA prior to employment of the nonimmigrant. In our view, a ''new'' employer which hires an H–1B nonimmigrant from another H–1B employer, pursuant to the October 2000 Amendments' ''portability'' provision, must have a certified LCA to support the visa petition when it is filed and the nonimmigrant begins work

C. What H–1B Workers Would Be ''Exempt H–1B Nonimmigrants''? (§ 655.737)

The ACWIA relieves H–1B-dependent employers and willful violators from the additional attestation elements if the LCA is used only for ''exempt'' H–1B nonimmigrants. In the words of Senator Abraham, ''* * * employers required to include the new statements on their applications are excused from doing so on applications that are filed only on behalf of 'exempt' H–1B nonimmigrants.'' (144 Cong. Rec. S12751 (Oct. 21, 1998)). See also the statement by Congressman Smith, 144 Cong. Rec. E2325 (Nov. 12, 1998).

In addition, for a limited time after the ACWIA's enactment, neither the numerator nor the denominator of the ratio of H–1B nonimmigrants to full-time equivalent workers, used to determine H–1B dependency, was to include ''exempt'' H–1B workers. Because that time will have expired with the promulgation of this Rule, this provision no longer has effect and it is not incorporated in the regulations.

The ACWIA establishes two tests for whether an H–1B nonimmigrant is ''exempt.'' The H–1B nonimmigrant must either (1) ''receive[] wages (including cash bonuses and similar compensation) at an annual rate equal to at least $60,000,'' or (2) ''ha[ve] attained a master's or higher degree (or its equivalent) in a specialty related to the intended employment''.

In introducing the topic of exempt status, the NPRM noted that the statutory language seems clear. A dependent employer or willful violator is required to attest and comply with the new attestation elements unless the only H–1B nonimmigrants employed pursuant to the LCA are exempt workers. It was the Department's reading of this ACWIA language that if a covered employer used an LCA in support of any nonexempt worker, that employer would be obligated to comply with the new attestations with respect to all H–1B nonimmigrants hired pursuant to that LCA, exempt as well as nonexempt. However, the NPRM noted that the employer would be free to file separate LCAs for its exempt and nonexempt workers. (**Note:** because this issue is closely related to IV.C.4 (''Should the LCA be Modified to Identify Whether it Will be Used in Support of Exempt and/or Nonexempt H–1B Nonimmigrants?''), below, the comments and discussion on this issue will be included in IV.C.4.)

The NPRM also specified that initial determinations of workers' exempt status will be made by INS while adjudicating petitions filed on their behalf by their prospective employers. The Department proposed that copies of the approved H–1B petition, with the INS determination as to exempt status, should appear in the employer's public access file. The Department stated that, in the event of an investigation, considerable weight would be given to the INS determinations of exempt status based on educational attainment. However, if the exemption was claimed based on earnings, the employer would be expected to document that the exempt H–1B nonimmigrant actually received sufficient pay to satisfy the statutory wage ''floor'' of $60,000.

Six commenters responded to these proposals.

The proposal that INS initially determine exempt status when it adjudicates petitions evoked a mixed response. Senators Abraham and Graham stated that the ACWIA does not grant either INS or DOL the authority to prevent approval of a visa on the basis of whether or not an individual qualifies as ''exempt.'' Similarly, AILA questioned the authority of DOL to delegate this review to INS and expressed concern that INS lacks the resources to make timely assessments of this issue; AILA stated that such review is contrary to the nature of the LCA as an employer attestation document, and that a worker's status should be reviewed only pursuant to a DOL investigation. AILA further suggested that DOL should accept an employer's reasonable determination of exempt status, or at a minimum should not assess penalties if the employer's reasonable determination is in error.

Conversely, ACIP, ITAA and Rapidigm agreed that the INS should make the exempt determination and suggested that its determination of educational relevance should be dispositive; ACIP pointed out that employers should first have an opportunity to challenge rejected claims. BRI questioned how INS can make an ''initial'' determination of the exemption status since employers must make the determination at the time the LCA is filed.

It is the Department's understanding that INS will examine the exempt status of any nonimmigrant whose petition is accompanied by an LCA that indicates that it is to be used exclusively for exempt workers. This INS review will not be pursuant to a delegation from DOL. Rather, INS has advised that it considers this review to be an appropriate adjunct to its role in

adjudicating the admissibility of the individual workers, since an LCA for exempt workers cannot validly be used for a worker unless the worker is in fact exempt. INS will not deny a petition on the basis that the worker is not exempt; however, it will require that the information on the accompanying LCA correspond with the characteristics of the worker for whom the petition was submitted. Thus, just as INS verifies that the worker's occupation and the LCA occupation correspond, it will verify that the worker is exempt where the employer has attested that the LCA will be used only to support exempt workers. If INS initially determines that a worker is nonexempt, the employer will be given an opportunity either to submit additional documentation in support of the worker's exempt status or to submit an LCA with no claim of exemption.

The Department anticipates that in most cases, INS will need to do no more than review the stated wage level to ensure that it would equal at least $60,000 per year. Only where the wage standard would not be met will it be necessary for INS to review a worker's educational qualifications. As discussed in IV.C.2 and IV.C.3, below, the Department believes that this determination too can be easily made in most cases, and therefore that INS review of valid exemptions should not ordinarily delay approval of a petition.

The Department in an investigation will ensure that a worker whom an employer attested will be paid more than $60,000 per year has in fact received the required compensation. Only if the employer had so attested and the earnings floor has not been satisfied will the Department determine whether the worker is exempt based on educational attainment (including the field of study). However, where the employer did not attest that a worker would be paid more than $60,000 per year but instead makes its claim of exemption based only on educational attainment, and INS has determined that an H–1B worker is exempt based on the evidence submitted to it of educational attainment, that INS determination will be conclusive unless the Department finds that the INS determination was based on false information.

The Department notes that this ''up front'' review by INS should generally avoid the situation which could arise in DOL enforcement if an employer erroneously determined a worker is exempt based on educational attainment, but DOL later determines the worker is not in fact exempt. In such situations, the employer would face possible penalties for misrepresentation and failure to perform the required attestation elements. DOL cannot agree with AILA's suggestion that the special attestation protections for U.S. workers would not apply where an employer has made a reasonable but erroneous determination as to exempt status. Furthermore, the Department believes that penalties are a particularly important remedy since, as a practical matter, it will often be impossible to cure such violations after the fact. Nor does the Act provide any relief from debarment for a failure to perform the attestation elements regarding displacement of U.S. workers. Debarment and other penalties may be imposed for recruitment violations, however, only where such violations are ''substantial.'' The circumstances regarding the exemption determination, as well as the facts regarding the recruitment performed by the employer, will be taken into consideration in determining whether a recruitment violation is ''substantial.'' The circumstances will also be taken into consideration in assessing civil money penalties and in determining whether an employer has made a misrepresentation in its attestation that the LCA will only be used for exempt workers.

With regard to BRI's question of how INS can make an ''initial'' determination when the employer has already done so on the LCA, the Department clarifies that the term ''initial'' is used to distinguish between determinations made by the INS at adjudication and the occasional determination which might occur during Departmental investigation. It is of course necessary for the employer to make its own similar assessment as to the worker's exempt status prior to submitting the LCA and the worker's petition.

Rapidigm commented that exempt H–1B nonimmigrants should not be included in the ratio in making the dependency determination. The Department notes that the statute imposes a time limit upon the period in which exempt H–1B nonimmigrants are excluded from the ratio (*i.e.,* six months after ACWIA enactment or the effective date of these regulations). Since that time limit has now expired, the determination of H–1B-dependency now must include exempt workers.

Finally, ITAA disagreed with the proposed requirement that employers maintain a copy of the H–1B petitions with the INS determinations of workers' exempt status in the public access file. On further consideration, the Department agrees that because of privacy considerations, these documents need not be included in the public access file. However, the Department believes that it is important for the public to know which workers are supported by an LCA for exempt workers, so that the public will know which workers are not covered by the new attestation elements, and be able to challenge exemption determinations where there is reason to believe the basis for the exemption is invalid. Therefore, employers will be required to include in their public access file a list of the H–1B nonimmigrants supported by an LCA attesting that it will be used only for exempt workers, or in the alternative, a simple statement that the employer employs only exempt H–1B workers. Furthermore, employers will need to retain H–1B petitions and any evidence regarding workers' exempt status (*i.e.,* pay records and evidence related to educational attainment) so that they may be provided to DOL in the event of an investigation.

1. How Would the $60,000 Annual Rate be Determined? (§ 655.737(c))

The ACWIA provides that H–1B nonimmigrants will qualify as ''exempt'' if they receive wages (including cash bonuses and similar compensation) at an annual rate of at least $60,000. Those who receive this level of compensation will qualify as ''exempt'' without satisfying the alternative, educational standard.

In the NPRM, the Department proposed that, to ensure this standard is met, it should be interpreted consistently with the existing DOL regulations for determining if an employer has satisfied its other wage obligations under the H–1B program (20 CFR 655.731(c)(3)). Future (*i.e.,* unpaid but to-be-paid) cash bonuses and similar compensation would be ''counted'' toward the required wage if their payment is assured, but not if they are conditional or contingent on some event such as the employer's annual profits, unless the employer guarantees that the nonimmigrant will receive compensation of at least $60,000 per year in the event the bonus contingency is not met. The Department also proposed that bonuses and compensation are to be paid ''cash in hand, free and clear, when due,'' meaning that they must have readily determinable market value, be readily convertible to cash tender, and be received by the worker when due. The bonuses and compensation for purposes of this ACWIA requirement must be received by the worker within the year for which the employer wants to ''count'' the compensation.

In addition, the Department interpreted the statutory language

''receives wages (including cash bonuses and similar compensation) at an annual rate equal to at least $60,000'' to mean that the worker actually receives at least $60,000 compensation in each year. Therefore, the NPRM provided that an H–1B nonimmigrant who, because of part-time employment, receives less than $60,000 in compensation in a year would not qualify as exempt on the basis of compensation, even if his or her hourly wage, projected to a full-time work schedule, would exceed $60,000 in a year.

Ten commenters responded to the Department's proposals on this issue.

The AFL–CIO stated that exempt workers must receive $60,000 in wages annually as an entitlement. The AEA stated that exempt workers should receive $60,000 or higher without including any benefits or bonuses. APTA and AOTA stated that an exempt worker must receive wages equal to at least $60,000, which must not include other employee benefits, such as health insurance, retirement plans, and life insurance.

Senators Abraham and Graham and ACIP contended that the statutory language ''at an annual rate equal to'' requires the Department to permit part-time workers and workers who work only part of the year to be considered exempt if their rate of pay, extrapolated to full-year, full-time work would meet the $60,000 threshold. Latour noted that in the information technology industry, some of the most highly compensated and distinguished experts work part-time for several employers, and therefore suggested that the Department allow the $60,000 minimum compensation to be computed on an hourly, weekly, or other basis. The National Association of Computer Consultant Businesses (NACCB) expressed concern about nonimmigrants who terminate during the year, and therefore suggested the Department interpret the statutory provision to allow a worker to receive $1,200 in wages per week.

The Department concurs in the view expressed by employee representatives that fringe benefits in the nature of health insurance, pension, and life insurance, are not similar to cash bonuses and are not wages within the meaning of the definition of ''exempt H–1B nonimmigrant.'' Therefore benefits will not count toward the required $60,000 level under the Interim Final Rule.

The Department does not concur, however, with the view that the $60,000 minimum compensation requirement may be prorated for part-time employees. Congressman Smith, in describing the legislation prior to its enactment, stated that the additional attestation requirements will apply to H–1B-dependent employers petitioning for H–1B nonimmigrants without masters degrees who ''plan to pay the H–1Bs less than $60,000 a year.'' 144 Cong. Rec. H8584 (Sept. 24, 1998). Later statements in the *Congressional Record* by both principal sponsors of the ACWIA also describe the annual wage standard as firm. Senator Abraham stated: ''An 'exempt' H–1B nonimmigrant is defined * * * as one whose wages, including cash bonuses and other similar compensation, are equal to at least $60,000. * * *'' (144 Cong. Rec. S12751 (Oct. 21, 1998)). Similarly, Congressman Smith stated: ''An 'exempt' H–1B nonimmigrant is defined * * * as one whose annual wages, including cash bonuses and other similar compensation, will be equal to at least $60,000 (and will remain at such level for the duration of his or her employment while under an H–1B visa).'' (144 Cong. Rec. E2325 (Nov. 12, 1998); see also E2324). These statements underscore the statutory objective of ensuring that only highly compensated H–1B workers are exempted on the basis of their compensation. If the workers are not, in fact, highly compensated (*i.e.*, if they do not actually receive wages of $60,000), then this objective is not achieved. Furthermore, allowing a *pro rata* of the $60,000 compensation would necessitate that the employer be able to demonstrate that the part-time worker received an appropriate ''share'' of the annual compensation, based on the portion of a full-time year's work that he/she performed. The Department considered allowing an employer to claim the exemption for workers who would be employed part-time by more than one employer and would earn combined wages of at least $60,000 per year. However, the Department concluded that this approach would not be feasible since an employer would not be able to ensure effectively that workers did in fact receive the statutory wage level of $60,000 and since such an exception could not be effectively administered. The Department notes that part-time employees could still qualify as exempt based on their education, notwithstanding their relatively lower annual compensation.

However, it is the Department's view that H–1B workers who are hired at compensation of at least $60,000 per year, but who are employed for less than a year, will satisfy the statutory requirement if they receive at least $5,000 for each month worked. For example, a worker who resigned after three months would be required to have been paid at least $15,000. Similarly, if the Administrator conducted an investigation and found that a worker had not yet worked a year, the Administrator would determine whether the worker had been paid $5,000 per month, including any unpaid, guaranteed bonuses or similar compensation.

ITAA concurred with the Department's view that unconditional, noncontingent bonuses or other payments may be counted toward the $60,000 compensation to qualify for the exemption. AEA opposed inclusion of bonuses at all, expressing concern that some employers might pay a very low wage and promise a bonus at the end of the year, but never pay the bonus unless ''caught'' before the end of the year. BRI suggested that the Department should allow an annual bonus to be paid on a specified date, contingent only upon compliance with the contract.

Since the ACWIA expressly permits inclusion of cash bonuses, the Department does not believe it has the discretion to exclude them from the required minimum compensation, as suggested by AEA. With regard to the bonus described by BRI, the Department is of the view that such a bonus would be in compliance only where the employer ensures that a worker who terminates employment before the end of the year in fact receives $60,000, prorated for the amount of time worked. An employer's remedy against the worker in such a case of early termination may be afforded by state law relating to the recovery of liquidated damages under the contract, as discussed in IV.J, below.

2. How Would the ''Equivalent'' of a Master's or Higher Degree be Determined? (§ 655.737(d)(1))

Also defined as ''exempt'' for purposes of the additional attestations are H–1B nonimmigrants who have ''attained a master's or higher degree (or its equivalent) in a specialty related to the intended employment.'' The Department proposed to define ''or its equivalent'' to mean a foreign academic degree equivalent to a master's degree or higher degree earned in the United States, and not to allow equivalency to be established through work experience.

The Department received ten comments on this proposal.

The AFL–CIO and AOTA agreed with the Department's interpretation limiting this prong of the exemption to nonimmigrants with a foreign academic degree equivalent to a U.S. master's or

higher degree, with no substitution of work experience. AOTA observed that the occupational therapy profession is moving toward a master level education requirement for entry to the profession, and believes it is reasonable for foreign workers to meet the same education and training as U.S. workers. Because a master's degree will be the benchmark for the physical therapist profession after January 1, 2002, APTA would go even further and require that a nonimmigrant have a doctorate degree to qualify for the exemption. ACIP also agreed with the Department's proposal that an exempt H–1B worker must hold a U.S. master's degree or its foreign academic equivalent.

Other trade associations and employers who commented on this issue generally disagreed with this interpretation. Six commenters (AILA, BRI, ITAA, Rapidigm, TCS, Satyam) contended that the Department's position is inconsistent with statutory language and current INS regulations. AILA asserted that the ACWIA's use of the phrase ''master's degree or equivalent'' rather than ''master's or equivalent foreign degree'' supports the well-established INS procedure of allowing equivalencies to be established through either degree equivalence or work experience in its adjudication of whether an applicant has the equivalent of a bachelor's degree for H–1B admission and whether an applicant has the equivalent of a master's degree for certain second preference employment admissions. Rapidigm and Satyam stated that different ''equivalency'' standards for H–1B admission and exempt status should not apply to the same pool of immigrants. TCS expressed concern that the Department's interpretation would lead to inquiries into the quality of education in foreign countries, rather than the level of education as contemplated by ACWIA; TCS contended further that since all foreign master's degrees are already incorporated under the term master's degree, the ACWIA phrase ''its equivalent'' must refer to something else.

Additionally, this Department requested the views of the U.S. Department of Education regarding this element of the ACWIA. The Department of Education, through its Office of Educational Research and Development, responded to this Department's inquiry.

The Office of Education Research and Improvement (OERI) expressed the general view that ''possession of a master's degree or its equivalent'' referred to master's degrees awarded by accredited United States institutions or degrees granted by foreign academic institutions, which as measured by educators within the United States, are at least equivalent to master's degrees awarded by accredited United States institutions. With regard to nonimmigrants possessing a United States degree, the OERI suggested a three-prong inquiry: (1) Was the awarding institution accredited at the time of the award by an association recognized by the Secretary of Education or is/was the institution a *bona fide* member of the Council on Higher Education Accreditation; (2) was the program of study for which the degree was awarded either included in the Classification of Instructional Program or incorporated by reference from an international program classification; and (3) is/was the program of study related to an occupation classified in the Standard Occupational Classification or an international occupation classification.

The OERI expressed the view that basically the same inquiry should take place where the academic credentials are granted by a foreign educational institution. The OERI recommended that the inquiry begin by determining whether the awarding institution is/was a recognized institution under the laws and policies governing accreditation in the institution's country. It suggested that the second and third prongs of the test could be met by applying the guidelines, recommendations, and practices of the National Council on the Evaluation of Foreign Educational Credentials, a group managed by the American Association of Collegiate Registrars and Admissions Officers. The OERI explained that these standards are utilized by U.S. educators in assessing the *bona fides* of a foreign degree or a program of study abroad and determining their equivalence to U.S. degrees and standards.

The Department is of the view that Congress intended exempt status to apply only to highly qualified employees. The Department therefore believes that Congress did not intend to substitute work experience for education, but rather required the attainment of an advanced academic degree (or the alternative $60,000 wage standard) for dependent employers and willful violators who may hire H–1B nonimmigrants without complying with the new attestation elements. In introducing the ACWIA on the floor, Congressman Smith explained: ''[T]he compromise eases requirements on companies when they are petitioning for workers who have advanced degrees. * * * The point I want to make is that the term 'or its equivalent' refers only to an equivalent foreign degree. Any amount of on-the-job experience does not qualify as the equivalent of an advanced degree.'' 144 Cong. Rec. H8584 (Sept. 24, 1998).

The commenters are correct in noting that the INS regulations they have cited, governing minimal qualifications for H–1B admission, do recognize work experience in lieu of an academic degree. However, the ACWIA employs the phrase ''or its equivalent'' in a subparagraph distinguishing minimally qualified ''nonexempt'' H–1B nonimmigrants from better qualified ''exempt'' workers. ''A master's or higher degree (or its equivalent)'' is one of two higher thresholds provided to draw this distinction. If the educational standard could be satisfied by relevant work experience alone, the wage threshold would serve no independent purpose. The added value of the $60,000 threshold is that it exempts well-compensated workers even if they have not attained a master's or higher degree, or have done so in a specialty not related to their intended employment. The ''work equivalency'' interpretation advocated by employers and their representatives blurs this clear statutory distinction between exempt and nonexempt nonimmigrants.

Moreover, it is the Department's view that its interpretation is fully consistent with the plain language of the statute, especially when contrasted with the language in section 214(i) of the INA, 8 U.S.C. 1184(i), which explicitly authorizes work experience in lieu of a bachelor's degree for admission as an H–1B nonimmigrant. The ACWIA exempts all H–1B nonimmigrants who have attained a master's or higher degree (or its equivalent) in a specialty related to their intended employment—with no suggestion that this requirement can be satisfied with work experience. The Department does not believe it is relevant that the INS regulations concerning admission of immigrants under the second preference employment category treat certain work experience as equivalent to a master's degree. Not only are those regulations unrelated to the H–1B nonimmigrant program, but the statutory language in section 203(b)(2)(A) of the INA, 8 U.S.C. 1153(b)(2)(A), is clearly distinguishable, granting preference to ''qualified immigrants who are members of the professions holding advanced degrees or their equivalent.'' Unlike the specific term ''master's degree'' cited in the ACWIA, the generic term ''advanced degree'' encompasses all post-graduate academic credentials. Consequently, the expression ''advanced degrees or their equivalent'' would seem to be without

meaning if not interpreted to include work experience.

The phrase ''or its equivalent'' in the ACWIA is not without meaning under the Department's interpretation. In fact, it is not uncommon for the titles of foreign degrees to differ from those used within the U.S. educational system, or for the same title to have different educational requirements. Differences in academic nomenclature can create significant confusion for government programs and universities that deal with persons educated abroad. The existence of credential evaluation services and academic guidelines for admission of foreign students to colleges and universities are indications that degree equivalency is not always readily apparent.

There is, however, a readily available source of information concerning degree equivalence. The National Council on the Evaluation of Foreign Educational Credentials (NCEFEC) and the American Association of Collegiate Registrars and Admissions Officers (AACRAO) have developed specific guidance for most countries regarding which education and training credentials are considered to be reasonably similar to corresponding U.S. credentials. AACRAO published these guidelines in 1994 in a publication entitled Foreign Educational Credentials Required for Consideration of Admission to Universities and Colleges in the United States (4th ed), which is widely used by admissions offices and credential evaluation services. These guidelines reflect the prevailing opinion and considered judgment of experienced foreign student admissions officers in U.S. colleges and universities. The Department will use this publication as a guide for determining degree equivalence. The AACRAO publication is available for a fee of $30 and can be obtained by contacting AACRAO Distribution Center, P.O. Box 231, Annapolis Junction, MD 20701, or through their website, *www.aacrao.com/pubsale/grade.html.*

The AACRAO guidelines explain that a Ph.D. entry level document—*i.e.,* the diploma or degree required for entry at the Ph.D. level (equivalent to a U.S. master's degree)—''represents a minimum of one full-time year of study beyond a bachelor's equivalent. The study must also be viewed as advanced as opposed to supplemental.'' For example, post-graduate training to earn a teacher's certificate is considered supplemental rather than advanced, and would not be equivalent to a master's degree. Where documents with the same name are awarded at more than one level, the publication includes parenthetical guidance such as ''earned after a three-year program.''

Because the AACRAO publication identifies academic prerequisites for entry into various levels of U.S. education, it must be used carefully. Three columns of information are provided for each country of origin: level of entry into the U.S. educational system; foreign certificates, diplomas or degrees required for admission at this level; and necessary supporting documentation. The first column displays the levels at which students are normally admitted into U.S. undergraduate or graduate programs. Within the graduate tier, the three levels of admission shown are Master, Ph.D., and Unclassified/Special. Persons entering Ph.D. programs would possess degrees equivalent to a U.S. master's, as set forth in the second column. Persons in the category ''Unclassified/Special'' would ordinarily possess degrees equivalent to a U.S. doctorate (Ph.D.), as set forth in the second column. (Persons whose credentials correspond to the entry ''Master'' currently have the equivalent of a U.S. bachelor's degree, qualifying them to begin master's level study.)

The Department seeks comments on whether it should incorporate the AACRAO publication in the Final Rule for use in determining whether a degree an H–1B nonimmigrant has obtained from a foreign educational institution is equivalent to a U.S. master's degree. In the alternative, employers would be able to present evidence of degree equivalence from a credential evaluation service where there is no foreign degree listed as equivalent to a U.S. master's, or where a worker obtained a degree in the past, and the terminology in the foreign country has changed.

As recommended by the OERI of the Department of Education, the Interim Final Rule requires that the institution from which the worker obtained its degree be recognized or accredited under the law of the country. The Interim Final Rule further provides that where an employer claims an H–1B nonimmigrant is exempt based upon educational attainment (rather than wages), the employer will be required to provide, upon request of INS or DOL, evidence that the worker has received the degree in question, as well as a transcript of the courses taken and grades earned.

3. How Is ''a Specialty Related to the Intended Employment'' Defined? (§ 655.737(d)(2))

The ACWIA specifies that the H–1B nonimmigrant who holds a master's or higher degree (or an equivalent degree) qualifies as ''exempt'' only if that degree is in ''a specialty related to the intended employment.'' The Department proposed that in order for the nonimmigrant's degree specialty to be sufficiently ''related'' to the intended employment to qualify for exempt status, that specialty must be generally accepted in the industry or occupation as an appropriate or necessary credential or skill for the person who undertakes the employment in question. Furthermore, the Department stated that it would give considerable weight to INS determinations concerning the academic credentials of H–1B nonimmigrants who are claimed to be ''exempt'' on this basis.

Six commenters responded to the Department's proposals on this issue.

AILA asserted that there is no statutory authority for the ''appropriate or necessary'' standard and that these terms are very different in that ''related'' does not mean ''necessary.'' AILA suggested that an employer should be able to determine what specialty degrees it considers to be ''appropriate'' and that it should be able to establish the relationship by a variety of means, such as through specific course work, or by showing that it is a standard company requirement and that all others in the same position have the same credentials.

ACIP acknowledged the statutory requirement that the master's degree or equivalent be in a field relevant to the occupation and suggested that due deference be given to an employer's determination that a degree is relevant. ACIP observed that employers are better placed than the government to track evolving occupations, job duties, and degrees. Other commenters (Kirkpatrick & Lockhart, Latour, TCS) went further and urged the Department to defer to an employer's good faith determination of what fields of study are related to the employment in question. One commenter noted that only one quarter of information technology professionals possess a computer science, computer engineering, or MIS degree.

The AFL–CIO suggested that the Department utilize the new North American Industrial Classification System (NAICS) in making the determination that a specialty is related to the employment; it stated that the NAICS includes job qualifications by occupational classification, formulated by the Bureau of Labor Statistics with the input of labor and business.

In addition, two law firms (Kirkpatrick & Lockhart and Latour) expressed the view that DOL should not judge the relevance of the alien's

educational background to their job if that alien is receiving $60,000 or more per year.

The Department agrees that a worker may qualify as exempt by meeting either the salary or educational standard, and is not required to qualify under both tests. However, where the compensation level is not met, the Department cannot simply disregard the statutory requirement that the individual hold a master's or equivalent degree in a specialty related to the intended employment, nor can it automatically defer to an employer's judgment, as some commenters seemed to suggest. The Department considers it appropriate to provide guidance as to the meaning of the statutory requirement. As Congressman Smith stated, ''It is also important to note that the degree must be in a specialty which has a legitimate, commonly accepted connection to the employment for which the H–1B nonimmigrant is to be hired.'' (144 Cong. Rec. E2325 (Nov. 12, 1998)). The Department believes that its proposed standard—that the degree be generally accepted in the industry or occupation as an appropriate or necessary skill or credential—is an appropriate articulation of this requirement, and this standard is adopted in the Interim Final Rule. The Department does not intend to imply that a master's degree in a specific field must be a prerequisite for employment in the occupation in order for a worker to meet the ''related'' requirement for the exemption. On the other hand, the employer's statement of relevance cannot be accepted without substantiation since the employer would have little incentive to consider the relevance of the field in which a master's degree was earned if the occupation does not normally require a master's degree. For example, many employers seeking a systems analyst require a bachelor's degree in computer science, information science, computer information systems, or data processing, but not an advanced degree. In contrast, computer scientist jobs in research laboratories or academic institutions generally require a Ph.D. or at least a master's degree in computer science or engineering. U.S. Bureau of Labor Statistics, 1998–99 Occupational Outlook Handbook. The Department does agree, however, that a field not ordinarily considered relevant to an occupation could be related to a specific job. For example, a master's degree in public health could be a related field for a computer specialist in the health industry.

The Department concurs with the AFL–CIO proposal that an objective standard is appropriate as a guide in determining whether a field is related to an occupation. However, it is the Department's view that the NAICS is not appropriate since it spells out industrial rather than occupational codes. The Department believes that there are two occupational data systems that provide information better suited to the related field inquiry: the U.S. Bureau of Labor Statistics Occupational Outlook Handbook, and 0*NET 98.

The Occupational Outlook Handbook is a well-recognized source of job and career information. Revised every two years, the Handbook describes for about 250 of the most common occupations, what workers do on each job, their working conditions, earnings, and other pertinent information. For each job, the Handbook identifies the training, education, and licensing requirement for the occupation, if any, as well as the educational background desired by employers and the common educational background of persons in the occupation. The Handbook can be purchased from the Government Printing Office in paper, hard cover, and CD–ROM format. Groups of related jobs covered in the Handbook are available for purchase as individual reprints. The Handbook also can be accessed free of charge on the Bureau of Labor Statistics' website, at *http://stats.bls.gov/ocohome.htm.* The Handbook's easy-to-use electronic version can be accessed by specific jobs or occupational clusters.

O*NET 98 was recently developed by the Labor Department, with the input of both labor and business. This user-friendly electronic data system, designed to replace and expand upon the Dictionary of Occupational Titles (DOT), links various occupational classifications to one another and to the Department of Education's Classification of Instructional Programs (CIP). For each of the over 1,100 occupations in this system, an O*NET 98 occupational profile lists the principal fields of study appropriate to that occupation under the heading ''instructional programs.'' O*NET 98 can be purchased on CD–ROM or diskette from the Government Printing Office and can also be downloaded free of charge from the Department's website at *www.doleta.gov/programs/onet.* In addition, like the Occupational Outlook Handbook, O*NET 98 can be accessed over the Internet at any public library.

The Handbook and O*NET 98, in the Department's view, provide useful, objective guidelines for determining whether a specific academic discipline is related to the occupation, i.e., whether a degree in the field is generally accepted in the industry or occupation as an appropriate or necessary skill or credential. The Department will therefore utilize these sources as guides. The Department also will consider other industry studies obtained by employers or the opinions, solicited by the employer, from a bona fide credentialing organization attesting that a nonimmigrant's academic specialty is generally accepted by the pertinent industry or occupation as appropriate or necessary for the employment in question. Employers are encouraged to rely on these sources in determining whether a master's degree (or its equivalent) is in a field related to the job in question.

The Department also seeks comment on whether the Final Rule should incorporate the Occupational Outlook Handbook and O*NET as the primary sources for determining fields of study related to specified occupations. The Department realizes, however, that there may be other instances where a master's degree in a specialty that is not identified in either of these sources still may be recognized by the industry or occupation in question as related to the employment in question. The Department proposes that if an employer chooses not to rely on O*NET or the Occupational Outlook Handbook, or these sources fail to establish the required relationship, an employer seeking to establish such relationship could obtain a report by a credentialing organization that a degree in the field is recognized by the industry or occupation as an appropriate or necessary skill or credential. The Department seeks comment on whether this is an appropriate task for credentialing services, and whether there are other recognized sources of information which can and should be utilized for this purpose—in addition to, or in place of, the sources cited.

4. Should the LCA Be Modified to Identify Whether it Will Be Used in Support of Exempt and/or Non-Exempt H–1B Nonimmigrants? (§ 655.737)

As discussed above, the ACWIA provides that ''[a]n application is not described in this clause [i.e., is not subject to the new attestation requirements] if the only H–1B nonimmigrants sought in the application are exempt nonimmigrants.'' The Department therefore proposed that a dependent employer or willful violator would be required to attest and comply with the new attestation elements unless the only H–1B nonimmigrants employed pursuant to the LCA are exempt workers. If a covered employer used an LCA in support of any nonexempt worker, that employer would be obligated to comply

with the new attestations with respect to all H–1B nonimmigrants hired pursuant to that LCA, exempt as well as nonexempt.

The NPRM stated that the Department considered proposing that employers file separate LCAs for their exempt and nonexempt H–1B workers. However, the Department noted that two different workers might very well both be qualified for the same occupation, but one might be exempt and another nonexempt. Therefore the Department preliminarily concluded that it was not appropriate to restrict an employer's freedom to utilize an LCA for both exempt and nonexempt workers, provided that the employer in such circumstances complied with the additional attestation requirements for all of the H–1B nonimmigrants under the LCA. The Department noted in the NPRM that an H–1B-dependent employer or willful violator would be free to file separate LCAs for its exempt and non-exempt workers, thereby obviating the requirement of complying with the new attestation elements for its exempt workers. Furthermore, the NPRM provided that a dependent employer or willful violator who planned to utilize an LCA only for exempt workers would be required to so attest on the LCA.

Five commenters responded to this proposal.

The AFL–CIO strongly agreed that when exempt and nonexempt H–1B workers are included on the same LCA, the new attestations should apply to both. In its view, it would be illogical for a single document to impose different obligations on the employer with respect to different nonimmigrants supported by the same document. TCS, on the other hand, stated that while it does not itself use a single LCA for multiple workers, DOL should not take away an appropriate exemption when the LCA of an exempt worker also includes nonexempt workers. Rapidigm questioned why dependent employers should be required to submit two LCAs where, under the same circumstances, other employers are permitted to submit just one. BRI suggested that employers have one LCA and check a box to indicate that they will comply with the attestations for nonexempt workers only. ITAA expressed concern that DOL will not be able to handle the increased workload from multiple LCAs.

It is the Department's view that the unambiguous language of the statute relieves dependent employers and willful violators from the special attestation requirements only if the LCA is used only for exempt H–1B nonimmigrants. The Department points out that such employers are not required to submit separate LCAs for exempt and non-exempt workers. However, the Department notes that if an employer attests that an LCA will only be used for exempt employees, but the LCA in fact is used for both exempt and nonexempt workers notwithstanding the employer's attestation, the employer is required to comply (from the beginning of the LCA's effective period) with the special requirements with respect to all workers on the LCA (both exempt and nonexempt).

With regard to concern about the Department's ability to handle the additional volume of LCAs associated with separate applications for exempt and nonexempt workers, the Department estimates that this requirement will affect not more than 150 to 250 employers, with a midpoint of 250. Furthermore, the Department has instituted a new FAX-back system for processing and certifying LCAs, which will help streamline the process.

There were only two comments on the narrow issue of what form the revised LCA should take. The AFL–CIO stated that employers should indicate on the face of the LCA whether or not it will be used in support of H–1B petitions for exempt H–1B workers. BRI suggested that a box should be provided on the LCA which the employer could check, agreeing to comply with the attestations for non-exempt workers only; a separate written statement regarding the worker's exempt status would then be filed with INS.

As noted above, the Department will permit dependent employers and willful violators to utilize one LCA for both exempt and nonexempt workers, but the employer taking this course will be obliged to comply with the new attestation elements for all workers under the LCA. Therefore the Department does not consider it necessary to require such employers to indicate on the form that it will be used for nonexempt workers. However, the language on the LCA form is modified to make it clear that if an employer checks the box attesting that it will only use the LCA for exempt workers, the employer will not be permitted to use the LCA for nonexempt workers. This will permit the employer, the public, and the workers, as well as DOL, to know whether the additional attestation elements apply with respect to the workers under an LCA, and will permit INS to know whether the worker's exempt status must be verified. The LCA form is further modified to state that if an employer utilizes the LCA for a nonexempt worker in violation of its attestation, the employer will have been required to comply with the new attestation elements with respect to all H–1B nonimmigrants supported by the LCA.

D. What Requirements Apply Regarding No ''Displacement'' of U.S. Workers Under the ACWIA? (§ 655.738)

Section 212(n)(1)(E) and (F) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(1)(E) and (F), imposes requirements upon H–1B-dependent employers and employers who have been found to have willfully violated their H–1B obligations that are designed to protect certain U.S. workers from being ''displaced'' by H–1B workers. As noted in the NPRM, such an employer is prohibited from displacing a U.S. worker who is ''employed by the [H–1B-dependent] employer'' and from displacing a U.S. worker who is employed by some other employer at whose worksite the H–1B dependent employer places an H–1B worker (where there are ''indicia of employment'' between the H–1B worker and the other employer). Thus, the prohibition may apply to the dependent employer's own workforce (primary displacement) or to the workforce of another employer with whom the dependent employer does business (secondary displacement). With respect to the dependent employer's own workforce, the prohibition applies during a period beginning 90 days before and ending 90 days after the date of the filing of an H–1B petition on behalf of the H–1B worker. With respect to a customer's workforce, the prohibition applies during a period beginning 90 days before and ending 90 days after the placement of the H–1B worker. As discussed at IV.C, above, the displacement prohibitions do not apply to LCAs that are used only to support the employment of ''exempt'' H–1B workers. See Section 212(n)(1)(E)(ii).

In introducing the compromise ACWIA bill to the Senate, Senator Abraham explained:

''[T]his legislation provides three types of layoff protection for American workers.

''Let me add that throughout the process of working on this legislation, we have been very mindful of the concerns people have that somehow these H–1B temporary workers might end up filling a position where an American worker could have filled the slot. Our goal is to make sure that does not happen, and we have built protections into this agreement which we and the administration feel will accomplish that objective.

''First, any company with 15% or more of its workforce in the United States on H–1B visas must attest that it will not lay off an American employee in the same job 90 days

or less before or after the filing of a petition for an H–1B professional.

''Second, an H–1B dependent company acting as a contractor must attest that it also will not place an H–1B professional in another company to fill the same job held by a laid off American 90 days before or after the date of placement.

''Third, any employer, whether H–1B dependent or not, will face severe penalties for committing a willful violation of H–1B rules, underpaying an individual on an H–1B visa, and replacing an American worker. That company will be debarred for 3 years from all employment immigration programs and fined $35,000 for each violation.''

144 Cong. Rec. 10878 (Sept. 24, 1998). (**Note:** the third type of layoff protection, discussed in IV.M.5, below, applies enhanced penalties for willful violations of any of the attestation provisions, by both H–1B-dependent and non-dependent employers, where a U.S. worker is displaced in the course of the violations. See Section 212(n)(2)(C)(iii) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(2)(C)(iii).)

The Department received virtually identical requests from several individuals that the Department provide additional information to U.S. workers so that they could better understand their rights; these individuals expressed their concern that H–1B workers might be used to replace older U.S. workers. As discussed in III.B, above, the Department plans extensive education activities in an effort to ensure that both U.S. and H–1B workers are aware of the provisions of the H–1B program as modified by the ACWIA. The Department acknowledges the concern among older workers that their employment may be placed at risk through the potential hire of younger H–1B workers, who may be willing to perform the same work at a reduced level of pay and benefits. Although the ACWIA may operate to reduce this possibility by requiring that H–1B workers be employed at no less than the higher of the prevailing wage or the actual wage paid by the employer for the work in question, the concerns of U.S. workers in this regard are more directly addressed by the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*, which is administered by the Equal Employment Opportunity Commission (EEOC). The Department suggests that workers or employers with particular concerns regarding possible instances of age discrimination should contact their local EEOC office.

The Department also notes that section 417 of the ACWIA directs the National Science Foundation to contract with the National Academy of Sciences to conduct a study to assess the status of older workers in the information technology field, including ''the relationship between rates of advancement, promotion, and compensation to experience, skill level, education, and age.'' See ACWIA, Section 417(b). The National Science Foundation also has been charged with conducting a study and preparing a report to assess labor market needs for workers with high technology skills during the next ten years. See ACWIA, Section 418(a) . The ACWIA further directs the Executive Branch to bring to the attention of Congress any reliable economic study that suggests that the increase in the number of H–1B workers effected by the ACWIA ''has had an impact on any national economic indicator, such as the level of inflation or unemployment, that warrants action by the Congress.'' See ACWIA, Section 418(b). Both of these reports were required to be submitted to Congress no later than October 1, 2000. NAS, through the Computer Science and Telecommunications Board, National Research Council, has invited submission of ''white papers'' and has scheduled a series of meetings to discuss and receive input for a single study addressing both sets of issues. Further information about this study, and the means by which members of the public may furnish input, can be found at *http://www4.nationalacademies.org/cpsma/ITWPublic2.nsf.*

1. What Constitutes ''Employed by the Employer,'' for Purposes of Prohibiting a Covered Employer from Displacing U.S. Workers in Its Own Workforce? (§ 655.715)

The ACWIA displacement protections only apply to U.S. workers ''employed by the employer'' and to U.S. workers ''employed by the other employer'' where the H–1B worker is placed at another employer's worksite and there are indicia of employment. See Section 212(n)(2)(E)(i) and (F) of the INA as amended by ACWIA, 8 U.S.C. 1182(n)(2)(E)(i) and (F). The ACWIA contains no definition of the phrase ''employed by the employer.'' The Department stated its view in the NPRM that where Congress has not specified a legal standard for identifying the existence of an employment relationship, the Supreme Court requires the application of ''common law'' standards, as held in *Nationwide Mutual Insurance Co.* v. *Darden*, 503 U.S. 318 (1992); *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730 (1989). Noting the Supreme Court's teaching that the common-law test contains ''no shorthand formula or magic phrase that can be applied to find the answer, * * * [and requiring that] all of the incidents of the relationship must be assessed and weighed with no one factor being decisive'' (*NLRB* v. *United Ins. Co. of America*, 390 U.S. 254, 258 (1968)), the Department proposed regulatory language setting out 16 factors (adapted from EEOC Policy Guidance on Contingent Workers, Notice No. 915.002 (Dec. 3, 1997)) that would indicate the existence of an employment relationship under the common law test. The NPRM sought comments regarding the proposed test and alternative formulations of the common law or other tests for determining whether an employment relationship exists, such as the test under the FLSA and the test used in the federal tax context.

The Department received nine comments on its proposal.

The NACCB agreed that, in light of the absence of a statutory standard for determining the existence of an employment relationship, the common law standard should be used. It also observed that the common law test used under the Internal Revenue Code should be the same as the common law test set forth in the NPRM and should provide consistent results. The NACCB opposed application of the Fair Labor Standards Act test. The AFL-CIO also agreed that the common law test was appropriate and stated that this determination should be based on objective criteria. It urged the Department to prevent employers from hiding behind artificial titles and job descriptions; it also noted its belief that many individuals deemed independent contractors (or employees of a staffing firm) are actually common law employees.

Four commenters (AILA, ITAA, Latour, Chamber of Commerce) rejected the common law test as unnecessary, failing to reflect contemporary realities within the regulated community, or lacking predictability. ITAA also asserted that the ACWIA did not signal a departure from the definitions of an ''employer'' under the current regulations of this Department (20 CFR 655.715) and the INS (8 CFR 214.2(h)(4), 274a.1(g)). Three of these commenters recommended using the standards set forth by the Internal Revenue Service, noting that these standards are already used by the industry and would eliminate confusion and promote predictability. BRI and Baumann recommended that the Department eliminate ''skill'' as a factor because it is essentially a requirement of the H–1B program. Senators Abraham and Graham expressed the view that the proposed test was ''unnecessarily complicated and subjective'' and

suggested that ''[t]he Department's regulation should follow the statute and our intent by using [as a sole factor whether] 'the worker is considered an employee of the firm or the client for tax purposes, *i.e.,* the entity withholds federal, state, and Social Security taxes.''' Similarly, AILA suggested that any worker who is classified as an independent contractor for tax and benefit purposes should not be considered an employee. The Chamber of Commerce commented that if the Department lists the common-law factors, it should use the list in the Supreme Court opinions, not the somewhat longer list of factors utilized by EEOC.

After careful consideration of the comments, the Department has concluded that it should utilize the common law standards for determining whether a United States worker is employed by a dependent employer—the status that invokes the statute's protection against displacement. As noted in the NPRM, the Department believes that it is required by Supreme Court precedent to apply the common law test for employment relationship in the absence of plain statutory language directing the use of a different test. None of the comments submitted persuade the Department that it may craft a different test under the ACWIA.

Upon reflection, however, the Department has concluded that the regulation should not include a detailed list of prescribed factors. The Department believes that the factors identified in the NPRM provide a useful framework, based on the common law, for distinguishing between employees and independent contractors. Nevertheless, to avoid any potential misunderstanding that the factors on the list are exclusive or that factors not listed are less deserving of consideration, the Department has decided that no list of factors should be included in the Interim Final Rule. The Interim Final Rule reiterates that the common-law test requires an assessment of all the factors bearing on the employment relationship, with the right to control the means and manner of work being the key determinant but with no one factor controlling.

Some commenters expressed a concern that there is tension between the NPRM's formulation and the IRS test. However, the Department has not been persuaded that such a tension exists between these tests, which are both drawn from the common law multifactor analysis. The NPRM list of factors is quite similar to the factors identified in IRS Rev. Rul. 87–41, 1987—Cum. Bull. 296, 298–99. As noted in the NPRM, the proposed list of factors for determining whether an employment relationship exists was drawn from a framework developed by the EEOC for its policies on contingent workers. And as the EEOC recognized, its framework was derived from non-exclusive lists of factors in *Darden* and the other sources for the common law test cited by the Supreme Court in *Darden: Reid*, the IRS ruling, and the Restatement (Second) of Agency 220(2) (1958).

Each of these sources for the common law test recognizes ''the right to control'' as the key determinant in ascertaining the existence of an employment relationship. As stated by the EEOC: ''The worker is a covered employee * * * if the right to control the means and manner of her work performance rests with the firm and/or its client rather than with the worker herself.'' Similarly, the IRS Revenue Ruling states: ''[G]enerally the relationship of employer and employee exists when the person or persons for whom the services are performed have the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is to be accomplished. * * * It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so.'' See also the Supreme Court in the *Darden* and *Reid* and Section 220(1) Restatement (Second) of Agency. Thus, an employer that properly applies any formulation of the common law test, grounded upon the cited authorities, should obtain the same conclusion regarding an individual's employment status.

In the Department's view, the EEOC's approach (in EEOC Policy Guidance on Contingent Workers, Notice No. 915.002, Dec. 3, 1997) provides an especially useful model for identifying particular factors that can be applied in the context of H–1B employment, particularly where workers are placed at third-party employer worksites. The EEOC established the list as guidance for ascertaining an individual's employment status in the analogous context of staffing firm workers, *i.e.,* workers who are ''placed in job assignments by temporary employment agencies, contract firms, and other firms that hire workers and place them in job assignments with the firms' clients.'' As such, the list is oriented towards individuals providing services, and it provides a focus that facilitates a differentiation among individuals who may possess attributes of both employees and independent contractors. This focus, the Department believes, makes the EEOC formulation useful for resolving employee status questions in the H–1B environment, with its mix of individuals working at a facility operated by one employer, but who may be self-employed or employees of another employer(s). Employers may wish to consider other sources in determining employee status, including IRS materials. The IRS, for instance, has identified the following factors that may be helpful in determining employee status in the H–1B context: the firm or the client provides training to the worker so that the worker may perform services in a particular manner or method; the worker performs services for only one firm at a time; and the worker has been personally selected to perform the job by the client or firm. See IRS Rev. Rul. 87–41, 1987–Cum. Bull. 296, 298–99.

The Department is not persuaded that Congress evinced any intention that tax law principles should be applied by employers or this Department in determining employee status for purposes of the H–1B program. The statute evinces only that the common law test be applied, not any particular formulation of the test. The Department disagrees with the further suggestion that the IRS formulation of the common law test should be the preferred method for making employee status determinations. Such use could pose some problems in administering the H–1B program. While the IRS has developed a list of factors that it will consider in making employee independent contractor decisions, Congress, for an extended period of time, has limited that agency's interpretation and application of its common law-based test. Congress has imposed significant statutory limitations upon the IRS in collecting taxes from employers who fail to withhold taxes from individuals whom employers claim to be independent contractors. See, *e.g.,* Section 530 of Pub. L. 95–600, as amended, 26 U.S.C. 3401 note, discussed in *Hospital Resource Personnel, Inc.* v. *United States,* 68 F.3d 421 (11th Cir. 1995). Section 530(b) also prohibits the IRS from issuing any regulations or Revenue Rulings that would further clarify the employment status of individuals for purposes of the employment taxes. Consequently, the Department cannot be confident that an employer's treatment of a worker as an independent contractor or an employee for tax purposes accords with the common law test. Accordingly, the Department does not consider an

employer's designation of a worker's status for tax purposes to be controlling on the matter of that worker's status for purposes of the H–1B program. The fact that an employer has treated a worker as an independent contractor for tax purposes, without protest by the IRS, will not excuse an employer's non-compliance with its H–1B obligations toward that worker as an employee if the common law test shows the worker to be an employee.

The Department is not persuaded that the factor relating to a worker's level of skill or expertise should be eliminated from the common law test. While the Department agrees with the observation that the occupations for which H–1B workers are sought require more advanced skills than those required for many other jobs, it remains true that a worker's advanced skill is one of the factors weighing against an employment relationship and must be examined in determining whether a worker who may have been displaced was an employee or an independent contractor.

Finally, the Department notes that although this test is most important in the context of displacement, the common law test applies in any situation under the H–1B program where the question of employment relationship may arise (see the discussion in IV.B.1, above, regarding application of the formula for determining whether an employer is H–1B-dependent). The Interim Final Rule states, however, that every H–1B nonimmigrant is by definition an employee of the petitioning employer since only employees are granted entry/status as H–1B nonimmigrants.

2. What Constitute ''Indicia of an Employment Relationship,'' for Purposes of the Prohibition on Secondary Displacement of U.S. Workers at Worksites Where the Sponsoring Employer Places H–1B Workers? (§ 655.738(d)(2)(ii))

Section 212(n)(1)(F)(ii) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(1)(F)(ii), prohibits the displacement of U.S. workers employed by another (''secondary'') employer, if an H–1B-dependent employer or willful violator intends or seeks to place its own H–1B workers with that other employer in a situation where, among other things, there are ''indicia of an employment relationship between the nonimmigrant and such other employer.''

In his *Congressional Record* statement, Senator Abraham characterized the secondary placement provision as applying ''where the H–1B worker would essentially be functioning as an employee of the other employer.'' Senator Abraham further stated that the requirement that there be ''indicia of employment'' is ''intended to operate similarly to the provisions in the Internal Revenue Code in determining whether or not an individual is an employee.'' 144 Cong. Rec. S12751 (Oct. 21, 1998).

In the NPRM, the Department stated its view that this protection would be invoked where the relationship between the business receiving the services of the H–1B individual possesses some, but not all, of the attributes of an employment relationship. Thus, the Department proposed as a test for this relationship a list of factors that it derived from the common law test which the Department had proposed for ''primary displacement'' (discussed above in IV.D.1). The Department identified nine factors it believed to be most useful in determining whether the H–1B worker and the business at which he or she has been placed by the primary employer possess the requisite ''indicia of an employment relationship.'' The Department requested comments on its proposed test and any alternative formulations for determining secondary displacement coverage.

Several commenters responded to the proposal on this issue. Two employee organizations (AOTA, APTA) generally endorsed the Department's proposal, but sought assurances that the Department will hold recruitment/staffing firms to the same standard as other employers. One individual (Miano) urged that workers on H–1B visas should be considered employees of a company if they work at that company's facility and take direction from the company's management. Rapidigm asked the Department to explain how it settled on the factors it identified in the proposal.

Senators Abraham and Graham and three representatives of employers (AILA, ITAA, Latour) asserted that the legislative history of the ACWIA notes that ''indicia of employment'' was meant to operate in a manner similar to IRS provisions and that the focus of the regulations should be on that test. Senators Abraham and Graham continued: ''[O]ur intent was simple * * *. Anyone without [a contract directly with the putative employer], whether an independent contractor, or an employee of a third-party employer, would not be 'employed by the employer.' '' The Chamber of Commerce reiterated its opposition to application of common law standards, but urged that if the Department does adopt these standards, both the quantity and quality of common law factors sufficient to establish ''indicia of an employment relationship'' should be substantially the same as those necessary to establish the ''employed by the employer requirement.'' The Chamber of Commerce also requested that the Department strike from the list of the ''indicia'' factors that ''the client can discharge the worker from providing services to the client'' because this factor, it asserts, places an unnecessary burden on typical contracting and subcontracting business arrangements, under which a client retains the right to insist that a worker be removed from the client's jobsite. TCS expressed concern that the Department's proposal may improperly lead to the result that its consultants will be seen as meeting the ''indicia'' nexus. In this regard, it stated that the Department fails to mention what TCS believes to be the most important criterion—who pays, assigns, and trains the individual at issue, and who possesses ultimate control over him—and does not indicate how various factors are to be weighed. AILA and ACIP expressed concern that a worker supplied by another company will often be subject to the controls identified by the Department as ''indicia.'' ACIP contended that the Department may be misinterpreting the common law, asserting that a client-firm's typical control of hours, location, access, etc. should not turn an individual into the client's employee—a relationship that should be rare, not commonplace. Both groups also suggested that this test will operate contrary to settled subcontracting practices.

The Department has carefully considered these comments. As explained previously, the Department is not persuaded by the suggestion that it could use anything other than the common law test for an employment relationship as the starting point for interpreting the ''indicia of an employment relationship.'' The Department proposed a subset of the common law factors, which, in its view, are relevant and useful in determining the relationship between the H–1B worker and the client business, as distinct from those factors of the test that simply focus on whether an individual is self-employed.

The Department sees no merit to the suggestion that Congress intended the use of the ''employment relationship'' test to determine the ACWIA-specific relationship between an H–1B worker and the secondary employer, which, in the language of the statute, possesses ''indicia of an employment relationship.'' If Congress had wanted to use the same test for both purposes, it could have done so by using the same

language as it did for the relationship between a U.S. worker and his or her employer. That congress chose different language is a strong indication that it had a different intention than suggested by the commenters.

Furthermore, how the employee is treated for IRS purposes is simply not pertinent, and is contrary to the clear intent of the provision. IRS is concerned only with the entity which is paying the worker—in this case necessarily the H–1B employer, not the secondary employer. Thus 26 U.S.C. 3401(d) defines ''employer'' for purposes of payroll deductions as ''the person for whom an individual performs or performed any service, of whatever nature,'' except that if that person does not have control of payment of wages, the person having such control is the employer. Regulations which followed the IRS approach would thus have the result of nullifying the secondary placement protections of the ACWIA.

Finally, reading the provision as requiring less than a full employment relationship is congruent with the purpose of the statute to assist U.S. workers in retaining their employment where their jobs may be threatened by the actual or potential placement of H–1B workers. Congressman Smith commented that the legislation is intended to address the problems posed by ''job shops.'' In his introduction of the compromise ACWIA bill to the House of Representatives, he stated:

> ''The employers most prone to abusing the H–1B program are called job contractors or job shops * * *. They are in business to contract their H–1Bs out to other companies. The companies to which the H–1Bs are contracted benefit by paying wages to the foreign workers often well below what comparable Americans would receive. Also, they do not have to shoulder the obligations of being the legally recognized employers; the job shops remain the official employers.''

144 Cong. Rec. H8584 (Sept. 24, 1998). Senator Abraham also stressed the importance of the layoff protections of the bill, ''very mindful of the concerns people have that somehow these H–1B temporary workers might end up filling a position where an American worker could have filled the slot. Our goal is to make sure that does not happen.'' 144 Cong. Rec. S10878 (Sept. 24, 1998). There is certainly no suggestion in Senator Abraham's explanation of this provision that it should be narrowly construed: ''An H–1B dependent company acting as a contractor must attest that it also will not place an H–1B professional in another company to fill the same job held by a laid off American 90 days before or after the date of placement.'' *Ibid.*

In the NPRM, the Department did not indicate the point at which the relationship between a customer and an H–1B worker would trigger the displacement obligation. In this regard, the Department stated that it had considered, but rejected, an approach that would require the presence of at least some unspecified number of factors as a litmus test. No commenter expressed disagreement with this decision.

Upon review, the Department has decided that, as with the test of employment relationship, the single most important consideration will be whether the customer has the right to control when, where, and how the worker performs the job, *i.e.,* the manner or method by which the particular duties of the job are to be performed. Thus, the presence of this element alone suggests that the relationship between the customer and the H–1B worker approaches that of employee to employer. Although a consideration, the displacement obligation would not be triggered simply because the H–1B worker performed duties on the customer's premises.

The Department disagrees with the suggestion that the approach it proposed is likely to upset usual contracting relationships. The triggering of the secondary displacement liability of the H–1B employer does not itself mean that there is an employment relationship between the secondary employer and the H–1B worker. The fact that the placing employer ordinarily will control important aspects of the relationship, such as the pay, assignment, and training of the H–1B worker, does not mean that the relationship between the worker and the employer's client will not bear sufficient ''indicia of employment'' for the secondary displacement provisions of the ACWIA to apply. However, these provisions apply to the primary employer, which becomes liable under the terms of its LCA—not to the secondary employer, which incurs no liability under the ACWIA for the displacement.

The Department is unpersuaded that it should eliminate any of the criteria it proposed as ''indicia.'' Contrary to the suggestion of some commenters, it is fully consistent with the purposes of the Act that the proposed test may result frequently in a conclusion that the secondary displacement prohibition is applicable.

3. What Constitutes an ''Essentially Equivalent Job,'' for Purposes of the Non-Displacement provisions of the ACWIA? (§ 655.738(b)(2))

Section 212(n)(4)(B) of the INA as amended by the ACWIA provides that displacement occurs if the employer ''lays off the [U.S.] worker from a job that is essentially the equivalent of the job for which the nonimmigrant or nonimmigrants is or are sought. A job shall not be considered to be essentially equivalent of another job unless it involves essentially the same responsibilities, was held by a United States worker with substantially equivalent qualifications and experience, and is located in the same area of employment as the other job.'' The area of employment is defined as ''the area within normal commuting distance of the worksite or physical location where the work of the H–1B nonimmigrant is, or will be, performed. If such worksite or location is within a Metropolitan Statistical Area, any place within such area is deemed to be within the area of employment.''

Congressman Smith explained that Congress intended to prevent covered employers from replacing or displacing American workers with H–1B workers. In his words:

> ''Congress ma[de] clear that the prohibition is directed to circumstances in which a covered employer hires H–1B workers with similar qualifications to those of laid off American workers in similar jobs.
>
> ''This language should not be interpreted as prohibiting and preventing only a one-for-one replacement of a particular laid off American worker; such an interpretation would be an overly rigid reading and a mischaracterization of Congressional intent. The focus of the provision is on the placement of H–1B workers in the kinds of jobs previously held by American workers. If an American worker was laid off from a job and the employer then hires an alien (on an H–1B visa) with sufficiently similar skills and experience to perform a sufficiently similar job, a prohibited displacement has taken place. This is a violation of the attestation regardless of whether the replacement was intentional or unintentional, or whether it was done in bad faith or not.''

144 Cong. Rec. E2324 (Nov. 12, 1998). He also noted that a dependent employer or willful violator is prohibited from ''concealing a lay off/displacement by making a modest or cosmetic change in job duties and responsibilities [or] * * * by some other subterfuge or pretense.''

On the other hand, Senator Abraham remarked:

> ''The reason for the change from ['specific employment opportunity'] is that it was thought desirable to include within the scope

of this prohibition situations where an employer sought to evade this prohibition by laying off a U.S. worker, making a trivial change in the job responsibilities, and then hiring the H–1B worker for a 'different'' job' * * *. For similar reasons, especially given the nature of the jobs in question, the geographical reach of the prohibition was extended so as potentially to cover other worksites within normal commuting distance of the worksite where the H–1B is employed. This was to cover the eventuality that an employer might try to evade this prohibition by laying off a U.S. worker, hiring an H–1B worker to do that person's job, but assigning the H–1B worker to a different worksite very close by in order to conceal what was going on.''

144 Cong. Rec. S12750 (Oct. 21, 1998).

Senator Abraham contrasted the provision in the ACWIA with the original definition in the House, which did not contain the phrase ''from a job that is essentially the equivalent of the job for which the [H–1B worker] is being sought.'' Senator Abraham stated that ''[t]hat phrase was added to make clear that this provision is not intended to be a generalized prohibition on layoffs by covered employers seeking to bring in covered H–1Bs, but rather a prohibition on a covered employer's replacing a particular laid-off U.S. worker with a particular covered H–1B.''

In the NPRM, the Department explained that the comparison required to determine whether an unlawful displacement has taken place involves: a comparison first of the job held by the H–1B worker with the job held by the U.S. worker to determine if the jobs involve essentially the same responsibilities; a comparison of the U.S. worker with the H–1B worker to determine if they have substantially equivalent qualifications and experience; and a determination of the areas of employment, which must be the same for each worker in question.

The Department proposed that when comparing the job responsibilities component of the provision, the focus should be on the core elements of the job, such as supervisory duties, design and engineering functions, or budget and financial accountability, and on whether both workers are capable of performing those duties. The Department further proposed that peripheral, non-essential duties that could be tailored to the particular abilities of the individual workers would not be determinative. The Department suggested that it might be useful to apply the standards under the Equal Pay Act (''EPA'') (29 U.S.C. 206(d)(1)) for determining the essential equivalence of jobs. See 29 CFR 1620.13 *et seq.* In this regard, the Department noted that the EPA standards focus on actual job duties and responsibilities, rather than a comparison of sometimes artificial job titles and position descriptions. The Department noted its concern that the protection for U.S. workers could be thwarted if essential equivalence required a match of insubstantial aspects of jobs.

As to the qualifications and experience of the workers, the Department proposed that the comparison be confined to matters which are normal and customary for the job, and which are necessary for its successful performance. In this regard, the Department proposed that although it would be appropriate to compare the relative qualification of the H–1B and U.S. workers by virtue of their education, skills, and experience, it would be inappropriate to compare their relative ages or their ethnic identities, or whether they are exactly alike in their educational background and work experiences. As an illustration, the Department stated its view that unlawful displacement could occur where an H–1B worker is ''overqualified'' for the job under comparison.

With regard to ''area of employment,'' the NPRM noted that the definition is much the same as the Department's regulatory definition at § 655.715 (see IV.P.5, below).

The Department received five comments on its proposals on this issue.

The AFL–CIO stated that the Department recognized that employers might seek to hide behind ''artificial job titles and position descriptions,'' and that the comparison is between the U.S. worker's and the H–1B worker's qualifications for the job in question. The AFL–CIO stated that the Department must continue to rely on objective criteria such as the North American Classifications (NAICS), ''rather than the employer's self-serving declarations . . . of 'intangible' qualifications, such as being a 'team player,' * * *''

Senators Abraham and Graham took issue with the Department's use of the EPA standard for a ''job'' which, they contended, takes the Department beyond the one-for-one displacement definition provided by the statute for determining whether an H–1B nonimmigrant displaced a U.S. worker in the same job. They stated that the EPA applies a ''substantially similar''definition, which, in their opinion, is much broader than the ACWIA's ''essentially equivalent'' jobs standard. ITAA requested the Department to adopt a narrow reading of the displacement prohibition, suggesting that the Department's proposal improperly attempted to put in place an approach that had been rejected during the legislative process. ACE urged the Department to reconsider its plan to ''strip away'' the relevant information about job responsibilities; it suggested that the Department, instead, should require that comparisons take into account the context and the actual, specific requirements and skills of a particular job.

AILA took issue with the ''core elements'' approach as too broad and too difficult for an employer to apply. For example, AILA contended that under the ''core responsibilities'' analysis, a software engineer for a telecommunications project would appear to have the same core responsibilities as a software engineer for administrative functions, although the positions are very different and require different expertise and knowledge. On the other hand, AILA stated that the essential equivalence analysis of the EPA is more in keeping with legislative intent. AILA proposed a test that would compare the employer's existing job requirements and duties to those of the H–1B employee.

AILA also stated its approval of the Department's proposals on ''substantially equivalent'' and ''area of intended employment.''

The Department continues to believe the distinction between core and peripheral elements of a job is important. The Department believes that its reference to the ''core elements'' of the job may have been misunderstood. The Department did not mean to imply, for example, that if each job required design and engineering functions, for example, there would be a match of core elements of the job, but rather that the design and engineering functions of a job such as software engineer are core rather than peripheral elements. The Department would agree with AILA that a job as software engineer for telecommunications would not ordinarily be similar to a job as software engineer for administrative matters—assuming the employer does not treat the job of ''software engineer'' as fungible and move workers from one project to another without regard to its content.

The Department finds no merit to the suggestion, in effect, that the Department's interpretation of the phrase ''essentially equivalent'' is not based on the language of the ACWIA, but on an approach that was discarded during the legislative process. The Department believes that its interpretation of this term is well-grounded in the specific language of the ACWIA. The Department is not

persuaded that the ACWIA's displacement provisions only operate on a ''one-to-one'' basis. Where the workforce in question is small, it is quite possible that the comparison will be so focused, but in other situations a wider inquiry will have to be undertaken. For example, where an employer, through reorganization, eliminates an entire department with several employees and staffs this function with one or more H–1B workers, any U.S. worker(s) in that Department who occupies(d) an essentially equivalent job as that filled or to be filled by the H–1B worker(s) would be protected against displacement. The Department will also look closely at situations where a U.S. worker is laid off and his/her job is filled by a U.S. worker colleague whose own job is then filled by an H–1B nonimmigrant; the Department would seek to determine whether the first U.S. worker was, in fact, the subject of a prohibited displacement.

The Department also continues to believe that the regulations implementing the EPA provide a useful source of standards for assessing the ''essential equivalence'' of jobs. Neither the EPA nor the ACWIA requires that the jobs under comparison be identical as a condition for invoking their provisions. Although the two statutes have operative language that differ in their specifics, each requires a determination of ''equivalence'' if an employee is to secure its protection. Thus, the EPA, at 29 U.S.C. 216(d)(2), provides: ''[No employee shall receive less pay than an employee of another gender] for equal work on jobs the performance of which requires equal skill, effort and responsibility under similar working conditions.'' This compares with the ACWIA, at Section 212(n)(4)(B), which provides: ''[A U.S. worker is displaced] from a job if the employer lays off the worker from a job that is essentially the equivalent of the job for which the [H–1B worker or workers] is or are sought,'' *i.e.,* the job ''involves essentially the same responsibilities, was held by a United States worker with substantially equivalent qualifications and experience, and is located in the same area of employment as the other job.'' With regard to each statute, the regulatory challenge is to determine the point at which two arguably different jobs that share some but not all characteristics become essentially alike for the purpose of the required statutory comparison. See also the Department's regulations under the Family and Medical Leave Act, 29 U.S.C. 825.115(a), which use the same concept in defining ''equivalent position.'' On the other hand, it is not the Department's intention to adopt wholesale the EPA regulations, but rather to adapt those provisions which it considers relevant and appropriate in satisfying the analogous but somewhat different statutory test under the ACWIA. Significantly, under neither statute did Congress require an identity of jobs as a condition to invoke the statutory protection afforded workers.

As noted in the NPRM, it is important that the comparison of the job filled by an H–1B worker and the job held by a U.S. worker take into account the actual duties of the jobs. See 29 CFR 1620.13(e), 1620.14(a). U.S. workers would receive little protection if the comparison were to be made simply by job titles or position descriptions that easily can be tailored to disguise jobs, which in their actual performance, are essentially alike. The same concerns require that the comparison take into account the most significant components (*i.e.,* core elements) of the jobs—so that a U.S. worker does not lose the Act's protection where the differences between the job and the workers themselves are insubstantial, peripheral, or reflect discrimination against U.S. workers. See 29 CFR 1620.14(a).

As under the EPA, the jobs will be viewed as different if the skill required to perform the job the U.S. worker was holding is substantially different than that required to perform the job of the H–1B worker. This does not end the inquiry, however, because the ACWIA requires in addition the comparison of the experience and qualifications of the workers, considering the experience, training, education, and ability of the workers as measured against the actual performance requirements of the jobs. Thus an inquiry must first be made into whether both workers possess the minimum qualifications for the job. Unlike the EPA, however, the comparison includes not only the experience and qualifications required to perform the job, but also experience and qualifications which are directly relevant in that they would materially affect a worker's relative ability to perform the job better or more efficiently. Furthermore, the statutory standard requires only that the workers' qualifications and experience be ''substantially equivalent;'' certainly no two workers would have identical experience and qualifications. For example, the Department would consider a bachelor's degree from one accredited university to be substantially equivalent to a bachelor's degree another accredited university. Similarly, the Department would consider 15 years of experience to be substantially equivalent to 10 years of experience. Finally, a worker's qualifications or experience that are not needed or useful in performing the specific requirements of the job are not relevant to the comparison. For example, the Department would not ordinarily consider experience or a degree in an unrelated field to be relevant.

As suggested in the NPRM, the Department's Interim Final Rule utilizes the current definition of ''area of intended employment'' at § 655.715 to define ''same area of performance.''

4. How Does the ACWIA Distinguish Between a Prohibited ''Layoff'' and a Permissible Termination of an Employment Relationship? (§ 655.738(b)(1))

The ACWIA's non-displacement prohibition applies only to a ''layoff'' as that term is defined by the ACWIA. Section 212(n)(4)(D)(i) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(4)(D)(i), states that a ''layoff'' means ''to cause the worker's loss of employment, other than through a discharge for inadequate performance, violation of workplace rules, cause, voluntary departure, [or] voluntary retirement.'' Furthermore, where loss of employment is caused by ''the expiration of a grant or contract (other than a temporary employment contract entered into in order to evade [the displacement provisions of the ACWIA],'' it is not a layoff within the meaning of the ACWIA.

Congressman Smith and Senator Abraham both stated that Congress intended that the expiration of a temporary employment contract would be treated as a layoff if an employer enters into such a contract with the intent of evading the displacement prohibition. 144 Cong. Rec. E2324 (Nov. 12, 1998); 144 Cong. Rec. S12750 (Oct. 21, 1998).

The Department explained in the NPRM that it would closely scrutinize any situation where there is some question regarding the voluntariness of the resignation or retirement of a U.S. worker. The Department also proposed that it would look to well-established principles concerning the ''constructive discharge'' of workers who are pressured to leave employment.

In the NPRM, the Department stated its view that the statutory exception where the U.S. worker's loss of employment is caused by the expiration of a grant or contract was meant to address the common situation where scientists and other academic personnel

are expressly hired to work under a contract or grant from another institution. Thus, the Department proposed that where the funding is lost, and the worker is not replaced because of this loss, no layoff would occur within the meaning of the ACWIA. The Department similarly proposed that where a staffing firm or other commercial firm hires an employee expressly to work on a specific project under a contract with another business entity, it may choose, in appropriate circumstances, to discontinue his or her employment without violating the ACWIA.

By way of illustration, the Department described a situation where no displacement violation occurs—the contract project ends and is not renewed, and the employer does not have a practice of then moving its employees to work under other contracts, or placing its employees on a call back list or its equivalent, but instead terminates the relationship for lack of work. The Department distinguished the preceding situation from one where a staffing firm places employees at other businesses, does not hire employees for a specific client or contract, and ordinarily moves its employees to perform work under other contracts. The Department proposed that in this latter situation, the Department might find a displacement if the employer terminates U.S. workers and hires H–1B workers to perform essentially the same job under a different contract or on a different project. The NPRM also noted the Department's intention to closely scrutinize situations where it appears that a particular contract, including commercial contracts and grants as well as employment contracts, has been used to evade the dependent employer's obligation not to displace U.S. workers.

The Department received several comments on this issue.

AOTA and the AFL–CIO generally supported the Department's approach. The AFL–CIO endorsed the Department's recognition of constructive discharge. The Chamber of Commerce, AILA and ACIP pointed out that the Department's proposal fails to mention that the ACWIA expressly excludes from ''layoff'' any discharge for inadequate performance, violation of workplace rules, or cause.

The Department acknowledges its oversight in failing to paraphrase the introductory clause to the ACWIA's definition of ''lays off'' in the NPRM discussion of this point. This clause lists those personnel actions, such as a discharge for poor performance or cause, that should not be mistakenly considered as a ''layoff.'' The omission of this language from the NPRM was not intended to signal that this part of the definition was insignificant—only that this portion of the statute did not seem to require any regulatory explication. The Interim Final Rule, however, contains a complete statement of the statute's layoff provision, including the statutory exceptions.

AOTA stated that the Department should scrutinize arrangements that may appear to be limited to the duration of a contract or grant; in its view, this would prevent staffing firms from falsely claiming that it had hired a person specifically for the contract in question. The AFL–CIO suggested that employers who claim that a U.S. worker was not laid off due to expiration of contract or grant must document that they have not engaged in a pattern or practice of denying workers assignment to other projects. Two commenters (Kirkpatrick & Lockhart, Latour) noted that the Department correctly recognized that the expiration of a contract leading to the termination of employment is not a ''layoff'' for ACWIA purposes.

Senators Abraham and Graham and ITAA stated that there should be no distinction between academic and other situations involving the expiration of a contract or grant. They expressed disagreement that it would be a layoff where a staffing firm deviates from its practice of continuing the employment of a worker after the expiration of a contract and fails to continue the employment of a U.S. worker. ITAA also objected to what it viewed to be an apparent presumption by the Department that temporary contracts ordinarily would be used to evade the displacement prohibition. The NACCB asserted that the distinction between employers that usually transfer employees from contract to contract and those that do not have that practice is impractical and unworkable in the information-technology staffing industry. It also provided examples of situations that it believed would be problematic under the Department's proposal. BRI expressed concern that the Department's approach would fail to account for situations where a particular worker was not qualified for positions under other contracts held by the employer.

The Department does not presume that temporary contracts ordinarily will be used to evade the statute's displacement obligations. The Department also does not hold the view that Congress believed that employment contracts tied to the life of a grant or contract were solely a creature of academia. While one of the examples discussed in the NPRM concerned the use of such academic contracts, the NPRM also discussed the applicability of the provision to staffing firms, whose contracts typically are with more commercially-oriented businesses.

As the NPRM suggested, the Department recognizes that the employment of workers on a contract or grant basis could pose some problematic issues. The comments received confirmed the Department's view. While the statute recognizes that a layoff typically will not occur where ''a worker's loss of employment * * * [is caused by] the expiration of a grant or contract,'' it expressly distinguishes this situation from an unlawful ''temporary employment contract entered into in order to evade a [displacement] condition.'' Section 212(n)(4)(D)(i)(I). The Department intends to look closely at such contracts to ensure that employers do not attempt to evade the statutory obligations.

Upon further review of this matter and consideration of the comments received, the Department has decided to continue the approach described in the NPRM. The Department, however, believes it appropriate that the totality of the circumstances be considered to determine whether a layoff has occurred. In many situations, the Department expects that it will be obvious whether a layoff has occurred (*e.g.,* where a worker has voluntarily retired). In other cases, it will be unnecessary to resolve the question of whether the loss of the job was because of the expiration of a contract or grant because the jobs are clearly not equivalent.

In the more difficult cases, a determination of whether the expiration of a grant or contract caused the loss of employment such that a layoff did not occur will require an examination of the practice of the employer (in cases of primary displacement) or the customer (where secondary displacement is at issue) insofar as it bears on the following questions: whether the U.S. worker's job, in fact, was tied to the life of a particular contract or grant; whether the employer has a practice, either as a general matter or with respect to the employee in question, to continue the individual, without interruption in his employment on other contracts or grants; whether the employer has a practice, again either as a general matter or with respect to the employee in question, that the employee will be called back when a contract for which he or she is qualified becomes available; whether the employer departed from its usual practice insofar as the hire or

placement of the H–1B worker is concerned; whether the reason for the departure from the practice was for a reason unrelated to the employment of the H–1B worker; whether there is any evidence to suggest that the employer intended to evade its displacement obligations; and the employer's previous history of compliance with its displacement and other H–1B obligations. This analysis will be used by the Department to determine whether it is the expiration of the contract or grant which has caused the termination of the employee or some other consideration such as the hiring of the H–1B worker.

The Department notes that where an employer has a practice of continuing employees on different projects or grants where work is available, but of laying workers off if there is no work available that fits the worker's skills and later offering the worker work under a new contract when one becomes available, the Department would expect the employer to contact the U.S. worker and offer the position prior to petitioning for an H–1B worker for the position. The Department will closely examine such situations to determine if the U.S. worker has been unlawfully displaced, and if not, if the employer's failure to contact such former employees is a recruiting violation.

5. What Constitutes ''a Similar Employment Opportunity'' for a U.S. Worker, Which—if Offered—Would Not Constitute a Prohibited ''Layoff'' or Displacement of the Worker?

Section 212(n)(4)(D)(i)(II) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(4)(D)(i)(II), provides that, even where an H–1B worker is placed in a job formerly held by a U.S. worker, no ''displacement'' or ''layoff'' is considered to have occurred if the U.S. worker was first offered but refused ''a similar employment opportunity with the same employer.''

As stated by Congressman Smith: ''The intent of Congress is that the 'similar employment opportunity with the same employer at equivalent or higher compensation and benefits' would be a meaningful offer.'' 144 Cong. Rec. E2324 (Nov. 12, 1998). Senator Abraham stated that it ''is the intent of Congress that the determination of similarity take into account factors such as level of authority and responsibility to the previous job, level within the overall organization, and other similar factors, but that it not include the location of the job opportunity.'' 144 Cong. Rec. S12750 (October 21, 1998).

In the NPRM, the Department described this provision as allowing a dependent employer an affirmative defense to its displacement of a U.S. worker if the employer can establish that it offered a *bona fide* transfer opportunity to the worker. The Department proposed that the U.S. worker would need to be offered not simply another job with a similar title, but that the offered position also carry with it attributes such as a similar level of authority and responsibility within the organization, a similar opportunity for advancement within the organization, similar tenure, and a similar work schedule.

Four commenters responded to this proposal.

The AFL–CIO asserted that by using the term ''employment opportunity'' rather than ''job'' or ''position,'' Congress intended that working conditions, such as schedules, worksite location, level of authority and discretion, and potential to advance, be factors that determine the similarity of opportunity, and that the term does not simply reflect a comparison of compensation and benefits. One commenter (Latour) urged the Department to be sensitive to the geographic needs of employers in administering this section of the ACWIA, noting that U.S. workers often are less willing to go to some localities than H–1B workers.

Most of the factors listed by the AFL–CIO are included in the Interim Final Rule. The Department notes that, apart from the economic comparison proposed by the Department, as discussed in the next section, no commenter objected to the other illustrative factors proposed by the Department in measuring ''similar employment opportunity.'' AILA stated that it agreed that the factors listed by the Department in the NPRM are appropriate for determining the similarity of an employment opportunity offer. The AFL–CIO identified as an additional factor, ''the level of * * * discretion'' of the two positions, which, it asserted, should be taken into account. This factor, the Department believes, is inherent in any comparison between two jobs, and it has specifically included this factor in the Interim Final Rule.

The Department has not included ''worksite location'' as an additional factor, as had been suggested by the AFL–CIO. The intended meaning of this term is not clear to the Department. To the extent it is intended to require a comparison of the relative costs of living in the areas of the jobs—a consideration discussed in the next section of the Preamble—the Department's proposal already accommodated the suggestion. If the AFL–CIO is suggesting that an employer should not be able to offer a job in a different geographic location, the Department disagrees with this suggestion. Although the ACWIA's language does not foreclose an interpretation that would require an offered position to be within the same geographic area in order to satisfy the test of ''similarity,'' the Department believes that this would unnecessarily limit an employer's ability to restructure its operations in order to ensure that no U.S. workers are displaced by an H–1B worker. Although the Department has not included worksite location as an explicit consideration in evaluating similarity of the employment opportunity, the Department notes that the offer of a similar employment opportunity must be *bona fide.* The Department would not consider an offer to be *bona fide* if all of the facts and circumstances indicate it is designed to be rejected by the employee and therefore is a subterfuge for a layoff.

6. What Constitutes ''Equivalent or Higher Compensation and Benefits'' for a U.S. Worker, for Purposes of the Other Job Offer to That Worker so as to Not Constitute a Prohibited ''Layoff'' or Displacement? (§ 655.738(b)(1)(iv)(C))

Section 212(n)(4)(D)(i)(II) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(4)(D)(i)(II), provides that no prohibited ''layoff'' of a discharged U.S. worker occurs if the U.S. worker is offered another employment opportunity with the same employer ''at equivalent or higher compensation and benefits than the position from which the employee was discharged.''

Congressman Smith stated: ''It is Congress'' intent that an employer should not be able to evade attestation by making an offer of an alternative employment opportunity without considerations such as relocation expenses and cost of living differentials if the alternative position was in a different geographical location.'' 144 Cong. Rec. E2324 (Nov. 12, 1998). Senator Abraham stated that ''the determination of similarity * * * [does] not include the location of the job opportunity.'' 144 Cong. Rec. S12750 (Oct. 21, 1998).

In the NPRM, the Department proposed that an ''opportunity'' could not be considered to provide ''equivalent or higher compensation and benefits,'' if that ''opportunity'' would provide the worker a lower disposable income, or would require the worker to incur expenses that drive down his financial standing. The Department also noted that Congress, by specifying ''equivalent or higher'' pay and benefits,

must have intended that the U.S. worker be offered a positive, rather than negative, ''employment opportunity.''

The Department also proposed that, ''[a]ssuming the regulations provide that a 'similar employment opportunity' may include a transfer to another commuting area,'' that opportunity must take into consideration matters such as cost of living differentials and relocation expenses (*e.g.,* a New York City ''opportunity'' offered to a worker ''laid off'' in Kansas City). The Department also noted that it was considering whether it would be appropriate for this purpose to use principles adapted from regulations defining equivalent compensation and benefits under the Equal Pay Act and the Family and Medical Leave Act. See 29 CFR 1620; 29 CFR 825.215(c).

The Department received five comments on this issue and its proposals.

The AFL–CIO agreed with the Department's proposal, noting that a position resulting in an actual loss of ''real wages'' for a U.S. worker should not be considered equivalent compensation and benefits. The AFL–CIO also observed that a change of employment that results in higher dependent care costs for an employee has the same consequences of decreasing real wages as cost-of-living and relocation expenses.

AILA, ITAA, the Chamber of Commerce, and Senators Abraham and Graham, on the other hand, contended that the Department's proposal that the cost of living and relocation costs should be considered in determining whether the offered job offers the employee ''equivalent or higher compensation and benefits'' is without support in the ACWIA, and that ''similarity'' should not take into account the geographic location of a job opportunity. The Chamber of Commerce noted that COLAs and other expenses will not necessarily increase with an offer of similar employment, such as where the position offered to the U.S. worker is located in an area with lower costs than the position from which he has been or will be laid off.

The Department believes that whether an employment opportunity provides equivalent or higher compensation and benefits requires consideration of the costs associated with the location of the jobs, *i.e.*, if the employment opportunity takes into consideration both the cost of living and any costs expenditures necessary to relocate to another location. The Department believes this accords with the most natural meaning of the provision. The Department does not believe that an employment opportunity can be *bona fide* if it does not take into consideration these costs which would erode compensation under the job offer.

The Department disagrees with the argument that Congress, by prescribing a geographical condition in section 212(n)(4)(B) for determining if a job offer would provide ''equivalent or higher compensation'' of the job offered to a U.S. worker, but not in section 212(n)(4)(D)(i)(II), evinced an intention that the jobs' locations are to be disregarded in making this latter comparison. The Department notes that the two provisions measure different aspects of the employer's displacement obligation. The first provision defines the universe of jobs which should be compared to determine if a displacement has taken place as those within the same geographical area. The second provision compares the equivalency of jobs which the U.S. worker occupies and is offered. The Department certainly does not believe that where the statutory language in one provision explicitly restricts the comparison to the same locality and in another provision it is silent, it follows that the cost of relocation and the cost of living cannot be taken into consideration in determining the equivalency of compensation between two positions in different localities. In fact, the Department believes that a more appropriate inference would be that Congress intended no such limitation.

The Department, in determining whether a *bona fide* job offer was made, does not intend to second-guess an employer's reasonable good-faith efforts to achieve economic comparability. Ordinarily this could be achieved if the job offer takes into account cost of living adjustments between localities and relocation costs which the employer ordinarily provides. If such cost of living adjustments are not ordinarily provided by the employer, the Department would accept an adjustment based on any published index of pay differentials or cost of living, or use of the adjustments provided by the Federal Government to its employees. In this regard, the Department agrees with the observation by the Chamber of Commerce that if the transfer is to an area with a less expensive cost of living, an employer may offer a position at a reduced rate of pay, provided this accords with the employer's normal policy.

AILA urged the Department not to adopt the EPA and the FMLA standards for equivalency. AILA objected to the use of the FMLA standard on the basis that it requires ''virtual identity,'' rather than the ACWIA's test of ''substantial equivalence.'' With regard to the possible use of the EPA regulations, AILA stated that its use would be inappropriate because ''substantial equivalence'' would be defeated whenever a job offered was located in another geographic area. AILA, instead, requested that ''equivalent or higher'' be determined on a case-by-case basis, in light of all circumstances of the job offer.

The Department notes that AILA has misstated the relevant ACWIA standard, which is ''equivalent or higher compensation and benefits,'' not ''substantial equivalence.'' The Department continues to believe that both EPA and FMLA regulations provide a proper basis for making the comparison of compensation and benefits, although the FMLA regulations are somewhat less useful since they provide less detailed guidance in making an economic comparison of jobs. Accordingly, the Interim Final Rule is based on the following principles drawn from the EPA regulations, 29 CFR 1620.10: Wages include:

> ''all payments made to [or on behalf of] an employee as remuneration for employment [*e.g.*,] all forms of compensation irrespective of the time of payment, whether paid periodically or deferred until a later date, and whether called wages, salary, profit sharing, expense account, monthly minimum, bonus, uniform cleaning allowance, hotel accommodations, use of company car, gasoline allowance, or some other name. Fringe benefits are deemed to be remuneration for employment. * * * Thus, vacation and holiday pay, and premium payments for work on Saturdays, Sundays, holidays, regular days of rest or other days or hours in excess or outside of the employee's regular days or hours of work are deemed remuneration for employment * * *.''

Consistent with 29 CFR 1620.11(a), ''fringe benefits'' include, *e.g.*, such benefits as medical, hospital, accident, life insurance and retirement benefits; profit sharing and bonus plans; leave; and other such benefit programs.

While the Department's interpretation allows for an inclusive definition of compensation and benefits, the Department expects that since the comparison will involve jobs with the same business, the benefit components of the employee's compensation often will be the same, leaving the cost of living differential as the sole or primary variable in most situations. As discussed above, the regulations specifically allow the job opportunity to be in a different locality, provided there is an adjustment for cost of living, and relocation costs are paid.

7. What Is Required of an H–1B–Dependent Employer or Willful Violator Which Seeks to Place H–1B Workers at a Secondary Employer's Worksite? (§ 655.738(d))

Section 212(n)(1)(F) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(1)(F), requires that H–1B-dependent employers and willful violators not place any H–1B worker at another employer's worksite ''unless the [H–1B] employer has inquired of the other employer as to whether, and has no knowledge that * * * the other employer has displaced or intends to displace a United States worker employed by the other employer'' within the period beginning 90 days before and continuing until 90 days after the H–1B worker's placement at that worksite. This requirement applies where there are ''indicia of an employment relationship'' between the H–1B worker and the customer-client of the dependent employer. section 212(n)(1)(G)(ii) further provides: ''The [LCA] application form shall include a clear statement explaining the liability under subparagraph (F) of a placing employer if the other employer * * * displaces a United States worker. * * *'' Additionally, section 212(n)(2)(E) provides that where an H–1B-dependent employer places a non-exempt H–1B worker with another employer in accordance with section 212(n)(1)(F) (*i.e.*, after having made the required inquiry), ''such displacement shall be considered * * * a failure, by the placing employer, to meet a condition specified [in an LCA]. However, the employer may not be debarred unless the Secretary finds that the placing employer ''knew or had reason to know of such displacement at the time of the placement,'' or the employer has been sanctioned ''based upon a previous placement of an H–1B nonimmigrant with the same other employer.''

In explaining these provisions and their interrelationships Congressman Smith stated: ''* * * [T]he legislation prohibits a covered employer in certain circumstances from placing an H–1B nonimmigrant with another employer where the 'other' employer has or will displace an American worker. * * * Congress intends that the employer make a reasonable inquiry and give due regard to available information. Simply making a pro forma inquiry would not insulate a covered employer from liability should the 'other' employer displace an American worker from a job sufficiently similar to the one which would be performed by an H–1B worker. That is one of the reasons why subsection 412(a)(2) of the legislation requires that the employer be notified through a clear statement on the labor condition application (LCA) regarding the scope of a covered employer's liability with respect to a lay off by a secondary employer. Through the LCA form, the Department of Labor will make clear to covered employers their obligation to exercise due diligence in ascertaining whether the placement of H–1B nonimmigrants may correspond with the lay off or displacement of American workers in similar jobs. Some of the most egregious cases involving the abuse of the H–1B visa program have involved American workers being retained only long enough to train their H–1B replacements under contract with a different employer. * * *''

144 Cong. Rec. E2324 (Nov. 12, 1998).

Similar statements were made by Senator Abraham:

In particular, the covered employer must promise to inquire whether the other employer will be using the H–1B worker to displace a U.S. worker whom the other employer had laid off or intends to lay off within 90 days of the placement of the H–1B worker. The covered employer must also state that it has no knowledge that the other employer has done so or intends to do so.

144 Cong. Rec. S12751 (Oct. 21, 1998).

Congressman Smith and Senator Abraham agreed that an employer who makes the required inquiries remains liable if the other employer displaces U.S. workers notwithstanding the inquiry made. Thus Congressman Smith stated:

''If the other employer has displaced an American worker (under the definitions used in this legislation) during the 90 days before or after the placement, the attesting employer is liable as if it had violated the attestation.

''In all instances, the sanction may be an administrative remedy (including civil monetary penalties and 'make-whole' remedies to the American worker affected). The attesting employer can only receive a debarment, however, if it is found to have known or to have had reason to know of the secondary displacement at the time of the placement of the H–1B worker with the other employer, or if the attesting employer was previously sanctioned for a secondary displacement under 212(n)(2)(E) for placing an H–1B nonimmigrant with the same other employer. If an employer has conducted the required inquiry prior to any placement with a ''secondary'' employer, and has no information or reason to know of that employer's past or intended displacement of U.S. workers, then the attesting employer should ordinarily be presumed not to have willfully violated the secondary displacement attestation. Congress anticipates that the Department of Labor, in promulgating and enforcing regulations, would require a reasonable level of inquiry.''

144 Cong. Rec. E2327 (Nov. 12, 1998).

Similarly, Senator Abraham stated:

''Making the required inquiries will not insulate a covered employer from liability should the secondary employer with which the covered employer is placing the covered H–1B worker turn out to have displaced a U.S. worker from the job that it has contracted with the covered employer to have the H–1B worker fill. That is why subsection 412(a)(2) of this legislation adds a new requirement to section 212(n)(1) that the application contain a clear statement regarding the scope of a covered employer's liability with respect to a layoff by a secondary employer with whom the covered employer places a covered H–1B worker. * * * If the other employer has displaced a U.S. worker (under the definitions used in this legislation) during the 90 days before or after the placement, the attesting employer is liable as if it had violated the attestation. The sanction is a $1,000 civil penalty per violation and a possible debarment. The attesting employer can only receive a debarment, however, if it is found to have known or to have had reason to know of the displacement at the time of the placement with the other employer, or if the attesting employer was previously sanctioned under 212(n)(2)(E) for placing an H–1B nonimmigrant with the same employer. If an employer has conducted the inquiry that it is required to attest that it has conducted before any such placement, and (as that attestation requires) acquired no knowledge of displacement of a U.S. worker in the course of that inquiry, it should ordinarily be presumed not to have known or have reason to know of a displacement unless there is an affirmative showing that it did have such knowledge or reason to know.''

144 Cong. Rec. S12750, S12751 (Oct. 21, 1998).

In order to achieve the purposes of this provision, the Department proposed to develop a regulatory provision which requires that the H–1B employer make a reasonable effort to inquire about potential secondary displacement. The NPRM set out a non-exclusive list of methods that could be used by an employer to demonstrate its efforts to assure compliance with its inquiry obligation. The methods suggested included obtaining a written assurance from the secondary employer that it does not intend to displace a similarly-employed U.S. worker during the 90-day period before or after the placement of the H–1B worker; a written memorialization of such a verbal assurance; or the inclusion of a non-displacement clause in a contract with the secondary employer. The NPRM noted that the Department had read the language and structure of the statutory provisions to reflect an intention that a dependent employer must take pro-active steps to determine whether the placement of H–1B workers would correspond with the layoff of similarly-employed U.S. workers. The NPRM proposed that an employer, even with the receipt of a ''no displacement'' assurance, should not be able to ignore other information, coming to its attention before placement of the H–1B worker, that calls into question the original assurance. The Department

proposed that in such circumstances the dependent employer would be expected to recontact its customer and obtain credible assurances that layoffs have not occurred or are planned during the relevant statutory time frame.

