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800 North Capitol Street, NW.
Washington, DC
(3 blocks north of Union Station Metro)

RESERVATIONS: 202–523–4538

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Presidential Documents

Title 3—

The President

Executive Order 13186 of January 10, 2001

Responsibilities of Federal Agencies To Protect Migratory Birds

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in furtherance of the purposes of the migratory bird conventions, the Migratory Bird Treaty Act (16 U.S.C. 703–711), the Bald and Golden Eagle Protection Acts (16 U.S.C. 668–668d), the Fish and Wildlife Coordination Act (16 U.S.C. 661–666c), the Endangered Species Act of 1973 (16 U.S.C. 1531–1544), the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347), and other pertinent statutes, it is hereby ordered as follows:

Section 1. *Policy.* Migratory birds are of great ecological and economic value to this country and to other countries. They contribute to biological diversity and bring tremendous enjoyment to millions of Americans who study, watch, feed, or hunt these birds throughout the United States and other countries. The United States has recognized the critical importance of this shared resource by ratifying international, bilateral conventions for the conservation of migratory birds. Such conventions include the Convention for the Protection of Migratory Birds with Great Britain on behalf of Canada 1916, the Convention for the Protection of Migratory Birds and Game Mammals-Mexico 1936, the Convention for the Protection of Birds and Their Environment- Japan 1972, and the Convention for the Conservation of Migratory Birds and Their Environment-Union of Soviet Socialist Republics 1978.

These migratory bird conventions impose substantive obligations on the United States for the conservation of migratory birds and their habitats, and through the Migratory Bird Treaty Act (Act), the United States has implemented these migratory bird conventions with respect to the United States. This Executive Order directs executive departments and agencies to take certain actions to further implement the Act.

Sec. 2. *Definitions.* For purposes of this order:

(a) ''Take'' means take as defined in 50 C.F.R. 10.12, and includes both ''intentional'' and ''unintentional'' take.

(b) ''Intentional take'' means take that is the purpose of the activity in question.

(c) ''Unintentional take'' means take that results from, but is not the purpose of, the activity in question.

(d) ''Migratory bird'' means any bird listed in 50 C.F.R. 10.13.

(e) ''Migratory bird resources'' means migratory birds and the habitats upon which they depend.

(f) ''Migratory bird convention'' means, collectively, the bilateral conventions (with Great Britain/Canada, Mexico, Japan, and Russia) for the conservation of migratory bird resources.

(g) ''Federal agency'' means an executive department or agency, but does not include independent establishments as defined by 5 U.S.C. 104.

(h) ''Action'' means a program, activity, project, official policy (such as a rule or regulation), or formal plan directly carried out by a Federal agency. Each Federal agency will further define what the term ''action'' means with respect to its own authorities and what programs should be included

in the agency-specific Memoranda of Understanding required by this order. Actions delegated to or assumed by nonfederal entities, or carried out by nonfederal entities with Federal assistance, are not subject to this order. Such actions, however, continue to be subject to the Migratory Bird Treaty Act.

(i) ''Species of concern'' refers to those species listed in the periodic report ''Migratory Nongame Birds of Management Concern in the United States,'' priority migratory bird species as documented by established plans (such as Bird Conservation Regions in the North American Bird Conservation Initiative or Partners in Flight physiographic areas), and those species listed in 50 C.F.R. 17.11.

Sec. 3. *Federal Agency Responsibilities.* (a) Each Federal agency taking actions that have, or are likely to have, a measurable negative effect on migratory bird populations is directed to develop and implement, within 2 years, a Memorandum of Understanding (MOU) with the Fish and Wildlife Service (Service) that shall promote the conservation of migratory bird populations.

(b) In coordination with affected Federal agencies, the Service shall develop a schedule for completion of the MOUs within 180 days of the date of this order. The schedule shall give priority to completing the MOUs with agencies having the most substantive impacts on migratory birds.

(c) Each MOU shall establish protocols for implementation of the MOU and for reporting accomplishments. These protocols may be incorporated into existing actions; however, the MOU shall recognize that the agency may not be able to implement some elements of the MOU until such time as the agency has successfully included them in each agency's formal planning processes (such as revision of agency land management plans, land use compatibility guidelines, integrated resource management plans, and fishery management plans), including public participation and NEPA analysis, as appropriate. This order and the MOUs to be developed by the agencies are intended to be implemented when new actions or renewal of contracts, permits, delegations, or other third party agreements are initiated as well as during the initiation of new, or revisions to, land management plans.

(d) Each MOU shall include an elevation process to resolve any dispute between the signatory agencies regarding a particular practice or activity.

(e) Pursuant to its MOU, each agency shall, to the extent permitted by law and subject to the availability of appropriations and within Administration budgetary limits, and in harmony with agency missions:

(1) support the conservation intent of the migratory bird conventions by integrating bird conservation principles, measures, and practices into agency activities and by avoiding or minimizing, to the extent practicable, adverse impacts on migratory bird resources when conducting agency actions;

(2) restore and enhance the habitat of migratory birds, as practicable;

(3) prevent or abate the pollution or detrimental alteration of the environment for the benefit of migratory birds, as practicable;

(4) design migratory bird habitat and population conservation principles, measures, and practices, into agency plans and planning processes (natural resource, land management, and environmental quality planning, including, but not limited to, forest and rangeland planning, coastal management planning, watershed planning, etc.) as practicable, and coordinate with other agencies and nonfederal partners in planning efforts;

(5) within established authorities and in conjunction with the adoption, amendment, or revision of agency management plans and guidance, ensure that agency plans and actions promote programs and recommendations of comprehensive migratory bird planning efforts such as Partners-in-Flight, U.S. National Shorebird Plan, North American Waterfowl Management Plan, North American Colonial Waterbird Plan, and other planning efforts, as well as guidance from other sources, including the Food and Agricultural

Organization's International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries;

(6) ensure that environmental analyses of Federal actions required by the NEPA or other established environmental review processes evaluate the effects of actions and agency plans on migratory birds, with emphasis on species of concern;

(7) provide notice to the Service in advance of conducting an action that is intended to take migratory birds, or annually report to the Service on the number of individuals of each species of migratory birds intentionally taken during the conduct of any agency action, including but not limited to banding or marking, scientific collecting, taxidermy, and depredation control;

(8) minimize the intentional take of species of concern by: (i) delineating standards and procedures for such take; and (ii) developing procedures for the review and evaluation of take actions. With respect to intentional take, the MOU shall be consistent with the appropriate sections of 50 C.F.R. parts 10, 21, and 22;

(9) identify where unintentional take reasonably attributable to agency actions is having, or is likely to have, a measurable negative effect on migratory bird populations, focusing first on species of concern, priority habitats, and key risk factors. With respect to those actions so identified, the agency shall develop and use principles, standards, and practices that will lessen the amount of unintentional take, developing any such conservation efforts in cooperation with the Service. These principles, standards, and practices shall be regularly evaluated and revised to ensure that they are effective in lessening the detrimental effect of agency actions on migratory bird populations. The agency also shall inventory and monitor bird habitat and populations within the agency's capabilities and authorities to the extent feasible to facilitate decisions about the need for, and effectiveness of, conservation efforts;

(10) within the scope of its statutorily-designated authorities, control the import, export, and establishment in the wild of live exotic animals and plants that may be harmful to migratory bird resources;

(11) promote research and information exchange related to the conservation of migratory bird resources, including coordinated inventorying and monitoring and the collection and assessment of information on environmental contaminants and other physical or biological stressors having potential relevance to migratory bird conservation. Where such information is collected in the course of agency actions or supported through Federal financial assistance, reasonable efforts shall be made to share such information with the Service, the Biological Resources Division of the U.S. Geological Survey, and other appropriate repositories of such data (e.g, the Cornell Laboratory of Ornithology);

(12) provide training and information to appropriate employees on methods and means of avoiding or minimizing the take of migratory birds and conserving and restoring migratory bird habitat;

(13) promote migratory bird conservation in international activities and with other countries and international partners, in consultation with the Department of State, as appropriate or relevant to the agency's authorities;

(14) recognize and promote economic and recreational values of birds, as appropriate; and

(15) develop partnerships with non-Federal entities to further bird conservation.

(f) Notwithstanding the requirement to finalize an MOU within 2 years, each agency is encouraged to immediately begin implementing the conservation measures set forth above in subparagraphs (1) through (15) of this section, as appropriate and practicable.

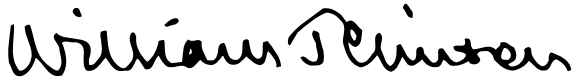
(g) Each agency shall advise the public of the availability of its MOU through a notice published in the **Federal Register**.

Sec. 4. *Council for the Conservation of Migratory Birds.* (a) The Secretary of Interior shall establish an interagency Council for the Conservation of Migratory Birds (Council) to oversee the implementation of this order. The Council's duties shall include the following: (1) sharing the latest resource information to assist in the conservation and management of migratory birds; (2) developing an annual report of accomplishments and recommendations related to this order; (3) fostering partnerships to further the goals of this order; and (4) selecting an annual recipient of a Presidential Migratory Bird Federal Stewardship Award for contributions to the protection of migratory birds.

(b) The Council shall include representation, at the bureau director/administrator level, from the Departments of the Interior, State, Commerce, Agriculture, Transportation, Energy, Defense, and the Environmental Protection Agency and from such other agencies as appropriate.

Sec. 5. *Application and Judicial Review.* (a) This order and the MOU to be developed by the agencies do not require changes to current contracts, permits, or other third party agreements.

(b) This order is intended only to improve the internal management of the executive branch and does not create any right or benefit, substantive or procedural, separately enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.



THE WHITE HOUSE,
January 10, 2001.

[FR Doc. 01–1387
Filed 1–12–01; 8:45 am]
Billing code 3195–01–P

Presidential Documents

Executive Order 13187 of January 10, 2001

The President's Disability Employment Partnership Board

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Advisory Committee Act, as amended (5 U.S.C. App.), and in order to promote the employment of people with disabilities, it is hereby ordered as follows:

Section 1. *Establishment and Composition of the Board.* (a) There is hereby established the President's Disability Employment Partnership Board (Board).

(b) The Board shall be composed of not more than 15 members who shall be appointed by the President for terms of 2 years. The membership shall include individuals who are representatives of business (including small business), labor organizations, State or local government, disabled veterans, people with disabilities, organizations serving people with disabilities, and researchers or academicians focusing on issues relating to the employment of people with disabilities, and may include other individuals representing entities involved in issues relating to the employment of people with disabilities as the President finds appropriate.

(c) The President shall designate a Chairperson from among the members of the Board to serve a term of two years.

(d) Members and the Chairperson may be reappointed for subsequent terms and may continue to serve until their successors have been appointed.

Sec. 2. *Functions.* (a) The Board shall provide advice and information to the President, the Vice President, the Secretary of Labor, and other appropriate Federal officials with respect to facilitating the employment of people with disabilities, and shall assist in other activities that promote the formation of public-private partnerships, the use of economic incentives, the provision of technical assistance regarding entrepreneurship, and other actions that may enhance employment opportunities for people with disabilities.

(b) In carrying out paragraph (a) of this section, the Board shall:

(i) develop and submit to the Office of Disability Employment Policy in the Department of Labor a comprehensive written plan for joint public-private efforts to promote employment opportunities for people with disabilities and improve their access to financial institutions and commercial and business enterprises;

(ii) identify strategies that may be used by employers, labor unions, national and international organizations, and Federal, State, and local officials to increase employment opportunities for people with disabilities; and

(iii) coordinate with the Office of Disability Employment Policy in the Department of Labor in promoting the collaborative use of public and private resources to assist people with disabilities in forming and expanding small business concerns and in enhancing their access to Federal procurement and other relevant business opportunities. Public resources include those of the Department of Labor, the Small Business Administration, the Department of Commerce, the Department of Education, the Department of Defense, the Department of Treasury, the Department of Veterans Affairs, the Federal Communications Commission, and of executive departments and agency offices responsible for small, disadvantaged businesses utilization.

(c) The Board shall submit annual written reports to the President, who may apprise the Congress and other interested organizations and individuals

on its activities, progress, and problems relating to maximizing employment opportunities for people with disabilities.

(d) The Chairperson of the Board shall serve as a member and Vice Chair of the National Task Force on Employment of Adults with Disabilities established under Executive Order 13078 of March 13, 1998.

Sec. 3. *Administration.* (a) The Board shall meet when called by the Chairperson, at a time and place designated by the Chairperson. The Chairperson shall call at least two meetings per calendar year. The Chairperson may form subcommittees or working groups within the Board to address particular matters.

(b) The Chairperson may from time to time prescribe such rules, procedures, and policies relating to the activities of the Board as are not inconsistent with law or with the provisions of this order.

(c) Members of the Board shall serve without compensation but shall be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law for persons serving intermittently in Federal service (5 U.S.C. 5701–5707).

(d) The Department of Labor shall provide funding and appropriate support to assist the Board in carrying out the activities described in section 2 of this order, including necessary office space, equipment, supplies, services, and staff. The functions of the President under the Federal Advisory Committee Act, as amended, except that of reporting to the Congress, that are applicable to the Commission, shall be performed by the Department of Labor in accordance with guidelines that have been issued by the Administrator of General Services.

(e) The heads of executive departments and agencies shall, to the extent permitted by law, provide the Board such information as it may need for purposes of carrying out the functions described in section 2 of this order.

Sec. 4. *Prior Orders and Transition.* (a) Executive Order 12640 of May 10, 1988, as amended, relating to the establishment of the President's Committee on Employment of People with Disabilities, is hereby revoked. The employees, records, property, and funds of the Committee shall become the employees, records, property, and funds of the Department of Labor.

(b) Executive Order 13078 of March 13, 1998, is amended in sections 1(a) and (b) by striking ''Chair of the President's Committee on Employment of People with Disabilities'' and inserting ''Chairperson of the President's Disability Employment Partnership Board.''

THE WHITE HOUSE,
January 10, 2001.

[FR Doc. 01–1438
Filed 1–12–01; 8:45 am]
Billing code 3195–01–P

Rules and Regulations

Federal Register
Vol. 66, No. 11
Wednesday, January 17, 2001

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

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 99–CE–83–AD; Amendment 39–12072; AD 2001–01–02]

RIN 2120–AA64

Airworthiness Directives; British Aerospace HP137 Mk1, Jetstream Series 200, and Jetstream Models 3101 and 3201 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that applies to certain British Aerospace HP137 Mk1, Jetstream series 200, and Jetstream Models 3101 and 3201 airplanes that are equipped with certain nose landing gear units. This AD requires you to inspect the steering jack assembly to assure proper clearance between the bush heads on the steering plates and the shim on the steering jack trunnions and to assure that there is adequate lubrication at both trunnions and the eye end fitting. This AD also requires you to adjust the clearance and provide adequate lubrication, as necessary. This AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for the United Kingdom. The actions specified by this AD are intended to prevent cracked steering jack piston rods caused by inadequate clearance or inadequate lubrication of the steering jack pivot points. The condition could result in failure of the nose wheel steering system with consequent loss of airplane control.

DATES: This AD becomes effective on March 5, 2001.

The Director of the **Federal Register** approved the incorporation by reference of certain publications listed in the regulations as of March 5, 2001.

ADDRESSES: You may get the service information referenced in this AD from British Aerospace Regional Aircraft, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland; telephone: (01292) 479888; facsimile: (01292) 479703. You may examine this information at the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 99–CE–83–AD, 901 Locust, Room 506, Kansas City, Missouri 64106; or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mr. Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4059; facsimile: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Discussion

What events have caused this AD?

The Civil Aviation Authority (CAA), which is the airworthiness authority for the United Kingdom, recently notified the FAA that an unsafe condition may exist on certain British Aerospace HP137 Mk1, Jetstream series 200, and Jetstream Models 3101 and 3201 airplanes. The CAA reports incidents where cracking has occurred at the base of the thread in the steering jack piston rod, part number 618212, in the nose landing gear unit. The condition could occur on the referenced airplanes that are equipped with nose landing gear unit 1873, B00A702852A, B00A703064A, or B00A703056A.

Inadequate clearance or inadequate lubrication of the steering jack pivot points can result in unusually high operational loads. These loads could result in such cracks in the steering jack piston rod.

What are the consequences if the condition is not corrected?

A cracked steering jack piston rod could result in failure of the nose wheel steering system with consequent loss of airplane control.

Has FAA taken any action to this point?

We issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to certain British Aerospace HP137 Mk1, Jetstream series 200, and Jetstream Models 3101 and 3201 airplanes that are equipped with certain nose landing gear units. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on October 24, 2000 (65 FR 63553). The NPRM proposed to require you to inspect the steering jack assembly to assure proper clearance between the bush heads on the steering plates and the shim on the steering jack trunnions and to assure that there is adequate lubrication at both trunnions and the eye end fitting. The NPRM also proposed to require you to adjust the clearance and provide adequate lubrication, as necessary.

Accomplishment of the proposed action would be in accordance with APPH Ltd. Service Newsletter, Issue 2, Jetstream 31 Steering Jack Part Number 618200, as referenced in British Aerospace Mandatory Service Bulletin 32–JA 981043, dated March 5, 1999.

Was the public invited to comment?

Interested persons were afforded an opportunity to participate in the making of this amendment. No comments were received on the proposed rule or the FAA's determination of the cost to the public.

The FAA's Determination

What is FAA's Final Determination on this Issue?

After careful review of all available information related to the subject presented above, we have determined that air safety and the public interest require the adoption of the rule as proposed except for minor editorial corrections. We determined that these minor corrections:

- Will not change the meaning of the AD; and
- Will not add any additional burden upon the public than was already proposed.

Cost Impact

How many airplanes does this AD impact?

We estimate that this AD affects 300 airplanes in the U.S. registry.

What is the cost impact of this AD on owners/operators of the affected airplanes?

We estimate the following costs to accomplish the inspection:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
1 workhour × $60 per hour	No parts required to accomplish the inspection.	$60	$18,000

We estimate the following costs to accomplish any necessary adjustments that are required based on the results of the inspections. We have no way of determining the number of airplanes that may need such adjustments:

Labor cost	Parts cost	Total cost per airplane
1 workhour × $60 per hour.	No parts necessary for adjustment	$60

Regulatory Impact

Does this AD impact various entities?

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

Does this AD involve a significant rule or regulatory action?

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. FAA amends § 39.13 by adding a new AD to read as follows:

2001–01–02 British Aerospace: Amendment 39–12072; Docket No. 99–CE–83–AD.

(a) *What airplanes are affected by this AD?* This AD affects Models HP137 Mk1, Jetstream series 200, and Jetstream Models 3101 and 3201 airplanes, all serial numbers, that are:

(1) equipped with a nose landing gear unit 1873, B00A702852A, B00A703064A, or B00A703056A; and

(2) certificated in any category.

(b) *Who must comply with this AD?* Anyone who wishes to operate any of the above airplanes must comply with this AD.

(c) *What problem does this AD address?* The actions specified by this AD are intended to prevent cracked steering jack piston rods caused by inadequate clearance or inadequate lubrication of the steering jack pivot points. The condition could result in failure of the nose wheel steering system with consequent loss of airplane control.

(d) *What actions must I accomplish to address this problem?* To address this problem, you must accomplish the following:

Action	Compliance time	Procedures
(1) Inspect the steering jack assembly to assure proper clearance between the bush heads on the steering plates and the shim on the steering jack trunnions and to assure that there is adeqeuate lubrication at both trunniions and the eye end fitting.	Within the next 200 hours time-in-service (TIS) after March 5, 2001, the effective date of this AD, unless already accomplished.	Accomplish in accordance with the instructions in APPH Ltd. Service Newsletter, Issue 2, Jetstream 31 Steering Jack Part Number 618200, as referenced in British Aerospace Mandataory Service Bulletin 32–JA 981043, dated March 5, 1999.
(2) Adjust the clearance and provide adequate lubrication, as necessary.	Prior to further flight after the inspection required by paragraph (d)(1) of this AD.	Accomplish in accordance with the instructions in APPH Ltd. Service Newsletter, Issue 2, Jetstream 31 Steering Jack Part Number 618200, as referenced in British Aerospace Mandatory Service Bulletin 32–JA 981043, dated March 5, 1999.

(e) *Can I comply with this AD in any other way?* You may use an alternative method of compliance or adjust the compliance time if:

(1) Your alternative method of compliance provides an equivalent level of safety; and

(2) The Manager, Small Airplane Directorate, approves your alternative. Submit your request through an FAA

Principal Maintenance Inspector, who may add comments and then send it to the Manager, Small Airplane Directorate.

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

(f) *Where can I get information about any already-approved alternative methods of compliance?* Contact Mr. Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4059; facsimile: (816) 329–4090.

(g) *What if I need to fly the airplane to another location to comply with this AD?* The FAA can issue a special flight permit under sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate your airplane to a location where you can accomplish the requirements of this AD.

(h) *Are any service bulletins incorporated into this AD by reference?* Actions required by this AD must be done in accordance with APPH Ltd. Service Newsletter, Issue 2, Jetstream 31 Steering Jack Part Number 618200, as referenced in British Aerospace Mandatory Service Bulletin 32–JA 981043, dated March 5, 1999. The Director of the Federal Register approved this incorporation by reference under 5 U.S.C. 552(a) and 1 CFR part 51. You can get copies from British Aerospace Regional Aircraft, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland. You can look at copies at the FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri, or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

(i) *When does this amendment become effective?* This amendment becomes effective on March 5, 2001.

Note 2: The subject of this AD is addressed in British AD 012–03–99.

Issued in Kansas City, Missouri, on January 4, 2001.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 01–916 Filed 1–16–01; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–NM–48–AD; Amendment 39–12052; AD 2000–26–03]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A310, and Model A300 B4–600, A300 B4–600R, and A300 F4–600R (A300–600) Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; correction.

SUMMARY: This document corrects a typographical error that appeared in airworthiness directive (AD) 2000–26–03, which was published in the **Federal Register** on December 28, 2000 (65 FR 82262). The typographical error resulted in the misidentification of affected airplanes. This AD is applicable to Airbus Model A310, and Model A300 B4–600, A300 B4–600R, and A300 F4–600R (A300–600) series airplanes. This AD requires new wiring modifications for the engine and the fire detection system of the auxiliary power unit.

EFFECTIVE DATE: Effective February 1, 2001.

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

SUPPLEMENTARY INFORMATION: Airworthiness Directive (AD) 2000–26–03, amendment 39–12052, was published in the **Federal Register** on December 28, 2000 (65 FR 82262). The AD requires new wiring modifications for the engine and auxiliary power unit (APU) fire detection system.

As published, AD 2000–26–03 incorrectly substituted a nonaffected group of airplanes for an affected group. Specifically, the AD substituted Model A300 B2 and B4 series airplanes for Model A310 series airplanes. The NPRM for this AD correctly identified the affected airplanes.

Since no other part of the regulatory information has been changed, the final rule is not being republished in the **Federal Register**.

The effective date of this AD remains February 1, 2001.

In AD 2000–26–03, amendment 39–12052, make the following corrections:

1. On page 82262, in the first column, the subject heading should read ''Airworthiness Directives; Airbus Model A310 Series Airplanes, and Model A30A300 B4–600, A300 B4–600R, and A300 F4–600R (A300–600) Series Airplanes.''

2. On page 82262, in the first column, under the heading **Summary,** in the fourth line, ''A300 B2 and B4'' should read ''A310.''

3. On page 82262, in the second column, under the heading **Cost Impact,** in the second line of the first paragraph, ''A300 B2 and B4'' should read ''A310.''

§ 39.13 [Corrected]

4. On page 82262, in the third column, the applicability of AD 2000–26–03 is corrected to read as follows:

* * * * *

Applicability: Model A310 series airplanes, and Model A300 B4–600, A300 B4–600R, and A300 F4–600R (A300–600) series airplanes; certificated in any category; except those on which Airbus Modifications 06267 and 07340 have been accomplished during production.

* * * * *

Issued in Renton, Washington, on January 8, 2001.

Donald L. Riggin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 01–1231 Filed 1–16–01; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 103

RIN 1076–AD73

Loan Guaranty, Insurance, and Interest Subsidy

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final rule.

SUMMARY: The Department of the Interior (DOI), Bureau of Indian Affairs (BIA) is revising the regulations that implement the Loan Guaranty, Insurance, and Interest Subsidy Program. This Program authorizes the Secretary of DOI to guaranty or insure loans made by private lenders to individual Indians and to organizations of Indians, and to assist qualified borrowers with a portion of their interest payments. The new regulations clarify prior regulatory language, in keeping with the ''plain language'' standard required by Executive Order 12866. They also reflect evolved BIA policies, and address several issues that prior regulations did not cover.

EFFECTIVE DATE: These regulations take effect on February 16, 2001. They do not govern pre-existing loan guarantees. However, a lender may elect to have its pre-existing loan guarantees governed by the new regulations after the effective date by entering into a new loan guaranty agreement with BIA.

FOR FURTHER INFORMATION CONTACT: David B. Johnson, Division of Indian Affairs, Office of the Solicitor, 202–208–3401.

SUPPLEMENTARY INFORMATION: The Loan Guaranty, Insurance, and Interest Subsidy Program (Program) was established in the Act of April 12, 1974, as amended, 88 Stat. 79, 25 U.S.C. 1481 *et seq.* and 25 U.S.C. 1511 *et seq.* The Program has existed since 1974, and the regulations implementing it have existed since 1975. Until now, there has never been any extensive or significant revision of these regulations. The new regulations clarify part 103, reflect evolved BIA policies, address issues that have emerged over the years, and enhance some features of the Program. For example, BIA has overhauled the loan insurance feature of the Program to encourage lenders to reconsider its many advantages.

BIA published a proposed rule in the **Federal Register** on September 6, 2000 (65 FR 53948). BIA considered all comments received during the comment period, September 6, 2000 through November 6, 2000, in drafting this final rule.

Review of Public Comments

BIA received 133 comments during the comment period. Commenters generally liked the organization and approach of the proposed rule much better than the prior rule, and sought only to influence the effect or wording of particular sections. Nonetheless, while most comments were rather specific, some raised issues of greater impact than was apparently envisioned. Correspondingly, in some cases BIA had to rethink sections of the proposed rule other than the one cited by the commenter. Here is a detailed breakdown of the comments, and how they impacted the proposed rule:

Subpart A—General Provisions

Section 103.1What does this part do? There were no comments on this section.

Section 103.2 Who does the Program help? One commenter felt that the second sentence of proposed Section 103.2 was superfluous. BIA agrees. The final rule omits the sentence.

Section 103.3 Who administers the Program? Two commenters made three comments on this section, to the effect that BIA regional offices cannot and should not be the first point of contact for all applicants. BIA agrees. The final rule now has applicants contact ''the BIA office serving the borrower's location.''

Section 103.4 What kinds of loans will BIA guarantee or insure? Three commenters made five comments on this section, two of which were subsequently withdrawn. One comment stated that paragraph (a) should require a business to contribute to the economy of an Indian reservation, instead of to ''an Indian tribe or its members.'' BIA agrees in part, and has changed the phrase in the final rule to ''an Indian reservation or tribal service area recognized by BIA.''

Another commenter stated that qualified loans should include individual housing loans, but should not include loans for refinancing. BIA disagrees with both of these comments. Individual housing loans are outside the apparent scope of statutory authority for the Program, whereas loans for refinancing Indian businesses are not. In BIA's experience, refinancing loans is occasionally required to meet Program objectives.

Section 103.5 What size loan will BIA guarantee or insure? Four commenters made five comments on this section. They generally questioned the concept of an ''acceptable Indian business entity,'' and warned of the potential abuse of small partnerships seeking big loans. BIA disagrees with these comments. It is BIA's duty to determine when there is a reasonable prospect of loan repayment. No regulatory ceiling on the amount an Indian business entity can borrow, especially one dependent on the organizational structure of the borrower, is an acceptable substitute for BIA's exercise of its reasonable discretion on a case-by-case basis.

A comment on Section 103.6, however, resulted in a change to Section 103.5. The commenter pointed out that the proposed rule appeared to allow an individual Indian to apply for more than one loan in a manner that would enable the borrower to exceed the statutory limitation of $500,000 for an individual Indian. BIA agrees, and has added language to Section 103.5 to resolve this potential concern.

Section 103.6 To what extent will BIA guarantee or insure a loan? Two commenters made three comments on this section, one of which was subsequently withdrawn and one of which was actually addressed in Section 103.5. The remaining comment was to the effect that BIA should allow only one guaranteed loan at a time between a particular borrower and lender. BIA disagrees, and believes that the proposed rule offers a more workable balance between reasonable limits and flexibility.

Section 103.7 Must the borrower have equity in the business being financed? Two commenters made comments on this section. One comment was subsequently withdrawn, and the other merely expressed confusion over the proposed language. Upon review, BIA does not find any need to change this section.

Section 103.8 Is there any cost for a BIA guaranty or insurance coverage? There were no comments on this section.

Subpart B—How a Lender Obtains a Loan Guaranty or Insurance Coverage

Section 103.9 Who applies to BIA under the Program? Three commenters made four comments on this section, one of which was subsequently withdrawn. The remaining comments were to the effect that the last sentence of the proposed section was partly redundant, and partly unnecessary. BIA agrees, and has deleted it in the final rule.

Section 103.10 What lenders are eligible under the Program? Three commenters made five comments on this section. Two commenters felt that tribes should not qualify as lenders. BIA disagrees with this comment, but notes that paragraph (b) of the proposed rule is superfluous, and eliminating it would satisfy these commenters, at least in part. BIA has removed the former paragraph (b) in the final rule, and re-lettered the remaining provisions accordingly.

Another commenter suggested that BIA establish minimum ownership interests for those lenders who sell off portions of their guaranteed loans; the commenter suggested 25 percent. BIA agrees in part, and has established a minimum ownership interest of 10 percent. The final rule reflects this change in Section 103.28(a), not Section 103.10.

A commenter suggested that BIA insert a new section, between proposed §§ 103.10 and 103.11, to explain how a lender applies to BIA to become an approved lender under the Program. BIA disagrees. Historically, lenders interested in the Program have expressed no trouble getting channeled to BIA Regional Credit Officers, who in turn make the application process simple and expeditious in the vast majority of cases. BIA also has new, OMB-approved Loan Guaranty Agreement and Loan Insurance Agreement forms (BIA forms 5–4753

and 5–4754) that are designed to answer a number of questions and circumstances that prior forms bearing those numbers did not. In summary, the process is simple and is adequately explained in standard forms. There is no need to put the procedure in the rule itself.

A final comment was unclear to BIA, and did not result in any change in the final rule.

Section 103.11 How does BIA approve lenders for the Program? Six commenters made fifteen comments on this section. Five comments were directed at the need for three different levels of guaranteed lender approval, and how those levels are defined. BIA did not change the final rule as a result of these comments. The three levels of guaranteed lender approval are fully explained in BIA's new form 5–4753, Loan Guaranty Agreement.

Four comments noted a typographical error repeated in paragraphs (b) and (c), which previously used the phrase ''loan agreement.'' BIA has corrected the phrase, which is now ''loan guaranty agreement.''

Four comments addressed the concern that a lender might think the suspension of its loan guaranty agreement and/or loan insurance agreement had an adverse impact on loan guarantees or insurance coverage already in effect. BIA has added a new paragraph (e) to clarify its intent.

One comment requested a grace period prior to the suspension of a lender's loan guaranty agreement and/or loan insurance agreement following a change in corporate structure or merger. BIA disagrees with this request. Suspension affects only the lender's ability to issue new guaranteed or insured loans, and can be quickly remedied when and if the lender has a new qualified loan to present.

One comment focused on the precise nature of the corporate changes that would trigger a suspension under this section. BIA agrees with the general comment, and has made changes in the final rule to clarify its intent. The changes appear in § 103.11(b)(2), and in the new paragraph (c). Correspondingly, BIA has renumbered the former paragraph (c) as paragraph (d). BIA also has added a new paragraph (g) in § 103.33, to conform with these changes.

Section 103.12 How does a lender apply for a loan guaranty? Four commenters made thirteen comments on this section, two of which were subsequently withdrawn. One comment suggested specifying that a lender should submit its application to the BIA Superintendent where the business is located. BIA's response to this comment already is incorporated in the changes made to Section 103.3.

One comment raised a question about the lender's role in providing a borrower with technical assistance, or even in evaluating the borrower's need for technical assistance. BIA agrees with this concern. BIA has reworded proposed paragraph (c) of this section—paragraph (d) in the final rule—to relieve the lender of these duties. BIA will bear primary responsibility for questions of technical assistance, to the extent it is able.

One comment suggested that in some cases obtaining a credit report on a natural person other than the borrower might violate the Fair Credit Reporting Act. BIA agrees that the law is not entirely clear. Accordingly, it has reworded proposed paragraph (d) of this section—paragraph (e) in the final rule.

One comment suggested that credit reports be more current than 90 days at the time of the application. BIA disagrees. The loan process can be lengthy, and BIA does not want to cause a borrower any unnecessary expense or a high number of credit report ''inquiries,'' when the reason for a stale credit report may not even be the borrower's fault. Lenders still may require a more recent credit report if that is their ordinary procedure.

One comment said that lenders should not have to issue a commitment letter to a borrower until after BIA has approved the loan under the Program. BIA disagrees. A lender can avoid potential exposure by issuing its commitment letter subject to BIA approval under the Program. BIA, on the other hand, has no substitute for having before it the lender's blueprint for how it thinks a given loan will work.

One comment requested a stylistic change in proposed paragraph (f) of this section. Upon reflection, BIA slightly reworded paragraph (f), but in a manner different from the suggested wording. The meaning remains the same.

One comment recommended establishing a standard for the maximum interest rate BIA would find acceptable. BIA disagrees, noting the historic volatility of interest rates.

Two comments noted that proposed paragraphs (e) and (h) of this section would require a borrower to make a substantial investment of time and money, very early in the overall application process. This investment may prove unwarranted, since some projects do not get even tentative approval before denial. BIA agrees. BIA has removed the requirements described in these proposed paragraphs, and made them conditions of closing in § 103.17 instead.