Several commenters responded to the Department's proposals on this issue.

One commenter (TCS) generally agreed with the Department's approach, urging the Department to clarify that usually all that will be required of a dependent employer is to make the layoff inquiry with its customer and to memorialize the customer's response. ITAA stated that it found helpful the Department's identification of a variety of methods by which an employer may satisfy its inquiry obligation.

The AFL–CIO asserted that a refusal by a secondary employer to respond to the staffing firm's inquiry should result in the disqualification of that LCA. ACE and IEEE stated their belief that the Department's proposal puts an unfair burden on the placing employer and that, at the very least, the secondary employer should share liability for violation of the displacement provision. The IEEE expressed particular concerns regarding the effect of the Department's approach on smaller businesses. Two other commenters (BRI and Cooley Godward) asserted that the NPRM neglected to address the treatment of primary employers who, despite reasonable efforts, receive no or an inadequate response from the secondary employer. BRI requested that the final regulation address a ''reasonable minimal effort'' threshold.

AILA, Rapidigm, and Satyam contended that getting written assurances from secondary employers will jeopardize negotiations and placement of H–1B workers. Rubin & Dornbaum and White Consolidated Industries, on the other hand, stated that although only H–1B-dependent employers and willful violators need obtain assurances, the effect of that requirement is to impose a paperwork requirement on the secondary employer.

AILA asserted that the proposal, in effect, required a dependent employer to conduct an ''interrogation'' of its customer regarding its layoff plans in order to satisfy its non-displacement obligation, and stated that the proposal lacked ''an articulable point at which the H–1B employer is deemed to have made sufficient, reasonable efforts.'' AILA requested that the Department allow flexibility to ascertain whether there is a realistic possibility of displacement, such as where the H–1B worker is only providing services for a special project or on a short-term basis.

The Department has given careful consideration to the divergent comments received on this proposal. The expressed concern regarding the impact which the inquiry will have upon the dependent employer's ability to place H–1B workers, in the Department's view, is misplaced. The obligation has been imposed by Congress as a condition for the employment of H–1B workers by H–1B-dependent employers and willful violators. While a dependent employer has discretion as to how it will meet this obligation, it must make the inquiry in every case where there will be indicia of an employment relationship (see IV.D.2, above).

The Department is not persuaded that its proposal imposes any undue burden on dependent employers or their customers. The Department believes that the statute contemplates due diligence in the inquiry, taking into consideration the circumstances of the case, rather than just a *pro forma* inquiry. Ordinarily, if the customer provides the assurance and there is no reason to suspect to the contrary—as where the project is only for a short-term, to satisfy a special need—an employer would need only make the relevant inquiry of its customer and memorialize the customer's intention not to displace any U.S. workers. The Department does not believe that the nature of the inquiry creates a significant burden in those instances where there is no reason to believe that a displacement may be contemplated. On the other hand, if the employer has any reason to believe the secondary employer may displace its employees—as where the H–1B workers will be performing services that the secondary employer performed with its own work force in the past—a greater inquiry may be necessary. The Department notes that the employer is not constrained by the Department's examples; it can choose an alternative means to assure itself that there will not be displacement and to minimize its potential liability, such as by an indemnity clause, as suggested by IEEE.

Furthermore, the Department has no reason to believe that the customer would have difficulty in answering the inquiry, especially where no layoffs are contemplated. If a customer balks at providing the lay-off information—an unlikely circumstance given the customer's demonstrated operational needs—the ACWIA does not allow the dependent employer to place an H–1B worker with that customer.

The Department disagrees with ACIP's contention that the Department's proposal effectively dictates contract terms through regulation and as such imposes an unauthorized and unwarranted burden. So long as the dependent employer meets its inquiry obligation and it does not have reason to believe there may be displacement, it is free to structure its contractual arrangements with its customers as it chooses.

The AFL–CIO commented that the Department had set ''an incredibly low bar'' for employers to meet this obligation, urging that the inquiry requirements should be supplemented by imputing knowledge of public facts about the actions and intentions of secondary employers to the H–1B-dependent employer. On the other hand, ITAA expressed concern that an employer would be held accountable for any public information relative to a layoff that might call into question a customer's assurance that it had no layoff plans—even where the information is buried in a local newspaper outside the area where the placing employer is based.

The Department disagrees with the suggestion that it should impute to the employer any public knowledge that layoffs by the customer had or would occur. With regard to this matter, the statute sets up a reasonableness standard. Although the H–1B employer is liable for civil money penalties and other appropriate remedies in every case where a displacement violation occurs, the ACWIA limits the imposition of the debarment sanction to circumstances where the H–1B employer ''knew or had reason to know of such displacement at the time of placement of the nonimmigrant with the other employer.'' Section 212(n)(2)(E)(i). Such a determination obviously will depend upon the particular circumstances presented, including the nature of the inquiry conducted by the employer. The Department established no presumptions about the employer's knowledge of public information, including newspaper articles. On the other hand, the employer cannot put its head in the sand and feign ignorance or disregard information that comes to its attention through the press or otherwise. As the proposal stated, ''[Where a] placing H–1B employer [receives information] such as newspaper reports of relevant layoffs by the secondary employer * * * the [placing] employer would be expected to recontact the secondary employer and receive credible assurances that no layoffs are planned or have occurred in the applicable time frame.''

ACIP asserted that the secondary employer might be unwilling to assist the placing employer if the latter were

investigated by the Department. It suggested that the receiving employer should be allowed to participate as an intervener in an enforcement proceeding involving an alleged displacement violation. The Department notes that pursuant to 20 CFR 655.815, service of the Administrator's determination is made on known interested parties, and that any interested party may request a hearing or participate in the proceeding (20 CFR 655.820). The Department believes that the secondary employer who has allegedly displaced a U.S. worker would generally qualify as an interested party even though it is not directly liable under the ACWIA. See also the rules of practice of the Office of Administrative Law Judges, which provide a right to participate in a proceeding where the ALJ determines that ''the final decision could directly and adversely affect [the applicants for participation] * * *, and if they may contribute materially to the disposition of the proceedings and their interest is not adequately represented by existing parties.'' 29 CFR 18.10(b).

ITAA requested a ''safe harbor'' provision for employers who make a demonstrated (*i.e.,* written agreement with secondary employer) good-faith effort to ascertain that no layoffs have occurred or will occur. ACIP and AILA urged the Department to include regulatory language to the effect that good faith efforts to cure violations should preclude sanctions.

The Department's discretion in this area is limited. The ACWIA imposes strict liability upon a dependent employer where a U.S. worker is displaced by a secondary employer. Section 212(n)(2)(E) specifically provides: ''If an H–1B-dependent employer places a non-exempt H–1B worker with another employer * * *, such displacement shall be considered * * * a failure by the placing employer, to meet a condition [of its LCA].'' At the same time, the ACWIA's three-tier penalty provisions require consideration of a violator's culpability which should minimize the liability of a dependent employer who has acted in good faith to comply with its displacement obligation. Additionally, the Department notes that the regulatory provisions applicable to the assessment of civil money penalties consider an employer's ''good faith'' as a factor affecting the level of the penalty assessed. See 20 CFR 655.810(b).

8. What Documentation Will be Required of Employers About the ACWIA's Non-Displacement Provisions? (§ 655.738(e))

In order to assure compliance with the ACWIA's non-displacement provisions, the Department proposed to require that an H–1B-dependent employer or willful violator retain certain documentation with respect to any U.S. workers (in the same locality and same occupation as any H–1B nonimmigrants it hired) who left its employ in the period 90 days before or after the employer's petition for the H–1B worker(s), and for any employees with respect to whom the employer took any action in the 180-day period to cause the employee's termination. The NPRM proposed that for all such employees, these documents must include: The employee's name, last-known mailing address, occupational title and job description; any documentation concerning the employee's experience, qualifications, and principal assignments; notification by the employer regarding termination and the employee's response; job evaluations; and information regarding offers of similar employment and the employee's response. The Department noted its belief that these records are required to be retained by EEOC regulations, 29 CFR 1602.14, therefore their retention would not present an additional burden on employers.

The Department received four comments on this proposal.

ITAA stated that it does not object to any documentation retention already mandated. It stressed the distinction between maintaining records already created and creating records. Senators Abraham and Graham asserted that the ACWIA imposes no requirement of maintaining records of job offers made to departing employees as proposed by the Department. Two commenters (AILA, Chamber of Commerce) stated their belief that the proposal imposes new record creation and retention burdens, disagreeing with the Department's assessment that the EEOC already requires the retention of such documents. The Chamber of Commerce stated that this burden will unduly impact upon small businesses that normally do not maintain such records.

The Department notes that pursuant to § 655.731(b), employers are already required to maintain basic payroll information for all employees in the specific employment at the place of employment, including name, home address, and occupation. This information is also required by other statutes such as the Fair Labor Standards Act and the Equal Pay Act. See 29 CFR 516.2; 29 CFR 1620.32. The Department does not believe that any prudent business person would fail to have such information.

The commenters correctly recognized that the EEOC regulation cited in the NPRM, 29 CFR 1602.14, does not establish a general requirement that employers create the records encompassed by the Department's displacement proposal. Section 1602.14 instead, requires the preservation of records, for purposes of Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act (ADA), where the employer chooses to make or keep personnel records, including situations where an employee is involuntarily terminated, or a discrimination charge is filed against the employer. As noted, § 1602.14 does not require an employer to create any records, but rather requires an employer to preserve all personnel or employment records which the employer ''made or kept.'' The Department believes that every prudent employer would ''make or keep'' the described records relating to the circumstances in which employees leave their employ. Once made or kept (*i.e.,* where records received from others are not immediately discarded), EEOC regulations require that these records be preserved.

Furthermore, the EEOC does require the preservation of the same or similar records under other statutes it administers, whether or not they would otherwise be kept. Under the Age Discrimination in Employment Act (ADEA), for example, there is an obligation to retain certain records and an obligation to retain broad categories of personnel documents which an employer ''in the regular course of his business, makes, obtains, or uses.'' 29 CFR 1627.3. In particular, employers are required to retain any and all documents it makes, obtains, or uses regarding ''[p]romotion, demotion, transfer, selection for training, layoff, recall, or discharge of any employee, * * *.''

Against this regulatory backdrop, it is clear that employers already are required by the EEOC, pursuant to Title VII and the ADEA, to retain (*i.e.,* preserve) the personnel documents that are encompassed by the Department's proposal for documenting an employer's displacement compliance. The Department repeats that it is not requiring employers to create any documents other than basic payroll information.

The Interim Final Rule provides that, for the purposes of meeting the

ACWIA's displacement requirements, a dependent employer or willful violator is required to preserve the following documents with respect to any U.S. worker(s) (in the same area of employment and occupation as any H–1B nonimmigrants) who left its employ in the period 90 days before or after the employer's petition for the H–1B nonimmigrant(s), and for any U.S. worker(s) with respect to whom the employer took any action during that 180-day period to cause the employee's termination (*e.g.,* a notice of termination): any documentation concerning the employee's experience, qualifications, and principal assignments; notification by the employer or the employee regarding the termination of employment and any response thereto; and job evaluations. The Department explains that the employer is not required to create any such records, if they do not exist.

In addition, if the employer offers the U.S. worker another employment opportunity, the employer shall maintain a record of the offer, including the position offered and terms of compensation and benefits, and the employee's response thereto. The Department believes that most employers would make such offers in writing, but recognizes that there may be a small burden to the employer in keeping a record if the employee response is not in writing. The Interim Final Rule continues the practice under the current regulations of applying a uniform period for retaining documentation required by this part. See § 655.760(c).

The Department wishes to clarify, as it has with regard to other documentation proposals in this part, that an employer is not required to retain these records in any particular form so long as they are maintained and retrievable upon this Department's request in accordance with the requirements of 29 CFR 516.1(a) (setting forth recordkeeping requirements under the FLSA, including the EPA). The Department also wants to make clear that such records need not be kept in the employer's LCA public access file.

As discussed in IV.D.7, the Interim Final Rule also requires employers to document their inquiry to secondary employers and any response. This inquiry may be done in any manner the employer deems appropriate under the circumstances. However, if the inquiry and response were not in writing, the employer will be required to keep a written memorandum detailing the substance of the conversation, the date of the communication, and the names of the individuals involved in the conversation.

E. What Requirements Does the ACWIA Impose Regarding Recruitment of U.S. Workers, and Which Employers are Subject to Those Requirements? (§ 655.739)

Section 212(n)(1)(G)(i)(I) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(G)(i)(I), requires that an H–1B-dependent employer or an employer found by DOL to have committed willful H–1B violations take ''good faith steps to recruit, in the United States using procedures that meet industry-wide standards and offering compensation that is at least as great as that required to be offered to H–1B nonimmigrants * * *, United States workers for the job for which the nonimmigrant or nonimmigrants is or are sought.'' The Department is charged with enforcing the recruitment obligation, while the Attorney General administers a special arbitration process to address complaints regarding an H–1B employer's companion obligation to ''offer the job to any United States worker who applies and is equally or better qualified for the job for which the nonimmigrant or nonimmigrants is or are sought.'' The ACWIA further provides that ''nothing in subparagraph (G) [the new attestation element] shall be construed to prohibit an employer from using legitimate selection criteria relevant to the job that are normal or customary to the type of job involved so long as such criteria are not applied in a discriminatory manner.''

The recruitment requirement does not apply where the LCA solely involves ''exempt'' H–1B workers (see Section 212(n)((1)(E)(ii)). In addition, the recruitment requirement does not apply to an application filed on behalf of an H–1B worker described in Section 203(b)(1)(A),(B), or (C) of the INA. Section 203(b)(1) establishes the first preference among employment-based immigrants to the United States. This group includes aliens with extraordinary ability, aliens who are outstanding professors and researchers, and aliens who have been employed by multinational corporations as executives or managers who will enter the U.S. to continue to provide executive or managerial services to the same employer or to its subsidiary or affiliate.

The Department noted in the NPRM that the literal language of the recruitment provision would require recruitment efforts be undertaken before an LCA is filed (''prior to filing the application—[the employer] has taken good faith steps to recruit''). The Department noted that this language appears to have been based on a presumption that employers file LCAs for individual workers at the time that need arises (see, *e.g.,* the statements by both Senator Abraham and Congressman Smith that an employer must state that it has taken good faith steps to recruit U.S. workers ''for the job or which it is seeking the H–1B worker'' (144 Cong. Rec. S12751 (Oct. 21,1998); 144 Cong. Rec. E2324 (Nov. 12, 1998))—a presumption that is contrary to the actual, longstanding practice of many employers in the H–1B program. Under the Department's regulations, §§ 655.730, .750, an LCA is in effect for three years and an employer is permitted to file an LCA for multiple positions so that it may use the LCA, during the three-year period it is in effect, to support future H–1B petitions when the actual need for employment arises. Many employers avail themselves of this procedure.

In light of this common practice (which had not been at issue in crafting the ACWIA), the Department set forth its view that it would not be reasonable to assume that Congress intended to require a separate LCA for each worker; nor was it reasonable to assume that Congress intended that the employer would already have recruited in good faith for every position it would fill over the three-year life of the LCA, and offered a job to every equally or better qualified U.S. worker who applied for each such position. The Department observed that this would be virtually impossible since employers would not yet have identified every job opportunity which would arise in the future.

Thus, the Department proposed that ''the 'good faith' recruitment attestation must be read, interpreted, and applied to mean that the employer promises—and agrees to be held accountable—that it has, or will recruit with respect to any job opportunity for which the application is used, whether that recruitment occurs before or after the application is filed (if the application is to be used in support of multiple petitions for future workers).'' The Department invited comments on this approach and any alternative approaches to appropriately balance employers' good faith recruitment obligations in the context of the statutory language.

The Department received no comments on this proposal from the employer community. The AFL–CIO, on the other hand, objected to this proposal, stating, in effect, that Congress intended that the good faith recruitment requirement be satisfied as a precondition to filing an LCA, not

merely a promise of future compliance with this obligation. The AFL–CIO contends that the three-year validity period of the LCA is in direct conflict with the worker protection requirements of the ACWIA, and suggests that the goal of protecting workers would be best served by a six-month validity period.

The Department disagrees with this view, noting that the AFL–CIO's interpretation would upset a long-settled practice that has promoted the efficient processing of LCAs, a goal which the ACWIA was not intended to impede. Furthermore, the House Report on H.R. 3736, whose language on recruitment is very similar to that in ACWIA as enacted, and is identical with respect to the timing of the recruitment, states that the bill ''endeavors to protect American workers by ensuring that companies at least make an attempt to locate qualified American workers before petitioning for foreign workers under the H–1B program.'' H.R. Rep. No.105–657, 105th Cong., 2d Sess. 47 (1998) (emphasis added). In the absence of any suggestion that Congress intended this result, the Department is unpersuaded that Congress intended the recruitment provision to be applied literally. Without drastically reducing the effective period of the LCA or limiting the LCA to a single job opportunity, the Department believes that it would be virtually impossible for major users of the program—namely the H–1B-dependent employers to whom the provision applies—to comply with the AFL–CIO's construction of the Act.

The Department received one comment that addressed the ''first preference'' exception to the recruitment obligation. The commenter (Cooley Godward) expressed the concern that an employer's utilization of this provision may prove problematic because determinations of ''first preference'' status require discretionary judgments, typically exercised by the INS, which if applied incorrectly by an employer, could subject the employer to sanctions for violating its recruitment obligation. Cooley Godward recommended that the Department promulgate a regulation that would protect employers who have made a reasonable good faith determination that an employee would qualify for first preference immigration status.

The Department agrees that such determinations might be problematic in some rare cases. The Department believes that it is likely that H–1B nonimmigrants who would meet the first-preference criteria would also be ''exempt H–1B nonimmigrants'' for purposes of LCA designations and obligations. The Department will consult with the INS if the issue of ''first preference'' status arises, and will take into account the employer's good faith efforts in any assessment of appropriate remedies.

1. How Are ''Industry-wide Standards'' for Recruitment To Be Identified? (§ 655.739(e))

The INA, at section 212(n)(1)(G)(i)(I), requires a dependent employer to attest that it ''has taken good-faith steps to recruit in the United States using procedures that meet industry-wide standards * * * United States workers for the job for which the nonimmigrant or nonimmigrants is or are sought.''

In discussing the meaning of this provision, Congressman Smith stated:

> ''Congress intends for an employer to at least use industry-wide recruiting practices (unless the employer's own recruitment practices are more successful in attracting American workers), and, in particular, to use those recruitment strategies by which employers in an industry have successfully recruited American workers. The Department of Labor, in defining and determining whether certain recruitment practices meet the statutory requirements, should consider the views of major industry associations, employee organizations, and other interest groups.''

144 Cong. Rec. E2324 (Nov. 12, 1998). Senator Abraham stated, on the other hand, that this provision ''allows employers to use normal recruiting practices standard to similar employers in their industry in the United States; it is not meant to require employers to comply with any specific recruitment regimen or practice, or to confer any authority on DOL to establish such regimens by regulation or guideline.'' 144 Cong. Rec. S12751 (Oct. 21, 1998).

Consistent with these statements, the Department stated in the NPRM that ''[t]he statute does not require employers to comply with any specific recruitment regimen or practice, [and the Department does not] believe it is authorized to prescribe any explicit regimen.'' The Department also proposed that the benchmark ''industry-wide standards'' requires the employer's recruitment efforts be ''at a level and through methods and media which are normal, common or prevailing in an industry * * * including at least the medium most prevalently used in the industry and shown to have been successfully used by employers in an industry * * * to recruit U.S. workers.'' The Department explained that ''industry-wide standards'' does not refer to the lowest common denominator among employers in a particular industry, *i.e.,* the minimum or least effective recruitment methods used by companies in an industry to recruit U.S. workers. The Department solicited the views of major industry associations, employee organizations and other interest groups concerning successful recruitment practices and strategies.

The NPRM identified a number of recruitment methods recognized as appropriate for recruiting U.S. workers (*e.g.,* advertising in publications of general interest, advertising in trade and professional journals, advertising on Internet sites such as the Department's own ''America's Job Bank,'' use of public and private employment agencies, including ''headhunters,'' outreach to educational and trade institutions, job fairs, and development and selection from among the employer's own workforce). The Department further stated its expectation that good faith recruitment ordinarily will involve several of these methods, ''both passive (where potential applicants find their way to an employer's job announcements, such as to advertisements in the publications and the Internet) and active (where the employer takes proactive steps to identify and get information about its job openings into the hands of potential applicants, such as through job fairs, outreach at universities, use of ''headhunters,'' and providing training to incumbent employees in the organization).''

The NPRM requested comment on a proposed presumption of good faith recruitment where the employer in good faith used a mix of prescribed recruiting methods (at least three, one or two of which are active). This presumption would be available to employers who did not want to go to the trouble of demonstrating that their recruitment methods meet the standards for their industry.

Under the proposal, an employer would not have to avail itself of the presumption, but good faith recruitment, at a minimum, would need to involve ''advertising in relevant and appropriate print media or the Internet (where common in the industry), in publications and at facilities commonly used by the industry * * *, as well as solicitation of U.S. workers within an employer's organization.'' The Department also expressed the view that there should be a general recognition that good faith recruitment must ''involve some active methods of solicitation, rather than just passive methods such as posting job announcements at the employer's worksite(s) or on its Internet web page.''

Finally, the Department proposed that employers utilize recruitment methods

that are used by employers competing for the same potential workers, *e.g.,* a hospital, university, or software development firm would be required to use the standards developed by the health care, academic, or information technology industries for the occupations targeted for recruitment. Similarly, a staffing firm seeking to place workers at other employers' worksites would be required to utilize the standards of the industry in which it seeks to place workers, not the standards that exist within the staffing firm's own industry.

Thirty-two commenters, including 21 individuals, responded to the Department's proposals relating to ''industry-wide standards.''

The individuals were consistent in urging the Department to strengthen recruitment requirements. They generally urged that, at a minimum, posting job openings in major publications, trade journals, state employment service offices, and local colleges be a prerequisite to the issuance of H–1B visas for particular workers. Many of these individuals also urged a requirement that a company expend a minimum amount, such as $1,000, on advertising a position as a precondition to petitioning for an H–1B nonimmigrant.

APTA, AOTA and IEEE supported the Department's proposals. AOTA stated its belief that it is especially important to require employers to undertake several methods of active recruitment, and that those methods comport with those undertaken by the specific industry. IEEE agreed specifically with the requirement that employers be held accountable for recruiting for each job they fill under an LCA and with the Department's listed methods of recruitment and standards for good faith steps.

The AFL–CIO opposed the idea of a presumption, noting that it is wrong to assume that some arbitrary combination of recruitment methods will equate with the ''industry-wide standards.'' In this regard, the AFL–CIO suggested that for some industries, including the information technology industry, no form of passive recruiting should be considered to meet the industry-wide standard.

The AFL–CIO endorsed the Department's proposal that employers must conform their recruitment practices to those used within the industry for which the workers are sought. It stated that staffing firms must conform to the methods used by the industry in which they are seeking to place workers, not the methods used by employers within the staffing industry.

Senators Abraham and Graham, ACIP, AILA, and TCS contended that the Department's proposed presumption represented an attempt to prescribe a specific regimen, contrary to the statute's intent to allow employers to use recruiting practices similar to other employers in the industry. The common thread through employer, trade association, and attorney comments was that there is no single template for recruitment to fit all situations, and that recruitment procedures vary by industry, size, geographic location, and market conditions. One commenter (Simmons) asserted that the Department's recruitment proposal will set up an infrastructure that some small employers and foreign-based employers will be unable to meet.

A number of commenters responded to the Department's proposal that an employer use a combination of approaches, some of which must be proactive. The IEEE agreed with the Department's approach, stating that this approach would ensure a ''fair and level playing field'' for all applicants by requiring that employers utilize methods that do not skew the process against U.S. workers or otherwise put them at a disadvantage in competing against H–1B workers for positions covered by an LCA. One commenter (Hammond), though expressing the view that the statutory requirement that an employer utilize an industry-wide standard did not need any detailed regulations, indicated its approval of the Department's recognition that an employer cannot use the least common denominator within its industry, but must instead use methods that are normal, common, or prevailing in the industry. Intel (although stating that it is not a dependent employer itself) commended the Department for listing many of the recruitment methods used in the information technology industry today, but suggested changing the terms from ''active'' and ''passive'' to ''on-going'' recruitment and ''targeted'' recruitment to better describe recruitment practices. Similarly, ACIP commented that employers commonly undertake both ''on-going'' and ''targeted'' recruitment.

The Department continues to be of the view that some guidance is appropriate to assist employers in determining industry-wide standards. The Department sees no merit in the suggestion that an employer should be able to use any legitimate process utilized by employers in the industry. The statute requires that an industry-wide standard be utilized. There likely will be considerable variance among the methods used by different employers within the same industry. An employer who selects a method that falls short of the standard will not satisfy the statutory requirement. Such an interpretation of the statute (allowing use of any single practice used within its industry, even if it is the least common denominator, to pass muster) would allow an employer's recruiting practice to be self-validating, thereby frustrating statutory intent as well as its plain meaning.

The Department therefore has decided to go forward with its proposal to list the most common recruiting methods, and stating its expectation that good faith recruitment ordinarily will involve several of these methods, both passive and active. In this connection, the Department finds helpful the distinction between ongoing recruitment efforts to find candidates for ''generic'' positions always in short supply as contrasted with its targeted recruitment for a particular opening. However, the Department believes the active/passive distinction is a different standard and is more useful in guiding an employer's compliance with its recruitment obligations. The Department continues to believe that ''industry-wide standards'' cannot reflect the lowest common denominator. Rather, they must include methods that are normal, common or prevailing in the industry—defined as those employers competing for the same potential workers—including the methods which have been most effective at recruiting U.S. workers.

In view of the comments regarding the Department's proposed presumption, however, the Interim Final Rule does not include any presumptive level of recruitment that constitutes good faith recruitment. Employers will be expected to demonstrate in the event of an investigation, that their recruitment was consistent with industry-wide standards.

The rule requires that employers at a minimum recruit both internally—among their own work force and workers whose employment recently terminated because of expiration of a contract or grant—and externally—among U.S. workers elsewhere in the economy. The Department believes that such practices are the norm in all industries. Furthermore, given employers' testimony at Congressional hearings regarding widespread shortages of workers, the Department is confident that active recruitment is also the norm, and the rule will require some active recruitment (either internally, such as by training other employees, or externally). Employers are cautioned that disproportionate recruitment

through some sources, such as college campuses, can have the unintended effect of discriminating against older workers. The Department also encourages employers to recruit among underrepresented populations (*e.g.,* minorities, persons with disabilities) and in rural areas.

Several comments were received regarding the particular methods of solicitation utilized by employers. Intel, among other commenters, noted a dramatic shift away from the use of traditional methods such as print advertisements to other methods such as electronic media and specialized contacts. The IEEE, while agreeing with the Department's approach, encouraged the Department to consider imposing a requirement that employers make greater utilization of Intranet and Internet publication of job openings. Others (AFL–CIO, Malyanker) expressed the view that the utility of the Internet is overstated. Another commenter (Satyam) noted that the use of the Internet for recruitment is common, but stated that its review of the NPRM left it with the impression that it is disfavored by DOL.

The Department did not intend to leave the impression that it does not favor the Internet. As the NPRM recognizes, recruitment within the industries for which H–1B workers are sought—especially the information technology industry—often involves the use of electronic media. The Department encourages the use of this method in industries where it has proven effective and where it has the potential to attract the widest relevant audience. The Department notes that this method has shown itself to be inexpensive and expeditious (and in the case of services such as America's Job Bank, this method is free and accessible by any personal computer with an Internet connection). At the same time, as some commenters have noted, the effectiveness of electronic advertising is sometimes overrated and, in any event, it is not a substitute for active methods of recruitment, which can be better targeted to U.S. workers who are qualified for a particular position.

AILA and Rapidigm contend that the Department's proposal is more stringent than the reduction-in-recruitment (RIR) guidelines established under GAL 1–97 (Oct. 1, 1996) (recently published for comment at 64 FR 23984 (May 4, 1999)) for the permanent program for occupations in which there is little or no availability.

The Department notes that the ACWIA establishes a specific recruitment requirement that employers recruit in accordance with industry-wide standards. Furthermore, unlike the H–1B program, the recruitment efforts and accompanying documentation of industry practice for each RIR application under the permanent program are reviewed by the State agency and ETA Regional Office, which base their determinations on local labor market conditions. Because under the H–1B program recruitment efforts by H–1B-dependent employers and willful violators will be reviewed only in the event of an investigation, the Department believes that an explication of the industry-wide requirement is appropriate in these rules.

It should be noted, however, that the Department has not suggested that an employer is required to undertake separate recruitment efforts for every position listed on the LCA. In a particular situation, an employer may reasonably decide to solicit for all similar positions listed on an LCA(s) at the same time, particularly where the employer plans to hire for the positions at or about the same time. Similarly, as commenters pointed out, employers which regularly experience large numbers of vacancies may undertake ongoing recruitment. The Department will not second-guess an employer's good faith, reasonable decision in such circumstances, provided it accords with the relevant ''industry-wide standards'' applicable to the employer.

Finally, with regard to the comments by numerous individuals, the Department believes there is no statutory support for measuring an employer's recruitment efforts by the amount of money expended by the employer. Accordingly, the Department is not persuaded that there is merit to the suggestion that an employer must make a threshold showing that it has incurred solicitation expenses at or above some prescribed amount.

2. What Constitute ''Good Faith Steps'' in Recruitment? (§ 655.739(h))

In the NPRM, the Department expressed the view that good faith recruitment requires employers to ''maintain a fair and level playing field for all applicants,'' and to ''be able to show that they have not skewed their recruitment process against U.S. workers.'' The Department stated its belief that the ''good faith'' recruitment obligation encompasses the pre-selection treatment of the applicants, not merely the steps taken by an employer to communicate job openings and solicit applicants. The Department indicated that, where an employer's recruitment efforts have been demonstrably unsuccessful, it would examine closely the entire recruitment process. This examination would include the pre-selection treatment of applicants, ''to insure that U.S. workers are given a fair chance for consideration for a job, rather than being ignored or rejected through some tailored screening process based on an employer's preferences or prejudices with respect to the makeup of its workforce.'' The NPRM proposed that an employer would not meet its good faith recruitment obligation if, for example, it only interviewed H–1B applicants or used different staff to screen or interview the H–1B applicants than the staff used for U.S. workers. The NPRM also stated that the Department would not second-guess work-related screening criteria or the hiring decision regarding any particular applicant (the latter assigned by the ACWIA to the Attorney General). The Department did not propose any specific regimen or practice for the pre-selection treatment of applications and applicants. However, the Department considered whether to craft a presumption of good faith recruitment based on an employer's hiring of a significant number of U.S. workers and, thereby, accomplishing a significant reduction in the ratio of H–1B workers to U.S. workers in the employer's workforce. The Department indicated that it would refer any potential violation of U.S. employment laws to the appropriate enforcement agency.

As stated by Representative Smith:

> ''Any 'good faith' recruitment effort, as required by this legislation, must include fair, adequate and equal consideration of all American applicants. The Act requires that the job must be offered to any American applicant equally or better qualified than a nonimmigrant. Congress recognizes that 'good faith' recruitment does not end upon receipt of applications, but rather must include the treatment of the applicants. In evaluating this treatment, the Department should consider the process and criteria for screening applicants, as well as the steps taken to recruit for the position and obtain those applicants. . . . Employers who consistently fail to find American workers to fill positions should receive the Department's special attention in this context of 'good faith' recruitment.''

144 Cong. Rec. E2324, 2325 (Nov. 12, 1998). Regarding the interface with the Attorney General's enforcement of the ''failure to select'' requirement, Congressman Smith stated:

> ''[The Act] also contains a savings clause that states that the provision should not be construed to affect the authority of the Secretary or the Attorney General with respect to 'any other violations.' This savings clause means that while the Secretary is not authorized to remedy a violation of (1)(G)(i)(II) regarding an individual American

worker, the Secretary retains the broad authority to investigate and take appropriate steps regarding the employer's 'good faith' recruitment efforts, including 'good faith' consideration of American applicants.

144 Cong. Rec. E2325 (Nov. 12, 1998).

Senator Abraham cautioned:

''[The Act] does not contemplate, for example, recharacterizing a 'failure to select' complaint as a 'failure to recruit in good faith' and then using the enforcement regime for the latter category of violations to pursue what in fact is a 'failure to select' complaint.''

144 Cong. Rec. S12754 (Oct. 21, 1998).

The Department received generally supportive comments from AOTA, APTA, IEEE, and the AFL-CIO. The AFL-CIO stated that the proposal represents ''a very important step in protecting the rights of U.S. job applicants by clearly stating that 'good faith steps' in recruiting also include fair pre-selection treatment of job applicants.'' It also stated that the Department's approach does not intrude upon the Department of Justice's duty to arbitrate wrongful selection cases because the proposal deals only with pre-selection treatment that necessarily precedes a selection decision. IEEE stated its agreement with the Department that employers are required to maintain a fair and level playing field for all job applicants, and that employers must be able to show that their recruitment and selection processes have not been skewed so as to disadvantage U.S. workers.

Several commenters opposed parts of the proposal. AILA and ACIP stated their view that the proposal violated the ACWIA's clear mandate that the Department not interfere with the enforcement of the ''selection'' aspects of an employer's recruitment practice. AILA observed that the statute specifically sets up a separate remedial mechanism for alleged violations of the ''selection'' portion of the recruitment attestation, while including a savings clause that states that this provision does not restrict either the Department's or the Attorney General's enforcement authorities with respect to other violations.

Several commenters opposed the proposed presumption based on an employer's success in hiring U.S. workers. The AFL-CIO stated that employer hiring of an arbitrary number of U.S. workers in no way establishes that an employer did not discriminate against others. Senators Abraham and Graham recognized that scrutiny of an employer's recruitment process may be proper in an investigation, but opposed the proposed presumption. Senators Abraham and Graham and AILA urged the Department to remember that the premise of the legislation was that at least in some cases recruitment had been demonstrably unsuccessful. ACIP, TCS, BRI and SBSC objected to the proposal that successful recruitment would be equated with good faith recruitment. Some commenters noted that the positions sought by LCAs often may be filled only from a small labor pool and that the filing of the LCA reflects the relative scarcity of U.S. workers for the job(s) involved.

After review of the comments, the Department no longer believes that it would be useful to create a presumption that an employer has met its recruitment obligation by demonstrating its ''success'' in recruiting U.S. workers. Apparently, there is a strong concern that a negative presumption will arise that any dependent employer who is unable to demonstrate success—a situation which the commenters believe to be commonplace—will be presumed not to have acted in good faith. This was not the Department's intention. The Department, however, believes that this misperception may persist and could divert the focus away from the statutory test—an employer's adherence to industry-wide standards in meetings its recruitment obligations. For this reason, the Department's Interim Final Rule does not establish ''successful recruitment'' as a basis for a presumption of compliance. However, in its enforcement, the Department intends to look particularly carefully at the recruitment practices of employers who have not had success in hiring U.S. workers.

In the Department's view, its proposal is faithful to the statute's provision charging the Attorney General, not the Secretary, with overseeing the mechanism designed to resolve a particular U.S. worker's allegations that the dependent employer failed to offer him a position for which an H–1B worker was sought. The NPRM explicitly recognizes the concern that the Department should not supplant the specific statutory mechanism by which a U.S. worker can adjudicate his or her complaint that an H–1B worker was unlawfully hired for a position for which the U.S. worker was qualified and should have been hired pursuant to Section 212(n)(1)(G)(i)(II) of the ACWIA. However, at the same time, the Department believes that an employer cannot engage in good faith recruitment if it does not give good faith consideration to U.S. applicants. The Department believes it entirely appropriate to consider the process and methods by which an employer screens applicants for a position in order to ensure that U.S. workers receive the protections accorded them under the ACWIA. As noted in the NPRM, the Department has no intention of second-guessing work-related screening criteria used by an employer or intruding upon the role provided for the Attorney General with respect to any hiring decision involving a particular applicant.

Nothing in the Department's proposal suggested that the Department was interpreting the ACWIA in a way that would require a departure from the way in which employers customarily recruit workers for positions with their companies. The Department recognizes, as Senator Abraham also observed, that a multitude of legitimate factors, objective and subjective, go into recruiting and hiring decisions. As discussed in greater detail in the following section of the Preamble, the Department's inquiry will be limited to ensuring that an employer's recruitment efforts meet the statutory standard, *i.e.,* that they are based on ''legitimate selection criteria relevant to the job that are normal or customary to the type of job involved, so long as such criteria are not applied in a discriminatory manner.'' See Section 212(n)(1)(G)(ii).

Finally, Senators Abraham and Graham and the Congressional commenters stated that there may be legitimate business reasons for a company to use different personnel to interview H–1B applicants than U.S. workers, such as where the employer lacks personnel who speak the language of an applicant, or where the company recruits specialists from other countries who are familiar with the foreign culture.

The Department agrees that there may be circumstances in which using different staff to interview U.S. and H–1B workers may be appropriate. In these situations, however, it is important, in the Department's view, that the personnel who interview the H–1B applicants not have a more effective say in the recruitment/hiring process than the personnel interviewing U.S. applicants. A U.S. worker's ability to compete for the position covered by the LCA should not be adversely affected by the status of the interviewer within the company or its recruitment/selection process. Furthermore, it is important that U.S. workers not be interviewed by employees or agents who have a financial interest in hiring H–1B nonimmigrants rather than U.S. workers.

3 & 4. How are ''Legitimate Selection Criteria Relevant to the Job that are Normal or Customary to the Type of Job Involved'' to be Identified and Documented? What Actions Would Constitute a Prohibited ''Discriminatory Manner'' of Recruitment? (§ 655.739(f) and (g))

Section 212(n)(1) of the INA as amended by the ACWIA provides that ''nothing in subparagraph (G) [of Section 212(n)(1), which establishes the dependent employer's recruitment obligation] shall be construed to prohibit an employer from using legitimate selection criteria relevant to the job that are normal or customary to the type of job involved, so long as such criteria are not applied in a discriminatory manner.''

In explaining this provision, Senator Abraham stated:

''The purpose of this language is to make clear that an employer may use ordinary selection criteria in evaluating the relative qualifications of an H–1B worker and a U.S. worker. It is intended to emphasize that the obligation to hire a U.S. worker who is 'equally or better qualified' is not intended to substitute someone else's judgment for the employer's regarding the employer's hiring needs. * * *. Moreover, its judgment as to what qualifications are relevant to a particular job is entitled to very significant deference. * * *. It is not intended to allow an employer to impose spurious hiring criteria with the intent of discriminating against U.S. applicants in favor of H–1Bs and thereby subvert employer obligations to hire an equally or better qualified U.S. worker.''

144 Cong. Rec. S12750 (Oct. 21, 1998).

Congressman Smith explained:

''The employer's recruitment and selection criteria therefore must be relevant to the job (not merely preferred by the employer), must be normal and customary (in the relevant industry) for that type of job, and must be applied in a non-discriminatory manner. Just because an employer in good faith believes that its selection criteria meet such standards does not necessarily mean that they in fact do. Any criteria that would, in itself, violate U.S. law can clearly not be applied, including criteria based on race, sex, age, or national origin. The employer cannot impose spurious hiring criteria that discriminate against American applicants in favor of H–1Bs, thereby subverting employer obligations to hire an equally or better qualified American worker.''

144 Cong. Rec. E2324 (Nov. 12, 1998).

In the NPRM, at Section E.3., the Department noted that employers are authorized to apply criteria that are legitimate (excluding any criterion which itself would be violative of any applicable law); relevant to the job; and normal or customary to the type of job involved—rather than the preferences of a particular employer.

The Department suggested the North American Industrial Classification System as one means of showing a match between the employer's criteria and the accepted practices for a job. In essence, the Department stated that employers cannot impose spurious criteria that discriminate against U.S. workers in favor of H–1B workers. The Department also proposed that in evaluating an employer's ''good faith'' in the pre-selection treatment of applicants it would limit its scrutiny of screening criteria to these factors. The Department proposed to issue a rule encapsulating the requirement that an employer conduct its recruitment ''on a fair and level playing field for all applicants without skewing the recruitment process against U.S. workers.'' The Department proposed that the rule would apprize employers that hiring criteria proscribed by applicable discrimination laws cannot be used in solicitation or screening processes, nor may employers apply such processes in a disparate manner.

As earlier noted, the Department's overall recruitment proposals generally received the support of the AFL–CIO, APTA, AOTA, and IEEE. Additionally, Intel specifically endorsed this aspect of the Department's proposal, stating: ''Legitimate selection criteria should be based on the 'core' requirements to the position [involved], which varies by position and the specific project.'' Intel continued: ''We agree with [the Department] that the selection criteria be legitimate, relevant to the job, and be normal and customary to the type of job involved.''

A general theme in many comments was that the Department should not define legitimate hiring criteria in advance, but rather should make determinations only in the context of individual enforcement cases.

AILA expressed the view that the statute does not intend the ''legitimate selection criteria'' provision as an affirmative requirement for employers, but rather as a savings clause where the Department or the Attorney General, in enforcement, believes that the employer's enforcement criteria were not ''legitimate'' or ''relevant,'' or were applied in a discriminatory manner. AILA further stated its view that the Department's entire proposal with regard to selection criteria is beyond its statutory authority. ACIP expressed its concern about the Department's reference to the NAICS, which it stated was unnecessary micromanagement and would be difficult for employers to use since it is not yet available to employers. Latour and Kirkpatrick & Lockhart commented that subjective factors cannot be removed from the hiring process, including considerations such as personality, attitude, and other intangible issues.

Miano, on the other hand, stated that it is important that H–1B nonimmigrants meet all the qualifications posted in the recruiting notices. In an apparent reference to employer recruitment prior to petitioning for immigrant workers under the permanent program, Miano observed that employers often advertise with more requirements than anyone can meet and then lower the requirements to bring in the foreign worker.

The Department has no intention of specifying which hiring criteria are legitimate and which are not. The Department's Interim Final Rule, like the proposal, simply makes plain that the statutory obligation of dependent employers and willful violators is to base their recruitment and selection decisions on criteria that are legitimate, relevant, and normal to the type of job involved. Nor does the Department intend to undertake any elaborate scrutiny of selection criteria in its enforcement. The Department's review of the process, as the Interim Final Rule provides, is designed to ensure that U.S. workers are not subject to criteria that deny them a fair opportunity, as fashioned by the ACWIA, to compete for jobs for which nonimmigrant workers are being sought.

The Department, however, has eliminated its reference to the North American Industrial Classification System as one means of showing a match between the employer's criteria and the accepted practices for a job. Upon review, the Department has determined that the online service ''O*NET,'' an enhanced version of the Dictionary of Occupational Titles, and the U.S. Bureau of Labor Statistics, Occupational Outlook Handbook, will serve better than NAICS as a means by which an employer may choose to demonstrate the nexus between its recruitment/screening criteria and accepted practices for the job in question. As explained in IV.C.3 above (which addresses ''exempt workers'' under the ACWIA), both O*NET and the Occupational Outlook Handbook are readily available on the Internet. The Department wishes to stress, however, that both O*NET and the Handbook are being suggested only as tools to employers, and to the Department in its enforcement. Employers are not required to use these tools. Although these sources represent a statement by the Department of common qualifications for the occupations listed, they are not intended to be definitive

lists of all the criteria which the Department would find meet the statutory test in the event of an investigation.

The Department also wishes to specifically caution against recruitment practices and selection criteria or practices which have the effect of discriminating against U.S. workers or other groups of workers, as the comment by Miano recognizes. In this connection, workers are advised that the three federal agencies ordinarily recognized as responsible for enforcement of anti-discrimination laws are the Equal Employment Opportunity Commission (EEOC), the Department of Justice's Office of Special Counsel (OSC), and the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). The EEOC administers several statutes prohibiting discrimination in employment based on factors such as age, race, color, religion, sex, or national origin. OFCCP administers several statutes and an executive order prohibiting discrimination by Federal government contractors and subcontractors based on factors such as race, color, religion, sex, national origin, disability, and veteran status. EEOC and OFCCP offices are located throughout the United States and can be located in the blue pages of the telephone directory. Complaints can be made to the EEOC by telephone at: (202) 275–7377; see also their website at *www.eeoc.gov.* Complaints can be made to OFCCP by telephone at: (202) 693–0102, –0106, or by contacting the local offices, which can be located at its website, *www.dol.gov/dol/esa/public/contacts/ofccp/ofcpkeyp.htm.*

OSC administers several statutes concerning employment discrimination based on national origin, citizenship status, and immigration document abuse. OSC can be contacted at P.O. Box 27728, Washington, DC 20038–7728; telephone: 1–800–255–7688 (workers) or 1–800–255–8155 (employers); and e-mail address: *osc.crt@usdoj.gov;* see also OSC's website at *www.USDOJ.gov/crt/osc.*

TCS described its own hiring practices, which it contended should be allowed as legitimate under the Department's regulations. Specifically, TCS recruits its employees from university campuses (apparently in India) and places them in a 12-to 18-month training program in India. At the same time requiring a three-year commitment from its employees, whom it sends on assignments in India and throughout the world. TCS suggested that the Department's proposal could be read to require TCS instead to recruit U.S. workers for assignments in the United States without regard to the employment terms and conditions it applies to its other employees—a requirement which it suggested could potentially subject it to anti-discrimination claims. TCS argued that the Department's proposal incorrectly focused on the recruitment/employment for the particular job listed on an LCA rather than the dependent employer's hiring criteria for a position with the dependent employer—a position that encompasses duties and responsibilities beyond those required for the performance of the particular job covered by an LCA. TCS explained that its employees, including those it places in H–1B positions, serve as team members of consulting groups that will move from job to job in the United States and elsewhere. It stated that it hires employees with this enduring employment relationship in mind, not for the employee's particular assignment to a job in the United States.

Similar practices are described by Simmons, which asked whether a foreign-based employer may give preference to its own (foreign) workers, who are familiar with the specific technologies and protocols of an ongoing project, and whether it would be required to offer permanent as distinguished from temporary positions to employees in the U.S., since it otherwise would only temporarily transfer its permanent, foreign workers to perform the job in the U.S. Simmons also commented that it provides extensive training to its employees in India, and asked if it could require that U.S. workers have such skills, or would it be required to use the hiring criteria it utilized to hire the workers in India. Finally, Simmons asked if it could require U.S. workers to have the precise, specialized skills to meet a specific customer need.

In the Department's view, an employer's recruitment obligation attaches to the position for which an H–1B worker is sought in the United States (the employer is obliged to take, in the words of the statute, ''good faith steps to recruit . . . United States workers for the job for which the [H-1B worker(s)] is or are sought''). Additionally, the employer is required to offer the job to the U.S. worker if the worker is at least as qualified as the H–1B worker. Accordingly, the focus must be on the particular job(s) in the United States which is/are covered by the LCA, not the position an H–1B applicant already occupies or will occupy with the dependent employer. An employer will fail to meet its recruitment obligation if it utilizes recruitment/selection criteria that have the effect of precluding an equally or better qualified U.S. worker from being hired for the position. The Department also notes that L visas, where the criteria are met, may be available as an alternative method to accommodate intra-company transfers.

5. What Documentation Would Be Required of Employers? (§ 655.739(i))

Concerning documentation to show that good faith recruitment was conducted in accordance with industry-wide standards, the NPRM stated that an employer would not need to retain actual copies of advertisements, provided it kept a record of the pertinent details. The Department proposed that an employer's public access file need only contain information summarizing the principal recruitment methods used in soliciting potential applicants and the time frame in which such recruitment was conducted. The NPRM also requested comments on how employers can and should determine industry-wide standards and how to make the employer's determination available for public disclosure.

With regard to documentation concerning pre-selection treatment of applicants for employment, the Department proposed in the NPRM that employers should retain any documentation they receive or prepare concerning the consideration of applications by U.S. workers, such as copies of applications and/or related documents, test papers, rating forms, records regarding interview and job offers. The Department stated its view that the EEOC already requires employers to retain such records and therefore this requirement imposes no new obligations on employers.

With regard to the proposed documentation requirement, Senator Abraham stated: ''The intent is not to require employers to retain extensive documentation in order to be able retroactively to justify recruitment and hiring decisions, provided that the employer can give an articulable reason for the decisions that it actually made.'' 144 Cong. Rec. S12751 (Oct. 21, 1998).

AILA and ACIP cited Senator Abraham's statement in the *Congressional Record* for the principle that the ACWIA did not impose any extensive documentation requirements. ACIP, however, stated its belief that prudent employers of their own volition may want to retain documentation and that it is appropriate for the Department to provide guidance on how long employers should retain such documentation.

The Department disagrees with the view that the ACWIA denies the

Department the usual regulatory authority to require recordkeeping as a means of ensuring compliance with an employer's statutory obligations—either generally or with specific reference to the recruitment obligation. The fact that the H–1B program is primarily complaint-driven with only attestations of compliance filed initially with the Department makes it all the more important that documentation be retained so that the Department can determine compliance in the event of an investigation. In response to AILA's comment about the length of time which documents must be retained, the Department notes that its standard record retention requirements are set forth in § 655.760(c) of the regulation, which has been clarified as discussed in IV.B.3, above.

With regard to documents concerning recruitment practices, the AFL–CIO and Miano urged that employers be required to retain copies of all job advertisements or other recruiting efforts. AILA asserted that the Department's statement that an employer need not keep copies of advertisements is an illusory saving because as a practical matter saving these documents is the only way to document the information the Department proposed to require. AILA recommended that employers only be required to keep a summary of their recruitment for the past six months, similar to the requirements of the RIR procedures in the permanent labor certification program—especially when an employer is still recruiting for open positions and it is its practice to hire U.S. as well as H–1B workers. However, AILA stated that employers should not be required to keep recruitment information in public access files because it invites competitor intrusion into an employer's recruitment practices.

The Interim Final Rule, like the proposal, requires employers to retain documentation of the recruiting methods used, including the places and dates of the recruitment, advertisements, or postings; the content of the advertisements and postings; and the compensation terms (if not included in the content). The Department continues to believe that copies of print advertisements are not necessary since publication can be verified if necessary. Rather, the documentation may be in any form, such as a copy of an order or response from the publisher, an electronic or print record of an Internet notice, or a memorandum to the file. Similarly, the documentation of recruitment of positions filled by H–1B nonimmigrants need not be segregated from other records provided it is available to the Department upon request in the event of an investigation.

In addition, as proposed, the employer will be required to maintain a summary of the recruitment methods used and time frames of recruitment in its public access file. The Department does not believe that information in this summary nature will unduly disclose proprietary information since advertisements and attendance at job fairs are public in any event.

ACIP was the only commenter responding to the Department's request for comments on how employers should determine industry-wide recruitment standards, stating only that it is unaware of any source that catalogues standard recruiting practices within an industry. The Department repeats its request for further information on this point. The Department has determined that employers will not be required to maintain evidence of industry practice. However, in the event of an investigation, the employer will be required to substantiate its assertion as to industry practice through credible evidence, such as through trade organization surveys, studies by consultative groups, or a statement from a trade organization regarding the industry norm(s). The Department will look behind such evidence as it deems appropriate in the context of the particular recruitment performed by an employer.

With regard to documentation concerning pre-selection treatment of applicants, AILA disagreed with the Department's characterization of EEOC guidelines, stating that EEOC only requires that if documentation is created or retained, it must be done consistently. It also stated that it is impractical to expect an employer to retain what may be thousands of resumes submitted to it at a job fair, especially since many resumes do not even relate to positions offered.

As discussed in detail in IV.D.8, above, in connection with the retention of records relating to displacement of U.S. workers, the Department disagrees with AILA's characterization of the EEOC requirements. The Department continues to believe that most employers are already required to preserve copies of the records listed and that retention of the documents is necessary to demonstrate fair treatment of U.S. applicants. ADEA regulations, for example, require an employer to preserve all records it makes, obtains or uses relating to ''[j]ob applications, resumes, or any other form of employment inquiry whenever submitted to the employer in response to his advertisement or other notice of existing or anticipated job openings, including records pertaining to the failure or refusal to hire any individual, * * * [j]ob orders submitted by the employer to an employment agency or labor organization for recruitment of personnel for job openings, * * * [a]ny advertisements or notices to the public or to employees relating to job openings, promotions, training programs, or opportunities for overtime work.'' 29 CFR 1627.3(b)(i).

The Department emphasizes that it is not requiring employers to create any documents regarding treatment of applicants for employment, but rather to preserve those documents which are created or received. With regard to the comment regarding job fairs, this rule would not require employers to retain any resumes which do not relate to the positions to be filled by H–1B nonimmigrants. Nor does the Interim Final Rule require that any information relating to treatment of applications be maintained in the public access file.

F. What Are the Requirements for Posting of Notice? (Combined With Section O.5 of the Preamble to the NPRM) (§ 655.734(a)(1)(ii)(A) and (B))

Section 212(n)(1)(C) of the INA, 8 U.S.C. 1182(n)(1)(C), requires that, at the time of filing the LCA, an employer seeking to hire an H–1B nonimmigrant shall notify the bargaining representative of its employees of the filing or, if there is no bargaining representative, post notice of filing in conspicuous locations at the place of employment. As amended by the ACWIA, Section 212(n)(1)(C) further provides (where there is no bargaining representative) that the notice may be accomplished ''by electronic notification to employees in the occupational classification for which the H–1B nonimmigrants are sought.''

1. What Are the Requirements for Posting of ''Hard Copy'' Notices at Worksite(s) Where H–1B Workers Are Placed? (NPRM Section O.5) (§ 655.734(a)(1)(ii)(A))

Regulations with respect to this notification requirement were published by the Department as a Final Rule on December 20, 1994 (59 FR 65646, 65647). That Final Rule (set forth in the current Code of Federal Regulations) required, among other things, that an employer, who sends an H–1B worker to a worksite within the area of intended employment listed on the LCA which was not contemplated at the time of filing the LCA, post a notice at the worksite on or before the date the H–1B nonimmigrant begins work. 20 CFR 655.734(a)(1)(ii)(D). The purpose of the

provision was to enable employers to place H–1B workers at worksites where posting had not occurred without filing a new LCA. This provision was among those enjoined for lack of notice and comment by the court in *National Association of Manufacturers* v. *Reich (NAM)*, 1996 WL 420868 (D.D.C. 1996). On October 31, 1995, during the pendency of the *NAM* litigation, the Department republished the regulation for comment (60 FR 55339).

In the 1999 NPRM, the Department proposed for comment § 655.734(a)(1)(ii)(A) (previously published for notice and comment in the October 31, 1995 proposed rule as § 655.734(a)(1)(ii)(C) and (D)). The provisions regarding ''hard copy'' notice requirements remained essentially unchanged from the 1995 proposed rule. Subclause (A)(3) requires employers to post notice at worksites on or within 30 days before the date the LCA is filed. Subclause (A)(4) requires that where the employer places an H–1B nonimmigrant at a worksite which is not contemplated at the time of filing the LCA, but is within the area of intended employment listed on the LCA, the employer is to post notice at the worksite (either by hard copy or electronically) on or before the date any H–1B nonimmigrant begins work there. The preamble explained that posting is not required if the location is not a ''worksite,'' as discussed in proposed Appendix B of the NPRM.

Fourteen commenters responded to the 1995 proposed rule on notification. Eight of those commenters (AILA, ACIP, Intel, Microsoft, Motorola, NAM, Complete Business Solutions, Inc. (CBSI), and Moon, Moss, McGill & Bachelder (Moon)) objected to posting at worksites not controlled by the LCA-filing employer. These commenters asserted that many employers' customers would not allow posting at their worksites. In addition, because the regulations define ''place of employment'' as the worksite or physical location at which the H–1B nonimmigrant's work is actually performed, some commenters expressed a concern that strict application of this definition of place of employment could lead to absurd and/or unduly burdensome notice requirements such as posting notice at a restaurant when an H–1B nonimmigrant has a business lunch, at a courthouse when the nonimmigrant makes a court appearance, or at an out-of-town hotel when the nonimmigrant attends a training seminar. One commenter (Microsoft), expressed concern about the burden of notification and suggested that the notice provision should not apply to employers who do not make great use of the H–1B nonimmigrant worker visa program.

The Department received six comments on these provisions in response to the 1999 NPRM.

The AFL–CIO emphasized the importance of giving notice to all affected employees, including employees of the secondary employer and employees of other staffing firms. The AFL–CIO stated that the purpose of the notice is to provide information to affected workers that they may have certain rights and that the employer has certain duties regarding placement of the H–1B worker which are not diminished because the worksite is ''short-term'' or ''transitory.''

Four employer organizations (ACIP, AILA, ITAA, NACCB) commented on the issue of notification (whether hard-copy or electronic) to affected workers at third-party worksites. These groups contended that the statute requires an employer to notify only its own employees and that it is unreasonable to hold a primary employer responsible for notifying employees at worksites over which it lacks control. AILA gave as an example, workers such as service engineers who travel to a number of worksites during the course of a day or a week. AILA stated that if a client refuses to post notice, an H–1B worker cannot be sent to the site, resulting in a potential loss of business.

One commenter (Latour) requested that the regulation specify that worksite posting requirements do not apply to rehabilitation professionals providing home health care.

The Department has carefully considered the comments submitted in response to the 1995 proposed rule and the 1999 NPRM. The Department notes first that the statute requires that notice be posted at the place of employment. See Section 212(n)(1)(C)(ii). The Department's regulations have consistently defined ''place of employment'' as ''the worksite or physical location where the work is performed.'' 20 CFR 655.715 (1992).

This definition was modified slightly in the 1994 Final Rule (currently in effect) to provide ''where the work actually is performed.''

Furthermore, the purposes of notification can only be satisfied by notice to all of the affected workers—*i.e.,* all of the workers in the occupation in which the H–1B worker is employed at the place of employment, including employees of a third-party employer. This is critical because of the real possibility of displacement by the H–1B employees. Although this would only be a violation if the employer is an H–1B-dependent employer or willful violator, there remains a real possibility that U.S. workers of other employers could be harmed by the placement of the H–1B worker. Thus the notice alerts affected employees to the fact that an LCA has been filed and that H–1B workers will be placed at the worksite. Without such notice affected workers would not be able to file complaints regarding H–1B violations either with regard to themselves (if they are displaced because of a placement by an H–1B-dependent employer or willful violator), or with regard to the H–1B workers (which might indirectly affect themselves).

The Department observes that a number of employers' concerns with respect to notification of affected employees, either by hard copy posting or electronically, at third-party work sites, have been addressed by the interpretation of ''place of employment''/''worksite'' discussed in detail in IV.P.1 and .2 of the preamble and § 655.715 of the Interim Final Rule (see Appendix B of the NPRM). As stated in § 655.715, the Department interprets ''place of employment'' as excluding locations where the H–1B worker's presence either is due to the developmental nature of his/her activity (*e.g.,* management seminar; formal training seminar), or is short-term (not exceeding five consecutive workdays for any one visit) and transitory due to the nature of his/her job (*e.g.,* computer ''troubleshooter,'' sales representative, trial witness). Under this interpretation, employers would not be required to give notice in many of the situations about which concerns have been expressed, but would be required to give notice in those instances where the Act and its purposes require. If a location does not constitute a ''worksite,'' the employer is not required to post notice.

Although the Department recognizes that in some instances it may be inconvenient for an employer to post notice at a worksite controlled by another business (such as the customer of an employer), the Department notes that its experience in enforcement is that no employer has been unable to post notices at a customer's worksite when the operator, owner, or controller of the worksite was informed that posting was required by the statute and the regulations.

The Department agrees with the comment that notice need not be provided where a rehabilitation professional is providing services in the client's home. The Interim Final Rule provides in paragraph (2) of the definition of ''place of employment'' in § 655.715, that ''a physical therapist

providing services to patients in their homes within an area of employment'' is an example of a non-worksite location; in these situations notice must be posted at the worker's home station or regular work location.

2. What is Required for ''Electronic Posting'' of Notice to Employees of the Employer's Intention to Employ H–1B Nonimmigrants? (§ 655.734(a)(1)(ii)(B))

The Department also proposed a regulation, § 655.734(a)(1)(ii)(B), which would implement the ACWIA provision allowing electronic notification of employees. The ACWIA modified the statutory requirement for worksite posting of notices (where there is no collective bargaining representative), to permit an H–1B employer to use electronic communication as an alternative to posting ''hard copy'' notices in conspicuous locations at the place of employment.

Senator Abraham explained: ''An employer may either post a physical notice in the traditional manner, or may post or transmit the identical information electronically in the same manner as it posts or transmits other company notices to employees. Therefore, use of electronic posting by employers should not be restricted by regulation.'' 144 Cong. Rec. S12751 (Oct. 21, 1998).

Congressman Smith elaborated: ''By providing this flexibility, Congress intended to improve the effectiveness of posting in the protection of American workers. Therefore, the electronic notification must actually be transmitted to the employees, not merely be made available through electronic means such as inclusion on an electronic bulletin board.'' 144 Cong. Rec. E2325 (Nov. 12, 1998).

As the NPRM explained, in providing this alternative method for notification to affected workers, Congress indicated no intention of reducing the effectiveness of the notice requirement which has been an element of the H–1B program from its inception. The proposed regulation therefore provided that electronic notice may be accomplished by any means the employer ordinarily uses to communicate with is workers about job vacancies or promotion opportunities. Thus the NPRM stated that notice would be permitted through the employer's ''home page'' or ''electronic bulletin board'' where employees as a practical matter have direct access; or through e-mail or other actively circulated electronic message such as the employer's newsletter, provided the employees have computer access readily available. Where such computer access is not readily available, the NPRM explained that notice may be accomplished by posting a ''hard copy'' at the worksite.

The preamble further explained at Section O.5 that where the H–1B nonimmigrant(s) will be employed at the worksite of another employer, the H–1B employer is required to provide notice to the affected workers at that worksite. Thus, the H–1B employer may make arrangements with the other employer to accomplish the notice (*e.g.,* the other employer may ''post'' the electronic notice on its Intranet or employee newsletter, or may ''post'' hard copy notice in conspicuous locations at the place of employment).

The Department received 30 comments, including 22 from individuals, on the 1999 NPRM provisions regarding electronic notice.

The individuals generally objected to the statutory provision allowing electronic posting as an alternative to hard copy posting, asserting that Internet posting alone allows companies to hide replacement of American workers with foreign workers. The AEA essentially expressed a similar view on electronic posting, noting that the Internet/Intranet method of notification is unworkable.

The AFL–CIO commented that electronic posting should only be allowed if employers can show that all workers have access to e-mail or the Internet site, and that all notices are flagged to them. Another employee organization, IEEE, emphasized that to be an effective notice, electronic communications must be readily available and accessible to all affected U.S. and foreign workers.

ACE, ACIP and SHRM commended the Department for its flexibility on methods of electronic posting. ACIP recommended that the Department distinguish between ''indirect'' and ''direct'' electronic notices, suggesting that where ''indirect'' notice is given, such as on a bulletin board, the employer should have to make the notice available for 10 days. If, however, the employer provides direct notice, such as e-mail to each employee, ACIP suggested that notice should only have to be sent to each affected employee once. SHRM urged the Department to allow an employer to document that notice has been given by permitting the employer to place a signed notice in the public access file regarding how notice was provided. AILA recommended amending the regulations to clarify that an employer may satisfy its electronic posting obligation by providing the notification on its internal network or website. AILA also recommended that with respect to employers which send the notice by e-mail, the regulation should specify that notification sent to a distribution group of ''affected workers'' satisfies the electronic posting requirement. Another commenter (Cooley Godward) sought clarification on the issue of how electronic posting can comply with the requirement of § 655.734(a)(1)(ii)(A) that the LCA be posted in two or more conspicuous places, and on whether or not all four pages of the LCA must be posted.

With regard to posting at third-party worksites, AILA suggested that a primary employer should be able to satisfy its obligation to document that an electronic posting was made at the work site of a third-party employer in any one of the following three ways: (1) A statement in the contract between the parties requiring the notification to be made; (2) a written statement by a responsible party at the third-party location; or (3) a printout of the electronic communication with a certification about when, how, and to whom it was sent.

The statute does not give the Department the discretion to disallow electronic posting, as suggested by the individual commenters. The Department agrees with the AFL–CIO and the IEEE, however, that the critical consideration is that the notice is readily available and accessible to the affected workers. The Department believes that the proposed regulation, as drafted, meets these concerns. Posting must be by the means the employer ordinarily uses to communicate with its workers about job vacancies or promotion opportunities. Posting on the employer's ''home page'' or electronic bulletin board is allowed where employees as a practical matter have direct access to these resources. Where employees lack computer access, a hard copy must be posted or the employer may provide employees individual copies of the notice.

The Interim Final Rule clarifies the operational requirements for electronic posting. Like the physical posting, the electronic notice need not incorporate a copy of the LCA, although it would be permissible since a copy of the LCA would satisfy the substantive requirements (see § 655.734(a)(1)(ii)). (Employers are reminded that all H–1B nonimmigrants must be given a copy of the LCA. See § 655.734(a)(2).) Like ''hard copy'' posting, electronic posting on a ''home page'' or electronic bulletin board must be posted for 10 days. If direct notice is given to each affected employee, as through e-mail or ''hard copy'' notices, the notice need only be given once during the regulatory time

period. Notice by e-mail may be provided by notification to an e-mail group consisting of all of the affected employees. Electronic posting, unlike hard copy posting, need not be posted in two locations, provided all the affected employees, as a practical matter, have access to the website or bulletin board. Another method of posting would have to be used to reach those employees who do not have such access. For example, home care therapists may not have practical access to a computer at all as a part of their job. Where there is no such access, physical posting at two sites in the home office or individual copies of the notice would be necessary. The Department believes the existing documentation provision is broad enough to encompass electronic posting, both at the employer's own worksite and at another employer's worksite.

The Interim Final Rule also clarifies that electronic notification, like other physical posting, shall be provided in the period on or before 30 days before the date the LCA is filed. Where H–1B nonimmigrants are placed at a worksite not contemplated when the LCA was filed, the notification shall be provided on or before the date the H–1B nonimmigrant begins work at the site.

Finally, upon review of the provisions of the ACWIA, the Department has concluded that some modification of the required notice is appropriate. Specifically, the Department has concluded that the content of the notice should be modified to require dependent employers and willful violators to notify affected workers, through the methods provided herein, that they are H–1B-dependent or a willful violator, subject to the requirements for recruitment and non-displacement of U.S. workers. Where the employer is dependent (or a willful violator) but will employ only exempt workers, the notice must so provide, and further state that it is not subject to the recruitment and non-displacement requirements. In addition, the notice about filing complaints with the Department of Justice for failure to offer employment to an equally or better qualified U.S. worker will only be required for H–1B-dependent employers and willful violators. Finally, because the full attestations are set forth in the cover sheet, Form ETA 9035CP, the provision in § 655.734(a)(3) requiring employers to give copies of the LCA to all H–1B nonimmigrants has been modified to provide that copies of the cover sheet shall be given to the H–1B nonimmigrant upon request.

G. What Does the ACWIA Require of Employers Regarding Benefits to H–1B Nonimmigrants? (§ 655.731(c)(3), § 655.732)

Section 212(n)(2)(C)(viii) of the INA as amended by the ACWIA states that ''[i]t is a failure to meet a condition of paragraph 1(A) [the wage and working condition attestation requirements] * * * to fail to offer an H–1B nonimmigrant, during the nonimmigrant's period of authorized employment, benefits and eligibility for benefits (including the opportunity to participate in health, life, disability, and other insurance plans; the opportunity to participate in retirement and savings plans; and cash bonuses and noncash compensation such as stock options (whether or not based on performance) on the same basis, and in accordance with the same criteria, as the employer offers to United States workers.''

Senator Abraham and Congressman Smith described the operation of this provision in similar terms. Senator Abraham explained:

> This obligation is only an obligation to make benefits available to an H–1B worker if an employer would make those benefits available to the H–1B worker if he or she were a U.S. worker. Thus, if an employer offers benefits to U.S. workers who hold certain positions, it must offer those same benefits to H–1B workers who hold those positions. Conversely, if an employer does not offer a particular benefit to U.S. workers who hold certain positions, it is not obligated to offer that benefit to an H–1B worker. Similarly, if an employer offers performance-based bonuses to certain categories of U.S. workers, it must give H–1B workers in the same categories the same opportunity to earn such a bonus, although it does not have to give the H–1B worker the actual bonus if the H–1B worker does not earn it.

144 Cong. Rec. S12753 (Oct. 21, 1998). See also the statement of Congressman Smith, 144 Cong. Rec. E2326.

Senator Abraham continued:

> While this clause is not intended to require that H–1B workers be given access to more or better benefits than a U.S. worker who would be hired for the same position, it does not forbid an employer from doing so. For example, an employer might conclude that it will pay foreign relocation expenses for an H–1B worker whereas it will not pay such relocation expenses for a U.S. worker.

144 Cong. Rec. S12753 (Oct. 21, 1998).

Congressman Smith, on the other hand, stated that ''[t]he statement 'on the same basis' is intended to mean equal or equivalent treatment, not preferential treatment for any group of workers. Thus, if an employer offers benefits to American workers, it must offer those same benefits to H–1B workers.'' 144 Cong. Rec. E2326 (Nov. 12, 1998).

Senator Abraham also explained that ''care must be taken to find the right U.S. worker to whom to compare the H–1B worker in terms of access to benefits. * * * If a particular benefit is available only to an employer's professional staff, then it only need be made available to an H–1B filling a professional staff position. If an employer's practice is not to offer benefits to part-time or temporary U.S. workers, then it is not required to offer benefits to part-time H–1B workers or temporary H–1B workers employed for similar periods.'' 144 Cong. Rec. S12753 (Oct. 21, 1998).

Senator Abraham and Congressman Smith differed in their view as to the application of the provision to multinational corporations. Thus Senator Abraham stated:

> If an employer's practice is to have its U.S. workers brought in on temporary assignment from a foreign affiliate of the employer remain on the foreign affiliate's benefits plan, then it must allow its H–1B workers brought in on similar assignments to do the same. Likewise, in that instance, it need not provide the H–1B workers with the benefits package it offers to its U.S. workers based in the U.S. Indeed, even if it does not have any U.S. workers stationed abroad whom it has brought in this fashion, it should be allowed to keep the H–1B worker on its foreign payroll and have that employee continue to receive the benefits package that other workers stationed at its foreign office receive in order to allow the H–1B worker to maintain continuity of benefits. In that instance, the basis on which the worker is being disqualified from receiving U.S. benefits (that he or she is receiving a different benefits package from a foreign affiliate) is one that, if there were any U.S. workers who were similarly situated, would be applied in the same way to those workers. Hence the H–1B worker is being treated as eligible for benefits on the same basis and according to the same criteria as U.S. workers. It is just that the criterion that disqualifies him or her happens not to disqualify any U.S. workers. Or to put the point a little differently: The H–1B worker is being given different benefits from the U.S. workers not because of the worker's status as an H–1B worker but because of his or her status as a permanent employee of a foreign affiliate with a different benefits package.

Ibid.

Congressman Smith had a different perspective:

> There is particular concern regarding such erosion in instances where a foreign affiliate of a petitioning employer is involved as the agent for payment of wages and provision of benefits to the H–1B workers. The statutory obligations must be fully met in such instances. Congress intends that the ultimate and complete responsibility for all employer obligations under this Act, including the provision of benefits to the H–1B worker equal to those offered the employer's

American workers based in the U.S., lies with the American (United States) employer who brings nonimmigrant workers into the country. Ultimately, it is the American employer, not the foreign subsidiary, pledging a benefit package similar to that of its American workers. Congress would expect the Secretary to look with particular care at circumstances involving a foreign subsidiary where there is an appearance of contrivance to avoid the obligation to provide equal wages and benefits to H–1B and American workers.

144 Cong. Rec. E2326 (Nov. 12, 1998).

1. What Does ''Same Basis and Same Criteria'' Mean With Respect to an Employer's Treatment of U.S. Workers and H–1B Workers With Regard to Benefits? (§ 655.731(c)(3), § 655.732)

In the NPRM, the Department proposed that: (a) An employer is required to offer H–1B workers the same benefit package it offers to U.S. workers; (b) the package must be offered on the same basis as it is offered to U.S. workers, *i.e.,* the employer may not impose more stringent eligibility or participation requirements on the H–1B workers than those applied to U.S. workers; (c) the comparison between the benefits offered U.S. and H–1B workers should be between similarly employed workers, *i.e.,* those in the same employment categories, such as full-time compared to full-time, professional to professional; and (d) the benefits actually provided to the H–1B workers, as distinguished from the benefits offered, might be different than those provided to U.S. workers because of an individual's choice among options. The Department also sought comments regarding whether the ACWIA would allow an employer to provide a different, but ''equivalent package'' to satisfy its benefits obligation, noting the difficulty of making an evaluation of the benefits—particularly a qualitative evaluation of the benefits, as distinguished from one based on the relative costs to the employer of providing such benefits.

The Department further proposed that an employer, consistent with its attestation to adhere to minimum standards for H–1B workers, may provide greater benefits to H–1B workers than to U.S. workers. The Department acknowledged, however, that the phrases ''same basis'' and ''same criteria,'' applied literally, could require that U.S. and H–1B workers be offered the same (or possibly equivalent) benefits.

The Department noted the possible complications that might arise with respect to benefits afforded employees of a multinational corporate operation, particularly where the H–1B worker works in the U.S. for only a short period of time. In this situation, the NPRM noted, it might not be practical for the U.S. employer to provide the H–1B worker with benefits identical to those provided its U.S. workers. The Department proposed that while the U.S. employer may cooperate with its corporate affiliate in the worker's home country with regard to the payment of wages to the worker and the maintenance of his or her ''home country'' benefits (such as that country's retirement system), the U.S. employer remains ultimately responsible for ensuring that the H–1B worker is provided benefits at least equal to those offered U.S. workers. The Department stated that it would look closely into situations involving a foreign affiliate where there was the appearance of a contrived arrangement to avoid the U.S. employer's obligation to provide to its H–1B workers wages and benefits at least equal to those provided its U.S. workers. At the same time, the Department proposed that it would carefully examine the circumstances to consider non-equivalent but nonetheless equitable benefits, including the H–1B worker's actual length of stay in the United States.

The Department also proposed to modify § 655.732 of the current regulations to clarify that an employer must provide the H–B worker with fringe benefits and working conditions at least equal to those provided U.S. workers. The NPRM noted that such a modification would make it clear that the requirement that the H–1B employer provide working conditions, including benefits, that will not adversely affect those provided similarly employed U.S. workers, requires consideration of similarly employed workers in the employer's own workforce and, in some circumstances, the prevailing conditions in the area of employment.

Finally, the Department sought comment on whether it would be beneficial to develop a regulatory definition of ''benefits'' within the meaning of the ACWIA or merely to provide a list of examples. The NPRM noted that the ACWIA contemplates the inclusion of various forms of cash and non-cash compensation, such as bonuses and stock options, which ordinarily are considered wages.

Several commenters, including AOTA, APTA, IEEE, and an attorney (Latour), generally endorsed the Department's NPRM approach in this area. IEEE stated that the Department's proposal ''will help implement the letter and the spirit of the law that the wages and working conditions of U.S. workers not be adversely affected'' and, at the same time, ''help to reduce the likelihood that employers will discriminate against H–1B workers by offering them less generous benefits.''

Senators Abraham and Graham and AILA noted that the NPRM created some confusion by failing to make it clear that an employer must offer ''benefits and eligibility for benefits'' on the same basis as offered to U.S. workers. Citing to Senator Abraham's statement in the Congressional Record, these commenters stated that this phraseology was important because workers must be or make themselves eligible to obtain benefits—*e.g.,* by selecting a plan, providing partial payment, working for a period of time, or performing at a high level. Similarly, ACE requested the Department to make clear that a comparison should be made between the benefits offered to workers, not the benefits actually selected by the workers. ACE mentioned, as one example, ''cafeteria plans'' offered by many employers. Under these plans, it explained, employees choose certain benefits and not others for a variety of reasons.

The Department agrees that the ACWIA requires an employer to offer H–1B workers benefits and eligibility for benefits on the same basis and in accordance with the same criteria as U.S. workers. Because employers often offer workers a choice of benefits, the ACWIA does not require that U.S. workers and H–1B workers actually receive the same benefits. Similarly, some employees may opt for ''family'' coverage of certain benefits, while others opt for ''individual'' coverage. Furthermore, as the commenters noted, workers may be required to meet certain criteria or take certain action to avail themselves of the benefits. However, an employer cannot satisfy its statutory requirement by ''offering'' benefits which it never actually provides to selecting workers. Thus, as discussed below, employers are required to retain documentation showing that employees actually receive the benefits that they have selected. While the Department believes that the NPRM comported with the statutory language, the Interim Final Rule clarifies these requirements in order to eliminate any ambiguity.

AILA and ACIP agreed with the Department's proposal that an employer lawfully may offer and provide greater benefits to H–1B workers than those offered to U.S. workers. The AFL–CIO asserted the contrary position. In the AFL–CIO's view, an employer should be required to provide identical benefits to H–1B and U.S. workers, a result it argues is consistent with the ACWIA's ''same basis'' requirement. Senators

Abraham and Graham suggested that the statute would allow employers to offer benefit incentives above and beyond normal benefits to lure foreign-based employees with critical skills to work in the United States. The Senators suggested that so long as the packages are offered on the same basis to U.S. and foreign nationals based abroad, the practice should be permitted.

In the Department's view, the statute does not require that H–1B workers and U.S. workers be offered the same benefits. While perhaps Section 212(n)(2)(C)(viii), read in isolation, could be read to require this result, this provision must be read in the context of the entire statute. Section 212(n)(2)(C)(viii) provides that it is a failure to meet paragraph (1)(A)—the wage requirements of the Act—to fail to provide the required benefits. Section 212(n)(1)(A)(i) in turn provides that the employer must offer wages that are ''at least'' those paid to similar workers. The Department notes, however, that an H–1B-dependent employer or willful violator, when it conducts good faith recruitment pursuant to section 212(n)(1)(G)(i), must offer U.S. workers the same compensation (including benefits) as it will offer the H–1B workers in the recruited positions. Furthermore, providing greater benefits to H–1B workers may violate requirements of the various discrimination laws. The agencies that enforce discrimination requirements and their telephone numbers and website addresses are set forth above in IV.E.4, above.

Senators Abraham and Graham asserted that the Department should look at the employer's entire benefits structure as it concerns ''benefits eligibility for its workforce generally'' to make sure that the comparison is made to the right employees. These Senators and AILA suggested that comparisons could appropriately be made on such bases as part-time vs. full-time workers, positions requiring extensive travel vs. those that do not, relative seniority, the particular organizational component to which the workers are assigned, and whether the individual occupies a position for which special incentives should apply. Similarly, ACIP suggested that the Department look beyond a simple full-time/part-time distinction.

The Department agrees that it should look at an employer's benefits structure. Employers commonly provide different benefits, for example, based on part-time vs. full-time status, seniority, union vs. non-union, organizational component, etc. The Department agrees that H–1B workers should be provided benefits based on their position in the organizational structure, provided the employer utilizes the same distinctions on an organization-wide basis. However, the Department will not accept artificial distinctions which are not generally accepted in the industry and which have the result of denying benefits to H–1B workers on the basis that there are no comparable workers in the organization or which otherwise have the effect of discriminating between workers on the basis of citizenship, nationality, or other prohibited grounds.

The Interim Final Rule incorporates these principles. The Interim Final Rule also prohibits employers from denying benefits based on the H–1B worker's temporary status since all H–1B workers, by virtue of their visa restrictions, are temporary workers. Thus, an employer by utilizing ''temporary'' as a basis for comparison could evade offering to these workers the benefits that typically would be paid to workers hired on a ''permanent basis,'' even though the tenure of workers in each group might be of comparable duration, thereby effectively nullifying the statutory provision. An employer would, however, be allowed to require that an H–1B workers meet eligibility and vesting requirements.

Sun Microsystems suggested that to the extent there was a perceived need for greater scrutiny over fringe benefits, the Department's efforts should be restricted to dependent employers. The Department disagrees. Unlike some other provisions of the ACWIA, the ''same basis''/''same criteria'' provision applies to all H–1B employers.

TCS asserted that the Department ''should clarify that, where length of service is applicable to the amount of the benefit, only the H–1B non-immigrant's length of service in the United States, and not the H–1B's entire length of service with the employer should be included in the calculation.''

It is the Department's view that an employer is required to offer benefits on the same basis as it offers benefits to its U.S. employees. If an employer offers benefits based on length of service for the employer, it must offer benefits to its H–1B workers on that basis as well. (See the discussion below regarding treatment of multinational organizations.)

APTA suggested that the INS inform all H–1B workers of their right to be offered the same benefits as U.S. workers, to better ensure that they receive the benefits due them. The Department notes that every H–1B worker is required to receive a copy of the LCA, which contains a brief reference to this requirement. Section III.B of the Preamble, above, discusses in greater detail the Department's plans to disseminate information regarding the program's requirements.

In response to the Department's query, BRI and AILA contended (without citing support for their position) that the ACWIA contemplates that an employer may satisfy the benefits attestation by offering H–1B workers different but ''equivalent'' benefit packages relative to the benefits offered to U.S. workers. BRI further stated that such benefits should be compared according to their monetary value.

The Department has concluded, as a general matter, that the statute's ''same basis'' provision does not permit an employer to offer its H–1B workers benefits ''equivalent'' to but different from those offered its U.S. workers. The Department notes that these commenters, like other commenters, appeared to be concerned with benefits provided by multinational corporations, which are discussed separately below.

Intel and ACIP stated that a few countries prohibit their citizens from owning stock in foreign corporations. Cooley Godward also raised the question of benefits such as stock options whose accrual will terminate after an H–1B employee's period of status ends.

Although there is nothing which requires an employee to take advantage of a stock option, it is the Department's view that if an employer is aware that its H–1B worker(s) is prohibited from taking advantage of a stock option because of laws of the worker's home country, the employer should offer such worker(s) an alternative benefit of comparable value. With regard to the question of stock options or benefits which will accrue after termination of an H–1B worker's period of status, such benefits should be provided on the same basis as they would otherwise be provided to workers who are no longer in the firm's employ (or who have transferred back to the home office). If other workers have a right to exercise the option or receive the benefit even if they are no longer in the firm's employ, the same would be true with regard to H–1B workers.

Turning to the question of treatment of employees of multinational firms, Senators Abraham and Graham asserted that the Department's proposal ''appear[s to provide no] consideration of the question of who the right similarly situated worker to compare [the transferee] is, and whether there actually is one.'' They, instead, suggested that the Department should focus on the transferee's status as a permanent employee with the

employer's foreign affiliate, rather than his or her status as an H–1B worker.

TCS stated that it appreciated the Department's sensitivity to the issue of the application of the benefits requirement to employees who receive a range of benefits from their foreign employer and are only in the United States on short-term assignments in connection with their long-term employment with the foreign employer. TCS contended, however, that the requirement that H–1B workers be provided benefits equivalent to those received by U.S. workers is contingent upon the existence of ''similarly employed'' workers in the United States. TCS argued that because it is an Indian company and its employees receive India-based benefits, they are not similarly employed to any computer engineers it might hire in the United States, and that TCS would therefore be relieved from any obligation to offer new benefits to its workers during the period of their temporary employment in the United States.

ACIP commented that a ''length of status'' test ''wrongly assumes that the practice of maintaining a foreign benefits program is a matter of convenience, when, in fact, the practice is maintained because the disruption often causes the employee to lose vested interest in a benefit plan.'' Instead, they suggested, ''[t]he Department should adopt a rule that allows for a transferee to maintain his or her foreign benefits as long as such benefits plan is administered abroad continuously without interruption and as long as the company typically offers this option to all international transferees.'' Similar comments were made by AILA and Intel, which stated that it is in the employees' best interest to stay on ''home country'' pay and benefits. SIA also stated that if it is an employer's practice to have its workers continue to receive ''home country'' benefits when they are on a short-period assignment in the United States, it should be allowed to continue to do so.

Some commenters (ACIP, Intel, Latour) indicated that multinational corporations typically offer similar benefit packages to all their employees. Thus, ACIP stated that ''most employers already provide the same benefits to all workers and do not distinguish between U.S. and foreign nationals.'' At the same time, it noted that ''in dealing with a global workforce, it is sometimes necessary to provide different benefit packages to workers from different countries, depending upon the laws and social services of that country.'' Intel similarly stated that the vast majority of its regular full-time H–1B workers are on U.S. benefits; it noted that a small percentage of these workers are on their ''home country'' pay and benefits. Intel further stated that all its H–1B workers are put on U.S. medical benefits, because of ''out of country'' coverage problems. ACIP explained that currently employers may provide certain benefits to workers depending upon standards in the workers' home countries and the employer's international relocation policies. As stated by ACIP: ''Benefits may include relocation expenses, schooling for children, housing allowance, travel expenses, additional vacation time and assistance with health care or other items the worker is accustomed to receiving.''

ACIP applauded the Department's effort to deal with this issue and supported the Department's statement that ''should the U.S. worker remain on the foreign plan, the U.S. employer will be held responsible for compliance with all H–1B regulations.''

AILA's comment, that flexibility is needed to preserve the ability of the H–1B workers to preserve their existing ''home country'' benefits (which if interrupted could have significant and perhaps long-term negative impact on the worker and the worker's family), was representative of several comments on this point.

The Department has carefully considered the question of application of the benefits requirements of the ACWIA to multinational firms. The Department cannot agree with the construction of the statute that would deprive foreign-based employees of the benefit protections enacted by the ACWIA on the basis that they are not ''similarly employed.'' On the other hand, the Department believes it is appropriate to provide some accommodation for multinational corporate operations where ''home country'' benefits are equitably equivalent to the benefits provided to employees.

The Department has crafted a two-part Interim Final Rule, distinguishing between workers who are in the United States for a short period of time (90 days or less) and workers who are in the United States for a longer period. Where H–1B workers permanently employed in their ''home country'' (or some other country) are not transferred to the United States but remain on the payroll of their permanent employer in their ''home country'' and continue to receive benefits from the ''home country'' without interruption, the Department will require nothing further, provided the worker is in the United States for no more than 90 continuous days in any one visit to the United States. Moreover, the employer must also provide reciprocity to its U.S. workers *i.e.,* U.S. workers based abroad and U.S. workers based in the United States must receive the benefits of their home work station (the station abroad or in the United States, respectively) when traveling on temporary business. It should be noted that this provision would allow H–1B workers who are not in the United States more than 90 continuous days in one trip to go back and forth between countries without any consideration to cumulative days of employment in the United States, provided there is no reason to believe the employer is trying to evade the Act's benefit requirements, such as where a worker remains in the United States most of the year but returns to the home country on brief visits.

Once the H–1B worker has worked in the U.S. for more than 90 continuous days (or from the point where the worker is transferred or it is anticipated that the worker will likely remain in the United States for more than 90 continuous days), the H–1B employer is required to offer that worker the same benefits on the same basis as provided to its U.S. workers unless: (1) The worker continues to be employed on the ''home country'' payroll; (2) the worker continues to receive ''home-country'' benefits without interruption; (3) the ''home-country'' benefits are equitable relative to the U.S. benefit package; and (4) the employer provides reciprocity (*i.e.,* similar treatment as discussed above) to its U.S. workers (if any) on assignment away from their home work station. In the Department's view, this strikes an appropriate balance between meeting the statutory requirement (thereby protecting the benefits of U.S. workers employed in the U.S. against erosion), and protecting the H–1B worker's interest in preserving long-term ''home country'' benefits which may be threatened by the disruption of these benefits.

Furthermore, as Intel noted in its comments, many health care plans fail to provide coverage, or fail to provide full coverage, outside their country's boundaries. Therefore any employer that offers health coverage to its U.S. workers must offer similar coverage (same plan and same basis) to its H–1B workers in the United States for more than 90 continuous days unless the H–1B workers' home-country plan provides full coverage (*i.e.,* coverage comparable to what they would receive at their home work station) for medical treatment in the United States.

In addition, employers will be required to provide H–1B workers who are in the United States more than 90

continuous days those U.S. ''benefits'' which are paid directly to the worker—namely paid vacation, paid holidays, and bonuses. H–1B workers must also be provided working conditions and eligibility for working conditions (hours, shifts, vacation periods, etc.) on the same basis and criteria provided to U.S. workers.

TCS argued that if the Department requires the same or even equivalent benefits for its workers, they will receive double benefits—the U.S. benefits plus their ''home country'' benefits. In the Department's view, TCS is mistaken. The Department's proposal tracks the ACWIA. Neither the proposal nor the statute requires the employer to continue to maintain ''home country'' benefits in such situations. While an employer in such situations, either by contract or otherwise, might be required to maintain such benefits (or it may decide to do so as a matter of company policy), the ACWIA does not impose such an obligation, nor does this rule.

The Department received a number of comments regarding whether a multinational employer continuing ''home country'' benefits to H–1B workers need establish that the benefits provided are equivalent or equitable in relation to benefits provided U.S. workers. ACIP expressed the view that ''it [would be] extremely burdensome to put a dollar value on benefits received.'' Similarly, AILA stated that multinational employers should be able to provide equitable but non-equivalent benefits to H–1B workers. BRI, on the other hand, took the position that benefits should be equivalent, comparing their monetary value. The AFL-CIO, as discussed above, contended that employers should be required to provide identical benefits to H–1B and U.S. workers.

The Department agrees that a multinational firm, under the circumstances described, should not be required to make a valuation of the benefits it offers and provides to U.S. and H–1B workers, but rather should be required, in the event of an investigation, to establish only that it provides benefits which are equitable in relation to U.S. workers' benefits. The Department finds very persuasive the arguments that it is in the workers' interest to allow employers to continue their permanent employees on ''home country'' benefits when working temporarily in the United States. At the same time, the Department believes that establishing benefits in terms of cost is unduly burdensome, and would not further the objective of establishing comparable benefits since there is no reason to believe even identical benefits abroad would cost the same as benefits in the United States.

Only ACIP provided comments on the meaning of the phrase ''equitable benefits.'' ACIP suggested that ''[t]he emphasis should be on whether the benefits package is equitable in light of basic human needs, similarity in treatment of all workers, how U.S. workers transferred abroad are treated, and the facts and circumstances of each H–1B worker.'' ACIP further stated: ''While we agree that the Department should look closely at 'contrived cases,' we stress that the Department should look closely at the facts of each case to determine whether equitable benefits have been provided. * * * [T]he Department should not place undue emphasis on any one factor such as the employee's length of stay in the U.S.''

The Department agrees that ''equitability'' between ''home country'' and U.S. benefits does not reduce to a bright-line test. In the event of an enforcement action, the Department will look into all the circumstances bearing upon the benefits to ensure that the H–1B worker's continued receipt of these benefits is not less advantageous to him than the benefits offered U.S. workers. This examination entails a qualitative rather than a quantitative review. In other words, an employer in these circumstances must be able to demonstrate that the worker's ''home-country'' benefits are equitable in relation to the benefits provided its U.S. workers based in the United States, similarity in treatment of all workers, how U.S. workers temporarily stationed abroad are treated, and the facts and circumstances of each H–1B worker. Where the employer makes this demonstration, and there is no appearance of contrivance to avoid payment of U.S. benefits, the Department will not second-guess the employer.

Several commenters responded to the Department's request for comments on whether it should define ''benefits'' as that term is used in Section 212(n)(2)(C)(viii), which provides that the requirement to offer benefits and eligibility for benefits includes: ''the opportunity to participate in health, life, disability, and other insurance plans; the opportunity to participate in retirement and savings plans; and cash bonuses and noncash compensation such as stock options (whether or not based on performance). * * *''. Senators Abraham and Graham and AILA stated that they did not see the need for further defining ''benefits,'' noting that the statute contains several examples of benefits. ACIP also stated that a regulatory definition was unnecessary, suggesting that instead the Department should examine the facts and circumstances of each case. TCS contended that the statutory list of benefits is exclusive; alternatively, it argued that the Department should specify the benefits so that employers do not have to guess about what is covered—*e.g.,* is a separate office a benefit? ACIP asserted that ''[c]ertain cash and non-cash bonuses considered benefits under ACWIA are considered wages under other laws. Adopting definitions from other laws further confuses immigration law, does not address practices abroad, and may have unintended tax consequences.'' Similarly, ACIP, SHRM and Cowan & Miller commented that further definition of benefits is unnecessary. Rapidigm asked for clarification of the Department's statement.

The Department agrees with the position of most commenters that the existing statutory definition is sufficient to administer effectively this aspect of the statute. The language of section 212(n)(2)(C)(viii) provides a fairly comprehensive list of the benefits that may be offered to workers in the U.S. While the use of ''including'' evinces an intention that the list is not exhaustive, the list, in the Department's view, is representative of the types of benefits that must be considered. Thus, an employer, by analogy, may determine whether other particular benefits should be taken into account. In this regard, the Department notes that the regulatory schemes under other employment-related statutes such as FMLA, the Equal Pay Act, the ADEA, and ERISA also provide guidance in this area. The Interim Final Rule takes this approach in lieu of an attempt to more fully define benefits. Under the Department's approach, it would appear clear that office accouterments—the example used by TCS—ordinarily would not constitute a benefit within the meaning of the statute. At the same time, it bears noting that the ACWIA does not relieve employers from any obligations they may have incurred through collective bargaining or otherwise with regard to particular working conditions, or of its obligation not to discriminate based on citizenship or national origin.

With regard to the Department's stated intention to modify the current regulatory provision concerning the working condition attestation, ACIP, AILA, and TCS expressed the concern that the Department was seeking to impose a new requirement, *i.e.,* that an employer was required to offer benefits to H–1B workers at least equivalent to the higher of those offered to their own U.S. employees or those prevailing in

the area. ACIP asserted that the Department lacks authority to require employers to consider conditions outside their own workforces. Rapidigm requested clarification on the meaning of the provision.

After review of the ACWIA and the provisions of the H–1B program as a whole, the Department concurs with commenters that Congress intended that the requirement for offering benefits and eligibility for benefits to H–1B workers on the same basis and same criteria as they are offered to U.S. workers employed by the employer includes both benefits paid as compensation for services rendered and working conditions. The Department has therefore concluded that it is inappropriate to continue the provision in § 655.732 which provides for consideration under some circumstances of prevailing conditions in the area of employment. Section 655.732 therefore is revised in the Interim Final Rule to clearly require that working conditions be provided to H–1B workers on the same basis and same criteria as they are offered to U.S. workers.

The Department also believes that certain benefits appropriately are in the nature of compensation for service rendered, and have a monetary value to workers and monetary cost to employers. Such benefits include cash bonuses, paid vacations and holidays, and termination pay, which are paid directly to workers and are taxable when earned. Also included are benefits such as health, life and disability insurance, and deferred compensation such as retirement plans and stock options which are funded by employers, either directly as costs are incurred or through contributions to fringe benefit plans or insurance companies. The Department has concluded that such benefits are more in the nature of wages than working conditions, although the Department cautions that only benefits which meet the criteria of § 655.731(c)(2) count toward satisfaction of the required wage since such benefits are not included in surveys used to determine the prevailing wage. On the other hand, benefits which do not have a direct monetary value to workers or cost to employers, are in the nature of working conditions, including matters such as seniority, hours, shifts, and vacation periods, and preferences relating thereto. Sections 655.731 and 655.732 are amended to reflect this distinction.

2. What Documentation Will Be Required? (§ 655.731(b))

The Department proposed to require H–1B employers to retain copies of fringe benefit plans and summary plan descriptions provided to workers, including all rules relative to eligibility and benefits, and documents showing the benefits actually provided and how the costs are shared between the workers and the employer. The Department sought suggestions as to exactly what records would demonstrate the value of benefits and satisfy the other retention requirements. The Department expressed the view that such records already are required for IRS and ERISA purposes (although noting in the paperwork analysis, at 64 FR 630, that a small percentage of employers might be required to keep records that otherwise would not be kept). In connection with the Department's query whether it might be possible to provide different ''home country'' benefits to employees of a multinational corporate operation in lieu of those provided to U.S. workers, the Department sought comment on what records would be necessary to demonstrate the relative value of the ''home-country'' benefits and the benefits provided to U.S. workers.

Many of the commenters opposed the notion of maintaining particular documentation in order to demonstrate compliance with the benefits attestation. ACIP and AILA asserted that the statute does not authorize the Department to require employers to retain documentation, suggesting that it is up to an employer to decide what documentation, if any, it should retain in order to demonstrate its compliance if it is investigated. Similarly, Senators Abraham and Graham stated: ''DOL is not authorized to require employers to maintain any particular documentation.'' The Department cannot, they asserted, include as part of the proposed LCA a ''new attestation'' that ''[the employer] will develop and maintain documentation of working conditions and benefits.''

ACIP addressed particular burdens it perceived in retaining such documentation, noting, for example, that they already maintain such documentation in a location or in a format different than that contemplated by the Department. While ACIP recognized that the Department correctly stated that employers now keep documents related to their fringe benefit plans, ACIP stated that these documents may be housed in various departments and urged the Department to let the employer decide where documentation must be kept. ACIP further explained that much information is sensitive and confidential (*e.g.,* stock option and incentive pay plans), requiring the Department, in its view, to allow an employer flexibility in documenting these benefits.

Intel stated that summary plan descriptions are a U.S. requirement. It noted that no other countries required the same depth and detail regarding the documentation of benefits, though stating that about one-half of its foreign subsidiaries have some benefits documentation. Intel explained that all its employees at orientation receive information regarding the company's benefits; in the U.S., it stated that employees receive a book that describes benefits, and that each year employees receive a particularized benefit portrait. Intel asserted that further documentation should not be required; it contends that a memorandum to the public access file that its employees are advised of the company's benefits at time of their hire should suffice.

Satyam questioned whether current requirements under other statutes and regulations relating to the retention of benefits documents would suffice for H–1B purposes; it suggested that the Department should not require putting specific information in the public access file. It also inquired whether it would be necessary to retain information relevant to the comparison group. ITAA said that the Interim Final Rule should recite rather than refer to IRS and PWBA requirements. AILA expressed the concern that the Department will make it a violation to fail to keep copies of benefits documents in a public access file and that requiring documentation to be kept up front would impose a huge burden. AILA recommended instead that an employer, for example, be simply required to bear the burden of proving the ''equivalency'' of foreign benefits in the event of an investigation.

None of the commenters took issue with the Department's statement that the documents sought are required already by IRS or ERISA.

Based on our review of the comments received on the proposal, it is apparent that the documentation requirements proposed in the NPRM have been misunderstood. With the exception of documentation specifically required to be retained in the public access file, there is no requirement that information be kept in any particular format or place, or that information be segregated by LCA, by locality, by H–1B versus U.S. workers, or in any other way from the employer's records for the entire company.

Nothing in the ACWIA suggests that documentation requirements are unauthorized or otherwise improper. To the contrary, section 212(n)(1) specifically requires employers to make the LCA ''and such accompanying documents as are necessary'' available for public examination. The Department believes that this provision clearly permits the Department to determine what documents must be created or retained by employers to support the LCA. The documentation that is required by the Interim Final Rule simply effectuates the more specific requirements imposed by the ACWIA. Furthermore, as the NPRM stated, the documents sought for the most part are already required by the IRS or ERISA, and would be kept by an ordinary prudent businessman in any event. Thus, the Department's ERISA regulations require at 29 CFR part 2520 that summary plan descriptions be provided to participants, and require employers to submit lengthy forms (Form 5500) to IRS with detailed information regarding their fringe benefits plans, which must be substantiated by records. In addition, EEOC rules under the ADEA, 29 CFR 1627.3(b)(2), require that every employer retain copies of all employee benefit plans, as well as copies of any seniority systems and merit systems which are in writing. Where the plan is not in writing, a memorandum fully outlining its terms and how it has been communicated to employees is required.

The Department believes that it is essential that employers, in order to establish that H–1B workers have in fact been offered the same benefits as U.S. workers (or that the special benefit requirements for certain employees of multinational firms are met), retain a copy of any document provided to employees describing the benefits offered to employees, the eligibility and participation rules, how costs are shared, etc. (*e.g.,* summary plan descriptions, employee handbooks, any special or employee-specific notices that might be sent). It is also important that employers keep a copy of all benefit plans or other documentation describing benefit plans and any rules the employer may have for differentiating among groups of workers. In addition, the employer will be required to retain evidence as to what benefits are actually provided to U.S. and H–1B workers. Where employees are given a choice of benefits, employers will be required to retain evidence of the benefits selected or declined by employees.

For multinational employers who choose to keep H–1B workers on ''home country'' benefit plans, the employer will be required to maintain evidence of the benefits provided to the worker before and after the employee went to the United States. In the event of an investigation, the employer will also be required to demonstrate that the other requirements for multinational firms are met, as appropriate—*e.g.,* that the employer maintains reciprocity by treating U.S. workers coming to the United States temporarily from abroad the same as H–1B workers, and likewise continues U.S. workers temporarily overseas on U.S. benefits, that the worker was not in the United States for more than 90 continuous days, that ''home country'' benefits are equitable in relation to U.S. benefits, etc.

With regard to the public access file, the employer need only maintain a summary of the benefits offered to U.S. workers in the same occupation as H–1B workers, including a statement explaining how employees are differentiated where not all employees in the occupation are offered the same benefits. If an employer has workers receiving ''home country'' benefits, the employer may place a simple notation to that effect in the file. The public access file need not show the proprietary details of a plan (such as a stock option or incentive distribution plan), the costs of providing the benefits, or the choices made by individual workers.

Since the regulations do not allow an employer to provide equivalent benefits as a general matter, and provide an ''equitable'' rather than an ''equivalent'' test for multinational benefits, no special documents regarding the cost of benefits are required.

H. What Does the ACWIA Require of Employers Regarding Payment of Wages to H–1B Nonimmigrants for Nonproductive Time? (§ 655.731(c)(7))

On October 31, 1995, the Department republished for comment a provision of the December 20, 1994 Final Rule which articulated the Department's position regarding payment of the required wage for nonproductive time. This provision, § 655.731(c)(5), required payment of the required wage beginning no later than the first day the H–1B nonimmigrant is in the United States and continuing throughout the nonimmigrant's period of employment, including periods when the nonimmigrant is in nonproductive status due to employment-related reasons such as training or lack of assigned work. The provision did not require payment of such wages where the nonproductive status is due to reasons unrelated to employment (*e.g.,* caring for an ill relative), provided the nonimmigrant's unpaid status is acceptable to the INS and is not subject to a wage payment obligation under some other statute (*e.g.,* Family and Medical Leave Act). The provision distinguished between full-time and part-time workers as provided on the I–129 petition filed with INS, but stated that in the event a part-time employee regularly worked a greater number of hours than stated on the I–129, the employer would be held to the actual hours disclosed in the enforcement action. Section 655.731(c)(5) was among the provisions of the December 20, 1994 Final Rule which had been enjoined from enforcement, due to lack of notice and comment, by the court in *National Association of Manufacturers* v. *United States Department of Labor.*

Subsequently, the ACWIA, amending section 212(n)(2) of the INA, enacted an explicit requirement, consistent with the Department's regulation, providing that it is a violation of the wage attestation in section 212(n)(1)(A) for an employer to fail to pay an H–1B worker the required wage for certain nonproductive time. Like the Department's regulation, an exception was created for nonproductive status which is due to non-work-related factors such as the worker's own, fully voluntary request, or circumstances rendering the worker unable to work. Under this provision, workers designated as full-time on the petition filed with INS must be paid full-time wages, and employees designated as part-time on the petition must be paid the hours designated in the petition. This obligation is effective ''after the H–1B worker has entered into employment with the employer,'' but in any event, not later than 30 days after the worker's date of admission to the United States (if entering the country pursuant to the petition) or 60 days after the date the worker ''becomes eligible to work for the employer'' (if already in the country when the petition is approved). The statute also contains a special provision regarding academic salaries which is discussed in IV.I, below.

Congressman Smith and Senator Abraham, in their remarks after enactment of the ACWIA, noted that the most extreme examples of ''benching'' occur when workers are brought to the United States on the promise of a certain wage, but only receive a fraction of that wage because the employer does not have enough work for the H–1B worker. 144 Cong. Rec. E2326 (Nov. 12, 1998); 144 Cong. Rec. S12753–54 (Oct. 21, 1998). They also both agreed that employers must pay full wages and benefits during an H–1B worker's non-productive status when that status is due to the employer's decision—based

on factors such as lack of work for the worker—or due to the worker's lack of a license or permit. Congressman Smith also remarked that Congress anticipated the Secretary's close scrutiny of ''voluntariness'' in circumstances that appear to be contrived to take advantage of unpaid time. Senator Abraham listed the following examples of H–1B employees taking unpaid leave which he stated would not be considered ''benching'': leave under FMLA or other corporate policies, annual plant shutdowns for holidays or retooling, summer recess or semester breaks, or personal days or vacations. Senator Abraham also stated that this provision does not prohibit an employer ''from terminating an H–1B worker's employment on account of lack of work or for any other reason.'' Congressman Smith stated that an attempt by an employer to avoid compliance with the ''benching'' provision by laying off an American worker ''would trigger the enforcement and penalty provisions of the Act.''

Congressman Smith and Senator Abraham agreed that the benching provision is not intended to preclude part-time H–1B employment, agreed to between the employer and the H–1B worker when the worker was hired. 144 Cong. Rec. E2326 (Nov. 12, 1998); 144 Cong. Rec. S12754 (Oct. 21, 1998). Congressman Smith stated that ''the employer's misrepresentation of this material fact should be scrutinized by the Secretary'' in determining whether a benching violation or misrepresentation has been made, with particular attention to whether U.S. workers would receive paid leave for nonproductive time. Senator Abraham stated that the Act is not intended to give the Secretary the authority ''to reclassify an employee designated as part-time based on the worker's actual workload after the employee begins employment.''

In the NPRM, the Department proposed regulatory text which, except for the different statutory language triggering the beginning of the period in which the ''benched'' worker must be paid, is very similar to its current regulation. In the preamble, the Department stated that it was considering whether the H–1B worker ''enters into employment'' when he first makes himself available for work, such as by reporting for orientation or training, or when the worker actually begins receiving orientation or training or ''otherwise performs work or comes under the control of his employer.'' In commenting on the purpose of the ''benching'' provision, the Department observed that an H–1B nonimmigrant is not permitted to be employed by another employer while ''benched'' (unless another employer files a petition on behalf of the worker or the worker adjusts his or her status under the INA), and is without any legal means of support in the country. In contrast, a U.S. worker can seek other employment and would be eligible for Federal programs such as food stamps. The Department also observed that the employer, at any time, may terminate the employment of the worker, notify INS, and pay the worker's return transportation, thereby ceasing its obligations to pay for non-productive time under the H–1B program. The Department proposed that payment of wages would not be required where the nonproductive status is due to reasons unrelated to employment, unless such payment is required by INS as a condition of the worker maintaining lawful status, or is required by some other Act such as FMLA. On the other hand, the employer would not be relieved from the wage obligation for any required leave of absence, even if it includes U.S. workers.

The Department received three comments on the 1995 proposed rule on this issue. Regarding the requirement in the 1995 NPRM that the employer pay the required wage for nonproductive time beginning no later than the first day the H–1B nonimmigrant is in the United States and continuing throughout the nonimmigrant's period of employment, AILA suggested that it would be more reasonable to require the employer to begin paying on the day that the nonimmigrant actually reports to work, provided that the date is no later than 30 days after the date the nonimmigrant enters the U.S. or otherwise becomes eligible to work for the employer. AILA also suggested that an exception be made where the nonimmigrant is given an unpaid leave of absence pursuant to a uniformly-enforced company policy. Similarly, another commenter, an electronics manufacturer (Motorola), complained that in the case of a temporary reduction in force, the employer would have to retain the H–1B nonimmigrant at full salary, while U.S. workers are off the payroll.

The Department received 33 comments on the 1999 NPRM proposals addressing the ACWIA's ''benching'' provisions. APTA stressed the importance of the Department ensuring that H–1B nonimmigrants are aware of their wage rights for nonproductive time. Miano commented that companies should not be allowed to use the H–1B program to create stables of available employees in anticipation of openings that do not yet exist, but should be required to demonstrate that an unfilled position actually exists.

The Department agrees that it is important that H–1B nonimmigrants be aware of their rights. For this reason, § 655.734(a)(3) requires that all H–1B nonimmigrants be provided a copy of the LCA which supports their petition. In addition, the Department is planning a comprehensive educational program, as discussed in III.B, above.

AILA suggested that the Department add to its list of exceptions situations where objective economic reasons are present, such as annual retooling in the automobile industry for production model changes. ACIP and SIA urged the Department to adopt Senator Abraham's October 21, 1998 comments as examples of what is not benching, *i.e.* leave under the Family and Medical Leave Act; or other corporate policies for no payment such as annual plant shutdowns for holidays or retooling, summer recess or semester breaks, or personal days or vacations. ACIP also urged that similar situations be included in the list of examples which do not constitute benching, such as disciplinary action, mandatory unpaid pre-employment training or orientation, mandatory vacation leave, and periods of downturn where all workers are treated the same. ACIP suggested that the facts and circumstances of each case be considered, including whether similarly-situated U.S. workers are placed on leave and whether H–1B workers knew before accepting employment of the possibility of such leave. ACIP and SIA encouraged the Department to exercise flexibility to avoid the potential effect of companies laying off U.S. workers to avoid the benching of H–1B workers by allowing for periods attributable to regular, objective business occurrences such as cyclical business downturns, holiday plant shutdowns, and plant retooling. They observed that when these events occur all workers are treated equally, according to the same standards.

The AFL–CIO and other commenters observed that the provision's prohibition against ''benching'' may lead employers to treat H–1B employees better than U.S. workers, and may create the situation where an employer retains an H–1B worker over an American worker during a lay-off to avoid paying full wages to the H–1B worker. The AFL–CIO stated its belief that U.S. workers who are laid off to avoid the benching provision may have grounds for a discrimination complaint based on nationality and immigration status and that the regulation should so indicate.

The Department believes that the statutory language is clear. The statute

requires payment, after a nonimmigrant has entered into employment with an employer, whenever nonproductive status is due to a decision by the employer or to the nonimmigrant's lack of a permit or license. In contrast, payment is not due when the nonproductive time is due to non-work-related factors, such as the voluntary request of the nonimmigrant for an absence or circumstances rendering the nonimmigrant unable to work. Therefore the Department cannot interpret the Act to allow employers to be relieved from payment for periods where the employer's business is shutdown, regardless of whether it affects U.S. workers as well, whether for economic downturn, annual retooling, or holiday shutdown; nor can the employer be relieved from liability for mandatory vacation, pre-employment training, or disciplinary action. All of these situations are caused by the employer, rather than at the voluntary request of the nonimmigrant. The Department notes that training or orientation required of an employee before productive work starts has always been considered compensable time under the Fair Labor Standards Act, and that the Department has required payment for such time in its enforcement of the H–1B attestation requirements since the injunction entered in the NAM litigation. If an employer finds need to discipline an H–1B nonimmigrant, it must find a method other than loss of pay, or it may terminate the employment relationship.

The Department understands the concern expressed regarding the possibility of an employer laying off U.S. workers while continuing to pay H–1B workers because of its obligation to continue paying H–1B workers during periods of nonproductive status. Congressman Smith suggested that an employer's action in laying off U.S. workers to avoid placing H–1B workers in nonproductive status for which they must be paid would be a violation of the ACWIA. We agree, with respect to H–1B-dependent employers and willful violators, where the required showing for a prohibited displacement under section 212(n)(1)(E) or (F) is made. In addition, we note that a displacement in connection with a willful violation of the attestation requirements or a willful misrepresentation can bring enhanced penalties pursuant to section 212(n)(2)(C)(iii). Additionally, other laws provide U.S. workers with rights and remedies for an employer's discriminatory practices. The names, telephone numbers, and websites of the three federal agencies responsible for enforcement of anti-discrimination laws are set forth in IV.E.4, above.

The Department notes that—in determining whether the statutory criteria have been met, including the exception for nonpayment based on ''the voluntary request of the nonimmigrant for an absence''—it will look closely at any situation where there is any question about whether the period of nonproductive time is truly voluntary. The Department will not under any circumstances consider the employer to be relieved of wage liability where there is a plant shutdown. Nor will the Department relieve an employer from liability simply because the employee agreed to periods without pay in the employment contract.

ACIP and AILA questioned the basis for the Department's proposed requirement that workers be paid where required by other statutes such as FMLA or the ADA, and that the worker's period of unpaid leave be consistent with maintenance of status under INS regulations.

The Department intended to say nothing more than that an employer must comply with other laws. The Department notes that FMLA only requires paid leave where the employer has a paid leave plan and either the employer or the employee wishes to substitute the paid leave for unpaid FMLA leave. Since the employer is required to offer H–1B workers the same benefits as U.S. workers, an employer would be required to provide H–1B workers with paid leave under any circumstances in which it is provided to U.S. workers. Enforcement of this requirement during periods where the employee voluntarily takes leave or is unable to work, is in accordance with the benefit obligations at section 212(n)(2)(C)(viii). The Department also wishes to point out, as stated by both Senator Abraham and Congressman Smith, that during periods of nonproductive time, employers are required to provide fringe benefits as well as wages.

ACIP and AILA agree with the proposal that an employer may choose to terminate an H–1B worker without violating the benching provision. ACIP also suggests that employers should not be held liable for the nonimmigrant's failure to leave the country.

The Department agrees that an employer is no longer liable for payments for nonproductive status if there has been a *bona fide* termination of the employment relationship. The Department would not likely consider it to be a *bona fide* termination for purposes of this provision unless INS has been notified that the employment relationship has been terminated pursuant to 8 CFR 241.2(h)(11)(i)(A) and the petition canceled, and the employee has been provided with payment for transportation home where required by section 214(E)(5)(A) of the INA and INS regulations at 8 CFR 214.2(h)(4)(iii)(E). In accordance with current INS policy (see 76 *Interpreter Releases* 378), once an employer terminates the employment relationship with the H–1B nonimmigrant, regardless of any arrangements for severance pay or benefits, that H–1B employee must either depart the United States upon termination of his or her services, or seek a change of immigration status for which he or she may be eligible. Therefore, under no circumstances would the Department consider it to be a *bona fide* termination if the employer rehires the worker if or when work later becomes available unless the H–1B worker has been working under an H–1B petition with another employer, the H–1B petition has been canceled and the worker has returned to the home country and been rehired by the employer, or the nonimmigrant is validly in the United States pursuant to a change of status.

Commenters also offered their views on the phrase ''entered into employment,'' one of the alternative triggers for an employer's obligation to pay the H–1B worker wages during periods of nonproductive status. The Department proposed that this term means the date when the H–1B worker makes himself/herself available for work, *e.g.,* reports for orientation or training, performs work for the employer, or is under the control of the employer. One attorney-commenter (Hammond) expressed appreciation for this ''bright line test'' and described the 30–day allowance as reasonable.

The Department received twenty essentially identical comments on this issue from individuals who urged payment of wages to nonimmigrants immediately on their arrival to the United States. The AEA suggested that the H–1B visa holder be given a firm starting date from his/her employer and that wages start from that date. AOTA commented that ''entered into employment'' should mean when the nonimmigrant makes himself or herself available for work. ACIP urged the Department to look at the facts of the case, but urged as a general matter that an H–1B worker has entered into employment when he or she has reported to the worksite, has been placed on the payroll, and has completed an I–9 form; ACIP stated that H–1B workers should not be required to be paid for short periods of unpaid

training or orientation or medical examinations, since U.S. workers are not. AILA suggested that ''entered into employment'' occurs when the employee actually commences the orientation, training or work because ACWIA, in mandating payments by the 30–day and 60–day deadlines, appears to provide the employer with discretion regarding the starting date prior to those deadlines.

The statutory language does not permit the Department to define the term ''entered into employment'' as the date the H–1B worker arrives in the United States. Likewise, payment of wages by the employer cannot be required before the H–1B petition is approved. On the other hand, the Department notes that the Fair Labor Standards Act itself requires that where there is an employment relationship (including where the worker has been promised employment, even if the employee is not yet on the payroll), both H–1B and U.S. workers be paid for orientation or training time required by the employer.

The Department has concluded that the term ''entered into employment'' means the date on or after the date of need on the H–1B petition when the worker makes himself or herself available for work or otherwise comes under the control of the employer and includes all activities thereafter, such as waiting for an assignment, going to an interview or meeting with a customer, attending orientation, studying for a licensing examination.

Several employers, attorneys and organizations also commented on the meaning of the phrase ''eligible to work for the employer.'' (Sixty days thereafter an H–1B nonimmigrant already in the United States legally under another visa (*e.g.,* F–1 student visa) or on another H–1B visa with another employer must be paid for nonproductive time, even if the H–1B nonimmigrant has not yet entered into employment.) One law firm (Hammond) encouraged flexibility on the 60–day test. An employer (BRI) urged that ''eligible to work for the employer'' should be based on the agreement of employment terms between the employer and employee and determined by the date an employment agreement is entered into between the employer and employee or the completion of the visa process, whichever comes last.

ACIP and Intel requested a specific exception from the benching regulations for export control licenses. ACIP explained that an employee who awaits a license to practice his or her profession in the United States, and is subject to the ACWIA benching provisions, is distinguishable from an export control license which must be procured by an employer in a process which can take three to six months. Therefore, ACIP suggested that the rule provide that where an export license and H–1B petition were filed concurrently but the export license is not approved within the 60–day window, the employer has an additional 90 days to obtain the license before being required to rescind the H–1B petition or pay the worker.

The Department continues to believe that an employee is eligible to work on the date of need stated in the petition, provided that the petition has been processed and the employee has either received a visa or had his/her status adjusted (where the employee is in the United States). The Department sees no basis for any exception based on the export control license. Clearly the employee is legally eligible to work, but work is simply not available (even if due to circumstances beyond the employer's control). The Department agrees that a worker need not be compensated if the H–1B nonimmigrant voluntarily chooses not to make himself or herself available for work, such as where the nonimmigrant has not yet finished school or chooses to remain with another employer in order to finish a project. In each case, although the H–1B nonimmigrant is eligible to work for the employer, he or she need not be paid because of the nonimmigrant's voluntary action. The Department notes, however, that the nonimmigrant may be out of status if he or she does not report to work on the date of need.

In response to the NPRM's proposals on nonproductive pay for part-time workers, Senators Abraham and Graham and AILA objected to the regulatory language requiring workers be paid for hours that exceed the part-time number of hours on the INS petition where in practice the worker regularly works a longer schedule. AILA seeks to allow an employer which has less work than anticipated after filing an I–129 petition for full-time work, to secure approval of a new I–129 petition for part-time work, after which the employer is obliged to pay only for the part-time work.

In addition, Latour commented that the traditional 40-hour week is rapidly changing. It stated that some firms engage workers to perform a project which is completed in less than a year, and then the worker has several months off and may ''moonlight'' at a second job (presumably under a second petition). Latour assumed this practice would be considered ''part-time,'' and suggest that DOL focus on three issues in determining if there is a violation of the ''benching'' provision: (1) Whether the prevailing wage is being paid; (2) whether the worker is making a plausible living; (3) whether the nature of the employment schedule is usual and reasonable for the type of work.

The Department agrees that nonproductive pay is based on the number of hours per week on the H–1B petition. The LCA has therefore been amended to alert employers that their H–1B employees should not regularly work more than the number of hours shown on the petition, which may be expressed as a range of hours. If the H–1B worker normally works full-time or a greater number of hours than shown on the petition, the Department will examine the facts and circumstances and charge the employer with misrepresentation where appropriate. In light of the importance of the distinction between part-time and full-time employment for purposes of the employer's wage obligations, the Department has modified the proposed LCA form to specify that the employer is to designate that the position(s) covered will be either part-time or full-time; a combination of part-time and full-time positions cannot be entered on a single LCA form.

The Department cautions employers that time spent in training or studying to get a license is ordinarily compensable hours worked under the Fair Labor Standards Act without regard to any rules on payment for nonproductive time under the H–1B program.

The Department agrees with AILA's comment that an employer may secure approval of a new H–1B petition for part-time work, after which the employer is obliged to pay only for the part-time work. The nonproductive pay computation is based on the petition that is in effect at the time the H–1B worker is in nonproductive status. Correspondingly, before INS approves a new petition that changes the work time (part-time to full-time or vice versa), the employer will need to file a new LCA that reflects the change.

Finally, the Department disagrees that the scenario described by Latour is part-time work. Rather, it is full-time work with periods where no work is available due to actions of the employer, rather than the employee. This period of non-productive work must be paid unless the worker is temporarily unable to return to work because of alternate commitments or other factors within the control of the employee.

I. What Special Rule Does the ACWIA Provide for Academic Salaries? (§ 655.731(c)(4))

The ACWIA provision on non-productive time (''benching'') (discussed in IV.H, above) has a special rule permitting ''a school or other education institution'' to apply an established salary practice which might result in an H–1B worker appearing to be ''unpaid'' for some part of a calendar year. *See* Section 212(n)(2(C)(vii)((V) of the INA as amended by the ACWIA. Specifically, that provision allows an education institution to disburse an annual salary to its H–1B workers and U.S. workers in the same occupational classification over fewer than 12 months if: (1) The H–1B worker agrees to the compressed annual salary payments prior to commencing payment, and (2) the salary practice does not otherwise cause any violation of the H–1B worker's authorization to remain in the United States.

Congressman Smith and Senator Abraham both explained that this provision ''is intended to make clear that a school or other educational institution that customarily pays employees an annual salary in disbursements over fewer than 12 months may pay an H–1B worker in the same manner without violating clause (vii), provided that the H–1B worker agrees to this payment schedule in advance.'' 144 Cong. Rec. E2326 (Nov. 12, 1998); 144 Cong. Rec. S1275 (Oct. 21, 1998). Congressman Smith explained that Congress ''specifically limited this exemption to schools and educational institutions in recognition of their unique salary patterns.'' 144 Cong. Rec. E2326. Senator Abraham, on the other hand, stated:

> Because Congress is not aware of all the possible kinds of legitimate salary arrangements that employers may establish, the situation covered by subclause (V) may be merely illustrative of other kinds of legitimate salary arrangements under which an employee's rate of pay may vary. Accordingly, so long as an H–1B worker is not being singled out by such a salary arrangement, it is not Congress's intent that such a salary arrangement be treated as suspect under or violative of clause (vii) merely because there is no special provision like subclause (V) addressing it. To the contrary, if it is an arrangement that the employer routinely uses with U.S. employees as well as H–1B workers, it should be treated as presumptively not a violation of that clause.''

144 Cong. Rec.S1275 9 (Oct. 21, 1998).

The one commenter on this provision, ACE, urged the Department to follow the law as written with no further regulation.

As the Department explained in the NPRM, the Department believes that this provision is directed to the common practice by which colleges, universities, and other educational institutions disburse faculty salaries over a nine-or ten-month period, with no salary payments during the summer, between academic quarters, or over some other period during which the faculty member may be away from the institution. As the statute provides, this special rule applies only to schools and other educational institutions. Any attempts to apply the more general definition of organizations to which the special prevailing wage requirements apply (see section 212(p)(1) of the INA as amended by the ACWIA) would change the statutory mandate. The Department has concluded that the NPRM properly implements the statutory mandate and will adopt the provision as proposed.

J. What Actions or Circumstances Would be Prohibited as a ''Penalty'' on an H–1B Nonimmigrant Leaving an Employer's Employment? (§ 655.731(c)(10)(i))

Section 212(n)(2)(C)(vi)(I) of the INA as amended by the ACWIA prohibits an employer from ''requir[ing] an H–1B nonimmigrant to pay a penalty for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer.'' This section requires the Department to ''determine whether a required payment is a penalty (and not liquidated damages) pursuant to relevant State law.'' As discussed in Sections L and M of the NPRM, section 212(n)(2)(C)(vi)(III) provides that the Department, after notice and opportunity for a hearing, ''may impose a civil money penalty for each such violation and issue an administrative order requiring the return to the [H–1B worker] of any amount paid in violation * * *, or if [the H–1B worker] cannot be located, requiring payment of any such amount to the general fund of the Treasury.''

Senator Abraham explained:

> New clause (vi)(I) * * * directs that the Secretary is to decide the question whether a required payment is a prohibited penalty as opposed to a permissible liquidated damages clause under relevant State law (*i.e.* the State law whose application choice of law principles would dictate). Thus, this section does not itself create a new federal definition of ''penalty'', and it creates no authority for the Secretary to devise any kind of federal law on this issue, whether through regulations or enforcement actions.''

144 Cong. Rec. S12752 (Oct. 21, 1998). Congressman Smith further explained that ''[t]his provision was added because of numerous cases that have come to light where visa holders or their families were required to make large payments to employers because the worker secured other employment.'' 144 Cong. Rec. E2325 (Nov. 12, 1998).

In the NPRM, the Department proposed to prohibit employers from attempting to enforce any such liquidated damages provisions without first obtaining a State court judgment ordering the H–1B worker to make such a payment. The Department explained its view that State courts were better versed than the Department to resolve State law questions posed by such matters. The Department also stated its intention to make it clear that employers cannot collect the additional $500 petition fee in the guise of liquidated damages, and noted its concern that some employers might attempt to collect liquidated damages in situations where the employers' unlawful conduct may have caused the H–1B worker to prematurely leave the employment.

A number of commenters responded to the Department's proposals on this issue. Two commenters (Latour, Padayachee) endorsed the approach taken in the NPRM. Padayachee also expressed the view that only quantifiable liquidated damages should be claimable. A third commenter (TCS), generally agreed with the Department's approach, although noting some specific objections as identified below.

The view most frequently expressed by other commenters was that the Department's approach was contrary to the intent of the ACWIA. These commenters (Senators Abraham and Graham and other Congressional commenters, ACIP, AILA, and other employers and employer representatives) viewed the proposal as inconsistent with the role intended for the Department under the ACWIA, *i.e.*, to determine whether or not a specific liquidated damages provision is legal under State law. Nallaseth and SBSC asserted that it would be discriminatory to require employers to first secure a State court judgment in enforcing an agreed damages provision against an H–1B worker when none is required to enforce a similar provision involving a U.S. worker. While some commenters recognized that the Department's concern about the difficulty of identifying and applying State law to a particular dispute was well-founded, it was their view that Congress intended the Department, not the State courts, to shoulder this burden. Senators Abraham and Graham asserted that the proposal that an employer obtain a State court judgment as a precondition to enforcing its contractual agreement—a practice,

they stated, they were not aware of under any State's law—constituted an attempt by the Department to create federal law on this question in contravention of the statute's direction that State law was to be applied in resolving such matters. They stated that it was the intention of Congress not to require litigation over each such agreement, but instead to allow the Department to bring an enforcement action if it believes an agreement is punitive as a matter of State law.

Congressional commenters and Network Appliance objected to any requirement that employers obtain a state court judgment where there is no disagreement between the parties. ACIP asserted: ''Requiring a state court judgment to enforce any part of a contract is an unreasonable intrusion upon the ability of parties to contract and limits their ability to settle disputes through mediation, arbitration or other forms of alternative dispute resolution. * * * [A]lthough we agree that individual state courts are much better versed in this area of their law for their state than the Secretary, it clearly was not Congress' intent to impose such a high burden on employers.'' TCS, on the other hand, asserted that a State court judgment should be a prerequisite to any finding of a violation by the Department, limiting its objection primarily to the Department's proposal that a State court judgment must be obtained, even where there is no dispute by the parties or they choose to resolve the dispute by settlement or otherwise.

As an alternative to the Department's proposal, ACIP, AILA, and SIA suggested that the regulation set forth examples of acceptable reimbursements and examples of prohibited penalties. AILA and TCS requested that the Department prohibit any class-based complaint or relief in the administrative proceeding, *i.e.,* to limit the relief to the particular H–1B worker who initiated the complaint. In a similar vein, AILA and ACIP argued that whether a provision is a penalty or liquidated damages should be inferred from the facts and circumstances of the case; thus the fact that a penalty is found in one case does not automatically mean all similar provisions are void. TCS asserted that the Department should adopt a rule that an employer cannot be held in violation of the ACWIA unless a State court first holds that an agreed damage provision is a penalty, and, that even where a State court so holds, the Department should not find an employer in violation unless it fails to cure the violation within a reasonable amount of time.

TCS also objected to any required notice to employees that would suggest that an employer's ability to enforce a damages provision contained in the employment contract is limited, expressing concern that such notification would encourage H–1B workers to disregard their contractual obligations. AILA encouraged the Department to avoid a presumption that any ''agreed damage'' is an unenforceable penalty. ACIP objected to the Department's statement that it would examine ''attempts by employers to collect damages where their violations of the INA [the H–1B program], or other employment law may have caused the H–1B worker to cease employment''—apparently viewing this statement as suggesting that employers might contrive to get workers to quit their employment in order to collect contract damages.

Notwithstanding the Department's continued reluctance to identify and interpret State law, the Department now concurs with the view that Congress intended the Department to determine whether a provision is liquidated damages or a penalty. For the same reason, it believes there is no merit to the suggestion by TCS that the Department cannot find that an employer has violated the ACWIA's bar against punitive damages, unless a State court first rules that a violation has occurred. Furthermore, the Department agrees that it is unnecessary to obtain a court judgment or a ruling from the Department of Labor if an employee pays voluntarily or the matter is settled. The Interim Final Rule reflects the Department's revised position on this question.

Under the Interim Final Rule, a complaint regarding an alleged attempt to enforce a penalty provision will be processed and investigated in the same way as other complaints by aggrieved parties under Subparts H and I. Thus, an individual who believes that an employer has sought to enforce a penalty provision should file a complaint with the Wage and Hour Administrator. After investigation, Wage and Hour will issue a determination in accordance with its analysis of the relevant State law, and, where violations are found, may assess a civil money penalty of $1,000 for each violation and order the return of any money paid by the worker(s) to the employer (or, if the worker(s) cannot be located, to the U.S. Treasury). A party aggrieved by Wage and Hour's determination may request a hearing before an ALJ; a party may obtain review of the ALJ's determination by the Department's Administrative Review Board.

The Department agrees with the suggestion that the regulations contain some of the general principles applied in resolving whether a provision is a permissible liquidated damages provision or an impermissible penalty. It is drawn primarily from two legal reference publications (American Jurisprudence 2d; Restatement (Second) Contracts) that provide a general discussion regarding the differences between liquidated damage and penalty provisions. However, the decisional and statutory law of a particular State, as applied to the particular circumstances relating to the employment and contract at issue—not these general principles—will control the resolution of most disputes. Furthermore, we do not address other legal remedies that may be available to the parties to recover damages for an alleged breach of the employment agreement—matters outside the Department's charge under the ACWIA. Individual State law also will determine the particular state whose law will apply to the dispute, where significant aspects of the contract and employment relationship involve different States (or nations).

The Department has also incorporated into the Interim Final Rule its proposal to examine attempts by employers to collect damages where violations of employment law may have caused the H–1B worker's premature termination of his or her employment. It is the Department's expectation that where there is a constructive discharge, or the employer has committed substantive violations of the H–1B provisions directly impacting on the employee (such as wage and benefit violations), State law would not permit the employer to collect the payment.

The Department reiterates the point it made in the NPRM that, although State law will govern the enforceability of liquidated damage provisions in agreements, an H–1B employer nevertheless must comply with the requirements of Federal statute and regulation bearing upon the H–1B employment relationship. For example, irrespective of any contractual agreement to the contrary, an employer is prohibited from directly or indirectly allocating any of the $500 LCA fee (recently increased to $1,000) or other employer expenses to the H–1B worker (see Section 212(n)(2)(C)(vi)(II)). Thus an employer is barred from directly withholding the $500 or $1,000 fee from the H–1B worker's pay or from indirectly collecting the fee through a liquidated damages provision in the contract. The Department agrees that

liquidated damages may encompass other costs the employer has borne on behalf of the employee, such as transportation and visa processing assistance. Employers should be aware that liquidated damages may be withheld from the required wage only if permitted under the criteria for allowable deductions at 20 CFR 655.731(c)(7).

With regard to the suggestion that the Department issue a rule limiting the relief available to the particular worker rather than allowing a particular determination to affect other cases or other workers, the Department will apply principles of administrative collateral estoppel (the legal principle limiting consideration of a dispute to only one court action), where appropriate, just as it would for any other employment law violation.

The Department sees no merit to the proposal by TCS that an employer may be held in violation of the ACWIA' s punitive damages bar only where it fails to cure the violation within a reasonable time after a determination that an agreed damages provision is an unenforceable penalty. There is nothing in the language of the statute to suggest that penalties under this provision should be assessed differently than penalties under other provisions.

K. What Standards Apply To Determine If an Employer Received a Prohibited Kickback of the Additional $500/$1,000 Petition Filing Fee From an H–1B Worker? (§ 655.731(c)(10)(ii))

The ACWIA prohibits an employer from ''requir[ing] an alien who is the subject of a [visa] petition * * * for which a fee is imposed under section 214(c)(9), to reimburse, or otherwise compensate, the employer for part or all of the cost of such fee. It is a violation for such an employer otherwise to accept such reimbursement or compensation from such an alien.'' The referenced filing fee is the ACWIA-enacted filing fee applicable to H–1B petitions, which is in addition to any other fees imposed by INS for filing H–1B petitions. The fee was created by the ACWIA, in the amount of $500; the October 2000 Amendments increased the fee to $1,000. The H–1B worker is not, in any manner, to pay or absorb the cost of any of the additional fee.

Senator Abraham explained that new clause (vi)(II) ''prohibits employers from requiring H–1B workers to reimburse or otherwise compensate employers for the new fee imposed under new section 214(c)(9), or to accept such reimbursement or compensation.'' 144 Cong. Rec. S12752 (Oct. 21, 1998); see also, 144 Cong. Rec. E2325 (Nov. 12, 1998). Congressman Smith explained that ''Congress included this provision to make it very clear that these fees are to be borne by the employer, not passed on to the workers.'' *Id.*

The proposed rule stated that the employee is not to be forced, encouraged, or permitted to rebate any part of the filing fee to the employer, directly or indirectly, *e.g.,* through an intermediary such as an attorney, relative, or co-worker.

The Department received three comments on this issue. All the commenters agreed that the statute prohibits employers from accepting reimbursement from the H–1B worker for the filing fee.

AILA asserted that not all third-party reimbursements are prohibited (*e.g.,* joint employment arrangements, cooperative or joint ventures). The Department agrees that the statute does not prohibit payment of the filing fee by a third party, nor does it require payment only from the employer. However, the Interim Final Rule does prohibit third-party payment if the third party receives or asks for reimbursement from the alien. The employer is held accountable even if it is a third party which violates the statute.

The AFL–CIO asserted that the Department should state specifically that deductions from the alien's wages will be scrutinized to prevent subterfuge for repayment of the filing fee. The Department intends to be alert to abuse or subterfuge. The Interim Final Rule makes it clear that deductions to cover the fee are not allowed, even if the H–1B worker's pay is higher than the required wage.

A third commenter (ITAA) contended that the Department does not have the authority to prohibit the alien from paying the expenses other than the filing fee. This issue regarding other expenses is discussed at § 655.731(c)(7) and Section P.3 of the NPRM, concerning allowable deductions from the required wage.

The Department has determined that the NPRM properly implements the statutory mandate that the employer not force, encourage, or permit an employee to rebate any part of the fee back to the employer or a third party, directly or indirectly, including payments through an intermediary such as an attorney, relative or co-worker. The Interim Final Rule, therefore, embodies the proposed rule. In addition, the Interim Final Rule takes into account the increased petition filing fee, enacted by the October 2000 Amendments. The Rule prescribes that for H–1B nonimmigrants admitted on petitions filed prior to December 18, 2000, the fee ''kickback'' prohibited by this statutory provision is $500 (the amount of the filing fee as created by ACWIA), and that for nonimmigrants admitted on petitions filed on or subsequent to December 18, 2000, the prohibited fee ''kickback'' is $1,000 (the increased fee enacted by the October 2000 Amendments). In the event of an investigation, the Administrator will determine the amount of the statutorily-prohibited ''kickback,'' based on the filing date of the petition.

L. What Penalties and Remedies Apply If the Employer Imposes an Impermissible Penalty or Receives an Impermissible Rebate? (§ 655.810)

The ACWIA enforcement provision on early termination penalties and filing fee kickbacks is self-contained and provides its own sanctions authority. The Department may impose a civil monetary penalty of $1,000 for each violation, whether willful or non-willful, and may order the employer to reimburse the worker (or the Treasury, if the worker cannot be located) for any such payment. The ACWIA provision does not authorize debarment for the penalty and kickback violations.

The Department proposed to adopt the ACWIA language verbatim. Three commenters (ACIP, AILA, TCS) encouraged an express provision prohibiting any class-based relief or res judicata effect and limiting an administrative finding of penalty and corresponding remedy to the particular H–1B worker for whom the violation was found. As discussed in IV.J, above, the Department will follow traditional principles of administrative collateral estoppel, if applicable, as it does under other employment laws.

The Interim Final Rule adopts the statutory language without further elaboration.

M. How Did the ACWIA Change DOL's Enforcement of the H–1B Provisions? (Subpart I)

Section 212(n)(2) of the INA as amended by the ACWIA provides specific authority to undertake ''random'' investigations of employers found to have previously violated their H–1B obligations and to undertake investigations of employers, in limited circumstances, based on information received from other sources that otherwise would be unable to submit complaints as aggrieved parties. The ACWIA also provides explicit employee whistleblower protections and enhanced monetary and debarment sanctions against employers who willfully violate H–1B requirements. The Department proposed to modify Subpart I of the current regulations to

reflect these additional provisions, integrating them into the existing regulatory scheme.

1. What Changes Has the ACWIA Made in the DOL's Enforcement Based on Complaints From ''Aggrieved Parties''? (§ 655.715)

Section 212(n)(2) of the INA as amended by the ACWIA, states that ''nothing in this subsection shall be construed as superseding or preempting any other enforcement-related authority under this Act * * *'' Senator Abraham and Congressman Smith both explained that this provision ''clarifies that none of the enforcement authorities granted in subsection 212(n)(2) as amended should be construed to supersede or preempt other enforcement-related authorities the Secretary of Labor or the Attorney General may have under the Immigration and Nationality Act or any other law.'' 144 Cong. Rec. S12755 (Oct. 21, 1998); 144 Cong. Rec. E2329 (Nov. 12, 1998). For this reason, and because the ACWIA did not by its terms purport to amend the Secretary's authority to investigate based upon complaints from an ''aggrieved party'' or the Secretary's regulations defining ''aggrieved party,'' the Department proposed no changes to the existing regulation defining ''aggrieved party'' at § 655.715. Accordingly, any changes to those regulations would be outside of the scope of this rulemaking.

Two comments were received regarding the issue of ''aggrieved party.''

AILA asserted that a fair reading of ACWIA suggests that governmental entities other than DOL should be removed from the current regulatory definition of aggrieved party and should instead present ''other source'' claims. The U.S. Department of State stated that requiring the Department of State to submit information only as an ''outside source,'' with the compelling standard required by section 212(n)(2)(G), discussed below, would be a mistake, as it could limit the effect of what could be an excellent source of information, and would therefore be detrimental to the effectiveness of the H–1B category.

The Department has consistently defined ''aggrieved party'' to include ''a government agency which has a program that is impacted by the employer's alleged non-compliance with the [LCA].'' 20 CFR 655.715. The State Department is an aggrieved party, for example, because its mission is adversely affected if H–1B petitions are erroneously granted. Because of the responsibility of consular officers to reject visa applications of anyone the officer ''knows or has reason to believe * * * is ineligible to receive a visa'' (8 U.S.C. 1201(g); 22 CFR 41.121(a)), the State Department would be required to expend its own investigative resources to ferret out illegal practices visa by visa if it did not provide information to the Administrator. Similarly, the State Department is required to withhold the granting of a visa and exclude the alien from the U.S. if it determines that the alien will become a public charge (8 U.S.C. 1182(a)(4); 22 CFR 40.41)—a possibility that increases significantly if an employer fails to pay its H–1B worker the required wage. Many of these violations would otherwise go undetected because of the inclination of H–1B workers and their employers to hide such matters from INS and the Labor Department.

Therefore the Department has made no change in the definition of ''aggrieved party.'' However, the Department will not consider information contained on the LCA or associated petition(s), including the documentation supporting the petition, to be the sole basis of a complaint under section 212(n)(2)(A) while section 212(n)(2)(G) remains in effect.

2. What Procedures Does the ACWIA Provide for Random Investigations? (§ 655.808)

Section 212(n)(2)(F) of the INA as amended by the ACWIA authorizes random investigations of employers found by the Secretary, after the ACWIA's enactment on October 21, 1998, to have committed a willful failure to meet an LCA condition or a willful misrepresentation of material fact on an LCA. The statute authorizes such random investigations over a period of five years, beginning on the date of the willful violation finding. The same special scrutiny exists where an H–1B-dependent employer or willful violator is found by the Attorney General to have willfully failed to meet its obligation under section 212(n)(1)(G)(i)(II) to offer a job to an ''equally or better qualified'' U.S. worker. The requirements of section 212(n)(2)(A) regarding investigation of complaints are not applicable to these random investigations.

Senator Abraham observed that this provision adds a new section 212(n)(2)(F) granting the Secretary authority to conduct random investigations of employers found after enactment of this act to have committed a willful violation or willful misrepresentation for five years following the finding. 144 Cong. Rec. S12754 (Oct. 21, 1998). Congressman Smith explained that this authority is ''in addition to the existing investigative authority in section 212(n)(2)(A), as heretofore exercised by the Secretary.'' 144 Cong. Rec. E2327 (Nov. 12, 1998).

The Department proposed that the date of the willful violation ''finding'' (which invokes the ''random investigation'' authority) would be the date of the agency's final determination of a violation for debarment purposes. 20 CFR 655.855(a); 59 FR 656757 (Preamble to the Final Rule). Although the NPRM proposed this interpretation, the Department sought comment on whether an earlier date, such as that of the Administrator's investigation finding or an ALJ's finding would be appropriate.

Three comments were received relating to the proposed regulation on random investigation authority.

IEEE expressed strong support for the new random enforcement provision in ACWIA and recommended that the regulations not be written or interpreted so strictly as to effectively prevent the Department from exercising this authority. Malyankar suggested directly surveying H–1B workers themselves at short intervals to determine how the program is being used and to detect possible abuses.

AILA responded that only final action finding a willful violation or willful misrepresentation should trigger its authority to conduct random investigations.

The Interim Final Rule, consistent with the AILA suggestion and the manner in which the current regulations address other Secretarial ''findings,'' states that a willful violation ''finding'' within the meaning of the statutory provision occurs when the administrative review process is completed, as described in § 655.855(b) of the regulations.

3. What Procedure Does the ACWIA Provide for Investigation Arising From Sources Other Than Aggrieved Parties? (§ 655.807)

Section 212(n)(2)(G) of the INA as amended by the ACWIA authorizes the Secretary to investigate possible violations based on information provided to the Department by sources other than aggrieved parties. The Department may, upon personal certification by the Secretary, undertake an investigation under this authority when it receives specific credible information that provides reasonable cause to believe that a particular type of violation has occurred. The types of violations covered are: A willful failure to meet statutory conditions relating to wages, working conditions, a strike/lockout, and the displacement and recruitment provisions applicable to dependent employers and willful

violators. In addition, such an investigation may be undertaken where the information provides reasonable cause to believe that the employer has engaged in a pattern or practice of failures to meet any of these conditions; or a substantial failure to meet such a condition that affects multiple employees. The Department is also charged with developing a form for receiving information on these potential violations. The ACWIA specified that this provision would be effective until September 30, 2001; the October 2000 Amendments extended the effective period to September 30, 2003.

The ACWIA limits the source who may provide information under this provision to a known source who is likely to have knowledge of the employer's practices, and specifically excludes information provided to the Secretary or to the Attorney General for purposes of securing employment of a nonimmigrant. However, the Secretary is authorized to commence an investigation under this provision if the information was obtained by the Secretary in the course of an investigation under the INA or any other Act.

To allow employers to respond to the allegations before an investigation is commenced, the ACWIA provides that the Secretary shall ordinarily provide notice to the employer concerning the allegations. However, the Secretary is authorized to withhold the source's identity and is not required to provide this notice if the Secretary determines it would interfere with efforts to secure compliance with the requirements of the H–1B program.

In explaining the purpose and effect of this provision, Senator Abraham stated:

> Subsection 413(e) grants the Secretary limited additional authority with respect to other employers to investigate certain kinds of allegations of failures to comply with labor condition attestations. The Secretary's authority under current law is limited to investigating complaints concerning such violations that come from aggrieved parties. * * * The rationale for this grant of authority is to make sure that if DOL receives specific, credible information from someone outside the DOL that an employer is doing something seriously wrong but that information comes from someone who is not an aggrieved party, DOL can nevertheless pursue the lead. * * *. Thus, this provision does not authorize 'self-directed' or 'self-initiated' investigations by the Secretary.

144 Cong. Rec. S12754 (Oct. 21, 1998).

In contrast, Congressman Smith stated:

> Subsection 413(e) specifies a particular investigative process, to be used by the Secretary during the three-year period following enactment of this legislation. This process does not supplant or curtail the Secretary's existing authority in paragraph (2)(A) and does not affect the Secretary's newly-created authority under paragraph (2)(F) ('random investigations')* * *. This provision does not address the matter of ''self-directed'' or ''self-initiated'' investigations by the Secretary. * * * Congress' intent in enacting this special enforcement process was to endorse the Secretary's efforts to be more vigilant and effective in the enforcement of this Act, especially given the authorization of a substantial increase in temporary foreign workers.

144 Cong. Rec. E2327 (Nov. 12, 1998).

The Department proposed regulatory language to integrate this ''other source'' protocol with the Department's other enforcement procedures in a new § 655.806. The Department additionally noted in the NPRM that it was developing a form to be used in receiving information from ''other sources'' that would be published for public comment.

Eight comments were received regarding this provision.

Three organizations representing employees (AFL–CIO, AOTA, IEEE) supported these provisions as essential to careful monitoring of the program. IEEE stated its view that it is important that the regulations not be written or interpreted so restrictively as to effectively prevent the Department from exercising this authority. The AFL–CIO commented that the ''integrated procedures'' for handling complaints from other sources will make it easier for workers and job applicants to follow the status of the complaint and ensure that the Department examines complaints against an employer in full.

AILA commented that Congress, in providing DOL with the new other source enforcement authority, ''repudiated and eliminated the so-called 'self directed' authority to initiate investigations.''

The Department has long believed that directed (no complaint) investigations are appropriate where the Department becomes aware of a possible H–1B violation, whether in the course of an investigation of another employer, an investigation under another statute, or as the result of the receipt of information from some other source. To do otherwise would place Department staff in the untenable position of being forced to ignore knowledge of potentially serious H–1B violations secured in performance of their official duties, and would be a departure from the Department's practice under the H–1A nonimmigrant nurses program. The Department is also of the view that directed investigation authority is not precluded by the Act.

However, the Department also believes that the explicit provisions of the ACWIA concerning random investigations of willful violators and investigations based on credible information from sources other than aggrieved parties allow it to conduct ''directed'' investigations in virtually all situations in which it might have done in the past. Consequently, at least through September 30, 2003 (the date the ''other source'' investigation authority sunsets), it is the Department's intention to conduct only investigations pursuant to complaints from aggrieved parties, investigations based on information from sources other than aggrieved parties (including information obtained by the Secretary during an investigation under the INA or any other Act), and random investigations of willful violators.

AILA also requested that the Department define the terms ''substantial'' and ''pattern and practice.''

In the Department's view, it is unnecessary to define these terms in the regulations. The concept of a ''substantial'' violation, like ''willful'' violation, has been in the statute since enactment of MTINA in 1991. Furthermore, ''pattern and practice'' is a recognized concept in employment law which requires no definition. Finally, the determination of whether there is reason to believe there is a pattern or practice of failures or a substantial failure to meet a condition that affects multiple employees are determinations that are necessarily fact-specific, based upon the facts and circumstances of a particular case.

ACIP suggested that employers should be notified of receipt of complaints within 48 hours of receipt, and that a decision not to notify the employer should be a rare occurrence, happening only if the Department possesses clear evidence that the employer is likely to impede the investigation.

The Department anticipates that a decision not to notify an employer of the substance of allegations against it is likely to be a rare occurrence. It is also the Department's experience that many employers quickly remedy violations when brought to their attention. However, the Department does not believe it is appropriate to specify the time period in which notification will occur, or to delineate a standard in the regulations.

Kirkpatrick & Lockhart and Latour expressed their views that investigations should be initiated only on information from injured parties, while acknowledging that the scope of the provision goes beyond

''whistleblowers.'' The firms expressed particular concern about competitor complaints.

Contrary to the views expressed by Kirkpatrick & Lockhart and Latour, the Department is of the view that the ''other source'' provision of the ACWIA was intended to extend to any source likely to have knowledge of the employer's practices or employment conditions, or of an employer's compliance with its attestation obligations. Furthermore, the Department has long considered a competitor to be an ''aggrieved party,'' as defined in its current regulations at § 655.715.

ITAA noted that the proposed regulations correctly state that the ''other source'' provisions expire on September 30, 2001, unless continued by future legislation, and suggested that the regulations should also identify other provisions that will ''sunset'' absent further action by Congress. The point is well taken. The Department notes that Congress in the October 2000 Amendments has, in fact, extended the effective periods for this and other provisions until 2003. The Interim Final Rule identifies the provisions that will expire on particular dates, absent their extension by future legislation.

AILA requested the opportunity to review and comment on the form that is being developed to receive ''other source'' information. One commenter (BRI) asserts that Department employees should not be allowed to complete forms on behalf of a ''source,'' suggesting that the Department's involvement might have a coercive effect.

The Department has attached its proposed form to this rule in order to obtain the views of the public, as required by the Paperwork Reduction Act. The Department notes that for the convenience of the public and of the Department, it has designed one form for use both by aggrieved parties and by other sources. This will allow the Department to make a determination as to whether the source is aggrieved, and if not, whether the statutory standard is met, after review of the information submitted. The Department disagrees with the comment by BRI, noting that the ''other source'' procedure is initiated by the individual who has submitted information to the Department—not vice-versa—and that the ACWIA expressly authorizes the Department to complete the form on behalf of the individual.

The Department has made other procedural changes. Sections 655.800(b), 655.806(a), and 655.807(b) of the Interim Final Rule provide that the Administrator may interview the complainant or other person supplying information to determine whether the statutory standards are met. (As a courtesy, the Administrator will notify the person providing the information if the standards have not been met, or if, after the determination by the Secretary, an investigation will be conducted.)

The section has been restructured, in accordance with the Department's reading of the statute, to provide that the employer will ordinarily be provided information regarding the allegations and given an opportunity to respond after the Administrator has made an initial determination that the statutory standards are met, rather than prior to this determination. The Administrator will then review this information in order to determine if the allegations should be referred to the Secretary for a determination as to whether an investigation should be commenced. Where the Administrator has determined that notification to the employer should be dispensed with, the Secretary will be advised in the referral; there will be no review of this determination other than by the Secretary.

Section 655.806(a)(3) (and the corresponding provision in § 655.807(i)) is clarified based on the Department's enforcement experience to provide that the time to conduct an investigation may be increased where, for reasons outside of the control of the Administrator, additional time is necessary to obtain information from the employer or other sources to determine if a violation has occurred. It has been the Department's experience that employers do not always timely provide requested information; in other circumstances Wage-Hour must obtain documentation from other agencies, such as information from INS regarding petitions filed (especially where employers have not provided requested information or where needed to verify information supplied by employers).

4. What Protections Are Provided to Whistleblowers by the ACWIA? (§ 655.801)

Section 212(n)(2)(C)(iv) of the INA as amended by the ACWIA provides explicit protection for H–1B employees who exercise their H–1B rights by complaining about a violation of the Act or cooperating with an investigation. An employer may not ''intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against [such] employee.'' ''Employee'' is defined to include former employees and applicants for employment. Like other whistleblower statutes, the ACWIA provision protects an employee's ''internal'' complaint to the employer or to any other person, as well as an employee who cooperates in an investigation or proceeding concerning an employer's compliance with the Act and these regulations. As Senator Abraham stated, this provision ''essentially codifies current Department of Labor regulations concerning whistleblowers.'' 144 Cong. Rec. S12752 (Oct. 21, 1998).

Section 212(n)(2)(C)(vi) directs the Department and the Attorney General to establish a process to enable an H–1B worker who files a whistleblower complaint to remain in the United States and seek other appropriate employment for a period not to exceed the maximum period provided for the H–1B classification. As noted in the NPRM, the Department and the INS are working in close cooperation to develop this process. This mechanism, however, is not within the scope of this rulemaking.

The whistleblower enforcement provision elicited five comments.

APTA, AOTA, and IEEE expressed strong support for the statute's whistleblower provisions.

AILA suggested that the ACWIA's anti-retaliation language protecting an employee from retaliation where the employee has disclosed information that the employee ''reasonably believes evidences a violation'' of the H–1B provisions covers only ''genuine infractions of law.'' It therefore suggested that the Department should amend its rule to make clear that the disclosure ''must be other than a de minimis violation.''

The Department rejects this interpretation. The Department is of the view that Congress intended that the Department, in interpreting and applying this provision, should be guided by the well-developed principles that have arisen under the various whistleblower protection statutes that have been administered by this Department (see 29 CFR part 24). The Department also believes that, as in those programs, the parameters of the provision are best developed through adjudication rather than through rulemaking. The Department points out that the statutory test is whether the employer has discriminated against an employee because the employee disclosed information the employee reasonably believed evidenced a violation, or because the employee cooperated or sought to cooperate in an investigation or other proceeding. The Department believes that there is no basis for inferring an intention to protect only complaints of actual infractions of

law, or to exclude potential *de minimis* violations.

BRI commented that the employer should not be liable for wrongful termination until found guilty by the appropriate authority. The Department agrees that an employer is not liable for wrongful termination until a final decision is issued in a Department of Labor proceeding.

5. What Changes Does the ACWIA Make in Enforcement Remedies and Penalties? (§ 655.810)

Prior to the ACWIA's enactment, the INA authorized the assessment of a civil money penalty (up to $1,000 per violation) and debarment from the sponsorship of nonimmigrant aliens for employment (at least one year), among other unspecified remedies, for H–1B violations. In place of this ''unitary'' scheme, section 212(n)(2)(C)(i)–(iii) of the INA as amended by the ACWIA established a three-tier scheme for sanctions and remedies, depending upon the nature and severity of the violations. The first tier provides for up to $1,000 per violation and debarment for at least one year (for violations of the attestation provisions regarding a strike or lockout, or the dependent employer/willful violator provisions regarding displacement; or for substantial violation of the attestation provisions regarding notice, the details of the attestation, or the dependent employer/willful violator provisions regarding recruitment). The second tier provides for up to $5,000 per violation and debarment for at least two years (for willful violations of any of the attestation provisions, willful misrepresentation, or violation of the whistleblower provisions). The third tier provides for up to $35,000 and debarment for at least three years (for willful violations of any of the attestation provisions or willful misrepresentation, in the course of which violation or misrepresentation the employer displaced a U.S. worker within the period beginning 90 days before and ending 90 days after the filing of an H–1B petition supported by the LCA). In each of the three penalty tiers, as in the previous statutory provision, the ACWIA authorizes the imposition of ''such other administrative remedies as the Secretary determines to be appropriate.''

In explaining new clause (iii), Senator Abraham explained:

> The rationale for this new penalty is that there have been expressions of concern that employers are bringing in H–1B workers to replace more expensive U.S. workers whom they are laying off. Current law, however, requires employers to pay the higher of the prevailing or the actual wage to an H–1B worker. Thus, the only way an employer could profitably be systematically doing what has been suggested is by willfully violating this obligation. Otherwise, the employer would have no economic reason for preferring an H–1B worker to a U.S. worker as a potential replacement. Thus, the new penalty set out in new clause (iii) is designed to assure that there are adequate sanctions for (and hence adequate deterrence against) [willful violations of the wage provisions] by imposing a severe penalty on a willful violation of the existing wage-payment requirements in the course of which an employer 'displaces' a U.S. worker with an H–1B worker.
>
> At the same time, Congress chose not to make the layoff itself a violation. The reason for this is that there are many reasons completely unconnected to the hiring of H–1B workers why an employer may decide to lay off U.S. workers. * * * Accordingly, it is important to understand that unlike the new attestation requirements imposed by the amendments to section 212(n)(1), clause (iii) of section 212(n)(2)(C) provides no new independent basis for DOL to investigate an employer's layoff decisions. The only point at which DOL can do so pursuant to clause (iii) is after it has already found that the employer has committed a willful violation of one of the pre-existing labor condition attestations.
>
> * * * At that point, and not before, provided that there is reasonable cause to believe that an employer had also displaced a U.S. worker in the course of committing that violation, it would be proper for DOL to investigate, but only in order to ascertain what penalty should be imposed. The definitions concerning ''displacement'' and the like, set out in new 212(n)(3) and 212(n)(4) of the Immigration and Nationality Act, and discussed in the previous portion of this section-by-section analysis dealing with the amendments to that Act made by section 412 of this legislation, apply in this context as well.

144 Cong. Rec. S12752 (Oct. 21, 1998).

Congressman Smith explained that new clause (iii) ''clarifies that certain kinds of employer conduct constitute a violation of the prevailing wage attestation, and that other kinds of employer conduct are also prohibited in the H–1B program. * * * Congress intends that this new penalty will assure that there are adequate sanctions for (and hence adequate deterrence against) any willful violation of the existing wage-payment requirements in the course of which an employer 'displaces' an American worker with an H–1B worker.'' 144 Cong. Rec. E2325 (Nov. 12, 1998).

These penalty provisions do not apply to the ACWIA prohibitions on penalizing an H–1B worker for his or her early cessation of employment, or on requiring an H–1B worker to reimburse the filing fee. For these violations, the Department, instead, may impose a civil money penalty of $1,000 for each violation and reimbursement of the H–1B worker (or the Treasury if the worker cannot be located). Debarment is not available as a sanction for these violations.

In the NPRM, the Department proposed that ''appropriate administrative remedies'' would include the imposition of curative actions such as providing notice to workers and affording ''make-whole'' relief for displaced workers, whistleblowers, or H–1B workers who failed to receive proper benefits or eligibility for benefits.

Senator Abraham and Congressman Smith had divergent views regarding the Secretary's authority to impose such remedies. Senator Abraham stated that these remedies ''do not include an order to an employer to hire, reinstate, or give back pay to a U.S. worker as a result of any violation an employer may commit.'' 144 Cong. Rec. S12752 (Oct. 21, 1998). Congressman Smith, on the other hand, stated that ''Congress intends that such remedies will include 'make-whole' relief for affected American workers (such as, in appropriate circumstances, monetary compensation to the American worker or reinstatement to the job from which the American worker was dismissed or placement in the job to which the American worker should have been hired).'' 144 Cong. Rec. E2325 (Nov. 12, 1998).

Several commenters (Senators Abraham and Graham, AILA, Network Appliance, Rubin & Dornbaum, Satyam, and White Consolidated Industries) stated that the authority to seek make-whole relief has never been asserted by the Department and is beyond the authority granted to the Department by the ACWIA. Other Congressional commenters commented that the proposed regulations on the scope of administrative remedies go far beyond what the statute contemplates, without specifically referring to make-whole relief.

After careful consideration, the Secretary remains persuaded that the plain language of the ACWIA (''the Secretary * * * may * * * impose such other administrative remedies * * * as the Secretary determines to be appropriate'') provides the Secretary the authority to award whatever relief is appropriate in the circumstances of a case, including make-whole relief. Since the Act already contains explicit authority for civil money penalties, back wages, and debarment, it seems apparent that Congress intended to allow the Secretary to order other appropriate remedies to cure the violations. In the case of displacement

or whistleblower violations in particular, such relief must logically include reinstatement and back pay. Nor does the Department believe that the fact that explicit language concerning such relief was not contained in the ACWIA, as Senator Abraham indicates was sought by the Administration, equates to an express legislative denial of such remedial authority to the Secretary.

ITAA, ACIP, and Intel requested that the Department define the various terms used in the statute's three-tier scheme for violations.

The Department notes that ''willful failure'' is currently defined in the regulations at § 655.805(b). As discussed above, it is the Department's view that it is unnecessary to define these terms further in the regulations.

SBSC sought assurances that ''punitive approaches'' would not be applied where there is an absence of negligence, fraud, or other blameworthy action. Intel and ACIP suggest that the Department should recognize, in effect, a good faith defense for an employer that is found in violation of the statute. Intel suggests that the Department should establish a practice akin to that provided for I–9 violations by 8 U.S.C. 1324a(b)(6). This provision stipulates that under certain circumstances ''a person is considered to have complied with a requirement of this subsection notwithstanding a technical or procedural failure to meet such requirement if there was a good faith attempt to comply with this requirement.''

In the Department's view, the ACWIA does not provide a general defense in the nature of those suggested by SBSC and Intel. Entirely missing from the statute is any provision comparable to 8 U.S.C. 1324a(b)(6). At the same time, however, it should be noted that the Department is vested with some enforcement discretion and intends to exercise this discretion in accordance with the purposes served by the statute and the public interest. Where appropriate, the Department will consider the totality of the circumstances, including an employer's demonstrated good faith attempts at compliance, in fashioning remedies appropriate to the violation. In this regard, the Department notes that its regulations providing the factors to be considered in assessing the amount of civil money penalties include an employer's good faith efforts to comply, the gravity of the violations, and the violator's explanation of the violations. See § 655.810(c) of the current regulations.

Several individuals urged the imposition of heavy penalties upon violators. The AFL–CIO suggested in particular that the Department should make greater use of the debarment penalty in cases that are resolved through consent judgments or other means of settlement.

The Department, of course, will be guided by the penalty scheme established by Congress and the Department's regulatory provisions governing debarment and the assessment of penalties. The ACWIA establishes a three-tier system for debarment and civil money penalties; the remedy in a particular case will depend upon the category of the violation involved and consideration of the regulatory factors, which may enhance or reduce a civil money penalty under the particular circumstances of the violation. The Department notes that the ACWIA particularly recognizes the gravity of willful violations, as demonstrated by the longer debarment period and authority to conduct random investigations. Accordingly, the Secretary will insist on debarment in appropriate cases.

The individual commenters urged the Department to issue a regulation that informs American workers of their rights under the statute. ITAA also suggested that the regulations should address the Attorney General's role under the statute.

The Interim Final Rule lays out the obligations of H–1B-dependent employers and willful violators, including the requirements—as laid out in Sections D and E of the NPRM—that they not displace workers, that they not place H–1B workers at worksites of other employers where U.S. workers are being displaced, that they recruit U.S. workers using industry-wide procedures, and that they offer the job to any U.S. worker who applies who is equally or more qualified than the H–1B workers. The rule also explains the provision for filing complaints with the Attorney General for violations of the hiring requirement. In addition, although there is no direct remedy for U.S. workers who are not employed by dependent employers or willful violators, they may file complaints with the Department.

ITAA requested that the Department clarify enforcement regulations as they pertain to recruitment violations and specify that only H–1B-dependent employers may be liable for such violations. The Interim Final Rule has been clarified to make clear that only an H–1B-dependent employer or willful violator may be held liable for a recruitment violation. The recruitment obligations of dependent employers are discussed in much greater detail in IV.E, above.

Finally, on review of the NPRM, the Department notes that it had misconstrued the scope of the third tier of penalties. The highest level of penalties (up to $35,000 per violation and a minimum of three years of debarment) are applicable whenever any employer displaces a U.S. worker in the course of committing a willful violation of any of the attestation provisions or a willful misrepresentation—regardless of whether the employer is a dependent employer or willful violator subject to the new attestation provisions of the ACWIA. In the Department's view this construction is clear from a careful reading of the statutory language, as well as the statement describing this provision by Senator Abraham, quoted above, at 144 Cong. Rec. S12752 (Oct. 21, 1998). Application of this higher penalty will arise only where the Department determines that the employer has committed a willful violation of an attestation requirement—*e.g.,* the employer has willfully failed to pay the required wage to H–1B workers. If the Department determines that the employer has displaced a U.S. worker within the period between 90 days before and 90 days after the LCA was filed, and that the employer has replaced that worker with an H–1B worker whom the employer has willfully failed to pay the required wage, the employer will be subject to a CMP of up to $35,000 per violation of the attestation requirements; in addition, the Department will advise INS, which shall not approve any petitions for at least a three-year period. The Interim Final Rule has been amended to correct this provision.

In addition, the H–1B enforcement provisions contained in Subpart I of Part 655 have been restructured to make them clearer and more user-friendly. Changes have also been made to comport with the Department's enforcement experience. Specifically, as discussed in IV.M.3, above, § 655.806(a)(3) (and the corresponding provision in § 655.807(i)) clarifies that the time to conduct an investigation may be increased where, for reasons outside of the control of the Administrator, additional time is necessary to obtain information from the employer or other sources to determine if a violation has occurred. Sections 655.800(b), 655.806(a), and 655.807(b) provide that the Administrator may interview the complainant or other person supplying information to determine whether the statutory standards are met.

Various clarifying changes have been made to proposed § 655.810, setting forth the remedies available to the Administrator upon a finding of violations. As discussed in IV.G, above, the Department has determined that certain benefits are in the nature of compensation for services rendered, and have a monetary value to workers and monetary cost to employers. Therefore such benefits are more in the nature of wages than of working conditions. Paragraph (a) of § 655.810 makes it clear that payment of unpaid benefits can be ordered by the Administrator pursuant to the Administrator's authority to order payment of back wages under section 212(n)(2)(D).

In addition, the Interim Final Rule clarifies at §§ 655.810(a)(14) and 655.810(a)(16) that the Department will issue CMP assessments for violations of the public access provisions of the Act, or for regulatory violations, such as a failure to cooperate in the investigation (see § 655.800(c)). The Department will also assess CMPs for violations of the recordkeeping requirements, where the violation impedes either the ability of the Administrator to determine whether a violation of the H–1B requirements has occurred, or the ability of members of the public to have information needed to file a complaint or information regarding alleged violations of the Act. Under the existing regulations (§ 655.810(b)), CMP assessments may be imposed for any violations of the regulations.

Finally, in conformance with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (see 28 U.S.C. 2461 note), new § 655.810(f) provides for inflationary adjustments to be made, by regulation, to civil money penalties in accordance with a specified cost-of-living formula. Such adjustments will be published in the Federal Register. The amount of the penalty in a particular case will be based on the penalty in effect at the time of the violation.

N. What Modification to Part 656 Does the ACWIA Provide for the Determination of the Prevailing Wage for Employees of ''Institutions of Higher Education,'' ''Related or Affiliated Nonprofit Entities,'' ''Nonprofit Research Organizations,'' or ''Governmental Research Organizations''? (§ 655.731(a)(2), § 656.40)

The ACWIA amends the INA (Section 212(p)(1), 8 U.S.C. 1182(p)(1)) to require that the computation of the prevailing wage for employees of institutions of higher education, nonprofit entities related to or affiliated with such institutions, nonprofit research organizations, and Governmental research organizations only take into account the wages paid by such institutions and organizations in the area of employment. In addition, section 212(p)(1) provides that with respect to professional athletes as defined in section 212(a)(5)(A)(iii)(II), where the job opportunity is covered by professional sports league rules, the wage prescribed by those rules shall be considered the prevailing wage. This ACWIA directive concerning academic and research institutions affects both the H–1B program and the Permanent Labor Certification program, since both programs use the prevailing wage computation procedures set out in the Permanent program regulation at 20 CFR 656.40. The provision regarding professional athletes affects only the Permanent program.

On March 20, 1998 (63 FR 13756), the Department published a Final Rule amending its Permanent Labor Certification regulation to change the effects of the *en banc* decision of the Board of Alien Labor Certification Appeals in *Hathaway Children's Services* (91–INA–388, February 4, 1994), which required prevailing wages to be calculated by using wage data obtained by surveying across industries in the occupation in the area of intended employment. The 1998 Final Rule, in effect, allows prevailing wage determinations made for researchers employed by colleges and universities, Federally Funded Research and Development Centers (FFRDCs) operated by colleges and universities, and certain Federal research agencies to be made by using wage data collected only from those entities. The Department stated in the Preamble to that Final Rule that the amendment to the regulation also changed the way prevailing wages are determined for those entities filing H–1B labor condition applications on behalf of researchers, since the regulations governing the prevailing wage determinations for the Permanent program are followed by State Employment Security Agencies (SESAs) in determining prevailing wages for the H–1B program as well.

The ACWIA provision goes considerably beyond the regulatory amendments made by the Department. The ACWIA provisions extend to all nonprofit research organizations and Governmental research organizations. In addition, the ACWIA provisions extend not only to researchers, but to all occupations in which institutions of higher education, nonprofit entities related to or affiliated with such institutions, and nonprofit research organizations or Governmental research organizations may want to employ H–1B workers or aliens immigrating for the purpose of employment.

In describing the application of this provision, Senator Abraham stated in pertinent part:

> Paragraph 212(p)(1) provides that the prevailing wage level at institutions of higher education and nonprofit research institutes shall take into account only employees at such institutions. The provision separates the prevailing wage calculations between academic and research institutions and other non-profit entities and those for for-profit businesses. Higher education institutions and nonprofit research institutes conduct scientific research projects, for the benefit of the public and frequently with federal funds, and recruit highly-trained researchers with strong academic qualifications to carry out their important missions. The bill establishes in statute that wages for employees at colleges, universities, nonprofit research institutes must be calculated separately from industry.

144 Cong. Rec. S12756 (Oct. 21, 1998).

The Department consulted with the INS on the definitional issues, since that agency has addressed similar issues with regard to the implementation of the additional fee required for petitions on behalf of H–1B nonimmigrants. The employers excluded from that fee are the same as the employers specified in the ACWIA provision concerning prevailing wage determinations. The Department worked with the INS in developing the following definitions contained in its Interim Final Rule published on November 30, 1998 (63 FR 65657), 8 CFR 214.2(h)(19)(iii)(B):

> ''*An institution of higher education,* as defined in section 801(a) of the Higher Education Act of 1965;
>
> ''*An affiliated or related nonprofit entity.* A nonprofit entity (including but not limited to hospitals and medical or research institutions) that is connected or associated with an institution of higher education, through shared ownership or control by the same board or federation, operated by an institution of higher education, or attached to an institution of higher education as a member, branch, cooperative, or subsidiary;
>
> ''*A nonprofit research organization or Governmental research organization.* A research organization that is either a nonprofit organization or entity that is primarily engaged in basic research and/or applied research, or a U.S. Government entity whose primary mission is the performance or promotion of basic and/or applied research. Basic research is research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind. Basic research is also research that advances scientific knowledge, but does not have specific immediate commercial objectives although it may be in fields of present or potential commercial

interest. Applied research is research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met. Applied research includes investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services.''

The INS Interim Final Rule also provides, in relevant part, that a nonprofit organization or entity is one that is qualified as a tax exempt organization under Section 501(c) (3), (4) or (6) of the Internal Revenue Code of 1986 (IRC) and has received approval as a tax exempt organization from the Internal Revenue Service, as it relates to research or educational purposes.

In the NPRM, the Department sought comments on the proper definitions of the entities to which the ACWIA prevailing wage provisions apply. The Department shared these comments with INS in the development of definitions to apply to both the INS and Departmental regulations. Comments received by INS concerning these definitions have also been considered by the Department and are included in the record of this rule.

In order to determine prevailing wages as required by the ACWIA, the Department explained that it is also necessary to determine the appropriate universe(s) to survey, and to determine the availability of relevant, reliable data. The Act sets forth the four types of organizations in two groups: educational institutions and related research organizations; and other nonprofit research organizations and Governmental research organizations. The Department stated, however, that the Act does not seem to require that prevailing wages be determined separately for those two groups, as distinguished from a universe consisting of all four groups, or surveys of the four types of organizations separately, or some other combination.

The Department explained in the NPRM that it has reason to believe that it may not be feasible to identify the different kinds of entities that might comprise educational institutions' related or affiliated nonprofit entities, or nonprofit research organizations. If those entities cannot be identified, it may not be possible to properly define the universe that should be surveyed to determine the appropriate prevailing wages. One possible alternative the Department said it would explore is the use of the prevailing wage data it currently collects in surveying institutions of higher education to determine prevailing wages for one universe consisting of institutions of higher education, affiliated or nonprofit research institutions, and nonprofit research organizations. The Department also stated that data currently being collected by the Office of Personnel Management (OPM) may be able to be used to determine prevailing wages for Federal Governmental research organizations.

The Department sought comments on the appropriate universes to use in determining prevailing wages for the entities (employers) mentioned in the ACWIA, methods to develop an appropriate universe, and the feasibility and appropriateness of the Department's using data collected from institutions of higher education and Federal Governmental research organizations to determine prevailing wages.

In the period since the NPRM was published, INS has published its Final Rule implementing the fee provisions of the ACWIA (65 FR 10678; February 29, 2000). These regulations include provisions defining organizations which are exempt from the H–1B petition filing fee. As discussed above, the ACWIA defines exempt organizations as those organizations described in section 212(p)(1). More recently, the October 2000 Amendments (Pub. L. 106–311) amended section 214(c)(9) of the INA to provide a modified definition of organizations exempt from the fee. However, this recent provision has no effect on the Department's prevailing wage obligation.

The Department received six comments on this section of the NPRM. The American Council on Education (ACE) also attached a copy of its comments on the INS Interim Final Rule. The Department also reviewed the comments received by INS pertaining to this issue.

With respect to definitions of covered entities, ACE and the Association of Independent Research Institutes (AIRI) commended the efforts of federal agencies to jointly develop regulatory definitions, and urged that all regulations that implement ACWIA sections include identical definitions, regardless of the agency source of the regulation.

AIRI stated that the proposed definitions adequately cover its member institutions—independent, nonprofit research institutions performing basic and clinical research in behavioral sciences. Similarly, the Smithsonian Institution stated that it had no problem with the definitions, stating that it believes that it qualifies as both a nonprofit research organization and as a governmental research organization.

ACE observed that the new section 212(p)(1) references only those institutions included in section 101(a) of the Higher Education Act of 1965. (ACE pointed out a typographical error in the NPRM, which referenced section 801 of the Higher Education Act rather than section 101(a).) The Higher Education Amendments of 1998 (Pub. L. No. 105–244, 112 Stat. 1581 (Oct. 7, 1998)), reauthorized the Higher Education Act and made a number of amendments. Institutions contained in sections 101(a) and (b) of the Act as amended in 1998, 20 U.S.C. 1001(a) and (b), were formerly contained in 20 U.S.C. 1201(a), which itself incorporated 20 U.S.C. 1088. ACE stated its belief that Congress inadvertently neglected to reference section 101(b) as well as section 101(a) of the Higher Education Act as amended in 1998 when it passed the ACWIA. ACE requested that the definition of an ''institution of higher education'' contained in the NPRM therefore be modified to include both section 101(a) and section 101(b), pending clarification by the Department of Education or a technical amendment. Unless this is done, ACE contends, some categories of higher education, such as independent medical colleges or graduate universities, might not qualify for the academic prevailing wage determination.

ACE further stated, with respect to definitions, that the NPRM did not define a ''governmental research organization.'' Both AILA and ACE stated that the definition should indicate that such organizations include all federal, state, and local government laboratories conducting scientific and/or scholarly research. ACE also noted that FFRDCs are operated by contractors rather than the Federal Government itself. ACE suggested that FFRDC contractors should be eligible for the academic prevailing wage if they are institutions of higher education, affiliated or related nonprofit entities, nonprofit research organizations, or governmental research organizations. ACE also recognized the problem inherent in applying the prevailing wage methodology provided for by section 212(p)(1) to for-profit contractors that operate FFRDCs. Nonetheless, ACE indicated it considered all FFRDC's to be members of the academic research community, and expressed hope that the Department will work with the ACE and the FFRDC contractor community to develop an appropriate solution to allow all academic researchers to be treated equally.

ACE also urged that the definition of ''affiliated or related nonprofit entity'' include, in addition, those nonprofit research hospitals which have an

historic affiliation with universities but do not meet the strict definition of ''affiliation'' in the INS Interim Final Rule. ACE proposed a specific modification of the definition to accommodate these hospitals. Similarly, AILA maintained in the comments it submitted to INS, that ''[c]ertain non-profit or governmental (non-research) institutions may have arrangements for the sharing of information, training or research with educational institutions, yet would not by this definition [of affiliated or related non-profit entity] be exempt from the fee.''

Finally, ACE urged that the definition of nonprofit organizations or entities be modified so that a state or local organization exempt from tax under IRC Section 115 or under an applicable state law qualifies as a nonprofit organization or entity for purposes of the ACWIA. By doing so, ACE contends, the Department's regulation would be consistent with the INS Interim Final Rule.

The Research Corporation of the University of Hawaii (RCUH) sought clarification regarding its status. RCUH explained that it was established by the State of Hawaii as a ''public instrumentality,'' part of the University of Hawaii ''for administrative purposes only,'' and non-profit under state law but not under the IRC. It expressed the view that both DOL and INS had failed to consider the special category of public/private semi-autonomous, non-profit research organizations created by other government agencies, and that they fit within the intent of the ACWIA language regarding non-profit research organizations.

In its comments on the definition provisions of the NPRM pertaining to nonprofit research organizations and Governmental research organizations, AILA maintained that the use of the word ''scientific'' connotes a natural science like chemistry or physics, but not a social science like history or sociology. In addition, AILA opined that the distinction between basic research and applied research is often a distinction drawn within the natural sciences, and that the NPRM therefore implies that DOL believes that ACWIA amendments covers only nonprofit organizations engaged in natural science research. The ACWIA amendments, according to the AILA, broadly refer to research and nowhere introduce the language limiting the amendment to natural science research.

With respect to the definition of ''nonprofit research organization,'' AILA opined that nonprofit research organizations engaged in substantial research should be covered by the ACWIA amendments, whether or not research is the nonprofit's primary purpose. AILA suggested that the Department's definition of nonprofit research organizations include ''organizations primarily engaged in research and organizations engaged in research as an essential or significant element of their operations.''

A law firm representing Texas school districts and private schools (Tindall and Foster) commented that elementary and secondary educational institutions should be exempt from the filing fee because they operate on tighter budgets than institutions of higher education and because of the critical shortage of bilingual teachers. That commenter also stated that ACWIA prevailing wage provisions should include elementary and secondary education institutions.

With regard to the comments by ACE that the definition of ''(a)n institution of higher education'' presented in the NPRM should be modified to include those institutions contained in section 101(b), as well as those contained in section 101(a) of the Higher Education Act, as amended by the Higher Education Amendments of 1998, the Department believes it is constrained by the unambiguous statutory language to include only those institutions in section 101(a). Furthermore, there is no indication in the legislative history as viewed in conjunction with the history of the Higher Education Amendments to indicate Congress intended to include section 101(b).

Concerning the view expressed by ACE and AILA that the definition of a ''Governmental research organization'' should include state and local government laboratories conducting scientific and/or scholarly research, the Department has concluded that by Congress' use of the initial capital ''G'' in the word ''Governmental'' in the statute, Congress intended to limit the provision to the Federal research organizations. In the INA, the words ''Government'' and ''government'' appear numerous times. It appears that only when a small ''g'' is used, does the term include state and local as well as Federal government agencies. See the discussion in C. Stine, ''Out of the Shadows: Defining 'Known to the Government' in the Immigration Reform and Control Act of 1986,'' 11 Fordham Int'l L.J. 641, 653 (Spring 1988); see also *Kalaw* v. *Ferro,* 651 F. Supp. 1163 1169–70 (W.D.N.Y. 1987). Furthermore, throughout the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105–277, 112 Stat. 2681 (Oct. 21, 1998), of which the ACWIA is a part, it appears that a capital ''G'' is used to mean the United States government or the government of a foreign nation, while a small ''g'' is used to refer to state, local, and tribal governments (unless the complete term ''Federal government'' is used). See also, *State Bank of Albany* v. *United States,* 530 F.2d 1379, 1382 (Ct. CL. 1976).

The Department agrees with the view expressed by ACE that the status of entities contracting with FFRDCs determines the application of the special provisions of Section 212(p)(1). An academic institution operating an FFRDC, for example, would obtain the prevailing wage determination applicable to academic institutions. The determination of prevailing wages for for-profit employers that operate FFRDCs is outside the scope of the proposed rule and is not addressed in this document.

As noted above, ACE recommended that the definition of ''[a]n affiliated or nonprofit entity'' be modified to include other ''nonprofit research hospitals'' that do not meet the definition of ''affiliation'' in the Department's NPRM and the INS Interim Final Rule and, because their primary mission is patient care, do not meet the definition of a ''nonprofit research organization.'' Specifically, ACE recommended that the phrase ''or through a documented understanding or affiliation'' be added to the definition. The Department is of the view, however, that the definition of ''affiliated or related nonprofit entity'' in the NPRM and the INA Interim Final Rule is consistent with the ordinary meaning of the phrase. The definition proposed by ACE is inappropriately broad and would likely include many entities in addition to the ones about which ACE and AILA are concerned. Consequently, the Department has decided not to adopt the modification to the definition of ''affiliated or nonprofit entity.''

In support of its view that the definition of a nonprofit organization or entity should be modified to include organizations exempt from tax under section 115 of the IRC (26 U.S.C. 115) or under an applicable state law as a nonprofit organization or entity, ACE stated that INS covers such organizations in its interim rule. To the contrary, the INS Interim Final Rule at 8 CFR 214.2(h)(iv) does not provide that organizations can qualify as nonprofit entities on the basis of being exempt from tax under IRC Section 115 or under an applicable state law, but instead provides at § 214.2(h)(iv):

For purposes of paragraphs (h)(19)(B) and (C) of this section, a nonprofit organization or entity is one that is qualified as a tax exempt organization under section 501(c)(3),

(4) or (6) of the Internal Revenue Code of 1966 (26 U.S.C. 501(c)(3), (c)(4) or (c)(6)) and has received approval as a tax exempt organization from the Internal Revenue Service, as it relates to research or educational purposes.

The preamble to the INS Interim Final Rule (63 FR 65658) does acknowledge that certain organizations (*e.g.,* churches) qualify for nonprofit status without a notice from the IRS confirming such status. (It is unlikely that such organizations would be institutions of higher education and related or affiliated institutions, or nonprofit and Governmental research organizations.) The INS goes on to state that it believes that most employers of specialty occupation workers claiming an exemption will be able to meet the evidentiary requirement specified in the rule, either with a notice from the IRS or other documents demonstrating the United States employer's nonprofit status. The Department agrees with these statements by INS. The preamble to the INS rule does not indicate that nonprofit status will in any instance be determined by the employer's tax exempt status pursuant to IRC Section 115 or state law. Moreover, we see no reason to include entities encompassed by Section 115 within the definition of nonprofit entities. Section 115 does not purport to be a list of tax-exempt organizations, but rather is a reference to the kinds of state income which are excluded from gross income in determining income tax. Furthermore, the Department believes that it is generally accepted that nonprofit status is determined by an entity's status under section 501(c). If Congress wanted an entity's nonprofit status to be determined by state law, Congress could have expressly so provided.

Based on the foregoing, this rule provides, as does INS' Interim Final Rule, that a nonprofit organization or entity is one that is qualified as a tax exempt organization under IRC section 501(c)(3), (c)(4) or (c)(6), and has received approval from the Internal Revenue Service as it relates to research or educational purposes.