One comment displayed confusion over whether the proposed paragraph (h)—now, paragraph (d) in § 103.17—required each of the items in sub-paragraphs 1 through 4, or merely listed the items for convenience, should they apply in a given transaction. BIA has reworded the final rule to reduce the likelihood of confusion, and also to clarify the process for establishing that a proposed business will not be located in a special flood hazard area.

One comment stated that proposed §§ 103.12 and 103.26 are redundant. BIA agrees in part. BIA has eliminated the redundant features of these sections and placed their common components in § 103.17.

Section 103.13 How does a lender apply for loan insurance coverage? One commenter felt that lenders should always have to ask for BIA's approval, even to obtain loan insurance for a loan of under $100,000. BIA disagrees, noting the apparent intent of Congress in 25 U.S.C. 1484.

Section 103.14 Can BIA request additional information? There were no comments on this section.

Section 103.15 Are there any prohibited loan terms? Five commenters made seven comments on this section, one of which was subsequently withdrawn. One commenter felt that BIA should be flexible concerning balloon payments, with the understanding that BIA would normally avoid them in determining whether there was a reasonable prospect of loan repayment. BIA agrees, and has deleted proposed paragraph (e).

Two commenters recommended establishing a standard for the maximum interest rate BIA would find acceptable. BIA disagrees, noting the historic volatility of interest rates.

One commenter suggested that BIA limit interest rate adjustments to quarterly. BIA disagrees. BIA has no compelling reason to force lenders to use special interest rate change dates, which could be viewed by lenders as a disincentive to use the Program.

Two commenters questioned the late fee limitations in proposed paragraph (j)(3), now paragraph (i)(3). BIA agrees in part. It has removed the $100 cap on late fees.

Section 103.16 How does BIA approve or reject a loan guaranty or insurance application? One commenter made a comment on this section, then withdrew it.

Section 103.17 Must the lender follow any special procedures to close the loan? Three commenters made seven comments on this section, four of which were withdrawn. One commenter suggested that BIA require lenders to

submit three copies of all loan closing documents. BIA disagrees. It has no compelling reason to force lenders to undertake large amounts of photocopying for BIA's convenience.

One commenter questioned whether BIA really needs copies of construction contracts and plans and specifications. BIA disagrees. BIA has experience with loans in which the absence of such documents has been disruptive.

One commenter felt that a lender should be given 90 days, not 60, within which to close a loan that BIA has approved under the Program. BIA agrees and correspondingly has changed proposed paragraph (c) of this section, which is paragraph (f) of this section in the final rule.

In addition, due to comments received with respect to proposed §§ 103.12 and 103.26, in the final rule BIA has taken requirements from those locations and placed them in § 103.17, specifically at paragraphs (c) and (d).

Section 103.18 How does BIA issue a loan guaranty certificate or confirm loan insurance? There were no comments on this section.

Section 103.19 When must the lender pay BIA the loan guaranty or insurance premium? One commenter made a comment on this section, then withdrew it.

Subpart C—Interest Subsidy

Section 103.20 What is interest subsidy? BIA received two comments on this section. One commenter asked BIA to adopt Robert Morris Associates as its standard for establishing industry norms for earnings. BIA disagrees. No single private source for such figures covers every circumstance that BIA encounters, and BIA typically avoids tying regulatory requirements to standards that are in the hands of a single private source.

A second commenter wanted BIA to delete the second sentence, effectively throwing interest subsidy open to every eligible borrower, regardless of their projected or historical earnings. BIA disagrees. The purpose and role of interest subsidy has evolved somewhat over the years, but at present policy considerations suggest that it should be available only in the limited circumstances BIA has proposed.

Section 103.21 Who applies for interest subsidy payments, and what is the application procedure? BIA received two comments on this section, one of which was subsequently withdrawn. One comment said that lenders should be required to submit interest subsidy applications at the same time they submit loan guaranty or loan insurance coverage applications. BIA disagrees. Prior regulations contained this requirement, and BIA found it too inflexible to adequately address the legitimate needs of borrowers.

Section 103.22 How does BIA determine the amount of interest subsidy? BIA received two comments on this section. One commenter requested that this section identify a more specific source of the ''rate determined by the Secretary of the Treasury in accordance with 25 U.S.C. 1464.'' BIA disagrees. Periodically issued source documents have been known to change, whereas the underlying statute can be expected to remain more stable. Lenders are of course free at any time to consult BIA on the current source document in use.

Another comment suggested that BIA fix the interest subsidy amount as of the date of BIA approval. BIA agrees, and has modified the section accordingly.

Section 103.23 How does BIA make interest subsidy payments? There were no comments on this section.

Section 103.24 How long will BIA make interest subsidy payments? One commenter suggested that BIA offer interest subsidy payments for three years only, with no extensions. BIA disagrees. Experience shows that in many cases the fourth and fifth years of a loan are the critical years in which a borrower first becomes profitable. Absent interest subsidy payments, some borrowers would not survive to see that happen.

Subpart D—Provisions Relating to Borrowers

Section 103.25 What kind of borrower is eligible under the Program? Three commenters made six comments, two of which were withdrawn. One comment asked BIA to specify that its guaranty would automatically be revoked in the event a borrower's business entity became less than 51 percent Indian-owned. BIA disagrees. While that interpretation may arguably apply to prior regulatory language, BIA specifically intends that the final rule preserve for a lender the option of either pursuing default remedies under the Program, or else ignoring the default (thereby allowing BIA's loan guaranty or insurance to become void) and simply carrying the loan on the lender's books without the benefit of Program coverage. In other words, prior regulatory language suggests that a reduction in the borrower's ownership to less than 51 percent Indian would automatically void BIA's guaranty or insurance of the lender's loan—through no fault of the lender, and without giving the lender any time to react. The new rule at least gives the lender the option of pursuing a claim under its loan guaranty or insurance coverage, should such an event occur.

One comment requested that a lender have at least 45 days within which to exercise its remedies, should there be a default under the 51 percent Indian ownership requirement. BIA disagrees. A default under the 51 percent Indian ownership requirement triggers the same procedures, and the same deadlines, that apply for any other kind of default. See §§ 103.35 and 103.36. Those deadlines already provide 60 days for the lender to notify BIA of the default, and 90 days from the date of the default for the lender to elect a Program remedy.

One comment suggested that BIA define any ineligible businesses there may be, such as business activities involving gaming, currently made ineligible due to BIA policy. BIA disagrees. Policy considerations can change more rapidly than BIA can revise its regulations, and at present there is no other sort of business activity specifically prohibited under the Program.

One comment suggested that, in the event a borrower's business becomes less than 51 percent Indian owned, and the lender decides not to pursue a claim against BIA under the Program, the lender should be required at least to notify BIA of the default under the 51 percent Indian ownership requirement. This notification would permit BIA to remove the loan from its active recordkeeping system. BIA agrees. BIA has not modified this section to reflect the comment, however; it has instead made an addition to § 103.33.

Section 103.26 What must the borrower supply the lender in its loan application? Four commenters made thirteen comments on this section, one of which was subsequently withdrawn. Three comments suggested that a borrower should provide balance sheets and operating statements for the preceding three years, instead of two. BIA agrees, and has made the change in the final rule.

Two comments suggested that a borrower should provide three or more years of financial projections. BIA agrees, and the final rule reflects a requirement of three years.

Four comments pointed out that the borrower was being required to provide appraisals and proof of compliance with applicable law too early in the lending process, and that a borrower could unnecessarily suffer wasted time and expense pursuing these requirements for a loan without even tentative approval from a lender or BIA. BIA agrees. It has changed these requirements into conditions for closing, at § 103.17.

One comment displayed confusion over whether or not the borrower was required to supply the kinds of evidence outlined in proposed § 103.26(l), or whether the items listed at § 103.26(l)(1)–(4) were simply examples, to be used when applicable. BIA has slightly re-worded the language (now moved to § 103.17(d)) to reduce the likelihood of confusion.

One comment suggested that BIA establish standards for appraisals. BIA disagrees. In most cases, existing law or lender policy already establishes adequate appraisal standards, and BIA has no compelling need to add another system of requirements to what already is in place. Any BIA appraisal standards should in any event be designed for applicability far beyond the boundaries of the Program; it would be inappropriate to establish them for use solely within the Program.

One comment suggested that parts of § 103.12 and 103.26 are redundant. BIA agrees, and has removed the principal redundancies. The affected provisions have been combined and added to § 103.17.

Section 103.27 Can the borrower get help preparing its loan application or putting its loan funds to use? There were two comments on this section, both of which suggested revising the procedures for referring borrowers in need of technical assistance. One comment suggested that BIA refer borrowers to tribal business information centers. BIA disagrees. While tribal business information centers may be one potential source of help, they are not uniformly available and may not in some cases be the best available resource.

One comment noted that BIA does not always have technical assistance funding. It suggested revising the proposed regulation to eliminate the inference that BIA is obliged to provide free technical assistance to a borrower, when BIA has no funds for that purpose. BIA agrees, and has removed the last sentence of the proposed section in the final rule.

Changes to proposed §§ 103.17 and 103.26 also necessitated a conforming change in this section.

Subpart E—Loan Transfers

Section 103.28 What if the lender transfers part of the loan to another person? There were three comments on this section. One comment wanted BIA to permit the transfer of insured loans, in addition to guaranteed loans. BIA disagrees, due to the statutory prohibition implied by 25 U.S.C. 1485.

Two comments expressed confusion over transfers brought about through merger, and on the distinction between a lender's right to make new guaranteed loans or insured loans under a loan guaranty agreement or loan insurance agreement, and a lender's right to guarantee or insurance coverage on the asset transferred. BIA has clarified this section and Section 103.29 in response to these comments.

In addition, a comment on § 103.10 caused BIA to insert in this section a requirement that lenders maintain at least a 10 percent ownership interest in loans they maintain under the Program.

Section 103.29 What if the lender transfers the entire loan? BIA received four comments on this section. One comment suggested that BIA restrict transfers to eligible BIA lenders. BIA disagrees. Congress specifically expanded the universe of potential transferees when it enacted the current 25 U.S.C. 1485.

One comment wanted BIA to permit the transfer of insured loans, in addition to guaranteed loans. BIA disagrees, due to the statutory prohibition implied by 25 U.S.C. 1485.

Two comments expressed confusion over transfers brought about through merger, and on the distinction between a lender's right to make new guaranteed loans or insured loans under a loan guaranty agreement or loan insurance agreement, and a lender's right to guarantee or insurance coverage on the asset transferred. BIA has clarified this section and Section 103.28 in response to these comments.

Subpart F—Loan Servicing Requirements

Section 103.30 What standard of care must a lender meet? BIA received two comments on this section. One comment requested deleting the requirement of automatic bank account debiting. BIA disagrees. The requirement is a reasonable and prudent use of modern technology, and in any event is required only when feasible.

One comment suggested an additional place within BIA for recording lien instruments. BIA disagrees. The proposed wording covers all necessary contingencies, and does not require lenders to file any instrument with BIA more than once.

Section 103.31 What loan servicing requirements apply to BIA? BIA received one comment on this section. The commenter suggested deleting proposed paragraph (b), as unnecessary. BIA agrees. It has deleted the paragraph, and correspondingly re-designated the paragraphs of this section in the final rule.

Section 103.32 What sort of loan documentation does BIA expect the lender to maintain? There were no comments on this section.

Section 103.33 Are there reporting requirements? BIA received two comments on this section, one of which was subsequently withdrawn. The other commenter asked to reduce the number of lender's reports to once per annum. BIA disagrees. It needs quarterly updates to prepare accurate reports for the Department of the Treasury.

Also, due to comments received on §§ 103.11 and 103.25, BIA expanded this section to reflect two additional notices that a lender may be obliged to send BIA.

Section 103.34 What if the lender and the borrower decide to change the terms of the loan? There were no comments to this section. However, BIA made a minor change in paragraph (a)(7), to conform with a change in § 103.4.

Subpart G—Default and Payment by BIA

Section 103.35 What must the lender do if the borrower defaults on the loan? Three commenters made four comments on this section, one of which was subsequently withdrawn. One comment suggested a stylistic change in the standard for when a lender is required to send a borrower notice of its default. BIA disagrees, finding its proposed language more appropriate.

One comment wanted BIA to keep its former requirement of having lenders notify BIA of a borrower's default within 45 days. BIA disagrees. BIA has determined that giving lenders an additional 15 days, as in the final rule, can be of significant benefit to lenders without exposing BIA to any significant risk of an overall increase of Program losses.

One comment suggested that BIA accept service by overnight delivery service. BIA agrees, and has changed the final rule accordingly.

Section 103.36 What options and remedies does the lender have if the borrower defaults on the loan? Four commenters made five comments on this section, one of which was subsequently withdrawn. Two comments sought additional time for a lender that elects to negotiate a loan modification agreement with a borrower. BIA agrees in part. Rather than give an automatic 60 days, as one commenter suggested, BIA has added language enabling it to extend the 45 day period specified in the proposed rule.

One comment suggested that BIA accept service by overnight delivery

service. BIA agrees, and has changed the final rule accordingly.

One comment suggested requiring lenders to liquidate collateral before submitting a claim for loss on a loan guaranty. BIA disagrees. Congress apparently wants lenders to have the option of making an immediate claim for loss without any prior efforts to enforce its other default remedies. See 25 U.S.C. 1491 and 1492.

Section 103.37 What must the lender do to collect payment under its loan guaranty certificate or loan insurance coverage? One commenter made three comments on this section. One comment suggested requiring lenders to submit claims for loss within 45 days of the borrower's default. BIA disagrees. Prior regulations gave the lender 60 days, and several lenders have had trouble complying with Program requirements within even that time period. BIA has determined that extending the required submission date for a claim for loss to 90 days will afford lenders the additional time they sometimes need, without unduly increasing BIA's potential exposure for overall Program losses.

One comment suggested requiring lenders to liquidate collateral before submitting a claim for loss on a loan guaranty. BIA disagrees. Congress apparently wants lenders to have the option of making an immediate claim for loss without any prior efforts to enforce its other default remedies. See 25 U.S.C. 1491 and 1492.

One comment observed an apparent inconsistency between allowing a lender up to 180 days following default to accrue interest while pursuing foreclosure remedies, and laws that require BIA to transfer a debt to the Department of the Treasury once it has been delinquent for 180 days. BIA disagrees. BIA is not obliged to send a debt to the Department of the Treasury until BIA has held the debt for at least 180 days, and in any event it need not forward any debt to Treasury that is in the process of foreclosure.

BIA made a change to paragraph (e) of this section, however, on the basis of a comment to Section 103.38. BIA has introduced a 90 day deadline for rendering a decision on a claim for loss.

Section 103.38 Is there anything else for BIA or the lender to do after BIA makes payment? BIA received two comments on this section, one of which was subsequently withdrawn. One comment asked BIA to adopt a 60 day deadline for making payment on a claim for loss. BIA agrees in part. It has added a 90 day deadline for rendering decision on a claim for loss. The change has been made in § 103.37(e).

Section 103.39 When will BIA refuse to pay all or part of a lender's claim? BIA did not receive any comments on this section.

Section 103.40 Will BIA make exceptions to its criteria for denying payment? BIA did not receive any comments on this section.

Section 103.41 What happens if a lender violates provisions of this part? BIA did not receive any comments on this section.

Section 103.42 How long must a lender comply with Program requirements? One commenter made two comments on this section. One comment suggested that BIA require either a shorter retention period, or else permit electronic data storage. BIA agrees. It has added appropriate language to the final rule.

One comment observed an apparent inconsistency between BIA's reservation of rights and applicable statutes of limitations. BIA disagrees. The final rule does not and cannot supercede Federal statutes of limitations.

Section 103.43 What must the lender do after repayment in full? BIA did not receive any comments on this section.

Subpart H—Definitions and Miscellaneous Provisions

Section 103.44 What certain terms mean in this part. Two commenters made four comments on this section, one of which was subsequently withdrawn. One comment suggested eliminating the phrase ''when used as a noun,'' in the definition of ''mortgage.'' BIA agrees. The change is in the final rule.

One comment suggested further restricting the definition of the word ''Tribe'' to those tribes recognized by the Federal government as eligible for services from BIA. BIA agrees. The change is in the final rule.

One comment suggested putting the definitions section at the beginning of the rule, rather than at the end. BIA disagrees. Current regulatory drafting theories suggest placing substantive provisions prominently at the beginning of a rule, and leaving reference materials towards the end.

Section 103.45 Information collection. BIA did not receive any comments on this section.

Other changes. In addition to the above comments, the final rule reflects a limited number of non-substantive, stylistic changes from the proposed rule. BIA added these for enhanced clarity, and in the case of a deletion in proposed § 103.30(e), to allow for conformity with another anticipated rulemaking. BIA also made a small number of conforming changes in definitions and paragraph designations, required due to the change, addition, or deletion of rule provisions based on public comments.

Regulatory Planning and Review

This document is not a significant rule and is not subject to review by the Office of Management and Budget (OMB) under Executive Order 12866.

This rule will not have an effect of $100 million or more on the economy. Current and foreseeable funding levels for the Program will permit at most $82 million in new loans per annum. The rule will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. The Program is designed to enhance, not hinder, productivity, competition, jobs, and the overall economy, and there is nothing inherent about the Program or the rule that will lead to adverse effects on the environment, public health or safety, or State, local, or tribal governments or communities.

This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. There is nothing in the rule to limit other efforts to encourage Indian economic development.

This rule does not alter the budgetary effects or entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. The Program does not create or limit any entitlement, has nothing to do with other grant or loan programs, and establishes no user fees.

This rule does not raise novel legal or policy issues. Part 103 has caused minimal legal review since 1975, and the new rule is in substance very similar to the existing rule.

Regulatory Flexibility Act

DOI certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The number of lenders who might be impacted by the changes in this document is limited by the relatively modest number of individual Indians and organizations of Indians whose loans can be guaranteed or insured under the Program.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

(a) Does not have an annual effect on the economy of $100 million or more. Current and foreseeable funding levels

for the Program will permit at most $82 million in new loans per annum.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. The rule is designed to clarify the roles and duties of the persons it may impact, and should in fact result in administrative savings. Any additional requirements imposed by the rule are either very limited in scope, or else in the nature of assembling information that lenders typically gather anyway.

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. To the contrary, the rule implements the Program in order to encourage investment in new Indian businesses, and thereby increase U.S.-based competition, employment, productivity, and innovation.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. It does not impose any mandates at all. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. Only a small segment of the private sector—the lending community—is directly affected by the rule, and the rule (1) is functionally very similar to existing law, and (2) relates to a Program that will permit at most $82 million in new loans per annum, based on current and foreseeable funding levels. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531, *et seq.*) is not required.

Takings

In accordance with Executive Order 12630, the rule does not have significant takings implications. The Program enhances the security available to lenders, and does not inherently involve any action that could deprive anyone of property without just compensation. A takings implication assessment is not required.

Federalism

In accordance with Executive Order 13132, this rule does not have federalism implications. This rule does not substantially and directly affect the relationship between the Federal and State governments. The rule is directed at the relationship between lenders and the Federal Government, and does not impact States at all. This rule does not impose costs on States or localities, for the same reason.

Civil Justice Reform

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

Paperwork Reduction Act

The Office of Management and Budget has reviewed and approved the information collections contained in this rule and assigned them number 1076–0020. The proposed rule was published on September 6, 2000 (65 FR 53948) and solicited comments on the information collection. OMB expressed no concerns with the information collection, and no comments were received from the public.

The information collection is required to obtain or retain a benefit. Information covered by the Privacy Act will be kept confidential as required by law. Please note that a Federal agency may not collect or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

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

List of Subjects in 25 CFR Part 103

Indians—Insurance, Interest subsidy, and Loan guaranty.

For the reasons given in the preamble, BIA is revising part 103 in chapter I of title 25 of the Code of Federal Regulations as set forth below.

PART 103—LOAN GUARANTY, INSURANCE, AND INTEREST SUBSIDY

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103.44 What certain terms mean in this part.
103.45 Information collection.

Authority: 25 U.S.C. 1498, 1511.

Subpart A—General Provisions

§ 103.1 What does this part do?

This part explains how to obtain and use a BIA loan guaranty or loan insurance agreement under the Program, and who may do so. It also describes how to obtain and use interest subsidy payments under the Program, and who may do so.

§ 103.2 Who does the Program help?

The purpose of the Program is to encourage eligible borrowers to develop viable Indian businesses through conventional lender financing. The direct function of the Program is to help lenders reduce excessive risks on loans they make. That function in turn helps borrowers secure conventional financing that might otherwise be unavailable.

§ 103.3 Who administers the Program?

Authority for administering the Program ultimately rests with the Secretary, who may exercise that authority directly at any time. Absent a direct exercise of authority, however, the Secretary delegates Program authority to BIA officials through the U.S. Department of Interior Departmental Manual. A lender should submit all applications and correspondence to the BIA office serving the borrower's location.

§ 103.4 What kinds of loans will BIA guarantee or insure?

In general, BIA may guarantee or insure any loan made by an eligible lender to an eligible borrower to conduct a lawful business organized for profit. There are several important exceptions:

(a) The business must contribute to the economy of an Indian reservation or tribal service area recognized by BIA;

(b) The borrower may not use the loan for relending purposes;

(c) If any portion of the loan is used to refinance an existing loan, the borrower must be current on the existing loan; and

(d) BIA may not guarantee or insure a loan if it believes the lender would be willing to extend the requested financing without a BIA guaranty or insurance coverage.

§ 103.5 What size loan will BIA guarantee or insure?

BIA can guarantee or insure a loan or combination of loans of up to $500,000 for an individual Indian, or more for an acceptable Indian business entity, Tribe, or tribal enterprise involving two or more persons. No individual Indian may have an outstanding principal balance of more than $500,000 in guaranteed or insured loans at any time. BIA can limit the size of loans it will guarantee or insure, depending on the resources BIA has available.

§ 103.6 To what extent will BIA guarantee or insure a loan?

(a) BIA can guarantee up to 90 percent of the unpaid principal and accrued interest due on a loan.

(b) BIA can insure up to the lesser of:

(1) 90 percent of the unpaid principal and accrued interest due on a loan; or

(2) 15 percent of the aggregate outstanding principal amount of all loans the lender has insured under the Program as of the date the lender makes a claim under its insurance coverage.

(c) BIA's guaranty certificate or loan insurance agreement should reflect the lowest guaranty or insurance percentage rate that satisfies the lender's risk management requirements.

(d) Absent exceptional circumstances, BIA will allow no more than:

(1) Two simultaneous guarantees under the Program covering outstanding loans from the same lender to the same borrower; or

(2) One loan guaranty under the Program when the lender simultaneously has one or more outstanding loans insured under the Program to the same borrower.

§ 103.7 Must the borrower have equity in the business being financed?

The borrower must be projected to have at least 20 percent equity in the business being financed, immediately after the loan is funded. If a substantial portion of the loan is for construction or renovation, the borrower's equity may be calculated based upon the reasonable estimated value of the borrower's assets after completion of the construction or renovation.

§ 103.8 Is there any cost for a BIA guaranty or insurance coverage?

BIA charges the lender a premium for a guaranty or insurance coverage.

(a) The premium is:

(1) Two percent of the portion of the original loan principal amount that BIA guarantees; or

(2) One percent of the portion of the original loan principal amount that BIA insures, without considering the 15 percent aggregate outstanding principal limitation on the lender's insured loans.

(b) Lenders may pass the cost of the premium on to the borrower, either by charging a one-time fee or by adding the cost to the principal amount of the borrower's loan. Adding the premium to the principal amount of the loan will not make any further premium due. BIA will guarantee or insure the additional principal to the same extent as the original approved principal amount.

Subpart B—How a Lender Obtains a Loan Guaranty or Insurance Coverage

§ 103.9 Who applies to BIA under the Program?

The lender is responsible for determining whether it will require a BIA guaranty or insurance coverage, based upon the loan application it receives from an eligible borrower. If the lender requires a BIA guaranty or insurance coverage, the lender is responsible for completing and submitting a guaranty application or complying with a loan insurance agreement under the Program.

§ 103.10 What lenders are eligible under the Program?

(a) Except as specified in paragraph (b) of this section, a lender is eligible under the Program, and may be considered for BIA approval, if the lender is:

(1) Regularly engaged in the business of making loans;

(2) Capable of evaluating and servicing loans in accordance with reasonable and prudent industry standards; and

(3) Otherwise reasonably acceptable to BIA.

(b) The following lenders are not qualified to issue loans under the Program:

(1) An agency or instrumentality of the Federal Government;

(2) A lender that borrows money from any Federal Government source, other than the Federal Reserve Bank System, for purposes of relending;

(3) A lender that does not include the interest on loans it makes in gross income, for purposes of chapter 1, title 26 of the United States Code; and

(4) A lender that does not keep any ownership interest in loans it originates.

§ 103.11 How does BIA approve lenders for the Program?

(a) BIA approves each lender by entering into a loan guaranty agreement and/or a loan insurance agreement with it. BIA may provide up to three different levels of approval for a lender making guaranteed loans, depending on factors such as:

(1) The number of loans the lender makes under the Program;

(2) The total principal balance of the lender's Program loans;

(3) The number of years the lender has been involved with the Program;

(4) The relative benefits and opportunities the lender has given to Indian business efforts through the Program; and

(5) The lender's historical compliance with Program requirements.

(b) BIA will consider a lender's loan guaranty agreement and/or loan insurance agreement suspended as of:

(1) The effective date of a change in the lender's corporate structure;

(2) The effective date of a merger between the lender and any other entity, when the lender is not the surviving entity; or

(3) The start of any legal proceeding in which substantially all of the lender's assets may be subject to disposition through laws governing bankruptcy, insolvency, or receivership.

(c) A change in a lender's name, without any other change specified under paragraph (b) of this section, will not cause a suspension of the lender's loan guaranty agreement and/or loan insurance agreement. The lender should notify BIA of its name change as soon as possible.

(d) If a lender's loan guaranty agreement and/or loan insurance agreement is suspended under paragraph (b) of this section, the lender, or its successor in interest, must enter into a new loan guaranty agreement and/or loan insurance agreement with BIA in order to secure any new BIA loan guarantees or insurance coverage.

(e) The suspension of a loan guaranty agreement and/or loan insurance agreement does not affect the validity of any guaranty certificate or insurance coverage in effect before the date of the suspension. Any such certificate or insurance coverage will remain governed by applicable terms of the suspended loan guaranty agreement and/or loan insurance agreement.

§ 103.12 How does a lender apply for a loan guaranty?

To apply for a loan guaranty, a BIA-approved lender must submit to BIA a loan guaranty application request form, together with each of the following:

(a) A written explanation from the lender indicating why it needs a BIA guaranty for the loan, and the minimum loan guarantee percentage it will accept;

(b) A copy of the borrower's complete loan application;

(c) A description of the borrower's equity in the business being financed;

(d) A copy of the lender's independent credit analysis of the borrower's business, repayment ability, and loan collateral (including insurance);

(e) An original report from a nationally-recognized credit bureau, dated within 90 days of the date of the lender's loan guaranty application package, outlining the credit history of the borrower, and to the extent permitted by law, each co-maker or guarantor of the loan (if any);

(f) A copy of the lender's loan commitment letter to the borrower, showing at a minimum the proposed loan amount, purpose, interest rate, schedule of payments, and security (including insurance requirements), and the lender's terms and conditions for funding;

(g) The lender's good faith estimate of any loan-related fees and costs it will charge the borrower, as authorized under this part;

(h) If any significant portion of the loan will be used to finance construction, renovation, or demolition work, the lender's:

(1) Insurance and bonding requirements for the work;

(2) Proposed draw requirements; and

(3) Proposed work inspection procedures;

(i) If any significant portion of the loan will be used to refinance or otherwise retire existing indebtedness:

(1) A clear description of all loans being paid off, including the names of all makers, cosigners and guarantors, maturity dates, payment schedules, uncured delinquencies, collateral, and payoff amounts as of a specific date; and

(2) A comparison of the terms of the loan or loans being paid off and the terms of the new loan, identifying the advantages of the new loan over the loan being paid off.

§ 103.13 How does a lender apply for loan insurance coverage?

BIA-approved lenders can make loans insured under the Program in two ways, depending on the size of the loan:

(a) For loans in an original principal amount of up to $100,000 per borrower, the lender can make each loan in accordance with the lender's loan insurance agreement, without specific prior approval from BIA.

(b) For loans in an original principal amount of over $100,000, the lender must seek BIA's specific prior approval in each case. The lender must submit a loan insurance coverage application request form, together with the same information required for a loan guaranty under § 103.12, except for the information required by § 103.12(a).

(c) The lender must submit a loan insurance application package even for a loan of less than $100,000 if:

(1) The total outstanding balance of all insured loans the lender is extending to the borrower under the Program exceeds $100,000; or

(2) the lender makes a request for interest subsidy, pursuant to § 103.21.

§ 103.14 Can BIA request additional information?

BIA may require the lender to provide additional information, whenever BIA believes it needs the information to properly evaluate a new lender, guaranty application, or insurance application. After BIA issues a loan guaranty or insurance coverage, the lender must let BIA inspect the lender's records at any reasonable time for information concerning the Program.

§ 103.15 Are there any prohibited loan terms?

A loan agreement guaranteed or insured under the Program may not contain:

(a) Charges by the lender styled as ''points,'' loan origination fees, or any similar fees (however named), except that if authorized in the loan agreement, the lender may charge the borrower a reasonable annual loan servicing fee that:

(1) Is not included as part of the loan principal; and

(2) Does not bear interest;

(b) Charges of any kind by the lender or by any third party except for the reasonable and customary cost of legal and architectural services, broker commissions, surveys, compliance inspections, title inspection and/or insurance, lien searches, appraisals, recording costs, premiums for required hazard, liability, key man life, and other kinds of insurance, and such other charges as BIA may approve in writing;

(c) A loan repayment term of over 30 years;

(d) Payments scheduled less frequently than annually;

(e) A prepayment penalty, unless the terms of the penalty are clearly specified in BIA's loan guaranty or loan insurance conditions;

(f) An interest rate greater than what BIA considers reasonable, taking into account the range of rates prevailing in the private market for similar loans;

(g) A variable interest rate, unless the rate is tied to a specific prime rate

published from time to time by a nationally recognized financial institution or news source;

(h) An increased rate of interest based on default;

(i) A fee imposed for the late repayment of any installment due, except for a late fee that:

(1) Is imposed only after the borrower is at least 30 days late with payment;

(2) Does not bear interest; and

(3) Equals no more than 5 percent of the late installment;

(j) An ''insecurity'' clause, or any similar provision permitting the lender to declare a loan default solely on the basis of its subjective view of the borrower's changed repayment prospects;

(k) A requirement that the borrower take title to any real or personal property purchased with loan proceeds by a title instrument containing restrictions on alienation, control or use of the property, unless otherwise required by applicable law; or

(l) A requirement that a borrower which is a tribe provide as security a general assignment of the tribe's trust income. If otherwise lawful, a tribe may provide as loan security an assignment of trust income from a specific source.

§ 103.16 How does BIA approve or reject a loan guaranty or insurance application?

(a) BIA reviews each guaranty or insurance application, and may evaluate each loan application independently from the lender. BIA bases its loan guaranty or insurance decisions on many factors, including compliance with this part, and whether there is a reasonable prospect of loan repayment from business cash flow, or if necessary, from liquidating loan collateral. Lenders are expected to obtain a first lien security interest in enough collateral to reasonably secure repayment of each loan guaranteed or insured under the Program, to the extent that collateral is available.

(b) BIA approves applications by issuing an approval letter, followed by the procedures in § 103.18. If the guaranty or insurance application is incomplete, BIA may return the application to the lender, or hold the application while the lender submits the missing information. If BIA denies the application, it will provide the lender with a written explanation, with a copy to the borrower.

§ 103.17 Must the lender follow any special procedures to close the loan?

(a) BIA officials or their representatives may attend the closing of any loan or loan modification that BIA agrees to guarantee or insure. For guaranteed loans, and insured loans that BIA must individually review under this part, the lender must give BIA notice of the date of closing at least 5 business days before closing occurs.

(b) At or prior to closing, the lender must obtain appropriate, satisfactory title and/or lien searches for each asset to be used as loan collateral.

(c) At or prior to closing, the lender must obtain recent appraisals for all real property and improvements to be used as collateral for the loan, to the extent required by law.

(d) At or prior to closing, the lender must document that the lender and borrower have complied with all applicable Federal, State, local, and tribal laws implicated by financing the borrower's business, for example by securing:

(1) Copies of all permits and licenses required to operate the borrower's business;

(2) Environmental studies required for construction and/or business operations under NEPA and other environmental laws;

(3) Archeological or historical studies required by law; and

(4) Certification by a registered surveyor or appropriate BIA official indicating that the proposed business will not be located in a special flood hazard area, as defined by applicable law.

(e) The lender must supply BIA with copies of all final, signed loan closing documents within 30 days following closing. To the extent applicable, loan closing documents must include the following:

(1) Promissory notes;

(2) Security agreements, including pledge and similar agreements, and related financing statements (together with BIA's written approval of any assignment of specific tribal trust assets under § 103.15(l), or of any security interest in an individual Indian money account);

(3) Mortgage instruments or deeds of trust (together with BIA's written approval, if required by 25 U.S.C. 483a, or if the mortgage is of a leasehold interest in tribal trust property);

(4) Guarantees (other than from BIA);

(5) Construction contracts, and plans and specifications;

(6) Leases related to the business (together with BIA's written approval, if required under 25 CFR part 162);

(7) Attorney opinion letters;

(8) Resolutions made by a Tribe or business entity;

(9) Waivers or partial waivers of sovereign immunity; and

(10) Similar instruments designed to document the loan, establish the basis for a security interest in loan collateral, and comply with applicable law.

(f) Unless BIA indicates otherwise in writing, the lender must close a guaranteed or insured loan within 90 days of any approval provided under § 103.16.