As indicated above, AILA believed the Department was implying in the NPRM that the ACWIA amendments and the definitions in the NPRM pertaining to nonprofit research organizations and Governmental research organizations only applied to organizations engaged in natural science research. The definitions of basic research and applied research used in the NPRM (and the INS interim rule) are based on the definitions of ''Basic Research'' and ''Applied Research'' found on pages 4–9 of Science & Engineering Indicators—1996, published by the National Science Foundation (NSF). The materials contained in the NSF publication indicate that these definitions apply to the social and behavioral sciences (which include psychology, sociology and other social sciences), as well as the natural sciences (which include all physical, earth, atmospheric, biological and agricultural sciences). NSF staff have confirmed that the NSF definitions of basic and applied research apply to both the social and natural sciences. These definitions are used in NSF's resource surveys and are well understood by members of the research community. The Department has revised the regulation to provide that ''research'' includes research in the sciences, social sciences, and humanities.

The Department has also concluded that the definition of nonprofit research organization should be limited to organizations primarily engaged in research. We believe this is most consistent with the statutory phrase ''research organization.'' Furthermore, Senator Abraham's statement, quoted above, indicates a specific Congressional intent that the determination of the prevailing wage not include other types of nonprofit entities. In addition, since workers in all occupations for which nonprofit research entities file H–1B labor condition applications or applications for alien employment certification are potentially affected by the ACWIA prevailing wage amendments, the proposed modification could affect large numbers of H–1B workers not engaged in research or related activities, thereby increasing the possibility of an adverse effect on U.S. workers who are not engaged in research or related activities. The Department believes such a construction would not be consistent with Congressional intent.

As indicated above, AILA indicated in its comments that the groups included in prevailing wage determinations should only include ''similarly employed'' individuals. This issue is outside the scope of this rulemaking. However, it is the Department's position that all occupations included within an OES occupational group for which prevailing wage determinations are provided are ''similarly employed.'' The Department also notes that the OES does collect data for faculty members by certain disciplines in accordance with an agreement reached with the academic community.

With regard to the collection of prevailing wage data and prevailing wage determinations, ACE and AIRI strongly supported the Department's approach as the most feasible solution to meeting the ACWIA requirements. These two organizations observed that institutions of higher education, affiliated and related research institutions, and nonprofit research organizations, are comparable for prevailing wage purposes due to the similarity of their missions and employment of H–1B nonimmigrants. ACE recommended a separate category for governmental research organizations based on their understanding that pay scales and wages for government research labs and other related activities are established and predetermined by federal, state and local governments, and do not necessarily correspond to the other three groups. The Smithsonian Institution opposed this approach, and urged the Department to treat all groups as a single universe for purposes of determining prevailing wage levels. The Smithsonian also noted that the NPRM did not address the issue of how organizations in the four groups are to make their status known to the local SESA for prevailing wage determinations. Moreover, the Smithsonian recommended that the Department follow the example of the INS for I–129W, with no additional evidentiary requirements.

ACE also expressed concern regarding the Department's treatment of independent academic wage surveys, stating its view that much DOL and state and local government academic wage information is inaccurate due to inclusion of an insufficient number of academic institutions. It therefore encouraged the Department to adopt independent surveys of academic wages.

AILA argued that the division of employer groups into two distinct subparagraphs in section 212(p)(1) is indicative of Congressional intent to treat the two groups separately. AILA further commented that the groups included in the prevailing wage determination should only include similarly employed individuals, as distinguished from a group of occupations. AILA also stated that similarly employed workers should include reference to the skills and knowledge required by the position.

As noted in the NPRM, the Department does not believe that the ACWIA requires that the four types of organizations be grouped in any particular way in determining the universe for prevailing wage surveys. The Department agrees with AIRI and ACE that there are substantial similarities among employment found in colleges and universities, affiliated or

related nonprofit entities, and nonprofit research organizations. Therefore, the Department plans to use the data it currently collects in surveying institutions of higher education to determine prevailing wages for institutions of higher education, related or nonprofit entities, and nonprofit research organizations.

The Department also agrees with ACE that pay scales for Governmental research laboratories and other related activities are established by the Federal government and do not necessarily correspond with the three other groups mentioned above. For this reason, the Department does not contemplate including Governmental research organizations in the same universe as the other three types of organizations unless the technical problems in determining prevailing wages for the Government research organizations prove to be insurmountable. The Department intends to use data currently being collected by the Office of Personnel Management relating to Federal Government employment to determine prevailing wages for Federal Government research organizations if certain technical issues can be satisfactorily resolved. One possible alternative approach would be to use Government-wide prevailing wage data by occupation as a proxy for prevailing wages in Government research organizations.

As an interim measure, since the prevailing wage provisions were effective on enactment of the ACWIA, the Department has issued a directive that provides that prevailing wages for institutions of higher education, affiliated or nonprofit entities, nonprofit research organizations and Government organizations should be based on the wages now being collected by the Occupational Employment Statistics Program for colleges and universities. General Administrative Letter No. 2–99, (GAL 2–99) dated April 23, 1999, ''Subject: Availability and Use of Occupational Employment Statistics Survey Data for Alien Labor Certification Purposes.'' With regard to ACE's comments on use of independent academic wage surveys, the Department points out that its guidance in GAL 2–98, dated October 31, 1997, ''Subject: Prevailing Wage Policy for Nonagricultural Immigration Programs,'' allows employers to submit their own surveys, which will be used by the SESA to determine prevailing wage if they meet the required standards.

With respect to the suggestion from the law firm that elementary and secondary educational institutions should be made exempt from the filing fee and should be included within the scope of the prevailing wage provisions, the Department notes that the fee provision has been modified by the October 2000 Amendments to exempt such organizations, but no such modification was made to the prevailing wage provisions.

The Smithsonian Institution in its comments points out that one issue not addressed in the NPRM is how the categories of employers are to make their status known when they ask the local SESA for a prevailing wage determination. These provisions have been in effect since enactment of the ACWIA and the Department has not found that any additional paperwork requirements are necessary. The Department anticipates that employers which are entitled to this provision will make themselves known. If additional guidance is necessary, the Department will provide it.

The regulatory text consistent with the above discussion is incorporated in the rules for the Permanent program, 20 CFR part 656, § 656.40(c). Conforming changes are made to cross-reference this provision in § 656.40(a) and in the H–1B regulations at § 655.731(a)(2) and (3). In addition, the related provisions concerning prevailing wages for academic institutions and certain Federal research agencies at § 656.3 (definition of ''Federal research agency'') and Subpart E, § 656.50, are deleted.

Finally, Section 415(b) of the ACWIA provides that these special prevailing wage provisions apply to computations made for applications filed on or after the date of enactment of the ACWIA, and to applications filed earlier ''to the extent that the computation is subject to an administrative or judicial determination that is not final as of such date.'' Thus, as discussed above, the amendments made to §§ 655.731(a)(2) and 656.40 are effective immediately, and apply to all cases in which the determination of the prevailing wage was not yet finally determined administratively pursuant to the regulations at Parts 655 and 656. Moreover, they are applicable to any cases pending in Federal court which were not finally decided where the prevailing wage determination was under review, as of the date of enactment.

O. What H–1B Regulatory Matters, in Addition to the ACWIA Provisions, Are Addressed in This Interim Final Rule?

In the NPRM, the Department re-published for further notice and comment some of the provisions of the Final Rule promulgated in December 1994 which had been proposed for comment on October 31, 1995, during the pendency of the *NAM* litigation. That litigation resulted in an injunction against the Department's enforcement of some of these provisions on Administrative Procedure Act procedural grounds (*National Association of Manufacturers* v. *Reich,* No. 95–0715, D.D.C. July 22, 1996).

As explained in the NPRM, some of the provisions of the Final Rule were modified in the NPRM in light of ACWIA requirements and others in light of comments received in response to the October, 1995 proposal.

This Interim Final Rule is based on the Department's consideration of all comments received, both on the 1995 proposal and the recent NPRM.

1. What Are the Standards or Restrictions for Placement of H–1B Workers at Locations Other Than Those Identified on the Original LCA? (§ 655.735)

In the NPRM, the Department dealt separately with three related matters concerning the work locations of H–1B workers and the movement of such workers to new locations. These matters, which are of significant concern to users of the H–1B program, were: the regulation concerning short-term placement of H–1B workers at worksites not covered by any LCA (NPRM Section O.1); the interpretation of the term ''place of employment''/''worksite,'' which affects many of the employer's LCA obligations (NPRM Section P.1); and the interface among the regulatory provisions affecting the ''roving'' or ''floating'' of H–1B workers away from their home base worksite(s) (NPRM Section P.2). Because the reactions of commenters indicated some confusion about the interplay among these three matters, they are addressed in the following combined discussion.

a. What Are the Opportunities and Guidelines for Short-Term Placement of H–1B Workers at Worksite(s) Outside the Location(s) Listed on the LCA? (NPRM Section O.1)

Regulations to authorize short-term placement of H–1B workers at places of employment outside the areas of intended employment listed on the employer's LCA(s) were first published by the Department in the December 20, 1994 Final Rule. The structure and application of this short-term placement option assumes that the new location to which an H–1B worker is sent is, in fact, a ''place of employment'' or ''worksite'' for that worker. However, as discussed below, not every physical location at which an H–1B worker's duties are

performed will constitute a ''worksite'' for that worker (see subsection b, below). It is important for employers to recognize that if the location is not a ''worksite'' for that H–1B worker, then the short-term placement provision will not be applicable to that worker at that location and, consequently, the placement of the worker there will not be subject to the requirements of this section of the regulation (see IV.O.1.b and c, below). The following discussion of the short-term placement option is, therefore, based on the assumption that the H–1B worker(s) will be temporarily placed at worksites which are not covered by an LCA.

Prior to promulgation of the short-term placement option, an employer was not permitted to employ a worker at a worksite in any area unless the employer had a certified LCA covering that area of employment. Section 655.735(b)(4) of the 1994 Final Rule provided the short-term placement option, whereby ''the employer's placement(s) of H–1B nonimmigrant(s) at any worksite(s) in an area of employment not listed on the employer's labor condition application(s) shall be limited to a cumulative total of ninety (90) workdays within a three-year period, beginning on the first day on which the employer placed an H–1B nonimmigrant at any worksite within such area of employment.'' This provision was intended by the Department to allow employers greater flexibility in deploying their H–1B workers in response to business needs and opportunities in new areas. The Department recognized that an employer could, in any such situation, choose to file a new LCA covering the new worksite at which it intended to place H–1B workers. However, the Department sought to provide a mechanism by which an employer—desiring to move its H–1B worker(s) quickly, or contemplating a temporary operation in a new location—could be accommodated under the program without the delay or obligations involved in filing a new LCA. With that goal in mind, the regulation authorized an employer to use H–1B worker(s) at worksite(s) in an area of employment not covered by an existing LCA for a total of 90 workdays within a three-year period, without having to file a new LCA for that new area. Essentially, the Department created a limited exception to the rule that there must be an LCA covering every worksite at which an H–1B worker is employed. By creating this exception, the Department enabled employers wishing to use H–1B worker(s) to respond immediately to an opportunity or a problem in a non-LCA location without waiting to prepare and file an LCA for that location. If the situation requiring quick response by H–1B worker(s) was resolved within the regulation's ''short-term'' window, then a new LCA would never be required. If, on the other hand, the H–1B worker(s) would be needed at worksite(s) in the new area for a longer period of time, the employer would have ample time to prepare and file a new LCA while already using the H–1B worker(s) there. The ''short-term'' placement regulation set forth in the 1994 Final Rule specified that the ''short-term'' 90-day period would be calculated by totaling all days of work by all the employer's H–1B workers in the area of employment (covering all worksites within that area), beginning with the first workday of any H–1B worker at any worksite in that area. The 90-day period was applied separately to each new area of employment (*i.e.,* a separate 90-day period was available for each new city or commuting area).

This provision was enjoined because of lack of appropriate notice and comment, in the NAM decision. In the meantime, the provision was published for comment in the October 31, 1995, Proposed Rule. The Department received eight comments in response to the 1995 proposed rule. All eight commenters considered the proposed ''short-term'' placement option to be unworkable. Several commenters (ACIP, Intel, Microsoft, Motorola, NAM) described this option as particularly burdensome to employers with many employees in positions where movement is required as a normal incident of job duties.

ACIP, Intel, and Microsoft commented that large employers, with many employees dispersed over a number of worksites, did not have the practical ability to keep track of cumulative work days for H–1B workers for every location to which the employees travel for business. Microsoft added that the ''short-term'' placement option effectively prevented H–1B employees from participating in joint development projects with development partners. Microsoft recommended that the rule be revised to increase the number of short-term placement days from 90 to 180 and that the regulation impose the time test on a per employee basis, rather than on a location basis; apply it to a specific worksite and not any worksite within the area of employment; and require a new LCA only when the principal place of employment is changed. Intel and ACIP recommended that the Department revise its approach to the roving employee to one which differentiates between companies that are dependent on foreign workers (employee base is comprised of more than 15 percent H–1B workers) and those that are not dependent. Such a system, Intel opined, would enable the Department to better focus its enforcement activities, while not penalizing non-dependent employers with excessive paperwork. ACIP further suggested that additional paperwork requirements should apply only when travel to another location involves ''performance of services'' and the H–1B worker does not remain under the ''sole control'' of the H–1B employer. ACIP also suggested that additional H–1B workers should be able to travel to any location for which an LCA is already on file for that employer and occupation, without any additional paperwork. AILA and NAM objected to the cumulative nature of the proposed rule and its application to an entire area, rather than to a given work site. ACIP, along with Coopers & Lybrand and CBSI, recommended that the 90-day limit should apply to one employee at one specific worksite, rather than for all of the employer's H–1B workers.

Based on the comments received in response to that 1995 publication, the 1999 NPRM proposed and requested comments on a modified version of the provision—allowing the employer to utilize the ''short-term'' placement option in an area of employment without an LCA until any individual H–1B worker works for 90 days at any worksite or combination of worksites in the area of employment. Under the proposal, the 90 workdays would be counted on a per-worker basis. The proposal specified that as soon as one H–1B worker has worked more than 90 workdays within that area of employment, no more work can be performed by any H–1B worker at any worksite in that area unless, and until, the employer files and ETA certifies an LCA for the area. In other words, the entire workforce and all worksites in the area of employment would be subject to a new LCA once any one H–1B worker has worked 90 days in a three-year period in the area.

Twenty commenters addressed the NPRM revisions to the short-term placement rule, including those who commented in both 1995 and 1999.

The AFL-CIO objected to the existence of a short-term placement option. It expressed the view that the Department had given H–1B employers an unnecessary and harmful ''benefit of the doubt'' in the proposed regulation, and that employers may use short-term placement to avoid prevailing wage and notice requirements.

Several commenters considered the rule to be complex and burdensome for employers. Seven commenters (ACIP, AILA, Cowan & Miller, Rubin & Dornbaum, White Consolidated Industries, Network Appliance, FHCRC) stated that the Department's proposal unrealistically requires the human resources staff at a large company to keep track of personnel movement from multiple divisions or offices to various customer sites around the country. Three commenters (Senators Abraham and Graham, Congressional commenters, and Oracle) stated that the Department has no authority, explicit or implicit, to impose what they believe is a complex monitoring requirement under the rule.

AILA stated that the Department's proposed modification to the rule was unresponsive to employers' fundamental concerns. AILA recommended that the regulation should have no bright-line test for the amount of time constituting temporary placement versus permanent re-assignment to the new non-LCA worksite. AILA suggested that the distinction between temporary and permanent placement should be based ''on all of the facts and circumstances of the situation,'' including such facts as whether the H–1B worker's ''place of abode'' has changed, whether the worker's business card shows the new work address, and whether the worker has a phone line and work station at the new worksite. AILA also suggested that, if a time test were to be used in the regulation, it should operate as a presumption rather than a bright-line rule (*i.e.,* once the time limit had been reached, a presumption would arise that the worker's place of employment had changed, but the employer could rebut the presumption by showing that the placement was temporary in light of the facts and circumstances). Further, AILA suggested that the determination of temporary versus permanent placement should be examined in an enforcement context, rather than be subject to a bright-line rule.

Eight commenters expressed concerns regarding the proposed regulation's time test of 90 cumulative workdays for any H–1B worker over a three-year period. Four commenters (ACIP, AILA, Oracle and SBSC) stated that limiting an individual worker to an average of 30 workdays per year (90 days over a three-year period) in any one geographic area would severely limit a company's ability to do business in the area. Two commenters (ACIP, AILA) stated that 90 workdays over three years is unreasonable; they suggested that the regulation allow 90 days per year rather than 90 days over three years (*i.e.,* three times the cumulative workdays stated in the NPRM time test). Three commenters (ACIP, ITAA, and Hammond) suggested that the time test be applied to each H–1B worker for each worksite (*i.e.,* the 90-day count would restart if the worker moved to a different worksite within the same area of employment, and one worker's accumulation of 90 workdays would have no effect on the rest of the employer's H–1B workforce in that area). In this regard, two commenters (Hammond, ACIP) commended the Department's modification of the regulation to provide for a workday count on a worker-by-worker basis (rather than a cumulative count of all workdays of all of an employer's H–1B workers in the area of employment), but ACIP nevertheless asserted that the modified regulation was unworkable since large employers do not track workers in such a manner. Two commenters (University of California, ACE) stated that the limitation of 90 cumulative workdays in a three-year period may have an adverse effect on academic researchers, whose research activities would not likely exceed 90 consecutive days but may require more than 90 cumulative workdays in a three-year period. These commenters suggested an exception to the time test, for researchers working for higher education institutions, government labs and research affiliated units for activities directly related to their research where the research requires travel and work at sites that have one of a kind equipment.

The Department has carefully considered the views of the AFL–CIO, which objected to the existence of the short-term placement option because of the potential for employer avoidance of H–1B program obligations applicable to the workers' new worksites. The Department shares this concern that employers' obligations be met and that U.S. workers be protected through the prevailing wage and notice requirements. However, the Department believes that it is appropriate and important to provide H–1B employers with a regulatory mechanism to accommodate legitimate business needs while, at the same time, preserving the program's protections. Without the regulation's short-term placement option, an employer would, quite literally, be unable to place any H–1B worker at any worksite that is not already covered by an LCA; the employer would have to prepare and file an LCA and await ETA certification prior to dispatching any H–1B worker(s) to such a worksite. Considering the fast pace of business—especially in industries such as information technology—the delay involved in the LCA process could handicap an employer which needed to use its H–1B workers to respond to a business need or opportunity at a non-LCA worksite. The Department considers the short-term placement option to be a reasonable means by which the employer may meet its obligations both in its business and in the H–1B program. This option allows the employer to move its H–1B worker(s) quickly, but also requires that the employer continue to comply with H–1B standards (*e.g.,* paying ''home base'' wages plus travel expenses to H–1B worker(s) in short-term placement). By setting a limitation on short-term placements, the regulatory provision also assures that the employer which needs to use its H–1B worker(s) at the new worksite beyond such a time-frame will have to fully comply with all statutory obligations for that location (*e.g.,* provide notice, obtain local prevailing wage rate and make any pay adjustments needed to meet that rate).

The Department recognizes that some employers and interest groups view the short-term placement option as impractical and burdensome. These commenters view the regulation as requiring employers to keep detailed records of placement of H–1B worker(s) to non-LCA worksite(s) in order to ensure that the workday limit is not exceeded by any worker. The Department considers it important to emphasize that the short-term placement regulation creates an option for the employer, and that no employer is required to use this provision. Further, the regulation does not impose any recordkeeping requirements on an employer that chooses to make short-term placements; the employer may utilize any appropriate means to ensure that the workday limit is not exceeded. Obviously, an employer may avoid all the perceived ''burdens'' of the short-term placement regulation simply by withholding its H–1B worker(s) from all non-LCA worksites until after the LCA filing process is completed and the worker(s) can be sent to the new worksites pursuant to new LCAs. Or, an employer may promptly file a new LCA when the first H–1B worker is sent to a non-LCA worksite, so that the LCA is certified well before the workday limit is reached.

The Department also reminds employers that—regardless of whether they are taking advantage of the short-term placement option—they are obliged to be vigilant in maintaining their compliance with the H–1B

program's requirements, many of which are worksite-specific. The Department presumes that employers are taking appropriate steps to assure such compliance, which would logically include the employer's being aware of the locations of its H–1B worker(s). An employer which is unable to determine the whereabouts of its H–1B worker(s) would be handicapped in assuring that the worker(s) are employed in full compliance with an approved LCA (*e.g.,* worksite notice, strike/lockout prohibition, local prevailing wage rate) or in accordance with the short-term placement option (*e.g.,* workday limitation, travel costs).

The Department has carefully considered but is unable to accommodate the suggestion that the short-term placement option have no ''time test'' but, instead, allow a *post hoc* determination of temporary versus permanent placement based on ''all the facts and circumstances.'' Such an approach would, in the Department's view, be too vague to be effective from either the employer's or the worker's perspective. A bright-line test, based on workdays, affords certainty to the employer and to workers regarding applicable standards (e.g., clarity as to when a new prevailing wage or notice would be needed).

After fully considering the commenters' views, however, the Department has concluded that the NPRM's time test—90 cumulative workdays for any one H–1B worker at any worksite or combination of worksites in one area of employment over a three-year period—should be modified to provide a more reasonable accommodation for employers' business needs. In the Interim Final Rule, the Department has maintained the worker-by-worker count of workdays (which most commenters endorsed) and has made an annual allocation, rather than a three-year accumulation, of workdays (which several commenters suggested). In addition, the Interim Final Rule incorporates the concept of short-term placement being determined, in part, based on facts such as the H–1B worker's maintenance of his/her workstation at the ''home office,'' as indicated by one of the commenters. Using these concepts, the Interim Final Rule provides that an employer may make a ''short-term'' placement or assignment of an individual H–1B worker at any worksite or combination of worksites in a non-LCA area for a total of 30 workdays in a one-year period (either the calendar year or the employer's fiscal year, whichever the employer chooses). The Rule also provides that the placement may be expanded by as much as an additional 30 workdays (thus, 60 workdays in a one-year period) if the employer is prepared to show that the worker maintains a workstation at the home office, spends a substantial amount of time at the home office, and maintains his/her ''place of abode'' in the area of the home office. Thus, under this regulation, the employer would be able to place an individual H–1B worker at worksite(s) in a non-LCA area for as many as 60 workdays in a one-year period, and have that placement be considered ''short-term'' so as not to trigger the requirements for filing and complying with a new LCA for the area of employment. Once an H–1B worker exceeds the workday limitation in a one-year period, the employer would not be permitted to continue the placement of that worker or any other H–1B worker in the same occupation in that area of employment, until one year from the beginning of the next one-year period (either the beginning of the next calendar year, or the beginning of the employer's next fiscal year) or until an LCA is in place.

The Department believes that any greater presence by an employer's workforce in an area cannot be considered short-term and should require the employer both to provide notice to the local workforce and to pay local prevailing wages. Under the Interim Final Rule, the employer may choose how to use the annual available workdays in placing an H–1B worker ''temporarily'' at worksite(s) in the area of employment (*i.e.,* use them all consecutively, or at different times within one year). While some other measurement might have been preferred by some commenters, the Department believes that, as a matter of common sense and fairness, a worker's placement at a worksite for more than the equivalent of 12 normal workweeks in a calendar year (60 workdays, five-day work weeks) cannot reasonably be characterized as ''short-term,'' whether the workdays are taken in one block or spread over a period of time.

The Department recognizes that some commenters have criticized the regulation as being confusing and difficult to use. Therefore, the Interim Final Rule contains clarifying changes which make the provision more user-friendly. For example, the Rule includes a definition of the ''one-year period'' for short-term placements (*i.e.,* either the calendar year or the employer's fiscal year, whichever the employer chooses) and provides a clear description of the employer's choices of actions when the time limit for short-term placement has been reached (*i.e.,* file an LCA to continue using H–1B workers, or discontinue use of H–1B workers until the next one-year period begins). These clarifications—made in response to commenters's concerns—do not affect the substantive requirements of the regulation.

The Department has concluded that the same standards should apply to all H–1B employers. A profusion of time tests and rules for different industries or types of employers would increase the complexity of the regulation without appreciable benefit in achieving the purposes of the program. The employer's option of timely filing an LCA for the location should alleviate any ''burdens'' which might otherwise argue for special rules or exceptions for certain industries.

One commenter (ACIP) suggested that the regulation should authorize employers to use a ''national LCA'' which would permit free movement of H–1B workers to any and all worksites around the country without the need to monitor the number of workdays at any particular worksites. According to ACIP, some employers pay a wage which is greater than the prevailing wage in any part of the country, as measured by the OES survey, the source of prevailing wage determinations issued by the Employment Service, or other published, nationwide data sources, so that their placements of H–1B workers at any worksites (whether temporarily or permanently) would have no adverse impact on local wages. Since this concept of a ''national LCA'' was not set forth for notice and comment in the NPRM, the Department cannot consider the matter for purposes of the Interim Final Rule. However, the Department is of the view that the concept warrants consideration. The Department, therefore, proposes it here for comment and possible inclusion in the Final Rule. In particular, the Department seeks comments as to whether such an LCA would be feasible under the statutory scheme, and also seeks information and suggestions as to how such an LCA would address each of the statutorily-prescribed attestation elements (*e.g.*, collective bargaining notice or worksite notice; local prevailing wage rates; strike/lockout).

The Department wishes to emphasize that it considers the various components of the short-term placement rule to be non-severable. After the injunction was issued by the court in *NAM*, some confusion arose concerning the effect of the injunction—*i.e.*, whether short-term placements were permitted without any time restriction, or whether employers would be required to place H–1B workers only at worksites in areas of

employment with certified LCAs. The Department has approached this matter on a case-by-case basis, taking into account the confusion created by the *NAM* decision. However, with the issuance of this Interim Final Rule, the Department considers all such confusion to have been dispelled. Therefore, the Department cautions employers that—except in accordance with the strict requirements of the short-term placement option—the H–1B provisions of the INA and the Department's regulations require that an LCA be filed for any and all worksites where H–1B workers are employed. Violations of any of the provisions of the short-term placement option will result in its inapplicability in its entirety.

i. When Is the Short-Term Placement Option Available? (§ 655.735)

As explained in the NPRM, the short-term placement option would be available only when an employer wants to send its H–1B worker(s) who are already in the United States under an H–1B petition supported by an LCA filed by the employer to a new worksite which is in an area of employment for which the employer does not have an LCA in effect for the occupation. After the 90-workday limit is reached by any one H–1B worker, the short-term placement option would no longer be available for any H–1B worker(s) for any worksite in that area of employment; the employer would be required to have an LCA in effect for the new area and to be in full compliance with all the LCA requirements. The NPRM explained that the short-term placement option would not be available where the H–1B worker has just arrived in the United States (or has adjusted status), in which case the worker must be placed at a place of employment listed on the LCA supporting the H–1B petition for the worker. In addition, the short-term placement option would not be available where the employer is moving its H–1B worker(s) among worksites in one or more areas covered by valid LCAs; the worker(s) would be subject to the requirements of those LCAs (*e.g.*, notice, prevailing wage, non-displacement for dependent employers) that cover those worksites. For example, as the NPRM explained, the short-term placement option cannot be used where the employer has an LCA in effect for an area of employment in order to avoid ''overcrowding'' the LCA with H–1B workers. As a matter of enforcement discretion in determining whether a violation exists in an ''overcrowded'' LCA situation, the Department will look at all the facts and circumstances in order to determine whether the employer is acting in good faith to assure compliance with the program, including taking steps to file new LCA(s) and rectify the overfilling of the numerical limitation specified by the employer itself on the initial LCA(s).

The Department received three comments addressing the specifics of the availability of the short-term placement option. ACIP commended the Department for demonstrating flexibility and for clarifying that an employer may file LCAs with multiple, open slots and use those slots for roving employees. However, ACIP sought clarification that short-term placements under the 90-workday rule do not ''fill'' an open LCA slot. ACIP also sought clarification of the NPRM discussion of the temporary placement of H–1B workers ''overfilling'' a valid LCA, particularly concerning the Department's use of enforcement discretion in such situations. ACIP suggested that, due to the lengthy processing time of LCAs, the Department should permit the employer to ''overfill'' an LCA. The second commenter, ITAA, stated that, in its view, the Department's past practice was to ignore ''LCA overcrowding'' if the employer met the notice and wage requirements for each worker at the site. ITAA observed that, under the proposed regulation, the Department stated an intention to use its enforcement authority and cite violations for ''LCA overcrowding'' if the number of H–1Bs ''significantly exceeds'' the number of openings listed on the LCA. ITAA anticipated that DOL would assess penalties for ''misrepresenting a material fact'' or a ''substantial failure'' to accurately list the information on the LCA. Therefore, ITAA requested a definition of ''significant'' overcrowding of the LCA. The third commenter, Latour, suggested that the Department be flexible regarding ''overfilled'' LCAs and consider employers' explanations in those situations where the ''overfill'' is significant.

As for the concerns of the commenters regarding the potential use of the short-term placement option to deal with situations of ''overcrowded'' or ''overfilled'' LCAs, the Department points out that the statute expressly requires that the employer's LCA ''specif[y] the number of workers sought,'' and further provides that a substantial failure to comply with this requirement can result in the assessment of a $1,000 civil money penalty and one-year debarment (8 U.S.C. 212(n)(1)(D) and 212(n)(2)(C)(i)). The number of H–1B workers taking jobs in a local labor market is a matter which Congress obviously considers to be significant, and the Department cannot set aside the statutory requirement that the employer accurately attest to this specific information. The Department is not aware of serious problems concerning overcrowded LCAs since the H–1B program's inception. Thus, the Department has used, and will continue to use, a rule of reason in assessing such situations; violations will not be cited as long as the employer is showing good faith and is taking steps to come into compliance. The determination would necessarily be made on a case-by-case basis, and it is not feasible to issue bright-line rules such as some particular degree of overcrowding which would be tolerable.

With respect to the query as to whether the use of the short-term placement option would affect the ''overcrowding'' determination, the Department emphasizes that where an LCA is in effect, the short-term placement option is simply not applicable. The LCA's terms—including its specification of the number of H–1B workers to be employed in the area—are binding on the employer, except with respect to an H–1B worker who moves into and out of the area without establishing a ''worksite'' there (see IV.O.1.b, below).

ii. What Are the Standards for Payment of the H–1B Worker's Travel Expenses Under the Short-Term Placement Option? (§ 655.735(b)(3), Previously Set Forth in Appendix B, Section a)

A component of the proposed short-term placement option is the requirement that employers who wish to avail themselves of this option pay travel-related expenses at a level at least equal to the rate prescribed for Federal Government employees on travel or temporary assignment, as set out in the General Services Administration (GSA) regulations. The NPRM explained that the GSA standards were used as a benchmark because the Department believes that some basic, universally available measures are needed, and because the GSA standards (based on surveys of travel costs) are appropriate for this purpose. The NPRM proposed to modify the provisions in the current Final Rule (enjoined by *NAM*), so as to better explain the uses of the GSA standards (*e.g.*, no payment to the worker for lodging would be required where the worker actually incurs no lodging costs).

The nine commenters on this proposal (ACIP, AILA, Cowan & Miller, Hammond & Associates, Intel, ITAA, Latour, Rubin & Dornbaum, White Consolidated Industries) were

unanimous in their opposition to a regulation that would require employers to have separate travel reimbursement standards for H–1B workers than for other employees. These commenters suggested that the standard for H–1B workers, like all other workers, should be reimbursement for actual expenses incurred while on travel.

The Department has fully considered these comments, as well as its own post-*NAM* enforcement experience. During the post-*NAM* period, when the regulation has been enjoined, the Department has been enforcing actual expense reimbursement for all H–1B business travelers. In these enforcement proceedings, the Department has not encountered problems pertaining to abusive practices or difficulties in proof of actual expenses, since it has found that employers in fact keep a record of expenses as a prudent business practice. Therefore, the Department is adopting the commenters' recommendation. The regulation is modified in this Interim Final Rule to specify that employers who use the short-term placement option must reimburse H–1B workers for the actual expenses incurred during their short-term placement. In those rare instances where the employer, in an enforcement action by DOL, is unable to demonstrate the actual expenses incurred, the Department will use the GSA standards to determine whether the reimbursement was sufficient and to assess back wages if appropriate.

b. What Constitutes an H–1B Worker's ''Worksite'' or ''Place of Employment'' for Purposes of the Employer's Obligations Under the Program? (NPRM Section P.1) (§ 655.715)

The H–1B program's requirements largely focus on the H–1B worker's ''place of employment'' or ''worksite.'' That location controls the prevailing wage determination, identifies where the employer must provide notice to workers, and specifies the scope of the strike/lockout prohibition. A location which is not a worksite, on the other hand, would not trigger those requirements, even if the H–1B worker were at that location in the course of the performance of job duties. The NPRM echoed the previous rules issued under this program at § 655.715, which define ''place of employment'' as ''the worksite or physical location where the work is actually performed.'' However, the NPRM provided further interpretation of this term (as part of proposed Appendix B to Subpart H of the regulations), in an effort to better inform the users of the program and to alleviate some apparent confusion on this matter.

The proposed guidance was in response to some employers' concern that a strict or literal application of the ''place of employment''/''worksite'' definition could lead to absurd and/or burdensome compliance requirements with regard to the employer's obligation of providing required notice and adjusting the H–1B worker's wages to comply with different prevailing wages for work at various locations. Employers raised questions regarding whether the ''worksite'' definition would be applicable (thus either causing the worker's time at that location to be counted towards the 90-workday ceiling, or triggering compliance obligations under an LCA covering that location) where an H–1B worker has a business lunch at a local restaurant, or appears as a witness in a court, or attends a training seminar at an out-of-town hotel.

The NPRM, in Appendix B, proposed that the term ''place of employment'' or ''worksite'' does not include any location where either of two criteria is satisfied:

1. An H–1B worker who is stationed and regularly works at one location is temporarily at another location for a particular individual or employer-required developmental activity such as a management conference, a staff seminar, or a formal training course (other than ''on-the-job-training'' at a location where the employee is stationed and regularly works). For the H–1B worker participating in such activities, the location of the function would not be considered a ''place of employment'' or ''worksite,'' and such location—whether owned or controlled by the employer or by a third party—would not invoke H–1B program requirements with regard to that worker at that location. However, if the employer uses H–1B nonimmigrants as instructors or resource or support staff who continuously or regularly perform their duties at such locations, the locations would be ''places of employment'' or ''worksites'' for any such workers and, thus, would be subject to H–1B program requirements with regard to these workers.

2. The H–1B worker's presence at that location satisfies three requirements regarding the nature and duration of the worker's job functions there—

a. The nature and duration of the H–1B worker's presence at the location is due to the fact that either the H–1B worker's job is by nature peripatetic, in that the normal duties of the worker's occupation (rather than the nature or the employer's business) require frequent travel (local or non-local) from location to location, or the H–1B worker spends most of the time working at one location but occasionally travels for short periods to other locations; and

b. The H–1B worker's presence at the locations to which the worker travels from the ''home'' worksite is on a casual, short-term basis, which can be recurring but not excessive (*i.e.*, not exceeding five consecutive workdays for any one visit); and

c. The H–1B worker is not at the location to perform work in an occupation in which workers are on strike or lockout.

The NPRM provided examples to illustrate these criteria, and explained that for an H–1B worker who performs work at a location which is a non-worksite (under either criterion 1 or criterion 2), the ''place of employment'' or ''worksite'' for purposes of notice, prevailing wage and working conditions is the worker's home base or regular work location. Further, the NPRM stated that, in applying this interpretation of ''place of employment'' or ''worksite,'' the Department will look carefully at any situations which appear to be contrived or abusive, such as where the H–1B worker's purported ''place of employment'' is a location other than where the worker spends most of his/her time, or where the purported ''area of employment'' does not include the location(s) where the worker spends most of his/her time.

The Department received nine comments on the NPRM ''worksite''/''place of employment'' proposal.

Several commenters addressed the general matter of whether the proposed Appendix B guidance was appropriate. Senators Abraham and Graham and Oracle remarked that ''place of employment'' is a term with a plain meaning (in their view, the location where the individual is employed); they stated that, in modern commerce, workers employed in one location frequently must travel to other locations to perform their duties and that, when they do so, they are not employed there but are merely visiting. Rapidigm, a staffing firm, requested a clearer definition of ''worksite,'' and asked whether the amount of time spent at a location is the only factor, regardless of the nature of the work or who has control or supervision of the worker. AILA urged that the proposed Appendix B be dropped because, in its view, it creates an absurd result and is ''micromanagement'' by the Department.

A number of commenters (ACIP, Intel, ITAA, Latour, Godward) expressed their approval of the Department's recognition that not all activities engaged in by a worker occur at a ''worksite.'' However, some commenters

were dissatisfied with the NPRM's proposal of five consecutive workdays as the test for a ''casual, short-term'' stay for purposes of a non-worksite visit by an H–1B worker. ACIP, Intel and ITAA stated that this standard is overly restrictive and unrealistic. ACIP suggested that the Department should not be concerned with the length of stay, as long as the worker is engaged in non-worksite activities; ACIP recommended that, if a duration-of-stay standard was adopted, it should be 10 workdays at least. ITAA expressed a similar view that ''casual, short-term basis'' should be defined to include visits of up to10 consecutive work days to accommodate training courses, business seminars, and other events which may last between five and 10 days. Intel recommended that the focus should be on the purpose of the trip, rather than on the length of stay.

The Department seeks to achieve the purposes of the Act which focuses its protections for workers on the ''place of employment,'' while accommodating the legitimate needs of employers using the H–1B program. The regulation, since the inception of the program, has recognized that the identification of the ''place of employment'' cannot be merely a matter of the employer's designation, since that approach would not serve the purposes of protecting workers' prevailing wages and other rights. Instead, the regulation identifies the ''place of employment'' by looking to the activities of the H–1B worker, defining ''place of employment'' as ''the worksite or physical location where the work is actually performed'' (20 CFR 655.715). However, the Department has determined that the regulation must afford reasonable flexibility so as to take into account the common practices of employers whose workers may have more than one ''place of employment'' over a period of time or, who may perform duties at various locations which should not, for practical reasons, be characterized as ''places of employment.'' In this regard, the Department shares the view of those commenters who observed that workers may legitimately ''visit'' locations to perform job duties without in all circumstances making those locations into ''places of employment'' for purposes of the H–1B program.

After consideration of all the comments, the Department has concluded that the five cumulative workdays standard is a reasonable and appropriate measure of a casual, short-term ''visit'' where a worker's job is by its nature peripatetic. A full, ordinary workweek of five days is, in the Department's view, a practical and reasonable measurement of a business ''visit'' by a worker performing job duties. Further, the worker may make recurring, short ''visits'' to the location, in order to perform job duties. On the other hand, the Department believes that more flexibility is appropriate for a worker who spends most of his or her time at one location but occasionally travels for short periods to other locations. Under these circumstances, the Department believes that a duration of up to 10 workdays is appropriate. The Interim Final Rule is modified accordingly.

With regard to the concern of some commenters that a five-workdays time frame would be unrealistic for developmental activities such as training and business seminars, the Department points out that there is, in fact, no time frame for developmental activities. Such activities are specifically addressed under criterion 1 rather than under criterion 2, which contains the business ''visit'' concept.

Finally, based on considerations of clarity and ease of use of the regulations, the Department has determined that the criteria for distinguishing between a worksite and a non-worksite should be included in the regulatory text which defines the statutory term ''place of employment.'' Thus, in this Interim Final Rule, this material appears in the regulation at § 655.715, rather than in Appendix B as proposed.

c. Under What Circumstances May an H–1B Worker ''Rove'' or ''Float'' From His/Her ''Home Base'' Worksite? (NPRM Section P.2 and Proposed Appendix B, section b)

The statute and regulations do not permit the employment of H–1B workers as ''roving'' or ''floating'' employees for whom no particular LCA, and thus no specific set of LCA requirements, would be applicable. However, as explained in the NPRM, the Department recognizes that some employers need to move their H–1B workers from place to place in order to meet the needs of clients or to respond to business problems and opportunities. This practice of moving H–1B workers is sometimes described as having the workers ''rove'' or ''float'' from a ''home base'' worksite. To assist employers in understanding how this practice can be accommodated under the program, Appendix B of the NPRM proposed guidance concerning the three circumstances in which an H–1B worker could legitimately ''rove'' or ''float'' from his/her home base worksite to perform job duties at some other location. This guidance, like the other provisions of proposed Appendix B, was initially developed as interpretive guidance that the Department had planned to issue independently of the regulations.

The Department received two comments on its proposed guidance.

AILA urged that the Appendix B guidance be dropped, because it considered both the ''rove''/''float'' discussion and the interpretation of ''worksite'' to be attempts by the Department ''to micromanage employers' commerce'' through ''peculiar workplace rules.''

ITAA requested clarification concerning the interface between the Department and INS policies concerning when an LCA for a ''new'' area of employment may be substituted for the ''original'' LCA, and whether such a substitution would require the filing of a new petition. The Department recognizes that employers need clarity regarding this matter, and will consult with the INS with the intention of providing official, coordinated guidance.

The Department has concluded, upon further review, that incorporation of the interpretive guidance in proposed Appendix B, section b, into the regulation is not necessary or appropriate at this time. The Department plans to issue separate interpretive guidance explaining the inter-relationship between the various provisions regarding employment of H–1B nonimmigrant workers outside of their home work station.

2. What Are an Employer's Wage Obligations for an H–1B Worker's ''Nonproductive Time''? (See IV.H, Above)

3. What Are the Guidelines for Determining and Documenting the Employer's ''Actual Wage''? (Appendix A to Subpart H)

Section 212(n)(1)(A)(i)(I) of the INA as amended by the Immigration Act of 1990 (IMMACT 90) and the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA) requires that an employer seeking to employ H–1B nonimmigrants agree that it will pay the nonimmigrants at least the higher of the prevailing wage or the ''actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question.''

In explaining the amendments to the H–1B program made by MTINA, Senator Reid explained Congress intended ''specific employment to mean the specific position held by the H–1B

worker at the place of employment.'' Furthermore, by ''similar experience and qualifications,'' Congress intended consideration of ''experience, qualifications, education, job responsibility and function, specialized knowledge, and other such legitimate factors'' 137 Cong. Rec. S18243 (Nov. 26, 1991).

The Department's regulations explaining the ''actual wage'' requirement, as amended in 1992 and 1994, provide at § 655.731(a)(1) that in determining the actual wage, employers may take into consideration experience, qualifications, education, job responsibility and function, specialized knowledge, and other legitimate business factors. Legitimate business factors are ''those that it is reasonable to conclude are necessary because they conform to recognized principles or can be demonstrated by accepted rules and standards.'' The actual wage is the amount paid to other employees with substantially similar experience and qualifications with substantially the same duties and responsibilities, or if there are no such employees, the wage paid the H–1B nonimmigrant. In addition, the regulation requires that adjustments such as cost of living increases or other periodic adjustments, higher entry rate due to market conditions, or the employee moving into a more advanced level of the occupation, be provided to H–1B nonimmigrants where the employer's pay system or scale provides for such adjustments during the LCA.

The regulations further provide at § 655.731(b)(2) that the employer shall retain documentation specifying the basis it used to establish the actual wage, *i.e.,* showing how the wage for the H–1B worker relates to the wages paid other individuals with similar experience and qualifications for the specific employment at the place of employment. The documentation is also required to show that after any adjustments in the employer's pay system or scale, the wage paid is at least the greater of the adjusted actual wage or the prevailing wage. In addition, the regulations provide at § 655.760(a)(3) that the public access file shall contain ''[a] full, clear explanation of the system that the employer used to set the 'actual wage' * * *, including any periodic increases which the system may provide. * * *'' This explanation may be in the form of a memorandum summarizing the system, or a copy of the pay system or scale. Payroll records do not need to be in the public access file, but are required to be made available to the Department in an enforcement action.

The Department initially offered guidance on factors to be considered in making this determination, with examples, in the preamble to the Interim Final Rule of January 13, 1992 (57 FR 1319). This guidance, in modified form, was published as Appendix A to Subpart H in the Final Rule of December 20, 1994 (59 FR 65671). In addition to the examples set forth in the preamble to the 1992 Interim Final Rule, Appendix A provided that the employer may take into consideration ''objective standards,'' and must ''have and document an objective system used to determine the wages of non-H–1B workers.'' The Appendix further provided that the explanation of the wage system in the public access file ''must be sufficiently detailed to enable a third party to apply the system to arrive at the actual wage rate computed by the employer for any H–1B nonimmigrant.'' The portions of Appendix A relating to an objective wage system were enjoined by the court in NAM, for lack of prior notice and comment. In the meantime, the ''Appendix A'' guidance was republished for public comment in the Proposed Rule dated October 31, 1995 (60 FR 55339).

The Department republished Appendix A for further notice and comment in the 1999 NPRM, as modified to include job performance among the legitimate business factors which may be taken into consideration. The underlying regulatory provisions at §§ 655.731(a)(1), 655.731(b)(2), and 655.760(a)(3) were not open for notice and comment. The preamble explained that under Appendix A as proposed, the employer would not be required to create or to document an elaborate ''step'' or ''grid'' type pay system, or any other complex, rigid system. Rather, the employer's actual wage system could take into consideration any objective, business-related factors relating to experience, qualifications, education, specific job responsibilities and functions, job performance, specialized knowledge and other business factors. The use of any or all of the factors would be at the discretion of the employer. All factors used in the employer's actual wage system would need to be applied to H–1B nonimmigrant workers in the same, nondiscriminatory manner as the factors would be applied to U.S. workers in the occupational classification. Further, the preamble explained that the explanation of the actual wage system in the public access file must be sufficiently detailed to enable a third party to understand how the wage system would apply to a particular worker and ''to derive a reasonably accurate understanding of that worker's wage.''

The Department received nine comments on proposed Appendix A in the 1995 Proposed Rule, and 15 (including two 1995 commenters) in response to the 1999 NPRM. Most 1995 and 1999 commenters viewed the Appendix guidance as inconsistent with the INA and demonstrating a lack of understanding of corporate pay systems. The comments focused on an employer's responsibilities in making the actual wage determination, what factors should be considered in making the determination, how the factors should be considered, when the factors should be considered, and the documentation required to enable a third party to apply the wage system to determine the actual wage rate.

Senators Abraham and Graham, the Congressional commenters, AILA (in 1995 and 1999 comments), FHCRC, Hammond, Network Appliance, Oracle, Rubin & Dornbaum, Sun Microsystems, the Massachusetts Institute of Technology (MIT) (1995 comment) and the National Association of Manufacturers (NAM) (1995 comment) contended that the INA does not require, nor did Congress intend, that employers be required to create and document an objective wage system for their U.S. workers to meet the requirement to pay H–1B workers no less than the greater of the actual or prevailing wage. AILA indicated further that the INA requires the actual wage to be paid only to H–1B workers, and does not dictate the wages of U.S. workers. NAM indicated that this requirement ignores the realities of how businesses establish salaries and epitomizes regulatory overreach.

Several commenters (AILA, ACIP, Kirkpatrick & Lockhart, Latour and Sun Microsystems) disagreed with the Appendix A requirement that an employer use only objective factors in determining the actual wage while others offered suggestions on factors to be considered. Kirkpatrick & Lockhart indicated that by limiting this determination to objective factors, the Department was eliminating an employer's discretion in hiring and ignoring the reality that subjective as well as objective factors are evaluated in compensating employees in the corporate world. Frost & Jacobs (1995 comment) suggested that the Department include ''performance level'' as a legitimate business factor in determining actual wage. ITAA agreed with the Department's addition of ''job performance'' as an acceptable business factor in the January 5, 1999 NPRM.

After carefully considering all the comments, the Department has concluded that Appendix A—which was created in response to employers' requests for technical guidance—has not served its intended purpose and has, instead, caused some confusion. The Department has, therefore, decided that Appendix A will not be included in the Interim Final Rule. The controlling standards for determining and documenting an employee's ''actual wage'' are contained in the current regulation, 20 CFR 655.731(a)(1), 655.731(b)(2), and 655.760(a)(3) (none of which were opened for comment in the NPRM). If the need arises in the future, the Department, as appropriate, will provide compliance advice or technical assistance further explaining the current regulation.

The commenters' reactions to the proposed Appendix A are based, in large part, on a lack of understanding of the fact that the Department's regulations (20 CFR 655.731(a)(1), 655.731(b)(2), and 655.760(a)(3))—which the proposed Appendix A was intended to explain and clarify—do not direct employers to develop a special corporate-wide wage system specifically to support the employment of H–1B nonimmigrants. The Department agrees with the commenters that section 212(n)(1)(A)((i)(I) of the INA does not require an employer seeking H–1B nonimmigrants to create an objective wage system for its U.S. and H–1B workers. The Department is imposing no obligation to create such a system.

Section 655.760(a)(3) requires that the factors used be legitimate business factors such as experience, qualifications, education, specific job responsibilities and functions, specialized knowledge, and job performance. The use of any or all of these factors is at the discretion of the employer. Whatever factors are used in the employer's actual wage system must be applied to H–1B nonimmigrant workers in the same, nondiscriminatory manner that they are applied to U.S. workers. Furthermore, the factors applied must relate to the statutory standard, *i.e.,* the workers' experience, qualifications, and job duties. Accordingly, it is the Department's position that an employer may not differentiate between the pay of H–1B and U.S. workers based on market forces, such as the lowest wage a worker is willing to accept. Similarly, it is inappropriate for an employer to consider factors which are not relevant to the job and which are not uniformly applied to H–1B and U.S. workers.

The Appendix A guidelines were drafted under the presumption that all U.S. businesses use wage systems to determine professional salaries that consider various legitimate business factors. The Department drafted Appendix A to limit the actual wage determination to objective legitimate business factors already being used by the employer because such factors could reasonably be used by the Department in its enforcement to compare H–1B nonimmigrant and U.S. workers in the specific employment in question. Although the Department remains concerned about the inherent difficulty in comparing the pay of workers based on subjective factors, it is persuaded that some subjective factors, such as an evaluation of performance levels, may be legitimate business factors used in setting the actual wage. However, pursuant to § 655.760(a)(3), the employer continues to be required to describe the wage system it used to determine the actual wage paid to H–1B nonimmigrants.

AILA and NAM (1995 comments) disagreed with the requirement that an employer establish the actual wage based on the ''occupation'' in which the H–1B nonimmigrant is employed. The commenters stated that the statute requires that H–1B workers be paid at least (the greater of the prevailing or) actual wage of those with similar qualifications and experience employed in the ''specific employment'' in question, a smaller group than dictated by the NPRM. Therefore AILA suggested that employers should be required to analyze which jobs are comparable for actual wage purposes, and pay the H–1B worker at least as much as the employees in those jobs.

The Department agrees that an employer must determine which workers are the subject of comparison with the H–1B worker in order to determine the actual wage required to be paid, at a minimum, to the H–1B worker. The Department also agrees that the appropriate actual wage determination comparison for H–1B nonimmigrants is to ''individuals with similar experience and qualifications for the specific employment in question'' and not ''occupation.'' However, in many circumstances this comparison can only be made if the Department is able to review the employer's compensation system for employees in the occupational category, since the employer's compensation system for other employees in the same occupation bears directly on determinations of the actual wage required to be paid for the specific employment in question.

Intel (1995 comments) and Microsoft (1995 comments) suggested that the Department allow blanket approval—as meeting actual wage requirements—for large employers with established ''total compensation'' wage systems which meet certain requirements such as executive bonuses and profit sharing supplements to base salary. The Department disagrees with this suggestion. The Department is charged with enforcement of the statutory requirement that the employer pay the H–1B worker(s) the higher of the actual or prevailing wage. Such enforcement includes a determination that H–1B workers have, in fact, been paid at least the actual wage paid to other workers with similar experience and qualifications for the specific employment—a determination that can only be made through an examination of the application of the employer's actual wage system. Furthermore, it would be inappropriate for the Department to make exceptions for large employers; the statute indicates no Congressional intent for differing obligations for employers depending upon the size of their workforce or the sophistication or apparent generosity of their compensation systems.

AILA (1995 comments) and NAM (1995 comments) asked how the Department can determine the actual wage in the absence of documentation by using an average (as stated in the preamble to the 1995 NPRM, 60 FR 55341), when the express language of the regulation is that the actual wage is not an average. AILA recommended that if the Department is allowed to use an average to compute the actual wage, employers should be able to use an average as well.

The Department is unable to accommodate the recommendation that employers be authorized to compute the actual wage by averaging the wages paid to employees. As stated in the preamble to the 1995 Proposed Rule, the actual wage is not an average. It reflects application of an employer's actual pay system. Use of the average by the employer would not satisfy the statutory requirement. However, the Department must have some method of determining the actual wage and calculating any back wages due H–1B workers if the employer has not documented and cannot reconstruct its actual wage system. In such circumstances, averaging the wages of non-H–1B workers may be an enforcement method of last resort. The Department would identify U.S. workers in the specific employment in question with experience and qualifications similar to the H–1B nonimmigrant and average their wages to determine the actual wage back wage assessment.

ITAA requested that an employer be permitted to set an actual wage range for a particular position, even if some H–1B workers with similar skills and education make more than others, as long as the workers are paid within the range and meet the prevailing wage requirement.

The Department agrees that an actual wage range can be used to determine compliance with the actual wage requirement, provided the employer's methodology in assigning wages within the range is based on acceptable, legitimate business factors and the methodology is applied in the same manner to H–1B nonimmigrants and U.S. workers. This should result in U.S. workers and H–1B workers with similar skills and qualifications being paid the same, where their duties and responsibilities are the same.

MIT (1995 comments), AILA (1995 comments), NAM (1995 comments), Microsoft (1995 comments), CBSI (1995 comments), Intel, and Rubin & Dornbaum objected to the requirement to update and document changes to the actual wage when the employer's pay system or scale provides for pay adjustments during the validity period of the LCA. They stated that Section 212(n)(1)(A)(i) of the INA directs that the required wage rate determination be ''based on the best information available as of the time of filing the application;'' thus an actual wage update should be required only at the time of filing the LCA. AILA further stated that to require constant reconsideration of the actual wage (like the prevailing wage) would be a massive burden on employers which Congress did not intend to impose.

The Department notes that the INA language referred to in the comments was included in the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Public Law 102–232, 105 Stat. 1733, and refers to the sources of wage information (''the best information available'') that an employer may use when reporting the appropriate wage on its LCA. 137 Cong. Rec. S18243 (Nov. 26, 1991) (Statement of Senator Simpson). As Senator Simpson stated, with the enactment of MTINA, employers were no longer required ''to use any specific methodology to determine that the alien's wage complies with the wage requirements of the Act and may utilize a State agency determination, such as SESA, an authoritative independent source, or other legitimate sources of wage information.''

The Department's interpretation of an employer's actual wage obligation as an ongoing, dynamic obligation has been the Department's position since the inception of the H–1B program, as provided by § 655.731(a)(1) of the existing regulations (which were not open for notice and comment). The regulation explains that the actual wage obligation includes adjustments in the actual wage. In response to comments on the 1993 NPRM expressing concern that infrequent prevailing wage updates would allow an employer to use ''stale'' wage data, the Department stated in the preamble to the December 20, 1994 Final Rule (59 FR 65654): ''[T]he ''actual wage rate'' has been and will continue to be a ''safety net'' for the H–1B nonimmigrant. Assuming the actual wage is higher than the prevailing wage and thus is the required wage rate, if an employer normally gives its employees a raise at year's end, or the employer's system provides for other adjustments, H–1B nonimmigrants must also be given the raise (consistent with employer-established criteria such as level of performance, attendance, etc.).'' Conversely, if no raises, bonuses, or other updates are provided U.S. workers throughout the life of the LCA, the H–1B worker is not entitled to such payments or adjustments. The Department's interpretation furthers the Congressional intent of parity in wages and benefits for U.S. workers and H–1B nonimmigrants.

Several commenters (Microsoft (1995 comment), Motorola (1995 comment), Coopers & Lybrand (1995 comment), ITAA, Intel, ACIP, and AILA expressed strong concern over the requirement that the employer's compensation system be sufficiently detailed and documented in the public access file to enable a third party to apply the system to arrive at the actual wage. The commenters contended that such a requirement is unrealistic and imposes an impossible burden on employers. Microsoft (1995 comment) recommended that the pertinent portion of Appendix A be revised to read: ''The explanation of the compensation system should be sufficiently detailed to illustrate to a third party, in the event of an enforcement action, how the employer applied the system to arrive at the actual wage for an H–1B nonimmigrant.'' MIT (1995 comment) agreed with the requirement of an equitable wage system for all employees, and recommended that the wording of the provision be changed to indicate that only a general explanation of the compensation system be provided. Similarly, Intel recommended that the employer be required to provide a general description of its compensation system sufficient to enable a third party to clearly understand how wages were determined. Intel also stated that it was unclear whether the employer had to do a detailed analysis for each LCA or an overview of the compensation system to support the third party review. ACIP and AILA indicated that it was unrealistic to expect a third party to be able to calculate a particular worker's salary based on the employer's documentation of its actual wage system. ACIP was troubled that an employer could be debarred for having inadequate documentation and urged the Department to eliminate or simplify this requirement. AILA recommended that employers should make the analysis of comparable employee, decide the appropriate documentation of the analysis, and leave the rest to enforcement.

The Department is persuaded that its proposed Appendix A requirement for a public access file with the detail sufficient to enable a third party to determine the actual wage rate for an H–1B nonimmigrant is an impractical requirement for employers. The explanation of the compensation system found in the public access file must be sufficiently detailed for a third party to understand how the employer applied its pay system to arrive at the actual wage for its H–1B nonimmigrant(s). It is the Department's view that although third parties may not have the information needed to arrive at the specific actual wage for the H–1B nonimmigrant(s), the information should be sufficient to allow them to make a judgement on the potential for an actual wage problem. At a minimum, the description of the actual wage system in the public access file should identify the business-related factors that are considered and the manner in which they are implemented (*e.g.,* stating the wage/salary range for the specific employment in the employer's workforce and identifying the pay differentials for factors such as education and job duties). Computation of U.S. and H–1B workers' particular wages need not appear in the public access file; that information must be available for review by the Department in the event of an enforcement action (such as in each worker's personnel file maintained by the employer).

4. What Records Must the Employer Keep Concerning Employees' Hours Worked? (§ 655.731(b)(1))

The Department sought further comment on proposed amendments to § 655.731(b)(1), the basic recordkeeping obligation to support an employer's

wage obligation. This provision was published for comment in the Proposed Rule dated October 31, 1995 (60 FR 55339). An earlier amendment to § 655.731(b)(1) was promulgated in the Department's Final Rule of December 20, 1994 (59 FR 65646), which was enjoined by the court in NAM, for lack of prior notice and comment.

The proposed regulation would require employers to keep specified payroll records for H–1B workers and ''for all other employees for the specific employment in question at the place of employment.'' Hours worked records would be required if (1) the employee is not paid on a salary basis, (2) the actual wage is expressed as an hourly rate, or (3) with respect to H–1B workers only, the prevailing wage is expressed as an hourly rate.

The Department has made a number of accommodations already to concerns expressed regarding the requirements of this rule, particularly in regard to the circumstances in which hours worked records must be maintained. Therefore a detailed rulemaking history is useful.

The regulations currently in effect at 20 CFR 655.731(b)(1) (1993) (i.e., the regulations which are not under injunction), require that payroll records be maintained for H–1B workers and for ''all other individuals with experience and qualifications similar to the H–1B nonimmigrant for the specific employment in question at the place of employment.'' Hours worked records are required if the employee is paid on other than a salary basis, or if the prevailing wage or actual wage is expressed as an hourly wage.

The 1994 Final Rule (set forth in the CFR, but enjoined in NAM), like the current NPRM, required that an employer maintain payroll records for H–1B workers and for ''all other employees for the specific employment in question at the place of the employment.'' Upon further consideration, the Department issued a Notice of Enforcement Position (60 FR 49505, September 26, 1995) announcing that, with respect to any additional workers for whom the Final Rule may have applied recordkeeping requirements (*i.e.,* U.S. workers in the specific employment in question who did not have similar qualifications and experience), the Department would enforce the provision to require the employer to keep only those records which are required by the Fair Labor Standards Act (FLSA), 29 CFR Part 516. The Department concluded that, in virtually all situations, the records required by the FLSA would include those listed under the H–B Final Rule.

In the October 1995 NPRM, the Department proposed to require employers to retain records of hours worked for all employees in the same specific employment as the H–B worker if (1) the employee is not paid on a salary basis, (2) the actual wage is expressed as an hourly rate, or (3) with respect to H–1B workers only, the prevailing wage is expressed as an hourly rate. Thus unlike the rule currently in effect (or the final rule enjoined in NAM), where the actual wage is expressed as a salary but the prevailing wage is expressed as an hourly wage, hourly records would not be required for U.S. workers in the specific employment question.

The January 1999 NPRM was identical to the October 1995 proposed rule, as described above.

The Department received one comment on the proposed modification of the documentation requirements in response to the 1995 NPRM and five additional comments in response to the 1999 NPRM.

A law firm (Moon) (1995 comment) commended the Department for ''revising the recordkeeping requirement to release employers from any obligation to keep records of hours worked by FLSA-exempt [U.S.] employees.'' At the same time, it criticized the proposal insofar as it requires records to be kept for FLSA-exempt H–1B workers where the prevailing wage is expressed as an hourly rate—a requirement it characterized as artificial and inconsistent with traditional FLSA principles. The firm recommended that the Department instead require SESAs to issue prevailing wage determinations on a salaried basis for exempt workers.

Intel asserted that all of its H–1B workers are paid on a salary basis (and apparently are listed as such on their LCAs); Intel noted, however, that SESAs sometimes issue rates on an hourly basis and suggested that the rule be clarified so that this alone would not trigger a recordkeeping requirement. Intel and ACIP both suggested that the provision should be modified to make plain that such records need be kept only where an employer includes an hourly rate on an LCA. ACIP stated that it should not matter if the SESA lists the rate as an hourly wage. It further argued that if recordkeeping is required in all instances where a SESA issues an hourly rate, this requirement would ''muddy up'' the FLSA-status of the workers. Another commenter (Rubin) expressed similar concerns, stating that considerable paperwork will be generated if recordkeeping is triggered simply because a SESA, without regard to the practice within a profession, issues a rate as an hourly wage.

The Department appreciates the concern expressed by commenters that SESAs sometimes issue hourly rates for certain occupations without regard to whether workers are commonly paid on a salary basis or the FLSA-exempt nature of the job. The Department notes that while SESAs ordinarily base prevailing wage determinations on the U.S. Bureau of Labor Statistics, Occupational Employment Statistics survey (OES), which are generally expressed as an hourly wage, the SESAs will issue the prevailing wage as a salary rate upon request. In addition, to alleviate the concerns of employers and to avoid confusion with regard to the nature of the prevailing wage or recordkeeping obligations, the Department is modifying § 655.731(a)(2) to expressly authorize the employer to convert the prevailing wage determination into the form which accurately reflects the wage which it will pay (*i.e.,* where the prevailing wage is expressed as an annual ''salary,'' it may be converted to an hourly rate by dividing the amount by 2080; where the prevailing wage is expressed as an hourly rate, it may be converted to a salary by multiplying the amount by 2080). The modified regulation instructs that the employer shall state the prevailing wage on the LCA in the manner in which the wage will be paid, *i.e.,* as an hourly rate or a salary. However, the prevailing wage must be expressed as an hourly wage if the worker is part-time, in order to ensure that the part-time worker is in fact paid for the proportion of the week in which he or she actually works.

In addition, after review, the Department has concluded that a further revision of the regulation is appropriate to remove the requirement that an employer keep hourly wage records for its full-time H–1B employees paid on a salary basis. (Employers are also directed to § 655.731(a)(4) (not revised in this rule), which explains payment of wages to employees paid on a salary basis.) The regulation continues to require employers to keep hours worked records for part-time employees, as well as hourly employees. It is the Department's view that there is no other way to ensure that employers comply with their obligation to pay these workers at least the prevailing wage for all hours worked. Otherwise, for example, an employer would be able to state on its H–1B petition that an employee will be paid 20 hours per week, pay the employee an annual salary based on 20 hours per week, keep no record of hours worked, and actually

work the employee 30 hours a week. In any event, the Department believes that most employers keep hours worked records for their part-time employees.

Another commenter (Latour) agreed that it was reasonable for DOL to require the retention of the records enumerated in the proposal, which it stated were records kept by typical employers. However, it expressed concern over a perceived requirement that all the documentation must be included in the public access file. Another commenter (Baumann) expressed concern over the requirement that the records be kept beginning with the date the LCA is submitted throughout the period of employment. This commenter stated that the proposal, read in the broadest sense, requires an employer to continue to update the public access file each time a new worker is hired or a current employee receives a pay increase. He requested the Department to make clear that the wage information relating to non-H–1B workers is limited to the period before the filing of the LCA.

It appears that these commenters have misunderstood the documentation requirement as it relates to the public access file. The basic payroll information required to be maintained does not need to be included in the public access file, but rather must be available to the Wage and Hour Division in the event of an investigation. As provided in § 655.760(a), the public access file is required to contain only the wage rate to be paid the H–1B workers, an explanation of the employer's actual wage system (discussed in IV.O.3, above), and the documentation used to establish the prevailing wage.

5. What Are the Requirements for Posting of ''Hard Copy'' Notices at Worksite(s) Where H–1B Workers Are Placed? (See IV.F, above)

6. What Are the Time Periods or ''Windows'' Within Which Employers May File LCAs? (§ 655.730(b) and § 655.731(a)(2)(iii)(A)(*1*))

Regulations with respect to the time periods or ''windows'' within which employers may file labor condition applications were first published by the Department as §§ 655.730(b) and 655.731(a)(2)(iii)(A)(*1*) in the December 20, 1994 Final Rule. That rule provides at § 655.730(b) that ''a labor condition application shall be submitted * * * no earlier than six months before the beginning date of the period of intended employment shown on the LCA.'' Section 655.731(a)(2)(iii)(A)(*1*) states that ''[a]n employer who chooses to utilize a SESA prevailing wage determination shall file the labor condition application not more than 90 days after the date of issuance of such SESA wage determination.''

These provisions were challenged in the *NAM* litigation as violative of the notice and comment provision of the APA, 5 U.S.C. 553(b)(3). The district court in *NAM*, however, concluded that §§ 655.730(b) and 655.731(a)(2)(iii)(A)(*1*) ''lie on the procedural side of the spectrum and are exempt from the notice and comment requirement of the APA.'' The court further found that the ''plaintiff has failed to demonstrate that the two time periods are so short that they encroach upon an employer's ability to utilize the H–1B workers, and plaintiff has failed to show that the rules alter any substantive standard by which [the Department] will evaluate LCAs.'' Therefore these rules are currently in effect.

On October 3, 1995, during the pendency of the *NAM* litigation, the Department republished these sections for comment. The 1999 NPRM republished these sections for comment without modification.

Six commenters (Intel, CBSI, Motorola, Moon, AILA, MIT) responded to the republication of these sections in the 1995 Proposed Rule. With respect to the requirement that an LCA be filed within 90 days of issuance of a SESA prevailing wage determination, all six commenters asserted that the requirement would make more work for employers and that it would slow down the LCA process. Two of these commenters (CBSI, MIT) also suggested that the validity period of a SESA determination should be 180 days, and one commenter (Moon) suggested that SESA determinations should carry no expiration date.

Three commenters (AILA, BRI, ITAA) responded to these sections as republished in the 1999 NPRM. ITAA supported the provision permitting employers to file LCAs up to six months before the beginning date of the period of intended employment as shown on the LCA, stating the proposal reflected an ''appropriate balance'' of the Department's and business interests. One commenter (BRI) sought clarification on whether an LCA already certified could be used any time during the validity of the LCA, assuming the prevailing wage was obtained from a source other than a SESA.

AILA objected to the 90-day validity period for the SESA prevailing wage as arbitrary and—because most U.S. employers make annual wage assessments—unrelated to the ''real world wage.'' Therefore, AILA asserted, requesting a prevailing wage from the SESA every 90 days places an undue burden on U.S. employers. AILA recommended that SESA prevailing wages should be valid for a period of one year, based on the observation that SESAs rely on the OES survey—an annual survey—to obtain wage information for purposes of issuing prevailing wage determinations.

The Department has considered the comments offered in response to its proposals regarding the time frames in which LCAs may be filed by employers.

Because there has been no objection to the requirement of § 655.730(b) that an LCA be filed within six months of the beginning date of intended employment, the Department will adopt that regulation as proposed.

With regard to the length of the ''validity period'' of SESA-issued wage determinations—the period during which the determination may be used by an employer to support a visa petition—the Department has concluded that the proposed rule can be modified to accommodate the views of the commenters, while maintaining the crucial principle that prevailing wage determinations should reflect rates which are current and accurate for the locality and the occupational classification. The Interim Final Rule therefore provides that the SESA's issuance of a prevailing wage determination shall include a specification of a validity period, which shall be not less than 90 days and not more than one year from the date of the issuance. The Department will provide guidance to the SESAs with regard to their assignment of validity periods. The Department notes that the Bureau of Labor Statistics' Occupational Employment Statistics (OES) survey and most employer-provided surveys are updated on a regular basis, and the update cycles for such surveys can be readily determined—unlike the update cycle for prevailing wages based on Service Contract Act and Davis-Bacon wage determinations or collective bargaining agreements. The Department anticipates that the validity period will be 90 days where the wage rate is based on SCA, Davis-Bacon, or collective bargaining agreements. The Department anticipates that where the wage rate is based on the OES survey or on a survey provided by the employer and found acceptable by the SESA, the validity period will ordinarily be until the next update, provided it is at least 90 days and no more than one year from the date of issuance. This will reduce the burden of employers and SESAs in filing and responding to wage determinations without any adverse affect on worker wages.

7. How May an Employer Challenge a SESA/ES-Issued Prevailing Wage Determination?
(§ 655.731(a)(2)(iii)(A)(*1*) and (d)(2), § 655.840(c))

H–1B regulations specifically explaining the procedures available to employers to challenge a SESA-issued prevailing wage determination were first published by the Department in the December 1994 Final Rule. That rule provides at §§ 655.731(a)(2)(iii)(A)(*1*), 655.731(d)(2) and 655.840(c) that irrespective of whether the wage determination is obtained by the employer prior to filing the LCA or by the Wage and Hour Division in an enforcement proceeding, employers must assert any challenge to the wage determination under the Employment Service (ES) complaint system at 20 CFR part 658, Subpart E, rather than in an enforcement proceeding before the Office of Administrative Law Judges pursuant to Subpart I of part 655. Furthermore, pursuant to § 655.731(a)(2)(iii)(A)(*1*), an employer which wishes to appeal a SESA-issued wage determination must file the appeal and obtain a final ruling pursuant to the ES complaint system prior to filing any LCA based on that determination. Section 655.731(d)(2) provides that where a prevailing wage determination is obtained by Wage and Hour pursuant to § 655.731(d)(1), an employer must file any appeal within 10 days of receipt of the wage determination; notwithstanding the provisions of §§ 658.420 and 658.426, the appeal is filed directly with ETA, rather than with the SESA.

These provisions of the 1994 Final Rule were challenged in the *NAM* litigation as contrary to the requirements of the APA. The court, in that matter, concluded that these provisions were procedural regulations, exempt from APA notice and comment requirements, and further found that the plaintiffs in that case had failed to demonstrate that an employer's substantive rights had been altered by these provisions. Accordingly, the regulations were not enjoined and remain in effect. During the pendency of that litigation, these provisions were republished for notice and comment in the October 1995 Proposed Rule. The identical provisions were republished for notice and comment in the January 1999 Proposed Rule.

The Department received five comments (AILA, Frost & Jacobs, Moon, Motorola, NAM) in response to the proposals republished in 1995. All commenters opposed the proposed provisions. One commenter (Moon) asserted that the ES system was inadequate because it ''handcuffs the employer by gagging the SESA from revealing information.'' The commenter was alluding to the language in § 655.731(d)(2), which states that neither ETA nor the SESA may divulge any employer wage data which was collected under the promise of confidentiality. Another commenter (Frost & Jacobs) urged that any challenge of a SESA determination be required to be resolved by the ES in a timely manner (recommended 30-day time limit). Motorola was also concerned with the ability of the ES to timely respond to SESA challenges, especially in situations of H–1B visa extensions or changes in status from an F-visa to an H–1B. In these situations, this commenter noted, an employer is forced to accept the challenged wage in order to obtain the LCA so that the application may be filed with the INS in sufficient time to prevent removing an individual from the payroll for lack of work authorization.

In their comments to the 1995 proposals, NAM and AILA contended that allowing challenges to prevailing wage determinations to be made only pursuant to the ES complaint system deprives employers of their procedural due process protections. These organizations commented that a paper appeal to an administrative agency, staffed by paid employees of the very agency which determined the prevailing wage, without any rights to discovery, an examination of the evidence in support of the wage determination, or an express written decision, does not substitute for the right to be heard by an independent ALJ where all of these rights are guaranteed.

The 1999 NPRM republication of the 1995 proposals on this issue sought further comment on these proposals. AILA, the sole commenter on this issue, stated that a poll of its members revealed that the complaint process is rarely used because of failure by either the ES or SESA Prevailing Wage Unit to publicize it. AILA further criticized the complaint system as laborious, complicated and protracted, requiring handling by several different offices of the SESA and ETA. Furthermore, the opportunity for a hearing before a DOL administrative law judge is permitted only at the discretion of the ETA Regional Administrator. AILA stated that without the opportunity for meaningful review of a SESA wage determination by an impartial judicial tribunal, such as in an ALJ hearing, employers feel that a meaningful and fair review might not be possible under the ES complaint system.

The Department continues to be of the view, as stated in the preamble to the December 1994 Final Rule, that ''permitting an employer to operate under a SESA prevailing wage determination and later contesting it in the course of an investigation or enforcement action is contrary to sound public policy; such a delayed disruptive challenge would have a harmful effect on U.S. and H–1B employees, competing employers, and other parties who may have received notice of and/or relied on the prevailing wage at issue.''

Challenges to SESA prevailing wage determinations prior to filing the LCA (as distinguished from challenges to prevailing wage determinations obtained by Wage and Hour) must be made through the ES complaint system by filing a complaint with the SESA. However, it should be clarified that complaints need not be initiated at the ES local office level. The complaint may be filed directly with the organization within the SESA responsible for alien labor certification prevailing wage determinations. This office is usually part of the central state office. Since the implementation of the OES program, SESA local offices are not involved in making or issuing prevailing wage determinations. See ETA's General Administrative Letter 2–98 (October 3, 1997).

Furthermore, although the regulations at § 658.421(h) provide that the offer of a hearing before an administrative law judge is discretionary, it is ETA's policy that where the employer is appealing a wage determination obtained by Wage-Hour pursuant to § 655.731(d), the ETA Regional Administrator will offer a hearing before an Administrative Law Judge in every H–1B case which is not resolved to the employer's satisfaction.

With regard to comments that challenges to a SESA prevailing wage determination should be resolved more expeditiously, the Department believes that allowing employers to initiate a challenge to the a SESA prevailing wage determination at the State rather than the local office level will simplify and reduce the time necessary to resolve those complaints. The regulations governing the ES complaint system provide that if the complaint has not been resolved within 30 working days the State office shall make a written determination. Furthermore, appeals to wage determinations obtained by Wage-Hour are filed directly with the ETA Regional Administrator, thus shortening the process.

As indicated above, one commenter to the 1995 Proposed Rule objected to the provision at § 655.731(d)(2) which

states, in relevant part, that neither ETA nor the SESA shall divulge any employer wage data which was collected under the promise of confidentiality. This regulatory provision prohibiting release of wage information codified a longstanding ETA policy of not releasing such information because release of such information would inhibit employers responding to SESA conducted prevailing wage surveys. Furthermore, since January 1998, SESAs, pursuant to ETA's General Administrative Letter 2–98 (October 3, 1997), have based their prevailing wage determinations on the wage component of the Bureau of Labor Statistics' expanded Occupational Employment Statistics (OES) program. The occupational employment statistics questionnaire used to conduct occupational employment surveys informs potential respondent employers that ''[t]he Bureau of Labor Statistics and the State agency collecting this information will use the information you provide for statistical purposes only and will hold the information in confidence to the full extent permitted by law.'' This statement reflects longstanding BLS policies and practices, as well as longstanding ETA policies and practices, which are essential to obtain the information needed to provide timely and accurate statistics to the public. Accordingly, the Department is leaving unchanged the provision at § 655.731(d)(2) which states that in a challenge to a SESA wage determination ''neither ETA nor the SESA shall divulge any employer wage data which was collected under the promise of confidentiality.''

AILA has maintained that one reason that the ES complaint system has not been widely used is that it has not been widely publicized; AILA contends that despite the stated obligation at 20 CFR 658.410(d), not all State agencies have publicized the use of the ES complaint system through the prominent display of an ETA-approved ES complaint system poster in each local office. ETA operating experience indicates that a failure to display an ETA-approved ES complaint system poster in each local office is a rare occurrence. Such a failure would be a basis for a complaint about ES actions or omissions under ES regulations (20 CFR 658.401). Further, the availability of the ES complaint to challenge SESA prevailing wage determinations issued under the H–1B program is clearly set forth in the H–1B regulations.

The Department has concluded that at this time further measures to streamline the complaint process for challenging SESA prevailing wage determinations are not warranted. The basic structure of the current system appears to be adequate in view of the few complaints (about six) concerning SESA wage determinations that have been received and processed since publication of the 1994 Final Rule. On review, however, the Department has concluded that classification determinations, including specifically whether an employee is properly classified as an experienced or inexperienced worker, are properly the subject of ALJ enforcement proceedings pursuant to part 655, subpart I, since a determination of whether an employee has been appropriately classified can best be determined upon a review of the actual duties performed by the employee. Accordingly, §§ 655.731(a)(2)(iii)(A)(*1*) and (*3*), and 655.731(d)(2)(ii), are revised to remove references to determinations by the SESA or the ETA Regional Administrator regarding occupational classification.

P. What Additional Interpretative Regulations Did the Department Propose?

The Department proposed a new Appendix B to the regulations in order to explain the Department's interpretation of several provisions of the regulations which were not themselves open for notice and comment. As the Department stated in the NPRM, these interpretations concerned questions that had arisen in its administration of the program and had been discussed with interest groups. It was the Department's view that because of the interest raised over these questions, its interpretations should be included in the regulations, either as an appendix or as regulatory text. As discussed below, on a number of the issues, the provisions have been removed from Appendix B into the regulations.

1. What Constitutes an H–1B Worker's ''Worksite'' or ''Place of Employment'' for Purposes of the Employer's Obligations Under the Program? (See IV.O.1.b, Above)

2. Under What Circumstances May an H–1B Worker ''Rove'' or ''Float'' From His/Her ''Home Base'' Worksite? (See IV.O.1.c, Above)

3. What H–1B Related Fees and Costs Are Considered To Be an Employer's Business Expenses? (§ 655.731(c)(9)(ii)&(iii), Previously in Proposed Appendix B, Section c)

Section 655.731(c)(7)(iii)(C) of the current regulations excludes from deductions which are authorized to be taken from the required wage those deductions which are a recoupment of the employer's business expenses. Paragraph (c)(9) further explains that where the imposition of the employer's business expense(s) on the H–1B worker has the effect of reducing the employee's wages below the required wage (the prevailing wage or actual wage, whichever is greater), that will be considered an unauthorized deduction from wages. These provisions were not open for notice and comment.

The Department sought comment on proposed Appendix B, which explains its interpretation of the operation of these provisions in the context of the H–1B petition process. The NPRM notes that the filing of an LCA and the filing of an H–1B petition are legal obligations required to be performed by the employer alone (workers are not permitted to file an LCA or an H–1B petition). Therefore the NPRM provides that any costs incurred in the filing of the LCA and the H–1B petition (*e.g.,* prevailing wage survey preparation, attorney fees, INS fees) cannot be shifted to the employee; such costs are the sole responsibility of the employer, even if the worker proposes to pay the fees.

The NPRM further notes that *bona fide* costs incurred in connection with visa functions which are required by law to be performed by the nonimmigrant (*e.g.,* translation fees and other costs relating to visa application and processing for prospective nonimmigrant residing outside of the United States) do not constitute an employer's business expense. The Department stated, however, that it would look behind what appear to be contrived allocations of costs.

The Department received 21 comments on this issue. All of the commenters (a number of whom were attorneys commenting only on this issue) opposed the Department's position in the NPRM. As a general matter, these commenters contended that the question of how fees are allocated between the employer and the H–1B worker is a question which should be decided between the employer and the employee.

Immigration attorneys and their professional association (AILA), as well as Senators Abraham and Graham, argued that the Department is interfering with the H–1B workers' right to counsel. AILA argued that how the H–1B petition is drafted is critical to an employee, since it may affect his or her maintenance of status and ability to stay in the United States. Another attorney (Freedman) stated that attorney representation of the alien has acted as a buffer against employer abuses, that there is no reason to imply that an

attorney representing an employer is more competent or more impartial than an attorney suggested by an alien, and that employers may not be aware of the expertise necessary to file H–1B petitions. This attorney also suggested that the requirement that employers pay attorney fees would intimidate a potential whistleblower.

Many commenters (AILA, ACIP, and a number of attorneys, businesses and trade associations) argued, in effect, that since Congress, in drafting the ACWIA, specifically prohibited employers from imposing the additional petition fee on employees, the failure to prohibit the payment of other expenses by employees evidences an intention to allow their imposition by an employer.

ITAA and ACIP argued that the current law is directed toward prohibiting certain deductions from an employee's salary that will push it below the required wage rate. In other words, as long as the H–1B worker receives at least the required wage, it should not be a violation if the worker then spends that money for job-related matters such as fees. ACIP and ITAA stated that as a minimum, if the H–1B worker's wages minus the expenses equals or exceeds the required wage rate, there should be no violation. Latour agreed with the Department that if an H–1B worker's wage is below the prevailing wage, it would be a violation to deduct attorney fees from the worker's compensation, but stated that there is no basis for prohibiting the employer from having the employee handle the payment if the fees, when subtracted from the worker's pay, would not result in compensation less than the prevailing wage.

BRI pointed out that many employers provide payment of immigration expenses as a benefit to employees. Making it mandatory that all employers pay such fees will disadvantage those employers who offer payment of fees as a benefit. BRI also suggested that employer payment of fees would make H–1B workers more likely to take advantage of the system.

ACIP, AILA, and ITAA asserted that an employer should be able to collect these expenses as liquidated damages if the H–1B nonimmigrant prematurely terminates an employment contract. One attorney (Freedman) contended that by listing attorney fees as an employer business expense, the Department was establishing a regulatory basis for repayment as liquidated damages—thereby promoting the abusive actions for which the ACWIA was enacted.

Educational and research institutions (ACE, AIRI, University of California, Johns Hopkins) noted that the INS has determined that because ACWIA has allowed an exemption from the additional fee for H–1B petitions from higher education institutions, affiliated or related research institutions, and nonprofit and governmental research organizations, these institutions are also exempt from the requirement that employers pay the $110 filing fee. Thus, they stated that INS has determined that H–1B workers may pay the cost of the filing fee, as in the past. These commenters therefore urged that DOL accept this approach so there is no conflict between Federal agencies. The University of California also stated that an employer does not have an interest in a worker being in the United States prior to commencement of employment and therefore should not bear the cost of a change of status. Finally, three attorney commenters (Latour, Quan, and Stump) argued that forbidding legal fee payment by nonimmigrant workers will be especially onerous to small businesses, small private schools, and other financially-limited groups which are not familiar with the requirements of the H–1B program.

At the outset, the Department wants to clarify an apparent misconception by some commenters regarding the restrictions placed upon employers in assessing the employer's own business expenses to H–1B workers. An H–1B employer is prohibited from imposing its business expenses on the H–1B worker—including attorney fees and other expenses associated with the filing of an LCA and H–1B petition—only to the extent that the assessment would reduce the H–1B worker's pay below the required wage, *i.e.,* the higher of the prevailing wage and the actual wage.

''Actual wage'' is explained at § 655.731(a)(1) of the existing regulations as ''the wage rate paid by the employer to all other individuals with the similar experience and qualifications for the specific employment in question.'' The regulation continues by noting that ''[w]here no such other employees exist at the place of employment, the actual wage shall be the wage paid to the H–1B nonimmigrant by the employer.''

The Department also wishes to emphasize, as provided in § 655.731(c)(9) of the existing regulations (renumbered in the Interim Final Rule as § 655.731(c)(12)), that where a worker is required to pay an expense, it is in effect a deduction in wages which is prohibited if it has the effect of reducing an employee's pay (after subtracting the amount of the expense) below the required wage (*i.e.,* the higher of the actual wage or the prevailing wage). An employer cannot avoid its wage requirements by paying an employee a check at the required wage and then accepting a prohibited payment from a worker either directly, or indirectly through the worker's payment of an expense which is the employer's responsibility.

The Interim Final Rule continues to provide that any expenses directly related to the filing of the LCA and the H–1B petition are a business expense that may not be paid by the H–1B worker if such payment would reduce his or her wage below the required wage. These expenses are the responsibility of the employer regardless of whether the INS filing is to bring an H–1B nonimmigrant into the United States, or to amend, change, or extend an H–1B nonimmigrant's status. As stated in the NPRM, the LCA application and H–1B petition, by law, may only be filed by the H–1B employer. The employer is not required to seek legal representation in completing and filing an LCA or H–1B petition, but once it utilizes the services of an attorney for this purpose, it has incurred an expense associated with the preparation of documents for which it has legal responsibility.

H–1B nonimmigrants are permitted to pay the expenses of functions which by law are required to be performed by the nonimmigrant, such as translation fees and other costs related to the visa application and processing. The Department also recognizes that there may be situations where an H–1B worker receives legal advice that is personal to the worker. Thus, we did not intend to imply that an H–1B worker may never hire an attorney in connection with his or her employment in the United States. While the illustrative expenses (translation fees and other costs relating to the visa application) were not denominated in the NPRM as legal expenses, if they were provided through an attorney these costs and associated attorney fees would be personal to the worker and may be paid by the worker, rather than expenses that would have to borne by the employer. Similarly, any costs associated with the H–1B worker's receipt of legal services he or she contracts to receive relative to obtaining visas for the worker's family, and the various legal obligations of the worker under the laws of the U.S. and the country of origin that might arise in connection with residence and employment in the U.S., are not ordinarily the employer's business expenses. As such, they appropriately may be borne by the worker.

An employer, however, may not seek to pass its legal costs associated with the

LCA and H–1B petition on to the employee. With respect to the concerns regarding small employers who may not have familiarity with H–1B requirements and may not know an attorney specializing in this area of law, there is nothing to prohibit an H–1B worker from recommending to the employer an attorney familiar with the requirements of the H–1B program. In addition, if an applicant for a job hired an attorney clearly to serve the employee's interest, to negotiate the terms of the worker's employment contract, to provide information necessary for the H–1B petition or review its terms on the worker's behalf, or to provide the applicant with advice in connection with application of U.S. employment laws, including the various employee protection provisions of the H–1B program and its new whistleblower provisions, the fees for such attorney services are not the employer's business expense. In its enforcement, the Department will look behind any situation where it appears that an employee is absorbing an employer's business expenses in the guise of the employee paying his or her own legitimate fees and expenses.

Contrary to the view of many commenters, the Department does not read the ACWIA's proscription against an employer's assessment of the additional petition filing fee on the H–1B worker as evincing an intention that an employer may assess any other expenses against the worker. Neither the language of this provision, nor its place within the statute's larger context, allows a conclusion that Congress intended this provision to affect the ability of an employer to assess other costs to H–1B workers. The ACWIA prohibition against charging the H–1B worker for the filing fee is much more sweeping than the regulatory provision at issue. The ACWIA prohibits an employer from charging the fee, even where there would not be a resulting wage violation, and even as a part of the liquidated damages an employer may contract with a worker to pay for early termination.

The Department concurs with the comments that the ACWIA does not preclude the recovery of expenses in connection with the filing of the LCA and H–1B petition as liquidated damages. It is the Department's view that there is no basis for distinguishing attorney fees and other expenses in connection with these filings from other expenses which may be permitted, under state law, as liquidated damages. However, as set forth in IV.K, above, the Interim Final Rule provides that the $500/$1,000 filing fee may not be collected through liquidated damages.

As stated above, education and research groups stated that INS has taken the position that qualified education and research organizations who are exempt from paying the additional filing fee will not be required to pay the separate $110 petition filing fee themselves, but rather INS will accept payment made by the H–1B workers. The Department does not believe that this statement is inconsistent with its position, since, as discussed above, employers are not prohibited from requiring workers to make these payments where the workers are paid above the required wage. To the extent these commenters may be suggesting that the Department should create an exception for academic and research institutions, the Department sees no basis for this suggestion. The status of these institutions as exempt from the additional filing fee does not change the fact that they are employers who, as such, are required to file the LCA and the H–1B petition, and to pay the attendant costs if payment by the H–1B worker would bring the worker's wages below the required wage.

In the Interim Final Rule, the discussion of expenses of the H–1B program which the employer may not impose on H–1B workers has been removed from Appendix B and incorporated in the regulations at § 655.731(c)(9)(ii) and (iii).

4. When Is the Service Contract Act Wage Rate Required To Be Applied as the ''Prevailing Wage''? (§ 655.731(a)(2)(i)(B), Previously Set Forth in Proposed Appendix B, Section d)

Under § 655.731(a)(2)(i) and (iii)(A) of the regulations, if there is an applicable wage determination issued under the McNamara-O'Hara Service Contract Act (SCA) for the occupational classification in the area of employment, that SCA wage determination is considered by the Department to constitute the prevailing wage for that occupation in that area. This use of the SCA wage determination applies regardless of whether the employer is an SCA contractor, and regardless of whether the workers will be employed on an SCA contract. In the NPRM, the Department addressed questions that have arisen concerning application of the SCA wage rate for computer occupations where the wage rate on the wage determination is $27.63, and application of the SCA wage rate where the employer is of the view that the workers are exempt from the SCA.

The NPRM provided at Appendix B, section d, that where an SCA wage determination for an occupational classification in the computer industry states a rate of $27.63, that rate will not be issued by the SESA and may not be used by the employer as the prevailing wage. That rate does not constitute a statement of the prevailing wage; it is the highest wage that any worker in a skilled computer occupation is required to be paid under the SCA. Under that statute, workers are exempt from the Act's requirements if they earn more than $27.63 per hour, regardless of whether they are paid on a salary basis an hourly rate. (See 29 CFR 4.156; 541.3). In such a case, the SESA will use the OES survey—rather than the SCA rate—and the employer, if it chooses not to obtain a prevailing wage rate from the SESA, will need to consult the OES survey or another source for wage information.

Proposed Appendix B also provided that the question of whether the nonimmigrant worker(s) who will be employed will be exempt or non-exempt from the SCA is irrelevant to use of the SCA wage determination to access the prevailing wage. Therefore, in issuing the SCA wage rate as the prevailing wage determination, the SESA will not consider questions of employee exemption, and, in an enforcement action, the Department will consider the SCA wage rate to be the prevailing wage without regard to whether any particular H–1B employee(s) would be exempt from the SCA if employed under an SCA contract.

The Department received six comments on this issue. ACIP expressed confusion over the Department's singling out the SCA wage rate for computer operations, and urged reconsideration of this position before issuing interim final regulations. AILA stated that the Department's proposal is inconsistent because of this singling out of the SCA rate for computer operations, and contended, along with two other commenters (Rubin & Dornbaum, Cowan & Miller), that by designating the SCA wage as the prevailing wage, the Department virtually requires employers to use SESA determinations instead of the other wage sources permitted by law. Finally, AILA questioned the proposal to disregard the exempt status of the H–1B workers, contending that this is inconsistent with the practice used in the Permanent Program, as recognized in the Technical Assistance Guide at page 114. Network Appliance and FHCRC objected to application of the SCA wage rate where the employer is not subject to that Act.