§ 103.18 How does BIA issue a loan guaranty or confirm loan insurance?

(a) A loan is guaranteed under the Program when all of the following occur:

(1) BIA issues a signed loan guaranty certificate bearing a series number, an authorized signature, a guaranty percentage rate, the lender's name, the borrower's name, the original principal amount of the loan, and such other terms and conditions as BIA may require;

(2) The loan closes and funds;

(3) The lender pays BIA the applicable loan guaranty premium; and

(4) The lender meets all of the conditions listed in the loan guaranty certificate.

(b) A loan is insured under the Program when all of the following occur:

(1) The loan's purpose and terms meet the requirements of the Program and the lender's loan insurance agreement with BIA;

(2) The loan closes and funds;

(3) The lender notifies BIA of the borrower's identity and organizational structure, the amount of the loan, the interest rate, the payment schedule, and the date on which the loan closing and funding occurred;

(4) The lender pays BIA the applicable loan insurance premium;

(5) If over $100,000 or if the loan requires interest subsidy, BIA approves the loan in writing; and

(6) If over $100,000 or if the loan requires interest subsidy, the lender meets all of the conditions listed in BIA's written loan approval.

§ 103.19 When must the lender pay BIA the loan guaranty or insurance premium?

The premium is due within 30 calendar days of the loan closing. If not paid on time, BIA will send the lender written notice by certified mail (return receipt requested), or by a nationally-recognized overnight delivery service (signature of recipient required), stating that the premium is due immediately. If the lender fails to make the premium payment within 30 calendar days of the date of BIA's notice, BIA's guaranty certificate or insurance coverage with respect to that particular loan is void, without further action.

Subpart C—Interest Subsidy

§ 103.20 What is interest subsidy?

Interest subsidy is a payment BIA makes for the benefit of the borrower, to reimburse part of the interest payments the borrower has made on a loan guaranteed or insured under the Program. It is available to borrowers whose projected or historical earnings before interest and taxes, after adjustment for extraordinary items, is less than the industry norm.

§ 103.21 Who applies for interest subsidy payments, and what is the application procedure?

(a) An eligible lender must request interest subsidy payments on behalf of an eligible borrower, after determining that the borrower qualifies. Typically, the lender should include a request for interest subsidy at the time it applies for a guaranty or insurance coverage under the Program. A request for interest subsidy must be supported by the information required in §§ 103.12 and 103.13 (relating to loan guaranty and insurance coverage applications). BIA approves, returns, or rejects interest subsidy requests in the same manner indicated in § 103.16, based on the factors in § 103.20 and BIA's available resources.

(b) BIA's approval of interest subsidy for an insured loan may provide for specific limitations on the manner in which the lender and borrower can modify the loan.

§ 103.22 How does BIA determine the amount of interest subsidy?

Interest subsidy payments should equal the difference between the lender's rate of interest and the rate determined by the Secretary of the Treasury in accordance with 25 U.S.C. 1464. BIA will fix the amount of interest subsidy as of the date it approves the interest subsidy request.

§ 103.23 How does BIA make interest subsidy payments?

The lender must send BIA reports at least quarterly on the borrower's loan payment history, together with a calculation of the interest subsidy then due. The lender's reports and calculation do not have to be in any specific format, but in addition to the calculation the reports must contain at least the information required by § 103.33(a). Based on the lender's reports and calculation, BIA will send interest subsidy payments to the borrower in care of the lender. The payments belong to the borrower, but the borrower and lender may agree in advance on how the borrower will use interest subsidy payments. BIA may verify and correct interest subsidy calculations and payments at any time.

§ 103.24 How long will BIA make interest subsidy payments?

(a) BIA will issue interest subsidy payments for the term of the loan, up to 3 years. If interest subsidy payments still are justified, the lender may apply for up to two 1-year extensions of this initial term. BIA will make interest subsidy payments on a single loan for no more than 5 years.

(b) BIA will choose the date from which it calculates interest subsidy years, usually the date the lender first extends the loan funds. Interest subsidy payments will apply to all loan payments made in the calendar years following that date.

(c) Interest subsidy payments will not be due for any loan payment made after the corresponding loan guaranty or insurance coverage stops under the Program, regardless of the circumstances.

Subpart D—Provisions Relating to Borrowers

§ 103.25 What kind of borrower is eligible under the Program?

(b) A borrower is eligible for a BIA-guaranteed or insured loan if the borrower is:

(1) An Indian individual;

(2) An Indian-owned business entity organized under Federal, State, or tribal law, with an organizational structure reasonably acceptable to BIA;

(3) A tribe; or

(4) A business enterprise established and recognized by a tribe.

(b) To be eligible for a BIA-guaranteed or insured loan, a business entity or tribal enterprise must be at least 51 percent owned by Indians. If at any time a business entity or tribal enterprise becomes less than 51 percent Indian owned, the lender either may declare a default as of the date the borrower stopped being at least 51 percent Indian owned and exercise its remedies under this part, or else continue to extend the loan to the borrower and allow BIA's guaranty or insurance coverage to become invalid.

§ 103.26 What must the borrower supply the lender in its loan application?

The lender may use any form of loan application it chooses. However, the borrower must supply the lender the information listed in this section in order for BIA to process a guaranty or insurance coverage application:

(a) The borrower's precise legal name, address, and tax identification number or social security number;

(b) Proof of the borrower's eligibility under the Program;

(c) A statement signed by the borrower, indicating that it is not delinquent on any Federal tax or other debt obligation;

(d) The borrower's business plan, including resumes of all principals and a detailed discussion of the product or service to be offered, market factors, the borrower's marketing strategy, and any technical assistance the borrower may require;

(e) A detailed description of the borrower's equity in the business being financed, including the method(s) of valuation;

(f) The borrower's balance sheets and operating statements for the preceding 3 years, or so much of that period that the borrower has been in business;

(g) The borrower's current financial statement, and the financial statements of all co-makers and guarantors of the loan (other than BIA);

(h) At least 3 years of financial projections for the borrower's business, consisting of pro-forma balance sheets, operating statements, and cash flow statements;

(i) A detailed list of all proposed collateral for the loan, including asset values and the method(s) of valuation;

(j) A detailed list of all proposed hazard, liability, key man life, and other kinds of insurance the borrower will maintain on its business assets and operations;

(k) If any significant portion of the loan will be used to finance construction, renovation, or demolition work:

(1) Written quotes for the work from established and reputable contractors; and

(2) To the extent available, copies of all construction and architectural contracts for the work, plans and specifications, and applicable building permits;

(l) If the borrower is a tribe or a tribal enterprise, resolutions by the tribe and proof of authority under tribal law permitting the borrower to borrow the loan amount and offer the proposed loan collateral; and

(m) If the borrower is a business entity, resolutions by the appropriate governing officials and proof of authority under its organizing documents permitting the borrower to borrow the loan amount and offer the proposed loan collateral.

§ 103.27 Can the borrower get help preparing its loan application or putting its loan funds to use?

A borrower may seek BIA's assistance when preparing a loan application or

when planning business operations, including assistance identifying and complying with applicable laws as indicated by § 103.17(d). The borrower should contact the BIA field or agency office serving the area in which the borrower's business is to be located, or if there is no separate field or agency office serving the area, then the borrower should contact the BIA regional office serving the area.

Subpart E—Loan Transfers

§ 103.28 What if the lender transfers part of the loan to another person?

(a) A lender may transfer one or more interests in a guaranteed loan to another person or persons, as long as the parties have in place an agreement that designates one person to perform all of the duties required of the lender under the Program and the loan guaranty certificate. Starting on the date of the transfer, only the person designated to perform the duties of the lender will be entitled to exercise the rights conferred by BIA's loan guaranty certificate, and will from that point forward be considered the lender for purposes of the Program. A lender under the Program must both service the guaranteed loan and own at least a 10 percent interest in the guaranteed loan. BIA will not consider more than one person at any given time to be the lender with respect to any loan guaranty certificate. If the person designated to perform the duties of the lender in an agreement among loan participants is not the original lender, then the provisions of § 103.29(a) will apply (relating to sale or assignment of guaranteed loans), and the person designated to perform the duties of the lender must give BIA notice of its interest in the loan. Failure to provide notice in accordance with § 103.29(a) will void BIA's loan guaranty certificate, without further action.

(b) Transferring any interest in an insured loan to another person will void the insurance coverage for that loan, except where the transfer is effected by a merger.

§ 103.29 What if the lender transfers the entire loan?

(a) A lender may transfer all of its rights in a guaranteed loan to any other person. The acquiring person must send BIA written notice of the transfer, describing the borrower, the loan, BIA's loan guaranty certificate number, and the acquiring person's name and address. Starting on the date of the transfer, only the acquiring person will be entitled to exercise the rights conferred by BIA's loan guaranty certificate, and will from that point forward be considered the lender for purposes of the Program. The acquiring person must service the guaranteed loan and otherwise perform all of the duties required of the lender under the Program and the loan guaranty certificate. Except when a transfer is effected by a merger, any failure by the acquiring person to send BIA proper notice of the transfer within 30 calendar days of the transfer date will void BIA's loan guaranty certificate, without further action.

(b) Transferring an insured loan to another person will void the insurance coverage for that loan, except where the transfer is effected by a merger.

(c) If a lender is not the surviving entity after a merger, the lender's successor must notify BIA in writing of the change within 30 calendar days of the merger. The lender also must re-apply to become an approved lender under the Program, as indicated in § 103.11.

Subpart F—Loan Servicing Requirements

§ 103.30 What standard of care must a lender meet?

Lenders must service all loans guaranteed or insured under the Program in a commercially reasonable manner, in accordance with standards and procedures adopted by prudent lenders in the BIA region in which the borrower's business is located, and in accordance with this part. If the lender fails to follow any of these standards, BIA may reduce or eliminate entirely the amount payable under its guaranty or insurance coverage to the extent BIA can reasonably attribute the loss to the lender's failure. BIA also may deny payment completely if the lender gets a loan guaranty or insurance coverage through fraud, or negligently allows a borrower's fraudulent loan application or use of loan funds to go undetected. In particular, and without limitation, lenders must:

(a) Check and verify information contained in the borrower's loan application, such as the borrower's eligibility, the authority of persons acting on behalf of the borrower, and the title status of any proposed collateral;

(b) Take reasonable precautions to assure that loan proceeds are used as specified in BIA's guaranty certificate or written insurance approval, or if not so specified, then in descending order of importance:

(1) BIA's written loan guaranty approval;

(2) The loan documents;

(3) The terms of the lender's final loan commitment to the borrower; or

(4) The borrower's loan application;

(c) When feasible, require the borrower to use automatic bank account debiting to make loan payments;

(d) Require the borrower to take title to real and personal property purchased with loan proceeds in the borrower's own name, except for real property to be held in trust by the United States for the benefit of a borrower that is a tribe;

(e) Promptly record all security interests and subsequently keep them in effect. Lenders must record all mortgages and other security interests in accordance with State and local law, including the laws of any tribe that may have jurisdiction. Lenders also must record any leasehold mortgages or assignments of income involving individual Indian or tribal trust land with the BIA office having responsibility for maintaining records on that trust land;

(f) Assure, to the extent reasonably practicable, that the borrower and any guarantor of the loan (other than BIA) keep current on all taxes levied on real and personal property used in the borrower's business or as collateral for the loan, and on all applicable payroll taxes;

(g) Assure, to the extent reasonably practicable, that all required insurance policies remain in effect, including hazard, liability, key man life, and other kinds of insurance, in amounts reasonably necessary to protect the interests of the borrower, the borrower's business, and the lender;

(h) Assure, to the extent reasonably practicable, that the borrower remains in compliance with all applicable Federal, State, local and tribal laws, including environmental laws and laws concerning the preservation of historical and archeological sites and data;

(i) Assure, to the extent reasonably practicable, that the borrower causes any construction, renovation, or demolition work funded by the loan to proceed in accordance with approved construction contracts and plans and specifications, which must be sufficient in scope and detail to adequately govern the work;

(j) Reserve for itself and BIA the right to inspect the borrower's business records and all loan collateral at any reasonable time;

(k) Promptly notify the borrower in writing of any material breach by the borrower of the terms of its loan, with specific instructions on how to cure the breach and a deadline for doing so;

(l) Participate in any probate, receivership, bankruptcy, or similar proceeding involving the borrower and

any guarantor or co-maker of the borrower's debt, to the extent necessary to maintain the greatest possible rights to repayment; and

(m) Otherwise seek to avoid and mitigate any potential loss arising from the loan, using at least that level of care the lender would use if it did not have a BIA loan guaranty or insurance coverage.

§ 103.31 What loan servicing requirements apply to BIA?

Once a lender extends a loan that is guaranteed or insured under the Program, BIA has no responsibility for decisions concerning it, except for:

(a) Any approvals required under this part;

(b) Any decisions reserved to BIA under conditions of BIA's guaranty certificate or insurance coverage; and

(c) Decisions concerning a loan that the lender has assigned to BIA or to which BIA is subrogated by virtue of paying a claim based on a guaranty certificate or insurance coverage.

§ 103.32 What sort of loan documentation does BIA expect the lender to maintain?

For every loan guaranteed or insured under the Program, the lender must maintain:

(a) BIA's original loan guaranty certificate or insurance coverage approval letter, if applicable;

(b) Original signed and/or certified counterparts of all final loan documents, including those listed in § 103.17 (concerning documents required for loan closing), all renewals, modifications, and additions to those documents, and signed settlement statements;

(c) Originals or copies, as appropriate, of all documents gathered by the lender under §§ 103.12, 103.13 and 103.26 (concerning information submitted by the borrower in its loan application, and information supplied to BIA in the lender's loan guaranty or insurance coverage application);

(d) Originals or copies, as appropriate, of all applicable insurance binders or certificates, including without limitation hazard, liability, key man life, and title insurance;

(e) A complete and current history of all loan transactions, including dated disbursements, payments, adjustments, and notes describing all contacts with the borrower;

(f) Originals or copies, as appropriate, of all correspondence with the borrower, including default notices and evidence of receipt;

(g) Originals or copies, as appropriate, of all correspondence, notices, news items or other information concerning the borrower, whether gathered by the lender or furnished to it, containing material information about the borrower and its business operations;

(h) Originals or copies, as appropriate, of all advertisements, notices, title instruments, accountings, and other documentation of efforts to liquidate loan collateral; and

(i) Originals or copies, as appropriate, of all notices, pleadings, motions, orders, and other documents associated with any legal proceeding involving the lender and the borrower or its assets, including without limitation judicial or non-judicial foreclosure proceedings, suits to collect payment, bankruptcy proceedings, probate proceedings, and any settlement associated with threatened or actual litigation.

§ 103.33 Are there reporting requirements?

(a) The lender must periodically report the borrower's loan payment history so that BIA can recalculate the government's contingent liability. Loan payment history reports must be quarterly unless BIA provides otherwise for a particular loan. These reports can be in any format the lender desires, as long as they contain:

(1) The lender's name;

(2) The borrower's name;

(3) A reference to BIA's Loan Guaranty Certificate or Loan Insurance Agreement number;

(4) The lender's internal loan number; and

(5) The date and amount of all loan balance activity for the reporting period.

(b) If applicable, the lender must supply a calculation of any interest subsidy payments that are due, as indicated in § 103.23.

(c) If there is a transfer of any or all of the lender's ownership interest in the loan, the party receiving the ownership interest may be required to notify BIA, as indicated in §§ 103.28 and 103.29.

(d) If there is a default on the loan, the lender must notify BIA, as indicated in §§ 103.35 and 103.36.

(e) If the borrower ceases to qualify for a BIA-guaranteed or insured loan under § 103.25(b), the lender must promptly notify BIA even if the lender does not pursue default remedies under §§ 103.35 and 103.36. This notice allows BIA to eliminate the guaranty or insurance coverage from its active recordkeeping system.

(f) If the loan is prepaid in full, the lender must promptly notify BIA in writing so that BIA can eliminate the guaranty or insurance coverage from its active recordkeeping system.

(g) If a lender changes its name, it should notify BIA in accordance with § 103.11(c).

§ 103.34 What if the lender and borrower decide to change the terms of the loan?

(a) The lender must obtain written BIA approval before modifying a loan guaranteed or insured under the Program, if the change will:

(1) Increase the borrower's outstanding principal amount (if a term loan), or maximum available credit (if a revolving loan).

(i) BIA will approve or disapprove a loan increase based upon the lender's explanation of the borrower's need for additional funding, and updated information of the sort required under §§ 103.12, 103.13, and 103.26, as applicable.

(ii) Upon approval by BIA and payment of an additional guaranty or insurance premium in accordance with §§ 103.8 and 103.19 and this section, the entire outstanding loan amount, as modified, will be guaranteed or insured (as the case may be) to the extent BIA specifies. The lender must pay the additional premium only on the increase in the outstanding principal amount of the loan (if a term loan) or the increase in the credit limit available to the borrower (if a revolving loan).

(iii) Lenders may not increase the outstanding principal amount of a loan guaranteed or insured under the Program if a significant purpose of doing so would be to allow the borrower to pay accrued loan interest it otherwise would have difficulty paying.

(2) Permanently adjust the loan repayment schedule.

(3) Increase a fixed interest rate, convert a fixed interest rate to an adjustable interest rate, or convert an adjustable interest rate to a fixed interest rate.

(4) Allow any changes in the identity or organizational structure of the borrower.

(5) Allow any material change in the use of loan proceeds or the nature of the borrower's business.

(6) Release any collateral taken as security for the loan, except items sold in the ordinary course of business and promptly replaced by similar items of collateral, such as inventory.

(7) Allow the borrower to move any significant portion of its business operations to a location that is not on or near an Indian reservation or tribal service area recognized by BIA.

(8) Be likely to materially increase the risk of a claim on BIA's guaranty or insurance coverage, or materially reduce the aggregate value of the collateral securing the loan.

(9) Cure a default for which BIA is to receive notice under § 103.35(b).

(b) In the case of an insured loan, the amount of which will not exceed

$100,000 when combined with all other insured loans from the lender to the borrower, the lender need not obtain BIA's prior approval to make any of the loan modifications indicated in § 103.34(a), except as provided in § 103.21(b). However, all loan modifications must remain consistent with the lender's loan insurance agreement with BIA, and in the event of an increase in the borrower's outstanding principal amount (if a term loan), or maximum available credit (if a revolving loan), the lender must send BIA an additional premium payment in accordance with §§ 103.8, 103.19 and this section. The lender must pay the additional premium only on the increase in the outstanding principal amount of the loan (if a term loan) or the increase in the credit limit available to the borrower (if a revolving loan). To the extent a loan modification changes any of the information supplied to BIA under § 103.18(b)(3), the lender also must promptly notify BIA of the new information.

(c) Subject to any applicable BIA loan guaranty or insurance coverage conditions, a lender may extend additional loans to a borrower without BIA approval, if the additional loans are not to be guaranteed or insured under the Program.

Subpart G—Default and Payment by BIA

§ 103.35 What must the lender do if the borrower defaults on the loan?

(a) The lender must send written notice of the default to the borrower, and otherwise meet the standard of care established for the lender in this part. The lender's notice to the borrower should be sent as soon as possible after the default, but in any event before the lender's notice to BIA under paragraph (b) of this section. For purposes of the Program, ''default'' will mean a default as defined in this part.

(b) The lender also must send written notice of the default to BIA by certified mail (return receipt requested), or by a nationally-recognized overnight delivery service (signature of recipient required) within 60 calendar days of the default, unless the default is fully cured before that deadline. This notice is required even if the lender grants the borrower a forbearance under § 103.36(a). One purpose of the notice is to give BIA the opportunity to intervene and seek assistance for the borrower, even though BIA has no duty, either to the lender or the borrower, to do so. Another purpose of the notice is to permit BIA to plan for a possible loss claim from the lender, under § 103.36(d). The lender's notice must clearly indicate:

(1) The identity of the borrower;

(2) The applicable Program guaranty certificate or insurance agreement number;

(3) The date and nature of all bases for default;

(4) If a monetary default, the amount of past due principal and interest, the date through which interest has been calculated, and the amount of any late fees, precautionary advances, or other amounts the lender claims;

(5) The nature and outcome of any correspondence or other contacts with the borrower concerning the default; and

(6) The precise nature of any action the borrower could take to cure the default.

§ 103.36 What options and remedies does the lender have if the borrower defaults on the loan?

(a) The lender may grant the borrower a temporary forbearance, even beyond any default cure periods specified in the loan documents, if doing so is likely to result in the borrower curing the default. However, BIA must approve in writing any forbearance or other agreement that:

(1) Permanently modifies the terms of the loan in any manner indicated by § 103.34(a);

(2) Would allow the borrower's default to extend beyond the deadline established in § 103.36(d) for the lender to elect a remedy; or

(3) Is not likely to result in the borrower curing the default.

(b) The lender may make precautionary advances on the borrower's behalf during the default, if doing so is reasonably necessary to ensure that loan recovery prospects do not significantly deteriorate. Items for which the lender may make precautionary advances include, for example:

(1) Hazard, liability, or key man life insurance premiums;

(2) Security measures to safeguard abandoned business assets;

(3) Real or personal property taxes;

(4) Corrective actions required by court or administrative orders; or

(5) Essential maintenance.

(c) BIA will guaranty or insure the amount of precautionary advances from the date of each advance to the same extent as other amounts due under the loan, if:

(1) The borrower has demonstrated its inability or unwillingness to make the payment or perform the duty that jeopardizes loan recovery, including by undue delay in making the payment or performing the duty;

(2) The total expense of all precautionary advances by the lender does not at the time of the advance exceed 10 percent of the outstanding principal balance of the loan;

(3) Where loan document provisions do not require the borrower to repay precautionary advances (however termed) when made by the lender, or where the total expense of all precautionary advances by the lender will exceed 10 percent of the outstanding principal balance of the loan when made, the lender secures BIA's prior written approval; and

(4) The lender properly claims and documents all precautionary advances, if and when it submits a claim for loss under § 103.37.

(d) If the default remains uncured, the lender must send BIA a written notice by certified mail (return receipt requested), or by a nationally-recognized overnight delivery service (signature of recipient required) within 90 calendar days of the default to select one of the following remedies:

(1) In the case of a guaranteed loan, the lender may submit a claim to BIA for its loss;

(2) In the case of either a guaranteed or insured loan, the lender may liquidate all collateral securing the loan, and upon completion, if it has a residual loss on the loan, it may submit a claim to BIA for that loss; or

(3) The lender may negotiate a loan modification agreement with the borrower to permanently change the terms of the loan in a manner that will cure the default. If the lender chooses this remedy, it may take no longer than 45 calendar days from the date BIA receives the notice of remedy selection to finalize a loan modification agreement and secure BIA's written approval of it, unless BIA specifically extends this deadline in writing. However, the lender may at any time before the expiration of the 45-day period (or any extension thereof) change its choice of remedy by sending BIA a notice otherwise complying with § 103.36(d)(1) or (2). If the lender fails to send BIA a notice changing its choice of remedy and does not finalize an approved loan modification agreement within the 45-day period (or any extension thereof), the lender's only permissible remedy under the Program will be to pursue the procedure specified in § 103.36(d)(2).

(e) Failure by the lender to provide BIA with notice of the lender's election of remedy within 90 calendar days of the default, as indicated in § 103.36(d), will invalidate BIA's loan guaranty certificate or insurance coverage for that particular loan, absent an express

waiver of this provision by BIA. BIA may preserve the validity of a loan guaranty certificate or insurance coverage through waiver of this provision only when BIA determines, in its discretion, that:

(1) The lender consistently has acted in good faith, and

(2) The lender's failure to provide timely notice either:

(i) Has not caused any actual or potential prejudice to BIA; or

(ii) Was the result of the lender relying upon specific written advice from a BIA official.

§ 103.37 What must the lender do to collect payment under its loan guaranty certificate or loan insurance coverage?

(a) For guaranteed loans, the lender must submit a claim for its loss on a form approved by BIA.

(1) If the lender makes an immediate claim under § 103.36(d)(1), it must send BIA the claim for loss within 90 calendar days of the default by certified mail (return receipt requested), or by a nationally-recognized overnight delivery service (signature of recipient required). The lender's claim for loss may include interest that has accrued on the outstanding principal amount of the loan only through the date it submits the claim.

(2) If the lender elects first to liquidate the collateral securing the loan under § 103.36(d)(2), and has a residual loss after doing so, it must send BIA the claim for loss within 30 calendar days of completing all liquidation efforts. The lender must perform collateral liquidation as expeditiously and thoroughly as is reasonably possible, within the standards established by this part. The lender's claim for loss may include interest that has accrued on the outstanding principal amount of the loan only through the earlier of:

(i) The date it submits the claim;

(ii) The date the lender gets a judgment of foreclosure or sale (or the non-judicial equivalent) on the principal collateral securing the loan; or

(iii) One hundred eighty calendar days after the date of the default.

(b) For insured loans, after liquidating all loan collateral, the lender must submit a claim for its loss (if any) on a form approved by BIA. The lender must send BIA the claim for loss by certified mail (return receipt requested), or by a nationally-recognized overnight delivery service (signature of recipient required) within 30 calendar days of completing all liquidation efforts. The lender must perform collateral liquidation as expeditiously and thoroughly as is reasonably possible, within the standards established by this part. The lender's claim for loss may include interest that has accrued on the outstanding principal amount of the loan through the earlier of:

(1) The date it submits the claim;

(2) The date the lender gets a judgment of foreclosure or sale (or the non-judicial equivalent) on the principal collateral securing the loan; or

(3) One hundred eighty calendar days after the date of the default.

(c) Whenever the lender liquidates loan collateral under § 103.36(d)(2), it must vigorously pursue all reasonable methods of collection concerning the loan collateral before submitting a claim for its residual loss (if any) to BIA. Without limiting the generality of the preceding sentence, the lender must:

(1) Foreclose, either judicially or non-judicially, all rights of redemption the borrower or any co-maker or guarantor of the loan (other than BIA) may have in collateral under any mortgage securing the loan;

(2) Gather and dispose of all personal property pledged as collateral under the loan, in accordance with applicable law;

(3) Exercise all set-off rights the lender may have under contract or applicable law;

(4) Make demand for payment on the borrower, all co-makers, and all guarantors of the loan (other than BIA); and

(5) Participate fully in all bankruptcy proceedings that may arise involving the borrower and any co-maker or guarantor of the loan. Full participation might include, for example, filing a proof of claim in the case, attending creditors' meetings, and seeking a court order releasing the automatic stay of collection efforts so that the lender can liquidate affected loan collateral.

(d) BIA may require further information, including without limitation copies of any documents the lender is to maintain under § 103.32 and all documentation of liquidation efforts, to help BIA evaluate the lender's claim for loss.

(e) BIA will pay the lender the guaranteed or insured portion of the lender's claim for loss, to the extent the claim is based upon reasonably sufficient evidence of the loss and compliance with the requirements of this part. BIA will render a decision on a claim for loss within 90 days of receiving all information it requires to properly evaluate the loss.

§ 103.38 Is there anything else for BIA or the lender to do after BIA makes payment?

When BIA pays the lender on its claim for loss, the lender must sign and deliver to BIA an assignment of rights to its loan agreement with the borrower, in a document acceptable to BIA. Immediately upon payment, BIA is subrogated to all rights of the lender under the loan agreement with the borrower, and must pursue collection efforts against the borrower and any co-maker and guarantor, as required by law.

§ 103.39 When will BIA refuse to pay all or part of a lender's claim?

BIA may deny all or part of a lender's claim for loss when:

(a) The loan is not guaranteed or insured as indicated in § 103.18;

(b) The guarantee or insurance coverage has become invalid under §§ 103.28, 103.29, or 103.36(e);

(c) The lender has not met the standard of care indicated in § 103.30;

(d) The lender presents a claim for a residual loss after attempting to liquidate loan collateral, and:

(1) The lender has not made a reasonable effort to liquidate all security for the loan;

(2) The lender has taken an unreasonable amount of time to complete its liquidation efforts, the probable consequence of which has been to reduce overall prospects of loss recovery; or

(3) The lender's loss claim is inflated by unreasonable liquidation expenses or unjustifiable deductions from collateral liquidation proceeds applied to the loan balance; or

(e) The lender has otherwise failed in any material respect to follow the requirements of this part, and BIA can reasonably attribute some or all of the lender's loss to that failure.

§ 103.40 Will BIA make exceptions to its criteria for denying payment?

(a) BIA will not reduce or deny payment solely on the basis of §§ 103.39(c) or (e) when the lender making the claim for loss:

(1) Is a person to whom a previous lender transferred the loan under §§ 103.28 or 103.29 before maturity for value;

(2) Notified BIA of its acquisition of the loan interest as required by §§ 103.28 or 103.29;

(3) Had no involvement in or knowledge of the actions or circumstances that would have allowed BIA to reduce or deny payment to a previous lender; and

(4) Has not itself violated the standards set forth in §§ 103.39(c) or (e).

(b) If BIA makes payment to a lender under this section, it may seek reimbursement from the previous lender or lenders who contributed to the loss by violating §§ 103.39(c) or (e).

§ 103.41 What happens if a lender violates provisions of this part?

In addition to reducing or eliminating payment on a specific claim for loss, BIA may either temporarily suspend, or permanently bar, a lender from making or acquiring loans under the Program if the lender repeatedly fails to abide by the requirements of this part, or if the lender significantly violates the requirements of this part on any single occasion.

§ 103.42 How long must a lender comply with Program requirements?

(a) A lender must comply in general with Program requirements during:

(1) The effective period of its loan guaranty agreement or loan insurance agreement; and

(2) Whatever additional period is necessary to resolve any outstanding loan guaranty or insurance claims or coverage the lender may have.

(b) Except as otherwise required by law, a lender must maintain records with respect to a particular loan for 6 years after either:

(1) The loan is repaid in full; or

(2) The lender accepts payment from BIA for a loss on the loan, pursuant to a guaranty certificate or an insurance agreement.

(c) At any time 2 years or more following one of the events specified in paragraphs (b)(1) or (2) of this section, a lender may convert its records for corresponding loans to any electronic format that is readily retrievable and that provides an accurate, detailed image of the original records. Upon converting its records in this manner, the lender may dispose of its original loan records.

(d) This section does not restrict any claims BIA may have against the lender or any other party arising from the lender's participation in the Program.

§ 103.43 What must the lender do after repayment in full?

The lender must completely and promptly release of record all remaining collateral for a guaranteed or insured loan after the loan has been paid in full. The release must be at the lender's sole cost. In addition, if the loan is prepaid the lender must notify BIA in accordance with § 103.33(f).

Subpart H—Definitions and Miscellaneous Provisions

§ 103.44 What certain terms mean in this part.

BIA means the Bureau of Indian Affairs within the United States Department of the Interior.

Default means:

(1) The borrower's failure to make a scheduled loan payment when it is due;

(2) The borrower's failure to meet a material condition of the loan agreement;

(3) The borrower's failure to comply with any other condition, covenant or obligation under the terms of the loan agreement within applicable grace or cure periods;

(4) The borrower's failure to remain at least 51 percent Indian owned, as provided in § 103.25(b);

(5) The filing of a voluntary or involuntary petition in bankruptcy listing the borrower as debtor;

(6) The imposition of a Federal, State, local, or tribal government lien on any assets of the borrower or assets otherwise used as collateral for the loan, except real property tax liens imposed by law to secure payments that are not yet due;

(7) Any default defined in the loan agreement, to the extent the definition is not inconsistent with this part.

Equity means the value, after deducting all debt, of the borrower's tangible assets in the business being financed, on which a lender can perfect a first lien security interest. It can include cash, securities, or other cash equivalent instruments, but cannot include the value of contractual options, the right to pay below market rental rates, or similar rights if those rights:

(1) Are unassignable; or

(2) Can expire before maturity of the loan.

Indian means a person who is a member of a tribe as defined in this part.

Loan agreement means the collective terms and conditions under which the lender extends a loan to a borrower, as reflected by the documents that evidence the loan.

Mortgage means a consensual lien on real or personal property in favor of the lender, given by the borrower or a co-maker or guarantor of the loan (other than BIA), to secure loan repayment. The term ''mortgage'' includes ''deed of trust.''

NEPA means the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*

Person means any individual or distinct legal entity.

Program means the BIA's Loan Guaranty, Insurance, and Interest Subsidy Program, established under 25 U.S.C. 1481 *et seq.*, 25 U.S.C. 1511 *et seq.*, and this part 103.

Reservation means any land that is an Indian reservation, California rancheria, public domain Indian allotment, pueblo, Indian colony, former Indian reservation in Oklahoma, or land held by an Alaska Native corporation under the provisions of the Alaska Native Claims Settlement Act (85 Stat. 688), as amended.

Secretary means the Secretary of the United States Department of the Interior, or his authorized representative.

Tribe means any Indian or Alaska Native tribe, band, nation, pueblo, rancheria, village, community or corporation that the Secretary acknowledges to exist as an Indian tribe, and that is eligible for services from BIA.

§ 103.45 Information collection.

(a) The information collection requirements of §§ 103.11, 103.12, 103.13, 103.14, 103.17, 103.21, 103.23, 103.26, 103.32, 103.33, 103.34, 103.35, 103.36, 103.37, and 103.38 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*, and assigned approval number 1076–0020. The information will be used to approve and make payments on Federal loan guarantees, insurance agreements, and interest subsidy awards. Response is required to obtain a benefit.

(b) The burden on the public to report this information is estimated to average from 15 minutes to 2 hours per response, including the time for reviewing instructions, gathering and maintaining data, and completing and reviewing the information collection. Direct comments regarding the burden estimate or any other aspect of this information collection to the Information Collection Control Officer, Bureau of Indian Affairs, MS 4613, 1849 C Street, NW., Washington, DC 20240.

Dated: December 28, 2000.

Kevin Gover,

Assistant Secretary—Indian Affairs.