The significant role in the regulations of SCA determinations of the prevailing wage is founded in the legislative history of the H–1B program in IMMACT 90, which evidences Congressional intent that prevailing wage determinations be made as in the Permanent Alien Labor Certification (immigrant worker) Program, 20 CFR 656.40. See Conf. Rep. No. 101–955, 101st Cong., 2d Sess. 122 (1990), 1990 U.S.C.C.A.N. 6787. In any event, the general provisions governing use of wage rates in SCA wage determinations set forth in the regulations at § 655.731(a)(2)(i) and (iii)(A) were not published for comment. Proposed Appendix B, section d, addressed only two specific questions: application of the SCA wage rate to skilled workers in computer occupations, and the broader question of the relevance of whether workers would be exempt from the SCA.

The Department continues to be of the view that SCA wage determinations cannot properly be used for computer occupations where the wage is stated as $27.63 per hour. As explained above, this wage rate is not in any sense a statement of the prevailing wage for the occupation. Rather, this rate is instead a ''cap'' on the SCA-required wage that results from an SCA statutory provision which has no application in the H–1B program. Allowing the use of the $27.63 rate as the prevailing wage would therefore undermine the statutory requirement that workers be paid at least the prevailing wage, and create an economic incentive to utilize H–1B workers rather than U.S. workers. Furthermore, computer occupations are treated differently than other occupations with regard to the use of SCA rates because these occupations are treated uniquely under the SCA. Only for skilled computer occupations is there a cap on the wage set under the SCA, by virtue of a Congressional enactment exempting workers who are paid more than $27.63 per hour from the Fair Labor Standards Act, and therefore from the SCA. See 41 U.S.C. 357(b); Pub. L. 101–583, § 2, Nov. 15, 1990, 104 Stat. 2871, as amended by Pub. L. 104–188, 110 Stat. 1929.

For several reasons, the Department also continues to be of the view that the potential SCA-exempt status of the nonimmigrant workers who will be employed under the LCA is irrelevant. SCA wage determinations (with the exception of computer professionals, as discussed above) are the Department's statement of the prevailing wage of the occupations listed, and are made without regard to the exempt status of workers surveyed. Furthermore, exemption status cannot be determined in advance, based on an employee's occupation. Rather, determinations are made only on examination of the actual duties performed by individual employees and on an examination of the manner in which the employees are paid. With the exception of computer professionals, doctors and attorneys, SCA-exempt employees must be paid either on a salary or fee basis. See 29 CFR part 541. The Department notes that this interpretation is not in fact inconsistent with the provisions of the Permanent Program's Technical Assistance Guide, which requires use of the SCA wage determination ''[i]f the job opportunity is in an occupation and a geographic area for which DOL has made a wage determination'' under the SCA. Page 114 of the Guide simply points out that executive, administrative, and professional employees are exempt from the SCA, but does not state that the exemption is intended to limit the application of the SCA wage determination in determining the prevailing wage under the permanent program. In any event, it is the Department's intention to conform its prevailing wage determinations under the Permanent Program to the interpretations in this Rule, as set forth in § 655.731(a)(2)(i)(B) (rather than in Appendix B, as proposed).

5. How Are the ''PMSA'' and ''CMSA'' Concepts Applied? (§ 655.715, Previously in Proposed Appendix B, Section e)

The regulations at § 655.731(a)(2) require that the prevailing wage be determined for the occupational classification in the area of intended employment. ''Area of intended employment'' in turn is defined to include ''the area within normal commuting distance'' of the place where the H–1B worker will be employed. This definition further provides that ''[i]f the place of employment is within a Metropolitan Statistical Area (MSA), any place within the MSA is deemed to be within normal commuting distance of the place of employment.''

Proposed Appendix B, section e, further explained that in computing prevailing wages for an ''area of intended employment,'' the Department will consider all locations within either an MSA or a primary metropolitan statistical area (PMSA) to constitute ''normal commuting distance.'' The NPRM further stated that ''a consolidated metropolitan statistical area (CMSA) will not be used in this manner in determining the prevailing wage rates.'' The Department sought to explain, parenthetically, that this simply meant that all locations within a CMSA will not necessarily be deemed to be within normal commuting distance. The Department determined, based on its operational experience, that CMSAs can be too geographically broad to be used in this manner. Because the Department has not adopted any rigid measure of distance as a ''normal commuting area,'' locations near the boundaries of MSAs and PMSAs, and locations within or near the boundaries of CMSAs may be within normal commuting distance, depending on the factual circumstances.

The Department received four comments (ACIP, AILA, Intel, Latour) on this issue. ACIP believes that there is no justification for eliminating the use of CMSAs for prevailing wage purposes, and that requiring the use of PMSAs and MSAs will unnecessarily inflate the prevailing wage rate for employers located in certain metropolitan areas. That organization further commented that the fact that many wage surveys use CMSAs supports their contention that workers do in fact commute within these regions and CMSAs should continue to be a valid statistical area.

AILA expressed its agreement that employers should make good faith efforts to utilize surveys which fit a geographical area, but noted that it is not always possible. Thus, it recommended that employers be able to use broader geographic surveys where no valid local surveys can be found. Intel expressed a similar view. Latour stated that it has used ''normal commuting distance'' since IMMACT 90, and the Department's proposal would only create confusion for employers.

These comments demonstrate a misunderstanding on the part of the commenters of the Department's view on the use of CMSAs. The Department did not intend to place a blanket prohibition on the use of CMSAs. Rather, the Department intended only to clarify, albeit parenthetically, that, unlike MSAs and PMSAs, locations within a CMSA are not automatically deemed to be within normal commuting distance. If an employer can show that it could not get an adequate sample at the MSA or PMSA level, a survey based upon a CMSA may, in fact, be appropriate. In such a situation, the employer should demonstrate that it was not possible to obtain a representative sample of similarly employed workers within the MSA or PMSA. Upon such a showing, the CMSA survey should be acceptable. Furthermore, if an employer is unable to obtain a representative sample at the MSA or PMSA level, GAL 2–98 (ETA's prevailing wage policy directive)

specifically directs that the geographic base of the survey should be expanded. The Department's proposals on this issue also sought to introduce the PMSA concept into the regulation, which had previously discussed only MSAs. The Department has therefore amended the definition of ''Area of intended employment'' in § 655.715, consistent with this discussion, and has removed the discussion from proposed Appendix B, section e.

6. How Does the ''Weighted Average'' Apply in the Determination of the Prevailing Wage, and What Other Issues Have Arisen Concerning the Determination of the Prevailing Wage? (§ 655.731(b)(3)(iii)(B)(*1*), Previously in Proposed Appendix B, Section f; § 655.731(a)(2)(vii); and Proposed Revisions to § 655.731(a)(2)(iii) and (d)(4))

Proposed Appendix B, section f, explained that, due to the inadvertent omission of the word ''weighted'' from one provision of the regulation, there had been a suggestion of confusion regarding whether an employer which uses an ''independent authoritative source'' to determine prevailing wages was required to use a ''weighted average'' methodology. Therefore proposed Appendix B described this methodology and how and when it is to be used.

The Department received no comments on this provision. The Department has amended § 655.731(b)(3)(iii)(B)(*1*) to expressly require a weighted average and has removed this section from Appendix B.

As discussed above in IV.O.4, the Department has concluded that an employer will not be required to keep hourly wage records for full-time H–1B workers paid on a salary basis where the prevailing wage is expressed as an hourly wage. In order to permit this change in the recordkeeping provisions, it is necessary that the regulations be amended to explain that the hourly wage may be converted to a salary. Section 655.731(a)(2)(vii) is therefore amended to provide that an hourly rate may be converted to a weekly salary by multiplying the rate by 40, and may be converted to an annual salary by multiplying by 2080, etc.

7. What is the Effect of a New LCA on the Employer's Prevailing Wage Obligation Under a Pre-Existing LCA? (§ 655.731(a)(4), Previously in Proposed Appendix B, Section g)

The Department, in the 1999 NPRM, acknowledged the possibility of confusion among employers regarding the prevailing wage obligation of an employer which has filed more than one LCA for the same occupational classification in the same area of employment. In such circumstances, the Department observed, the employer could have H–1B employees in the same occupational classification in the same area of employment brought into the United States (or accorded H–1B status) based on petitions approved pursuant to different LCAs (filed at different times) with different prevailing wage determinations. Therefore, the Department advised in proposed Appendix B to Subpart H, that the prevailing wage rate as to any particular H–1B nonimmigrant is prescribed by the LCA which supports that nonimmigrant's H–1B petition. The regulations require that the employer obtain the prevailing wage at the time that the LCA is filed (§ 655.731(a)(2)). The LCA is valid for the period certified by ETA, and the employer must satisfy all the LCA's requirements for as long as any H–1B nonimmigrants are employed pursuant to that LCA (§ 655.750). Where new nonimmigrants are employed pursuant to a new LCA, that new LCA prescribes the employer's obligations as to those new nonimmigrants. The prevailing wage determination on the later/subsequent LCA does not ''relate back'' to operate as an ''update'' of the prevailing wage for the previously-filed LCA for the same occupational classification in the same area of employment. The Department also cautioned employers that every H–1B worker is to be paid in accordance with the employer's actual wage system (regardless of any difference among prevailing wage rates under various LCAs), and thus is to receive any pay increases which that system provides (*e.g.,* merit increases; cost of living increases).

One commenter, AILA, welcomed the acknowledgment that a prevailing wage on an LCA is not changed by later prevailing wage determinations. However, AILA expressed opposition to the reminder that an employer is obligated to pay any wage increases provided by its actual wage system.

The Department has removed its discussion of this issue from Appendix B to the regulations at § 655.731(a)(4). The issue of payment of wage increases under the actual wage system is discussed above in IV.O.3 of the preamble.

Q. Miscellaneous Matters

The Department has also made minor changes to the regulations not discussed above.

Section 655.700(c)(2) has been amended to explain the effect of the ACWIA amendments upon the entry and employment of a nonimmigrant who is a citizen of Mexico pursuant to the provisions of the North American Free Trade Agreement (NAFTA). As a general matter, the H–1B requirements continue to apply. To avoid the imposition of more stringent requirements on the entry of such nonimmigrants (who are classified as ''TN''), however, neither the recruitment nor the displacement provisions apply to these nonimmigrants. The Interim Final Rule also continues the practice of applying the statutory and regulatory provisions for registered nurses (most recently the Nursing Relief for Disadvantaged Areas Act of 1999, Pub. L. 106–95) to TNs.

In addition, several places (*e.g.,* §§ 655.700, 655.705, 655.715), have been revised to reflect the amendments made by the ACWIA and the October 2000 Amendments, and to reflect the current Departmental organizational structure.

V. Executive Order 12866

Because of its importance to the public and to the Administration's priorities, the Department is treating this rule as a ''significant regulatory action'' within the meaning of section 3(f)(4) of Executive Order (E.O.) 12866. E.O. 12866 requires a full economic impact analysis only for ''economically significant'' rules as defined in section 3(f)(1). An ''economically significant'' rule pursuant to section 3(f)(1) is one that may ''have an annual effect on the economy of $100 million or more, or 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.''

As noted in the NPRM, the H–1B visa program is a voluntary program that allows employers to temporarily secure and employ nonimmigrants admitted under H–1B visas to fill specialized jobs not filled by U.S. workers. In order to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers, Section 212(n) of the INA imposes various requirements on employers, including the requirement that the employer pay an H–1B worker the higher of the actual wage or the prevailing wage. This Interim Final Rule implements statutory changes in the H–1B visa program enacted by the ACWIA. The ACWIA (1) temporarily increases the maximum number of H–1B visas permitted each year; (2) temporarily requires, during the increased H–1B cap period, new non-displacement (layoff) and recruitment attestations by ''H–1B-

dependent'' employers and employers found to have committed willful violations or misrepresentations; (3) requires employers of H–1B workers to offer the same fringe benefits to H–1B workers as they offer U.S. workers; (4) requires employers in certain cases to pay H–1B workers in a non-productive status; and (5) provides whistleblower protections to employees (including former employees and applicants) who disclose information about potential violations or cooperate in an investigation or proceeding. In addition, this Rule contains final rules on certain proposals previously published for comment in October 1995, and on proposals relating to the Department's interpretations of the INA and its existing regulations.

The Department, in the NPRM, concluded that this rule is not ''economically significant'' because the direct, incremental costs that an employer would incur because of this rule, above customary business expenses associated with recruiting qualified job applicants and retaining qualified employees in specialized jobs, are expected to be minimal. Collectively, the changes proposed by this rule will not have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. Therefore, the Department concluded that this rule is not a ''significant regulatory action'' as defined by section 3(f)(1) of E.O. 12866, and no economic impact analysis is required under section 6(a)(3).

Four commenters (ACIP, AILA, Hammond and TCS) specifically responded to the Department's findings with respect to E.O. 12866. Hammond disagreed with the Department's assessment that a full economic impact analysis is not required. That commenter stated its belief that the direct, incremental costs an employer would incur because of this rule are above the customary and usual business expenses for recruiting qualified job applicants and for retaining qualified employees in specialized jobs. Hammond contended that the rule will impose significant costs that will have an annual effect on the economy of $100 million or more, and will adversely affect the computer industry and its productivity.

All four commenters stated their view that the Department has underestimated the additional burdens and costs to be attributed to the new regulatory provisions on all H–1B employers, and that the economic impact of the rule is not limited to H–1B-dependent employers. AILA urged the Department to provide a more accurate and reasonable estimate of the burden created by its regulatory provisions, using reliable data and computations, before imposing the regulations in final form. In the alternative, and in the absence of data to support a reasonable estimate of the economic impact on H–1B employers, AILA recommended the adoption of regulations that are less burdensome.

For the reasons discussed above and in the preamble of the NPRM, the Department continues to believe that the Interim Final Rule is not an ''economically significant'' regulatory action under E.O. 12866, section 3(f)(1). Furthermore, as described in detail above, the Department has made significant changes in several provisions which will lessen the perceived burden to employers. Accordingly, the Rule does not require an assessment of costs and benefits under section 6(a)(3) of that E.O. The Rule, however, was treated as a ''significant regulatory action'' under E.O. 12866, section 3(f)(4), because of its importance to the public and to the Administration's priorities and was, therefore, reviewed by the Office of Management and Budget.

VI. Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601–612) requires agencies to prepare and make available for public comment an initial regulatory flexibility analysis, describing the anticipated impact of the proposed rule on small entities. This initial analysis was published as part of the NPRM. The initial regulatory flexibility analysis concluded that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. The Regulatory Flexibility Act also requires agencies to prepare a final regulatory analysis, assessing comments received on the initial analysis, describing any significant alternatives affecting small entities that were considered in arriving at the final rule, and the anticipated impact of the rule on small entities.

In the initial regulatory flexibility analysis, the Department noted that available data and analyses indicated that most of the businesses in the industries in which H–1B workers likely would be employed would meet SBA's definition of ''small.'' The Department, however, stated its conclusion that the economic impact of the rule would not be significant. As there explained, most of the new compliance obligations addressed in this rulemaking apply to only a small subset of the full universe of employers that participate in the H–1B program, namely, those that meet the new definition of ''H–1B dependent employer'' and those found to have committed willful violations or misrepresentations (''willful violators''), which the Department estimated to be no more than 200 employers.

Upon further analysis, including review of the comments received by the Department, we have concluded that the Department's initial assessment was correct, *i.e.,* the rules will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

The discussion which follows addresses the statutory requirements bearing on this final analysis. While much of the discussion closely tracks the language in the Department's initial analysis, we address below the comments received bearing upon the impact of the rule on small entities. The reader should review the supplementary information section of the preamble (particularly section IV) for a full discussion of the various alternatives considered by the Department in crafting the IFR. However, we discuss below some aspects of these alternatives as they relate to small entities.

1. What Are the Objectives of, and the Legal Basis for, the Interim Final Rule?

On October 21, 1998, President Clinton signed into law the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), which was enacted as Title IV of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999 (Public Law 105–277). The ACWIA amended the Immigration and Nationality Act (INA), as amended (8 U.S.C. 1101 *et seq.*), relating to the H–1B visa program. Under the H–1B visa program, employers may temporarily employ nonimmigrants admitted into the U.S. under H–1B visas in specialty occupations and as fashion models, instead of employing U.S. workers, under certain conditions. Section 412(d) of the ACWIA provides that some of the amendments made by the ACWIA do not take effect until the Department promulgates implementing regulations, which are the subject of this rulemaking.

The Interim Final Rule is issued pursuant to provisions of the INA, as amended, and the ACWIA, 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and 1184; 29 U.S.C. 49 *et seq.*; sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8

U.S.C. 1182 note); and sec. 412(d) and (e), Pub. L. 105–277, 112 Stat. 2681. The objectives of the rule are to enable employers to understand and comply with applicable requirements under the amended H–1B visa program, and to advise employees and applicants of the protections afforded by the amendments to U.S. and H–1B workers.

2. What Comments Were Received Addressing the Initial Regulatory Flexibility Analysis, How Does the Department Assess the Comments, and What Changes, if Any, Were Made as a Result of the Comments?

As discussed below, the Department received only a few comments (from ACIP, AILA, Hammond and ITAA) that specifically discussed the initial regulatory flexibility analysis. The comments specifically directed at the initial regulatory flexibility analysis addressed only the commenters' disagreement with the Department's estimate of the number of U.S. employers that would be affected by the rule's requirements pertaining to H–1B–dependent employers or willful violators. Employers with such status (generally those employers with more than 15 percent of their workforce comprised of nonimmigrants or employers found to have willfully violated H–1B requirements) must follow requirements not imposed on the much larger number of employers that employ a smaller percentage of nonimmigrant workers. Since the comments received specifically relate to the Department's estimate regarding the number of small entities affected by the IFR, the comments are discussed in the next section of this analysis.

Although not raised in connection with the initial analysis, numerous commenters, as detailed in the preceding sections of the preamble to the Interim Final Rule, objected to the recordkeeping burdens imposed by the rule; a few commenters (Chamber of Commerce, IEEE, Simmons) expressed a general concern that the regulations would impose requirements that small businesses would find burdensome. (See sections IV.D.7, D.8, E.1.)

The Department has taken these comments into account, clarifying the particular requirements in several respects. While many of these comments did not differentiate among employers by size, the Department has made many adjustments in the Interim Final Rule, as discussed above, that will benefit small employers. The comments reflected some misunderstanding regarding the need to create, as distinguished from retaining or maintaining, documents relating to the H–1B employment process. The Rule requires the creation of documents in only a relatively few instances. And, in most instances, the maintenance of these documents already is required by other statutes and regulations. For example, while the regulation requires employers in some instances to maintain basic payroll and hours worked records for certain employees, employers are already required to do so by other federal statutes, such as the Fair Labor Standards Act. In a related matter, the Interim Final Rule clarifies that employers need not segregate H–1B documents in a file or system separate from other employment documents. Finally, the Rule, at § 655.760, clarifies the documents that need to be kept in a public access file and simplifies the employer's obligations in this regard. These aspects of the Rule are discussed in full in the earlier sections of the preamble. The reader's particular attention to the following points is recommended: The Paperwork Reduction Act summary in section I; non-displacement documentation (IV.D.8); recruitment practices (IV.E.2); recruitment documentation (IV.E.5); benefits documentation (IV.G.2); location of documents (IV.D.3); hours worked documentation (IV.O.4); public access rules clarified (IV.O.4 and § 655.760 of the Rule).

The Rule also contains several provisions that will particularly benefit small businesses. The Department has provided: A toll free fax number to file LCAs (see IV.B); free or nominal charge resources for determining ''master's degree equivalence'' (see IV.C.2) and determining ''specialities related to'' a master's degree (see IV.C.3). Other aspects of the Rule that may be of particular assistance to some small entities include the use of a download program that can be used with Apple Macintosh systems (see IV.B.5) and employer options regarding the payment of benefits to H–1B workers already employed abroad by the employer or its affiliate (see IV.G.1). The Department's outreach efforts to explain the requirements of the ACWIA and the Rule also benefit small entities. As part of these efforts, the Department, as discussed in the preamble above, at section IV.B, plans to make available soon its small business compliance guide and to set up a computer program that will enable individuals and employers to obtain answers to their H–1B questions.

The Department received some miscellaneous comments that concern small entities. As noted above, at section IV.N of the preamble, the Department received a comment requesting that state school districts and private schools be included in the special prevailing wage provisions. The Department has concluded that the statute does not allow for such exemption.

One commenter (Gurtu & McGoldrick) expressed the summary view that the rules would impose excessive recordkeeping requirements on small businesses. As noted here and throughout the preamble, we believe that the Interim Final Rule imposes only minimal obligations on employers, and that the ACWIA does not allow the latitude to except small entities from the requirements necessary to ensure compliance with the statute. (See section 8 below.)

Another commenter (SBSC) expressed the view that the Department's use of established definitions and regulations from areas of the law external to immigration would prove costly to small employers. We believe that we have provided ample information to allow all employers to understand and comply with all aspects of the H–1B program. No employer is required to look beyond the regulations in order to meet these obligations. At the same time, the references in the preamble to other statutes should assist employers by providing them with potentially useful guides to help them in meeting these requirements and by reminding them that other laws may bear on the employment of H–1B workers.

3. How Many Small Entities Will Be Covered by the Interim Final Rule?

A. As the Department noted in the initial regulatory flexibility analysis, the rule will have the greatest impact on ''H–1B-dependent'' employers and ''willful violators.'' Other aspects of the rule will apply all to employers which seek to temporarily employ nonimmigrants admitted into the U.S. under the H–1B visa program in specialty occupations and as fashion models. The initial analysis distinguished between ''H–1B dependent employers''/''willful violators'' and all other H–1B employers and we follow that approach here in discussing these two groups of employers.

Section 412 (a)(3) of the ACWIA defines ''H–1B-dependent employer'' as an employer that has 25 or fewer full-time equivalent employees employed in the U.S. and more than 7 H–1B nonimmigrants, at least 26 but not more than 50 full-time equivalent employees and more than 12 H–1B nonimmigrants, or at least 51 full-time equivalent employees and a workforce of H–1B nonimmigrants comprising at least 15

percent of its full-time equivalent employees. The ACWIA requires H–1B-dependent employers and employers found to have willfully violated H–1B requirements to attest that they will not displace (layoff) U.S. workers and replace them with H–1B workers in essentially equivalent jobs, that they will not place H–1B workers with other employers without first inquiring as to whether they intend to displace U.S. workers, and that they have taken good faith steps to recruit in the United States for U.S. workers to fill the jobs for which they are seeking H–1B workers. An employer filing an LCA pertaining only to ''exempt H–1B nonimmigrants'' need not comply with the non-displacement and good faith recruitment attestations, regardless of status as an H–1B-dependent or willful violator. ''Exempt H–1B nonimmigrants'' are defined as those who earn at least $60,000 annually or who have attained a master's degree or its equivalent in a specialty related to the intended employment.

B. The definition of ''small'' business varies considerably, depending on the policy issues and circumstances under review, the industry being studied, and the measures used. The size standards used by the U.S. Small Business Administration (SBA) to define small business concerns according to their Standard Industrial Classification (SIC) codes are codified at 13 CFR 121.201. SBA's small size standards are generally expressed either in maximum number of employees or annual receipts (in millions of dollars).

As explained in the initial analysis, we could apply SBA's size standards and gauge precisely how many of the affected businesses are ''small'' if we were able to construct a profile of each business that used H–1B workers, showing both the total number of workers employed and the portion that are H–1B workers, together with total annual receipts and the applicable SIC industry code. Unfortunately, the precise data required for this analysis are not available. However, we know that by far the greatest number of occupations in LCAs certified under the H–1B program have historically been for computer-related occupations, and for therapists (principally physical and occupational).[1] Looking just at these categories would present a view of 60 to 70 percent of all the certified job openings under the H–1B program.

For Major Group 73, Business Services, the SBA's small business size standards for SIC codes in which computer-related occupations would likely be employed are all at the $18 million level (annual receipts).[2] Data from the *1992 Census of Service Industries: Establishment and Firm Size* (published February 1995) indicate that 39,511 out of a total 40,242 firms (or 98.18 percent) have annual receipts less than $18 million.

The Business Services category would not include other users of H–1B workers in computer-related occupations, such as computer equipment manufacturers. For computer and other electronic equipment manufacturers, the SBA's small size threshold is 1,000 employees.[3] In 1994 (latest data on size distribution), 1.6 percent of the establishments employed 1,000 or more workers (comprising 42.1 percent of the employment in the industry).[4] There were more than 14,000 establishments in this industry in 1996.

For Major Group 80, Health Services, the SBA's small size threshold for all categories within the group are at the $5 million (annual receipts) level. Data from the *1992 Census of Service Industries: Establishment and Firm Size* (February 1995) indicate that 244,437 out of a total 249,052 firms (or 98.15 percent) have annual receipts less than $5 million.[5]

Based on the above data, we concluded in the initial analysis that the vast majority (over 98 percent) of the businesses in the industries in which H–1B workers are likely to be employed would meet SBA's definition of ''small.'' In the initial analysis, the Department estimated that approximately 50,000 employers a year file LCA's for H–1B nonimmigrants. The Department also estimated that not more than ten (10) employers a year will be found to have committed willful violations. The Department has received no comments, nor possesses any other information, that would call into question this approach or the estimate it yielded in the initial analysis. Based upon its updated review of the number of LCAs filed per year and taking into consideration the increase in petitions permitted by the October 2000 amendments to the INA, the Department currently estimates that 63,500 employers a year will file LCAs.

C. As noted in the initial analysis, there are no data available to determine how many ''H–1B-dependent'' employers will exist under the rule. We arrived at our estimate of the number of ''H–1B-dependent'' employers for purposes of the initial analysis, as follows. Although the test for H–1B dependency varies with the size of the employer, an employer must employ at least seven H–1B workers to be dependent. Therefore, we stated that if we assume that every H–1B-dependent employer had the smallest workforce threshold (25 full-time equivalent employees) and therefore subject to the ''more than seven H–1B'' workers test, we can estimate the maximum potential number of H–1B-dependent employers in computer-related fields and health services (using therapists) by determining how many of those employers submitted LCAs seeking certification of more than seven H–1B nonimmigrants on a single LCA. This approach undercounts the potential number of H–1B-dependent employers because some employers requesting fewer than seven H–1B workers on a single LCA may already employ other H–1B workers or may file more than one LCA. For purposes of the initial analysis, therefore, we calculated the number of employers for which more

[1] Our initial analysis, utilizing 1997 data, showed that 398,324 job openings were certified—44.4 percent in computer-related occupations and 25.9 percent for therapists. More recent data for FY 1999 shows 53.2 percent of 1,089,524 openings certified were in computer-related occupations and 17.7 percent were therapists (of whom 118,350 or 88.27 percent were filed by one employer). For the period October 1, 1999 through May 31, 2000, 514,263 openings were certified—61 percent in computer-related occupations and only 0.5 percent therapists.

[2] Major Group 73 includes the followng SIC industries: Computer Programming Services (7371); Prepackaged Software (7372); Computer Intergrated Systems Design (7373); Computer Processing and Data Preparation and Processing Services (7374); Information Retrieval Services (7375); Computer Facilities Management Services (7376); Computer Rental and Leasing (7377); Computer Maintenance and Repair (7378); and Computer Related Services. Not Elsewhere Classified (N.E.C.) (7379).

[3] According to BLS, the following five SICs comprise the electronic equipment manufacturing industry: 357, Computer and Office Equipment; 365; Household Audio and Video Equipment; 366, Communications Equipment; 367, Electronic Components and Accessories; and 381, Search and Navigation Equipment. These five SICs share common need for high levels of computer programmers, analysts, engineers and other computer scientists. BLS has published data on establishment size for the industry as a whole, but not its five components. See *Career Guide to Industries*, BLS Bulletin 2503, pp. 53–56, January 1998. The products of this industry include computers and computer storage devices such as disk drives; semiconductors (silicon or computer chips or integrated circuits), which are the core of computers and other advanced electronic products; computer peripheral equipment such as printers and scanners; calculating and accounting machines such as automated teller machines; and other electronic equipment using highly skilled computer and other scientists and professionals.

[4] BLS Bulletin 2503 (January 1998). Source: U.S. Department of Commerce. *County Business Patterns*, 1994.

[5] SIC industries 8021 (Offices and Clinics of Dentists), 8042 (Offices and Clinics of Optometrists), 8072 (Dental Laboratories), and 8092 (Kidney Dialysis Centers) were subtracted from the total number of health service firms in SIC 80 for purposes of this analysis, based on the assumption that such firms would not likely employ physical or occupational therapists.

than five (5) H–1B nonimmigrants were certified on a single LCA to work in computer-related fields or as therapists in FY 1997, to estimate an upper-bound limit of the maximum potential number of H–1B-dependent employers. This yielded a total of 1,425 employers (8.7 percent of the total in the sample). This approach for setting the maximum upper limit greatly overstates H–1B dependency, however, because many larger firms employing more than 25 full-time employees would automatically be included in the count of H–1B dependents. For example, we know, that many major employers of H–1B workers have workforces larger than 25 full-time equivalent employees. In addition, some employers file LCAs certifying a need for H–1B workers but for various reasons never fill all the positions.

Both ACIP and AILA asserted that the Department's premises and conclusion were not logically connected and, along with the other two commenters, contended that the Department's estimate is not supported by reliable data. AILA stated that the number of affected employers and the resultant burden ''may be significantly higher than the DOL suggests.'' ACIP and AILA asserted that the Department's estimated ''upper limit'' of 1,425 H–1B dependent employers was based on an unsupported and, in their view, incorrect assumption that employers generally file ''blanket LCAs.'' Hammond recommended that the Department work with the INS to analyze the economic information required in an H–1B petition to determine the probable number of small and H–1B dependent employers that will be affected by the proposed regulations.

As the Department explained in both the initial regulatory analysis and in other sections of the preamble to the NPRM, aside from reasonable estimates, there are no data available to determine precisely how many ''H–1B dependent'' employers will exist under the rule in any given year, nor how many employers will be found to have committed willful violations or misrepresentations. Such precision would require a profile of each business that used H–1B workers, showing both the total number of workers employed and the portion that are H–1B workers, together with total annual receipts and the applicable SIC industry code for each business. Additional data identifying the education and earnings profiles of the H–1B workers would be needed to determine whether H–1B-dependent employers would likely be filing LCAs for only exempt workers. In the course of developing the NPRM, the Department requested available information from the INS and was advised that information required in an H–1B petition would not enable us or the INS to determine the probable number of small or H–1B-dependent employers that would be affected by the proposed regulations. The Department's conclusion that no such data existed was borne out by the lack of any suggestions in the comments that such data exist. Similarly, we received no suggestions for arriving at a better estimate of the number of employers that would be affected by the rule.

After review of the comments and available data, the Department has concluded that there are no data to assist it in determining the likely number of H–1B-dependent employers and willful violators. The Department has received no information that leads it to question its estimate in the initial analysis that the number of H–1B-dependent employers and willful violators who would be subject to the new recruitment and displacement attestations would be between 100 and 200 employers. The Department does not believe that the increase in the cap for H–1B workers will have a proportionate effect on the number of dependent employers, since the Department believes that most such employers are already dependent. To take into account employers that may have been close to H–1B-dependency under the former cap who could now employ a larger number of H–1B workers, the Department now estimates the number of H–1B-dependent employers and willful violators to be 150 to 250 employers, at a midpoint of 200 employers.

4. What Are the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Interim Final Rule, Which Small Entities Will They Affect, and What Type of Professional Skills Are Needed To Meet the Requirements?

The reporting and recordkeeping requirements of the Rule are not overly complex, and in most cases simply require that a copy be kept of a record made for other purposes or that a simple arithmetic calculation be performed. There are no requirements for technical, specialized or professional skills to comply with the reporting or recordkeeping provisions of the rule. The particular reporting and recordkeeping requirements of this Rule are described above in the Supplementary Information section entitled ''Paperwork Reduction Act'' and in various places throughout the preamble. Some of these requirements are also briefly summarized below.

As noted, most new recordkeeping and compliance requirements imposed by the ACWIA and this rule apply only to employers meeting the new definition of ''H–1B-dependent employer'' or employers found to have committed willful violations or misrepresentations, which we estimate to number between 125 and 225. To determine if it meets the new definition of ''H–1B-dependent employer,'' an employer of H–1B workers must compare the number of its H–1B workers to the number of full-time equivalent employees. H–1B-dependent employers and willful violators must comply with the new ''non-displacement'' and ''good faith recruitment'' requirements of the ACWIA. In many cases, it will be readily apparent, at either end of the spectrum, whether an employer is or is not H–1B dependent and no actual computation will be necessary. Based on the comments, the Interim Final Rule provides an easy test for determining if H–1B-dependency status is readily apparent. In the few instances where actual computations will be required, the Rule also provides an easier, alternative method of determining full-time equivalent employees.

The ACWIA provisions on non-displacement and recruitment of U.S. workers do not apply if the LCA is used for petitioning only ''exempt H–1B nonimmigrants.'' If INS determines in the course of adjudicating an H–1B petition that an H–1B nonimmigrant is exempt, the employer must keep a copy of the determination in the public access file.

The Interim Final Rule would require an H–1B-dependent employer or willful violator that is seeking to place an H–1B nonimmigrant with another employer to secure and retain a written assurance from the second employer, a contemporaneous written record of the second employer's verbal statement, or a prohibition in the contract between the two employers, stating that the second employer has not displaced and intends not to displace a U.S. worker.

H–1B-dependent employers and willful violators must maintain documentation that they have not displaced U.S. workers for a period 90 days before and 90 days after the employer petitions for an H–1B worker. The Interim Final Rule, like the proposed rule, requires covered employers to maintain typical personnel records that would ordinarily be readily available, including name, last known mailing address, title and description of job, and any documentation kept on the employee's experience and

qualifications and principal assignments, for all U.S. workers who left employment during the 180-day window. The employer must also keep all documents concerning the departure of any such U.S. employees and the terms of any offers of similar employment made to them and their responses. In most cases no special records need to be created to meet these requirements. EEOC requires under its regulations that any such existing records be maintained by employers.

H–1B-dependent employers and willful violators must make good faith efforts to recruit U.S. workers using procedures that meet industry-wide standards before hiring H–1B workers. These employers will be required to keep documentation of the recruiting methods they used, including the places, dates, and contents of advertisements or postings, and the compensation terms (if not included in contents of advertisements and postings). These employers must also summarize in the public disclosure file the principal recruitment methods used and the time frame within which the recruitment was conducted. As discussed above at section IV.E.5 of the preamble to this Rule, the NPRM requested comments on how employers should determine industry-wide standards, and how to make this determination available to U.S. workers. (See IV.E.1, E.5.) Inasmuch as the requirements are based on industry-wide standards, meeting this statutory standard should not impose significant burdens on affected employers in most cases. To ascertain whether employers have given good faith consideration to U.S. worker/applicants, the Interim Final Rule also requires the retention of applications and related documents, rating forms, job offers, etc. Retention of such records already is required by EEOC, so no additional burden will be imposed. (See IV.D.8, above.)

All employers of H–1B workers must offer fringe benefits to H–1B workers on the same basis and terms as offered to similarly-employed U.S. workers. To document that they have done so, employers must keep copies of their fringe benefit plans and summary plan descriptions, including rules on eligibility and benefits, evidence of what benefits are actually provided to workers, and how costs are shared between employers and employees. Because regulations of the Pension and Welfare Benefits Administration and the Internal Revenue Service generally require employers to keep copies of such fringe benefit information, meeting this requirement should not impose any additional burdens on most affected employers, and in the few cases where such information is not currently retained, it is anticipated that the additional burden will be minor. (See IV.G.1, above.)

As noted in the initial analysis, the Department republished and asked for comment on several provisions of the December 20, 1994 Final Rule (59 FR 65646) that were published for notice and comment on October 31, 1995 (60 FR 55339). As explained above, H–1B workers are required to be paid at least the actual wage or the prevailing wage, whichever is higher. To ensure this requirement is met, employers are required to include in the public access file documents explaining their actual wage system, and to maintain payroll records for the specific employment in question for both their H–1B workers and their U.S. workers. The Interim Final Rule revises the proposal to require that hours worked records be retained with respect to U.S. workers only if the employee is not paid on a salary basis or the actual wage is expressed as an hourly rate, and further that hours worked records be kept for H–1B workers only if the worker is part-time or is not paid on a salary basis. In virtually all cases, these employees would be paid hourly and hourly pay records would therefore be kept. (See IV.O.4, above.)

5. Are There any Federal Rules That Duplicate, Overlap or Conflict With the Interim Final Rule?

There are no Federal rules that directly duplicate, overlap or conflict with the Interim Final Rule. Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*), enforced by the EEOC, prohibits national origin discrimination by employers with 15 or more employees (see 29 CFR part 1606). The Immigration Reform and Control Act of 1986 (see 8 U.S.C. 1324b; 8 U.S.C. 1103(a)), enforced by the U.S. Department of Justice, prohibits national origin discrimination by employers with between four and fourteen employees (those not covered by Title VII), and citizenship-status discrimination by employers with at least four employees (see 28 CFR part 44). In addition, under the ACWIA, an ''H–1B dependent'' employer must attest that it has taken good faith steps to recruit in the U.S. for the position for which it is seeking the H–1B worker, and that it has offered the job to any U.S. worker/applicant who is equally or better qualified. The Department of Labor is responsible for enforcing the required recruitment, and the Department of Justice is responsible for administering an arbitration process detailed in the ACWIA if U.S. worker/applicants complain that they were not offered a job for which they were equally or better qualified, as required.

6. Are There Significant Alternatives Available Such as Differing Compliance or Reporting Requirements or Timetables for Small Entities?

The compliance and reporting requirements of the Interim Final Rule, together with those significant alternatives which have been identified, are discussed in the ''Supplementary Information'' section of the preamble above. Different timetables for implementing the statutory requirements for smaller businesses would not be consistent with the statute. The statute temporarily increases the maximum allowable number of nonimmigrants that may be admitted into the U.S. to perform specialized jobs not filled by U.S. workers, and temporarily adds corresponding provisions intended to protect the wages and working conditions of U.S. workers in similar jobs during the same period.

7. Can Compliance and Reporting Requirements Be Clarified, Consolidated, or Simplified Under the Interim Final Rule for Small Entities?

The compliance and reporting requirements of the Interim Final Rule, and each of the alternatives considered together with their expected advantages and disadvantages, are described in the preamble above. The Department has attempted to keep new recordkeeping requirements to the minimum necessary for the Department to ascertain compliance and for the public to be aware of the primary documentation relied on by the employer to satisfy the statutory requirements. (See Section 212(n)(1) of the INA.) Moreover, most of the recordkeeping requirements already are imposed by other statutes, or only require retention of documents which, in any event, would be kept as a matter of prudent business practice.

Upon further review and consideration if the comments received, the Department has clarified several aspects of the rule. Among other items clarified are the documents to be kept in the public disclosure file and other documents which, in contrast, need not be segregated within the employer's system of records. (See § 655.760.)

In this connection, the Department also considered the use of performance rather than design standards in the regulations. The proposed rules discussed such alternatives, such as establishing a presumption of good faith recruitment based on the employer's hiring a significant number of U.S.

workers and, thereby, accomplishing a significant reduction in the ratio of H–1B workers to U.S. workers in the employer's workforce. (See IV.E.1, E.2, above.) The comments received on these proposals were negative and these alternatives were not included in the Interim Final Rule.

8. Can Small Entities Be Exempted From Coverage of the Rule, or Any Part of the Rule?

Exemption from coverage under this Interim Final Rule for small entities would not be appropriate under the terms of the controlling H–1B statutory mandates. The ACWIA contains no authority for the Department to grant such an exemption except to the extent that the statute itself grants an exemption (*e.g.*, the definition of ''H–1B-dependent employer''). Further, as discussed above, the Department believes that the impact on small businesses will not require significant, additional expenditures. The direct, incremental costs associated with the customary and usual business expenses for recruiting qualified job applicants and retaining qualified employees in specialized jobs should be minimally affected by implementation of this Rule. Most employers, including the smallest entities, should already have systems in place to meet the additional requirements prescribed by the ACWIA and this Rule.

VII. Small Business Regulatory Enforcement Fairness Act

The Department, in the NPRM, concluded that the proposed rule is not a ''major rule'' within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 801 *et seq.*. The rule will not likely result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S. based enterprises to compete with foreign-based enterprises in domestic or export markets.

Five commenters (ACIP, AILA, Hammond, ITAA and SBSC) responded to the Department's conclusion that this rule is not a ''major rule'' within the meaning of SBREFA. The commenters generally focused on their belief that the Department has underestimated the costs to employers of complying with the rule. They asserted that a reasonable, reliable estimate of costs would show that the rule is a major one requiring approval by Congress. ACIP and AILA contended that the Department has underestimated the cost of this rule to employers because it has not included in its analysis the costs to employers for legal services, training materials, computers, files and other systems necessary for compliance.

The Department believes that employer compliance with the additional requirements of the ACWIA will not require significant, additional expenditures as suggested by commenters. The direct, incremental costs associated with the customary and usual business expenses for recruiting qualified job applicants and retaining qualified employees in specialized jobs should be minimally affected by implementation of this rule. Those systems needed for compliance with the few additional requirements of the ACWIA should largely already be in place. The Department has concluded that collectively, the changes set forth in this Rule will not have an economically significant impact, and therefore the Rule is not a major rule under SBREFA.

VIII. Unfunded Mandates Reform Act of 1995; Executive Order 13132

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531 *et seq.*) directs agencies to assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector, ''* * * (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' The Department concluded in the NPRM that for purposes of the Unfunded Mandates Reform Act, this rule does not include any Federal mandate that may result in increased annual expenditures in excess of $100 million by State, local or tribal governments in the aggregate, or by the private sector. Moreover, the requirements of the Unfunded Mandates Reform Act do not apply to this Rule because it does not include a ''Federal mandate,'' which is defined to included either a ''Federal intergovernmental mandate'' or a ''Federal private sector mandate.'' 2 U.S.C. 658(6). Except in limited circumstances not applicable here, those terms do not include ''a duty arising from participation in a voluntary program.'' 2 U.S.C. 658(5)(A)(I)(II) and 7(A)(ii). A decision by an employer to obtain an H–1B worker is purely voluntary and the obligations arise ''from participation in a voluntary Federal program.''

AILA specifically took issue with the Department's description of the H–1B program as ''voluntary.'' AILA believes that there is very little that is ''voluntary'' about the H–1B program. Rather, that group asserts, Congress recognized an urgent need for additional qualified professionals in certain fields and responded to that need by enacting ACWIA. AILA describes the H–1B program as a ''government monopoly'' where businesses have no choice but to accept the burdensome requirements of the program if they are to obtain the highly skilled foreign workers necessary for their economic survival. While from an employer's perspective, use of the H–1B visa program may be an economic necessity, participation in the program remains voluntary since it applies only to employers who choose to participate in the program.

In addition, the Rule 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, within the meaning of Executive Order 13132. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

IX. Catalog of Federal Domestic Assistance Number

This program is listed in the Catalog of Federal Domestic Assistance at 17.252.

List of Subjects in 20 CFR Parts 655 and 656

Administrative practice and procedure, Agriculture, Aliens, Employment, Forest and forest products, Health professions, Immigration, Labor, Longshore work, Migrant labor, Penalties, Reporting requirements, Students, Wages.

The Interim Final Rule

Parts 655 and 656 of Chapter V of Title 20, Code of Federal Regulations, are amended as follows:

PART 655—TEMPORARY EMPLOYMENT OF ALIENS IN THE UNITED STATES

1. The table of contents for part 655, subparts H and I, is revised to read as follows:

Subpart H—Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models

655.700 What statutory provisions govern the employment of H–1B nonimmigrants and how do employers apply for an H–1B visa?

655.705 What federal agencies are involved in the H–1B program, and what are the

responsibilities of those agencies and of employers?
655.710 What is the procedure for filing a complaint?
655.715 Definitions
655.720 Where are labor condition applications to be filed and processed?
655.721 What are the addresses of the ETA regional offices which handle matters other than processing LCAs?
655.730 What is the process for filing a labor condition application?
655.731 What is the first LCA requirement, regarding wages?
655.732 What is the second LCA requirement, regarding working conditions?
655.733 What is the third LCA requirement, regarding strikes and lockouts?
655.734 What is the fourth LCA requirement, regarding notice?
655.735 What are the special provisions for short-term placement of H–1B nonimmigrants at place(s) of employment outside the area(s) of intended employment listed on the LCA?
655.736 What are H–1B-dependent employers and willful violators?
655.737 What are ''exempt'' H–1B nonimmigrants, and how does their employment affect the additional attestation obligations of H–1B-dependent employers and willful violator employers?
655.738 What are the ''non-displacement of U.S. workers'' obligations that apply to H–1B-dependent employers and willful violators, and how do they operate?
655.739 What is the ''recruitment of U.S. workers'' obligation that applies to H–1B-dependent employers and willful violators, and how does it operate?
655.740 What actions are taken on labor condition applications?
655.750 What is the validity period of the labor condition application?
655.760 What records are to be made available to the public, and what records are to be retained?

Subpart I—Enforcement of H–1B Labor Condition Applications

655.800 Who will enforce the LCAs and how will they be enforced?
655.801 What protection do employees have from retaliation?
655.805 What violations may the Administrator investigate?
655.806 Who may file a complaint and how is it processed?
655.807 How may someone who is not an ''aggrieved party'' allege violations, and how will those allegations be processed?
655.808 Under what circumstances may random investigations be conducted?
655.810 What remedies may be ordered if violations are found?
655.815 What are the requirements for the Administrator's determination?
655.820 How is a hearing requested?
655.825 What rules of practice apply to the hearing?
655.830 What rules apply to service of pleadings?
655.835 How will the administrative law judge conduct the proceeding?
655.840 What are the requirements for a decision and order of the administrative law judge?
655.845 What rules apply to appeal of the decision of the administrative law judge?
655.850 Who has custody of the administrative record?
655.855 What notice shall be given to the Employment and Training Administration and the Attorney General of the decision regarding violations?

2. The authority citation for Part 655 is revised to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H)(i) and (ii), 1182(m) and (n), 1184, 1188, and 1288(c) and (d); 29 U.S.C. 49 *et seq.*; sec. 3(c)(1), Pub.L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub.L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 323, Pub.L. 103–206, 107 Stat. 2149; Title IV, Pub.L. 105–277, 112 Stat. 2681; Pub.L. 106–95, 113 Stat. 1312 (8 U.S.C. 1182 note); and 8 CFR 213.2(h)(4)(i).

Section 655.00 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184, and 1188; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

Subparts A and C issued under 8 U.S.C. 1101(a)(150(H)(ii)(b) and 1184; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184, and 1188; and 29 U.S.C. 49 *et seq.*

Subparts D and E issued under 8 U.S.C. 1101(a)(15)(H)(i)(a), 1182(m), and 1184; 29 U.S.C. 49 *et seq.*; and sec. 3(c)(1), Pub.L. 101–238, 103 Stat. 2099, 2103 (8 U.S.C. 1182 note).

Subparts F and G issued under 8 U.S.C. 1184 and 1288(c); and 29 U.S.C. 49 *et seq.*

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and 1184; 29 U.S.C. 49 *et seq.*; sec 303(a)(8), Pub.L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1182 note); and Title IV, Pub.L. 105–277, 112 Stat. 2681.

Subparts J and K issued under 29 U.S.C. 49 *et seq.*; and sec 221(a), Pub.L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note).

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c), 1182 (m) and 1184; and 29 U.S.C. 49 *et seq.*

3. Section 655.700 is revised to read as follows:

§ 655.700 What statutory provisions govern the employment of H–1B nonimmigrants and how do employers apply for an H–1B visa?

(a) *Statutory provisions.* With respect to nonimmigrant workers entering the United States (U.S.) on H–1B visas, the Immigration and Nationality Act (INA), as amended, provides as follows:

(1) Establishes an annual ceiling (exclusive of spouses and children) on the number of foreign workers who may be issued H–1B visas—

(i) 195,000 in fiscal year 2001;

(ii) 195,000 in fiscal year 2002;

(iii) 195,000 in fiscal year 2003; and

(iv) 65,000 in each succeeding fiscal year;

(2) Defines the scope of eligible occupations for which nonimmigrants may be issued H–1B visas and specifies the qualifications that are required for entry as an H–1B nonimmigrant ;

(3) Requires an employer seeking to employ H–1B nonimmigrants to file a labor condition application (LCA) agreeing to various attestation requirements and have it certified by the Department of Labor (DOL) before a nonimmigrant may be provided H–1B status by the Immigration and Naturalization Service (INS); and

(4) Establishes an enforcement system under which DOL is authorized to determine whether an employer has engaged in misrepresentation or failed to meet a condition of the LCA, and is authorized to impose fines and penalties.

(b) *Procedure for obtaining an H–1B visa classification.* Before a nonimmigrant may be admitted to work in a ''specialty occupation'' or as a fashion model of distinguished merit and ability in the United States under the H–1B visa classification, there are certain steps which must be followed:

(1) First, an employer shall submit to DOL, and obtain DOL certification of, a labor condition application (LCA). The requirements for obtaining a certified LCA are provided in this subpart. The LCA (Form ETA 9035) and cover page (Form ETA 9035CP, containing the full attestation statements that are incorporated by reference in Form ETA 9035) may be obtained from *http://ows.doleta.gov,* from DOL regional offices, and from the Employment and Training Administration (ETA) national office. Employers are encouraged to utilize the electronic filing system developed by ETA to expedite the certification process (see § 655.720).

(2) After obtaining DOL certification of an LCA, the employer may submit a nonimmigrant visa petition (INS Form I–129), together with the certified LCA, to INS, requesting H–1B classification for the foreign worker. The requirements concerning the submission of a petition to, and its processing by, INS are set forth in INS regulations. The INS petition (Form I–129) may be obtained from an INS district or area office.

(3) If INS approves the H–1B classification, the nonimmigrant then may apply for an H–1B visa abroad at a consular office of the Department of State. If the nonimmigrant is already in the United States in a status other than H–1B, he/she may apply to the INS for a change of visa status.

(c) *Applicability.* (1) This subpart H and subpart I of this part apply to all employers seeking to employ foreign workers under the H–1B visa

classification in specialty occupations or as fashion models of distinguished merit and ability.

(2) During the period that the provisions of Appendix 1603.D.4 of Annex 1603 of the North American Free Trade Agreement (NAFTA) apply, this subpart H and subpart I of this part shall apply (except for the provisions relating to the recruitment and displacement of U.S. workers (see §§ 655.738 and 655.739)) to the entry and employment of a nonimmigrant who is a citizen of Mexico under and pursuant to the provisions of section D or Annex 1603 of NAFTA in the case of all professions set out in Appendix 1603.D.1 of Annex 1603 of NAFTA other than registered nurses. Therefore, the references in this part to ''H–1B nonimmigrant'' apply to any Mexican citizen nonimmigrant who is classified by INS as ''TN.'' In the case of a registered nurse, the following provisions shall apply: subparts D and E of this part or the Nursing Relief for Disadvantaged Areas Act of 1999 (Public Law 106–95) and the regulations issued thereunder, 20 CFR part 655, subparts L and M.

4. Section 655.705 is revised to read as follows:

§ 655.705 What federal agencies are involved in the H–IB program, and what are the responsibilities of those agencies and of employers?

Three federal agencies (Department of Labor, Department of State, and Department of Justice) are involved in the process relating to H–1B nonimmigrant classification and employment. The employer also has continuing responsibilities under the process. This section briefly describes the responsibilities of each of these entities.

(a) *Department of Labor (DOL) responsibilities.* DOL administers the labor condition application process and enforcement provisions (exclusive of complaints regarding non-selection of U.S. workers, as described in 8 U.S.C. 1182(n)(1)(G)(i)(II) and 1182(n)(5)). Two DOL agencies have responsibilities:

(1) The Employment and Training Administration (ETA) is responsible for receiving and certifying labor condition applications (LCAs) in accordance with this subpart H. ETA is also responsible for compiling and maintaining a list of LCAs and makes such list available for public examination at the Department of Labor, 200 Constitution Avenue, NW., Room C–4318, Washington, DC 20210.

(2) The Wage and Hour Division of the Employment Standards Administration (ESA) is responsible, in accordance with subpart I of this part, for investigating and determining an employer's misrepresentation in or failure to comply with LCAs in the employment of H–1B nonimmigrants.

(b) *Department of Justice (DOJ) and Department of State (DOS) responsibilities.* The Department of State, through U.S. Embassies and Consulates, is responsible for issuing H–1B visas. The Department of Justice, through the Immigration and Naturalization Service (INS), accepts the employer's petition (INS Form I–129) with the DOL-certified LCA attached. INS is responsible for approving the nonimmigrant's H–1B visa classification. In doing so, the INS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the labor condition application is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements for H–1B visa classification. If the petition is approved, INS will notify the U.S. Consulate where the nonimmigrant intends to apply for the visa unless the nonimmigrant is in the U.S. and eligible to adjust status without leaving this country. See 8 U.S.C. 1255(h)(2)(B)(i). The Department of Justice administers the system for the enforcement and disposition of complaints regarding an H–1B-dependent employer's or willful violator employer's failure to offer a position filled by an H–1B nonimmigrant to an equally or better qualified United States worker (8 U.S.C. 1182(n)(1)(E), 1182(n)(5)), or such employer's willful misrepresentation of material facts relating to this obligation. The Department of Justice, through the INS, is responsible for disapproving H–1B and other petitions filed by an employer found to have engaged in misrepresentation or failed to meet certain conditions of the labor condition application (8 U.S.C. 1182(n)(2)(C)(i)–(iii); 1182(n)(5)(E)).

(c) *Employer's responsibilities.* Each employer seeking an H–1B nonimmigrant in a specialty occupation or as a fashion model of distinguished merit and ability has several responsibilities, as described more fully in this subpart and subpart I, including—

(1) The employer shall submit a completed labor condition application (LCA) on Form ETA 9035 in the manner prescribed in § 655.720. By completing and signing the LCA, the employer agrees to several attestations regarding an employer's responsibilities, including the wages, working conditions, and benefits to be provided to the H–1B nonimmigrants (8 U.S.C. 1182(n)(1)); these attestations are specifically identified and incorporated by reference in the LCA, as well as being set forth in full on Form ETA 9035CP. The LCA contains additional attestations for certain H–1B-dependent employers and employers found to have willfully violated the H–1B program requirements; these attestations impose certain obligations to recruit U.S. workers, to offer positions to U. S. workers who are equally or better qualified than the H–1B nonimmigrant(s), and to avoid the displacement of U.S. workers (either in the employer's workforce or in the workforce of a second employer with whom the H–1B nonimmigrant(s) is placed with indicia of employment by that employer (8 U.S.C. 1182(n)(1)(E)–(G)). These additional attestations are specifically identified and incorporated by reference in the LCA, as well as being set forth in full on Form ETA 9035CP. If the LCA is certified by ETA, a copy will be returned to the employer.

(2) The employer shall make the LCA and necessary supporting documentation (as identified under this subpart) available for public examination at the employer's principal place of business in the U.S. or at the place of employment within one working day after the date on which the LCA is filed with ETA.

(3) The employer then may submit a copy of the certified LCA to INS with a completed petition (INS Form I–129) requesting H–1B classification.

(4) The employer shall not allow the nonimmigrant worker to begin work until INS grants the worker authorization to work in the United States for that employer or, in the case of a nonimmigrant who is already in H–1B status and is changing employment to another H–1B employer, until the new employer files a petition supported by a certified LCA.

(5) The employer shall develop sufficient documentation to meet its burden of proof with respect to the validity of the statements made in its LCA and the accuracy of information provided, in the event that such statement or information is challenged. The employer shall also maintain such documentation at its principal place of business in the U.S. and shall make such documentation available to DOL for inspection and copying upon request.

5. Section 655.710 is revised to read as follows:

§ 655.710 What is the procedure for filing a complaint?

(a) Except as provided in paragraph (b) of this section, complaints concerning misrepresentation in the labor condition application or failure of the employer to meet a condition specified in the application shall be filed with the Administrator, Wage and Hour Division (Administrator), ESA, according to the procedures set forth in subpart I of this part. The Administrator shall investigate where appropriate, and after an opportunity for a hearing, assess appropriate sanctions and penalties, as described in subpart I of this part.

(b) Complaints arising under section 212(n)(1)(G)(i)(II) of the INA, 8 U.S.C. 1182(n)(1)(G)(i)(II), alleging failure of the employer to offer employment to an equally or better qualified U.S. worker, or an employer's misrepresentation regarding such offer(s) of employment, may be filed with the Department of Justice, 10th Street & Constitution Avenue, NW., Washington, DC 20530. The Department of Justice shall investigate where appropriate and shall take such further action as may be appropriate under that Department's regulations and procedures.

6. Section § 655.715 is amended to revise the definition of ''Area of intended employment'', to add the definition of ''Employed, employed by the employer or employment relationship'', to revise the definition of ''Employer'', to revise the definition of ''Employment and Training Administration (ETA)'', to add the definition of ''Office of Workforce Security (OWS)'', to revise the definitions of ''Place of employment'' and ''State Employment Security Agency (SESA)'', to remove the definition of ''United States Employment Service'', and to add the definition of ''United States worker (U.S. worker)'', to read as follows:

§ 655.715 Definitions.

Area of intended employment means the area within normal commuting distance of the place (address) of employment where the H–1B nonimmigrant is or will be employed. There is no rigid measure of distance which constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (*e.g.,* normal commuting distances might be 20, 30, or 50 miles). If the place of employment is within a Metropolitan Statistical Area (MSA) or a Primary Metropolitan Statistical Area (PMSA), any place within the MSA or PMSA is deemed to be within normal commuting distance of the place of employment; however, all locations within a Consolidated Metropolitan Statistical Area (CMSA) will not automatically be deemed to be within normal commuting distance. The borders of MSAs and PMSAs are not controlling with regard to the identification of the normal commuting area; a location outside of an MSA or PMSA (or a CMSA) may be within normal commuting distance of a location that is inside (*e.g.,* near the border of) the MSA or PMSA (or CMSA).

* * * * *

Employed, employed by the employer, or employment relationship means the employment relationship as determined under the common law, under which the key determinant is the putative employer's right to control the means and manner in which the work is performed. Under the common law, ''no shorthand formula or magic phrase * * * can be applied to find the answer * * *. [A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive.'' *NLRB* v. *United Ins. Co. of America,* 390 U.S. 254, 258 (1968).

Employer means a person, firm, corporation, contractor, or other association or organization in the United States which has an employment relationship with H–1B nonimmigrants and/or U.S. worker(s). The person, firm, contractor, or other association or organization in the United States which files a petition on behalf of an H–1B nonimmigrant is deemed to be the employer of that H–1B nonimmigrant.

Employment and Training Administration (ETA) means the agency within the Department which includes the Office of Workforce Security (OWS).

* * * * *

Office of Workforce Security (OWS) means the agency of the Department which is charged with administering the national system of public employment offices.

Place of employment means the worksite or physical location where the work actually is performed.

(1) The term does not include any location where either of the following criteria—paragraph (1)(i) or (ii)—is satisfied:

(i) *Employee developmental activity.* An H–1B worker who is stationed and regularly works at one location may temporarily be at another location for a particular individual or employer-required developmental activity such as a management conference, a staff seminar, or a formal training course (other than ''on-the-job-training'' at a location where the employee is stationed and regularly works). For the H–1B worker participating in such activities, the location of the activity would not be considered a ''place of employment'' or ''worksite,'' and that worker's presence at such location—whether owned or controlled by the employer or by a third party—would not invoke H–1B program requirements with regard to that employee at that location. However, if the employer uses H–1B nonimmigrants as instructors or resource or support staff who continuously or regularly perform their duties at such locations, the locations would be ''places of employment'' or ''worksites'' for any such employees and, thus, would be subject to H–1B program requirements with regard to those employees.

(ii) *Particular worker's job functions.* The nature and duration of an H–1B nonimmigrant's job functions may necessitate frequent changes of location with little time spent at any one location. For such a worker, a location would not be considered a ''place of employment'' or ''worksite'' if the following three requirements (*i.e.,* paragraphs (1)(ii)(A) through (C)) are all met—

(A) The nature and duration of the H–1B worker's job functions mandates his/her short-time presence at the location. For this purpose, either:

(*1*) The H–1B nonimmigrant's job must be peripatetic in nature, in that the normal duties of the worker's occupation (rather than the nature of the employer's business) requires frequent travel (local or non-local) from location to location; or

(*2*) The H–1B worker's duties must require that he/she spend most work time at one location but occasionally travel for short periods to work at other locations; and

(B) The H–1B worker's presence at the locations to which he/she travels from the ''home'' worksite is on a casual, short-term basis, which can be recurring but not excessive (*i.e.,* not exceeding five consecutive workdays for any one visit by a peripatetic worker, or 10 consecutive workdays for any one visit by a worker who spends most work time at one location and travels occasionally to other locations); and

(C) The H–1B nonimmigrant is not at the location as a ''strikebreaker'' (*i.e.,* the H–1B nonimmigrant is not performing work in an occupation in which workers are on strike or lockout).

(2) Examples of ''non-worksite'' locations based on worker's job functions: A computer engineer sent out to customer locations to ''troubleshoot'' complaints regarding software malfunctions; a sales representative

making calls on prospective customers or established customers within a ''home office'' sales territory; a manager monitoring the performance of out-stationed employees; an auditor providing advice or conducting reviews at customer facilities; a physical therapist providing services to patients in their homes within an area of employment; an individual making a court appearance; an individual lunching with a customer representative at a restaurant; or an individual conducting research at a library.

(3) Examples of ''worksite'' locations based on worker's job functions: A computer engineer who works on projects or accounts at different locations for weeks or months at a time; a sales representative assigned on a continuing basis in an area away from his/her ''home office;'' an auditor who works for extended periods at the customer's offices; a physical therapist who ''fills in'' for full-time employees of health care facilities for extended periods; or a physical therapist who works for a contractor whose business is to provide staffing on an ''as needed'' basis at hospitals, nursing homes, or clinics.

(4) Whenever an H–1B worker performs work at a location which is not a ''worksite'' (under the criterion in paragraph (1)(i) or (1)(ii) of this definition), that worker's ''place of employment'' or ''worksite'' for purposes of H–1B obligations is the worker's home station or regular work location. The employer's obligations regarding notice, prevailing wage and working conditions are focused on the home station ''place of employment'' rather than on the above-described location(s) which do not constitute worksite(s) for these purposes. However, whether or not a location is considered to be a ''worksite''/''place of employment'' for an H–1B nonimmigrant, the employer is required to provide reimbursement to the H–1B nonimmigrant for expenses incurred in traveling to that location on the employer's business, since such expenses are considered to be ordinary business expenses of employers (§§ 655.731(c)(7)(iii)(C); 655.731(c)(9)). In determining the worker's ''place of employment'' or ''worksite,'' the Department will look carefully at situations which appear to be contrived or abusive; the Department would seriously question any situation where the H–1B nonimmigrant's purported ''place of employment'' is a location other than where the worker spends most of his/her work time, or where the purported ''area of employment'' does not include the location(s) where the worker spends most of his/her work time.

* * * * *

State Employment Security Agency (SESA) means the State agency designated under section 4 of the Wagner-Peyser Act to cooperate with OWS in the operation of the national system of public employment offices.

* * * * *

United States worker (''U.S. worker'') means an employee who is either

(1) A citizen or national of the United States, or

(2) An alien who is lawfully admitted for permanent residence in the United States, is admitted as a refugee under section 207 of the INA, is granted asylum under section 208 of the INA, or is an immigrant otherwise authorized (by the INA or by the Attorney General) to be employed in the United States.

7. Section 655.720 is revised to read as follows:

§ 655.720 Where are labor condition applications to be filed and processed?

(a) *Facsimile transmission (FAX).* If the employer submits the LCA (Form ETA 9035) by FAX, the transmission shall be made to 1–800–397–0478 (regardless of the intended place of employment for the H–1B nonimmigrant(s)). (Note to paragraph (a): The employer submitting an LCA via FAX shall not use the FAX number assigned to an ETA regional office, but shall use only the 1–800–397–0478 number designated for this purpose.) The cover pages to Form ETA 9035 (*i.e.,* Form ETA 9035CP) should not be FAXed with the Form ETA 9035.

(b) *U.S. Mail.* If the employer submits the LCA (Form ETA 9035) by U.S. Mail, the LCA shall be sent to the ETA service center at the following address: ETA Application Processing Center, P.O. Box 13640, Philadelphia PA 19101.

(c) *All matters other than the processing of LCAs* (*e.g.,* prevailing wage challenges by employers) are within the jurisdiction of the Regional Certifying Officers in the ETA regional offices identified in § 655.721.

8. Section 655.721 is added to read as follows:

§ 655.721 What are the addresses of the ETA regional offices which handle matters other than processing LCAs?

(a) The Regional Certifying Officers in the ETA regional offices are responsible for administrative matters under this subpart other than the processing of LCAs (*e.g.,* prevailing wage challenges by employers). (Note to paragraph (a): LCAs are filed by employers and processed by ETA only in accordance with § 655.720.)

(b) The ETA regional offices with responsibility for labor certification programs are—

(1) Region I Boston (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont): J.F.K. Federal Building, Room E–350, Boston, Massachusetts 02203. Telephone: 617–565–4446.

(2) Region I New York (New York, New Jersey, Puerto Rico, and the Virgin Islands): 201 Varick Street, Room 755, New York, New York 10014. Telephone: 212–337–2186.

(3) Region II (Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia): Suite 825 East, The Curtis Center, 170 S. Independence Mall West, Philadelphia, Pennsylvania 19106–3315. Telephone: 215–861–5250.

(4) Region III (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee): Atlanta Federal Ctr., 100 Alabama St., NW, Suite 6M–12, Atlanta, Georgia 30303. Telephone: 404–562–2115.

(5) Region IV (Arkansas, Colorado, Louisiana, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah, and Wyoming): 525 Griffin Street, Room 317, Dallas, Texas 75202. Telephone: 214–767–4989.

(6) Region V (Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin): 230 South Dearborn Street, Room 605, Chicago, Illinois 60604. Telephone: 312–353–1550.

(7) Region VI (Alaska, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon, and Washington): P.O. Box 193767, San Francisco, California 94119–3767. Telephone: 415–975–4601.

(c) The ETA website at *http://ows.doleta.gov* will be updated to reflect any changes in the information contained in this section concerning the ETA regional offices.

9. Section 655.730 is revised to read as follows:

§ 655.730 What is the process for filing a labor condition application?

(a) *Who must submit labor condition applications?* An employer, or the employer's authorized agent or representative, which meets the definition of ''employer'' set forth in § 655.715 and intends to employ an H–1B nonimmigrant in a specialty occupation or as a fashion model of distinguished merit and ability shall submit an LCA to the Department.

(b) *Where and when is an LCA to be submitted?* An LCA shall be submitted by the employer to ETA in accordance with the procedure prescribed in

§ 655.720 no earlier than six months before the beginning date of the period of intended employment shown on the LCA. It is the employer's responsibility to ensure that a complete and accurate LCA is received by ETA. Incomplete or obviously inaccurate LCAs will not be certified by ETA. ETA shall process all LCAs sequentially upon receipt regardless of the method used by the employer to submit the LCA (*i.e.,* either FAX or U.S. Mail as prescribed in § 655.720) and shall make a determination to certify or not certify the LCA within seven working days of the date the LCA is received and date stamped by ETA. If the LCA is submitted by FAX, the LCA containing the original signature shall be maintained by the employer as set forth at § 655.760(a)(1).

(c) *What is to be submitted?* Form ETA 9035.

(1) *General.* One completed and dated original Form ETA 9035 bearing the employer's original signature (or that of the employer's authorized agent or representative) shall be submitted by the employer to ETA in accordance with the procedure prescribed in § 655.720. The signature of the employer or its authorized agent or representative on Form ETA 9035 acknowledges the employer's agreement to the labor condition statements (attestations), which are specifically identified in Form ETA 9035 as well as set forth in the cover pages (Form ETA 9035CP) and incorporated by reference in Form ETA 9035. The labor condition statements (attestations) are described in detail in §§ 655.731 through 655.735, and 655.736 through 655.739 (if applicable). Copies of Form ETA 9035 and cover pages Form ETA 9035CP are available from ETA regional offices and on the ETA website at *http://ows.doleta.gov.* Each Form ETA 9035 shall identify the occupational classification for which the LCA is being submitted and shall state:

(i) The occupation, by Dictionary of Occupational Titles (DOT) Three-Digit Occupational Groups code and by the employer's own title for the job;

(ii) The number of H–1B nonimmigrants sought;

(iii) The gross wage rate to be paid to each H–1B nonimmigrant, expressed on an hourly, weekly, biweekly, monthly or annual basis;

(iv) The starting and ending dates of the H–1B nonimmigrants' employment;

(v) The place(s) of intended employment;

(vi) The prevailing wage for the occupation in the area of intended employment and the specific source (*e.g.,* name of published survey) relied upon by the employer to determine the wage. If the wage is obtained from a SESA, the appropriate box must be checked and the wage must be stated; the source for a wage obtained from a source other than a SESA must be identified along with the wage; and

(vii) The employer's status as to whether or not the employer is H–1B-dependent and/or a willful violator, and, if the employer is H–1B-dependent and/or a willful violator, whether the employer will use the application only in support of petitions for exempt H–1B nonimmigrants.

(2) *Multiple positions and/or places of employment.* The employer shall file a separate LCA for each occupation in which the employer intends to employ one or more H–1B nonimmigrants, but the LCA may cover more than one intended position (employment opportunity) within that occupation. All intended places of employment shall be identified on the LCA; the employer may file one or more additional LCAs to identify additional places of employment.

(3) *Full-time and part-time jobs.* The position(s) covered by the LCA may be either full-time or part-time; full-time and part-time positions cannot be combined on a single LCA.

(d) *What attestations does the LCA contain?* An employer's LCA shall contain the labor condition statements referenced in §§ 655.731 through 655.734, and § 655.736 through 655.739 (if applicable), which provide that no individual may be admitted or provided status as an H–1B nonimmigrant in an occupational classification unless the employer has filed with the Secretary an application stating that:

(1) The employer is offering and will offer during the period of authorized employment to H–1B nonimmigrants no less than the greater of the following wages (such offer to include benefits and eligibility for benefits provided as compensation for services, which are to be offered to the nonimmigrants on the same basis and in accordance with the same criteria as the employer offers such benefits to U.S. workers):

(i) The actual wage paid to the employer's other employees at the worksite with similar experience and qualifications for the specific employment in question; or

(ii) The prevailing wage level for the occupational classification in the area of intended employment;

(2) The employer will provide working conditions for such nonimmigrants that will not adversely affect the working conditions of workers similarly employed (including benefits in the nature of working conditions, which are to be offered to the nonimmigrants on the same basis and in accordance with the same criteria as the employer offers such benefits to U.S. workers);

(3) There is not a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment;

(4) The employer has provided and will provide notice of the filing of the labor condition application to:

(i)(A) The bargaining representative of the employer's employees in the occupational classification in the area of intended employment for which the H–1B nonimmigrants are sought, in the manner described in § 655.734(a)(1)(i); or

(B) If there is no such bargaining representative, affected workers by providing electronic notice of the filing of the LCA or by posting notice in conspicuous locations at the place(s) of employment, in the manner described in § 655.734(a)(1)(ii); and

(ii) H–1B nonimmigrants by providing a copy of the LCA to each H–1B nonimmigrant at the time that such nonimmigrant actually reports to work, in the manner described in § 655.734(a)(2).

(5) The employer has determined its status concerning H–1B-dependency and/or willful violator (as described in § 655.736), has indicated such status, and if either such status is applicable to the employer, has indicated whether the LCA will be used only for exempt H–1B nonimmigrant(s), as described in § 655.737.

(6) The employer has provided the information about the occupation required in paragraph (c) of this section.

(e) *Change in employer's corporate structure or identity.* (1) Where an employer corporation changes its corporate structure as the result of an acquisition, merger, ''spin-off,'' or other such action, the new employing entity is not required to file new LCAs and H–1B petitions with respect to the H–1B nonimmigrants transferred to the employ of the new employing entity (regardless of whether there is a change in the Employer Identification Number (EIN)), *provided that* the new employing entity maintains in its records a list of the H–1B nonimmigrants transferred to the employ of the new employing entity, and maintains in the public access file(s) (see § 655.760) a document containing all of the following:

(i) Each affected LCA number and its date of certification;

(ii) A description of the new employing entity's actual wage system applicable to H–1B nonimmigrant(s)

who become employees of the new employing entity;

(iii) The employer identification number (EIN) of the new employing entity (whether or not different from that of the predecessor entity); and

(iv) A sworn statement by an authorized representative of the new employing entity expressly acknowledging such entity's assumption of all obligations, liabilities and undertakings arising from or under attestations made in each certified and still effective LCA filed by the predecessor entity. Unless such statement is executed and made available in accordance with this paragraph, the new employing entity shall not employ any of the predecessor entity's H–1B nonimmigrants without filing new LCAs and petitions for such nonimmigrants. The new employing entity's statement shall include such entity's explicit agreement to:

(A) Abide by the DOL's H–1B regulations applicable to the LCAs;

(B) Maintain a copy of the statement in the public access file (see § 655.760); and

(C) Make the document available to any member of the public or the Department upon request.

(2) Notwithstanding the provisions of paragraph (e)(1) of this section, the new employing entity must file new LCA(s) and H–1B petition(s) when it hires any new H–1B nonimmigrant(s) or seeks extension(s) of H–1B status for existing H–1B nonimmigrant(s). In other words, the new employing entity may not utilize the predecessor entity's LCA(s) to support the hiring or extension of any H–1B nonimmigrant after the change in corporate structure.

(3) A change in an employer's H–1B-dependency status which results from the change in the corporate structure has no effect on the employer's obligations with respect to its current H–1B nonimmigrant employees. However, the new employing entity shall comply with § 655.736 concerning H–1B-dependency and/or willful-violator status and § 655.737 concerning exempt H–1B nonimmigrants, in the event that such entity seeks to hire new H–1B nonimmigrant(s) or to extend the H–1B status of existing H–1B nonimmigrants. (See § 655.736(d)(6).)

10. Section 655.731 is revised to read as follows:

§ 655.731 What is the first LCA requirement, regarding wages?

An employer seeking to employ H–1B nonimmigrants in a specialty occupation or as a fashion model of distinguished merit and ability shall state on Form ETA 9035 that it will pay the H–1B nonimmigrant the required wage rate.

(a) *Establishing the wage requirement.* The first LCA requirement shall be satisfied when the employer signs Form ETA 9035 attesting that, for the entire period of authorized employment, the required wage rate will be paid to the H–1B nonimmigrant(s); that is, that the wage shall be the greater of the actual wage rate (as specified in paragraph (a)(1) of this section) or the prevailing wage (as specified in paragraph (a)(2) of this section). The wage requirement includes the employer's obligation to offer benefits and eligibility for benefits provided as compensation for services to H–1B nonimmigrants on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers.

(1) The *actual wage* is the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question. In determining such wage level, the following factors may be considered: Experience, qualifications, education, job responsibility and function, specialized knowledge, and other legitimate business factors. ''Legitimate business factors,'' for purposes of this section, means those that it is reasonable to conclude are necessary because they conform to recognized principles or can be demonstrated by accepted rules and standards. Where there are other employees with substantially similar experience and qualifications in the specific employment in question—*i.e.,* they have substantially the same duties and responsibilities as the H–1B nonimmigrant—the actual wage shall be the amount paid to these other employees. Where no such other employees exist at the place of employment, the actual wage shall be the wage paid to the H–1B nonimmigrant by the employer. Where the employer's pay system or scale provides for adjustments during the period of the LCA—*e.g.,* cost of living increases or other periodic adjustments, or the employee moves to a more advanced level in the same occupation—such adjustments shall be provided to similarly employed H–1B nonimmigrants (unless the prevailing wage is higher than the actual wage).

(2) The *prevailing wage* for the occupational classification in the area of intended employment must be determined as of the time of filing the application. The employer shall base the prevailing wage on the best information as of the time of filing the application. Except as provided in paragraph (a)(3) of this section, the employer is not required to use any specific methodology to determine the prevailing wage and may utilize a SESA, an independent authoritative source, or other legitimate sources of data. One of the following sources shall be used to establish the prevailing wage:

(i) A wage determination for the occupation and area issued under one of the following statutes (which shall be available through the SESA):

(A) The Davis-Bacon Act, 40 U.S.C. 276a *et seq.* (see also 29 CFR part 1), or

(B) The McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.* (SCA) (see also 29 CFR part 4). The following provisions apply to the use of the SCA wage rate as the prevailing wage:

(*1*) Where an SCA wage determination for an occupational classification in the computer industry states a rate of $27.63, that rate will not be issued by the SESA and may not be used by the employer as the prevailing wage; that rate does not represent the actual prevailing wage but, instead, is reported by the Wage and Hour Division in the SCA determination merely as an artificial ''cap'' in the SCA-required wage that results from an SCA exemption provision (see 41 U.S.C. 357(b); 29 CFR 541.3). In such circumstances, the SESA and the employer must consult another source for wage information (*e.g.,* Bureau of Labor Statistics' Occupational Employment Statistics Survey).

(*2*) Except as provided in paragraph (a)(2)(i)(B)(*1*) of this section, for purposes of the determination of the H–1B prevailing wage for an occupational classification through the use of an SCA wage determination, it is irrelevant whether a worker is employed on a contract subject to the SCA or whether the worker would be exempt from the SCA through application of the SCA/FLSA ''professional employee'' exemption test (*i.e.,* duties and compensation; see 29 CFR 4.156; 541.3). Thus, in issuing the SCA wage rate as the prevailing wage determination for the occupational classification, the SESA will not consider questions of employee exemption, and in an enforcement action, the Department will consider the SCA wage rate to be the prevailing wage without regard to whether any particular H–1B employee(s) could be exempt from that wage as SCA contract workers under the SCA/FLSA exemption. An employer who employs H–1B employee(s) to perform services under an SCA-covered contract may find that the H–1B employees are required to be paid the SCA rate as the H–1B prevailing wage even though non-H–1B employees

performing the same services may be exempt from the SCA.

(ii) A union contract which was negotiated at arms-length between a union and the employer, which contains a wage rate applicable to the occupation; or

(iii) If the job opportunity is in an occupation which is not covered by paragraph (a)(2)(i) or (ii) of this section, the prevailing wage shall be the weighted average rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wages paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers. Since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within five percent of the average rate of wages. See paragraph (c) of this section, regarding payment of required wages. See also paragraph (d)(4) of this section, regarding enforcement. The prevailing wage rate under this paragraph (a)(2)(iii) shall be based on the best information available. The Department believes that the following prevailing wage sources are, in order of priority, the most accurate and reliable:

(A) *A SESA Determination.* Upon receipt of a written request for a prevailing wage determination, the SESA will determine whether the occupation is covered by a Davis-Bacon or Service Contract Act wage determination, and, if not, whether it has on file current prevailing wage information for the occupation. This information will be provided by the SESA to the employer in writing in a timely manner. Where the prevailing wage is not immediately available, the SESA will determine the prevailing wage using the methods outlined at 20 CFR 656.40 and other administrative guidelines or regulations issued by ETA. The SESA shall specify the validity period of the prevailing wage, which shall in no event be for less than 90 days or more than one year from the date of the SESA's issuance of the determination.

(*1*) An employer who chooses to utilize a SESA prevailing wage determination shall file the labor condition application within the validity period of the prevailing wage as specified on the determination. Once an employer obtains a prevailing wage determination from the SESA and files an LCA supported by that prevailing wage determination, the employer is deemed to have accepted the prevailing wage determination (as to the amount of the wage) and thereafter may not contest the legitimacy of the prevailing wage determination through the Employment Service complaint system or in an investigation or enforcement action. Prior to filing the LCA, the employer may challenge a SESA prevailing wage determination through the Employment Service complaint system, by filing a complaint with the SESA. See subpart E of 20 CFR part 658. Employers which challenge a SESA prevailing wage determination must obtain a final ruling from the Employment Service complaint system prior to filing an LCA based on such determination. In any challenge, the SESA shall not divulge any employer wage data which was collected under the promise of confidentiality.

(*2*) If the employer is unable to wait for the SESA to produce the requested prevailing wage determination for the occupation in question, or for the Employment Service complaint system process to be completed, the employer may rely on other legitimate sources of available wage information in filing the LCA, as set forth in paragraph (a)(2)(iii)(B) and (C) of this section. If the employer later discovers, upon receipt of a prevailing wage determination from the SESA, that the information relied upon produced a wage that was below the prevailing wage for the occupation in the area of intended employment and the employer was paying below the SESA-determined wage, no wage violation will be found if the employer retroactively compensates the H–1B nonimmigrant(s) for the difference between the wage paid and the prevailing wage, within 30 days of the employer's receipt of the SESA determination.

(*3*) In all situations where the employer obtains the prevailing wage determination from the SESA, the Department will accept that prevailing wage determination as correct (as to the amount of the wage) and will not question its validity where the employer has maintained a copy of the SESA prevailing wage determination. A complaint alleging inaccuracy of a SESA prevailing wage determination, in such cases, will not be investigated.

(B) *An independent authoritative source.* The employer may use an independent authoritative wage source in lieu of a SESA prevailing wage determination. The independent authoritative source survey must meet all the criteria set forth in paragraph (b)(3)(iii)(B) of this section.

(C) *Another legitimate source of wage information.* The employer may rely on other legitimate sources of wage data to obtain the prevailing wage. The other legitimate source survey must meet all the criteria set forth in paragraph (b)(3)(iii)(C) of this section. The employer will be required to demonstrate the legitimacy of the wage in the event of an investigation.

(iv) For purposes of this section, ''similarly employed'' means ''having substantially comparable jobs in the occupational classification in the area of intended employment,'' except that if no such workers are employed by employers other than the employer applicant in the area of intended employment, ''similarly employed'' means:

(A) Having jobs requiring a substantially similar level of skills within the area of intended employment; or

(B) If there are no substantially comparable jobs in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

(v) A prevailing wage determination for LCA purposes made pursuant to this section shall not permit an employer to pay a wage lower than that required under any other applicable Federal, State or local law.

(vi) Where a range of wages is paid by the employer to individuals in an occupational classification or among individuals with similar experience and qualifications for the specific employment in question, a range is considered to meet the prevailing wage requirement so long as the bottom of the wage range is at least the prevailing wage rate.

(vii) The employer shall enter the prevailing wage on the LCA in the form in which the employer will pay the wage (*i.e.,* either a salary or an hourly rate), except that in all cases the prevailing wage must be expressed as an hourly wage if the H–1B nonimmigrant will be employed part-time. Where an employer obtains a prevailing wage determination (from any of the sources identified in paragraph (a)(2)(i) through (iii) of this section) that is expressed as an hourly rate, the employer may convert this determination to a salary by multiplying the hourly rate by 2080. Conversely, where an employer obtains a prevailing wage (from any of these sources) that is expressed as a salary, the employer may convert this determination to an hourly rate by dividing the salary by 2080.

(viii) In computing the prevailing wage for a job opportunity in an occupational classification in an area of intended employment in the case of an employee of an institution of higher education or an affiliated or related nonprofit entity , a nonprofit research

organization, or a Governmental research organization as these terms are defined in 20 CFR 656.40(c), the prevailing wage level shall only take into account employees at such institutions and organizations in the area of intended employment.

(ix) An employer may file more than one LCA for the same occupational classification in the same area of employment and, in such circumstances, the employer could have H–1B employees in the same occupational classification in the same area of employment, brought into the U.S. (or accorded H–1B status) based on petitions approved pursuant to different LCAs (filed at different times) with different prevailing wage determinations. Employers are advised that the prevailing wage rate as to any particular H–1B nonimmigrant is prescribed by the LCA which supports that nonimmigrant's H–1B petition. The employer is required to obtain the prevailing wage at the time that the LCA is filed (see paragraph (a)(2) of this section). The LCA is valid for the period certified by ETA, and the employer must satisfy all the LCA's requirements (including the required wage which encompasses both prevailing and actual wage rates) for as long as any H–1B nonimmigrants are employed pursuant to that LCA (§ 655.750). Where new nonimmigrants are employed pursuant to a new LCA, that new LCA prescribes the employer's obligations as to those new nonimmigrants. The prevailing wage determination on the later/subsequent LCA does not ''relate back'' to operate as an ''update'' of the prevailing wage for the previously-filed LCA for the same occupational classification in the same area of employment. However, employers are cautioned that the actual wage component to the required wage may, as a practical matter, eliminate any wage-payment differentiation among H–1B employees based on different prevailing wage rates stated in applicable LCAs. Every H–1B nonimmigrant is to be paid in accordance with the employer's actual wage system, and thus to receive any pay increases which that system provides.

(3) Once the prevailing wage rate is established, the H–1B employer then shall compare this wage with the actual wage rate for the specific employment in question at the place of employment and must pay the H–1B nonimmigrant at least the higher of the two wages.

(b) *Documentation of the wage statement.* (1) The employer shall develop and maintain documentation sufficient to meet its burden of proving the validity of the wage statement required in paragraph (a) of this section and attested to on Form ETA 9035. The documentation shall be made available to DOL upon request. Documentation shall also be made available for public examination to the extent required by § 655.760. The employer shall also document that the wage rate(s) paid to H–1B nonimmigrant(s) is(are) no less than the required wage rate(s). The documentation shall include information about the employer's wage rate(s) for all other employees for the specific employment in question at the place of employment, beginning with the date the labor condition application was submitted and continuing throughout the period of employment. The records shall be retained for the period of time specified in § 655.760. The payroll records for each such employee shall include:

(i) Employee's full name;

(ii) Employee's home address;

(iii) Employee's occupation;

(iv) Employee's rate of pay;

(v) Hours worked each day and each week by the employee if:

(A) The employee is paid on other than a salary basis (*e.g.,* hourly, piece-rate; commission); or

(B) With respect only to H–1B nonimmigrants, the worker is a part-time employee (whether paid a salary or an hourly rate).

(vi) Total additions to or deductions from pay each pay period, by employee; and

(vii) Total wages paid each pay period, date of pay and pay period covered by the payment, by employee.

(viii) Documentation of offer of benefits and eligibility for benefits provided as compensation for services on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers (see paragraph (c)(3) of this section):

(A) A copy of any document(s) provided to employees describing the benefits that are offered to employees, the eligibility and participation rules, how costs are shared, etc. (*e.g.,* summary plan descriptions, employee handbooks, any special or employee-specific notices that might be sent);

(B) A copy of all benefit plans or other documentation describing benefit plans and any rules the employer may have for differentiating benefits among groups of workers;

(C) Evidence as to what benefits are actually provided to U.S. workers and H–1B nonimmigrants, including evidence of the benefits selected or declined by employees where employees are given a choice of benefits;

(D) For multinational employers who choose to provide H–1B nonimmigrants with ''home country'' benefits, evidence of the benefits provided to the nonimmigrant before and after he/she went to the United States. See paragraph (c)(3)(iii)(C) of this section.

(2) *Actual wage.* In addition to payroll data required by paragraph (b)(1) of this section (and also by the Fair Labor Standards Act), the employer shall retain documentation specifying the basis it used to establish the actual wage. The employer shall show how the wage set for the H–1B nonimmigrant relates to the wages paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question at the place of employment. Where adjustments are made in the employer's pay system or scale during the validity period of the LCA, the employer shall retain documentation explaining the change and clearly showing that, after such adjustments, the wages paid to the H–1B nonimmigrant are at least the greater of the adjusted actual wage or the prevailing wage for the occupation and area of intended employment.

(3) *Prevailing wage.* The employer also shall retain documentation regarding its determination of the prevailing wage. This source documentation shall not be submitted to ETA with the labor condition application, but shall be retained at the employer's place of business for the length of time required in § 655.760(c). Such documentation shall consist of the documentation described in paragraph (b)(3)(i), (ii), or (iii) of this section and the documentation described in paragraph (b)(1) of this section.

(i) If the employer used a wage determination issued pursuant to the provisions of the Davis-Bacon Act, 40 U.S.C. 276a *et seq.* (*see* 29 CFR part 1), or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.* (*see* 29 CFR part 4), the documentation shall include a copy of the determination showing the wage rate for the occupation in the area of intended employment.

(ii) If the employer used an applicable wage rate from a union contract which was negotiated at arms-length between a union and the employer, the documentation shall include an excerpt from the union contract showing the wage rate(s) for the occupation.

(iii) If the employer did not use a wage covered by the provisions of paragraph (b)(3)(i) or (b)(3)(ii) of this section, the employer's documentation shall consist of:

(A) A copy of the prevailing wage finding from the SESA for the

occupation within the area of intended employment; or

(B) A copy of the prevailing wage survey for the occupation within the area of intended employment published by an independent authoritative source. For purposes of this paragraph (b)(3)(iii)(B), a prevailing wage survey for the occupation in the area of intended employment published by an independent authoritative source shall mean a survey of wages published in a book, newspaper, periodical, loose-leaf service, newsletter, or other similar medium, within the 24-month period immediately preceding the filing of the employer's application. Such survey shall:

(*1*) Reflect the weighted average wage paid to workers similarly employed in the area of intended employment;

(*2*) Be based upon recently collected data—*e.g.,* within the 24-month period immediately preceding the date of publication of the survey; and

(*3*) Represent the latest published prevailing wage finding by the independent authoritative source for the occupation in the area of intended employment; or

(C) A copy of the prevailing wage survey or other source data acquired from another legitimate source of wage information that was used to make the prevailing wage determination. For purposes of this paragraph (b)(3)(iii)(C), a prevailing wage provided by another legitimate source of such wage information shall be one which:

(*1*) Reflects the weighted average wage paid to workers similarly employed in the area of intended employment;

(*2*) Is based on the most recent and accurate information available; and

(*3*) Is reasonable and consistent with recognized standards and principles in producing a prevailing wage.

(c) *Satisfaction of required wage obligation.* (1) The required wage must be paid to the employee, cash in hand, free and clear, when due, *except that* deductions made in accordance with paragraph (c)(9) of this section may reduce the cash wage below the level of the required wage. Benefits and eligibility for benefits provided as compensation for services must be offered in accordance with paragraph (c)(3) of this section.

(2) ''Cash wages paid,'' for purposes of satisfying the H–1B required wage, shall consist only of those payments that meet all the following criteria:

(i) Payments shown in the employer's payroll records as earnings for the employee, and disbursed to the employee, cash in hand, free and clear, when due, except for deductions authorized by paragraph (c)(9) of this section;

(ii) Payments reported to the Internal Revenue Service (IRS) as the employee's earnings, with appropriate withholding for the employee's tax paid to the IRS (in accordance with the Internal Revenue Code of 1986, 26 U.S.C. 1, *et seq.*);

(iii) Payments of the tax reported and paid to the IRS as required by the Federal Insurance Contributions Act, 26 U.S.C. 3101, *et seq.* (FICA). The employer must be able to document that the payments have been so reported to the IRS and that both the employer's and employee's taxes have been paid *except that* when the H–1B nonimmigrant is a citizen of a foreign country with which the President of the United States has entered into an agreement as authorized by section 233 of the Social Security Act, 42 U.S.C. 433 (*i.e.,* an agreement establishing a totalization arrangement between the social security system of the United States and that of the foreign country), the employer's documentation shall show that all appropriate reports have been filed and taxes have been paid in the employee's home country.

(iv) Payments reported, and so documented by the employer, as the employee's earnings, with appropriate employer and employee taxes paid to all other appropriate Federal, State, and local governments in accordance with any other applicable law.

(v) Future bonuses and similar compensation (*i.e.,* unpaid but to-be-paid) may be credited toward satisfaction of the required wage obligation if their payment is assured (*i.e.,* they are not conditional or contingent on some event such as the employer's annual profits). Once the bonuses or similar compensation are paid to the employee, they must meet the requirements of paragraphs (c)(2)(i) through (iv) of this section (*i.e.,* recorded and reported as ''earnings'' with appropriate taxes and FICA contributions withheld and paid).

(3) *Benefits and eligibility for benefits* provided as compensation for services (*e.g.,* cash bonuses; stock options; paid vacations and holidays; health, life, disability and other insurance plans; retirement and savings plans) shall be offered to the H–1B nonimmigrant(s) on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers.