[FR Doc. 01–1249 Filed 1–16–01; 8:45 am]

BILLING CODE 4310–02–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 155

[USCG–1998–3417]

RIN 2115–AF60

Salvage and Marine Firefighting Requirements; Vessel Response Plans for Oil

AGENCY: Coast Guard, DOT.

ACTION: Final rule; partial suspension of regulation.

SUMMARY: Current vessel response plan regulations require the owners or operators of vessels carrying Groups I

through V petroleum oil as a primary cargo to identify in their response plans a salvage company with expertise and equipment, and a company with firefighting capability that can be deployed to a port nearest to the vessel's operating area within 24 hours of notification (Groups I–IV) or a discovery of a discharge (Group V). On February 12, 1998, a notice of suspension was published in the **Federal Register**, suspending the 24-hour requirement scheduled to become effective on February 18, 1998, until February 12, 2001 (63 FR 7069). The Coast Guard has decided to extend this suspension period for another 3 years to allow us to complete the rulemaking that proposes to revise the salvage and marine firefighting requirements. The extension is necessary because the potential impact on small businesses from this new rulemaking requires us to prepare an initial regulatory flexibility analysis under the Small Business Regulatory Enforcement Fairness Act of 1996. This was not determined until a draft regulatory assessment was complete in November 2000. We expect to complete the analysis and publish a notice of proposed rulemaking this year. The extension of the suspension period will continue to relieve the affected industry from complying with the existing 24-hour requirements until the project is complete, and amendments to the salvage and marine firefighting requirements become final.

DATES: This extension is effective as of February 12, 2001. Termination of the suspension will be on February 12, 2004.

ADDRESSES: You may submit comments by one of the following methods:

(1) By mail to the Docket Management Facility, (USCG–1998–3417), U.S. Department of Transportation, room PL–401, 400 Seventh Street SW., Washington, DC 20590–0001.

(2) By hand delivery to room PL–401 on the Plaza level of the Nassif Building, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

(3) By fax to the Docket Management Facility at 202–493–2251.

(4) Electronically through the Web site for the Docket Management System at *http://dms.dot.gov.*

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

FOR FURTHER INFORMATION CONTACT: For questions on this final rule partial suspension of regulations, call Lieutenant Douglas Lincoln, Office of Response, Response Operations Division, Coast Guard Headquarters, telephone 202–267–0448, or via e-mail: *dlincoln@comdt.uscg.mil.* For questions on viewing, or submitting material to, the docket, call Dorothy Beard, Chief, Dockets, Department of Transportation, telephone 202–366–9329.

SUPPLEMENTARY INFORMATION:

Background and Regulatory History

Requirements for salvage and marine firefighting resources in vessel response plans have been in place since February 5, 1993 (58 FR 7424). The existing requirements are general. The Coast Guard did not originally develop specific requirements because each salvage and marine firefighting response for an individual vessel is unique, due to the vessel's size, construction, operating area and other variables. The Coast Guard's intent was to rely on the planholder to prudently identify contractor resources to meet their needs. The Coast Guard anticipated that the significant benefits of a quick and effective salvage and marine firefighting response would be sufficient incentive for industry to develop salvage and marine firefighting capability parallel to the development of oil spill removal organizations.

Early in 1997, it became apparent that there was disagreement among planholders, salvage and marine firefighting contractors, maritime associations, public agencies, and other stakeholders as to what constituted adequate salvage and marine firefighting resources. There was also concern as to whether these resources could respond to the port nearest to the vessel's operating area within 24 hours.

On June 24, 1997, a notice of meeting was published in the **Federal Register** (62 FR 34105) announcing a workshop to solicit comments from the public on potential changes to the salvage and marine firefighting requirements currently found in 33 CFR part 155.

A public workshop was held on August 5, 1997, to address issues related to salvage and marine firefighting response capabilities, including the 24-hour response time requirement, which was then scheduled to become effective on February 18, 1998. The participants uniformly identified the following three issues that they felt the Coast Guard needed to address:

(1) Defining the salvage and marine firefighting capability that is necessary in the plans.

(2) Establishing how quickly these resources must be on-scene.

(3) Determining what constitutes an adequate salvage and marine firefighting company.

Reason for Suspension

On February 12, 1998, a notice of suspension was published in the **Federal Register**, suspending the 24-hour requirement scheduled to become effective on February 18, 1998, until February 12, 2001 (63 FR 7069) so that the Coast Guard could address the issues identified at the public workshop through a rulemaking that would revise the existing salvage and marine firefighting requirements. The Coast Guard has decided to extend the suspension period for another 3 years. The extension is necessary because the potential impact on small businesses from this new rulemaking requires us to prepare an initial regulatory flexibility analysis under the Small Business Regulatory Enforcement Fairness Act of 1996. This was not determined until a draft regulatory assessment was complete in November 2000. We expect to complete the analysis and publish a notice of proposed rulemaking this year. The extension of the suspension period will continue to relieve the affected industry from complying with the existing 24-hour requirements until the project is complete, and amendments to the salvage and marine firefighting requirements become final.

Regulatory Evaluation

Although the final rule published in 1996 was a significant regulatory action under section 3(f) of Executive Order 12866, the Office of Management and Budget (OMB) does not consider this extension as a significant action. As a result, it does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Transportation (DOT)(44 FR 11040, February 26, 1979).

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Coast Guard considered whether this extension will have a significant economic impact on a substantial number of small entities. ''Small entities'' include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their

fields, and governmental jurisdictions with populations of less than 50,000.

This action will not have a significant economic impact on a substantial number of small entities because the original requirements did not have a significant effect on a substantial number of small entities. The extension on the suspension does not change those original requirements. Any future regulatory action on this issue will address any economic impacts, including impacts on small entities.

Therefore, the Coast Guard certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that this extension to a suspension of a final rule will not have a significant economic impact on a substantial number of small entities.

Assistance for Small Entities

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

Collection of Information

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

Federalism

We have analyzed this action under E.O. 13132 and have determined that it does not have implications for federalism under that Order. Because this action extends a suspension of a final rule, it does not preempt any state action.

Unfunded Mandates Reform Act

This action will not result in an unfunded mandate under the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538).

Taking of Private Property

This action will not effect a taking of private property or otherwise have taking implications under E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This action meets applicable standards in sections 3(a) and 3(b)(2) of E.O. 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this action under E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not concern an environmental risk to health or risk to safety that may disproportionately affect children.

Environment

We considered the environmental impact of this proposed rule and concluded that preparation of an Environmental Impact Statement is not necessary. An Environmental Assessment and a Finding of No Significant Impact are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 155

Hazardous substances, Incorporation by reference, Oil pollution, Reporting and recordkeeping requirements.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 155 as follows:

PART 155—OIL OR HAZARDOUS MATERIAL POLLUTION PREVENTION REGULATIONS FOR VESSELS

1. The authority citation for part 155 continues to read as follows:

Authority: 33 U.S.C. 1231, 1321(j); 46 U.S.C. 3715, 3719; sec. 2, E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; 49 CFR 1.46, 1.46 (iii).

Sections 155.110–155.130, 155.350–155.400, 155.430, 155.440, 155.470, 155.1030(j) and (k), and 155.1065(g) also issued under 33 U.S.C. 1903(b); and §§ 155.1110–155.1150 also issued 33 U.S.C. 2735.

Note: Additional requirements for vessels carrying oil or hazardous materials appear in 46 CFR parts 30 through 36, 150, 151, and 153.

§ 155.1050 [Amended]

2. In § 155.1050, paragraph (k)(3) is suspended until February 12, 2004.

§ 155.1052 [Amended]

3. In § 155.1052, the last sentence in paragraph (f) is suspended until February 12, 2004.

Dated: January 10, 2001.

R.C. North,

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

[FR Doc. 01–1205 Filed 1–11–01; 2:28 pm]

BILLING CODE 4910–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICE

45 CFR Part 46

RIN 0925–AA14

Protection of Human Research Subjects

AGENCY: Department of Health and Human Services (DHHS).

ACTION: Final rule.

SUMMARY: The Department of Health and Human Services (DHHS) is amending its human subjects protection regulations. These regulations provide additional protections for pregnant women and human fetuses involved in research and pertains to human in vitro fertilization. The rule continues the special protections for pregnant women and human fetuses that have existed since 1975. The rule enhances the opportunity for participation of pregnant women in research by promoting a policy of presumed inclusion, by permitting the pregnant woman to be the sole decision maker with regard to her participation in research, and by exempting from the regulations six categories of research. The rule also provides a mechanism for the Secretary of HHS to conduct or fund research not otherwise approvable after consultation with an expert panel and public review and comment.

DATES: Effective date: March 19, 2001.

FOR FURTHER INFORMATION CONTACT: Susan Sherman, JD, Office for Human Research Protections (OHRP), 6100 Executive Blvd, Suite 3B01, Rockville, MD 20892–7507. Telephone 301–496–7005. Email: *ShermanS@od.nih.gov*.

SUPPLEMENTARY INFORMATION:

Background

The Department of Health and Human Services (DHHS) regulates research involving human subjects conducted or supported by the agency through regulations codified at Title 45, part 46, of the Code of Federal Regulations. Subpart B of 45 CFR part 46, promulgated on August 8, 1975, pertains to research involving fetuses, pregnant women, and human in vitro fertilization. The 1975 regulations were jointly published in the **Federal Register** with the report and recommendations of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, Research on the Fetus (40 FR 33526). Subsequent changes were incorporated January 11, 1978 (43 FR 1758), November 3, 1978 (43 FR 51559), and June 1, 1994 (59 FR

28276). This preamble refers to these rules as the ''1975 regulations.''

Recent guidelines issued by components of DHHS have addressed the participation of women in research as follows:

- Food and Drug Administration 1993 Guideline for the Study and Evaluation of Gender Differences in the Clinical Evaluation of Drugs (58 FR 39406);
- National Institutes of Health 1994 Guidelines on the Inclusion of Women and Minorities as Subjects in Clinical Research (59 FR 14508); and
- Centers for Disease Control and Prevention 1995 Policy on the Inclusion of Women and Racial and Ethnic Minorities in Externally Awarded Research (60 FR 47947), and February 16, 1996 policy Inclusion of Women and Racial and Ethnic Minorities in Research.

These policies are all designed, in part, to improve the opportunity for women to be included as subjects in research.

A Committee on the Ethical and Legal Issues Relating to the Inclusion of Women in Clinical Studies of the Institute of Medicine issued a report in 1994 on Women and Health Research that included the recommendation that DHHS revise subpart B in accordance with the Committee's other recommendations. The Committee believed that women and men should have the opportunity to participate equally in the benefits and burdens of research, and many of the Committee's recommendations were aimed at enhancing the participation of women, including pregnant women, in clinical research.

The National Task Force on AIDS Drug Development and the Presidential Advisory Council on HIV/AIDS subsequently recommended that the lack of paternal consent should not disqualify a pregnant woman from participation in a federally funded clinical trial.

These guidelines and recommendations, and the lack of a formal review of subpart B for over two decades, led DHHS to determine that a substantive examination of subpart B was appropriate.

Based on this review the Department proposed to amend subpart B in a Notice of Proposed Rulemaking (NPRM) published on May 20, 1998 (63 FR 27794). The Department proposed that a policy of presumed opportunity for inclusion of pregnant women in research replace one of presumed exclusion. The Department also concurred with the recommendations of the National Task Force on AIDS Drug Development, the Presidential Advisory Council on HIV/AIDS, and the IOM Committee regarding paternal consent and proposed to modify the consent requirement to remove potential barriers to research that might provide a medical benefit to a fetus.

The exemptions in 45 CFR part 46, Subpart A, Basic DHHS Policy for Protection of Human Research Subjects, were proposed to apply to subpart B. These exemptions of certain categories of research (*e.g.*, survey research without subject identifiers) have applied since 1981 to research involving nonpregnant women.

In light of the 1993 legislative nullification of the regulatory requirement for ethical advisory board review of research involving in vitro fertilization of human ova (Public Law 103–43), the Department proposed a mechanism for the Secretary to modify or waive certain requirements of Subpart B, following consultation with experts and public input, in place of the provision that the Department have a standing ethical advisory board. Nonsubstantive technical, formatting, and clarifying changes were also proposed.

Discussion of Comments

During the public comment period that ended August 18, 1998, the Department received 13 public comments on the proposed rule from interested parties. The comments are summarized as follows:

General Comments

One commenter endorsed the NPRM in its entirety. One commenter suggested that there be three classes of research that mirror the categories in subpart D of part 46, Additional DHHS Protections for Children Involved as Subjects in Research. Those categories are: no greater than minimal risk, greater than minimal risk but presenting the prospect of direct benefit, and greater than minimal risk and no prospect of direct benefit. The Department finds that modification of the format of subpart B to parallel the categories of research in subpart D would not enhance the protection of women or fetuses and would likely cause confusion. Subpart B, since its inception in 1975 and in this final rule, requires that the risk to the fetus be the least possible risk for achieving the research objectives and any risk which is greater than minimal must hold out the prospect of direct benefit for the fetus or the woman.

One commenter objected to distinctions between ''therapeutic'' and ''nontherapeutic'' research as illogical, because, by definition, the purpose of research is always to contribute to generalizable knowledge. The commenter noted that this distinction confuses therapy with research. The Department concurs with this comment and has modified the final rule to eliminate language implying that the purpose of research is ever therapeutic. The final rule uses the phrases ''* * * interventions or procedures that hold out the prospect of direct benefit * * *'' and ''* * * research [that] holds out the prospect of enhancing the probability of survival * * *'' to describe research from which a subject may benefit (§ 46.204(b) and § 46.205(b)(1)(i)).

Applicability (Section 46.201)

The Department proposed that the exemptions at 45 CFR 46.101(b)(1)–(6) of subpart A apply to subpart B. These exemptions of six categories of research were promulgated in 1981, subsequent to the last substantive revision of subpart B, and have applied to research with nonpregnant subjects since that time. Two commenters endorsed the incorporation of the exemptions into subpart B. One commenter noted that pregnancy should not preclude women from participating in these types of research; one stated that pregnant women are autonomous decision makers and should not be treated as vulnerable or impaired because of their condition. Consistent with these comments, the exemptions are retained in the final rule (§ 46.201(b)).

The Department has retained in the final rule language specifying that the requirements of subpart B are in addition to those imposed under the other subparts of 45 CFR part 46, for purposes of clarity (§ 46.201(d)).

Definitions (Section 46.202)

The proposed definitions were substantively the same as those in the 1975 regulations.

The Department proposed the following simplified definition of ''fetus:'' ''fetus means the product of conception during pregnancy until a determination is made after delivery that it is viable.'' One commenter noted that ''product of conception'' is generally understood to mean the associated placenta as well. The Department intends that research with the placenta prior to delivery be governed by 45 CFR 46.204, Research involving pregnant women or fetuses prior to delivery. For purposes of clarity, the definition of ''fetus'' in the final rule utilizes the phrase ''from implantation,'' which is the same phrase used in the definition of ''pregnancy.''

Since 1975, subpart B has included the fetus *ex utero* until such time as

viability of the fetus is determined. The Department proposed to replace the phrase ''ex utero'' with ''after delivery.'' No comments were received on that proposal and the final rule retains the proposed language.

The Department also proposed the term ''newborn,'' equating newborn with ''fetus after delivery,'' because some persons may prefer one term to the other depending on the length of the gestation period. Two commenters found the introduction of this term confusing and inconsistent because after delivery there exists an entity that could be called either fetus or newborn. The Department concurs with these comments and has deleted the term ''newborn'' from the final rule.

One commenter noted that newborns can be of any species and believed that the term ''child'' should be used in place of ''newborn.'' Another commenter stated that a viable fetus is generally understood to mean a fetus after the point of viability, generally at 5–6 months gestation. In response to these comments the Department has defined ''viable'' in the final rule and emphasized that, as it pertains to the fetus, ''viable'' means a fetus after delivery and the regulations at 45 CFR part 46, subpart D, are applicable (§ 46.202(h)).

Research Involving Pregnant Women or Fetuses Prior to Delivery (Section 46.204)

For purposes of clarity, the scope of § 46.204 has been narrowed in the final rule to research involving pregnant women or fetuses prior to delivery, and those provisions of proposed § 46.204 that are applicable to research involving fetuses after delivery have been repeated in section § 46.205 (see § 46.205(a)(1)–(6) and (b)(1)(i)).

The Department proposed to require, as a prerequisite to research on pregnant women or fetuses, preclinical and clinical studies, including studies on nonpregnant women, that provide data for assessing potential risks to pregnant women and fetuses. One commenter endorsed the increased specificity and noted that it would ensure that reproductive toxicity data are available. Another commenter found that to require pregnant women to wait until studies have been conducted on nonpregnant women is to neglect them as a population. The Department notes that preclinical and clinical studies are required only when scientifically appropriate. The final rule retains the proposed provision for preclinical and clinical studies (§ 46.204(a) and § 46.205(a)(1)).

To strengthen protections for the pregnant woman and fetus, the Department proposed a new informed consent provision: that the woman be fully informed regarding the reasonably foreseeable impact of the research on the fetus. No commenters objected to this provision. The final rule, at § 46.204(e), retains this requirement with the clarification that it also applies to the legally authorized representative. This provision is repeated in § 46.205(a)(2), so that the person whose informed consent is a prerequisite to participation in the research must be fully informed of the reasonably foreseeable impact of the research on the fetus.