(i) For purposes of this section, the offer of benefits ''on the same basis, and in accordance with the same criteria'' means that the employer shall offer H–1B nonimmigrants the same benefit package as it offers to U.S. workers, and may not provide more strict eligibility or participation requirements for the H–1B nonimmigrant(s) than for similarly employed U.S. workers(s) (*e.g.,* full-time workers compared to full-time workers; professional staff compared to professional staff). H–1B nonimmigrants are not to be denied benefits on the basis that they are ''temporary employees'' by virtue of their nonimmigrant status. An employer may offer greater or additional benefits to the H–1B nonimmigrant(s) than are offered to similarly employed U.S. worker(s), *provided* that such differing treatment is consistent with the requirements of all applicable nondiscrimination laws (*e.g.,* Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e–2000e17). Offers of benefits by employers shall be made in good faith and shall result in the H–1B nonimmigrant(s)'s actual receipt of the benefits that are offered by the employer and elected by the H–1B nonimmigrant(s).

(ii) The benefits received by the H–1B nonimmigrant(s) need not be identical to the benefits received by similarly employed U.S. workers(s), *provided that* the H–1B nonimmigrant is offered the same benefits package as those workers but voluntarily chooses to receive different benefits (*e.g.,* elects to receive cash payment rather than stock option, elects not to receive health insurance because of required employee contributions, or elects to receive different benefits among an array of benefits) or, in those instances where the employer is part of a multinational corporate operation, the benefits received by the H–1B nonimmigrant are provided in accordance with an employer's practice that satisfies the requirements of paragraph (c)(3)(iii)(B) or (C) of this section. In all cases, however, an employer's practice must comply with the requirements of any applicable nondiscrimination laws (*e.g.,* Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e–2000e17).

(iii) If the employer is part of a multinational corporate operation (*i.e.,* operates in affiliation with business entities in other countries, whether as subsidiaries or in some other arrangement), the following three options (*i.e.,* (A), (B) or (C)) are available to the employer with respect to H–1B nonimmigrants who remain on the ''home country'' payroll.

(A) The employer may offer the H–1B nonimmigrant(s) benefits in accordance with paragraphs (c)(3)(i) and (ii) of this section.

(B) Where an H–1B nonimmigrant is in the U.S. for no more than 90 consecutive calendar days, the employer during that period may maintain the H–

1B nonimmigrant on the benefits provided to the nonimmigrant in his/her permanent work station (ordinarily the home country), and not offer the nonimmigrant the benefits that are offered to similarly employed U.S. workers, *provided that* the employer affords reciprocal benefits treatment for any U.S. workers (*i.e.,* allows its U.S. employees, while working out of the country on a temporary basis away from their permanent work stations in the United States, or while working in the United States on a temporary basis away from their permanent work stations in another country, to continue to receive the benefits provided them at their permanent work stations). Employers are cautioned that this provision is available only if the employer's practices do not constitute an evasion of the benefit requirements, such as where the H–1B nonimmigrant remains in the United States for most of the year, but briefly returns to the ''home country'' before any 90-day period would expire.

(C) Where an H–1B nonimmigrant is in the U.S. for more than 90 consecutive calendar days (or from the point where the worker is transferred to the U.S. or it is anticipated that the worker will likely remain in the U.S. more than 90 consecutive days), the employer may maintain the H–1B nonimmigrant on the benefits provided in his/her home country (*i.e.,* ''home country benefits'') (and not offer the nonimmigrant the benefits that are offered to similarly employed U.S. workers) *provided that* all of the following criteria are satisfied:

(*1*) The H–1B nonimmigrant continues to be employed in his/her home country (either with the H–1B employer or with a corporate affiliate of the employer);

(*2*) The H–1B nonimmigrant is enrolled in benefits in his/her home country (in accordance with any applicable eligibility standards for such benefits);

(*3*) The benefits provided in his/her home country are equivalent to, or equitably comparable to, the benefits offered to similarly employed U.S. workers (*i.e.,* are no less advantageous to the nonimmigrant);

(*4*) The employer affords reciprocal benefits treatment for any U.S. workers while they are working out of the country, away from their permanent work stations (whether in the United States or abroad), on a temporary basis (*i.e.,* maintains such U.S. workers on the benefits they received at their permanent work stations);

(*5*) If the employer offers health benefits to its U.S. workers, the employer offers the same plan on the same basis to its H–1B nonimmigrants in the United States where the employer does not provide the H–1B nonimmigrant with health benefits in the home country, or the employer's home-country health plan does not provide full coverage (*i.e.,* coverage comparable to what he/she would receive at the home work station) for medical treatment in the United States; and

(*6*) *the* employer offers H–1B nonimmigrants who are in the United States more than 90 continuous days those U.S. benefits which are paid directly to the worker (*e.g.,* paid vacation, paid holidays, and bonuses).

(iv) Benefits provided as compensation for services may be credited toward the satisfaction of the employer's required wage obligation only if the requirements of paragraph (c)(2) of this section are met (*e.g.,* recorded and reported as ''earnings'' with appropriate taxes and FICA contributions withheld and paid).

(4) For *salaried employees*, wages will be due in prorated installments (*e.g.,* annual salary divided into 26 bi-weekly pay periods, where employer pays bi-weekly) paid no less often than monthly *except that,* in the event that the employer intends to use some other form of nondiscretionary payment to supplement the employee's regular/pro-rata pay in order to meet the required wage obligation (*e.g.,* a quarterly production bonus), the employer's documentation of wage payments (including such supplemental payments) must show the employer's commitment to make such payment and the method of determining the amount thereof, and must show unequivocally that the required wage obligation was met for prior pay periods and, upon payment and distribution of such other payments that are pending, will be met for each current or future pay period. An employer that is a school or other educational institution may apply an established salary practice under which the employer pays to H–1B nonimmigrants and U.S. workers in the same occupational classification an annual salary in disbursements over fewer than 12 months, *provided that* the nonimmigrant agrees to the compressed annual salary payments prior to the commencement of the employment and the application of the salary practice to the nonimmigrant does not otherwise cause him/her to violate any condition of his/her authorization under the INA to remain in the U.S.

(5) For *hourly-wage employees*, the required wages will be due for all hours worked and/or for any nonproductive time (as specified in paragraph (c)(7) of this section) at the end of the employee's ordinary pay period (*e.g.,* weekly) but in no event less frequently than monthly.

(6) Subject to the standards specified in paragraph (c)(7) of this section (regarding nonproductive status), an H–1B nonimmigrant shall receive the required pay beginning on the date when the nonimmigrant ''enters into employment'' with the employer.

(i) For purposes of this paragraph (c)(6), the H–1B nonimmigrant is considered to ''enter into employment'' when he/she first makes him/herself available for work or otherwise comes under the control of the employer, such as by waiting for an assignment, reporting for orientation or training, going to an interview or meeting with a customer, or studying for a licensing examination, and includes all activities thereafter.

(ii) Even if the H–1B nonimmigrant has not yet ''entered into employment'' with the employer (as described in paragraph (c)(6)(i) of this section), the employer that has had an LCA certified and an H–1B petition approved for the H–1B nonimmigrant shall pay the nonimmigrant the required wage beginning 30 days after the date the nonimmigrant first is admitted into the U.S. pursuant to the petition, or, if the nonimmigrant is present in the United States on the date of the approval of the petition, beginning 60 days after the date the nonimmigrant becomes eligible to work for the employer. For purposes of this latter requirement, the H–1B nonimmigrant is considered to be eligible to work for the employer upon the date of need set forth on the approved H–1B petition filed by the employer, or the date of adjustment of the nonimmigrant's status by INS, whichever is later. Matters such as the worker's obtaining a State license would not be relevant to this determination.

(7) *Wage obligation(s) for H–1B nonimmigrant in nonproductive status.*

(i) *Circumstances where wages must be paid.* If the H–1B nonimmigrant is not performing work and is in a nonproductive status due to a decision by the employer (*e.g.,* because of lack of assigned work), lack of a permit or license, or any other reason except as specified in paragraph (c)(7)(ii) of this section, the employer is required to pay the salaried employee the full pro-rata amount due, or to pay the hourly-wage employee for a full-time week (40 hours or such other number of hours as the employer can demonstrate to be full-time employment for hourly employees, or the full amount of the weekly salary for salaried employees) at the required wage for the occupation listed on the LCA. If the employer's LCA carries a

designation of ''part-time employment,'' the employer is required to pay the nonproductive employee for at least the number of hours indicated on the I–129 petition filed by the employer with the INS and incorporated by reference on the LCA. If the I–129 indicates a range of hours for part-time employment, the employer is required to pay the nonproductive employee for at least the average number of hours normally worked by the H–1B nonimmigrant, provided that such average is within the range indicated; in no event shall the employee be paid for fewer than the minimum number of hours indicated for the range of part-time employment. In all cases the H–1B nonimmigrant must be paid the required wage for all hours performing work within the meaning of the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*

(ii) *Circumstances where wages need not be paid.* If an H–1B nonimmigrant experiences a period of nonproductive status due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience (*e.g.,* touring the U.S., caring for ill relative) or render the nonimmigrant unable to work (*e.g.,* maternity leave, automobile accident which temporarily incapacitates the nonimmigrant), then the employer shall not be obligated to pay the required wage rate during that period, *provided that* such period is not subject to payment under the employer's benefit plan or other statutes such as the Family and Medical Leave Act (29 U.S.C. 2601 *et seq.*) or the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*). Payment need not be made if there has been a *bona fide* termination of the employment relationship. INS regulations require the employer to notify the INS that the employment relationship has been terminated so that the petition is canceled (8 CFR 214.2(h)(11)), and require the employer to provide the employee with payment for transportation home under certain circumstances (8 CFR 214.2(h)(4)(iii)(E)).

(8) If the employee works in an occupation other than that identified on the employer's LCA, the employer's required wage obligation is based on the occupation identified on the LCA, and not on whatever wage standards may be applicable in the occupation in which the employee may be working.

(9) ''Authorized deductions,'' for purposes of the employer's satisfaction of the H–1B required wage obligation, means a deduction from wages in complete compliance with one of the following three sets of criteria (*i.e.,* paragraph (c)(9)(i), (ii), or (iii))—

(i) Deduction which is required by law (*e.g.,* income tax; FICA); or

(ii) Deduction which is authorized by a collective bargaining agreement, or is reasonable and customary in the occupation and/or area of employment (*e.g.,* union dues; contribution to premium for health insurance policy covering all employees; savings or retirement fund contribution for plan(s) in compliance with the Employee Retirement Income Security Act, 29 U.S.C. 1001, *et seq.), except that* the deduction may not recoup a business expense(s) of the employer (including attorney fees and other costs connected to the performance of H–1B program functions which are required to be performed by the employer, *e.g.,* preparation and filing of LCA and H–1B petition); the deduction must have been revealed to the worker prior to the commencement of employment and, if the deduction was a condition of employment, had been clearly identified as such; and the deduction must be made against wages of U.S. workers as well as H–1B nonimmigrants (where there are U.S. workers); or

(iii) Deduction which meets the following requirements:

(A) Is made in accordance with a voluntary, written authorization by the employee (Note to paragraph (c)(9)(iii)(A): an employee's mere acceptance of a job which carries a deduction as a condition of employment does not constitute voluntary authorization, even if such condition were stated in writing);

(B) Is for a matter principally for the benefit of the employee (Note to paragraph (c)(9)(iii)(B): housing and food allowances would be considered to meet this ''benefit of employee'' standard, unless the employee is in travel status, or unless the circumstances indicate that the arrangements for the employee's housing or food are principally for the convenience or benefit of the employer (*e.g.,* employee living at worksite in ''on call'' status));

(C) Is not a recoupment of the employer's business expense (*e.g.,* tools and equipment; transportation costs where such transportation is an incident of, and necessary to, the employment; living expenses when the employee is traveling on the employer's business; attorney fees and other costs connected to the performance of H–1B program functions which are required to be performed by the employer (*e.g.,* preparation and filing of LCA and H–1B petition)). (For purposes of this section, initial transportation from, and end-of-employment travel, to the worker's home country shall not be considered a business expense.);

(D) Is an amount that does not exceed the fair market value or the actual cost (whichever is lower) of the matter covered (Note to paragraph (c)(9)(iii)(D): The employer must document the cost and value); and

(E) Is an amount that does not exceed the limits set for garnishment of wages in the Consumer Credit Protection Act, 15 U.S.C. 1673, and the regulations of the Secretary pursuant to that Act, 29 CFR part 870, under which garnishment(s) may not exceed 25 percent of an employee's disposable earnings for a workweek.

(10) A deduction from or reduction in the payment of the required wage is not authorized (and is therefore prohibited) for the following purposes (*i.e.,* paragraphs (c)(10) (i) and (ii)):

(i) A penalty paid by the H–1B nonimmigrant for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer.

(A) The employer is not permitted to require (directly or indirectly) that the nonimmigrant pay a penalty for ceasing employment with the employer prior to an agreed date. Therefore, the employer shall not make any deduction from or reduction in the payment of the required wage to collect such a penalty.

(B) The employer is permitted to receive *bona fide* liquidated damages from the H–1B nonimmigrant who ceases employment with the employer prior to an agreed date. However, the requirements of paragraph (c)(9)(iii) of this section must be fully satisfied, if such damages are to be received by the employer via deduction from or reduction in the payment of the required wage.

(C) The distinction between liquidated damages (which are permissible) and a penalty (which is prohibited) is to be made on the basis of the applicable State law. In general, the laws of the various States recognize that *liquidated damages* are amounts which are fixed or stipulated by the parties at the inception of the contract, and which are reasonable approximations or estimates of the anticipated or actual damage caused to one party by the other party's breach of the contract. On the other hand, the laws of the various States, in general, consider that penalties are amounts which (although fixed or stipulated in the contract by the parties) are not reasonable approximations or estimates of such damage. The laws of the various States, in general, require that the relation or circumstances of the parties,

and the purpose(s) of the agreement, are to be taken into account, so that, for example, an agreement to a payment would be considered to be a prohibited penalty where it is the result of fraud or where it cloaks oppression. Furthermore, as a general matter, the sum stipulated must take into account whether the contract breach is total or partial (*i.e.,* the percentage of the employment contract completed). (*See, e.g., Vanderbilt University* v. *DiNardo*, 174 F.3d 751 (6th Cir. 1999) (applying Tennessee law); *Overholt Crop Insurance Service Co.* v. *Travis,* 941 F.2d 1361 (8th Cir. 1991) (applying Minnesota and South Dakota law); *BDO Seidman* v. *Hirshberg*, 712 N.E.2d 1220 (N.Y. 1999); *Guiliano* v. *Cleo, Inc.,* 995 S.W.2d 88 (Tenn. 1999); *Wojtowicz* v. *Greeley Anesthesia Services, P.C.,* 961 P.2d 520 (Colo.Ct.App. 1998); *see generally,* Restatement (Second) Contracts § 356 (comment b); 22 Am.Jur.2d Damages §§ 683, 686, 690, 693, 703). In an enforcement proceeding under subpart I of this part, the Administrator shall determine, applying relevant State law (including consideration where appropriate to actions by the employer, if any, contributing to the early cessation, such as the employer's constructive discharge of the nonimmigrant or non-compliance with its obligations under the INA and its regulations) whether the payment in question constitutes liquidated damages or a penalty. (Note to paragraph (c)(10)(i)(C): The $500/$1,000 filing fee under section 214(c)(1) of the INA can never be included in any liquidated damages received by the employer. *See* paragraph (c)(10)(ii), which follows.)

(ii) *A rebate of the $500/$1,000 filing fee paid by the employer under Section 214(c)(1) of the INA.* The employer may not receive, and the H–1B nonimmigrant may not pay, any part of the $500 additional filing fee (for a petition filed prior to December 18, 2000) or $1,000 additional filing fee (for a petition filed on or subsequent to December 18, 2000), whether directly or indirectly, voluntarily or involuntarily. Thus, no deduction from or reduction in wages for purposes of a rebate of any part of this fee is permitted. Further, if liquidated damages are received by the employer from the H–1B nonimmigrant upon the nonimmigrant's ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer, such liquidated damages shall not include any part of the $500/$1,000 filing fee (*see* paragraph (c)(10)(i) of this section). If the filing fee is paid by a third party and the H–1B nonimmigrant reimburses all or part of the fee to such third party, the employer shall be considered to be in violation of this prohibition since the employer would in such circumstances have been spared the expense of the fee which the H–1B nonimmigrant paid.

(11) Any unauthorized deduction taken from wages is considered by the Department to be non-payment of that amount of wages, and in the event of an investigation, will result in back wage assessment (plus civil money penalties and/or disqualification from H–1B and other immigration programs, if willful).

(12) Where the employer depresses the employee's wages below the required wage by imposing on the employee any of the employer's business expenses(s), the Department will consider the amount to be an unauthorized deduction from wages even if the matter is not shown in the employer's payroll records as a deduction.

(13) Where the employer makes deduction(s) for repayment of loan(s) or wage advance(s) made to the employee, the Department, in the event of an investigation, will require the employer to establish the legitimacy and purpose(s) of the loan(s) or wage advance(s), with reference to the standards set out in paragraph (c)(9)(iii) of this section.

(d) *Enforcement actions.* (1) In the event of an investigation pursuant to subpart I of this part, concerning a failure to meet the ''prevailing wage'' condition or a material misrepresentation by the employer regarding the payment of the required wage, the Administrator shall determine whether the employer has the documentation required in paragraph (b)(3) of this section, and whether the documentation supports the employer's wage attestation. Where the documentation is either nonexistent or insufficient to determine the prevailing wage (e.g., does not meet the criteria specified in this section, in which case the Administrator may find a violation of paragraph (b)(1), (2), or (3), of this section); or where, based on significant evidence regarding wages paid for the occupation in the area of intended employment, the Administrator has reason to believe that the prevailing wage finding obtained from an independent authoritative source or another legitimate source varies substantially from the wage prevailing for the occupation in the area of intended employment; or where the employer has been unable to demonstrate that the prevailing wage determined by another legitimate source is in accordance with the regulatory criteria, the Administrator may contact ETA, which shall provide the Administrator with a prevailing wage determination, which the Administrator shall use as the basis for determining violations and for computing back wages, if such wages are found to be owed. The 30-day investigatory period shall be suspended while ETA makes the prevailing wage determination and, in the event that the employer timely challenges the determination through the Employment Service complaint system (see paragraph (d)(2), which follows), shall be suspended until the Employment Service complaint system process is completed and the Administrator's investigation can be resumed.

(2) In the event the Administrator obtains a prevailing wage from ETA pursuant to paragraph (d)(1) of this section, the employer may challenge the ETA prevailing wage only through the Employment Service complaint system. (See 20 CFR part 658, subpart E.) Notwithstanding the provisions of 20 CFR 658.421 and 658.426, the appeal shall be initiated at the ETA regional office which services the State in which the place of employment is located (see § 655.721 for the ETA regional offices and their jurisdictions). Such challenge shall be initiated within 10 days after the employer receives ETA's prevailing wage determination from the Administrator. In any challenge to the wage determination, neither ETA nor the SESA shall divulge any employer wage data which was collected under the promise of confidentiality.

(i) Where the employer timely challenges an ETA prevailing wage determination obtained by the Administrator, the 30-day investigative period shall be suspended until the employer obtains a final ruling from the Employment Service complaint system. Upon such final ruling, the investigation and any subsequent enforcement proceeding shall continue, with ETA's prevailing wage determination serving as the conclusive determination for all purposes.

(ii) Where the employer does not challenge ETA's prevailing wage determination obtained by the Administrator, such determination shall be deemed to have been accepted by the employer as accurate and appropriate (as to the amount of the wage) and thereafter shall not be subject to challenge in a hearing pursuant to § 655.835.

(3) For purposes of this paragraph (d), ETA may consult with the appropriate SESA to ascertain the prevailing wage applicable under the circumstances of the particular complaint.

(4) No prevailing wage violation will be found if the employer paid a wage that is equal to, or more than 95 percent of, the prevailing wage as required by paragraph (a)(2)(iii) of this section. If the employer paid a wage that is less than 95 percent of the prevailing wage, the employer will be required to pay 100 percent of the prevailing wage.

11. Section 655.732 is revised to read as follows:

§ 655.732 What is the second LCA requirement, regarding working conditions?

An employer seeking to employ H–1B nonimmigrants in specialty occupations or as fashion models of distinguished merit and ability shall state on Form ETA 9035 that the employment of H–1B nonimmigrants will not adversely affect the working conditions of workers similarly employed in the area of intended employment.

(a) *Establishing the working conditions requirement.* The second LCA requirement shall be satisfied when the employer affords working conditions to its H–1B nonimmigrant employees on the same basis and in accordance with the same criteria as it affords to its U.S. worker employees who are similarly employed, and without adverse effect upon the working conditions of such U.S. worker employees. Working conditions include matters such as hours, shifts, vacation periods, and benefits such as seniority-based preferences for training programs and work schedules. The employer's obligation regarding working conditions shall extend for the longer of two periods: the validity period of the certified LCA, or the period during which the H–1B nonimmigrant(s) is(are) employed by the employer.

(b) *Documentation of the working condition statement.* In the event of an enforcement action pursuant to subpart I of this part, the employer shall produce documentation to show that it has afforded its H–1B nonimmigrant employees working conditions on the same basis and in accordance with the same criteria as it affords its U.S. worker employees who are similarly employed.

12. The title to § 655.733 is revised to read as follows:

§ 655.733 What is the third LCA requirement, regarding strikes and lockouts?

13. Section 655.734 is amended by revising the title and by revising paragraphs (a) (l) (ii) and (a) (2) and by adding paragraph (a)(3), to read as follows:

§ 655.734 What is the fourth LCA requirement, regarding notice?

* * * * *

(a) * * *

(1) * * *

(i) * * *

(ii) Where there is no collective bargaining representative, the employer shall, on or within 30 days before the date the LCA is filed with ETA, provide a notice of the filing of the LCA. The notice shall indicate that H–1B nonimmigrants are sought; the number of such nonimmigrants the employer is seeking; the occupational classification; the wages offered; the period of employment; the location(s) at which the H–1B nonimmigrants will be employed; and that the LCA is available for public inspection at the H–1B employer's principal place of business in the U.S. or at the worksite. The notice shall also include the statement: ''Complaints alleging misrepresentation of material facts in the labor condition application and/or failure to comply with the terms of the labor condition application may be filed with any office of the Wage and Hour Division of the United States Department of Labor.'' If the employer is an H–1B-dependent employer or a willful violator, and the LCA is not being used only for exempt H–1B nonimmigrants, the notice shall also set forth the nondisplacement and recruitment obligations to which the employer has attested, and shall include the following additional statement: ''Complaints alleging failure to offer employment to an equally or better qualified U.S. worker, or an employer's misrepresentation regarding such offer(s) of employment, may be filed with the Department of Justice, 10th Street & Constitution Avenue, NW., Washington, DC 20530.'' The notice shall be provided in one of the two following manners:

(A) *Hard copy notice,* by posting a notice in at least two conspicuous locations at each place of employment where any H–1B nonimmigrant will be employed (whether such place of employment is owned or operated by the employer or by some other person or entity).

(1) The notice shall be of sufficient size and visibility, and shall be posted in two or more conspicuous places so that workers in the occupational classification at the place(s) of employment can easily see and read the posted notice(s).

(2) Appropriate locations for posting the notices include, but are not limited to, locations in the immediate proximity of wage and hour notices required by 29 CFR 516.4 or occupational safety and health notices required by 29 CFR 1903.2(a).

(3) The notices shall be posted on or within 30 days before the date the labor condition application is filed and shall remain posted for a total of 10 days.

(B) *Electronic notice,* by providing electronic notification to employees in the occupational classification (including both employees of the H–1B employer and employees of another person or entity which owns or operates the place of employment) for which H–1B nonimmigrants are sought, at each place of employment where any H–1B nonimmigrant will be employed. Such notification shall be given on or within 30 days before the date the labor condition application is filed, and shall be available to the affected employees for a total of 10 days, except that if employees are provided individual, direct notice (as by e-mail), notification only need be given once during the required time period. Notification shall be readily available to the affected employees. An employer may accomplish this by any means it ordinarily uses to communicate with its workers about job vacancies or promotion opportunities, including through its ''home page'' or ''electronic bulletin board'' to employees who have, as a practical matter, direct access to these resources; or through e-mail or an actively circulated electronic message such as the employer's newsletter. Where affected employees at the place of employment are not on the ''intranet'' which provides direct access to the home page or other electronic site but do have computer access readily available, the employer may provide notice to such workers by direct electronic communication such as e-mail (*i.e.,* a single, personal e-mail message to each such employee) or by arranging to have the notice appear for 10 days on an intranet which includes the affected employees (*e.g.,* contractor arranges to have notice on customer's intranet accessible to affected employees). Where employees lack practical computer access, a hard copy must be posted in accordance with paragraph (a)(1)(ii)(A) of this section, or the employer may provide employees individual copies of the notice.

(2) Where the employer places any H–1B nonimmigrant(s) at one or more worksites not contemplated at the time of filing the application, but which are within the area of intended employment listed on the LCA, the employer is required to post electronic or hard-copy notice(s) at such worksite(s), in the manner described in paragraph (a)(1) of this section, on or before the date any H–1B nonimmigrant begins work.

(3) The employer shall, no later than the date the H–1B nonimmigrant reports to work at the place of employment, provide the H–1B nonimmigrant with a copy of the LCA (Form ETA 9035) certified by the Department. Upon request, the employer shall provide the H–1B nonimmigrant with a copy of the cover pages, Form ETA 9035CP.

* * * * *

14. Section 655.735 is revised to read as follows:

§ 655.735 What are the special provisions for short-term placement of H–1B nonimmigrants at place(s) of employment outside the area(s) of intended employment listed on the LCA?

(a) Subject to the conditions specified in this section, an employer may make short-term placements or assignments of H–1B nonimmigrant(s) at worksite(s) (place(s) of employment) in areas not listed on the employer's approved LCA(s) without filing new labor condition application(s) for such area(s).

(b) The following conditions must be fully satisfied by an employer during all short-term placement(s) or assignment(s) of H–1B nonimmigrant(s) at worksite(s) (place(s) of employment) in areas not listed on the employer's approved LCA(s):

(1) The employer has fully satisfied the requirements of §§ 655.730 through 655.734 with regard to worksite(s) located within the area(s) of intended employment listed on the employer's LCA(s).

(2) The employer shall not place, assign, lease, or otherwise contract out any H–1B nonimmigrant(s) to any worksite where there is a strike or lockout in the course of a labor dispute in the same occupational classification(s) as that of the H–1B nonimmigrant(s).

(3) For every day the H–1B nonimmigrant(s) is placed or assigned outside the area(s) of employment listed on the approved LCA(s) for such worker(s), the employer shall:

(i) Continue to pay such worker(s) the required wage (based on the prevailing wage at such worker's(s') permanent worksite, or the employer's actual wage, whichever is higher);

(ii) Pay such worker(s) the actual cost of lodging (for both workdays and non-workdays); and

(iii) Pay such worker(s) the actual cost of travel, meals and incidental or miscellaneous expenses (for both workdays and non-workdays).

(c) An employer's short-term placement(s) or assignment(s) of H–1B nonimmigrant(s) at any worksite(s) in an area of employment not listed on the employer's approved LCA(s) shall not exceed a total of 30 workdays in a one-year period for any H–1B nonimmigrant at any worksite or combination of worksites in the area, *except that* such placement or assignment of an H–1B nonimmigrant may be for longer than 30 workdays but for no more than a total of 60 workdays in a one-year period where the employer is able to show the following:

(1) The H–1B nonimmigrant continues to maintain an office or work station at his/her permanent worksite (*e.g.,* the worker has a dedicated workstation and telephone line(s) at the permanent worksite);

(2) The H–1B nonimmigrant spends a substantial amount of time at the permanent worksite in a one-year period; and

(3) The H–1B nonimmigrant's U.S. residence or place of abode is located in the area of the permanent worksite and not in the area of the short-term worksite(s) (*e.g.,* the worker's personal mailing address; the worker's lease for an apartment or other home; the worker's bank accounts; the worker's automobile driver's license; the residence of the worker's dependents).

(d) For purposes of this section, the term *workday* shall mean any day on which an H–1B nonimmigrant performs any work at any worksite(s) within the area of short-term placement or assignment. For example, three workdays would be counted where a nonimmigrant works three non-consecutive days at three different worksites (whether or not the employer owns or controls such worksite(s)), within the same area of employment. Further, for purposes of this section, the term *one-year period* shall mean the calendar year (*i.e.,* January 1 through December 31) or the employer's fiscal year, whichever the employer chooses.

(e) The employer may not make short-term placement(s) or assignment(s) of H–1B nonimmigrant(s) under this section at worksite(s) in any area of employment for which the employer has a certified LCA for the occupational classification. Further, an H–1B nonimmigrant entering the U.S. is required to be placed at a worksite in accordance with the approved petition and supporting LCA; thus, the nonimmigrant's initial placement or assignment cannot be a short-term placement under this section. In addition, the employer may not continuously rotate H–1B nonimmigrants on short-term placement or assignment to an area of employment in a manner that would defeat the purpose of the short-term placement option, which is to provide the employer with flexibility in assignments to afford enough time to obtain an approved LCA for an area where it intends to have a continuing presence (*e.g.,* an employer may not rotate H–1B nonimmigrants to an area of employment for 20-day periods, with the result that nonimmigrants are continuously or virtually continuously employed in the area of employment, in order to avoid filing an LCA; such an employer would violate the short-term placement provisions).

(f) Once any H–1B nonimmigrant's short-term placement or assignment has reached the workday limit specified in paragraph (c) of this section in an area of employment, the employer shall take one of the following actions:

(1) File an LCA and obtain ETA certification, and thereafter place any H–1B nonimmigrant(s) in that occupational classification at worksite(s) in that area pursuant to the LCA (*i.e.,* the employer shall perform all actions required in connection with such LCA, including determination of the prevailing wage and notice to workers); or

(2) Immediately terminate the placement of any H–1B nonimmigrant(s) who reaches the workday limit in an area of employment. No worker may exceed the workday limit within the one-year period specified in paragraph (d) of this section, unless the employer first files an LCA for the occupational classification for the area of employment. Employers are cautioned that if any worker exceeds the workday limit within the one-year period, then the employer has violated the terms of its LCA(s) and the regulations in the subpart, and thereafter the short-term placement option cannot be used by the employer for H–1B nonimmigrants in that occupational classification in that area of employment.

(g) An employer is not required to use the short-term placement option provided by this section, but may choose to make each placement or assignment of an H–1B nonimmigrant at worksite(s) in a new area of employment pursuant to a new LCA for such area. Further, an employer which uses the short-term placement option is not required to continue to use the option. Such an employer may, at any time during the period identified in paragraphs (c) and (d) of this section, file an LCA for the new area of employment (performing all actions required in connection with such LCA); upon certification of such LCA, the employer's obligation to comply with this section concerning short-term placement shall terminate. (However, see § 655.731(c)(9)(iii)(C) regarding payment of business expenses for

employee's travel on employer's business.)

15. Section 655.736 is added to read as follows:

§ 655.736 What are H–1B-dependent employers and willful violators?

Two attestation obligations apply only to two types of employers: H–1B-dependent employers (as described in paragraphs (a) through (e) of this section) and employers found to have willfully violated their H–1B obligations within a certain five-year period (as described in paragraph (f) of this section). These obligations apply only to certain labor condition applications filed by such employers (as described in paragraph (g) of this section), and do not apply to LCAs filed by such employers solely for the employment of ''exempt'' H–1B nonimmigrants (as described in paragraph (g) of this section and § 655.737). These obligations require that such employers not displace U.S. workers from jobs (as described in § 655.738) and that such employers recruit U.S. workers before hiring H–1B nonimmigrants (as described in § 655.739).

(a) *What constitutes an ''H–1B-dependent'' employer?*

(1) ''H–1B-dependent employer,'' for purposes of THIS subpart H and subpart I of this part, means an employer that meets one of the three following standards, which are based on the ratio between the employer's total work force employed in the U.S. (including both U.S. workers and H–1B nonimmigrants, and measured according to full-time equivalent employees) and the employer's H–1B nonimmigrant employees (a ''head count'' including both full-time and part-time H–1B employees) —

(i)(A) The employer has 25 or fewer full-time equivalent employees who are employed in the U.S.; and

(B) Employs more than seven H–1B nonimmigrants;

(ii)(A) The employer has at least 26 but not more than 50 full-time equivalent employees who are employed in the U.S.; and

(B) Employs more than 12 H–1B nonimmigrant; or

(iii)(A) The employer has at least 51 full-time equivalent employees who are employed in the U.S.; and

(B) Employs H–1B nonimmigrants in a number that is equal to at least 15 percent of the number of such full-time equivalent employees.

(2) *''Full-time equivalent employees'' (FTEs)*, for purposes of paragraph (a) of this section are to be determined according to the following standards:

(i) The determination of FTEs is to include only persons employed by the employer (as defined in § 655.715), and does not include *bona fide* consultants and independent contractors. For purposes of this section, the Department will accept the employer's designation of persons as ''employees,'' provided that such persons are consistently treated as ''employees'' for all purposes including FICA, FLSA, etc.

(ii) The determination of FTEs is to be based on the following records:

(A) To determine the number of employees, the employer's quarterly tax statement (or similar document) is to be used (assuming there is no issue as to whether all employees are listed on the tax statement); and

(B) To determine the number of hours of work by part-time employees, for purposes of aggregating such employees to FTEs, the last payroll (or the payrolls over the previous quarter, if the last payroll is not representative) is to be used, or where hours of work records are not maintained, other available information is to be used to make a reasonable approximation of hours of work (such as a standard work schedule). (But see paragraph (a)(2)(iii)(B)(*1*) of this section regarding the determination of FTEs for part-time employees without a computation of the hours worked by such employees.)

(iii) *The FTEs employed by the employer* means the total of the two numbers yielded by paragraphs (a)(2)(iii)(A) and (B), which follow:

(A) The number of full-time employees. A full-time employee is one who works 40 or more hours per week, unless the employer can show that less than 40 hours per week is full-time employment in its regular course of business (however, in no event would less than 35 hours per week be considered to be full-time employment). Each full-time employee equals one FTE (*e.g.*, 50 full-time employees would yield 50 FTEs). (Note to paragraph (a)(2)(iii)(A): An employee who commonly works more than the number of hours constituting full-time employment cannot be counted as more than one FTE.); plus

(B) The part-time employees aggregated to a number of full-time equivalents, if the employer has part-time employees. For purposes of this determination, a part-time employee is one who regularly works fewer than the number of hours per week which constitutes full-time employment (*e.g.*, employee regularly works 20 hours, where full-time employment is 35 hours per week). The aggregation of part-time employees to FTEs may be performed by either of the following methods (*i.e.*, paragraphs (a)(2)(iii)(B)(*1*) or (*2*)):

(*1*) Each employee working fewer than full-time hours counted as one-half of an FTE, with the total rounded to the next higher whole number (*e.g.*, three employees working fewer than 35 hours per week, where full-time employment is 35 hours, would yield two FTEs (*i.e.*, 1.5 rounded to 2)); or

(*2*) The total number of hours worked by all part-time employees in the representative pay period, divided by the number of hours per week that constitute full-time employment, with the quotient rounded to the nearest whole number (*e.g.*, 72 total hours of work by three part-time employees, divided by 40 (hours per week constituting full-time employment), would yield two FTEs (*i.e.*, 1.8 rounded to 2)).

(iv) *Examples of determinations of FTEs:* Employer A has 100 employees, 70 of whom are full-time (with full-time employment shown to be 44 hours of work per week) and 30 of whom are part-time (with a total of 1004 hours of work by all 30 part-time employees during the representative pay period). Utilizing the method in paragraph (a)(2)(iii)(B)(*1*) of this section, this employer would have 85 FTEs: 70 FTEs for full-time employees, plus 15 FTEs for part-time employees (*i.e.*, each of the 30 part-time employees counted as one-half of a full-time employee, as described in paragraph (a)(2)(iii)(B)(*1*) of this section). (This employer would have 23 FTEs for part-time employees, if these FTEs were computed as described in paragraph (a)(2)(iii)(B)(*2*) of this section: 1004 total hours of work by part-time employees, divided by 44 (full-time employment), yielding 22.8, rounded to 23)). Employer B has 100 employees, 80 of whom are full-time (with full-time employment shown to be 40 hours of work per week) and 20 of whom are part-time (with a total of 630 hours of work by all 30 part-time employees during the representative pay period). This employer would have 90 FTEs: 80 FTEs for full-time employees, plus 10 FTEs for part-time employees (*i.e.*, each of the 20 part-time employees counted as one-half of a full-time employee, as described in paragraph (a)(2)(iii)(B)(*1*) of this section) (This employer would have 16 FTEs for part-time employees, if these FTEs were computed as described in paragraph (a)(2)(iii)(B)(*2*) of this section: 630 total hours of work by part-time employees, divided by 40 (full-time employment), yielding 15.7, rounded to 16)).

(b) *What constitutes an ''employer'' for purposes of determining H–1B-dependency status?* Any group treated

as a single employer under the Internal Revenue Code (IRC) at 26 U.S.C. 414(b), (c), (m) or (o) shall be treated as a single employer for purposes of the determination of H–1B-dependency. Therefore, if an employer satisfies the requirements of the IRC and relevant regulations with respect to the following groups of employees, those employees will be treated as employees of a single employer for purposes of determining whether that employer is an H–1B-dependent employer.

(1) Pursuant to section 414(b) of the IRC and related regulations, all employees ''within a controlled group of corporations'' (within the meaning of section 1563(a) of the IRC, determined without regard to section 1563(a)(4) and (e)(3)(C)), will be treated as employees of a single employer. A *controlled group of corporations* is a parent-subsidiary-controlled group, a brother-sister-controlled group, or a combined group. 26 U.S.C. 1563(a), 26 CFR 1.414(b)–1(a).

(i) A *parent-subsidiary-controlled group* is one or more chains of corporations connected through stock ownership with a common parent corporation where at least 80 percent of the stock (by voting rights or value) of each subsidiary corporation is owned by one or more of the other corporations (either another subsidiary or the parent corporation), and the common parent corporation owns at least 80 percent of the stock of at least one subsidiary.

(ii) A *brother-sister-controlled group* is a group of corporations in which five or fewer persons (individuals, estates, or trusts) own 80 percent or more of the stock of the corporations and certain other ownership criteria are satisfied.

(iii) A *combined group* is a group of three or more corporations, each of which is a member of a parent-subsidiary controlled group or a brother-sister-controlled group and one of which is a common parent corporation of a parent-subsidiary-controlled group and is also included in a brother-sister-controlled group.

(2) Pursuant to section 414(c) of the IRC and related regulations, all employees of trades or businesses (whether or not incorporated) that are under common control are treated as employees of a single employer. 26 U.S.C. 414(c), 26 CFR 1.414(c)–2.

(i) Trades or businesses are under common control if they are included in:

(A) A parent-subsidiary group of trades or businesses;

(B) A brother-sister group of trades or businesses; or

(C) A combined group of trades or businesses.

(ii) Trades or businesses include sole proprietorships, partnerships, estates, trusts or corporations.

(ii) The standards for determining whether trades or businesses are under common control are similar to standards that apply to controlled groups of corporations. However, pursuant to 26 CFR 1.414(c)–2(b)(2), ownership of at least an 80 percent interest in the profits or capital interest of a partnership or the actuarial value of a trust or estate constitutes a controlling interest in a trade or business.

(3) Pursuant to section 414(m) of the IRC and related regulations, all employees of the members of an affiliated service group are treated as employees of a single employer. 26 U.S.C. 414(m).

(i) An *affiliated service group* is, generally, a group consisting of a service organization (the ''first organization''), such as a health care organization, a law firm or an accounting firm, and one or more of the following:

(A) A second service organization that is a shareholder or partner in the first organization and that regularly performs services for the first organization (or is regularly associated with the first organization in performing services for third persons); or

(B) Any other organization if :

(*1*) A significant portion of the second organization's business is the performance of services for the first organization (or an organization described in paragraph (b)(3)(i) of this section or for both) of a type historically performed in such service field by employees, and

(*2*) Ten percent or more of the interest in the second organization is held by persons who are highly compensated employees of the first organization (or an organization described in paragraph (b)(3)(i) of this section).

(ii) [Reserved]

(4) Section 414(o) of the IRC provides that the Department of the Treasury may issue regulations addressing other business arrangements, including employee leasing, in which a group of employees are treated as employed by the same employer. However, the Department of the Treasury has not issued any regulations under this provision. Therefore, that section of the IRC will not be taken into account in determining what groups of employees are considered employees of a single employer for purposes of H–1B dependency determinations, unless regulations are issued by the Treasury Department during the period the dependency provisions of the ACWIA are effective.

(5) The definitions of ''single employer'' set forth in paragraphs (b)(1) through (b)(3) of this section are established by the Internal Revenue Service (IRS) in regulations located at 26 CFR 1.414(b)–1(a), (c)–2 and (m)–5. Guidance on these definitions should be sought from those regulations or from the IRS.

(c) *Which employers are required to make determinations of H–1B-dependency status?* Every employer that intends to file an LCA or to file H–1B petition(s) or request(s) for extension(s) of H–1B status between January 19, 2001 and October 1, 2003 is required to determine whether it is an H–1B-dependent employer or a willful violator which, except as provided in § 655.737, will be subject to the additional obligations for H–1B-dependent employers (see paragraph (g) of this section). During this time period, no H–1B-dependent employer or willful violator may use an LCA filed before January 19, 2001 to support a new H–1B petition or request for an extension of status. Furthermore, on all LCAs filed during this period an employer will be required to attest as to whether it is an H–1B-dependent employer or willful violator. An employer that attests that it is non-H–1B-dependent but does not meet the ''snap shot'' test set forth in paragraph (c)(2) of this section shall make and document a full calculation of its status. However, as explained in paragraphs (c)(1) and (2), which follow, most employers would not be required to make any calculations or to create any documentation as to the determination of H–1B status.

(1) *Employers with readily apparent status concerning H–1B-dependency need not calculate that status.* For most employers, regardless of their size, H–1B-dependency status (*i.e.*, H–1B-dependent or non-H–1B-dependent) is readily apparent and would require no calculations, in that the ratio of H–1B employees to the total workforce is obvious and can easily be compared to the definition of ''H–1B-dependency'' (see definition set out in paragraph (a)(1) of this section).

For example: Employer A with 20 employees, only one of whom is an H–1B non-immigrant, would obviously not be H–1B-dependent and would not need to make calculations to confirm that status. Employer B with 45 employees, 30 of whom are H–1B nonimmigrants, would obviously be H–1B-dependent and would not need to make calculations. Employer C with 500 employees, only 30 of whom are H–1B nonimmigrants, would obviously not be H–1B-dependent and would not need to make calculations. Employer D with

1,000 employees, 850 of whom are H–1B nonimmigrants, would obviously be H–1B-dependent and would not have to make calculations.

(2) *Employers with borderline H–1B-dependency status may use a ''snap-shot'' test to determine whether calculation of that status is necessary.* Where an employer's H–1B-dependency status (*i.e.*, H–1B-dependent or non-H–1B-dependent) is not readily apparent, the employer may use one of the following tests to determine whether a full calculation of the status is needed:

(i) *Small employer* (50 or fewer employees). If the employer has 50 or fewer employees (both full-time and part-time, including H–1B nonimmigrants and U.S. workers), then the employer may compare the number of its H–1B nonimmigrant employees (both full-time and part-time) to the numbers specified in the definition set out in paragraph (a)(1) of this section, and shall fully calculate its H–1B-dependency status (*i.e.*, calculate FTEs) where the number of its H–1B nonimmigrant employees is above the number specified in the definition. In other words, if the employer has 25 or fewer employees, and more than seven of them are H–1B nonimmigrants, then the employer shall fully calculate its status; if the employer has at least 26 but no more than 50 employees, and more than 12 of them are H–1B nonimmigrants, then the employer shall fully calculate its status.

(ii) *Large employer* (51 or more employees). If the number of H–1B nonimmigrant employees (both full-time and part-time), divided by the number of full-time employees (including H–1B nonimmigrants and U.S. workers), is 0.15 or more, then an employer which believes itself to be non-H–1B-dependent shall fully calculate its H–1B-dependency status (including the calculation of FTEs). In other words, if the number of full-time employees (including H–1B nonimmigrants and U.S. workers) multiplied by 0.15 yields a number that is equal to or less than the number of H–1B nonimmigrant employees (both full-time and part-time), then the employer shall attest that it is H–1B-dependent or shall fully calculate its H–1B dependency status (including the calculation of FTEs).

(d) *What documentation is the employer required to make or maintain, concerning its determination of H–1B-dependency status?* All employers are required to retain copies of H–1B petitions and requests for extensions of H–1B status filed with the INS, as well as the payroll records described in § 655.731(b)(1). The nature of any additional documentation would depend upon the general characteristics of the employer's workforce, as described in paragraphs (d)(1) through (4), which follow.

(1) *Employer with readily apparent status concerning H–1B-dependency.* If an employer's H–1B-dependency status (*i.e.*, H–1B-dependent or non-H–1B-dependent) is readily apparent (as described in paragraph (c)(1) of this section), then that status must be reflected on the employer's LCA but the employer is not required to make or maintain any particular documentation. The public access file maintained in accordance with § 655.760 would show the H–1B-dependency status, by means of copy(ies) of the LCA(s). In the event of an enforcement action pursuant to subpart I of this part, the employer's readily apparent status could be verified through records to be made available to the Administrator (*e.g.*, copies of H–1B petitions; payroll records described in § 655.731(b)(1)).

(2) *Employer with borderline H–1B-dependency status.* An employer which uses a ''snap-shot'' test to determine whether it should undertake a calculation of its H–1B-dependency status (as described in paragraph (c)(2) of this section) is not required to make or maintain any documentation of that ''snap-shot'' test. The employer's status must be reflected on the LCA(s), which would be available in the public access file. In the event of an enforcement action pursuant to subpart I of this part, the employer's records to be made available to the Administrator would enable the employer to show and the Administrator to verify the ''snap-shot'' test (*e.g.*, copies of H–1B petitions; payroll records described in § 655.731(b)(1)) .

(3) *Employer with H–1B-dependent status.* An employer which attests that it is H–1B-dependent—whether that status is readily apparent or is determined through calculations—is not required to make or maintain any documentation of the calculation. The employer's status must be reflected on the LCA(s), which would be available in the public access file. In the event of an enforcement action pursuant to subpart I of this part, the employer's designation of H–1B-dependent status on the LCA(s) would be conclusive and sufficient documentation of that status (except where the employer's status had altered to non-H–1B-dependent and had been appropriately documented, as described in paragraph (d)(5)(ii) of this section).

(4) *Employer with non-H–1B-dependent status who is required to perform full calculation.* An employer which attests that it is non-H–1B-dependent and does not meet the ''snap shot'' test set forth in paragraph (c)(2) of this section shall retain in its records a dated copy of its calculation that it is not H–1B-dependent. In the event of an enforcement action pursuant to subpart I of this part, the employer's records to be made available to the Administrator would enable the employer to show and the Administrator to verify the employer's determination (*e.g.,* copies of H–1B petitions; payroll records described in § 655.731(b)(1)).

(5) *Employer which changes its H–1B-dependency status due to changes in workforce.* An employer may experience a change in its H–1B-dependency status, due to changes in the ratio of H–1B nonimmigrant to U.S. workers in its workforce. Thus it is important that employers who wish to file a new LCA or a new H–1B petition or request for extension of status remain cognizant of their dependency status and do a recheck of such status if the make-up of their workforce changes sufficiently that their dependency status might possibly change. In the event of such a change of status, the following standards will apply:

(i) Change from non-H–1B-dependent to H–1B-dependent. An employer which experiences this change in its workforce is not required to make or maintain any record of its determination of the change of its H–1B-dependency status. The employer is not required to file new LCA(s) (which would accurately state its H–1B-dependent status), unless it seeks to hire new H–1B nonimmigrants or extend the status of existing H–1B nonimmigrants (see paragraph (g) of this section).

(ii) Change from H–1B-dependent to non-H–1B-dependent. An employer which experiences this change in its workforce is required to perform a full calculation of its status (as described in paragraph (c) of this section) and to retain a copy of such calculation in its records. If the employer seeks to hire new H–1B nonimmigrants or extend the status of existing H–1B nonimmigrants (see paragraph (g) of this section), the employer shall either file new LCAs reflecting its non-H–1B-dependent status or use its existing certified LCAs reflecting an H–1B-dependency status, in which case it shall continue to be bound by the dependent-employer attestations on such LCAs. In the event of an enforcement action pursuant to subpart I of this part, the employer's records to be made available to the Administrator would enable the employer to show and the Administrator to verify the employer's determination (*e.g.*, copies of H–1B petitions; payroll records described in § 655.731(b)(1)).

(6) *Change in corporate structure or identity of employer.* If an employer which experiences a change in its corporate structure as the result of an acquisition, merger, ''spin-off,'' or other such action wishes to file a new LCA or a new H–1B petition or request for extension of status, the new employing entity shall redetermine its H–1B-dependency status in accordance with paragraphs (a) and (c) of this section (see paragraph (g) of this section). (See § 655.730(e), regarding change in corporate structure or identity of employer.) In the event of an enforcement action pursuant to subpart I of this part, the employer's calculations where required under paragraph (c) of this section and its records to be made available to the Administrator would enable the employer to show and the Administrator to verify the employer's determination (*e.g.,* copies of H–1B petitions; payroll records described in § 655.731(b)(1)).

(7) *''Single employer'' under IRC test.* If an employer utilizes the IRC single-employer definition and concludes that it is non-H–1B-dependent, the employer shall perform the ''snap-shot'' test set forth in paragraph (c)(2) of this section, and if it fails to meet that test, shall attest that it is H–1B-dependent or shall perform the full calculation of dependency status in accordance with paragraph (a) of this section. The employer shall place a list of the entities included as a ''single employer'' in the public access file maintained in accordance with § 766.760. In addition, the employer shall retain in its records the ''snap-shot'' or full calculation of its status, as appropriate (showing the number of employees of each entity who are included in the numerator and denominator of the equation, whether the employer utilizes the ''snap shot'' test or a complete calculation as described in paragraph (c) of this section). In the event of an enforcement action pursuant to subpart I of this part, the employer's records to be made available to the Administrator would enable the employer to show and the Administrator to verify the employer's determination (*e.g.,* copies of H–1B petitions; payroll records described in § 655.731(b)(1)).

(e) *How is an employer's H–1B-dependency status to be shown on the LCA?* The employer is required to designate its status by marking the appropriate box on the Form ETA–9035 (*i.e.,* either H–1B-dependent or non-H–1B-dependent). An employer which marks the designation of ''H–1B-dependent'' may also mark the designation of its intention to seek only ''exempt'' H–1B nonimmigrants on the LCA (see paragraph (g) of this section, and § 655.737). In the event that an employer has filed an LCA designating its H–1B-dependency status (either H–1B-dependent or non-H–1B-dependent) and thereafter experiences a change of status, the employer cannot use that LCA to support H–1B petitions for new nonimmigrants or requests for extension of H–1B status for existing nonimmigrants. Similarly, an employer that is or becomes H–1B-dependent cannot continue to use an LCA filed before January 19, 2001 to support new H–1B petitions or requests for extension of status. In such circumstances, the employer shall file a new LCA accurately designating its status and shall use that new LCA to support new petitions or requests for extensions of status.

(f) *What constitutes a ''willful violator''* employer and what are its special obligations?

(1) *''Willful violator''* or *''willful violator employer,''* for purposes of this subpart H and subpart I of this part means an employer that meets all of the following standards (*i.e.,* paragraphs (f)(1)(i) through (iii))—

(i) A finding of violation by the employer (as described in paragraph (f)(1) (ii)) is entered in either of the following two types of enforcement proceeding:

(A) A Department of Labor proceeding under section 212(n)(2) of the Act (8 U.S.C. 1182(n)(2)(C) and subpart I of this part; or

(B) A Department of Justice proceeding under section 212(n)(5) of the Act (8 U.S.C. 1182(n)(5).

(ii) The agency finds that the employer has committed either a willful failure or a misrepresentation of a material fact during the five-year period preceding the filing of the LCA; and

(iii) The agency's finding is entered on or after October 21, 1998.

(2) For purposes of this paragraph, ''willful failure'' means a violation which is a ''willful failure'' as defined in § 655.805(c).

(g) What LCAs are subject to the additional attestation obligations?

(1) An employer that is ''H–1B-dependent'' (under the standards described in paragraphs (a) through (e) of this section) or is a ''willful violator'' (under the standards described in paragraph (f) of this section) is subject to the attestation obligations regarding displacement of U.S. workers and recruitment of U.S. workers (under the standards described in §§ 655.738 and 655.739, respectively) for all LCAs that are filed during the time period specified in paragraph (2)(g) of this section, to be used to support any petitions for new H–1B nonimmigrants or any requests for extensions of status for existing H–1B nonimmigrants. An LCA which does not accurately indicate the employer's H–1B-dependency status or willful violator status shall not be used to support H–1B petitions or requests for extensions. Further, an employer which falsely attests to non-H–1B-dependency status, or which experiences a change of status to H–1B-dependency but continues to use the LCA to support new H–1B petitions or requests for extension of status shall—despite the LCA designation of non-H–1B-dependency—be held to its obligations to comply with the attestation requirements concerning nondisplacement of U.S. workers and recruitment of U.S. workers (as described in §§ 655.738 and 655.739, respectively), as explicitly acknowledged and agreed on the LCA.

(2) During the period between January 19, 2001 and October 1, 2003, any employer that is ''H–1B-dependent'' (under the standards described in paragraphs (a) through (e) of this section) or is a ''willful violator'' (under the standards described in paragraph (f) of this section) shall file a new LCA accurately indicating that status in order to be able to file petition(s) for new H–1B nonimmigrant(s) or request(s) for extension(s) of status for existing H–1B nonimmigrant(s). An LCA filed prior to January 19, 2001 may not be used to support petition(s) for new H–1B nonimmigrant(s) or request(s) for extension(s) of status for existing H–1B nonimmigrants.

(3) An employer that files an LCA indicating ''H–1B-dependent'' and/or ''willful violator'' status may also indicate on the LCA that all the H–1B nonimmigrants to be employed pursuant to that LCA will be ''exempt H–1B nonimmigrants'' as described in § 655.737. Such an LCA is not subject to the additional LCA attestation obligations, *provided that* all H–1B nonimmigrants employed under it are, in fact, exempt. An LCA which indicates that it will be used only for exempt H–1B nonimmigrants shall not be used to support H–1B petitions or requests for extensions of status for H–1B nonimmigrants who are not, in fact, exempt. Further, an employer which attests that the LCA will be used only for exempt H–1B nonimmigrants but uses the LCA to employ non-exempt H–1B nonimmigrants (through petitions and/or extensions of status) shall—despite the LCA designation of exempt H–1B nonimmigrants—be held to its obligations to comply with the attestation requirements concerning

nondisplacement of U.S. workers and recruitment of U.S. workers (as described in §§ 655.738 and 655.739, respectively), as explicitly acknowledged and agreed on the LCA.

(4) The special provisions for H–1B-dependent employers and willful violator employers do not apply to LCAs filed after October 1, 2003 (see 8 U.S.C. 1182(n)(1)(E)(ii)). However, all LCAs filed prior to that date, and containing the additional attestation obligations described in this section and §§ 655.737 through 655.739, will remain in effect with regard to those obligations, for so long as any H–1B nonimmigrant(s) employed pursuant to the LCA(s) remain employed by the employer.

16. Section 655.737 is added to read as follows:

§ 655.737 What are ''exempt'' H–1B nonimmigrants, and how does their employment affect the additional attestation obligations of H–1B-dependent employers and willful violator employers?

(a) An employer that is H–1B-dependent or a willful violator of the H-1B program requirements (as described in § 655.736) is subject to the attestation obligations regarding displacement of U.S. workers and recruitment of U.S. workers (as described in §§ 655.738 and 655.739, respectively) for all LCAs that are filed during the time period specified in § 655.736(g). However, these additional obligations do not apply to an LCA filed by such an employer if the LCA is used only for the employment of ''exempt'' H–1B nonimmigrants (through petitions and/or extensions of status) as described in this section.

(b) *What is the test or standard for determining an H–1B nonimmigrant's ''exempt'' status?* An H–1B nonimmigrant is ''exempt'' for purposes of this section if the nonimmigrant meets either of the two following criteria:

(1) Receives wages (including cash bonuses and similar compensation) at an annual rate equal to at least $60,000; or

(2) Has attained a master's or higher degree (or its equivalent) in a specialty related to the intended employment.

(c) *How is the $60,000 annual wage to be determined?* The H–1B nonimmigrant can be considered to be an ''exempt'' worker, for purposes of this section, if the nonimmigrant actually receives hourly wages or annual salary totaling at least $60,000 in the calendar year. The standards applicable to the employer's satisfaction of the required wage obligation are applicable to the determination of whether the $60,000 wages or salary are received (see § 655.731(c)(2) and (3)). Thus, employer contributions or costs for benefits such as health insurance, life insurance, and pension plans cannot be counted toward this $60,000. The compensation to be counted or credited for these purposes could include cash bonuses and similar payments, *provided that* such compensation is paid to the worker ''cash in hand, free and clear, when due'' (§ 655.731(c)(1)), meaning that the compensation has readily determinable market value, is readily convertible to cash tender, and is actually received by the employee when due (which must be within the year for which the employer seeks to count or credit the compensation toward the employee's $60,000 earnings to qualify for exempt status). Cash bonuses and similar compensation can be counted or credited toward the $60,000 for ''exempt'' status only if payment is assured (*i.e.,* if the payment is contingent or conditional on some event such as the employer's annual profits, the employer must guarantee payment even if the contingency is not met). The full $60,000 annual wages or salary must be received by the employee in order for the employee to have ''exempt'' status. The wages or salary required for ''exempt'' status cannot be decreased or *pro rated* based on the employee's part-time work schedule; an H–1B nonimmigrant working part-time, whose actual annual compensation is less than $60,000, would not qualify as exempt on the basis of wages, even if the worker's earnings, if projected to a full-time work schedule, would theoretically exceed $60,000 in a year. Where an employee works for less than a full year, the employee must receive at least the appropriate *pro rata* share of the $60,000 in order to be ''exempt'' (*e.g.,* an employee who resigns after three months must be paid at least $15,000). In the event of an investigation pursuant to subpart I of this part, the Administrator will determine whether the employee has received the required $60,000 per year, using the employee's anniversary date to determine the one-year period; for an employee who had worked for less than a full year (either at the beginning of employment, or after his/her last anniversary date), the determination as to the $60,000 annual wages will be on a *pro rata* basis (*i.e.,* whether the employee had been paid at a rate of $60,000 per year (or $5,000 per month) including any unpaid, guaranteed bonuses or similar compensation).

(d) *How is the ''master's or higher degree (or its equivalent) in a specialty related to the intended employment'' to be determined?*

(1) ''Master's or higher degree (or its equivalent),'' for purposes of this section means a foreign academic degree from an institution which is accredited or recognized under the law of the country where the degree was obtained, and which is equivalent to a master's or higher degree issued by a U.S. academic institution. The equivalence to a U.S. academic degree cannot be established through experience or through demonstration of expertise in the academic specialty (*i.e.,* no ''time equivalency'' or ''performance equivalency'' will be recognized as substituting for a degree issued by an academic institution). The INS and the Department will consult appropriate sources of expertise in making the determination of equivalency between foreign and U.S. academic degrees. Upon the request of the INS or the Department, the employer shall provide evidence to establish that the H–1B nonimmigrant has received the degree, that the degree was earned in the asserted field of study, including an academic transcript of courses, and that the institution from which the degree was obtained was accredited or recognized.

(2) ''Specialty related to the intended employment,'' for purposes of this section, means that the academic degree is in a specialty which is generally accepted in the industry or occupation as an appropriate or necessary credential or skill for the person who undertakes the employment in question. A ''specialty'' which is not generally accepted as appropriate or necessary to the employment would not be considered to be sufficiently ''related' to afford the H–1B nonimmigrant status as an ''exempt H–1B nonimmigrant.''

(e) *When and how is the determination of the H–1B nonimmigrant's ''exempt'' status to be made?* An employer that is H–1B-dependent or a willful violator (as described in § 655.736) may designate on the LCA that the LCA will be used only to support H–1B petition(s) and/or request(s) for extension of status for ''exempt'' H–1B nonimmigrants.

(1) If the employer makes the designation of ''exempt'' H–1B nonimmigrant(s) on the LCA, then the INS—as part of the adjudication of the H–1B petition or request for extension of status—will determine the worker's ''exempt'' status, since an H–1B petition must be supported by an LCA consistent with the petition (*i.e.,* occupation, area of intended employment, exempt status). The employer shall maintain, in the public access file maintained in

accordance with § 755.760, a list of the H–1B nonimmigrant(s) whose petition(s) and/or request(s) are supported by LCA(s) which the employer has attested will be used only for exempt H–1B nonimmigrants. In the event of an investigation under subpart I of this part, the Administrator will give conclusive effect to an INS determination of ''exempt'' status based on the nonimmigrant's educational attainments (*i.e.,* master's or higher degree (or its equivalent) in a specialty related to the intended employment) unless the determination was based on false information. If the INS determination of ''exempt'' status was based on the assertion that the nonimmigrant would receive wages (including cash bonuses and similar compensation) at an annual rate equal to at least $60,000, the employer shall provide evidence to show that such wages actually were received by the nonimmigrant (consistent with paragraph (c) of this section and the regulatory standards for satisfaction or payment of the required wages as described in § 655.731(c)(3)).

(2) If the employer makes the designation of ''exempt'' H–1B nonimmigrants on the LCA, but is found in an enforcement action under subpart I of this part to have used the LCA to employ nonimmigrants who are, in fact, not exempt, then the employer will be subject to a finding that it failed to comply with the nondisplacement and recruitment obligations (as described in §§ 655.738 and 655.739, respectively) and may be assessed appropriate penalties and remedies.

(3) If the employer does not make the designation of ''exempt'' H–1B nonimmigrants on the LCA, then the employer has waived the option of not being subject to the additional LCA attestation obligations on the basis of employing only exempt H–1B nonimmigrants under the LCA. In the event of an investigation under subpart I of this part, the Administrator will not consider the question of the nonimmigrant(s)'s ''exempt'' status in determining whether an H–1B-dependent employer or willful violator employer has complied with such additional LCA attestation obligations.

17. Section 655.738 is added to read as follows:

§ 655.738 What are the ''non-displacement of U.S. workers'' obligations that apply to H–1B-dependent employers and willful violators, and how do they operate?

An employer that is subject to these additional attestation obligations (under the standards described in § 655.736) is prohibited from displacement of any U.S. worker(s)—whether directly (in its own workforce) or secondarily (at a worksite of a second employer)—under the standards set out in this section.

(a) *''United States worker''* (''U.S. worker'') is defined in § 655.715.

(b) *''Displacement,''* for purposes of this section, has two components: ''lay off'' of U.S. worker(s), and ''essentially equivalent jobs'' held by U.S. worker(s) and H–1B nonimmigrant(s).

(1) *''Lay off''* of a U.S. worker means that the employer has caused the worker's loss of employment, other than through—

(i) Discharge of a U.S. worker for inadequate performance, violation of workplace rules, or other cause related to the worker's performance or behavior on the job;

(ii) A U.S. worker's voluntary departure or voluntary retirement (to be assessed in light of the totality of the circumstances, under established principles concerning ''constructive discharge'' of workers who are pressured to leave employment);

(iii) Expiration of a grant or contract under which a U.S. worker is employed, other than a temporary employment contract entered into in order to evade the employer's non-displacement obligation. The question is whether the loss of the contract or grant has caused the worker's loss of employment. It would not be a layoff where the job loss results from the expiration of a grant or contract without which there is no alternative funding or need for the U.S. worker's position on that or any other grant or contract (*e.g.,* the expiration of a research grant that funded a project on which the worker was employed at an academic or research institution; the expiration of a staffing firm's contract with a customer where the U.S. worker was hired expressly to work pursuant to that contract and the employer has no practice of moving workers to other customers or projects upon the expiration of contract(s)). On the other hand, it would be a layoff where the employer's normal practice is to move the U.S. worker from one contract to another when a contract expires, and work on another contract for which the worker is qualified is available (*e.g.,* staffing firm's contract with one customer ends and another contract with a different customer begins); or

(iv) A U.S. worker who loses employment is offered, as an alternative to such loss, a similar employment opportunity with the same employer (or, in the case of secondary displacement at a worksite of a second employer, as described in paragraph (d) of this section, a similar employment opportunity with either employer) at equivalent or higher compensation and benefits than the position from which the U.S. worker was discharged, regardless of whether or not the U.S. worker accepts the offer. The validity of the offer of a similar employment opportunity will be assessed in light of the following factors:

(A) The offer is a *bona fide* offer, rather than an offer designed to induce the U.S. worker to refuse or an offer made with the expectation that the worker will refuse;

(B) The offered job provides the U.S. worker an opportunity similar to that provided in the job from which he/she is discharged, in terms such as a similar level of authority, discretion, and responsibility, a similar opportunity for advancement within the organization, and similar tenure and work scheduling;

(C) The offered job provides the U.S. worker equivalent or higher compensation and benefits to those provided in the job from which he/she is discharged. The comparison of compensation and benefits includes all forms of remuneration for employment, whether or not called wages and irrespective of the time of payment (*e.g.,* salary or hourly wage rate; profit sharing; retirement plan; expense account; use of company car). The comparison also includes such matters as cost of living differentials and relocation expenses (*e.g.,* a New York City ''opportunity'' at equivalent or higher compensation and benefits offered to a worker discharged from a job in Kansas City would provide a wage adjustment from the Kansas City pay scale and would include relocation costs).

(2) *Essentially equivalent jobs.* For purposes of the displacement prohibition, the job from which the U.S. worker is laid off must be essentially equivalent to the job for which an H–1B nonimmigrant is sought. To determine whether the jobs of the laid off U.S. worker(s) and the H–1B nonimmigrant(s) are essentially equivalent, the comparison(s) shall be on a one-to-one basis where appropriate (*i.e.,* one U.S. worker left employment and one H–1B nonimmigrant joined the workforce) but shall be broader in focus where appropriate (*e.g.,* an employer, through reorganization, eliminates an entire department with several U.S. workers and then staffs this department's function(s) with H–1B nonimmigrants). The following comparisons are to be made:

(i) Job responsibilities. The job of the H–1B nonimmigrant must involve essentially the same duties and responsibilities as the job from which the U.S. worker was laid off. The

comparison focuses on the core elements of and competencies for the job, such as supervisory duties, or design and engineering functions, or budget and financial accountability. Peripheral, non-essential duties that could be tailored to the particular abilities of the individual workers would not be determinative in this comparison. The job responsibilities must be similar and both workers capable of performing those duties.

(ii) Qualifications and experience of the workers. The qualifications of the laid off U.S. worker must be substantially equivalent to the qualifications of the H–1B nonimmigrant. The comparison is to be confined to the experience and qualifications (*e.g.,* training, education, ability) of the workers which are directly relevant to the actual performance requirements of the job, including the experience and qualifications that would materially affect a worker's relative ability to perform the job better or more efficiently. While it would be appropriate to compare whether the workers in question have ''substantially equivalent'' qualifications and experience, the workers need not have identical qualifications and experience (*e.g.,* a bachelor's degree from one accredited university would be considered to be substantially equivalent to a bachelor's degree from another accredited university; 15 years experience in an occupation would be substantially equivalent to 10 years experience in that occupation). It would not be appropriate to compare the workers' relative ages, their sexes, or their ethnic or religious identities.

(iii) Area of employment. The job of the H–1B nonimmigrant must be located in the same area of employment as the job from which the U.S. worker was laid off. The comparison of the locations of the jobs is confined to the area within normal commuting distance of the worksite or physical location where the work of the H–1B nonimmigrant is or will be performed. For purposes of this comparison, if both such worksites or locations are within a Metropolitan Statistical Area or a Primary Metropolitan Statistical Area, they will be deemed to be within the same area of employment.

(3) The worker's rights under a collective bargaining agreement or other employment contract are not affected by the employer's LCA obligations as to non-displacement of such worker.

(c) *Direct displacement.* An H–1B-dependent or willful-violator employer (as described in § 655.736) is prohibited from displacing a U.S. worker in its own workforce (*i.e.,* a U.S. worker ''employed by the employer'') within the period beginning 90 days before and ending 90 days after the filing date of an H–1B petition supported by an LCA described in § 655.736(g). The following standards and guidance apply under the direct displacement prohibition:

(1) *Which U.S. workers are protected against ''direct displacement''?* This prohibition covers the H–1B employer's own workforce—U.S. workers ''employed by the employer''—who are employed in jobs that are essentially equivalent to the jobs for which the H–1B nonimmigrant(s) are sought (as described in paragraph (b)(2) of this section). The term ''employed by the employer'' is defined in § 655.715.

(2) *When does the ''direct displacement'' prohibition apply?* The H–1B employer is prohibited from displacing a U.S. worker during a specific period of time before and after the date on which the employer files any H-1B petition supported by the LCA which is subject to the non-displacement obligation (as described in § 655.736(g)). This protected period is from 90 days before until 90 days after the petition filing date.

(3) *What constitutes displacement of a U.S. worker?* The H–1B employer is prohibited from laying off a U.S. worker from a job that is essentially the equivalent of the job for which an H–1B nonimmigrant is sought (as described in paragraph (b)(1) of this section).

(d) *Secondary displacement.* An H–1B-dependent or willful-violator employer (as described in § 655.736) is prohibited from placing certain H–1B nonimmigrant(s) with another employer where there are indicia of an employment relationship between the nonimmigrant and that other employer (thus possibly affecting the jobs of U.S. workers employed by that other employer), unless and until the H–1B employer makes certain inquiries and/or has certain information concerning that other employer's displacement of similarly employed U.S. workers in its workforce. Employers are cautioned that even if the required inquiry of the secondary employer is made, the H–1B-dependent or willful violator employer shall be subject to a finding of a violation of the secondary displacement prohibition if the secondary employer, in fact, displaces any U.S. worker(s) during the applicable time period (see § 655.810(d)). The following standards and guidance apply under the secondary displacement prohibition:

(1) *Which U.S. workers are protected against ''secondary displacement''?* This provision applies to U.S. workers employed by the other or ''secondary'' employer (not those employed by the H–1B employer) in jobs that are essentially equivalent to the jobs for which certain H–1B nonimmigrants are placed with the other/secondary employer (as described in paragraph (b)(2) of this section). The term ''employed by the employer'' is defined in § 655.715.

(2) *Which H–1B nonimmigrants activate the secondary displacement prohibition?* Not every placement of an H–1B nonimmigrant with another employer will activate the prohibition and—depending upon the particular facts—an H–1B employer (such as a service provider) may be able to place H–1B nonimmigrant(s) at a client or customer's worksite without being subject to the prohibition. The prohibition applies to the placement of an H–1B nonimmigrant whose H–1B petition is supported by an LCA described in § 655.736(g) and whose placement with the other/secondary employer meets both of the following criteria:

(i) The nonimmigrant performs duties in whole or in part at one or more worksites owned, operated, or controlled by the other/secondary employer; and

(ii) There are indicia of an employment relationship between the nonimmigrant and the other/secondary employer. The relationship between the H–1B-nonimmigrant and the other/secondary need not constitute an ''employment'' relationship (as defined in § 655.715), and the applicability of the secondary displacement provision does not establish such a relationship. Relevant indicia of an employment relationship include:

(A) The other/secondary employer has the right to control when, where, and how the nonimmigrant performs the job (the presence of this indicia would suggest that the relationship between the nonimmigrant and the other/secondary employer approaches the relationship which triggers the secondary displacement provision);

(B) The other/secondary employer furnishes the tools, materials, and equipment;

(C) The work is performed on the premises of the other/secondary employer (this indicia alone would not trigger the secondary displacement provision);

(D) There is a continuing relationship between the nonimmigrant and the other/secondary employer;

(E) The other/secondary employer has the right to assign additional projects to the nonimmigrant;

(F) The other/secondary employer sets the hours of work and the duration of the job;

(G) The work performed by the nonimmigrant is part of the regular business (including governmental, educational, and non-profit operations) of the other/secondary employer;

(H) The other/secondary employer is itself in business; and

(I) The other/secondary employer can discharge the nonimmigrant from providing services.

(3) *What other/secondary employers are included in the prohibition on secondary displacement of U.S. workers by the H–1B employer?* The other/secondary employer who accepts the placement and/or services of the H–1B employer's nonimmigrant employee(s) need not be an H–1B employer. The other/secondary employer would often be (but is not limited to) the client or customer of an H–1B employer that is a staffing firm or a service provider which offers the services of H–1B nonimmigrants under a contract (*e.g.,* a medical staffing firm under contract with a nursing home provides H–1B nonimmigrant physical therapists; an information technology staffing firm under contract with a bank provides H–1B nonimmigrant computer engineers). Only the H–1B employer placing the nonimmigrant with the secondary employer is subject to the non-displacement obligation on the LCA, and only that employer is liable in an enforcement action pursuant to subpart I of this part if the other/secondary employer, in fact, displaces any of its U.S. worker(s) during the applicable time period. The other/secondary employer will not be subject to sanctions in an enforcement action pursuant to subpart I of this part (except in circumstances where such other/secondary employer is, in fact, an H–1B employer and is found to have failed to comply with its own obligations). (Note to paragraph (d)(3): Where the other/secondary employer's relationship to the H–1B nonimmigrant constitutes ''employment'' for purposes of a statute other than the H–1B provision of the INA, such as the Fair Labor Standards Act (29 U.S.C. 201 *et seq.*), the other/secondary employer would be subject to all obligations of an employer of the nonimmigrant under such other statute.)

(4) *When does the ''secondary displacement'' prohibition apply?* The H–1B employer's obligation of inquiry concerns the actions of the other/secondary employer during the specific period beginning 90 days before and ending 90 days after the date of the placement of the H–1B nonimmigrant(s) with such other/secondary employer.

(5) *What are the H–1B employer's obligations concerning inquiry and/or information as to the other/secondary employer's displacement of U.S. workers?* The H–1B employer is prohibited from placing the H–1B nonimmigrant with another employer, unless the H–1B employer has inquired of the other/secondary employer as to whether, and has no knowledge that, within the period beginning 90 days before and ending 90 days after the date of such placement, the other/secondary employer has displaced or intends to displace a similarly-employed U.S. worker employed by such other/secondary employer. The following standards and guidance apply to the H–1B employer's obligation:

(i) The H–1B employer is required to exercise due diligence and to make a reasonable effort to enquire about potential secondary displacement, through methods which may include (but are not limited to)—

(A) Securing and retaining a written assurance from the other/secondary employer that it has not and does not intend to displace a similarly-employed U.S. worker within the prescribed period;

(B) Preparing and retaining a memorandum to the file, prepared at the same time or promptly after receiving the other/secondary employer's oral statement that it has not and does not intend to displace a similarly-employed U.S. worker within the prescribed period (such memorandum shall include the substance of the conversation, the date of the communication, and the names of the individuals who participated in the conversation, including the person(s) who made the inquiry on behalf of the H–1B employer and made the statement on behalf of the other/secondary employer); or

(C) including a secondary displacement clause in the contract between the H–1B employer and the other/secondary employer, whereby the other/secondary employer would agree that it has not and will not displace similarly-employed U.S. workers within the prescribed period.

(ii) The employer's exercise of due diligence may require further, more particularized inquiry of the other/secondary employer in circumstances where there is information which indicates that U.S. worker(s) have been or will be displaced (*e.g.,* where the H–1B nonimmigrants will be performing functions that the other/secondary employer performed with its own workforce in the past). The employer is not permitted to disregard information which would provide knowledge about potential secondary displacement (*e.g.,* newspaper reports of relevant lay-offs by the other/secondary employer) if such information becomes available before the H–1B employer's placement of H–1B nonimmigrants with such employer. Under such circumstances, the H–1B employer would be expected to recontact the other/secondary employer and receive credible assurances that no lay-offs of similarly-employed U.S. workers are planned or have occurred within the prescribed period.

(e) *What documentation is required of H–1B employers concerning the non-displacement obligation?* The H–1B employer is responsible for demonstrating its compliance with the non-displacement obligation (whether direct or indirect), if applicable.

(1) Concerning *direct displacement* (as described in paragraph (c) of this section), the employer is required to retain all records the employer creates or receives concerning the circumstances under which each U.S. worker, in the same locality and same occupation as any H–1B nonimmigrant(s) hired, left its employ in the period from 90 days before to 90 days after the filing date of the employer's petition for the H–1B nonimmigrant(s), and for any such U.S. worker(s) for whom the employer has taken any action during the period from 90 days before to 90 days after the filing date of the H–1B petition to cause the U.S. worker's termination (*e.g.,* a notice of future termination of the employee's job). For all such employees, the H–1B employer shall retain at least the following documents: the employee's name, last-known mailing address, occupational title and job description; any documentation concerning the employee's experience and qualifications, and principal assignments; all documents concerning the departure of such employees, such as notification by the employer of termination of employment prepared by the employer or the employee and any responses thereto, and evaluations of the employee's job performance. Finally, the employer is required to maintain a record of the terms of any offers of similar employment to such U.S. workers and the employee's response thereto.

(2) Concerning *secondary displacement* (as described in paragraph (d) of this section), the H–1B employer is required to maintain documentation to show the manner in which it satisfied its obligation to make inquiries as to the displacement of U.S. workers by the other/secondary employer with which the H–1B employer places any H–1B

nonimmigrants (as described in paragraph (d)(5) of this section).

18. Section 655.739 is added to read as follows:

§ 655.739 What is the ''recruitment of U.S. workers'' obligation that applies to H–1B-dependent employers and willful violators, and how does it operate?

An employer that is subject to this additional attestation obligation (under the standards described in § 655.736) is required—prior to filing the LCA or any petition or request for extension of status supported by the LCA—to take good faith steps to recruit U. S. workers in the United States for the job(s) in the United States for which the H–1B nonimmigrant(s) is/are sought. The recruitment shall use procedures that meet industry-wide standards and offer compensation that is at least as great as the required wage to be paid to H–1B nonimmigrants pursuant to § 655.731(a) (*i.e.,* the higher of the local prevailing wage or the employer's actual wage). The employer may use legitimate selection criteria relevant to the job that are normal or customary to the type of job involved, so long as such criteria are not applied in a discriminatory manner. This section provides guidance for the employer's compliance with the recruitment obligation.

(a) ''*United States worker*'' (''U.S. worker'') is defined in § 655.715.

(b) ''*Industry,*'' for purposes of this section, means the set of employers which primarily compete for the same types of workers as those who are the subjects of the H–1B petitions to be filed pursuant to the LCA. Thus, a hospital, university, or computer software development firm is to use the recruitment standards utilized by the health care, academic, or information technology industries, respectively, in hiring workers in the occupations in question. Similarly, a staffing firm, which places its workers at job sites of other employers, is to use the recruitment standards of the industry which primarily employs such workers (*e.g.,* the health care industry, if the staffing firm is placing physical therapists (whether in hospitals, nursing homes, or private homes); the information technology industry, if the staffing firm is placing computer programmers, software engineers, or other such workers).

(c) ''*Recruitment,*'' for purposes of this section, means the process by which an employer seeks to contact or to attract the attention of person(s) who may apply for employment, solicits applications from person(s) for employment, receives applications, and reviews and considers applications so as to present the appropriate candidates to the official(s) who make(s) the hiring decision(s) (*i.e.,* pre-selection treatment of applications and applicants).

(d) ''*Solicitation methods,*'' for purposes of this section, means the techniques by which an employer seeks to contact or to attract the attention of potential applicants for employment, and to solicit applications from person(s) for employment.

(1) Solicitation methods may be either external or internal to the employer's workforce (with internal solicitation to include current and former employees).

(2) Solicitation methods may be either active (where an employer takes positive, proactive steps to identify potential applicants and to get information about its job openings into the hands of such person(s)) or passive (where potential applicants find their way to an employer's job announcements).

(i) Active solicitation methods include direct communication to incumbent workers in the employer's operation and to workers previously employed in the employer's operation and elsewhere in the industry; providing training to incumbent workers in the employer's organization; contact and outreach through collective bargaining organizations, trade associations and professional associations; participation in job fairs (including at minority-serving institutions, community/junior colleges, and vocational/technical colleges); use of placement services of colleges, universities, community/junior colleges, and business/trade schools; use of public and/or private employment agencies, referral agencies, or recruitment agencies (''headhunters'').

(ii) Passive solicitation methods include advertising in general distribution publications, trade or professional journals, or special interest publications (*e.g.,* student-oriented; targeted to underrepresented groups, including minorities, persons with disabilities, and residents of rural areas); America's Job Bank or other Internet sites advertising job vacancies; notices at the employer's worksite(s) and/or on the employer's Internet ''home page.''

(e) *How are ''industry-wide standards for recruitment'' to be identified?* An employer is not required to utilize any particular number or type of recruitment methods, and may make a determination of the standards for the industry through methods such as trade organization surveys, studies by consultative groups, or reports/statements from trade organizations. An employer which makes such a determination should be prepared to demonstrate the industry-wide standards in the event of an enforcement action pursuant to subpart I of this part. An employer's recruitment shall be at a level and through methods and media which are normal, common or prevailing in the industry, including those strategies that have been shown to be successfully used by employers in the industry to recruit U.S. workers. An employer may not utilize only the lowest common denominator of recruitment methods used in the industry, or only methods which could reasonably be expected to be likely to yield few or no U.S. worker applicants, even if such unsuccessful recruitment methods are commonly used by employers in the industry. An employer's recruitment methods shall include, at a minimum, the following:

(1) Both internal and external recruitment (*i.e.,* both within the employer's workforce (former as well as current workers) and among U.S. workers elsewhere in the economy); and

(2) At least some active recruitment, whether internal (*e.g.,* training the employer's U.S. worker(s) for the position(s)) or external (*e.g.,* use of recruitment agencies or college placement services).

(f) *How are ''legitimate selection criteria relevant to the job that are normal or customary to the type of job involved'' to be identified?* In conducting recruitment of U.S. workers (*i.e.,* in soliciting applications and in pre-selection screening or considering of applicants), an employer shall apply selection criteria which satisfy all of the following three standards (*i.e.,* paragraph (b) (1) through (3)). Under these standards, an employer would not apply spurious criteria that discriminate against U.S. worker applicants in favor of H–1B nonimmigrants. An employer that uses criteria which fail to meet these standards would be considered to have failed to conduct its recruitment of U.S. workers in good faith.

(1) *Legitimate criteria,* meaning criteria which are legally cognizable and not violative of any applicable laws (*e.g.,* employer may not use age, sex, race or national origin as selection criteria);.

(2) *Relevant to the job,* meaning criteria which have a nexus to the job's duties and responsibilities; and

(3) *Normal and customary to the type of job involved,* meaning criteria which would be necessary or appropriate based on the practices and expectations of the industry, rather than on the preferences of the particular employer.

(g) *What actions would constitute a prohibited ''discriminatory manner'' of recruitment?* The employer shall not

apply otherwise-legitimate screening criteria in a manner which would skew the recruitment process in favor of H–1B nonimmigrants. In other words, the employer's application of its screening criteria shall provide full and fair solicitation and consideration of U.S. applicants. The recruitment would be considered to be conducted in a discriminatory manner if the employer applied its screening criteria in a disparate manner (whether between H–1B and U.S. workers, or between jobs where H–1B nonimmigrants are involved and jobs where such workers are not involved). The employer would also be considered to be recruiting in a discriminatory manner if it used screening criteria that are prohibited by any applicable discrimination law (*e.g.,* sex, race, age, national origin). The employer that conducts recruitment in a discriminatory manner would be considered to have failed to conduct its recruitment of U.S. workers in good faith.

(h) *What constitute ''good faith steps'' in recruitment of U.S. workers?* The employer shall perform its recruitment, as described in paragraphs (d) through (g) of this section, so as to offer fair opportunities for employment to U.S. workers, without skewing the recruitment process against U.S. workers or in favor of H–1B nonimmigrants. No specific regimen is required for solicitation methods seeking applicants or for pre-selection treatment screening applicants. The employer's recruitment process, including pre-selection treatment, must assure that U.S. workers are given a fair chance for consideration for a job, rather than being ignored or rejected through a process that serves the employer's preferences with respect to the make up of its workforce (*e.g.,* the Department would look with disfavor on a practice of interviewing H–1B applicants but not U.S. applicants, or a practice of screening the applications of H–1B nonimmigrants differently from the applications of U.S. workers). The employer shall not exercise a preference for its incumbent nonimmigrant workers who do not yet have H–1B status (*e.g.,* workers on student visas). The employer shall recruit in the United States, seeking U.S. worker(s), for the job(s) in the United States for which H–1B nonimmigrant(s) are or will be sought.

(i) What documentation is the employer required to make or maintain, concerning its recruitment of U.S. workers?

(1) The employer shall maintain documentation of the recruiting methods used, including the places and dates of the advertisements and postings or other recruitment methods used, the content of the advertisements and postings, and the compensation terms (if such are not included in the content of the advertisements and postings). The documentation may be in any form, including copies of advertisements or proofs from the publisher, the order or confirmation from the publisher, an electronic or printed copy of the Internet posting, or a memorandum to the file.

(2) The employer shall retain any documentation it has received or prepared concerning the treatment of applicants, such as copies of applications and/or related documents, test papers, rating forms, records regarding interviews, and records of job offers and applicants' responses. To comply with this requirement, the employer is not required to create any documentation it would not otherwise create.

(3) The documentation maintained by the employer shall be made available to the Administrator in the event of an enforcement action pursuant to subpart I of this part. The documentation shall be maintained for the period of time specified in § 655.760.

(4) The employer's public access file maintained in accordance with § 655.760 shall contain information summarizing the principal recruitment methods used and the time frame(s) in which such recruitment methods were used. This may be accomplished either through a memorandum or through copies of pertinent documents.

(j) In addition to conducting good faith recruitment of U.S. workers (as described in paragraphs (a) through (h) of this section), the employer is required to have offered the job to any U.S. worker who applies and is equally or better qualified for the job than the H–1B nonimmigrant (see 8 U.S.C. 1182(n)(1)(G)(i)(II)); this requirement is enforced by the Department of Justice (see 8 U.S.C. 1182(n)(5); 20 CFR 655.705(c)).

19. Section 655.740 is amended by revising the title and paragraph (a)(2)(ii) to read as follows:

§ 655.740 What actions are taken on labor condition applications?

(a) * * *

(2) * * *

(ii) When the Form ETA 9035 contains obvious inaccuracies. An obvious inaccuracy will be found if the employer files an application in error—*e.g.,* where the Administrator, Wage and Hour Division, after notice and opportunity for a hearing pursuant to subpart I of this part, has notified ETA in writing that the employer has been disqualified from employing H–1B nonimmigrants under section 212(n)(2) of the INA. Examples of other obvious inaccuracies include stating a wage rate below the FLSA minimum wage, submitting an LCA earlier than six months before the beginning date of the period of intended employment, identifying multiple occupations on a single LCA, identifying a wage which is below the prevailing wage listed on the LCA, or identifying a wage range where the bottom of such wage range is lower than the prevailing wage listed on the LCA.

* * * * *

20. Section 655.750 is amended by revising the title and paragraph (b)(2) to read as follows:

§ 655.750 What is the validity period of the labor condition application?

* * * * *

(b) * * *

(2) Requests for withdrawals shall be in writing and shall be directed to the ETA service center at the following address: ETA Application Processing Center, P.O. Box 13640, Philadelphia PA 19101.

* * * * *

21. Section 655.760 is amended by revising the title and paragraph (a)(1), adding paragraphs (a)(6), (a)(7), (a)(8), (a)(9) and (a)(10), and revising the first sentence of paragraph (c), to read as follows:

§ 655.760 What records are to be made available to the public, and what records are to be retained?

(a) * * *

(1) A copy of the completed labor condition application, Form ETA 9035, and cover pages, Form ETA 9035CP. If the application is submitted by facsimile transmission, the application containing the original signature shall be maintained by the employer.

* * * * *

(6) A summary of the benefits offered to U.S. workers in the same occupational classifications as H–1B nonimmigrants, a statement as to how any differentiation in benefits is made where not all employees are offered or receive the same benefits (such summary need not include proprietary information such as the costs of the benefits to the employer, or the details of stock options or incentive distributions), and/or, where applicable, a statement that some/all H–1B nonimmigrants are receiving ''home country'' benefits (*see* § 655.731(c)(3));

(7) Where the employer undergoes a change in corporate structure, a sworn statement by a responsible official of the

new employing entity that it accepts all obligations, liabilities and undertakings under the LCAs filed by the predecessor employing entity, together with a list of each affected LCA and its date of certification, and a description of the actual wage system and EIN of the new employing entity (*see* § 655.730(e)(1)).

(8) Where the employer utilizes the definition of ''single employer''in the IRC, a list of any entities included as part of the single employer in making the determination as to its H–1B-dependency status (*see* § 655.736(d)(7));

(9) Where the employer is H–1B-dependent and/or a willful violator, and indicates on the LCA(s) that only ''exempt'' H–1B nonimmigrants will be employed, a list of such ''exempt'' H–1B nonimmigrants (*see* § 655.737(e)(1));

(10) Where the employer is H–1B-dependent or a willful violator, a summary of the recruitment methods used and the time frames of recruitment of U.S. workers (or copies of pertinent documents showing this information) (*see* § 655.739(i)(4).

* * * * *

(c) *Retention of records*. Either at the employer's principal place of business in the U.S. or at the place of employment, the employer shall retain copies of the records required by this subpart for a period of one year beyond the last date on which any H–1B nonimmigrant is employed under the labor condition application or, if no nonimmigrants were employed under the labor condition application, one year from the date the labor condition application expired or was withdrawn.* * *

* * * * *

Subpart I—Enforcement of H–1B Labor Condition Applications

22. Section 655.800 is revised to read as follows:

§ 655.800 Who will enforce the LCAs and how will they be enforced?

(a) *Authority of Administrator*. Except as provided in § 655.807, the Administrator shall perform all the Secretary's investigative and enforcement functions under section 212(n) of the INA (8 U.S.C. 1182(n)) and this subpart I and subpart H of this part.

(b) *Conduct of investigations*. The Administrator, either pursuant to a complaint or otherwise, shall conduct such investigations as may be appropriate and, in connection therewith, enter and inspect such places and such records (and make transcriptions or copies thereof), question such persons and gather such information as deemed necessary by the Administrator to determine compliance regarding the matters which are the subject of the investigation.

(c) *Employer cooperation/availability of records*. An employer shall at all times cooperate in administrative and enforcement proceedings. An employer being investigated shall make available to the Administrator such records, information, persons, and places as the Administrator deems appropriate to copy, transcribe, question, or inspect. No employer subject to the provisions of section 212(n) of the INA and/or this subpart I or subpart H of this part shall interfere with any official of the Department of Labor performing an investigation, inspection or law enforcement function pursuant to 8 U.S.C. 1182(n) or this subpart I or subpart H of this part. Any such interference shall be a violation of the labor condition application and this subpart I and subpart H of this part, and the Administrator may take such further actions as the Administrator considers appropriate. (Federal criminal statutes prohibit certain interference with a Federal officer in the performance of official duties. 18 U.S.C. 111 and 18 U.S.C. 1114.)

(d) *Confidentiality*. The Administrator shall, to the extent possible under existing law, protect the confidentiality of any person who provides information to the Department in confidence in the course of an investigation or otherwise under this subpart I or subpart H of this part.

23. Section 655.801 is added to read as follows:

§ 655.801 What protection do employees have from retaliation?

(a) No employer subject to this subpart I or subpart H of this part shall intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against an employee (which term includes a former employee or an applicant for employment) because the employee has—

(1) Disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of section 212(n) of the INA or any regulation relating to section 212(n), including this subpart I and subpart H of this part and any pertinent regulations of INS or the Department of Justice; or

(2) Cooperated or sought to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of section 212(n) of the INA or any regulation relating to section 212(n).

(b) It shall be a violation of this section for any employer to engage in the conduct described in paragraph (a) of this section. Such conduct shall be subject to the penalties prescribed by section 212(n)(2)(C)(ii) of the INA and § 655.810(b)(2), *i.e.*, a fine of up to $5,000, disqualification from filing petitions under section 204 or section 214(c) of the INA for at least two years, and such further administrative remedies as the Administrator considers appropriate.

(c) Pursuant to section 212(n)(2)(v) of the INA, an H–1B nonimmigrant who has filed a complaint alleging that an employer has discriminated against the employee in violation of paragraph (d)(1) of this section (or § 655.501(a)) may be allowed to seek other appropriate employment in the United States, provided the employee is otherwise eligible to remain and work in the United States. Such employment may not exceed the maximum period of stay authorized for a nonimmigrant classified under section 212(n) of the INA. Further information concerning this provision should be sought from the Immigration and Naturalization Service.

24. Section 655.805 is revised to read as follows:

§ 655.805 What violations may the Administrator investigate?

(a) The Administrator, through investigation, shall determine whether an H–1B employer has—

(1) Filed a labor condition application with ETA which misrepresents a material fact (Note to paragraph (a)(1): Federal criminal statutes provide penalties of up to $10,000 and/or imprisonment of up to five years for knowing and willful submission of false statements to the Federal Government. 18 U.S.C. 1001; see also 18 U.S.C. 1546);

(2) Failed to pay wages (including benefits provided as compensation for services), as required under § 655.731 (including payment of wages for certain nonproductive time);

(3) Failed to provide working conditions as required under § 655.732;

(4) Filed a labor condition application for H–1B nonimmigrants during a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment, as prohibited by § 655.733;

(5) Failed to provide notice of the filing of the labor condition application, as required in § 655.734;

(6) Failed to specify accurately on the labor condition application the number of workers sought, the occupational classification in which the H–1B nonimmigrant(s) will be employed, or the wage rate and conditions under

which the H–1B nonimmigrant(s) will be employed;

(7) Displaced a U.S. worker (including displacement of a U.S. worker employed by a secondary employer at the worksite where an H–1B worker is placed), as prohibited by § 655.738 (if applicable);

(8) Failed to make the required displacement inquiry of another employer at a worksite where H–1B nonimmigrant(s) were placed, as set forth in § 655.738 (if applicable);

(9) Failed to recruit in good faith, as required by § 655.739 (if applicable);

(10) Displaced a U.S. worker in the course of committing a willful violation of any of the conditions in paragraphs (a)(2) through (9) of this section, or willful misrepresentation of a material fact on a labor condition application;

(11) Required or accepted from an H–1B nonimmigrant payment or remittance of the additional $500/$1,000 fee incurred in filing an H–1B petition with the INS, as prohibited by § 655.731(c)(10)(ii);

(12) Required or attempted to require an H–1B nonimmigrant to pay a penalty for ceasing employment prior to an agreed upon date, as prohibited by § 655.731(c)(10)(i);

(13) Discriminated against an employee for protected conduct, as prohibited by § 655.801;

(14) Failed to make available for public examination the application and necessary document(s) at the employer's principal place of business or worksite, as required by § 655.760(a);

(15) Failed to maintain documentation, as required by this part; and

(16) Failed otherwise to comply in any other manner with the provisions of this subpart I or subpart H of this part.

(b) The determination letter setting forth the investigation findings (see § 655.815) shall specify if the violations were found to be substantial or willful. Penalties may be assessed and disqualification ordered for violation of the provisions in paragraphs (a)(5), (6), or (9) of this section only if the violation was found to be substantial or willful. The penalties may be assessed and disqualification ordered for violation of the provisions in paragraphs (a)(2) or (3) of this section only if the violation was found to be willful, but the Secretary may order payment of back wages (including benefits) due for such violation whether or not the violation was willful.

(c) For purposes of this part, *''willful failure''* means a knowing failure or a reckless disregard with respect to whether the conduct was contrary to section 212(n)(1)(A)(i) or (ii) of the INA, or §§ 655.731 or 655.732. See *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128 (1988); see also *Trans World Airlines* v. *Thurston*, 469 U.S. 111 (1985).

(d) The provisions of this part become applicable upon the date that the employer's LCA is certified, pursuant to §§ 655.740(a)(1) and 655.750, whether or not the employer hires any H–1B nonimmigrants in the occupation for the period of employment covered in the labor condition application. If the period of employment specified in the labor condition application expires or the employer withdraws the application in accordance with § 655.750(b), the provisions of this part will no longer apply with respect to such application, except as provided in § 655.750(b)(3) and (4).

25. Section 655.806 is added to read as follows:

§ 655.806 Who may file a complaint and how is it processed?

(a) Any aggrieved party, as defined in § 655.715, may file a complaint alleging a violation described in § 655.805(a). The procedures for filing a complaint by an aggrieved party and its processing by the Administrator are set forth in this section. The procedures for filing and processing information alleging violations from persons or organizations that are not aggrieved parties are set forth in § 655.807. With regard to complaints filed by any aggrieved person or organization—

(1) No particular form of complaint is required, except that the complaint shall be written or, if oral, shall be reduced to writing by the Wage and Hour Division official who receives the complaint.

(2) The complaint shall set forth sufficient facts for the Administrator to determine whether there is reasonable cause to believe that a violation as described in § 655.805 has been committed, and therefore that an investigation is warranted. This determination shall be made within 10 days of the date that the complaint is received by a Wage and Hour Division official. If the Administrator determines that the complaint fails to present reasonable cause for an investigation, the Administrator shall so notify the complainant, who may submit a new complaint, with such additional information as may be necessary. No hearing or appeal pursuant to this subpart shall be available where the Administrator determines that an investigation on a complaint is not warranted.

(3) If the Administrator determines that an investigation on a complaint is warranted, the complaint shall be accepted for filing; an investigation shall be conducted and a determination issued within 30 calendar days of the date of filing. The time for the investigation may be increased with the consent of the employer and the complainant, or if, for reasons outside of the control of the Administrator, the Administrator needs additional time to obtain information needed from the employer or other sources to determine whether a violation has occurred. No hearing or appeal pursuant to this subpart shall be available regarding the Administrator's determination that an investigation on a complaint is warranted.

(4) In the event that the Administrator seeks a prevailing wage determination from ETA pursuant to § 655.731(d), or advice as to prevailing working conditions from ETA pursuant to § 655.732(c)(2), the 30-day investigation period shall be suspended from the date of the Administrator's request to the date of the Administrator's receipt of the wage determination (or, in the event that the employer challenges the wage determination through the Employment Service complaint system, to the date of the completion of such complaint process).

(5) A complaint must be filed not later than 12 months after the latest date on which the alleged violation(s) were committed, which would be the date on which the employer allegedly failed to perform an action or fulfill a condition specified in the LCA, or the date on which the employer, through its action or inaction, allegedly demonstrated a misrepresentation of a material fact in the LCA. This jurisdictional bar does not affect the scope of the remedies which may be assessed by the Administrator. Where, for example, a complaint is timely filed, back wages may be assessed for a period prior to one year before the filing of a complaint.

(6) A complaint may be submitted to any local Wage and Hour Division office. The addresses of such offices are found in local telephone directories, and on the Department's informational site on the Internet at *http://www.dol.gov/dol/esa/public/contacts/whd/america2.htm*. The office or person receiving such a complaint shall refer it to the office of the Wage and Hour Division administering the area in which the reported violation is alleged to have occurred.

(b) When an investigation has been conducted, the Administrator shall, pursuant to § 655.815, issue a written determination as described in § 655.805(a).

26. Section 655.807 is added to read as follows:

§ 655.807 How may someone who is not an ''aggrieved party'' allege violations, and how will those allegations be processed?

(a) Persons who are not aggrieved parties may submit information concerning possible violations of the provisions described in § 655.805(a)(1) through (4) and (a)(7) through (9). No particular form is required to submit the information, except that the information shall be submitted in writing or, if oral, shall be reduced to writing by the Wage and Hour Division official who receives the information. An optional form shall be available to be used in setting forth the information. The information provided shall include:

(1) The identity of the person submitting the information and the person's relationship, if any, to the employer or other information concerning the person's basis for having knowledge of the employer's employment practices or its compliance with the requirements of this subpart I and subpart H of this part; and

(2) A description of the possible violation, including a description of the facts known to the person submitting the information, in sufficient detail for the Secretary to determine if there is reasonable cause to believe that the employer has committed a willful violation of the provisions described in § 655.805(a)(1), (2), (3), (4), (7), (8), or (9).

(b) The Administrator may interview the person submitting the information as appropriate to obtain further information to determine whether the requirements of this section are met. In addition, the person submitting information under this section shall be informed that his or her identity will not be disclosed to the employer without his or her permission.

(c) Information concerning possible violations must be submitted not later than 12 months after the latest date on which the alleged violation(s) were committed. The 12-month period shall be applied in the manner described in § 655.806(a)(5).

(d) Upon receipt of the information, the Administrator shall promptly review the information submitted and determine:

(1) Does the source likely possess knowledge of the employer's practices or employment conditions or the employer's compliance with the requirements of subpart H of this part?

(2) Has the source provided specific credible information alleging a violation of the requirements of the conditions described in § 655.805(a)(1), (2), (3), (4), (7), (8), or (9)?

(3) Does the information in support of the allegations appear to provide reasonable cause to believe that the employer has committed a violation of the provisions described in § 655.805(a)(1), (2), (3), (4), (7), (8), or (9), and that

(i) The alleged violation is willful?

(ii) The employer has engaged in a pattern or practice of violations? or

(iii) The employer has committed substantial violations, affecting multiple employees?

(e) ''Information'' within the meaning of this section does not include information from an officer or employee of the Department of Labor unless it was obtained in the course of a lawful investigation, and does not include information submitted by the employer to the Attorney General or the Secretary in securing the employment of an H–1B nonimmigrant.

(f)(1) Except as provided in paragraph (f)(2) of this section, where the Administrator has received information from a source other than an aggrieved party which satisfies all of the requirements of paragraphs (a) through (d) of this section, or where the Administrator or another agency of the Department obtains such information in a lawful investigation under this or any other section of the INA or any other Act, the Administrator (by mail or facsimile transmission) shall promptly notify the employer that the information has been received, describe the nature of the allegation in sufficient detail to permit the employer to respond, and request that the employer respond to the allegation within 10 days of its receipt of the notification. The Administrator shall not identify the source or information which would reveal the identity of the source without his or her permission.

(2) The Administrator may dispense with notification to the employer of the alleged violations if the Administrator determines that such notification might interfere with an effort to secure the employer's compliance. This determination shall not be subject to review in any administrative proceeding and shall not be subject to judicial review.

(g) After receipt of any response to the allegations provided by the employer, the Administrator will promptly review all of the information received and determine whether the allegations should be referred to the Secretary for a determination whether an investigation should be commenced by the Administrator.

(h) If the Administrator refers the allegations to the Secretary, the Secretary shall make a determination as to whether to authorize an investigation under this section.

(1) No investigation shall be commenced unless the Secretary (or the Deputy Secretary or other Acting Secretary in the absence or disability) personally authorizes the investigation and certifies—

(i) That the information provided under paragraph (a) of this section or obtained pursuant to a lawful investigation by the Department of Labor provides reasonable cause to believe that the employer has committed a violation of the provisions described in § 655.805(a)(1), (2), (3), (4), (7), (8), or (9);

(ii) That there is reasonable cause to believe the alleged violations are willful, that the employer has engaged in a pattern or practice of such violations, or that the employer has committed substantial violations, affecting multiple employees; and

(iii) That the other requirements of paragraphs (a) through (d) of this section have been met.

(2) No hearing shall be available from a decision by the Administrator declining to refer allegations addressed by this section to the Secretary, and none shall be available from a decision by the Secretary certifying or declining to certify that an investigation is warranted.

(i) If the Secretary issues a certification, an investigation shall be conducted and a determination issued within 30 days after the certification is received by the local Wage and Hour office undertaking the investigation. The time for the investigation may be increased upon the agreement of the employer and the Administrator or, if for reasons outside of the control of the Administrator, additional time is necessary to obtain information needed from the employer or other sources to determine whether a violation has occurred.

(j) In the event that the Administrator seeks a prevailing wage determination from ETA pursuant to § 655.731(d), or advice as to prevailing working conditions from ETA pursuant to § 655.732(c)(2), the 30-day investigation period shall be suspended from the date of the Administrator's request to the date of the Administrator's receipt of the wage determination (or, in the event that the employer challenges the wage determination through the Employment Service complaint system, to the date of the completion of such complaint process).

(k) Following the investigation, the Administrator shall issue a determination in accordance with to § 655.815.

(l) This section shall expire on September 30, 2003 unless section

212(n)(2)(G) of the INA is extended by future legislative action. Absent such extension, no investigation shall be certified by the Secretary under this section after that date; however, any investigation certified on or before September 30, 2003 may be completed.

27. Section 655.808 is added to read as follows:

§ 655.808 Under what circumstances may random investigations be conducted?

(a) The Administrator may conduct random investigations of an employer during a five-year period beginning with the date of any of the following findings, provided such date is on or after October 21, 1998:

(1) A finding by the Secretary that the employer willfully violated

any of the provisions described in § 655.805(a)(1) through (9);

(2) A finding by the Secretary that the employer willfully misrepresented material fact(s) in a labor condition application filed pursuant to § 655.730; or

(3) A finding by the Attorney General that the employer willfully failed to meet the condition of section 212(n)(1)(G)(i)(II) of the INA (pertaining to an offer of employment to an equally or better qualified U.S. worker).

(b) A finding within the meaning of this section is a final, unappealed decision of the agency. See §§ 655.520(a), 655.845(c), and 655.855(b).

(c) An investigation pursuant to this section may be made at any time the Administrator, in the exercise of discretion, considers appropriate, without regard to whether the Administrator has reason to believe a violation of the provisions of this subpart I and subpart H of this part has been committed. Following an investigation, the Administrator shall issue a determination in accordance with § 655.815.

28. Section 655.810 is revised to read as follows:

§ 655.810 What remedies may be ordered if violations are found?

(a) Upon determining that an employer has failed to pay wages or provide fringe benefits as required by § 655.731 and § 655.732, the Administrator shall assess and oversee the payment of back wages or fringe benefits to any H–1B nonimmigrant who has not been paid or provided fringe benefits as required. The back wages or fringe benefits shall be equal to the difference between the amount that should have been paid and the amount that actually was paid to (or with respect to) such nonimmigrant(s).

(b) *Civil money penalties.* The Administrator may assess civil money penalties for violations as follows:

(1) An amount not to exceed $1,000 per violation for:

(i) A violation pertaining to strike/lockout (§ 655.733) or displacement of U.S. workers (§ 655.738);

(ii) A substantial violation pertaining to notification (§ 655.734), labor condition application specificity (§ 655.730), or recruitment of U.S. workers (§ 655.739);

(iii) A misrepresentation of material fact on the labor condition application;

(iv) An early-termination penalty paid by the employee (§ 655.731(c)(10)(i));

(v) Payment by the employee of the additional $500/$1,000 filing fee (§ 655.731(c)(10)(ii)); or

(vi) Violation of the requirements of the regulations in this subpart I and subpart H of this part or the provisions regarding public access (§ 655.760) where the violation impedes the ability of the Administrator to determine whether a violation of section 212(n) of the INA has occurred or the ability of members of the public to have information needed to file a complaint or information regarding alleged violations of section 212(n) of the INA;

(2) An amount not to exceed $5,000 per violation for:

(i) A willful failure pertaining to wages/working conditions (§§ 655.731, 655.732), strike/lockout, notification, labor condition application specificity, displacement (including placement of an H–1B nonimmigrant at a worksite where the other/secondary employer displaces a U.S. worker), or recruitment;

(ii) A willful misrepresentation of a material fact on the labor condition application; or

(iii) Discrimination against an employee (§ 655.801(a)); or

(3) An amount not to exceed $35,000 per violation where an employer (whether or not the employer is an H–1B-dependent employer or willful violator) displaced a U.S. worker employed by the employer in the period beginning 90 days before and ending 90 days after the filing of an H–1B petition in conjunction with any of the following violations:

(i) A willful violation of any of the provisions described in § 655.805(a)(2) through (9) pertaining to wages/working condition, strike/lockout, notification, labor condition application specificity, displacement, or recruitment; or

(ii) A willful misrepresentation of a material fact on the labor condition application (§ 655.805(a)(1)).

(c) In determining the amount of the civil money penalty to be assessed, the Administrator shall consider the type of violation committed and other relevant factors. The factors which may be considered include, but are not limited to, the following:

(1) Previous history of violation, or violations, by the employer under the INA and this subpart I or subpart H of this part;

(2) The number of workers affected by the violation or violations;

(3) The gravity of the violation or violations;

(4) Efforts made by the employer in good faith to comply with the provisions of 8 U.S.C. 1182(n) and this subparts H and I of this part;

(5) The employer's explanation of the violation or violations;

(6) The employer's commitment to future compliance; and

(7) The extent to which the employer achieved a financial gain due to the violation, or the potential financial loss, potential injury or adverse effect with respect to other parties.

(d) *Disqualification from approval of petitions.* The Administrator shall notify the Attorney General pursuant to § 655.855 that the employer shall be disqualified from approval of any petitions filed by, or on behalf of, the employer pursuant to section 204 or section 214(c) of the INA for the following periods:

(1) At least one year for violation(s) of any of the provisions specified in paragraph (b)(1)(i) through (iii) of this section;

(2) At least two years for violation(s) of any of the provisions specified in paragraph (b)(2) of this section; or

(3) At least three years, for violation(s) specified in paragraph (b)(3) of this section.

(e) *Other administrative remedies.* (1) If the Administrator finds a violation of the provisions specified in paragraph (b)(1)(iv) or (v) of this section, the Administrator may issue an order requiring the employer to return to the employee (or pay to the U.S. Treasury if the employee cannot be located) any money paid by the employee in violation of those provisions.

(2) If the Administrator finds a violation of the provisions specified in paragraph (b)(1)(i) through (iii), (b)(2), or (b)(3) of this section, the Administrator may impose such other administrative remedies as the Administrator determines to be appropriate, including but not limited to reinstatement of workers who were discriminated against in violation of § 655.805(a), reinstatement of displaced U.S. workers, back wages to workers who have been displaced or whose employment has been terminated in violation of these

provisions, or other appropriate legal or equitable remedies.

(f) The civil money penalties, back wages, and/or any other remedy(ies) determined by the Administrator to be appropriate are immediately due for payment or performance upon the assessment by the Administrator, or upon the decision by an administrative law judge where a hearing is timely requested, or upon the decision by the Secretary where review is granted. The employer shall remit the amount of the civil money penalty by certified check or money order made payable to the order of ''Wage and Hour Division, Labor.'' The remittance shall be delivered or mailed to the Wage and Hour Division office in the manner directed in the Administrator's notice of determination. The payment or performance of any other remedy prescribed by the Administrator shall follow procedures established by the Administrator. Distribution of back wages shall be administered in accordance with existing procedures established by the Administrator.

(g) The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. 2461 note), requires that inflationary adjustments to civil money penalties in accordance with a specified cost-of-living formula be made, by regulation, at least every four years. The adjustments are to be based on changes in the Consumer Price Index for all Urban Consumers (CPI–U) for the U.S. City Average for All Items. The adjusted amounts will be published in the **Federal Register**. The amount of the penalty in a particular case will be based on the amount of the penalty in effect at the time the violation occurs.

29. Section 655.815 is amended by revising the title and paragraphs (a) and (c)(5) to read as follows:

§ 655.815 What are the requirements for the Administrator's determination?

(a) The Administrator's determination, issued pursuant to § 655.806, 655.807, or 655.808, shall be served on the complainant, the employer, and other known interested parties by personal service or by certified mail at the parties' last known addresses. Where service by certified mail is not accepted by the party, the Administrator may exercise discretion to serve the determination by regular mail.

* * * * *

(c) * * *

(5) Where appropriate, inform the parties that, pursuant to § 655.855, the Administrator shall notify ETA and the Attorney General of the occurrence of a violation by the employer.

30. Section 655.820 is amended by revising the title and paragraph (a) to read as follows:

§ 655.820 How is a hearing requested?

(a) Any interested party desiring review of a determination issued under §§ 655.805 and 655.815, including judicial review, shall make a request for such an administrative hearing in writing to the Chief Administrative Law Judge at the address stated in the notice of determination. If such a request for an administrative hearing is timely filed, the Administrator's determination shall be inoperative unless and until the case is dismissed or the Administrative Law Judge issues an order affirming the decision.

* * * * *

31. The title of § 655.825 is revised to read as follows:

§ 655.825 What rules of practice apply to the hearing?

* * * * *

32. The title of § 655.830 is revised to read as follows:

§ 655.830 What rules apply to service of pleadings?

* * * * *

33. The title of § 655.835 is revised to read as follows:

§ 655.835 How will the administrative law judge conduct the proceeding?

* * * * *

34. Section 655.840 is amended by revising the title and paragraph (c) to read as follows:

§ 655.840 What are the requirements for a decision and order of the administrative law judge?

* * * * *

(c) In the event that the Administrator's determination of wage violation(s) and computation of back wages are based upon a wage determination obtained by the Administrator from ETA during the investigation (pursuant to § 655.731(d)) and the administrative law judge determines that the Administrator's request was not warranted (under the standards in § 655.731(d)), the administrative law judge shall remand the matter to the Administrator for further proceedings on the existence of wage violations and/or the amount(s) of back wages owed. If there is no such determination and remand by the administrative law judge, the administrative law judge shall accept as final and accurate the wage determination obtained from ETA or, in the event either the employer or another interested party filed a timely complaint through the Employment Service complaint system, the final wage determination resulting from that process. See § 655.731; see also 20 CFR 658.420 through 658.426. Under no circumstances shall the administrative law judge determine the validity of the wage determination or require submission into evidence or disclosure of source data or the names of establishments contacted in developing the survey which is the basis for the prevailing wage determination.

* * * * *

35. Section 655.845 is revised to read as follows:

§ 655.845 What rules apply to appeal of the decision of the administrative law judge?

(a) The Administrator or any interested party desiring review of the decision and order of an administrative law judge, including judicial review, shall petition the Department's Administrative Review Board (Board) to review the decision and order. To be effective, such petition shall be received by the Board within 30 calendar days of the date of the decision and order. Copies of the petition shall be served on all parties and on the administrative law judge.

(b) No particular form is prescribed for any petition for the Board's review permitted by this subpart. However, any such petition shall:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the administrative law judge decision and order giving rise to such petition;

(4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;

(5) Be signed by the party filing the petition or by an authorized representative of such party;

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and

(7) Attach copies of the administrative law judge's's decision and order, and any other record documents which would assist the Board in determining whether review is warranted.

(c) Whenever the Board determines to review the decision and order of an administrative law judge, a notice of the Board's determination shall be served upon the administrative law judge, upon the Office of Administrative Law Judges, and upon all parties to the proceeding within 30 calendar days after the Board's receipt of the petition for review. If the Board determines that

it will review the decision and order, the order shall be inoperative unless and until the Board issues an order affirming the decision and order.

(d) Upon receipt of the Board's notice, the Office of Administrative Law Judges shall within 15 calendar days forward the complete hearing record to the Board.

(e) The Board's notice shall specify:

(1) The issue or issues to be reviewed;

(2) The form in which submissions shall be made by the parties (*e.g.,* briefs);

(3) The time within which such submissions shall be made.

(f) All documents submitted to the Board shall be filed with the Administrative Review Board, Room S–4309, U.S. Department of Labor, Washington, DC 20210. An original and two copies of all documents shall be filed. Documents are not deemed filed with the Board until actually received by the Board. All documents, including documents filed by mail, shall be received by the Board either on or before the due date.

(g) Copies of all documents filed with the Board shall be served upon all other parties involved in the proceeding. Service upon the Administrator shall be in accordance with § 655.830(b).

(h) The Board's final decision shall be issued within 180 calendar days from the date of the notice of intent to review. The Board's decision shall be served upon all parties and the administrative law judge.

(i) Upon issuance of the Board's decision, the Board shall transmit the entire record to the Chief Administrative Law Judge for custody pursuant to § 655.850.

36. The title of § 655.850 is revised to read as follows:

§ 655.850 Who has custody of the administrative record?

* * * * *

37. Section 655.855 is revised to read as follows:

§ 655.855 What notice shall be given to the Employment and Training Administration and the Attorney General of the decision regarding violations?

(a) The Administrator shall notify the Attorney General and ETA of the final determination of any violation requiring that the Attorney General not approve petitions filed by an employer. The Administrator's notification will address the type of violation committed by the employer and the appropriate statutory period for disqualification of the employer from approval of petitions. Violations requiring notification to the Attorney General are identified in § 655.810(f).

(b) The Administrator shall notify the Attorney General and ETA upon the earliest of the following events:

(1) Where the Administrator determines that there is a basis for a finding of violation by an employer, and no timely request for hearing is made pursuant to § 655.820; or

(2) Where, after a hearing, the administrative law judge issues a decision and order finding a violation by an employer, and no timely petition for review is filed with the Department's Administrative Review Board (Board) pursuant to § 655.845; or

(3) Where a timely petition for review is filed from an administrative law judge's decision finding a violation and the Board either declines within 30 days to entertain the appeal, pursuant to § 655.845(c), or the Board reviews and affirms the administrative law judge's determination; or

(4) Where the administrative law judge finds that there was no violation by an employer, and the Board, upon review, issues a decision pursuant to § 655.845, holding that a violation was committed by an employer.

(c) The Attorney General, upon receipt of notification from the Administrator pursuant to paragraph (a) of this section, shall not approve petitions filed with respect to that employer under sections 204 or 214(c) of the INA (8 U.S.C. 1154 and 1184(c)) for nonimmigrants to be employed by the employer, for the period of time provided by the Act and described in § 655.810(f).

(d) ETA, upon receipt of the Administrator's notice pursuant to paragraph (a) of this section, shall invalidate the employer's labor condition application(s) under this subpart I and subpart H of this part, and shall not accept for filing any application or attestation submitted by the employer under 20 CFR part 656 or subparts A, B, C, D, E, H, or I of this part, for the same calendar period as specified by the Attorney General.

PART 656—LABOR CERTIFICATION PROCESS FOR PERMANENT EMPLOYMENT OF ALIENS IN THE UNITED STATES

1. The authority citation for Part 656 is revised to read as follows:

Authority: 8 U.S.C. 1182(a)(5)(A), 1182(p)(1); 29 U.S.C. 49 *et seq.*; section 122, Pub.L. 101–649, 109 Stat. 4978.

2. Section 656.3 is amended by removing the definition of *Federal research agency.*

3. Section 656.40 is amended by revising paragraphs (a)(1) and (c), and the introductory text to paragraph (b), by redesignating paragraph (d) as (e), and by adding a new paragraph (d) as follows:

§ 656.40 Determination of prevailing wage for labor certification purposes.

(a) * * *

(1) Except as provided in paragraphs (c) and (d) of this section, if the job opportunity is in an occupation which is subject to a wage determination in the area under the Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, 29 CFR part 1, or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.*, 29 CFR part 4, the prevailing wage shall be at the rate required under the statutory determination. Certifying Officers shall request the assistance of the DOL Employment Standards Administration wage specialists if they need assistance in making this determination.

* * * * *

(b) For purposes of this section, except as provided in paragraphs (c) and (d), ''similarly employed'' shall mean ''having substantially comparable jobs in the occupational category in the area of intended employment,'' except that, if no such workers are employed by employers other than the employer applicant in the area of intended employment, ''similarly employed'' shall mean:

* * * * *

(c) In computing the prevailing wage for a job opportunity in an occupational classification in an area of intended employment in the case of an employee of an institution of higher education, or a related or affiliated nonprofit entity; a nonprofit research organization; or a Governmental research organization, the prevailing wage level shall only take into account employees at such institutions and organizations in the area of intended employment.

(1) The organizations listed in this paragraph (c) are defined as follows:

(i) *Institution of higher education* is defined in section 101(a) of the Higher Education Act of 1965. Section 101(a), 20 U.S.C. 1001(a) (1999), provides that an ''institution of higher education'' is an educational institution in any State that—

(A) Admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate;

(B) Is legally authorized within such State to provide a program of education beyond secondary education;

(C) Provides an educational program for which the institution awards a

bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree;

(D) Is a public or other nonprofit institution; and

(E) Is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

(ii) *Affiliated or related nonprofit entity.* A nonprofit entity (including but not limited to hospitals and medical or research institutions) that is connected or associated with an institution of higher education, through shared ownership or control by the same board or federation, operated by an institution of higher education, or attached to an institution of higher education as a member, branch, cooperative, or subsidiary;

(iii) *Nonprofit research organization or Governmental research organization.* A research organization that is either a nonprofit organization or entity that is primarily engaged in basic research and/or applied research, or a U.S. Government entity whose primary mission is the performance or promotion of basic and/or applied research. Basic research is general research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind. Basic research is also research that advances scientific knowledge, but does not have specific immediate commercial objectives although it may be in fields of present or potential commercial interest. It may include research and investigation in the sciences, social sciences, or humanities. Applied research is research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met. Applied research includes investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services. It may include research and investigation in the sciences, social sciences, or humanities.

(2) *A nonprofit organization or entity* within the meaning of this paragraph is one that is qualified as a tax exempt organization under Section 501(c)(3), (c)(4) or (c)(6) of the Internal Revenue Code of 1986, 26 U.S.C. 510(c)(3), (c)(4) or (c)(6), and has received approval as a tax exempt organization from the Internal Revenue Service, as it relates to research or educational purposes.

(d) With respect to a *professional athlete* as defined in section 212(a)(5)(A)(iii)(II) of the Immigration and Nationality Act, when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in those rules or regulations shall be considered the prevailing wage. Section 212(a)(5)(A)(iii)(II), 8 U.S.C. 1182(a)(5)(A)(iii)(II) (1999), defines a professional athlete as an individual who is employed as an athlete by—

(1) A team that is a member of an association of six or more professional sports teams whose total combined revenues exceed $10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or

(2) Any minor league team that is affiliated with such an association.

* * * * *

Signed at Washington, DC, this 11th day of December, 2000.

Raymond Bramucci,

Assistant Secretary, Employment and Training Administration.

T. Michael Kerr,

Administrator, Wage and Hour Division, Employment Standards Administration.

[The following three forms will not appear in the Code of Federal Regulations.]

BILLING CODE 4510–27–P

Labor Condition Application Cover Pages

U.S. Department of Labor
Employment and Training Administration

Form ETA 9035CP
OMB Approval:
Expiration Date:

IMPORTANT: Please read these cover pages carefully before completing Form ETA 9035 - Labor Condition Application for H-1B nonimmigrants. These cover pages and instructions contain full explanations of attestations that you are required to make and are incorporated by reference into the form pages that you are required to complete and submit to ETA. A copy of these cover pages must be included in the public disclosure file and given to the H-1B nonimmigrant upon request.

Employers seeking to hire H-1B nonimmigrants in specialty occupations or as fashion models of distinguished merit and ability must submit the completed and dated original Form ETA 9035 to the designated certifying officer in the Department of Labor (Department or DOL), Employment and Training Administration (ETA) Application Processing Center. ***Labor condition applications should be submitted to an ETA Application Processing Center via facsimile transmission (FAX to 1-800-397-0478) or via mail to P.O. Box 13640 * Philadelphia, PA * 19101.*** If the application is submitted by FAX, the application containing the original signature shall be maintained by the employer. An application which is complete and has no obvious inaccuracies will be certified by the Department and returned to the employer, who may then file it in support of its petition for an H-1B nonimmigrant with the Immigration and Naturalization Service (INS).

The completed form will be electronically scanned. To ensure the accuracy of readability and avoid rejections, it is preferred that the form be completed using the ETA 9035 program available from the U.S. Department of Labor's web site at http://ows.doleta.gov. If you hand write the form, print legibly in ink using a medium to thick pen. Print only in CAPITAL LETTERS and avoid contact with the edge of the boxes. If you use a typewriter to complete the form, use a font equivalent to 12-14 pt. Center each letter in the box and use only CAPITAL LETTERS. Be sure to sign and date the form. The regulatory citations below refer to 20 CFR part 655, subparts H and I.

To knowingly and willingly furnish any false information in the preparation of the Form ETA 9035 and any supporting documentation, or to aid, abet, or counsel another to do so is a federal offense, punishable by fine or imprisonment up to five years, or both (18 U.S.C. 1001). Other penalties apply as well to fraud or misuse of this immigration document and to perjury with respect to this form (18 U.S.C. 1546 and 1621).

OMB Notice Paperwork Reduction Project 1205-0310

Persons are not required to respond to this collection of information unless it displays a current, valid OMB control number. Respondent's obligation to reply to these reporting requirements is mandatory (INA, Section 212 (n)). Public reporting burden for this collection of information is estimated to average 1 hour per response, which includes the 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 this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the Employment and Training Administration at U.S. Department of Labor * Room C-4318 * 200 Constitution Avenue, NW * Washington, DC * 20210

Examples of how best to fill out Form ETA 9035

A. For optimum accuracy, please print in capital letters and avoid contact with the edge of the box.
The following will serve as an example:

A	B	C	D	E	F	G	H	I	J	K	L	M
N	O	P	Q	R	S	T	U	V	W	X	Y	Z

B. For optimum accuracy, please print carefully and avoid contact with the edges of the box. The following will serve as an example:

1	2	3	4	5	6	7	8	9	0

C. Shade Circles Like This--> ●
Not Like This-->

! Do Not Fax these cover pages (Form ETA 9035CP). Fax ONLY the completed Labor Condition Application for H-1B nonimmigrants - Form ETA 9035.

Draft

Labor Condition Application Cover Pages

U.S. Department of Labor
Employment and Training Administration

Form ETA 9035CP
OMB Approval:
Expiration Date:

Instructions for Section A
Employers Information

1. Return Fax Number: If you want the application to be returned via facsimile transmission, enter the fax number, area code first, to which you want the Department to send the final determination on the application. This may be the fax number of a person or entity other than the employer (e.g., an attorney or agent). **If you want the application mailed, leave the Return Fax Number blank.**

2. Employer's Full Legal Name: Enter the full legal name of the business, firm, or organization, or, if an individual, enter the name used on legal documents. Some abbreviation may be required for long names.

3. Employer's Address: Enter the address of the employer's principal place of business.

4. Employer's City, State, and Zip/Postal Code: Self - Explanatory

5. Employer's EIN Number: Enter the employer's Federal Employer Identification Number (EIN) (assigned by the Internal Revenue Service) (9 digits).

6. Employer's Phone Number and Extension: Enter the phone number, area code first, and extension, as appropriate, of the hiring or other designated official listed in Section H.

Instructions for Section B
Rate of Pay

1. Wage Rate (or Rate From) (Required): Enter the wage rate to be paid to H-1B nonimmigrants. If the wage offer is expressed as a range, enter the bottom of the wage range to be paid.

2. Rate Up To (Optional): Enter the top of the wage range to be paid to H-1B nonimmigrants.

3. Rate is Per: Enter whether the rate of pay is in terms of per year, month, two weeks, week, or hour.

4. Is this position part-time? Mark "Yes" or "No". If the position is part-time, the employer attests that the H-1B nonimmigrant(s) supported by the LCA will not regularly work more than the number of hours indicated (which may be a range of hours) on the INS Form(s) I-129 filed for the nonimmigrant(s). **Note: All H-1B nonimmigrants under the LCA must be part-time if question 4 is marked "Yes"; all H-1B nonimmigrants must be full-time if question 4 is marked "No".**

Instructions for Section C
Period of Employment and Occupation Information

1. Begin Date: Enter the beginning date (month, date, and 4 digit year) on which the H-1B nonimmigrant(s) will be employed under this application. For example, June 5, 2000 would be entered as 06-05-2000.

2. End Date: Enter the end date (month, date, and 4 digit year) on which the H-1B nonimmigrants will be employed. For example, June 5, 2000 would be entered as 06-05-2000.

3. Occupational Code: Enter the 3 digit code from Appendix 1 which most clearly describes the occupation to be performed.

4. Number of H-1B nonimmigrants: Enter the number of H-1B nonimmigrants that will be employed under this application. Use only numerals. Do NOT spell out the number: e.g., enter "001," not "ONE".

5. Job Title: Self - Explanatory

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Instructions for Section D
Information relating to Work Location for the H-1B nonimmigrant

1. City and State: Enter the city and state of the physical location where the work will actually be performed. See definition of "place of employment" in 20 CFR 655.175 and regulation concerning short-term placement in 20 CFR 655.735.

2. Prevailing Wage: Enter the prevailing wage rate. If the position is part-time, enter the prevailing wage on an hourly basis.

3. Wage is Per: Enter whether the prevailing wage is expressed in terms of per year, month, two weeks, week, or hour.

4. Wage Source: If the employer is relying on a wage determination obtained from a State Employment Security Agency, mark the SESA box. If the employer is using a collective bargaining agreement, mark that box. If the employer is using another source, mark the "Other" box and specify such other source in the space provided (question 6). This other source must be an appropriate survey. It may NOT be an established pay scale which has not been negotiated.

5. Year: Enter the 4 digit year in which the "other source" wage survey was published.

6. Other Wage Source: Enter the name of the published wage survey or other source used to determine the prevailing wage: e.g., "BLS Occupational Compensation Survey, Denver," "employer-conducted survey," etc. Any "other source" survey must meet all the criteria set forth in 20 CFR 655.731 (b) (3) (iii) (B) or (C), as appropriate.

Instructions for Section D - Subsection A
Information for Additional or Subsequent Work Location
Subsection A of Section D is only necessary if filing for more than one location

If H-1B nonimmigrants are to be employed concurrently or sequentially in more than one location, fill out Subsection A using the instructions listed above for Section D.

Instructions for Section E
Employer Labor Condition Statements

The employer must read and agree to statements (1) through (4) below and demonstrate that agreement by marking "Yes" in Section E of Form ETA 9035 and by signing the application form. The employer agrees to develop and maintain documentation supporting labor condition statements (1) and (4) as specified in 20 CFR 655.731 and 655.734, and to make this documentation available to DOL officials upon request. The employer also agrees to make available for public examination a copy of the labor condition application and necessary supporting documentation as specified in 20 CFR 655.760 within one (1) working day after the date on which the application has been filed with DOL. This documentation must be retained for public examination at the place of employment or the employer's principal place of business, as specified in Item G.

1. Wages: The employer attests that H-1B nonimmigrants will be paid wages which are at least the higher of the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question or the prevailing wage level for the occupational classification in the area of intended employment. By marking "Yes" in section E of the Labor Condition Application for H-1B nonimmigrants (Form ETA 9035), the employer also attests that it will pay H-1B nonimmigrants the required wage for time in nonproductive status due to a decision of the employer or due to the H-1B nonimmigrant's lack of a permit or license. The employer further attests that H-1B nonimmigrants will be offered benefits and eligibility for benefits on the same basis, and in accordance with the same criteria, as offered to U.S. workers. See 20 CFR 655.731.

Instructions for Section E are continued on page 4

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Continued Instructions for Section E
Employer Labor Condition Statements

2. Working Conditions: The employer attests that the employment of H-1B nonimmigrants in the named occupation will not adversely affect the working conditions of workers similarly employed. The employer further attests that H-1B nonimmigrants will be afforded working conditions on the same basis, and in accordance with the same criteria, as offered to similarly employed U.S. workers. See 20 CFR 655.732.

3. Strike, Lockout, or Work Stoppage: The employer attests that on the date the application is signed and submitted, there is not a strike, lockout, or work stoppage in the course of a labor dispute in the named occupation at the place of employment and that, if such a strike, lockout, or work stoppage occurs after the application is submitted, the employer will notify ETA within three (3) days of such occurrence and the application will not be used in support of a petition filing with INS for H-1B nonimmigrants to work in the same occupation at the place of employment until ETA determines the strike, lockout, or work stoppage has ceased. See 20 CFR 655.733.

4. Notice: The employer attests that as of the date of filing, notice of the labor condition application has been or will be provided to workers employed in the named occupation. Notice of the application shall be provided to workers through the bargaining representative, or where there is no such bargaining representative, notice of the filing shall be provided either through physical posting in conspicuous locations where H-1B nonimmigrants will be employed, or through electronic notification to employees in the occupational classification for which H-1B nonimmigrants are sought. The employer also attests that each H-1B nonimmigrant employed pursuant to the application will be provided with a copy of the certified Form ETA 9035, and provided with a copy of ETA 9035CP if requested. This notification shall be provided no later than the date the H-1B nonimmigrant reports to work at the place of employment. See 20 CFR 655.734.

! Please note that you have read and agree to these conditions by marking "Yes" in Section E of the Labor Condition Application for H-1B nonimmigrants (Form ETA 9035).

Instructions for Section F - Subsection 1
Additional Employer Labor Condition Statements

Notice To Employers: If an employer is or becomes H-1B dependent or is found to have committed a willful violation or a misrepresentation of a material fact, any labor condition application for H-1B nonimmigrants that was certified by the Department of Labor prior to January 19, 2001 will be deemed invalid and may not be used in support of a new petition or an extension of a petition for an H-1B nonimmigrant.

Please Note: The determination as to whether an employer is H-1B dependent is a function of the number of H-1B nonimmigrants employed as a proportion of the total number of full-time equivalent employees employed in the U.S. The following table can be used to determine whether the employer is or is not H-1B dependent:

An employer is H-1B dependent if it employs in the U.S.:	
Number of Full-Time Equivalent Employees (U.S. and H-1B workers):	**Number of H-1B Nonimmigrant Employees:**
1 to 25	8 or more
26 to 50	13 or more
51 or more	15% or more of workforce (U.S. and H-1B workers).

See 20 CFR 655.736 for more detailed guidance as to what constitutes an "H-1B dependent employer" or a "willful violator".

Instructions for Section F - Subsection 1 are continued on page 5

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Continued Instructions for Section F - Subsection 1
Additional Employer Labor Condition Statements

! **All employers are required to choose one of the following alternatives. Please note the alternative chosen by marking A, B, or C in section F - Subsection 1 of the Labor Condition Application for H-1B nonimmigrants (Form ETA 9035).**

Alternative A - The employer is not H-1B dependent (as defined above) and has not been found to have committed a willful violation or a misrepresentation of a material fact during the five (5) year period preceding the date of this application (and after October 20, 1998). The employer agrees to maintain the documentation required by 20 CFR 655.736 where applicable.

If an employer chooses Alternative A and is or becomes H-1B dependent or was found, prior to the date of filing, to have committed a willful violation or a misrepresentation, the submitted labor application shall be deemed invalid and may not be used in support of a new petition or extension of a petition for an H-1B nonimmigrant. By choosing Alternative A, the employer also acknowledges that if it uses this application despite its invalidity, it is required to comply with the Additional Employer Labor Condition Statements in Section F - Subsection 2.

Alternative B - The employer is an H-1B dependent employer and/or the employer has been found during the five (5) year period preceding the date of this application (and after October 20, 1998) to have committed a willful violation or a misrepresentation of a material fact.

! **If Alternative B is chosen, Section F - Subsection 2 of Form ETA 9035 MUST be filled out.**

Alternative C - The employer is an H-1B dependent employer and/or the employer has been found during the five (5) year period preceding the submittal date of this application (and after October 20, 1998) to have committed a willful violation or a misrepresentation of a material fact, BUT the employer will use this labor condition application ONLY in support of petitions or extensions of status for exempt H-1B nonimmigrants who will receive wages at a rate equal to at least $60,000 per year, or have attained a master's degree (or equivalent or higher degree) in a specialty related to the employment. The employer also agrees to maintain documentation required by 20 CFR 655.737.

By Choosing Alternative C, the employer acknowledges that if it uses this application in support of a petition or extension of a petition of an H-1B nonimmigrant who is not exempt, it is required to comply with the Additional Employer Labor Condition Statements in Section F - Subsection 2 with respect to all H-1B nonimmigrants supported by this application.

Instruction for Section F - Subsection 2
Additional Employer Labor Condition Statements

All employers (1) that are H-1B dependent (as defined above) and/or (2) that have been found to have committed a willful violation or a misrepresentation of a material fact during the five (5) year period preceding the date of this application (and after October 20, 1998), **must read and agree to statements (A) through (C) below and demonstrate that agreement by marking "Yes" in Section F - Subsection 2 of Form ETA 9035 and by signing the application form.** The employer agrees to develop and maintain documentation supporting labor condition statements (A), (B), and (C) as specified in 20 CFR 655.738 and 655.739 and to make this documentation available to DOL officials upon request. The employer also agrees to make available for public examination a copy of the labor condition application and necessary supporting documentation as specified in 20 CFR 655.760 within one (1) working day after the date on which the application has been filed with DOL. This documentation must be retained for public examination at the place of employment or the employer's principal place of business as identified in Item A. In addition, the employer agrees to maintain documentation supporting compliance with requirements on:

Instructions for Section F - Subsection 2 are continued on page 6

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Instruction for Section F - Subsection 2
Additional Employer Labor Condition Statements

(A) Displacement: The employer will not displace any similarly employed U.S. worker within the period beginning 90 days before and ending 90 days after the date of filing a petition for an H-1B nonimmigrant supported by the application. See 20 CFR 655.738.

(B) Secondary Displacement: The employer will not place any H-1B nonimmigrant employed pursuant to this application with any other employer or at another employer's worksite UNLESS the employer applicant first makes a bona fide inquiry as to whether the other employer has displaced or intends to displace a similarly employed U.S. worker within the period beginning 90 days before and ending 90 days after the placement, and the employer applicant has no contrary knowledge.

If the other employer displaces a similarly employed U.S. worker during such period, the displacement will constitute a failure to comply with the terms of the labor condition application and the employer applicant may be subject to civil money penalties and debarment. See 20 CFR 655.738.

(C) Recruitment and Hiring: Prior to filing any petition for an H-1B nonimmigrant pursuant to this application, the employer took or will take good faith steps meeting industry-wide standards to recruit U.S. workers for the job for which the nonimmigrant is sought, offering compensation at least as great as required to be offered to the H-1B nonimmigrant. The employer will (has) offer(ed) the job to any U.S. worker who (has) applied and is equally or better qualified than the H-1B nonimmigrant. See 20 CFR 655.739.

This labor condition statement "C" does not apply to the employment of an H-1B nonimmigrant who is a "priority worker" (defined as a person with extraordinary ability, or outstanding professors or researchers, or certain multi-national executives or managers) within the meaning of Section 203 (b)(1)(A), (B), or (C) of the Immigration and Nationality Act, 8 U.S.C. 1153.

Instructions for Section G
Public Disclosure Information

Mark the appropriate circle identifying where documentation concerning this application will be maintained.

Instructions for Section H
Declaration of Employer

! **The application must be signed by an official designated by the employer and authorized by the employer to agree to the statements herein on the employer's behalf.**

False statements are subject to Federal criminal penalties, as stated above. Failure to meet a condition of the application or misrepresentation of a material fact may result in civil money penalties, debarment, and other appropriate relief.

Instructions for Section I
Contact Information

Enter information in this section only if the person to whom questions regarding this application should be directed is different from the hiring or other designated official signing the application on behalf of the employer.

1. Contact First Name and Middle Initial (MI): Self-Explanatory

2. Contact Last Name: Self-Explanatory

3. Contact Phone Number and Extension: Self-Explanatory

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Labor Condition Application Cover Pages

U.S. Department of Labor
Employment and Training Administration

Form ETA 9035CP
OMB Approval:
Expiration Date:

Appendix 1
Three - Digit Occupational Groups
Professional, Technical, and Managerial Occupations and Fashion Models

Occupations in Architecture, Engineering, and Surveying

001 ARCHITECTURAL OCCUPATIONS
002 AERONAUTICAL ENGINEERING OCCUPATIONS
003 ELECTRICAL/ELECTRONICS ENGINEERING OCCUPATIONS
005 CIVIL ENGINEERING OCCUPATIONS
006 CERAMIC ENGINEERING OCCUPATIONS
007 MECHANICAL ENGINEERING OCCUPATIONS
008 CHEMICAL ENGINEERING OCCUPATIONS
010 MINING AND PETROLEUM ENGINEERING OCCUPATIONS
011 METALLURGY AND METALLURGICAL ENGINEERING OCCUPATIONS
012 INDUSTRIAL ENGINEERING OCCUPATIONS
013 AGRICULTURAL ENGINEERING OCCUPATIONS
014 MARINE ENGINEERING OCCUPATIONS
015 NUCLEAR ENGINEERING OCCUPATIONS
017 DRAFTERS
018 SURVEYING/CARTOGRAPHIC OCCUPATIONS
019 OTHER OCCUPATIONS IN ARCHITECTURE, ENGINEERING, AND SURVEYING

Occupations in Mathematics and Physical Sciences

020 OCCUPATIONS IN MATHEMATICS
021 OCCUPATIONS IN ASTRONOMY
022 OCCUPATIONS IN CHEMISTRY
023 OCCUPATIONS IN PHYSICS
024 OCCUPATIONS IN GEOLOGY
025 OCCUPATIONS IN METEOROLOGY
029 OTHER OCCUPATIONS IN MATHEMATICS AND PHYSICAL SCIENCES

Computer - Related Occupations

030 OCCUPATIONS IN SYSTEMS ANALYSIS AND PROGRAMMING
031 OCCUPATIONS IN DATA COMMUNICATIONS AND NETWORKS
032 OCCUPATIONS IN COMPUTER SYSTEM USER SUPPORT
033 OCCUPATIONS IN COMPUTER SYSTEM TECHNICAL SUPPORT
039 OTHER COMPUTER-RELATED OCCUPATIONS

Occupations in Life Sciences

040 OCCUPATIONS IN AGRICULTURAL SCIENCES
041 OCCUPATIONS IN BIOLOGICAL SCIENCES
045 OCCUPATIONS IN PSYCHOLOGY
049 OTHER OCCUPATIONS IN LIFE SCIENCES

Occupations in Social Sciences

050 OCCUPATIONS IN ECONOMICS
051 OCCUPATIONS IN POLITICAL SCIENCE
052 OCCUPATIONS IN HISTORY
054 OCCUPATIONS IN SOCIOLOGY
055 OCCUPATIONS IN ANTHROPOLOGY
059 OTHER OCCUPATIONS IN SOCIAL SCIENCES

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Appendix 1 Continued
Three - Digit Occupational Groups
Professional, Technical, and Managerial Occupations and Fashion Models

Occupations in Medicine and Health

070 PHYSICIANS AND SURGEONS
071 OSTEOPATHS
072 DENTISTS
073 VETERINARIANS
074 PHARMACISTS
075 REGISTERED NURSES
076 THERAPISTS
077 DIETICIANS
078 OCCUPATIONS IN MEDICAL AND DENTAL TECHNOLOGY
079 OTHER OCCUPATIONS IN MEDICINE AND HEALTH

Occupations in Education

090 OCCUPATIONS IN COLLEGE AND UNIVERSITY EDUCATION
091 OCCUPATIONS IN SECONDARY SCHOOL EDUCATION
092 OCCUPATIONS IN PRESCHOOL, PRIMARY SCHOOL, AND KINDERGARTEN EDUCATION
094 OCCUPATIONS IN EDUCATION OF PERSONS WITH DISABILITIES
096 HOME ECONOMISTS AND FARM ADVISERS
097 OCCUPATIONS IN VOCATIONAL EDUCATION
099 OTHER OCCUPATIONS IN EDUCATION

Occupations in Museum, Library, and Archival Sciences

100 LIBRARIANS
101 ARCHIVISTS
102 MUSEUM CURATORS AND RELATED OCCUPATIONS
109 OTHER OCCUPATIONS IN MUSEUM, LIBRARY, AND ARCHIVAL SCIENCES

Occupations in Law and Jurisprudence

110 LAWYERS
111 JUDGES
119 OTHER OCCUPATIONS IN LAW AND JURISPRUDENCE

Occupations in Religion and Theology

120 CLERGY
129 OTHER OCCUPATIONS IN RELIGION AND THEOLOGY

Occupations in Writing

131 WRITERS
132 EDITORS: PUBLICATION, BROADCAST, AND SCRIPT
139 OTHER OCCUPATIONS IN WRITING

Occupations in Art

141 COMMERCIAL ARTISTS: DESIGNERS AND ILLUSTRATORS, GRAPHIC ARTS
142 ENVIRONMENTAL, PRODUCT, AND RELATED DESIGNERS
149 OTHER OCCUPATIONS IN ART

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Labor Condition Application Cover Pages

U.S. Department of Labor
Employment and Training Administration

Form ETA 9035CP
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Appendix 1 Continued
Three - Digit Occupational Groups
Professional, Technical, and Managerial Occupations and Fashion Models

Occupations in Entertainment and Recreation

152 OCCUPATIONS IN MUSIC
159 OTHER OCCUPATIONS IN ENTERTAINMENT AND RECREATION

Occupations in Administrative Specializations

160 ACCOUNTANTS, AUDITORS, AND RELATED OCCUPATIONS
161 BUDGET AND MANAGEMENT SYSTEMS ANALYSIS OCCUPATIONS
162 PURCHASING MANAGEMENT OCCUPATIONS
163 SALES AND DISTRIBUTION MANAGEMENT OCCUPATIONS
164 ADVERTISING MANAGEMENT OCCUPATIONS
165 PUBLIC RELATIONS MANAGEMENT OCCUPATIONS
166 PERSONNEL ADMINISTRATION OCCUPATIONS
168 INSPECTORS AND INVESTIGATORS, MANAGERIAL AND PUBLIC SERVICE
169 OTHER OCCUPATIONS IN ADMINISTRATIVE OCCUPATIONS

Managers and Officials

180 AGRICULTURE, FORESTRY AND FISHING INDUSTRY MANAGERS AND OFFICIALS
181 MINING INDUSTRY MANAGERS AND OFFICIALS
182 CONSTRUCTION INDUSTRY MANAGERS AND OFFICIALS
183 MANUFACTURING INDUSTRY MANAGERS AND OFFICIALS
184 TRANSPORTATION, COMMUNICATION, AND UTILITIES INDUSTRY MANAGERS AND OFFICIALS
185 WHOLESALE AND RETAIL TRADE MANAGERS AND OFFICIALS
186 FINANCE, INSURANCE, AND REAL ESTATE MANAGERS AND OFFICIALS
187 SERVICE INDUSTRY MANAGERS AND OFFICIALS
188 PUBLIC ADMINISTRATION MANAGERS AND OFFICIALS
189 MISCELLANEOUS MANAGERS AND OFFICIALS

Miscellaneous Professional, Technical, and Managerial Occupations

195 OCCUPATIONS IN SOCIAL AND WELFARE WORK
199 MISCELLANEOUS PROFESSIONAL, TECHNICAL, AND MANAGERIAL OCCUPATIONS

Sales Promotion Occupations

297 FASHION MODELS

Miscellaneous

137 INTERPRETERS AND TRANSLATORS
143 OCCUPATIONS IN PHOTOGRAGPHY
144 FINE ARTISTS
150 OCCUPATIONS IN DRAMATICS
151 OCCUPATIONS IN DANCING
153 OCCUPATIONS IN ATHLETICS AND SPORTS
191 AGENTS AND APPRAISERS
193 RADIO OPERATORS
194 SOUND, FILM
196 AIRPLANE PILOTS
197 SHIP CAPTAINS
198 RAILROAD CONDUCTORS

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Labor Condition Application for H-1B Nonimmigrants

U.S. Department of Labor
Employment and Training Administration

Form ETA 9035
OMB Approval:
Expiration Date:

A. Employer's Information

! **If you want the application returned by mail, leave the Return Fax Number blank.**

1. Return Fax Number ( ) -

2. Employer's Full Legal Name

3. Employer's Address (Number and Street)

4. Employer's City , State Zip/Postal Code

5. Employer's EIN Number -

6. Employer's Phone Number ( ) - Extension

B. Rate of Pay

1. Wage Rate (or Rate From) (Required): $.

2. Rate Up To (Optional): $.

3. Rate is Per:
- ◯ Year
- ◯ Week
- ◯ Month
- ◯ Hour
- ◯ 2 Weeks

4. Is this position part-time?
- ◯ Yes
- ◯ No

! **Please Note: Part-time hours worked by nonimmigrant(s) will be in the range of hours stated on the INS Form(s) I-129.**

C. Period Of Employment and Occupation Information

! **Please Note: The Date Information MUST be in MM/DD/YYYY format**

1. Begin Date / /

2. End Date / /

3. Occupational Code

4. Number of H-1B Nonimmigrants

5. Job Title

D. Information relating to Work Location for the H-1B Nonimmigrants

! **This section is REQUIRED**

! **Do NOT write "Same As Above". This section MUST be filled out.**

1. City , State

2. Prevailing Wage $.

3. Wage is Per:
- ◯ Year
- ◯ Week
- ◯ Month
- ◯ Hour
- ◯ 2 Weeks

4. Wage Source
- ◯ SESA
- ◯ Collective Bargaining Agreement
- ◯ Other

! **If OTHER is chosen as the Wage Source, Numbers 5 and 6 in this section MUST be filled out.**

5. Year

6. Other Wage Source

Page Link

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Labor Condition Application for H-1B Nonimmigrants

U.S. Department of Labor
Employment and Training Administration

Form ETA 9035
OMB Approval:
Expiration Date:

D. Subsection A Information For Additional or Subsequent Work Location

! This Section should be completed only if filing for more than 1 work location.

1. City _____ , State _____

2. Prevailing Wage $ _____ . _____

3. Wage is Per:
- ◯ Year
- ◯ Week
- ◯ Month
- ◯ Hour
- ◯ 2 Weeks

4. Wage Source
- ◯ SESA
- ◯ Collective Bargaining Agreement
- ◯ Other

! **If OTHER is chosen as the Wage Source, Numbers 5 and 6 in this section MUST be filled out.**

5. Year _____

6. Other Wage Source _____

E. Employer Labor Condition Statements

! **Please Note: In order for your application to be processed, you MUST read section E of the Labor Condition Application cover pages under the heading "Employer Labor Condition Statements" and agree to all 4 labor condition statements summarized below:**

(1) Wages: Pay nonimmigrants at least the local prevailing wage or the employer's actual wage, whichever is higher, and pay for non-productive time. Offer nonimmigrants benefits on the same basis as U.S. workers.

(2) Working Conditions: Provide working conditions for nonimmigrants which will not adversely affect the working conditions of workers similarly employed.

(3) Strike, Lockout, or Work Stoppage: No strike or lockout in the occupational classification at the place of employment.

(4) Notice: Notice to union or to workers at the place of employment. A copy of this form to H-1B workers.

I have read and agree to Employer Labor Condition Statements 1, 2, 3, and 4 as set forth in Section E of the Labor Condition Application Cover Pages. ◯ Yes ◯ No

F. Additional Employer Labor Condition Statments

! **Please Note: In order for your application to be processed, you MUST read Section F - Subsections 1 and 2 of the Labor Conditio n Application cover pages under the heading "Additional Employer Labor Condition Statements" and choose one of the 3 alternatives (A, B, or C) listed below in Subsection 1. If you mark Alternative B, you MUST read Section F - Subsection 2 of the cover pages under the heading "Additional Employer Labor Condition Statements" and indicate your agreement to all 4 additional statements summarized below in Subsection 2.**

1. Subsection 1
Choose ONE of the following 3 alternatives:

A ◯ **Employer is not H-1B dependent and is not a willful violator.**

B ◯ **Employer is H-1B dependent and/or a willful violator.**

C ◯ **Employer is H-1B dependent and/or a willful violator BUT will use this application ONLY to support H-1B petitions for exempt nonimmigrants.**

2. Subsection 2
If Alternative B in Subsection 1 is marked, the following Additional Labor Condition Statements are applicable:

A. **Displacement: Non-displacement of the U.S. workers in employer's work force;**

B. **Secondary Displacement: Non-displacement of U.S. workers in another employer's work force; and**

C. **Recruitment and Hiring: Recruitment of U.S. workers and hiring of U.S. worker applicant(s) who are equally or better qualified than the H-1B nonimmigrant(s).**

I have read and agree to Additional Labor Conditional Statements 2 A, B, and C. ◯ Yes ◯ No

Page Link _____

! **If filing the form electronically, the Page Link field will be automatically created for you upon printing. If filing the form manually, please ensure that the Page Link field contains a 6 digit number that is repeated on all 3 pages.**

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Labor Condition Application for H-1B Nonimmigrants

U.S. Department of Labor
Employment and Training Administration

Form ETA 9035
OMB Approval:
Expiration Date:

G. Public Disclosure Information

Public disclosure information will be kept at:

! You must choose one of the two options listed in this Section.

◯ Employer's principal place of business

◯ Place of employment

H. Declaration of Employer

! **By signing this form, I, on behalf of the employer, attest that the information and labor condition statements provided are tru e and accurate; that I have read the sections E and F of the cover pages (Form ETA 9035CP), and that I agree to comply with the Labor Condition Statements as set forth in the cover pages and with the Department of Labor regulations (20 CFR part 655, Subparts H and I). I agree to make this applicaton, supporting documentation, and other records, available to officials of the Department of Labor upon request during any investigation under the Immigration and Nationality Act.**

1. First Name of Hiring or Other Designated Official ____ , MI ____

2. Last Name of Hiring or Other Designated Official ____

3. Hiring or Other Designated Official Title ____

4. Signature - Do NOT let signature extend beyond the box

5. Date __ / __ / ____

I. Contact Information

1. Contact First Name ____ , MI ____

2. Contact Last Name ____

3. Contact Phone Number (___) ___ - ____ Extension ____

J. U.S. Government Agency Use Only

By virtue of my signature below, I hereby acknowledge this application certified for

Date Starting _____ and Date Ending _____

Signature and Title of Authorized DOL Official _____ ETA Case Number _____ Date _____

The Department of Labor is not the guarantor of the accuracy, truthfulness, or adequacy of a certified labor condition applicat ion.

K. Complaints

Complaints alleging misrepresentation of material facts in the labor condition application and/or failure to comply with the te rms of the labor condition application may be filed with any office of the Wage and Hour Division of the United States Department of Labor. Com plaints alleging failure to offer employment to an equally or better qualified U.S. worker, or an employer's misrepresentation regardin g such offer(s) of employment, may be filed with: U.S Department of Justice * 10th Street and Constitution Avenue, NW * Washington, DC * 20530.

Page Link ____

! **If filing the form electronically, the Page Link field will be automatically created for you upon printing. If filing the form manually, please ensure that the Page Link field contains a 6 digit number that is repeated on all 3 pages.**

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H-1B Nonimmigrant Information Form	U.S. Department of Labor Employment Standards Administration	ESA Form WH-4 OMB Approval: Expiration Date:

This report is authorized by 8 U.S.C. 1182(n)(2)(G)(ii) of the American Competitiveness and Workforce Improvement Act (ACWIA) of 1998. The information provided on this form will assist the Department of Labor in determining whether the named employer of H-1B nonimmigrants has committed a violation of provisions of the H-1B program. Your identity will be kept confidential to the fullest extent provided by law. Please provide as much of the requested information as possible. Attach additional sheets if you need additional space to respond to a question. If you do not understand a term, or need assistance in the completion of this form, please contact the local Wage and Hour office of the U.S. Department of Labor. After you submit the form, a representative from the Department of Labor may contact you if further information is necessary to initiate an investigation.

1. **Person Submitting Information** (*please print*)

Mr., Miss, Mrs., Ms. _____
First Name Middle Initial Last Name

Current Address: _____
Number, Street, Apt. or P.O. Box No.

_____
City, State, ZIP Code

Telephone Number: (*including area code*) _____

Days/Times When You Can be Reached at that Number: _____

E-Mail Address (optional): _____

2. **Nature of Source's Relationship to Employer**: (*Please check all that apply*)

(a) ☐ H-1B Nonimmigrant Employee
☐ Former or ☐Current Employee (*dates of employment*): _____

(b) ☐ U.S. Worker
☐ Former or ☐ Current Employee (*dates of employment*):
(c) ☐ Job Applicant (*date of application*): _____
(d) ☐ Competitor Business (*please specify*): _____
(e) ☐ Federal Government Agency (*please specify*): _____
(f) ☐ State or Local Government Agency (*please specify*): _____
(g) ☐ Community or Service Organization (*please specify*): _____
(h) ☐ Other (*please specify*): _____

3. **Information on H-1B Employer Committing Alleged Violation**

Name of Employer/Company: _____

Address: _____
Number, Street City State ZIP Code

Employer Representative to be Contacted: _____

Telephone Number (*including area code*): _____

4. **Description of Alleged H-1B Violations**

Please check the appropriate box(es), (a) through (q), which best describe the violation of the H-1B provisions of the Immigration and Nationality Act which you believe have occurred. In section 8, identify each item checked and describe, in as much detail as possible, the facts and circumstances which cause you to believe that violations have occurred.

(a) ☐ Employer supplied incorrect or false information on the Labor Certification Application (LCA).

(b) ☐ Employer failed to pay H-1B worker(s) the higher of the prevailing or actual wage.

(c) ☐ Employer failed to pay H-1B worker(s) for time off due to a decision by the employer (e.g., for lack of work) or for time needed by the H-1B worker(s) to acquire a license or permit.

(d) ☐ Employer made illegal deductions from H-1B worker's wages (e.g., for H-1B petition processing; for food and housing expenses while the worker is traveling on employer's business; for tools and equipment necessary to perform employer's work).

(e) ☐ Employer failed to provide fringe benefits to H-1B worker(s) equivalent to those provided to U.S. worker(s) (e.g., cash bonuses, stock options, paid vacations and holidays, health benefits, insurance, retirement and savings plans).

(f) ☐ Employer does not afford H-1B worker(s) working conditions (hours, shifts, vacation periods) on the same basis as it does U.S. worker(s), or the employment of H-1B worker(s) adversely affects the working conditions of U.S. worker(s).

(g) ☐ Employer failed to comply with "no strike/lockout" requirement by: 1) placing or contracting out H-1B worker(s) during the validity period of the LCA to any place of employment where there is a labor dispute; 2) failing to notify the DOL, within 3 working days of the occurrence, of such a labor dispute; or 3) using an LCA for H-1B worker(s) to work at a site before the DOL has determined that a labor dispute has ended.

(h) ☐ Employer failed to provide employees or their collective bargaining representative, either by hard copy posting or electronically, notice of its intentions to hire H-1B worker(s); **or** has failed to provide H-1B worker(s) with a copy of the LCA.

(i) ☐ Employer required H-1B worker(s) to pay all or any part of $500/$1000 filing fee.

(j) ☐ Employer imposed an illegal penalty on H-1B worker(s) for ceasing employment with the employer prior to a date agreed upon by the worker and employer.

(k) ☐ Employer retaliated or discriminated against an employee, former employee, or job applicant for disclosing information, filing a complaint, or cooperating in an investigation or proceeding about a violation of the H-1B laws and regulations (i.e., whistleblower).

(l) ☐ Employer failed to maintain and make available for public examination the LCA and necessary documents at the employer's principal place of business or worksite.

(m) ☐ Employer laid off U.S. worker(s) and has replaced or seeks to replace U.S. worker(s) with H-1B worker(s) within 90 days before or after filing H-1B visa petitions.

(n) ☐ Employer placed H-1B worker(s) at another employer's worksite where U.S. workers have been laid off; and/or has failed to inquire of the second employer whether it has or intends to lay-off U.S. worker(s) and replace them with H-1B worker(s).

(o) ☐ Employer failed to recruit U.S. worker(s) for jobs for which H-1B worker(s) are sought.

(p) ☐ Employer failed to hire a U.S. worker who applied and was equally or better qualified for the job for which the H-1B worker was sought. Complaints regarding this violation should be filed with the U.S. Department of Justice, 10th and Constitution Ave., N.W., Washington, D.C., 20530.

(q) ☐ Other _____

_____

__5. Date(s) of Alleged Violation(s):

_____

6. Location of Worksite(s) where Alleged Violation(s) occurred: _____

__

_____

7. Basis of Knowledge of Alleged Violation(s): _____

8. Description of facts and circumstances which support allegations in items 4 (a) through (q). Use additional sheets of paper, if necessary.

FOR DOL USE ONLY

Complaint Received/Taken by: _____ Date: _____

Source of Complaint is: ☐ Aggrieved Party ☐ Credible information source

Public Burden Statement: We estimate that it will take an average of 20 minutes to complete this form, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, send them to the U.S. Department of Labor, Wage and Hour Division, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

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December 20, 2000

Part IV

Department of Defense

General Services Administration

National Aeronautics and Space Administration

48 CFR Part 9, et al.

Federal Acquisition Regulation; Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings; Final Rule

Federal Acquisition Regulation; Small Entity Compliance Guide; Final Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 9, 14, 15, 31, and 52

[FAC 97–21; FAR Case 1999–010]

RIN 9000–AI40

Federal Acquisition Regulation; Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Federal Acquisition Regulatory Council (FAR Council) is issuing a final rule clarifying what constitutes a ''satisfactory record of integrity and business ethics'' in making contractor responsibility determinations under FAR Part 9, and revising certain cost principles under FAR Part 31 related to labor relations, and legal and other proceedings.

DATES: *Effective Date:* January 19, 2001.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Ralph De Stefano, Procurement Analyst, at (202) 501–1758. Please cite FAC 97–21, FAR case 1999–010.

SUPPLEMENTARY INFORMATION: The Federal Acquisition Regulatory Council (FAR Council) is issuing a final rule that clarifies what constitutes a ''satisfactory record of integrity and business ethics'' in making contractor responsibility determinations under FAR Part 9, and revises certain cost principles under FAR Part 31 relating to labor relations, and legal and other proceedings. Public comment on proposed revisions on these matters had previously been requested on July 9, 1999 (64 FR 37360) and on June 30, 2000 (65 FR 40830).

1. The Statutory and FAR Responsibility Criteria

The main portion of this rule makes clarifying revisions to the existing regulatory language in FAR Part 9 (and adds an accompanying certification in FAR Part 52) regarding what constitutes a ''satisfactory record of integrity and business ethics'' in making contractor ''responsibility'' determinations.

By statute, Federal agencies are required to award contracts to ''responsible'' sources. 10 U.S.C. 2305(b); 41 U.S.C. 253b. A ''responsible source'' is defined to be a prospective contractor which, among other things, ''has a satisfactory record of integrity and business ethics.'' 41 U.S.C. 403(7)(D). Congress enacted this definition of ''responsible source'' in 1984 (Pub. L. 98–369, Div. B, Title VII, § 2731, 98 Stat. 1195).

The statutory ''responsibility'' requirement has been implemented in FAR Part 9. The FAR states that ''[p]urchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.'' 48 CFR 9.103(a). The FAR makes clear that ''an affirmative determination'' of responsibility is required. ''No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility. In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility.'' 48 CFR 9.103(b); see also 48 CFR 9.103(c) (''A prospective contractor must affirmatively demonstrate its responsibility . . .'').

In accordance with the statutory definition of ''responsible source,'' the FAR states that, ''[t]o be determined responsible, a prospective contractor must . . . Have a satisfactory record of integrity and business ethics . . . .'' 48 CFR 9.104–1. Beyond this simple reiteration of the statutory language, however, the FAR has not elaborated upon what it means to have ''a satisfactory record of integrity and business ethics,'' nor has the FAR provided contracting officers with a framework to guide their analysis and assist them in making this statutorily-required determination.

This lack of guidance has an unfortunate consequence: Contracting officers are extremely reluctant, absent clear guidance, to exercise their discretion in making this determination. As a result, the Government continues to award contracts to firms that have violated procurement and other Federal laws, in some cases repeatedly. For example, in a study of the top 100 defense contractors over a four year period, the General Accounting Office found over 100 instances in which contractors had either been convicted of or signed settlements after charges of violations—of procurement-related law alone. These companies paid more than $400 million in fines and restitution, in some cases for multiple violations. If the analysis had been expanded to include compliance with other laws, the concern might well have been even broader.

It is clear that, in many cases, the Government continues to do business with contractors who violate laws, sometimes repeatedly. By giving contracting officers a clearer basis for declining to contract with such businesses, the Government can improve the integrity of the contracting process, reduce the risk of fraud or noncompliance, and encourage standards of integrity and compliance with the law.

2. The July 1999 Proposed Rule To Clarify the FAR Responsibility Requirement

In July 1999, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) requested comment on a proposed rule that would amend the FAR's responsibility provisions so as to assist contracting officers in making the statutory determination of whether a prospective contractor has ''a satisfactory record of integrity and business ethics.'' (64 FR 37360, July 9, 1999). In fleshing out what constitutes ''a satisfactory record of integrity and business ethics,'' the preamble to the proposed rule stated that a prospective contractor's ''record of compliance with laws'' constitutes ''a relevant and important part of the overall responsibility determination'' *Id.* It was believed that additional regulatory guidance was needed in the FAR ''concerning general standards of contractor compliance with applicable laws when making pre-award responsibility determinations.'' *Id.*

The Councils, therefore, requested comment on a revision to the FAR that ''clarifies the existing rule by providing several examples of what constitutes an unsatisfactory record of compliance with laws and regulations.'' *Id.* Specifically, the proposed rule would have amended FAR 9.104–1(d) by adding—immediately after the statutory requirement that a prospective contractor ''Have a satisfactory record of integrity and business ethics''—the following parenthetical phrase: ''(examples of an unsatisfactory record may include persuasive evidence of the prospective contractor's lack of compliance with tax laws, or substantial noncompliance with labor laws, employment laws, environmental laws, antitrust laws, or consumer protection laws)''. (64 FR 37361, July 9, 1999).

The Councils provided the public with 120 days in which to submit

comments. The Councils received more than 1500 comment letters on the proposal. Some commenters expressed strong support for the proposed rule, while others strongly opposed it. In addition to indicating their overall support or opposition to the proposed rule, commenters on both sides focused on what they viewed as problems with the specific regulatory language in the proposal. In some cases, the commenters suggested alternative language.

3. The June 2000 Revised Proposed Rule To Clarify the FAR Responsibility Requirement

In response to the comments received on the July 1999 proposal, the FAR Council developed a revised proposal. Again, as with the original proposal, the purpose of the revised proposal was to provide contracting officers with guidance in evaluating a prospective contractor's ''record of compliance with laws and regulations'' in connection with the statutory ''responsibility'' determination that the contractor has ''a satisfactory record of integrity and business ethics.'' In addition, the Council proposed additional procedural protections for contractors, to provide further confidence that contracting officers would not misuse their discretion.

The FAR Council requested comment on the revised proposal in June 2000 (65 FR 40830, June 30, 2000). In the preamble to the June 2000 notice, the FAR Council summarized the comments that had been submitted on the July 1999 proposal. *Id.*

In response to the concerns raised by commenters on the July 1999 proposal, the FAR Council revised the proposed amendment to FAR Part 9 in a number of respects. First, to aid contracting officers in evaluating a prospective contractor's ''record of compliance with laws and regulations,'' the FAR Council proposed additional language, for inclusion in FAR 9.103, to state that contracting officers ''should coordinate nonresponsibility determinations based upon integrity and business ethics with legal counsel (see 9.104–1(d)).'' Second, the FAR Council modified the amendments that had been proposed in July 1999 for FAR Part 9, ''to confirm that satisfactory compliance with Federal laws including tax laws, labor and employment laws, environmental laws, antitrust laws, and consumer protection laws would be part of a satisfactory record of integrity and business ethics.'' 65 FR 40830. Under the proposed amendments, as modified by the FAR Council, FAR 9.104–1(d) would state that a prospective contractor shall ''Have a satisfactory record of integrity and business ethics including satisfactory compliance with Federal laws including tax laws, labor and employment laws, environmental laws, antitrust laws, and consumer protection laws. (See 9.104–3(c).)'' The concluding reference to FAR 9.104–3(c) was to add new language, contained in the FAR Council's amended proposal, that would assist contracting officers by providing them with a framework for their evaluation of a prospective contractor's ''record of compliance with laws'':

''(c) Integrity and business ethics. In making a determination of responsibility based upon integrity and business ethics (see 9.104–1(d)), contracting officers may consider all relevant credible information. Contracting officers should give greatest weight to decisions within the past three years preceding the offer as follows—

''(1) Convictions of or civil judgments rendered against the prospective contractor for:

''(i) Commission of Fraud or a criminal offense in connection with obtaining, attempting to obtain or performing a public (Federal, State or local) contract or subcontract;

''(ii) Violation of Federal or State antitrust statutes relating to the submission of offers;

''(iii) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property;

''(iv) Any other Federal or State felony convictions or pending Federal or State felony indictments; and

''(v) Federal court judgments in civil cases brought by the United States against the contractor.

''(2) Federal decisions by Federal Administrative Law Judges or Federal Administrative Judges and adjudicatory decisions, orders, or complaints issued by any Federal agency, board, or commission, indicating the contractor has been found to have violated Federal tax, labor and employment, antitrust, or consumer protection law.''

In connection with this proposed framework, the FAR Council also proposed a corresponding amendment to the existing contractor responsibility certification in FAR Part 52. This amended certification would provide information that the contracting officer would need in conducting the evaluation in proposed FAR 9.104–3(c). Under the FAR Council's proposal, a prospective contractor would certify whether it ''has'' or ''has not''—

''within the past three years, been convicted of any felonies (or has any felony indictment currently pending against them) arising from any Federal tax, labor and employment, environmental, antitrust, or consumer protection laws, had any adverse court judgments in civil cases against them arising from any Federal tax, labor and employment, environmental, antitrust, or consumer protection laws in which the United States brought the action, or been found by a Federal Administrative Law Judge, Federal Administrative Judge, agency, board or commission to have violated any Federal tax, labor and employment, environmental, antitrust, or consumer protection law. If the respondent has answered ''has'' to the above question, please explain the nature of the violation and whether any fines, penalties, or damages were assessed.''

Finally, as the preamble explained, the FAR Council proposed to amend FAR Parts 14 and 15 to ''ensure that if non-responsibility is the basis for rejection of [a party] from the competition, then the contracting officer must provide the reasons for the non-responsibility determination in the notification'' that is provided to that unsuccessful bidder and offeror (65 FR 40831, June 30, 2000).

The FAR Council provided the public with 60 days in which to submit comments on the revised proposal. Substantially fewer comments were submitted on the June 2000 proposal than had been submitted on the July 1999 proposal. Whereas more than 1500 comment letters were submitted on the original proposal, only about 300 comments were received on the revised proposal (and a substantial number of these 300 comments were an essentially identical form letter). Again, as with the original proposal, some commenters expressed strong support for the revised proposal, while others strongly opposed it. Moreover, commenters on both sides focused on what they viewed as problems with the specific regulatory language in the revised proposal and, in some cases, they suggested alternative language.

4. The June 2000 Proposal to Amend Part 31

In addition to the revised proposals to amend FAR Parts 9, 14, 15, and 52 on the contractor responsibility determination, the June 2000 notice also proposed amendments to FAR Part 31 to address the allowability, in the context of cost-based Federal contracts, of costs relating to labor relations and to legal and other proceedings (65 FR 40833, June 30, 2000). These proposed amendments to Part 31 were a revision of the amendments that had been proposed in the July 9, 1999 notice (65 FR 37361). As the preamble to the June 2000 notice explained, the FAR Council revised its proposed Part 31 amendments in response to the concerns that were expressed by the 135 commenters who had addressed the Part 31 proposal in the July 1999 notice. *Id.* at 40831.

In sum, the June 2000 notice proposed that the following costs would not be allowable (*i.e.*, the Federal Government would not pay for them): costs incurred ''for activities that assist, promote, or deter unionization'' and costs incurred in ''a civil or administrative proceeding'' brought by a government where there has been ''a finding that the contractor violated, or failed to comply with, a law or regulation.'' *Id.* at 40833. The purpose of these amendments was to ensure consistency with Federal ''neutrality'' in labor relations (*id.* at 40831) and with the principle that ''[t]axpayers should not have to pay the legal defense costs associated with adverse decisions against contractors'' (64 FR at 37360–61).

B. The Final Rule

1. Summary of the Final Rule

Based on its consideration of the comments received on both proposed rules, the FAR Council is issuing this final rule. It provides both clearer guidance than in earlier proposals and additional procedural protection for contractors, to ensure that contracting officer discretion is fairly employed. The following changes are being made to the FAR:

FAR Part 9. Language has been added to FAR Part 9 that:

—Clarifies that contracting officers should coordinate nonresponsibility determinations based upon integrity and business ethics with agency legal counsel (FAR 9.103(b)).

—Clarifies that a satisfactory record of integrity and business ethics includes satisfactory compliance with the law including tax, labor and employment, environmental, antitrust, and consumer protection laws (FAR 9.104–1(d)).

—Provides an expanded guidance statement to contracting officers that (1) reinforces the link between a satisfactory record of integrity and business ethics, compliance with law and the Government's interest in contracting with responsible reliable, honest and law abiding contractors; in sum, contractors it can trust; (2) requires contracting officers to consider all relevant credible information but states that the greatest weight must be given to offenses adjudicated within the past three years; (3) explains that a single violation of law will not ''normally'' give rise to a determination of non-responsibility, and that the focus of the assessment should be on ''repeated, pervasive or significant'' violations of law; and (4) requires the contracting officer to take into account any administrative agreements entered into between the prospective contractor and the Government (FAR 9.104–3(c)).

FAR Parts 14 and 15. New language has been added to modify FAR 14.404–2(i) and 15.503(a)(1) that provides for notification to unsuccessful bidders and offerors promptly after a nonresponsibility determination is made. The modification would ensure that if nonresponsibility is the basis for rejection of the bid or elimination of an offer from the competition, then the contracting officer must provide the reasons for the nonresponsibility determination in the notification. If the prospective contractor disagrees with the contracting officer's decision, the prospective contractor may seek an independent review of that decision by filing suit in Federal District court under the Administrative Procedures Act; or by filing a bid protest with the General Accounting Office, the agency protest official, the Court of Federal Claims or the Federal District Court. If an agency receives notice of a protest from the GAO prior to award, a contract may not be awarded unless specifically authorized by 31 U.S.C. 3553. If an agency receives notice of a protest from the GAO within the later of ten days after award, or five days after the debriefing date offered to an unsuccessful offeror for any debriefing that is requested and, when requested, is required, contracting officers shall immediately suspend performance or terminate the award of the contract unless specifically authorized by 31 U.S.C. 3553.

FAR Part 31. Language has been added to FAR Part 31 on the following points:

• FAR 31.205–21, Labor Relations Costs. This rule makes unallowable those costs incurred for activities that assist, promote or deter unionization.

• FAR 31.305–47, Costs related to legal and other proceedings. This rule makes unallowable those costs incurred in civil or administrative proceedings brought by a government where the contractor violated, or failed to comply with a law or regulation.

FAR Part 52. Language has been added to FAR Part 52 on the following points:

• FAR 52.209–5, Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters. The current certification is amended to require offerors to certify regarding violations of tax, labor and employment, environmental, antitrust, or consumer protection laws adjudicated within the last three years. This certification will impose less burden on contractors than the certification that had been proposed in June 2000. It is a check-the-box certification under which a contractor will have to provide additional detailed information only upon the request of the contracting officer, and this is expected to occur generally only when that contractor is the apparently successful offeror.

• FAR 52.212–3(h), Certification Regarding Debarment, Suspension or Ineligibility for Award (Executive Order 12549). The existing certification is amended to require offerors to certify regarding violations of tax, labor and employment, environmental, antitrust, or consumer protection laws adjudicated within the last three years. This certification will impose less burden on contractors than the certification that had been proposed in June 2000. It is a check-the-box certification under which a contractor will have to provide additional detailed information only upon the request of the contracting officer, and this is expected to occur generally only when that contractor is the apparently successful offeror.

2. Comments on the June 2000 Proposal and Changes in the Final Rule

As noted above, some commenters on the June 2000 notice expressed strong support for the revised proposal, while others strongly opposed it. Moreover, commenters on both sides focused on what they viewed as problems with the specific regulatory language in the revised proposal and, in some cases, they suggested alternative language. The following summarizes the significant comments received on the June 2000 proposal, outlines the FAR Council's responses to those comments, and explains the significant changes that have been made to the amendments that were proposed in June 2000.

A number of commenters who opposed the proposed revisions argued that the proposal would provide contracting officers with excessive discretion to eliminate prospective contractors from Federal contracting opportunities, and that this would result in arbitrary responsibility decisions. We believe that the final rule addresses this concern. As has been noted earlier in this notice, and in the two proposals, the purpose behind this rulemaking is to provide contracting officers with additional guidance to assist them in making the ''integrity and business ethics'' responsibility determination. In addition to providing this guidance, the FAR Council has added a number of safeguards that are discussed elsewhere in this notice. The FAR Council believes

that the guidance and safeguards in the final rule will help to ensure that contracting officers make responsibility determinations in a non-arbitrary manner that, in accord with the statutory purpose, protects the Government's interest. Of course, if a contracting officer determines that a prospective contractor does not have a ''satisfactory record of integrity and business ethics,'' and the prospective contractor disagrees with that determination, the prospective contractor may seek an independent review of that decision by filing suit in Federal District court under the Administrative Procedures Act; or by filing a bid protest with the General Accounting Office, the agency protest official, the Court of Federal Claims or the Federal District Court.

Many of the commenters who expressed opposition to the proposed FAR amendments on the ''integrity and business ethics'' responsibility determination made arguments that, in one way or another, essentially questioned the underlying premise of this rulemaking and advocated that no revisions be made to the FAR in this area. These commenters asserted that there is no evidence of a ''problem'' which this rulemaking would ''solve''; they argued that there is no ''nexus'' between a prospective contractor's record of compliance with the law and the contracting officer's ''responsibility'' determination; they argued that a non-responsibility determination, based on a prospective contractor's lack of compliance with legal requirements, is an impermissible ''extra penalty'' for the violations; they argued that contracting officers are not qualified to evaluate a prospective contractor's record of compliance with the law; they argued that the proposed revisions to FAR Part 9 would not have the effect of clarifying the responsibility determination, and in this regard they argued that the proposed language was vague; and they contended that proposed language (and, in particular, the proposed certification) would not improve the efficiency of the procurement process and, in this regard, they argued that a ''cost-benefit'' analysis of the proposal should be conducted.

These arguments had also been raised in comments that opposed the July 1999 proposal, and the FAR Council continues to disagree with them. This rulemaking is intended to provide contracting officers with additional guidance on making an ''integrity and business ethics'' determination that, by statute, contracting officers are already required to make. As noted above, the FAR has previously not provided any elaboration on what it means to have ''a satisfactory record of integrity and business ethics'' the FAR has simply restated the statutory language that a ''responsible source'' is one that has ''a satisfactory record of integrity and business ethics.'' The fundamental premise of the two prior proposals, and this final rule, is that an evaluation of a prospective contractor's ''record of integrity and business ethics'' necessarily needs to include an evaluation of its ''record of compliance with laws and regulations.'' (64 FR 37360, July 9, 1999.) This is an eminently reasonable proposition. Operating in a law-abiding (as opposed to law-breaking) manner is an essential component of having ''integrity'' and ''ethics'' and, therefore, of meeting the overall requirement of responsibility that businesses contracting with the Government—and with private businesses—must meet.'' Thus, while the statutory criterion of ''integrity and business ethics'' is not limited to (*i.e.,* it is not exhausted by) the inquiry into whether a firm operates within the boundaries of the law, an irreducible element of what it means for a prospective contractor to have ''a satisfactory record of integrity and business ethics'' is that the prospective contractor is, essentially, law-abiding. We therefore believe, and many commenters expressed their strong agreement, that it would be entirely proper for a contracting officer to reach the conclusion, for example, that a company does not have a ''satisfactory record of integrity and business ethics'' when the facts show that the company has engaged, within the past three years, in ''repeated, pervasive, or significant violations'' of legal requirements.

Scrutinizing a prospective contractor's record of compliance with the law, and making satisfactory compliance an express element of the responsibility determination, is both consistent with practices outside the Government and serves the Government's interests. First, by ensuring that its contractors possess a satisfactory record of compliance with law, the Government increases its confidence that a contractor is a responsible, reliable company that will perform the contract in an efficient, responsible and timely manner. It should also reduce the risk that compliance issues will interfere with performance of the contract.

A justification for this rulemaking, then, is that it provides contracting officers with guidance that will assist them in evaluating a prospective contractor's record of compliance with laws and, thus, in making the statutory determination of whether the prospective contractor has ''a satisfactory record of integrity and business ethics.'' We believe that the final rule provides useful clarifying guidance, and it has been improved through the rulemaking process, in response to the comments that were submitted on the two proposals. In particular, by establishing a hierarchy of violations of legal requirements (and obtaining factual information on such violations), the final rule provides a more refined and objective framework for making this determination than simply having contracting officers make determinations about ''integrity and business ethics''—as they have done in the past—without the benefit of any clarifying guidance. We believe that contracting officers, guided by the amended regulation and in consultation with agency legal counsel, are in a better position to make the ''integrity and business ethics'' determination. In sum, we believe that the final rule represents a considerable improvement over the existing rule, which has required contracting officers to make an ''integrity and business ethics'' determination, but has not provided them with any guidance on how they should make that determination.

Another objection to the June 2000 proposal was the argument by some commenters that the proposed rule, in their view, does not provide prospective contractors with ''due process.'' This was also raised by those commenters who argued that the Federal agencies should rely instead on the debarment process, which they argued is sufficient to address the problem posed by prospective contractors who do not comply with the law. On the debarment issue, some commenters also argued that a nonresponsibility determination that is based on a prospective contractor's unsatisfactory record of complying with legal requirements constitutes a ''de facto debarment'' and, as such, is inappropriate.

The FAR Council does not agree with these objections. Contrary to the commenters who argued otherwise, prospective contractors will have at least as much (if not more) ''due process'' than they have enjoyed up to now with respect to the responsibility determination of whether they have ''a satisfactory record of integrity and business ethics.'' In summary, prospective contractors know, in advance, the general substantive standard that they are being evaluated under *i.e.,* whether they have ''a satisfactory record of integrity and business ethics.'' They also know, in advance, that the contracting officer will

focus on the prospective contractor's record of compliance with legal requirements and, in doing so, the contracting officer will be aided by a framework that establishes a hierarchy of violations and a certification that obtains information, from the prospective contractor, on such violations. When a contracting officer makes a nonresponsibility determination, he or she is required to notify the unsuccessful bidder or offeror, and state the reasons for the determination. If the prospective contractor does not agree with a determination of nonresponsibility, then it may file suit in Federal District Court under the Administrative Procedures Act; or the prospective contractor may file a bid protest with the General Accounting Office, the agency protest official, the Court of Federal Claims, or the Federal District Court. The prospective contractor may present its arguments against the non-responsibility determination, and the determination will be reviewed by the independent body.

In response to the arguments in the comments about the debarment process, we do not agree that the separate debarment process is a substitute for a responsibility determination on ''integrity and business ethics.'' The fact that a prospective contractor is not found on the list of debarred entities does not mean, ipso facto, that the prospective contractor therefore has a ''satisfactory record of integrity and business ethics.'' Contracting officers are required, by statute and the FAR, to make an ''affirmative determination of responsibility'' (FAR 9.103(b)), which must include a determination by the contracting officer that the prospective contractor has a ''satisfactory record of integrity and business ethics.'' As we have explained, the ''integrity and business ethics'' responsibility determination needs to include an evaluation by the contracting officer of the prospective contractor's record of compliance with legal requirements. We also do not agree with those commenters who argued that a nonresponsibility determination, based on a prospective contractor's violation of legal requirements, would necessarily constitute a ''de facto debarment.'' The fact that a contracting officer has determined that a prospective contractor is nonresponsible does not mean that the prospective contractor has therefore been subject to a ''de facto debarment.'' As the case law makes clear, the determination of whether a prospective contractor has been subject to a ''de facto debarment'' is fact-sensitive and depends on the circumstances of each case. Moreover, if a prospective contractor believes that it has been subject to a ''de facto debarment,'' then it will continue to have the same remedy that it has had up to now: it may seek an independent review of the contracting officer's non-responsibility determination. The final rule does not diminish the remedies that are available to prospective contractors for challenging what they believe are ''de facto debarments.''

Finally, a number of commenters raised concerns about the impact of the proposed rule, or about the scope of the guidance in FAR 9.104–3(c) or the scope of the certification. Some commenters stated their belief that the proposal would have a significant, and disproportionately adverse, impact on the ability of small businesses to obtain Federal contracts. As is explained below in connection with the Regulatory Flexibility Act, the FAR Council does not believe that the final rule will have a significant economic impact on a substantial number of small entities. Apart from the certification requirement, the final rule does not impose any new obligations, of any kind, on prospective contractors; they already have an obligation to comply with the law. This is not a regulation that, for example, requires a company to install certain equipment, prescribes how a company shall carry out its operations, or prohibits a company from operating in any particular way. Rather, the final rule provides guidance to contracting officers on how they are to make their statutory determination of whether a prospective contractor has a ''satisfactory record of integrity and business ethics.'' In addition, the FAR Council does not believe that the guidance in the final rule will have a significant or disproportionate adverse impact on small businesses generally. The FAR Council believes that, as a class, small businesses are generally law-abiding and, furthermore, the FAR Council is not aware of any evidence that would indicate (and the FAR Council has no reason to believe) that small businesses are any less law-abiding than large businesses. The FAR Council, therefore, does not expect that there will be a substantial number of small businesses that will be found, by a contracting officer, to have an unsatisfactory ''record of integrity and business ethics.'' Finally, for the reasons set forth in the Regulatory Flexibility Act and Paperwork Reduction Act discussions, below, the FAR Council does not believe that responding to the certification in the final rule will require small businesses to expend a significant amount of effort and resources.

A number of commenters addressed the fact that the proposed certification included only violations of Federal law. Some commenters argued that the certification should also address violations of State law. Commenters also argued that the certification should include adverse civil judgments that arose in cases that are brought by private parties, as well as in cases brought by governmental authorities. Other commenters raised the concern that the proposed certification, by focusing on violations of Federal law, could harm U.S.-based firms, as opposed to foreign-based firms. In response to these comments, it is helpful to distinguish between the standard that is set forth in FAR 9.104–1(d) and 9.104–3(c), and the implementing certification that has been added to FAR Part 52. Under the standard in FAR 9.104, the contracting officer ''must consider all relevant credible information'' regarding the prospective contractor's compliance with laws (the proposal stated that the contracting officer ''may consider'' such information; in response to comments, this was made mandatory rather than permissive). Although the final rule establishes a hierarchy of violations of law, some of which are also referenced in the certification, the contracting officer is not limited to considering only the listed violations. Again, the contracting officer ''must consider all relevant credible information,'' and such information relates to the prospective contractor's record of compliance with laws and regulations. The FAR Council expects that, as a practical matter, such information will generally pertain to compliance with Federal and State laws, but a prospective contractor's record of compliance with foreign laws and regulations can also constitute ''relevant credible information.''

The final certification that has been added to Part 52, however, is not as broad as the standard in FAR 9.104. The certification is an implementation measure, designed to provide the contracting officer with the information that the FAR Council anticipates will be most useful in making the responsibility determination (*e.g.,* felony convictions and indictments), while at the same time avoiding the imposition of undue reporting burdens on prospective contractors. In response to comments, the final certification has been broadened to include violations of State felony law as well as Federal law. In both cases, the certification focuses on cases that have been brought by

governmental authorities. The final certification, however, has not been broadened to include adverse judgments in civil cases brought by private parties or to include violations of foreign law. In addition, in response to comments, the certification in the final rule has been clarified to exclude administrative ''complaints'' (as opposed to adjudicated administrative actions); the final certification, therefore, addresses ''adverse decisions by Federal administrative law judges, boards, or commissions indicating willful violations.'' The fact that administrative complaints, private civil cases, and violations of foreign law have been not included in the final certification, however, does not mean that they cannot be taken into the contracting officer's consideration in making the responsibility determination; to the extent that the contracting officer becomes aware of such cases, and they constitute ''relevant credible information,'' the contracting officer must consider them in making the responsibility determination. Rather, the relatively narrow focus of the certification (as opposed to the general standard) reflects the FAR Council's attempt to craft a certification that is clear and that does not impose an undue reporting burden on prospective contractors. Finally, in an attempt to reduce the reporting burden on prospective contractors, the final certification requires a prospective contractor to supply additional detailed information only if requested to do so by the contracting officer, whereas the proposed certification would have required all prospective contractors who responded affirmatively to supply additional information (*e.g.,* ''explain the nature of the violation and whether any fines, penalties, or damages were assessed'').

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that 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. Section 601, *et seq.* In accordance with the requirements of 5 U.S.C. Section 605, the FAR Council is publishing the following statement in support of its certification. A copy of this certification and supporting statement has been forwarded to the Chief Counsel for Advocacy of the Small Business Administration.

Statement in Support of Certification

FAR Part 31

With regard to the changes to Part 31 cost principles, this rule will not have a significant economic impact on a substantial number of small entities, because most contracts and subcontracts with small entities are awarded using simplified acquisition procedures or are awarded on a competitive fixed price basis, and do not require application of the cost principles contained in this rule.

FAR Parts 9, 14, 15, and 52

With regard to the changes to Parts 9, 14, 15, and 52, this rule will not have a significant economic impact on a substantial number of small entities for the following reasons:

Background

The law requires contracting officers to award contracts to responsible sources defined, in part, to be prospective contractors who have a record of integrity and business ethics. 41 U.S.C. 253b, 10 U.S.C. 2305(b) and 41 U.S.C. 403. The objective of this final rule is to provide an objective basis for making this judgment. The rule makes clear that contracting officers must consider violations of laws in determining whether a prospective contractor has met that standard.

A satisfactory record of integrity and business ethics is one that indicates that the prospective contractor possesses basic honesty, and that the Government can trust or rely on the contractor to perform the contract. A satisfactory record is one that includes satisfactory compliance with laws. Five categories of laws are identified—tax, labor and employment, environmental, antitrust and consumer protection laws.

In assessing whether the contractor has a record of satisfactory compliance with laws, the rule directs the contracting officer to focus on a pattern of repeated, pervasive, or significant violations of the law rather than single violations and to give the greatest weight to matters adjudicated within the last three years.

To facilitate the transfer of information between the prospective contractor and contracting officer, a new certification has been added, requiring the prospective contractor to certify regarding certain violations adjudicated within the last three years.

It is estimated that the rule will apply to approximately 171,000 small entities.

Discussion

In considering whether the rule would have a significant economic impact on a substantial number of small entities, the FAR Council viewed the impact in two ways: first, by application of the statutory standard and implementing guidance for assessing a prospective contractor's record of integrity and business ethics; and two, through the requirement of a non statutory certification.

The following summarizes the significant comments received from small businesses, the basic assumptions made regarding the potential impact, and changes made in the rule to address the two areas of impact outlined above.

Response to Significant Comments

1. ''The rule would punish a wrongdoer's employer, the small business entity employees and their local communities through the loss of work.'' The purpose of this rule is not to ''punish'' prospective contractors for violations of law. Instead, the purpose of this rule is to provide contracting officers with additional guidance to assist them in making the determination, that they are required by statute to make, that a prospective contractor has a ''satisfactory record of integrity and business ethics.'' A prospective contractor's record of complying with legal requirements is a necessary component of its ''record of integrity and business ethics.'' No change in the rule was made as a result of this comment.

2. ''The rule assumes that large and small business entities will be treated equally under the rule.'' Concern was expressed that the rule does not place small entities on a level playing field with large businesses because small entities lack the resources to defend potential lawsuits and the flexibility to mitigate the impact of adverse judgments. The FAR Council is not in a position to know what factors may motivate a particular business, in any particular case, to defend itself (or not) against charges of legal wrongdoing. However, we believe that the final rule addresses the thrust of the commenters' concern. For example, through the hierarchy of violations and the certification, the rule focuses the contracting officer on criminal felony convictions and indictments, on adverse civil judgments in cases brought by the Federal Government, and on adjudicated administrative decisions, not simply unadjudicated complaints. The hierarchy of violations and the certification thus focuses on judicial and administrative processes that have their own inherent procedural protections. The FAR Council therefore has no reason for concluding that these judicial and administrative processes are inherently unfair as applied to small businesses. In addition, the guidance in the final rule instructs the contracting officer to focus on ''repeated, pervasive, or significant'' violations of law, rather than on isolated infractions. We therefore believe that, under the final rule, there is a ''level playing field'' between large and small businesses. No change in the rule was made based on size of the business offering to the Government.

3. ''Lack of adequate guidance to contracting officers and their legal counsel to determine satisfactory compliance with law will/could cause the improper elimination of small business concerns from a contract award.'' In response to this comment, an extended guidance statement has been added that will assist the contracting officer making this determination. However, as with any business decision, this is a judgment call requiring the contracting officer to review and analyze the facts and make a determination based on those facts. Also, the SBA Certification of Competency program remains intact requiring nonresponsibility determinations to be referred to SBA.

4. ''The rule does not provide any guidance how small entities, offering as prime contractors, are to deal with responsibility determinations of their prospective

subcontractors. Nor does the rule provide guidance how small entities offering as subcontractors will be affected by the rule.'' Currently, a prime contractor is responsible for determining the responsibility of its prospective subcontractors; the only requirement imposed is that the prime contractor assure the Government that each first tier subcontractor is not debarred, suspended, or proposed for debarment. This rule does not change that requirement. It will still be up to the prime contractor, large or small, to assure the capability and honesty of the potential subcontractor to fulfill the Government's needs. We assume some kind of due diligence on the part of the prime contractor.

5. ''The burden on small businesses is not minimized by only requiring the certification over $100,000; small businesses will still have to demonstrate their responsibility under $100,000 and the absence of a certification will deny them the opportunity to do so.'' The Federal Acquisition Streamlining Act provided for the use of simplified acquisition procedures under $100,000. For example, oral solicitations are permitted under that threshold. In establishing the certification as an implementation measure, the FAR Council had to balance the need to obtain information that will be useful to the contracting officer in making the responsibility determination with the need to avoid imposing undue reporting burden on prospective contractors. The FAR Council believes that the $100,000 acquisition level is an appropriate threshold for imposition of the certification.

Basic Assumptions

In developing the policies and procedures contained in the final rule, the FAR Council considered available alternative approaches and impacts of each of the alternatives on small entities. To start, however, the FAR Council was bound by statutory requirements and made certain assumptions regarding the impact on small businesses that narrowed the scope of alternatives available for consideration.

By law, a contracting officer must already make an affirmative determination of responsibility in order for a prospective contractor to be eligible for award. That determination must include an assessment of the contractor's record of integrity and business ethics. By law, a contracting officer must already make an affirmative determination of responsibility in order for a prospective contractor to be eligible for award. That determination must include an assessment of the contractor's record of integrity and business ethics. Until this point the FAR has merely restated the law and has not provided any guidance to the contracting officer on what constituted a record of integrity and business ethics. This rule intends to fill that gap and provide contracting officers with a road map for use in that decision-making process.

One alternative would be to exempt small businesses from the rule. But because the rule assists the contracting officer in making the basic statutory assessment, the FAR Council concluded that exempting small businesses would actually remove the beneficial aspect of the rule to small businesses. In addition, the FAR council believes that a prospective contractor's record of complying with legal requirements is a relevant consideration for evaluating its record of integrity and business ethics—regardless of the size of the business. Under the procurement statutes, small and large business are subject to the same ''integrity and business ethics'' responsibility determination. Thus, the rule does not exempt small businesses from the statutory ''integrity and business ethics'' determination, and the rule does not exempt small businesses from the final rule's clarifying guidance on how contracting officers should evaluate a prospective contractor's legal compliance when making this determination.

The basic policy of the Government is to award a fair share of contracts to small entities. It is not the intent of the final rule to interfere with that policy. Sufficient procedures are in place to ensure this policy is not altered and that the essence of the final rule is carried out in an equitable manner. For example, the contracting officer will still be required to forward nonresponsibility determinations for small entities to the Small Business Administration (SBA) in accordance with the certificate of competency program.

A Certificate of Competency (COC) is the certificate issued by the Small Business Administration (SBA) stating that the holder is responsible (with respect to all elements of responsibility, including, but not limited to, integrity) for the purpose of receiving and performing a specific Government contract. In accordance with FAR 19.602, upon determining and documenting that an apparent successful small business offeror lacks certain elements of responsibility, the contracting officer must refer the matter to the cognizant SBA area office. Contract award must be withheld for a period of at least 15 days while SBA reviews the referral. The SBA at that point is authorized to overturn the decision of the contracting officer and issue a COC determining that the small offeror is responsible and, therefore, eligible for award.

The FAR Council has long believed that small entities are generally law-abiding. This rulemaking process has not given the FAR Council any reason to change this view. Neither the public comment nor internal agency data indicate that a substantial number of small entities have violated applicable legal requirements in a manner that would result in a contracting officer determining that they are nonresponsible under this rule.

For example, for fiscal year 2000, the Department of Labor is reporting 536 violations of the Service Contract Act by small businesses with less than 100 employees. (For the same year, the Federal Procurement Data System shows 46,205 (through the third quarter) contract awards to small entities.) After consideration of violations of all laws by small businesses, agencies made only 20 nonresponsibility determinations based on a lack of integrity and business ethics for fiscal years 1996 through 1999 which were referred to SBA for a COC. Of that number, the SBA declined to issue a COC in 10 cases. Given these numbers, we cannot conclude that violations of laws by small entities occur in such a number as to render a substantial number nonresponsible under the provisions of this rule.

Another alternative considered was to exempt small businesses from the requirement of the certification. The FAR Council did not adopt this alternative either, for several reasons. First, the FAR Council could not conclude that the new certification (requiring all offerors for contracts greater than $100,000 to certify regarding certain violations of law adjudicated within the past three years) represented a significant economic burden to small entities. This is a check-the-box certification requiring detailed information only from offerors that respond affirmatively to the certification, and normally only from the apparent awardee. The average time required of a small business to respond to the certification should be much lower than that of a large business and most small businesses should require minimal recordkeeping. Second, the certification is a streamlined method of securing information upon which the contracting officer would make the determination that the prospective contractor has a satisfactory record of integrity and business ethics. Ultimately, this should be beneficial to small businesses in assuring that the contracting officer has the correct information upon which to make this determination.

In assessing the potential economic impact of the certification on small businesses, the FAR Council also considered the fact that the new requirement is simply an amendment to an existing certification. The current certification already requires prospective contractors to certify regarding violations adjudicated within the last three years of a number of laws at the Federal, state and local levels. The current certification already applies to both criminal and civil actions, as well as convictions and indictments. The new certification merely adds five new categories of laws and also extends to administrative actions. Consequently, the FAR Council concluded that the new requirement would not result in a significant economic impact on a substantial number of small entities.

Thus, while we believe that the rule will apply to a substantial number of small entities, we are unable to conclude that it will have a significant economic impact on a substantial number of small entities.

Changes Made to the Rule

Notwithstanding the above, alternatives to language in the proposed rules were considered which the FAR Council believes would achieve the Government's goal and minimize the impact of small entities. Those areas were the following:

1. *Link to honesty and trustworthiness.* Some commenters were concerned that the rule does not contain an overarching policy statement thereby creating a vagueness for contracting officers trying to assess a contractor's record of integrity and business ethics. They expressed concern that

inadvertent violations of laws could form the basis for nonresponsibility determinations. The rule now reflects that a satisfactory record of integrity and business ethics is one that indicates that the prospective contractor possesses basic honesty and trustworthiness, and that the Government can trust or rely on the contractor to perform the contract.

2. *Additional guidance has been added for how contracting officers should weigh the evidence.* Some commented that the rule did not contain guidance on how contracting officers should weigh evidence. The final rule provides a hierarchy of violations for consideration by the contracting officers. First, the hierarchy focuses on Federal and state offenses (convictions, civil judgments, administrative rulings, indictments). Second, criminal violations are limited to felonies. Third, although the contracting officer may consider relevant credible information, the hierarchy focuses on five new categories of laws: tax, labor and employment, antitrust, environmental and consumer protection laws. Fourth, violations adjudicated within the last three years are to be given the greatest weight.

3. *Comments were received that the proposed rule will establish vague, ambiguous and subjective standards.* To the contrary, this rule provides an objective basis for making a determination that otherwise is subjective. Some expressed concern that a series of minor violations could form the basis for a non-responsibility determination. To respond to those comments, an extended guidance statement has been added. The rule directs the contracting officer to give the greatest weight to adjudicated matters where there is a history of repeated, pervasive and significant violations. A single violation normally will not be cause for a determination of nonresponsibility.

4. *Certification.* Some commented that the certification requirement was burdensome. In response to those commentors, the new certification is a check-the-box certification requiring detailed information only upon request by the contracting officer and not from all offerors. Normally, this will be where the apparent awardee has responded affirmatively to the certification.

Conclusion

Based on the above, the FAR Council has concluded, and thereby certifies, that the rule will not have a significant economic impact on a substantial number of small entities.

C. Executive Order 12866

This rule is not regarded as a significant rule subject to Office of Management and Budget review under Section 6(b) of the Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not considered a major rule under 5 U.S.C. Section 804.

D. Non-Statutory Certification Approval

In accordance with Section 29 of the Office of Federal Procurement Policy Act, 41 U.S.C. Section 425, the FAR Council has requested approval from the Administrator for Federal Procurement Policy for inclusion of a non-statutory Certification in the Federal Acquisition Regulation. In the absence of an Administrator, that approval has been granted by the Director of the Office of Management and Budget in accordance with the Federal Vacancies Reform Act of 1998, 5 U.S.C. 3348(b)(2).

E. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104–13) applies because the FAR changes to Parts 9 and 52 increase the information collection requirements that have been approved by the Office of Management and Budget (OMB) under OMB Control Number 9000–0094. OMB had previously approved an annual reporting burden of 91,667 hours based on 1,100,000 respondents and 1,100,000 annual responses. The information collection provisions of this rule have been submitted to OMB but will not take effect prior to OMB approval of these provisions under the Paperwork Reduction Act.

The FAR Council analysis for the proposed rule estimated that the annual reporting burden for OMB Control Number 9000–0094 applied to only 89,995 respondents, of which approximately 50,000 would be affected by the new certification requirement. The FAR Council further estimated that the addition of this new certification requirement would increase the total burden hours by 515,000 hours, for a new total of 606,667 hours. This was based on an estimate that the additional certification would take an average of 3 hours each for 50,000 initial responses and .5 hours each for 450,000 subsequent responses that year, for a composite average of .75 hours per response. In addition, the FAR Council estimated that in 50,000 cases the contracting officer would request additional information from the respondent in accordance with FAR 9.408(a), requiring an additional 4 hours each for 30,000 initial responses, and 1 hour each for each of 20,000 subsequent responses for a composite average of 2.8 hours per response.

Several commenters addressed the estimated paperwork burden. The FAR Council considered these comments in formulation of the final rule and in the final paperwork burden analysis.

1. Estimates of burden

One commenter argued that the PRA burden estimate for the proposed rule was low, and the commenter pointed to an earlier (and higher) draft burden estimate that had been prepared. The higher estimate cited by the commenter reflected an earlier (unpublished) draft version of the collection of information. The FAR Council believes that its burden estimate for the proposed rule was correct. In this case, the burden estimate was being updated as the collection was being developed. It is not uncommon for an agency to revise its burden estimate as the agency develops a collection of information. Under the PRA, it is entirely appropriate for agencies, in their development of a collection of information, to seek to identify ways to decrease its burden or increase its practical utility through modifications to the collection. In addition, during the development of a collection of information, agencies often review their methodology and analysis for estimating its burden, and this review can also result in revisions to a burden estimate (this can occur even when the collection itself has not changed). In this case, after a draft (higher) burden estimate was prepared, clarifying changes were made to the collection, and it was this revised collection that was published for comment. In the course of updating the burden estimate for the collection, to take into account these clarifications, the FAR Council also reviewed its methodology and analysis for estimating the collection's burden. As a result of the clarifications and review, the burden estimate for the proposed rule was lower than the draft (informal) burden estimate that had been prepared for the prior draft of the collection. Similarly, in response to comments that were received on the proposed rule, the collection of information has been subsequently modified, and this has resulted in the burden estimate being further revised.

2. Number of Respondents and Responses.

The paperwork burden justification for the final rule retains the estimate of 50,000 respondents and 500,000 responses per year.

One commenter states that the FAR Council's estimate appears based on suspension and debarment actions. This is incorrect. This new certification requirement has been added to the provision at 52.209–5, Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters and 52.212–3, Offeror Representations and Certifications—Commercial Items. One of these provisions is included in all solicitations where the contract value is expected to exceed the simplified acquisition threshold (SAT). Therefore, the same 50,000 respondents must answer all parts of the certification, whether or not they have been debarred,

suspended, or convicted of various violations. As previously stated, the 39,995 subcontractors that respond to inquiries from the prime contractor regarding debarment, suspensions, or proposed debarment are not affected by the new certification requirements.

Most of the 171,000 small business entities that may be affected by the new responsibility standards are not affected by the certification requirement. Only offerors responding to solicitations that exceed the simplified acquisition threshold are affected. Such small businesses are already included in the estimate of 50,000 respondents. This new certification cannot increase the number of respondents, but only increase the burden hours per respondent.

Another commenter cites Federal Procurement Data System data that the Government undertook 11.6 million procurement actions in FY 1998. The number of procurement actions is much greater than the number of contract awards that exceed the SAT. Most contract actions are under the SAT. In addition, contract actions also include orders, funding actions, additional work, or change orders. These contract actions would not require certification. For example, DoD is responsible for about half of all FPDS contract actions. In FY 1998, DoD only awarded 22,549 definitive contracts that exceeded the simplified acquisition threshold. The estimate of 500,000 responses considered the fact that each offeror, not just the ultimate awardee, must complete the required certificate.

3. Burden Hours.

The proposed rule required each offeror that responded affirmatively to the new certification to explain the nature of the violation and whether any fines, penalties, or damages were assessed and also permitted the contracting officer to request additional information. The paperwork burden estimate for the proposed rule included 375,000 hours for response to the certification (3 hours per initial response, 0.5 hours per subsequent response) and 140,000 hours to supply additional information requested by the contracting officer (4 hours per initial response and 1 hour per subsequent response).

The final rule does not require any information other than the certification, unless requested by the contracting officer. Therefore, we have reduced the estimated hours per response to 1 hour per initial response and 0.3 hours per subsequent response, for a total of 185,000 hours for the certification itself, a reduction of 190,000 hours. We estimate that in many acquisitions, the contracting officer will only request additional information if the otherwise apparently successful offeror has certified affirmatively. However, in some source selections, the contracting officer may request such information from all offerors in the competitive range that certified affirmatively. Therefore, we still estimate 50,000 additional requests for information from 30,000 respondents. We have retained the burden estimate of 4 hours per initial response and 1 hour per subsequent response, for a total of 140,000 hours for providing additional information.

Several commenters state that businesses wishing to do business with the Government in excess of the SAT will have to establish a system to track compliance and keep it current. As one commenter stated, no single official at any but the smallest companies is presently able to keep track of its compliance with all applicable laws, nor would they have reason to do so. We concur that most large businesses and some small businesses will probably establish a new system or augment a current system to track such compliance. Such a system would be required in any complex organization to obtain the significant reductions that we have built into estimates of subsequent response time. Therefore, we have included an estimated average of 6 hours per year for recordkeeping for each of the 30,000 respondents to the request for additional information, for a total of 180,000 annual recordkeeping hours.

The revised annual reporting burden is estimated as follows:

Respondents: 89,995.

Responses per respondent: 12.8.

Total annual responses: 1,150,000.

Average hours per response: [1] 0.362 hours.

Recordkeepers: 30,000.

Average annual hours per recordkeeper: 6 hours.

Additional burden hours: 505,000.

Total burden hours: 596,667 hours.

The Paperwork Reduction Act does not apply to the changes to FAR Part 31, Contract Cost Principles and Procedures, because these changes do not impose information collection requirements that require Office of Management and Budget approval under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 9, 14, 15, 31, and 52

Government procurement.

[1] Average hours per response is calculated by dividing total nonrecordkeeping burden hours by total annual responses.

Dated: December 15, 2000.

Al Matera,

Acting Director, Federal Acquisition Policy Division.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 97–21 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

All Federal Acquisition Regulation (FAR) changes and other directive material contained in FAC 97–21 are effective January 19, 2001.

Dated: December 15, 2000.

David A. Drabkin,

Deputy Associate Administrator, Office of Acquisition Policy, General Services Administration.

Dated: December 15, 2000.

Michael E. Sipple,

Acting Director, Defense Procurement.

Dated: December 15, 2000.

Tom Luedtke,

Associate Administrator for Procurement, National Aeronautics and Space Administration.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 9, 14, 15, 31, and 52 as set forth below:

1. The authority citation for 48 CFR parts 9, 14, 15, 31, and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 9—CONTRACTOR QUALIFICATIONS

2. Amend section 9.103 to add a new sentence after the second sentence in paragraph (b) to read as follows:

9.103 Policy.

* * * * *

(b) * * * Contracting officers should coordinate nonresponsibility determinations based upon integrity and business ethics with legal counsel.

* * *

3. Revise paragraph (d) of section 9.104–1 to read as follows:

9.104–1 General standards.

* * * * *

(d) Have a satisfactory record of integrity and business ethics including satisfactory compliance with the law including tax laws, labor and employment laws, environmental laws, antitrust laws, and consumer protection laws.

* * * * *

4. In section 9.104–3, redesignate paragraphs (c) and (d) as (d) and (e)

respectively; and add a new paragraph (c) to read as follows:

9.104–3 Application of standards.

* * * * *

(c) *Integrity and business ethics.* (1) Prospective contractors must have a satisfactory record of integrity and business ethics in order to receive a Government contract. This determination can be made by examining a prospective contractor's record of compliance with the law. A satisfactory record of compliance with the law indicates that the prospective contractor possesses basic honesty, integrity and trustworthiness, and that the Government can trust or rely on the contractor to perform the contract in a timely manner. In making a determination of responsibility based upon integrity and business ethics, contracting officers must consider all relevant credible information. However, contracting officers should give the greatest weight to violations of laws that have been adjudicated within the last three years preceding the offer. Normally, a single violation of law will not give rise to a determination of nonresponsibility, but evidence of repeated, pervasive, or significant violations of the law may indicate an unsatisfactory record of integrity and business ethics. Also, contracting officers should give consideration to any administrative agreements entered into with prospective contractors who take corrective action after disclosure of law violations. These contractors, despite findings of law violations, may continue to be responsible contractors because they have corrected the conditions that led to the misconduct. On the other hand, failure to comply with the terms of an administrative agreement is evidence of a lack of integrity and business ethics. Contracting officers must consider information based on the following which are listed in descending order of importance:

(i) Convictions of and civil judgments rendered against the prospective contractor for—

(A) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, state or local) contract or subcontract;

(B) Violation of Federal or state antitrust statutes relating to the submission of offers;

(C) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statement, tax evasion, or receiving stolen property.

(ii) Indictments for the offenses listed in 9.104–3(c)(1)(i).

(iii) Relative to tax, labor and employment, environmental, antitrust, or consumer protection laws:

(A) Federal or state felony convictions.

(B) Adverse Federal court judgments in civil cases brought by the United States.

(C) Adverse decisions by a Federal administrative law judge, board, or commission indicating violations of law.

(D) Federal or state felony indictments.

Also, contracting officers may consider other relevant information such as civil or administrative complaints or similar actions filed by or on behalf of a federal agency, board or commission, if such action reflects an adjudicated determination by the agency.

* * * * *

PART 14—SEALED BIDDING

5. Revise paragraph (i) of section 14.404–2 to read as follows:

14.404–2 Rejection of individual bids.

* * * * *

(i) The contracting officer must reject low bids received from concerns determined to be nonresponsible pursuant to subpart 9.1 (but if a bidder is a small business concern, see subpart 19.6 with respect to certificates of competency). The contracting officer must promptly notify the bidder of the nonresponsibility determination and the basis for it.

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

6. Revise paragraph (a)(1) of section 15.503 to read as follows:

15.503 Notifications to unsuccessful offerors.

(a) *Preaward notices*—(1) *Preaward notices of exclusion from competitive range.* The contracting officer must notify offerors promptly in writing when their proposals are excluded from the competitive range or otherwise eliminated from the competition. The notice must state the basis for the determination and that a proposal revision will not be considered. When the exclusion or elimination of a proposal is based on a nonresponsibility determination, the contracting officer must state the basis for the determination.

* * * * *

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

7. Amend section 31.205–21 by designating the existing paragraph as paragraph (a) and adding paragraph (b) to read as follows:

31.205–21 Labor relations costs.

* * * * *

(b) Costs incurred for activities that assist, promote, or deter unionization are unallowable.

8. Amend section 31.205–47 in paragraph (a) by removing the definition ''Fraud''; and revising paragraph (b)(2) to read as follows:

31.205–47 Costs related to legal and other proceedings.

* * * * *

(b) * * *

(2) In a civil or administrative proceeding, a finding that the contractor violated, or failed to comply with, a law or regulation;

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

9. In section 52.209–5—

a. Revise the date of the clause;

b. In paragraph (a)(1)(i)(B), remove ''a 3-year'' and add ''the three-year'' in its place; and remove ''and'' at the end of the paragraph;

c. In paragraph (a)(1)(i)(C), at the end of the paragraph remove the period and add ''; and'' in its place; and

d. Redesignate paragraph (a)(1)(ii) as (a)(1)(iii) and add a new (a)(1)(ii) to read as follows:

52.209–5 Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters.

* * * * *

Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters (Jan. 2001)

* * * * *

(a) * * *

(1) * * *

(ii)(A) The offeror, aside from the offenses enumerated in paragraphs (a)(1)(i)(A), (B), and (C) of this provision, has [ ] has not [ ] within the past three years, relative to tax, labor and employment, environmental, antitrust, or consumer protection laws—

(*1*) Been convicted of a Federal or state felony (or has any Federal or state felony indictments currently pending against them); or

(*2*) Had a Federal court judgment in a civil case brought by the United States rendered against them; or

(*3*) Had an adverse decision by a Federal administrative law judge, board, or commission indicating a willful violation of law.

(B) If the offeror has responded affirmatively, the offeror shall provide additional information if requested by the Contracting Officer; and

* * * * *

10. In section 52.212–3—

a. Revise the date of the clause;

b. Revise the introductory text of paragraph (h);

c. In paragraph (h)(1), remove ‘‘, and’’ and add ‘‘;’’ in its place; and

d. Revise paragraph (h)(2);

e. Add new paragraphs (h)(3) and (h)(4) to read as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

Offeror Representations and Certifications—Commercial Items (Jan. 2001)

* * * * *

(h) *Certification Regarding Debarment, Suspension or Ineligibility for Award (Executive Order 12549).* (Applies only if the contract value is expected to exceed the simplified acquisition threshold.) The offeror certifies, to the best of its knowledge and belief, that—

* * * * *

(2) [ ] Have, [ ] have not, within the three-year period preceding this offer, been convicted of or had a civil judgment rendered against them for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a Federal, state or local government contract or subcontract; violation of Federal or state antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property;

(3) [ ] Are, [ ] are not presently indicted for, or otherwise criminally or civilly charged by a government entity with, commission of any of these offenses; and

(4)(i) The offeror, aside from the offenses enumerated in paragraphs (1), (2), and (3) of this paragraph (h), [ ] has [ ] has not within the past three years, relative to tax, labor and employment, environmental, antitrust, or consumer protection laws—

(A) Been convicted of a Federal or state felony (or has any Federal or state felony indictments currently pending against them); or

(B) Had a Federal court judgment in a civil case brought by the United States rendered against them; or

(C) Had an adverse decision by a Federal administrative law judge, board, or commission indicating a willful violation of law.

(ii) If the offeror has responded affirmatively, the offeror shall provide additional information if requested by the Contracting Officer.

* * * * *

[FR Doc. 00–32429 Filed 12–19–00; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

Federal Acquisition Regulation; Small Entity Compliance Guide

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator for the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121). It consists of a summary of the rule appearing in Federal Acquisition Circular (FAC) 97–21 which amends the Federal Acquisition Regulation (FAR). Interested parties may obtain further information regarding this rule by referring to FAC 97–21 which precedes this document. This document is also available via the Internet at *http://www.arnet.gov/far*.

FOR FURTHER INFORMATION CONTACT: Laurie Duarte, FAR Secretariat, (202) 501–4225. For clarification of content, contact Ralph De Stefano, Procurement Analyst, General Services Administration, at (202) 501–1758.

Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings (FAC 97–21, FAR Case 1999–010)

This final rule amends—

- Part 9 to clarify that a satisfactory record of compliance with the law indicates that the prospective contractor possesses basic honesty and that the Government can trust or rely on the contractor to perform the contract in a timely manner. In making a determination of responsibility based upon integrity and business ethics, contracting officers must consider all relevant credible information. However, contracting officers should give the greatest weight to violations of laws that have been adjudicated within the last three years preceding the offer.
- FAR Parts 14 and 15 to provide notice to prospective contractors as quickly as possible when a nonresponsibility determination is made;
- FAR Part 31, to make unallowable certain costs related labor activities, and other legal proceedings unallowable; and
- FAR Part 52, to add a requirement for offerors to certify to violations of certain laws.

Dated: December 15, 2000.

Al Matera,

Acting Director, Federal Acquisition Policy Division.

[FR Doc. 00–32430 Filed 12–19–00; 8:45 am]

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Federal Register

Wednesday,
December 20, 2000

Part V

Department of Labor

Office of the Secretary

29 CFR Part 5

Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (Also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act); Final Rule

DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 5

RIN 1215–AB21

Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (Also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act)

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor adopts as a final rule an amendment to the regulations, 29 CFR Part 5, which define the Davis-Bacon Act language *construction, prosecution, completion*, or *repair* at 29 CFR 5.2(j), and *site of the work* at 29 CFR 5.2(l). Specifically, this document revises the *site of the work* definition to include material or supply sources, tool yards, job headquarters, *etc.*, in the site of the work only where they are dedicated to the covered construction project and are adjacent or virtually adjacent to the location where the building or work is being constructed. Also changed is the regulatory definition of *construction* to provide that the off-site transportation of materials, supplies, tools, etc., is not covered unless such transportation occurs between the construction work site and a dedicated facility located ''adjacent or virtually adjacent'' to the construction site.

This document also revises section 5.2(l)(1) to include within the *site of the work*, secondary sites, other than the project's final resting place, which have been established specifically for the performance of the Davis-Bacon covered contract and at which a significant portion of the public building or work called for by the contract is constructed. In conjunction with this change, section 5.2(j) has been amended to provide that transportation of portion(s) of the building or work between a secondary covered construction site and the site where the building or work will remain when it is completed is subject to Davis-Bacon requirements.

EFFECTIVE DATE: January 19, 2001.

FOR FURTHER INFORMATION CONTACT: Timothy Helm, Office of Enforcement Policy, Government Contracts Team, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3018, 200 Constitution Avenue, NW., Washington, D.C. 20210. Telephone (202) 693–0574. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act

This regulation does not contain any new information collection requirements and does not modify any existing requirements. Thus, this regulation is not subject to the Paperwork Reduction Act.

II. Background

A. Statutory and Regulatory Framework

Section 1 of the Davis-Bacon Act (DBA or Act) requires that ''the advertised specifications for contracts * * * for construction, alteration and/or repair, including painting and decorating, of public buildings or public works * * * shall contain a provision stating the minimum wages to be paid to various classes of laborers and mechanics * * * and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers *employed directly upon the site of the work* * * * the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, * * * and that the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work * * * .'' 40 U.S.C. 276a (emphasis added).

Section 2 of the Act requires that every covered contract provide that in the event the contracting officer finds that ''any laborer or mechanic employed by the contractor or any subcontractor *directly on the site of the work covered by the contract* has been or is being paid less than required wages, the government ''may terminate the contractor's right to proceed with the work or such part of the work as to which there has been a failure to pay the required wages'' and to hold the contractor liable for the costs for completion of the work. 40 U.S.C. 276a–1 (emphasis added).

The Congress directed the Department of Labor, through Reorganization Plan No. 14 of 1950 (5 U.S.C. App., effective May 24, 1950, 15 FR 3176, 64 Stat. 1267), to ''prescribe appropriate standards, regulations and procedures'' to be observed by federal agencies responsible for the administration of the Davis-Bacon and related Acts ''[i]n order to assure coordination of administration and consistency of enforcement.'' 64 Stat. 1267.

On April 29, 1983, the Department promulgated a regulation (29 CFR 5.2(l)) defining the term *site of the work* within the meaning of the Davis-Bacon Act (see 48 FR 19540). This regulation reflected the Department's longstanding, consistent interpretation of the Act's *site of the work* requirement. See, *e.g., United Construction Company*, Wage Appeals Board (WAB) Case No. 82–10 (January 14, 1983); *Sweet Home Stone*, WAB Case Nos. 75–1 & 75–2 (August 14, 1975); *Big Six, Inc.*, WAB Case No. 75–3 (July 21, 1975); *T.L. James & Co.*, WAB Case No. 69–2 (August 13, 1969); CCH Wage-Hour Rulings ¶ 26,901.382, Solicitor of Labor letter (July 29, 1942).

The Department's regulations provide a three-part definition of *site of the work*. The first part at 29 CFR 5.2(l)(1) provides that ''the *site of the work* is the physical place or places where the construction called for in the contract will remain when work on it has been completed and, as discussed in paragraph (l)(2) of this section, other adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the site.''

The second part at 29 CFR 5.2(l)(2) provides that ''fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, *etc.*'' are part of the *site of the work* provided they meet two tests—a geographic test of being ''so located in proximity to the actual construction location that it would be reasonable to include them,'' and a functional test of being ''dedicated exclusively, or nearly so, to performance of the contract or project.''

The third part at 29 CFR 5.2(l)(3) states that fabrication plants, batch plants, borrow pits, tool yards, job headquarters, etc., ''of a commercial supplier or materialman which are established by a supplier of materials for the project before the opening of bids and not on the project site, are not included in the *site of the work*.'' In other words, facilities such as batch plants and borrow pits are not covered if they are ongoing businesses apart from the federal contract work.

The regulatory definition of the statutory terms *construction, prosecution, completion*, or *repair* in section 5.2(j)(1) applies the *site of the work* concept. It defines these statutory terms as including the following:

[a]ll types of work done on a particular building or work *at the site thereof*, including work at a facility which is dedicated to and deemed a part of the *site of the work within the meaning of § 5.2(l)*—including without limitation (i) [a]lteration, remodeling, installation

(where appropriate) on the *site of the work* of items fabricated off-site; (ii) [p]ainting and decorating; (iii) [m]anufacturing or furnishing of materials, articles, supplies or equipment *on the site of the building or work* * * *; and (iv) [t]ransportation between the actual construction location and a facility which is dedicated to such construction and deemed a part of the *site of the work within the meaning of § 5.2(l).* (Emphasis added.)

B. The Department of Labor's Longstanding Interpretation of the Regulatory Site of the Work Definition

Prior to the recent appellate court rulings, the Department's longstanding, consistent application of the regulatory definition of *site of the work*—the area where laborers and mechanics are to be paid at least the prevailing wage rates, as determined by the Secretary of Labor—included both the location where a public building or work would remain after work on it had been completed, and nearby locations used for activities directly related to the covered construction project, provided such locations were dedicated exclusively (or nearly so) to meeting the needs of the covered project.

The Wage Appeals Board, which acted with full and final authority for the Secretary of Labor on matters concerning the labor standards provisions of the Davis-Bacon and related Acts (see 29 CFR 5.1 and 7.1 (c)),[1] consistently interpreted 29 CFR 5.2(l) to include as part of the *site of the work*, for purposes of Davis-Bacon prevailing wage coverage, support facilities dedicated exclusively to the covered project and located within a reasonable distance from the actual construction site. Consistent with the regulations, the Board also treated the transportation of materials and supplies between the covered locations and transportation of materials or supplies to or from a covered location by employees of the construction contractor or subcontractor as covered Davis-Bacon work. *See, e.g., Patton-Tully Transportation Co.*, WAB No. 90–27 (March 12, 1993) (distances of 5.4 to 14 miles, and 16 to 60 miles); *Winzler Excavating Co.*, WAB No. 88–10 (October 30 1992) (12½ miles); *ABC Paving Co.*, WAB Case No. 85–14 (September 27, 1985) (3 miles).

[1] On April 17, 1996, the Secretary redelegated jurisdiction to issue final agency decisions under, *inter alia,* the Davis-Bacon and related Acts and their implementing regulations, to the newly created Administrative Review Board (ARB or the Board). Secretary's Order 2–96 (Apr. 17, 1996), 61 FR 19978, May 3, 1996.

C. Federal Appellate Decisions and Subsequent Decision of the Administrative Review Board (ARB)

The D.C. Circuit first discussed the Department's *site of the work* definition in *Building and Construction Trades Department, AFL–CIO* v. *United States Department of Labor Wage Appeals Board*, 932 F.2d 985 (D.C. Cir. 1991) (*Midway*). That case involved truck driver employees of the prime contractor's wholly owned subsidiary, who were delivering materials from a commercial supplier to the construction site. The material delivery truck drivers spent ninety percent of their workday on the highway driving to and from the commercial supply sources, ranging up to 50 miles round trip and stayed on the *site of the work* only long enough to drop off their loads, usually for not more than ten minutes at a time.

At issue before the D.C. Circuit was whether the ''material delivery truckdrivers'' were within the scope of *construction* as defined by the regulatory provision then in effect at section 5.2(j), which defined the statutory terms *construction, prosecution, completion*, or *repair* to include, among other things, ''the transporting of materials and supplies to or from the building or work by the employees of the construction contractor or construction subcontractor.'' The court held that ''the phrase 'mechanics and laborers employed directly upon the site of the work' restricts coverage of the Act to employees who are working directly on the physical site of the public building or public work being constructed.'' 932 F.2d at 992. The court further stated that ''[m]aterial delivery truckdrivers who come onto the *site of the work* merely to drop off construction materials are not covered by the Act even if they are employed by the government contractor,'' and consequently held that ''29 CFR § 5.2(j), insofar as it includes off-site material delivery truck drivers in the Act's coverage, is invalid.'' *Id.*

The court expressly declined to rule on the validity of the regulation defining the *site of the work* at 29 CFR 5.2(l). 932 F.2d at 989 n.6, 991 n.12. However, it expressed the view that Congress intended to limit Davis-Bacon coverage to ''employees working directly on the physical site of the public building or public work under construction.'' 932 F.2d at 990 n.9, 991.

On May 4, 1992, the Department promulgated a revised section 5.2(j) to accommodate the holding in *Midway*. 57 FR 19204. The revised regulation limits coverage of offsite transportation to ''[t]ransportation between the actual construction location and a facility which is dedicated to such construction and deemed a part of the *site of the work* within the meaning of § 5.2(l).'' 29 CFR 5.2(j)(1)(iv) (1993).

In the two more recent rulings, *Ball, Ball and Brosamer* v. *Reich*, 24 F. 3d 1447 (D.C. Cir. 1994) (*Ball*) and *L.P. Cavett Company* v. *U.S. Department of Labor*, 101 F.3d 1111 (6th Cir. 1996) (*Cavett*), the D.C. Circuit and Sixth Circuit, respectively, focused on the proper geographic scope of the statutory phrase *site of the work* in relation to borrow pits and batch plants established specifically to serve the needs of covered construction projects. In *Ball*, the D.C. Circuit ruled that the Department's application of section 5.2(l)(2) was inconsistent with the Act to the extent it covers sites that are at a distance from the actual construction location. The case involved workers at the borrow pit and batch plant of a subcontractor who obtained raw materials from a local sand and gravel pit and set up a portable batch plant for mixing concrete. The pit and batch plant were dedicated exclusively to supplying material for the completion of the 13-mile stretch of aqueduct that the prime contractor had contracted to construct. As described by the court, ''the borrow pit and batch plant were located about two miles from the construction site at its nearest point.'' 24 F.3d at 1449.

In holding that the Davis-Bacon prevailing wage requirements did not apply to the borrow pit and batch plant workers, the court cited *Midway*, in which it had found ''no ambiguity in the text [of the Davis-Bacon Act]'' and thought it clear that ''the ordinary meaning of the statutory language is that the Act applies only to employees working directly on the physical site of the public building or public work under construction.'' 24 F.3d at 1452. The court added that ''the reasoning in *Midway* obviously bears on the validity of § 5.2(l)(2) to the extent that the regulation purports to extend the coverage of the Davis-Bacon Act beyond the actual physical site of the public building or public work under construction,'' (*id.*), and accordingly ruled that ''the Secretary's regulations under which Ball was held liable are inconsistent with the Davis-Bacon Act. *See* 29 CFR § 5.2(l)(1).'' 24 F.3d at 1453. The court nevertheless indicated that the regulations at section 5.2(l)(2) might satisfy the geographic limiting principle of the Davis-Bacon Act and *Midway* if the regulatory phrase in section 5.2(l)(2) ''so located in proximity to the actual construction location that it would be reasonable to include them'' were

applied ''only to cover batch plants and gravel pits located in actual or virtual adjacency to the construction site.'' 24 F.3d at 1452.

In *Cavett* (arising under the Federal-Aid Highway Act, a Davis-Bacon related Act), the Sixth Circuit held that truck drivers hauling asphalt from a temporary batch plant to the highway under construction three miles away were not entitled to Davis-Bacon prevailing wages. The contract involved resurfacing of an Indiana state road, and as characterized by the court, ''the Department of Labor included in the *site of the work* both a batch plant located at a quarry more than three miles away from the highway construction project and the Indiana highway system that was used to transport materials from the batch plant to the construction project.'' 101 F.3d at 1113–1114.

Relying on the D.C. Circuit's reasoning in *Midway* and *Ball,* the Sixth Circuit disagreed with the views of the lower court that the statutory language was ambiguous and that the *Ball* decision recognized ambiguity in the statutory text when it declined to decide whether coverage could extend to batch plants adjacent to or virtually adjacent to the boundaries of the completed project. The Sixth Circuit reasoned that it was not inconsistent for the *Ball* court to ''conclude that while a facility in virtual adjacency to a public work site might be considered part of that site, a facility located two (or in this case three) miles away from the site would not.'' 101 F.3d at 1115. Thus, agreeing with *Ball*, the Sixth Circuit concluded that the statutory language means that ''only employees working directly on the physical site of the work of the public work under construction have to be paid prevailing wage rates.'' *Id.*

Subsequent to the rulings in *Midway*, *Ball*, and *Cavett*, the Department's Administrative Review Board (ARB) addressed the Davis-Bacon Act's *site of the work* provision in *Bechtel Contractors Corporation (Prime Contractor), Rogers Construction Company (Prime Contractor), Ball, Ball and Brosamer, Inc., (Prime Contractor), and the Tanner Companies, Subcontractor,* ARB Case No. 97–149, March 25, 1998, reaffirming ARB Case No. 95–045A, July 15, 1996.

This case involved a dispute over whether the Davis-Bacon provisions applied to work performed at three batch plants established and operated in connection with construction work on the Central Arizona Project (CAP), a massive Bureau of Reclamation construction project consisting of 330 miles of aqueduct and pumping plants. The batch plants were located less than one-half mile from various pumping stations that were being constructed as part of the project. The Board initially ruled on the case on July 15, 1996 (*Bechtel I*) and later reaffirmed that decision on March 25, 1998 (*Bechtel II*).

The Board observed that the D.C. Circuit's recent decision in *Ball* had ''created a good deal of confusion with respect to the coverage of the DBA.'' *Bechtel I*, slip op. at 6. The Board declined to read *Ball* or *Cavett* to mean that the statutory phrase ''directly upon the site of the work'' limits the wage standards of the DBA to ''the physical space defined by contours of the permanent structures that will remain at the close of work.'' *Id.* Rather, the Board read *Ball* and *Cavett* as only precluding the Secretary from enforcing section 5.2(l)(2) of the regulations in a manner that did not respect the geographic limiting principle of the statute, while reserving ruling on section § 5.2(l)(1), since that provision was not at issue in those cases. *Bechtel II*, slip op. at 5; *Bechtel I*, slip op. at 6. The Board stated that interpretation of § 5.2(l)(1) requires examination of the question of whether the temporary facilities are so ''located in virtual adjacency'' to the site of the work that it would be reasonable to include them. *Id.*

The Board found that the work performed at the plants satisfied the test set out in § 5.2(l)(1), since aerial photographs of the construction sites showed the temporary batch plants to be located on land integrated into the work area adjacent to the pumping stations. The Board believed there was no principled basis for excluding the batch plant workers since they were employed on sites of the work to the same extent as the workers who cleared the land and the workers who inventoried, assembled, transported or operated tools, equipment or materials on nearby or adjacent property. The Board also observed that

> it is the nature of such construction, *e.g.,* highway, airport and aqueduct construction, that the work may be long, narrow and stretch over many miles. Where to locate a storage area or a batch plant along such a project is a matter of the contractor's convenience and is not a basis for excluding the work from the DBA. The map of the project introduced at hearing * * * abundantly illustrates that the project consisted of miles of narrow aqueduct connected by pumping stations. The only feasible way to meet the needs of the aqueduct construction was to have the concrete prepared at a convenient site and transported to the precise area of need. This equally holds true for the storage and distribution of other materials and equipment. Faced with such a project, the Board finds that work performed in actual or virtual adjacency to one portion of the long continuous project is to be considered adjacent to the entire project.

Bechtel I, slip op. at 6.

D. The Proposed Rule

The Department, by Notice of Proposed Rulemaking (NPRM) published in the **Federal Register** on September 21, 2000 (65 FR 57270), proposed for public comment an amendment to the regulations that define the Davis-Bacon Act language *construction, prosecution, completion,* or *repair* at 29 CFR 5.2(j), and *site of the work* at 29 CFR 5.2(l). The Department explained that revisions to these definitions are needed (1) to clarify the regulatory requirements in view of the three appellate court decisions, which concluded that the Department's application of these regulatory definitions was at odds with the language of the Davis-Bacon Act that limits coverage to workers employed ''directly upon the site of the work,'' and (2) to address situations that were not contemplated when the current regulations were promulgated.

Specifically, the Department proposed to revise the *site of the work* definition to include material or supply sources, tool yards, job headquarters, *etc., only* where they are dedicated to the covered construction project *and* are adjacent or virtually adjacent to a location where the building or work is being constructed. The Department also proposed to revise the regulatory definition of *construction* to provide that the off-site transportation of materials, supplies, tools, etc., is not covered, except where such transportation occurs between the construction work site and a dedicated facility located ''adjacent or virtually adjacent'' to the construction site. However, the proposal did not alter the Department's view that truck drivers employed by construction contractors and subcontractors must be paid Davis-Bacon wage rates for any time spent on-site which is more than *de minimis.* Moreover, the Department did not propose to define the terminology ''adjacent or virtually adjacent,'' leaving this question to be determined on a case-by-case basis, given that the actual distances will vary depending upon the size and nature of the project in question.

The Department also proposed to revise the *site of the work* definition so that it will address certain construction situations that the Department believes warrant coverage, which were not contemplated by the current regulations. The Department explained, by way of example, that new construction

technologies have been developed that make it practical and economically advantageous to build major segments of complex public works, such as lock and dam projects and bridges, at locations some distance up-river from the locations where the permanent structures will remain when their construction is completed. The Department noted that, in such situations, much of the construction of the public work is performed at a secondary site other than where it will remain after construction is completed, and therefore, believed that it is reasonable and consistent with the language and intent of the statute to cover such a location where it has been established specifically for the purpose of constructing a significant portion of a ''public building or public work''. The Department further stated that, to the best of its knowledge, projects built in such a manner are currently rare, and that it did not anticipate that the proposed rule would create a major exception to the normal rule limiting the *site of the work* to the place where the building or work will remain when the construction is completed. The Department, therefore, proposed to revise § 5.2(l)(1) to include within the *site of the work*, secondary sites, other than the project's final resting place, which have been established specifically for the performance of the Davis-Bacon covered contract and at which a significant portion of the public building or work called for by the contract is actually constructed.

In conjunction with this change, the Department also proposed to amend § 5.2(j) to provide that transportation of portion(s) of the building or work between a secondary covered construction site and the site where the building or work will remain when it is completed is subject to Davis-Bacon requirements. The Department stated that the *site of the work*, under these circumstances, would be literally moving between the two work sites, and therefore the laborers or mechanics who transport these portions or segments of the project should be reasonably viewed as ''employed directly upon the site of the work.''

The Department received 50 responses to the NPRM during the public comment period: two from federal agencies: the U.S. Army Corps of Engineers and the Department of the Air Force; four from state Departments of Transportation (DOT's) in Utah, Oregon, Iowa and West Virginia; thirteen contractor associations: the Associated General Contractors of America, Inc. (AGC) and the California AGC, AGC of Washington, the New York State AGC Chapter, the General Contractors Association of New York (which represents the heavy construction industry active in New York City), Associated Builders and Contractors, Inc. (ABC), the American Road & Transportation Builders Association (ARTBA), the National Asphalt Pavement Association (NAPA), the National Ready Mixed Concrete Association (NRMCA), an attorney for the California Dump Truck Owners Association, the Wisconsin Transportation Builders Association (WTBA), and the Contractors Association of Western Pennsylvania; the American Society of Civil Engineers (ASCE); an engineering firm—Johansen & Tuttle Engineering, Inc.; seventeen construction companies, ten reflecting AGC views; and the Pinal Gila Community Child Services, Inc.

Also submitting comments were ten union and union-supported organizations: the Building and Construction Trades Department, AFL-CIO (Building Trades), the International Union of Operating Engineers (IUOE), the Laborers International Union of North America (LIUNA), and the International Brotherhood of Teamsters, AFL-CIO; the National Alliance for Fair Contracting, and the Illinois Foundation for Fair Contracting (FFC), the Indiana-Illinois FFC, and the Midwest FFC; and the International Brotherhood of Electrical Workers, Local Unions Nos. 193 and No. 146 (Springfield and Decatur, Illinois, respectively). An individual who has been involved in wage regulation for twelve years also provided comments.

III. Comments and Analysis

The following is an analysis of all the principal comments received. Each submission has been thoroughly reviewed, and each criticism and suggestion has been given careful consideration. For each proposed revision, the analysis contains a description of the major comments and the Department's conclusions regarding those comments.

A. Site of the Work—§ 5.2(l)

1. Limiting Coverage of Dedicated Facilities to Those That Are ''Adjacent or Virtually Adjacent'' to the Construction Location

The Building Trades, LIUNA, the Teamsters and the Operating Engineers oppose this change, urging the Department to adopt a rule that would extend prevailing wage coverage to locations that are dedicated exclusively, or nearly so, to the performance of the covered project without regard to their geographic proximity to the actual construction site. The General Contractors Association of New York, Inc. also opposes this change, urging the Department to retain its previous interpretation of the law, *i.e.,* covering facilities that are located ''within a reasonable distance'' from the actual construction site. Johansen & Tuttle Engineering, Inc. expressed concern that disputes would arise if everyone working on a Davis-Bacon contract were not paid on the same basis.

The Building Trades, based on its reading of the legislative history of the Davis-Bacon Act, stated that the term ''site of the work'' was intended to refer to *any* location where tasks relating to construction of the public building or public work are performed by laborers and mechanics employed by contractors and subcontractors otherwise covered by the Davis-Bacon or related Acts. The Building Trades stated that the merits of this legislative history argument have never been considered by the courts, and therefore, the Secretary is not precluded from adopting a site of the work definition that extends coverage beyond the physical site of the public building or public work under construction. The Operating Engineers commented that the statutory language ''directly upon the site of the work'' is ambiguous, and can fairly be construed to mean any location where work in furtherance of the contract occurs.

The Department believes that both the D.C. Circuit and the Sixth Circuit have spoken clearly on these issues and that the Department is constrained by these courts' decisions in *Ball* and *Cavett,* respectively, to limit prevailing wage coverage of off-site, dedicated support facilities to those that are either adjacent or virtually adjacent to the construction location.

The Building Trades and LIUNA both stated that the same justification for including locations established specifically for the purpose of constructing a significant portion of a building or work in the definition of ''site of the work'' for Davis-Bacon purposes applies with equal force to locations used for activities such as temporary batch plants, fabrication facilities, borrow pits and tool yards that are directly related to the covered construction project, provided those locations are dedicated exclusively or nearly so to supporting that project. In the Department's view, the underlying justification for covering secondary construction sites where significant portions of the building or work are being constructed has no application to dedicated support facilities, such as those mentioned in the regulation. The

basis for the Department's proposed change (discussed below), to include secondary construction sites where a significant portion of the public building or work called for by the contract is constructed, is that the Department views such locations as the actual physical site of the public building or work being constructed. On the other hand, the Department does not view the location of dedicated support facilities, which typically involve the furnishing of materials or supplies, as an actual physical location of the public building or public work. Rather, such dedicated support facilities are viewed as ''included'' within the ''site of the work'' only where they are located on, adjacent, or virtually adjacent to the site of the public building or public work.

In its comments, the AGC questioned whether a facility located two miles away from a Davis-Bacon construction site is ''adjacent or virtually adjacent'' to it, and expressed concern that the Department's proposal provides inadequate guidance as to the geographical range for covering support facilities. The AGC of Texas urged the Department to define ''site of the work'' precisely and to exempt facilities not located directly upon the physical site of the work. The ABC, on the other hand, sees no purpose to engaging in rulemaking to define ''adjacent,'' because it means ''next to; adjoining,'' and any attempts to expand the Davis-Bacon Act's coverage to non-adjacent locations violates the holdings in *Ball* and *Cavett*. The Air Force stated that it took no exception to this proposed change, based on its assumption that the Department would ''not attempt to expand the term into something more closely resembling its previous 'in proximity' test.''

The state DOT's of Oregon, Utah, Iowa, and West Virginia, and the National Ready Mixed Concrete Association stated that the Department should clarify the meaning of ''adjacent or virtually adjacent'' in terms of the distance from the actual construction site within which dedicated support facilities will be deemed covered. The West Virginia DOT recommended that facilities located one-fourth of a mile from the construction site be considered ''virtually adjacent''; the Iowa DOT suggested that ''virtually adjacent'' should be defined as a specific distance, such as ''1,500 meters from the limits of the work site or from the project right of way, etc.''; and the Utah DOT recommended setting the distance at ''approximately one-half mile, with the qualifier that if the facility is set up more than a half-mile away just to avoid paying Davis-Bacon, [the contractor] must pay Davis-Bacon anyway.''

The Operating Engineers, on the other hand, commented that, if the Department continues to include a geographic test in its site of the work definition, it should not define the terminology ''adjacent or virtually adjacent'' because a strict limitation in a definition of those terms would have the potential to create results contrary to the intent of the Act. The Operating Engineers agreed with the Department's observation in its NPRM that ''actual distance may vary depending upon the size and nature of the project,'' and commented that ''[t]he Wage and Hour Division must have the latitude to reach results that make sense given the parameters of the particular project under construction.''

The U.S. Army Corps of Engineers commented that ''[c]ase by case referral to the Department for resolution of 'actual or virtual adjacency' would disrupt both contract administration and effective management of project appropriations.'' However, the Corps' discussion of this concern related primarily to the Department's proposal to expressly cover secondary sites where substantial portions of the project are constructed, which does not contain an ''actual or virtually adjacent'' limitation. In this same vein, the Nicholas Grant Corporation commented that if the question of whether a support facility is ''adjacent or virtually adjacent'' is to be determined on a case-by-case basis, such determination ''must be made prior to bid time so the contractor can bid the project with reasonable knowledge that their construction costs are covered.''

After review of the relevant comments, the Department continues to be of the view that it should not include a precise definition of the terms ''adjacent or virtually adjacent'' in its regulations. The Department believes that by using the term ''virtual'' the courts intended the Department to apply the ''site of the work'' requirement narrowly, but with common sense and some flexibility. As the Board observed in *Bechtel II*, ''[i]t is not uncommon or atypical for construction work related to a project to be performed outside the boundaries defined by the structure that remains upon completion of the work.'' The Board cited as an example construction cranes that are typically positioned outside the permanent site of the construction because it would not be possible to place the crane where the building is to stand. Another common example would be work at a temporary batch plant constructed for the exclusive purpose of supplying asphalt for the construction of a highway project. It would certainly appear unlikely for practical reasons that the contractor would install the batch plant directly on the site of the highway because it would stand in the way of the paving process. Rather, the batch plant would more likely be located somewhere off to the side of the highway, *i.e.,* nearby, but not directly upon the site of where the highway will remain upon completion. Thus, while the Department clearly recognizes that the courts have narrowed the geographic limitation for covering temporary support facilities as previously applied under the regulations, we also believe that the courts allowed the Department some leeway to determine whether such facilities are in ''virtual adjacency'' to the permanent construction site.

Since it is apparent that in certain circumstances dedicated support facilities not located directly on the site where the permanent construction will remain should be covered, the question arises of just how far such a facility can be from the actual construction site and still be considered part of the ''site of the work.'' The Department is of the opinion that establishing a specific maximum distance would be ill-advised because it would create an arbitrary, artificial benchmark for determining Davis-Bacon coverage that ignores the differing nature of various construction processes. This would enable contractors to locate dedicated support facilities immediately beyond any such boundary solely for the purpose of avoiding Davis-Bacon coverage, thereby defeating the purposes of the Act.

The Department has concluded that the only fair and practical method for determining whether a temporary facility is virtually adjacent to the ''site of the work'' is on a case-by-case basis. The Department believes that the Board's analysis in the two *Bechtel* decisions, following close on the heels of the issuance of the court opinions in *Ball* and *Cavett,* provides an excellent example of such a determination and, as such, provides considerable guidance on how the amended definition will be applied by the Department. In the *Bechtel* matter, the record was unclear as to the exact measurement of distance between the location of the temporary batch plants and the permanent location of the pumping stations, which were constructed as part of the 330-mile aqueduct project. The distances were estimated at somewhere between several hundred feet and one-half mile. Because of the narrow, linear nature of the project, concrete from the batch plants was delivered to construction locations up to 15 miles from the batch plants.

Based in part on its examination of aerial photographs, the Board determined that the batch plants were located ''on land integrated into the work area adjacent to the pumping plants,'' and that ''[w]orkers at the batch plants were employed on the sites of work equally as much as the workers who cleared the land and the workers who inventoried, assembled, transported or operated tools, equipment or materials on nearby or adjacent property.'' *Bechtel I,* slip op. at 6. The Board concluded that ''in examining a project like the [Arizona aqueduct project]—a huge project stretching over approximately 330 miles—'it is not unreasonable' to consider the three batch plants in 'virtual adjacency' to the project, given their proximity to the pumping stations as clearly shown by the photographs in evidence.'' *Bechtel II,* slip op. at 6.

The Department believes that the *Bechtel* matter illustrates the difficulties inherent in establishing a specific distance for defining the terms, ''virtually adjacent.'' As demonstrated in *Bechtel,* it can be almost impossible to determine the exact outer boundaries of large public works projects, such as the aqueduct project in *Bechtel* or a major highway construction project. Thus, a numerical figure representing the maximum distance a dedicated facility can be located from the construction site would be arbitrary and impractical to apply. In addition, the Department does not believe that a single linear measurement of distance could be fairly applied to determine the coverage of all off-site facilities, given that Davis-Bacon projects vary to such a wide degree in size and nature. *See, e.g., Bechtel II,* slip op. at 6. For example, it was reasonable, given the magnitude and the nature of the aqueduct project in *Bechtel,* for the Board to conclude that the batch plants located somewhere up to one-half mile from the actual construction sites (the pumping stations) were located ''virtually adjacent'' to the project. In contrast, the ''site of the work'' limits applicable to a project for the construction of a single building in an urban location would likely be more constricted. In such a case, a dedicated facility located only a few city blocks away from the building project would most likely *not* be considered ''virtually adjacent'' for Davis-Bacon purposes.

The Department believes that in practice the determination of the site of the work will not be difficult. In fact, the *Bechtel* case is the only case we are aware of in which the issue has arisen since the *Ball* and *Cavett* decisions. The Department would expect contracting agencies and contractors to perform a practical analysis similar to that employed by the Board in the *Bechtel* decisions to determine whether temporary facilities established nearby to serve the federal or federally-assisted project are covered by the Davis-Bacon provisions, just as they do with respect to other issues as a regular matter.

2. Inclusion of Secondary Sites Established Specifically for the Performance of the Davis-Bacon Covered Contract and at Which a Significant Portion of the Public Building or Work Called for by the Contract Is Constructed

In support of this proposed change, LIUNA, the Building Trades, and the Operating Engineers have each, to a varying degree, provided detailed descriptions of the innovative construction techniques developed and currently in use, which allow significant portions of public buildings and public works to be constructed at locations other than the final resting place of the building or work. The Building Trades stated that the amount of so-called ''off-site'' work specifically related to many construction projects has steadily expanded in ways never contemplated when the Davis-Bacon Act was amended in 1935 to include the language ''directly upon the site of the work.'' The Operating Engineers stated that Congress clearly intended to cover actual construction sites, but could never have envisioned that ''significant portions'' of public works could be constructed other than at the final resting place of the public work. The General Contractors Association of New York similarly commented that new construction technologies have made it practical for ''major segments of complex public works'' to be built off-site and then transported by barge or rail to be put into place at the final location, and that such projects were not contemplated by the Department's current rules because such technology did not exist at the time of their promulgation.

LIUNA, the Building Trades, and the Operating Engineers each cite the Braddock Locks and Dam project on the Monongahela River in Allegheny County, Pennsylvania as an example that illustrates the compelling need for modification of the current site of the work regulation. The Braddock project involves the construction of two massive floating structures, each about the length of a football field, which would comprise the vast bulk of the new gated dam. The actual construction of these floating structures is at an upriver location on or near the water. They are then floated down the river to the point where they are submerged into the dam and gate piers. According to these commenters, the Army Corps of Engineers, which is contracting for this work, views the construction of these 300-foot structures as ''off-site'' work, and thus, has taken the position that the workers who build the structures are not entitled to Davis-Bacon coverage. Citing language in the *Cavett* decision, LIUNA stated that there is ''no doubt'' that the place where the floating structures will be constructed is ''the actual physical site of the public work under construction.'' 101 F.3d at 1115.

The Operating Engineers also cited two Wage Appeals Board cases as demonstrating the need for this regulatory change—*ATCO Construction, Inc.*, WAB Case No. 86–1 (August 22, 1986), and *Titan IV Mobile Service Tower,* WAB Case No. 89–14 (May 10, 1991). The Operating Engineers suggested that the absence of a regulation allowing coverage of a construction site other than the place where the building or work will remain resulted in the Board inappropriately applying the geographic test set forth in section 5.2(l)(2) in reaching inconsistent conclusions regarding coverage of the remote construction locations that were at issue in those two cases.

In *ATCO,* the Board found that Davis-Bacon coverage applied to workers at a temporary dedicated facility in Portland, Oregon that was established exclusively for the construction of about 405 military housing units, which were then shipped 3,000 miles for final placement at Adak Naval Air Station in the Aleutian Islands, Alaska. The Operating Engineers stated that the Board reached the right result for the wrong reason, and by finding the construction facility in Portland to meet the regulatory geographic test of reasonable proximity to the Naval Air Station 3,000 miles away, left the Department vulnerable to criticism from the courts. In *Titan,* the Board reached an opposite result with respect to workers who constructed several ''modular units'' that were to be transported to a distant location where they would be assembled into a 300-foot mobile service tower for building and servicing Titan missiles. According to the Operating Engineers, the largest of the modular units was equivalent in size to a three-story building. The units were originally constructed at a dedicated facility in Tongue Point, Oregon, and then transported by barge to Vandenberg AFB, which was located approximately 1,000 miles away, where the units were finally assembled. The Board found that the Tongue Point location did not

satisfy the geographic prong of the two-part site of work test for covering off-site facilities, and thus, denied Davis-Bacon coverage to nearly 400 construction workers, notwithstanding that they performed 40% of the total amount of work called for by the contract.

The Operating Engineers stated that there is no rational basis for the selection of one site of work over another where substantial construction work occurs at more than one site, and that the proposed change to section 5.2(l)(1) will ensure that Davis-Bacon coverage applies to projects such as the Braddock Lock and Dam, the Titan missile service tower, and the ATCO housing unit project, where significant portions of a public work are constructed at dedicated sites other than where the public work will remain.

The ABC, AGC, several other contractor associations, individual contractors, the Oregon Department of Transportation, the Air Force and the Army Corps of Engineers opposed this proposed change to the definition of ''site of the work,'' stating it amounts to an expansion of statutory coverage and would result in vague standards for coverage without objective criteria for determining what constitutes a ''significant portion'' of the project. The ABC also commented that the Department has not provided any credible basis for its assertion that this proposed change will not create a ''major'' exception to the normal rule limiting the site of the work to the place where the building or work will remain. The ABC also expressed concern that the new rule would threaten to expand the Act's coverage to ''many existing off-site pre-fabrication specialty contractors.''

The Air Force and the Army Corps of Engineers expressed concern that this proposed change would present significant procurement and administrative problems. The Air Force states that agencies would be compelled in some instances ''to solicit and award contracts without knowing where all of the various possible sites of 'significant work' may be located after award, and that some solicitations would require ''numerous wage determinations to cover all the possible 'areas' where some construction might occur, depending upon which bidder might be awarded the contract. The Corps similarly commented that ''[a]ny effort on the part of the contracting agency to 'guess' the location of potential secondary sites planned by potential bidders can not be fairly administered.''

After review of these comments, the Department continues to be of the view that the current *site of the work* definition does not adequately address certain rare situations that warrant coverage. As many of the comments have demonstrated, new construction technologies currently exist that make it practical and economically advantageous to build major segments of complex public works, such as lock and dam projects and bridges, at locations some distance up-river from the locations where the permanent structures will remain when their construction is completed. Several commenters have provided actual examples of current, ongoing projects where payment of Davis-Bacon wages for work performed at the secondary locations is in dispute. These comments have also shown that, in such situations, much of the actual construction of the public work itself is performed at a secondary site other than where it will remain after construction is completed.

The existing regulatory definition in § 5.2(l)(1) states that coverage is ''limited to the physical place or places where construction called for in the contract will remain * * * and other adjacent or nearby property.'' As the Operating Engineers demonstrated with reference to past Wage Appeals Board cases, literal application of the current regulatory language can result in the exclusion from coverage construction at a location some distance from the final resting place of a project, even if a significant portion of the project is actually constructed at that location. The Department does not believe such a result to be consistent with either the language or intent of the Davis-Bacon Act.

The Department does not believe that this change constitutes an expansion of statutory coverage beyond the geographical requirement ''directly upon the site of the work,'' as several commenters have alleged. As the court in *Cavett* stated, ''The statutory phrase 'employed directly on the site of the work' means that only employees working directly on the physical site of the public work under construction have to be paid prevailing wages.'' 101 F.3d at 1115. The Department believes that when a significant portion of a project, like the 300-foot floating structures that comprise the Braddock Lock and Dam, the three-story Titan missile service tower modules, or the 405 Adak housing units, is constructed at a secondary location, such location is, in actuality, the physical site of the public work being constructed. Or, as the Operating Engineers succinctly stated, ''it is the covered construction project.'' Therefore, the Department concludes that a location established specifically for the purpose of constructing a significant portion of a ''public building or public work'' is reasonably viewed as an independent ''site of the work'' within the meaning of the Davis-Bacon Act and that employees performing construction work at such a location should receive prevailing wages, regardless of the distance between the location of their construction site and the final resting place of the project.

The Department emphasizes that it does not intend that this change to the definition of the site of the work will create a major exception to the normal rule limiting the site of the work to the place where the building or work will remain when the construction is completed. Ordinary commercial fabrication plants, such as plants that manufacture prefabricated housing components, would *not* be covered by this amendment because they are not ''established specifically for the performance of the contract or project.'' Furthermore, ordinary material supply sites, even if dedicated to the project, would not involve the construction of a ''significant portion'' of the building or work being constructed pursuant to the government contract. This definitional change is designed to apply Davis-Bacon coverage only to locations where such a large amount of construction is taking place that it is fair and reasonable to view such location as a site where the public building or work is being constructed. In the past, the Wage Appeals Board has termed such a situation an ''anomaly,'' but the Department has treated such anomalous situations with inconsistent results under the current regulations (*ATCO* and *Titan*). It is the Department's intention in this rulemaking to require in the future that workers who construct significant portions of a federal or federally-assisted project at a location other than where the project will finally remain, will receive prevailing wages as Congress intended when it enacted the Davis-Bacon and related Acts.

Following review of the comments, the Department continues to be of the view that it is rare for projects to be built in this manner. While LIUNA in particular has described various types of structures that can be built at one location and then transported to another, the commenters, as a whole, have identified only two ongoing lock and dam projects (Braddock and Olmsted) as examples of projects that could fall within the criteria of this amendment. Additionally, the Department is aware of only two administrative cases considered by the Department's Wage Appeals Board or Administrative Review Board where a

significant portion of a project was constructed at a location established specifically for the project before being transported to another location for installation (*ATCO* and *Titan*).

With respect to the comments urging the Department to specifically define the terms ''significant portion,'' we believe that it is both unnecessary and unwise to do so. We think that a precise definition would be unwise because the size and nature of the project will dictate what constitutes a ''significant portion'' under this provision. We believe such a definition to be unnecessary because, in those rare situations where projects are constructed in this manner, application of this provision should normally be obvious. However, if the agency is unable to determine whether this provision should apply, we anticipate that any question would typically arise early in the procurement process so that advice could be obtained from the Department of Labor in a timely manner.

We appreciate the concerns raised by the contracting agencies since some changes in their procedures may be necessary. However, since these projects will likely be rare, the Department does not anticipate that this amendment will place any significant additional burden on the contracting agencies with respect to their procurement practices. The Department recognizes that contracting agencies will need a mechanism to ascertain in advance the locations where potential bidders would build the project so that wage determinations may be obtained for each location. The Department believes these mechanisms are best developed through the agencies' procurement regulations. The Department points out that most wage determinations are published and widely available. The Department is of the view that, in most instances where a significant portion of a major project is to be constructed at a secondary site, the possible locations of the construction sites would be limited as a practical matter, and therefore, it would not be onerous for the contracting agency to include a wage determination covering the possible construction locations when soliciting bids for the project. One option may be the two-step process utilized under the McNamara-O'Hara Service Contract Act. *See* 29 CFR 4.54(b).

B. Coverage of Transportation—§ 5.2(j)

1. Limiting Coverage of Off-Site Transportation of Materials, Supplies, Tools, etc., to Transportation Between the Construction Work Site and a Dedicated Facility Located ''Adjacent or Virtually Adjacent'' to the Construction Site

The Building Trades, LIUNA and the Teamsters oppose this amendment, urging the Department to reinstate or repromulgate the definition of ''construction, prosecution, completion, or repair'' that was withdrawn in 1992, which included transportation of materials and supplies by laborers and mechanics employed by contractors and subcontractors covered by the Davis-Bacon and related Acts. These commenters maintained that the Department's revision of section 5.2(j) in response to *Midway* to limit coverage of off-site transportation to that occurring between the actual construction site and dedicated, nearby facilities was unnecessary. In their view, *Midway* did not address the question of whether the regulatory definition of ''construction,'' in effect at that time, could validly be applied to truck drivers hauling off-site to and from projects covered by the so-called ''related Acts,'' which require the payment of Davis-Bacon prevailing wages on federally-assisted projects. They note that the related Acts generally do not contain the ''site of the work'' language relied upon by the court in *Midway*. They believe that the Department should in each case look to the particular statute applicable to the project to determine whether it contains a site-of-work limitation that would preclude coverage of off-site truck driving activities.

This request in effect asks the Department to apply different standards for prevailing wage coverage to projects subject to the Davis-Bacon Act from those applicable to the related Acts. The Department believes that such a result would run contrary to the spirit and intent of Reorganization Plan No. 14 of 1950, which authorizes the Secretary of Labor to ''prescribe appropriate standards, regulations, and procedures'' in order to ''assure consistent and effective enforcement'' of the labor standards provisions of the Davis-Bacon Act and the related Acts. Coverage standards that would differ for the same type of work depending upon the applicable statute would likely result in confusion in the construction industry among both contractors and contracting agencies and likely would lead to labor dissatisfaction and disputes. Furthermore, the Sixth Circuit rejected the notion that different coverage standards might be applied to related Act projects, when it concluded that the Federal-Aid Highways Act, a Davis-Bacon related Act, ''incorporates from the Davis-Bacon Act not only its method of determining prevailing wage rates but also its method of determining prevailing wage coverage. In other words, if 29 CFR 5.2(l) is inconsistent with the Davis-Bacon Act it must also be inconsistent with the Federal-Aid Highways Act.'' *Cavett,* 101 F.3d at 1116. An exception would of course exist if the language and/or clear legislative history of a particular Davis-Bacon related Act reflected clear congressional intent that a different coverage standard be applied. *See,* e.g., the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996.

The AGC and the ABC oppose the proposed amendment to section 5.2(j), contending that the regulation should instead be amended to ''exempt'' delivery truck drivers from Davis-Bacon coverage while engaged in hauling activities, regardless of who employs them and how much time they spend on-site. The AGC, the ABC, the Wisconsin Transportation Builders Association and the American Road & Transportation Builders Association also object to the Department's statement in the NPRM that ''truck drivers employed by construction contractors and subcontractors must be paid at least the rate required by the Davis-Bacon Act for any time spent on-site which is more than *de minimis.*'' 65 FR 57272. The AGC states that the ''de minimis'' threshold is ''subjective, vague and ambiguous,'' but assuming such a threshold is appropriate, 50 percent would be the proper standard, *i.e.,* only where the employee spends more than 50 percent of his or her total time in a workweek performing work as a laborer or mechanic on-site should the worker be compensated at prevailing wage rates.

The Department disagrees that *Midway* exempts all material delivery truck drivers regardless of how much time they spend on the site of the work. Clearly, truck drivers who haul materials or supplies from one location on the site of the work to another location on the site of the work are ''mechanics and laborers employed directly upon the site of the work,'' and therefore, entitled to prevailing wages. Likewise, truck drivers who haul materials or supplies from a dedicated facility that is adjacent or virtually adjacent to the site of the work pursuant to amended section 5.2(l) are employed on the site of the work within the

meaning of the Davis-Bacon Act and are entitled to prevailing wages for all of their time spent performing such activities.

It is also the Department's position, as stated in the NPRM, that truck drivers employed by construction contractors and subcontractors must be paid at least Davis-Bacon rates for any time spent on-site which is more than de minimis. It must be noted that this is not a regulatory change, nor is it a subject of this rulemaking. However, the Department will provide some discussion on this issue in order to provide some clarification as to its position.

In the wake of *Midway* and the corresponding change to our regulations, the Department no longer asserts coverage for time spent off-site by material delivery truck drivers. *Midway* determined that material delivery truck drivers are not covered because their work is not performed on the site of the work, not because of the type of work they perform. The court held ''that the Act covers only mechanics and laborers who work on the site of the federally-funded public building or public work, not mechanics and laborers employed *off-site,* such as suppliers, materialmen, and material delivery truckdrivers, regardless of their employer.'' 932 F.2d 992 (emphasis added). Thus, *Midway* provided material delivery truck drivers no blanket exception to Davis-Bacon coverage, as some commenters seem to suggest.

Giving the Act a literal reading, as the courts have done in *Midway, Ball,* and *Cavett,* all laborers and mechanics, including material delivery truck drivers, are entitled to prevailing wages for *any* time spent ''directly upon the site of the work.'' The *Midway* court noted that the Midway truck drivers came on-site for only ten minutes at a time to drop off their deliveries and that the time spent ''directly upon the site of the work'' constituted only ten percent of their workday, but that no one had argued in the case that the truckdrivers were covered only during that brief time. Our reading of *Midway* does not preclude coverage for time spent on the site of the work no matter how brief. However, as a practical matter, since generally the great bulk of the time spent by material truck drivers is off-site beyond the scope of Davis-Bacon coverage, while the time spent on-site is relatively brief, the Department chooses to use a rule of reason and will not apply the Act's prevailing wage requirements with respect to the amount of time spent on-site, unless it is more than ''de minimis.'' Pursuant to this policy, the Department does not assert coverage for material delivery truckdrivers who come onto the site of the work for only a few minutes at a time merely to drop off construction materials.

2. Covering Transportation of Portions of the Building or Work Between a Secondary Covered Construction Site and the Site Where the Building or Work Will Remain When It Is Completed

The Department received only a few comments in connection with this proposed change. The ABC stated that ''the Department has no authority to extend the Act's coverage to the nation's highways or rivers for the action of transporting items of any kind to or from a construction site, or between sites of any kind.'' The ABC further stated that the Department's explanation that the site of the work is ''literally moving'' between the two work sites is ''completely unsupported and contrary to law.'' The American Road & Transportation Builders Association objected to this provision on the grounds that it will increase transportation costs. The Army Corps of Engineers stated that ''moving sites of work'' is an impractical concept because multiple wage determinations might have to be issued in cases where the project was transported across more than one wage determination area. The Foundations for Fair Contracting favored this proposal.

The Department does not anticipate that this proposed change will have a substantial impact since the Department believes that the instances where substantial amounts of construction are performed at one location and then transported to another location for final installation are rare. Thus, the Department believes that this type of transportation activity will occur rarely. The Department nonetheless continues to believe that workers who are engaged in transporting a significant portion of the building or work between covered sites, as contemplated in § 5.2(l)(1), are ''employed directly upon the site of the work,'' and therefore, are entitled to prevailing wages, provided they are ''laborers and mechanics'' under the Act. However, not included in such coverage would be the separate transportation of materials and supplies between the two covered ''sites of the work.'' With respect to the Corps' concern that multiple wage determinations might apply in some instances, the Department has made an administrative determination that when faced with the prospect that transportation will take place in more than one wage determination area, the applicable wage determination will be the wage determination for the area in which the construction will remain when completed and will apply to all bidders, regardless of where they propose to construct significant portions of the project.

IV. Executive Order 12866; Small Business Regulatory Enforcement Fairness Act; Unfunded Mandates Reform Act

No comments were received on the Department's initial determinations under this section that the proposed rule was neither a ''significant regulatory action'' within the meaning of section 3(f) of Executive Order 12866, nor a ''major rule'' under the Small Business Regulatory Enforcement Fairness Act of 1996, and that this rulemaking is not subject to the Unfunded Mandates Reform Act of 1995. Because of the interests expressed by some of the contracting agencies, the final rule is nonetheless being treated as a significant rule. However, the rule is not economically significant and does not require preparation of a full regulatory impact analysis. The rule is not expected to have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a section of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. The modifications to regulatory language in this final rule limit coverage of off-site material and supply work from Davis-Bacon prevailing wage requirements as a result of appellate court rulings. In addition, the final rule makes only a limited amendment to the *site of the work* definition to address an issue not contemplated under the current regulatory language—those instances where significant portions of buildings or works may be constructed at secondary sites which are not in the vicinity of the project's final resting place. It is believed that such instances will be rare, and that any increased costs which may arise on such projects would be offset by the savings resulting from the other changes that limit coverage.

The Department also concludes that the rule is not a ''major rule'' requiring approval by the Congress under the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*). The Department continues to be of the view that the rule will not likely result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for

consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

For purposes of the Unfunded Mandates Reform Act of 1995, this rule does not include any federal mandate that may result in excess of $100 million in expenditures by state, local and tribal governments in the aggregate, or by the private sector. Furthermore, the requirements of the Unfunded Mandates Reform Act, 2 U.S.C. 1532, do not apply here because the rule does not include a Federal mandate. The term *Federal mandate* is defined to include either a Federal intergovernmental mandate or a Federal private sector mandate. 2 U.S.C. 658(6). Except in limited circumstances not applicable here, those terms do not include an enforceable duty which is a duty arising from participation in a voluntary program. 2 U.S.C. 658(7)(A). A decision by a contractor to bid on federal and federally assisted construction contracts is purely voluntary in nature, and the contractor's duty to meet Davis-Bacon Act requirements arises from participation in a voluntary federal program.

V. Executive Order 13132 (Federalism)

The Department has reviewed this rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have federalism implications. The rule does 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.

VI. Regulatory Flexibility Analysis

The Department has determined that this regulation will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. This rule will primarily implement modifications resulting from court decisions interpreting statutory language, which would reduce the coverage of Davis-Bacon prevailing wage requirements as applied to construction contractors and subcontractors, both large and small, on DBRA covered contracts. In addition, the rule will make a limited amendment to the *site of the work* definition to address an issue not contemplated under the current regulatory language—those instances where significant portions of buildings or works may be constructed at secondary sites which are not in the vicinity of the project's final resting place. The Department believes that such instances will be rare, and that any increased costs which may arise on such projects would be offset by the savings due to the other limitations on coverage provided by the rule. The Department of Labor has certified to this effect to the Chief Counsel for Advocacy of the Small Business Administration. Notwithstanding the above, the Department prepared and published a Regulatory Flexibility Analysis in the NPRM. After reviewing comments on the proposed rule, the Department has prepared the following final regulatory flexibility analysis regarding this rule:

(1) The Need for and Objectives of the Rule

The Department is promulgating this new rule to clarify the regulatory requirements concerning the Davis-Bacon Act's *site of the work* language in view of three appellate court decisions. These decisions concluded that the Department's application of its regulations to cover certain activities related to off-site facilities dedicated to the project was at odds with the Davis-Bacon Act language that limits coverage to workers employed ''directly upon the site of the work.'' This amendment to the Department's regulations is therefore necessary to bring the Department's regulatory definitions of the statutory terms *construction, prosecution, completion,* and *repair* at 29 CFR 5.2(j), and *site of the work* at 29 CFR 5.2(l) into conformity with these court decisions.

The Department is also issuing this new rule in order to address situations that were not contemplated when the current regulations concerning *site of the work* were promulgated. The revised regulations make clear that the Davis-Bacon Act's scope of coverage includes work performed at locations established specifically for the purpose of constructing a significant portion of a building or work, as well as transportation of portions of the building or work to and from the project's final resting place. These regulatory changes are necessitated by the development of new construction technologies, whereby major segments of a project can be constructed at locations some distance from where the permanent structure(s) will remain after construction is completed.

(2) Summary of Significant Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis

None of the commenters raised any issues specifically related to the Department's Initial Regulatory Flexibility Analysis. Some commenters expressed concerns that the Department's proposal to cover work performed at locations established specifically for the purpose of constructing a significant portion of a building or work, as well as transportation of portions of the building or work to and from the project's final resting place, would result in an expansion of Davis-Bacon coverage and an increase in costs. The Department has responded to these concerns by explaining that the number of projects affected by this change would be very limited and that the prevailing wage implications would not be substantial, especially with regard to the transportation activities attendant to these types of projects.

(3) Number of Small Entities Covered Under the Rule

Size standards for the construction industry are established by the Small Business Administration (SBA), and are expressed in millions of dollars of annual receipts for affected entities, *i.e.,* Major Group 15, Building Construction—General Contractors and Operative Builders, $17 million; Major Group 16, Heavy Construction (non-building), $17 million; and Major Group 17, Special Trade Contractors, $7 million. The overwhelming majority of construction establishments would have annual receipts under these levels. According to the Census, 98.7 percent of these establishments have annual receipts under $10 million. Therefore, for the purpose of this analysis, it is assumed that virtually all establishments potentially affected by this rule would meet the applicable criteria used by the SBA to define small businesses in the construction industry.

(4) Reporting, Recordkeeping, and Other Compliance Requirements of the Rule

There are no additional reporting or recording requirements for contractors under this rule. There may be rare instances where, pursuant to the new rule, contractors, including small entities, engaged in the construction of a significant portion of a Davis-Bacon project at a secondary site specifically established for such purpose, would be required to comply with Davis-Bacon wage and recordkeeping requirements with respect to certain laborers and

mechanics in circumstances not required under the current regulations.

(5) Description of the Steps Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Objective of the Davis-Bacon and Related Acts

As stated above, the Department has determined that this rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. Furthermore, an alternative standard for small entities would not be feasible.

VII. Document Preparation

This document was prepared under the direction of John R. Fraser, Deputy Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

List of Subjects in 29 CFR Part 5

Administrative practice and procedure, Government contracts, Investigations, Labor, Minimum wages, Penalties, Recordkeeping requirements, Reporting requirements, Wages.

For the reasons set out in the preamble, Title 29, Part 5, is amended as follows:

PART 5—LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION (ALSO LABOR STANDARDS PROVISIONS APPLICABLE TO NONCONSTRUCTION CONTRACTS SUBJECT TO THE CONTRACT WORK HOURS AND SAFETY STANDARDS ACT)

1. The authority citation for part 5 is revised to read as follows:

Authority: 40 U.S.C. 276a–276a–7; 40 U.S.C. 276c; 40 U.S.C. 327–332; Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix; 5 U.S.C. 301; 29 U.S.C. 259; and the statutes listed in § 5.1(a) of this part.

2. Section 5.2 is amended by revising paragraphs (j) and (l) to read as follows:

§ 5.2 Definitions.

* * * * *

(j) The terms *construction, prosecution, completion,* or *repair* mean the following:

(1) All types of work done on a particular building or work at the site thereof, including work at a facility which is deemed a part of the site of the work within the meaning of (paragraph (l) of this section by laborers and mechanics employed by a construction contractor or construction subcontractor (or, under the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996, all work done in the construction or development of the project), including without limitation—

(i) Altering, remodeling, installation (where appropriate) on the site of the work of items fabricated off-site;

(ii) Painting and decorating;

(iii) Manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work (or, under the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996 in the construction or development of the project);

(iv)(A) Transportation between the site of the work within the meaning of paragraph (l)(1) of this section and a facility which is dedicated to the construction of the building or work and deemed a part of the site of the work within the meaning of paragraph (l)(2) of this section; and

(B) Transportation of portion(s) of the building or work between a site where a significant portion of such building or work is constructed, which is a part of the site of the work within the meaning of paragraph (l)(1) of this section, and the physical place or places where the building or work will remain.

(2) Except for laborers and mechanics employed in the construction or development of the project under the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996, and except as provided in paragraph (j)(1)(iv)(A) of this section, the transportation of materials or supplies to or from the site of the work by employees of the construction contractor or a construction subcontractor is not ''construction, prosecution, completion, or repair'' (see *Building and Construction Trades Department, AFL–CIO* v. *United States Department of Labor Wage Appeals Board (Midway Excavators, Inc.),* 932 F.2d 985 (D.C. Cir. 1991)).

* * * * *

(l) The term *site of the work* is defined as follows:

(1) *The site of the work* is the physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed, *provided* that such site is established specifically for the performance of the contract or project;

(2) Except as provided in paragraph (l)(3) of this section, job headquarters, tool yards, batch plants, borrow pits, etc., are part of the *site of the work, provided* they are dedicated exclusively, or nearly so, to performance of the contract or project, *and provided* they are adjacent or virtually adjacent to the *site of the work* as defined in paragraph (l)(1) of this section;

(3) Not included in the *site of the work* are permanent home offices, branch plant establishments, fabrication plants, tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial or material supplier, which are established by a supplier of materials for the project before opening of bids and not on the site of the work as stated in paragraph (l)(1) of this section, are not included in the *site of the work.* Such permanent, previously established facilities are not part of the *site of the work,* even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

* * * * *

Signed in Washington, DC, on this 14th day of December, 2000.

T. Michael Kerr,

Administrator, Wage and Hour Division.

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Federal Aviation Administration

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Empresa Brasileira de Aeronautica, S.A.; published 11-15-00

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Recognition of gain on stock or securities distribution; published 12-20-00

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Agricultural Marketing Service

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Levy assessments; automatic exemptions adjustment; comments due by 12-27-00; published 11-27-00

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Domestic lamb industry adjustment assistance program set aside; comments due by 12-29-00; published 10-30-00

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Gasoline antidumping requirements; American Samoa exemption petition; comments due by 12-29-00; published 11-29-00

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Michigan; comments due by 12-26-00; published 11-24-00

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LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with ''P L U S'' (Public Laws Update Service) on 202–523–6641. This list is also available online at http://www.nara.gov/fedreg.

The text of laws is not published in the **Federal Register** but may be ordered in ''slip law'' (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at http://www.access.gpo.gov/nara/index.html. Some laws may not yet be available.

H.J. Res. 133/P.L. 106–543

Making further continuing appropriations for the fiscal year 2001, and for other purposes. (Dec. 15, 2000; 114 Stat. 2714)

Last List December 19, 2000

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