One commenter stated that informed consent should highlight known or suspected risks and should incorporate unknown harms. The Department notes that provisions of subpart A at 45 CFR part 46.116(a)(2) and § 46.116(b)(1), respectively, also applicable to subpart B, address these concerns. The commenter further noted that researchers should work to ensure that the woman or her legally authorized representative understands the information that has been disclosed, that checks for understanding should be tailored according to the situation of particular women or representatives, and women should be encouraged to discuss research participation with their obstetrician before making a final decision about enrollment. The Department notes that ensuring that information is understood and checks for understanding tailored to particular situations are not precluded by the regulations, nor are they unique to research with pregnant women. Subpart A affords IRBs the opportunity and the authority to ensure the adequacy of informed consent and protections by imposing additional requirements or monitoring the research or the consent process. Similarly, with regard to the suggestion concerning encouragement of discussion with an obstetrician, the Department notes that the rules do not preclude encouragement to discuss participation with obstetricians or any other individuals and that subpart A requires that consent be sought only under circumstances that provide sufficient opportunity to consider participation (45 CFR 46.116).

The Department proposed to modify the consent requirements in the 1975 regulations by permitting research with pregnant women or fetuses prior to delivery based on the consent of the woman or her legally authorized representative. The Department recognizes and encourages paternal involvement in decisions affecting the pregnant woman and fetus prior to delivery. Nonetheless, in some cases the father's consent has been a barrier to participation in research of the woman or fetus prior to delivery. The recommendations of the National Task Force on AIDS Drug Development, the Presidential Advisory Council on HIV/AIDS, and the IOM Committee were unanimous that the consent of the father should not be a condition of the participation of a pregnant woman in research.

Ten commenters endorsed or applauded the proposal to modify the parental consent requirement, many describing specific research trials in which pregnant women were unable to participate in potentially beneficial research because of the requirement that the father's consent be secured. One commenter believed the consent of the father should continue to be required and that waivers from the Secretary should be sought if the father's consent is difficult to obtain. The Department concludes that the decision making authority for research participation of the pregnant woman or fetus prior to delivery should rest with the pregnant woman and has retained this provision in the final rule (§ 46.204(d)).

One commenter indicated that the rules are unclear whether a researcher may inform a pregnant woman of nonresearch alternatives. The Department notes that subpart B does not address alternatives to research, but that subpart A, at 45 CFR part 46.116(a)(4), also applicable to subpart B, requires disclosure of appropriate alternative procedures or courses of treatment that might be advantageous to the subject.

The Department has also decided to continue the use of the word ''terminate'' in sections 204 and 205 instead of utilizing the proposed change to the word ''abort.'' The Department believes that the original language is clearer.

Research Involving Fetuses After Delivery (Section 46.205)

As indicated above, those provisions proposed in § 46.204 that are applicable to research involving fetuses after delivery are reiterated in the final rule under § 46.205(a) and (b)(1)(i).

One commenter requested that the Department explain why this section is separate from subpart D. As noted above, the 1975 regulations extended the definition of fetus to include the fetus *ex utero* until such time as a fetus is determined to be viable. The final rule continues this extension because nonviable fetuses, and fetuses whose viability has not yet been determined

after delivery, require protection and are not covered by subpart D. Accordingly, subpart B permits research with fetuses of uncertain viability only if the research holds out the prospect of enhancing the probability of survival or there will be no risk resulting from the research and the purpose is the development of important biomedical knowledge that cannot be obtained by other means (§ 46.205(b)). Research with nonviable fetuses after delivery, which must be considered dying subjects, must meet the five criteria at § 46.205(c)(1)–(5), also intended to provide protection for such subjects.

Section 498(a), ''Fetal Research,'' of the Public Health Service Act, 42 U.S.C. 289g(a), places statutory restrictions on research involving nonviable living fetuses ex utero or living fetuses ex utero for whom viability has not been ascertained. The statute permits research under either of the following two conditions: ''the research * * * (1) may enhance the well-being or meet the health needs of the fetus or enhance the probability of its survival to viability; or (2) will pose no added risk of suffering, injury, or death to the fetus and the purpose * * * is the development of important biomedical knowledge that cannot be obtained by other means.'' This rule exceeds those requirements for fetuses of uncertain viability by permitting research only if it either (1) holds out the prospect of enhancing the probability of survival of the particular fetus to the point of viability, or (2) poses no risk to the fetus and the purpose is the development of important biological knowledge that cannot be obtained by other means. This rule also exceeds the statutory requirements for nonviable living fetuses ex utero by specifying that vital functions of the nonviable fetus may not be artificially maintained and the research may not terminate the heartbeat or respiration of the fetus.

The consent requirements for research involving fetuses of uncertain viability and nonviable fetuses at § 46.205(b)(2) and § 46.205(c)(5), respectively, also ensure protection of the fetus. Research involving fetuses of uncertain viability may proceed with the consent of either parent (or under certain circumstances the consent of a legally authorized representative), but the research must hold the prospect of enhancing the probability of survival of the fetus to the point of viability or pose no risk to the fetus. The Department recognizes that, in cases of uncertain viability, a decision regarding research participation must often be made very quickly, especially where the research presents the prospect of enhancing the probability of survival of the fetus. Thus, the consent of only one parent (or legally authorized representative) is required. However, if both parents are readily available at the time when a decision is needed, reasonable efforts should be made to provide all relevant information to both parents. The Department believes that research involving the nonviable fetus should only proceed with the consent of both parents (unless one is unavailable, incompetent, or temporarily incapacitated), and the consent of a representative is expressly prohibited. The individual(s) providing consent under § 46.205(b)(2) or (c)(5) must be fully informed regarding the reasonably foreseeable impact of the research on the fetus (§ 46.205(a)(2)).

Research after delivery, involving fetuses determined to be viable, is governed by Subpart D (§ 46.205(d)).

Research Not Otherwise Approvable That Presents Certain Opportunities section 46.207)

The Department proposed to replace the 1975 regulatory authority of the Secretary to modify or waive specific requirements with the approval of an ethical advisory board, with the authority to modify or waive requirements after consultation with appropriate experts and opportunity for public review and comment. The proposal would have required the Secretary to consider whether the risks to the subjects were so outweighed by the sum of the benefits to the subjects and the importance of the knowledge to be gained as to warrant modification or waiver. One commenter noted that the proposed waiver provision did not require IRB review, as does the similar section in subpart D (45 CFR 46.407). The commenter further noted that the proposed wording appeared to require that the overarching consideration be ''beneficence'' based, and that adopting the language in 45 CFR 46.407 would encompass all of the ethical principles in the Belmont Report and ensure consistency between subparts B and D. The Department concurs with these comments and the final rule, at § 46.207, is consistent with 45 CFR 46.407, with conforming and clarifying changes.

Under this provision the waiver authority is limited to the requirements of § 46.204 applicable to pregnant women and fetuses prior to delivery. The other requirements of subpart B, including those in § 46.205, cannot be waived. Even though the Secretary has the authority to waive the requirements of § 46.205 that exceed the statutory requirements of section 498(a), ''Fetal Research,'' of the Public Health Service Act, 42 U.S.C. 289g(a) (see discussion of § 46.205 above), it was determined that the additional protections afforded by § 46.205 are essential and should not be waived under any circumstances.

Conclusion

After considering the comments, the Department is adopting the rule as proposed except for the changes noted above and editorial changes to clarify the intent of the regulation. Distinctions between therapeutic and nontherapeutic research are eliminated. The term ''newborn'' is deleted in the final rule for purposes of clarity, and the definition of ''viable'' as it pertains to the fetus is clarified. Section 46.207, regarding approval by the Secretary of research that would not otherwise be approvable under § 46.204, is modified consistent with the similar provision in subpart D. The Department has also incorporated additional nonsubstantive editorial and clarifying revisions in the final rule.

The rule is effective 60 days after publication to give Institutional Review Boards (IRBs) time to incorporate the regulations into their review of research protocols. All initial and ongoing projects reviewed after the effective date by IRBs under Multiple Project Assurances or other Assurances with the DHHS, Office for Human Research Protections, OHRP (formerly OPRR), must be reviewed in accordance with these rules.

Executive Order 12866

Executive Order 12866 requires that all regulatory actions reflect consideration of the costs and benefits they generate and that they meet certain standards, such as avoiding the imposition of unnecessary burdens on the affected public. If an action is deemed to fall within the scope of the definition of the term ''significant regulatory action'' contained in § 3(f) of the Order, a pre-publication review by the Office of Management and Budget's (OMB's) Office of Information and Regulatory Affairs (OIRA) is necessary. OMB deemed this rule a ''significant regulatory action,'' as defined by Executive Order 12866. Therefore, the rule was submitted to OIRA for review prior to its publication in the **Federal Register**.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. Chapter 6) requires that regulatory actions be analyzed to determine whether they create a significant impact on a substantial number of small entities. This rule primarily affects individual research

subjects and institutions that receive funding from the Department of Health and Human Services for research involving human subjects. It will not have the effect of imposing significant additional costs on small research institutions that are within the definition of small entities. Therefore, the Secretary certifies that this rule will not have significant impact on a substantial number of small entities and that preparation of an initial regulatory flexibility analysis is not required.

Paperwork Reduction Act

This rule does not contain any new information collection requirements that are subject to Office of Management and Budget (OMB) approval under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

List of Subjects in 45 CFR Part 46

Health—clinical research, medical research.

Dated: September 21, 2000.

David Satcher,

Assistant Secretary for Health and Surgeon General.

Approved: October 30, 2000.

Donna E. Shalala,

Secretary of Health and Human Services.

Accordingly, the Department of Health and Human Services amends part 46 of the Regulations for the Protection of Human Subjects (45 CFR part 46), as follows:

1. authority citation for 45 CFR part 46 is revised to read as follows:

Authority: 5 U.S.C. 301; 42 U.S.C. 289(a).

2. Supbart B of 45 CFR part 46 is revised to read as follows:

Subpart B—Additional Protections for Pregnant Women and Human Fetuses Involved in Research, and Pertaining to Human In Vitro Fertilization

Sec.

46.201 To what do these regulations apply?
46.202 Definitions.
46.203 Duties of IRBs in connection with research involving pregnant women, fetuses, and human in vitro fertilization.
46.204 Research involving pregnant women or fetuses prior to delivery.
46.205 Research involving fetuses after delivery.
46.206 Research involving, after delivery, the placenta, the dead fetus, or fetal material.
46.207 Research not otherwise approvable which presents an opportunity to understand, prevent, or alleviate a serious problem affecting the health or welfare of pregnant women or fetuses.

§ 46.201 To what do these regulations apply?

(a) Except as provided in paragraph (b) of this section, this subpart applies to all research involving pregnant women or human fetuses, and to all research involving the in vitro fertilization of human ova, conducted or supported by the Department of Health and Human Services (DHHS). This includes all research conducted in DHHS facilities by any person and all research conducted in any facility by DHHS employees.

(b) The exemptions at § 46.101(b)(1) through (6) are applicable to this subpart.

(c) The provisions of § 46.101(c) through (i) are applicable to this subpart. Reference to State or local laws in this subpart and in § 46.101(f) is intended to include the laws of federally recognized American Indian and Alaska Native Tribal Governments.

(d) The requirements of this subpart are in addition to those imposed under the other subparts of this part.

§ 46.202 Definitions.

The definitions in § 46.102 shall be applicable to this subpart as well. In addition, as used in this subpart:

(a) *Dead fetus* means a fetus after delivery that exhibits neither heartbeat, spontaneous respiratory activity, spontaneous movement of voluntary muscles, nor pulsation of the umbilical cord. Delivery means complete separation of the fetus from the woman by expulsion or extraction or any other means.

(b) *Fetus* means the product of conception from implantation until a determination is made after delivery that it is viable.

(c) *In vitro fertilization* means any fertilization of human ova which occurs outside the body of a female, either through admixture of donor human sperm and ova or by any other means.

(d) *Nonviable fetus* means a fetus after delivery that, although living, is not viable.

(e) *Pregnancy* encompasses the period of time from implantation until delivery. A woman shall be assumed to be pregnant if she exhibits any of the pertinent presumptive signs of pregnancy, such as missed menses, until the results of a pregnancy test are negative or until delivery.

(f) *Secretary* means the Secretary of Health and Human Services and any other officer or employee of the Department of Health and Human Services to whom authority has been delegated.

(g) *Viable* as it pertains to the fetus means being able, after delivery, to survive (given the benefit of available medical therapy) to the point of independently maintaining heartbeat and respiration. The Secretary may from time to time, taking into account medical advances, publish in the **Federal Register** guidelines to assist in determining whether a fetus is viable for purposes of this subpart. If a fetus after delivery is viable then it is a child as defined by § 46.402(a), and subpart D of this part is applicable.

§ 46.203 Duties of IRBs in connection with research involving pregnant women, fetuses, and human in vitro fertilization.

In addition to other responsibilities assigned to IRBs under this part, each IRB shall review research covered by this subpart and approve only research which satisfies the conditions of all applicable sections of this subpart and the other subparts of this part.

§ 46.204 Research involving pregnant women or fetuses prior to delivery.

Pregnant women or fetuses prior to delivery may be involved in research if all of the following conditions are met:

(a) Where scientifically appropriate, preclinical studies, including studies on pregnant animals, and clinical studies, including studies on nonpregnant women, have been conducted and provide data for assessing potential risks to pregnant women and fetuses;

(b) The risk to the fetus is not greater than minimal, or any risk to the fetus which is greater than minimal is caused solely by interventions or procedures that hold out the prospect of direct benefit for the woman or the fetus;

(c) Any risk is the least possible for achieving the objectives of the research;

(d) The woman's consent or the consent of her legally authorized representative is obtained in accord with the informed consent provisions of subpart A of this part, unless altered or waived in accord with § 46.101(i) or § 46.116(c) or (d);

(e) The woman or her legally authorized representative, as appropriate, is fully informed regarding the reasonably foreseeable impact of the research on the fetus or resultant child;

(f) For children as defined in 45 CFR 46.402(a) who are pregnant, assent and permission are obtained in accord with the provisions of subpart D of this part;

(g) No inducements, monetary or otherwise, will be offered to terminate a pregnancy;

(h) Individuals engaged in the research will have no part in any decisions as to the timing, method, or procedures used to terminate a pregnancy; and

(i) Individuals engaged in the research will have no part in determining the viability of a fetus.

§ 46.205 Research involving fetuses after delivery.

(a) After delivery, fetuses may be involved in research if all of the following conditions are met:

(1) Where scientifically appropriate, preclinical and clinical studies have been conducted and provide data for assessing potential risks to fetuses.

(2) The individual(s) providing consent under paragraph (b)(2) or (c)(5) of this section is fully informed regarding the reasonably foreseeable impact of the research on the fetus or resultant child.

(3) No inducements, monetary or otherwise, will be offered to terminate a pregnancy.

(4) Individuals engaged in the research will have no part in any decisions as to the timing, method, or procedures used to terminate a pregnancy.

(5) Individuals engaged in the research will have no part in determining the viability of a fetus.

(6) The requirements of paragraph (b) or (c) of this section have been met as applicable.

(b) Fetuses of uncertain viability. After delivery, and until it has been ascertained whether or not a fetus is viable, a fetus may not be involved in research covered by this subpart unless the following additional conditions are met:

(1) The IRB determines that:

(i) The research holds out the prospect of enhancing the probability of survival of the particular fetus to the point of viability, and any risk is the least possible for achieving the objectives of the research, or

(ii) The purpose of the research is the development of important biomedical knowledge which cannot be obtained by other means and there will be no risk to the fetus resulting from the research; and

(2) The legally effective informed consent of either parent of the fetus or, if neither parent is able to consent because of unavailability, incompetence, or temporary incapacity, the legally effective informed consent of either parent's legally authorized representative is obtained in accord with subpart A of this part, unless altered or waived in accord with § 46.101(i) or § 46.116(c) or (d).

(c) Nonviable fetuses. After delivery, a nonviable fetus may not be involved in research covered by this subpart unless all of the following additional conditions are met:

(1) Vital functions of the fetus will not be artificially maintained;

(2) The research will not terminate the heartbeat or respiration of the fetus;

(3) There will be no risk to the fetus resulting from the research;

(4) The purpose of the research is the development of important biomedical knowledge that cannot be obtained by other means; and

(5) The legally effective informed consent of both parents of the fetus is obtained in accord with subpart A of this part, except that the waiver and alteration provisions of § 46.116(c) and (d) do not apply. However, if either parent is unable to consent because of unavailability, incompetence, or temporary incapacity, the informed consent of one parent of a nonviable fetus will suffice to meet the requirements of this paragraph. The consent of a legally authorized representative of either or both of the parents of a nonviable fetus will not suffice to meet the requirements of this paragraph.

(d) Viable fetuses. A fetus, after delivery, that has been determined to be viable is a child as defined by § 46.402(a) and may be included in research only to the extent permitted by and in accord with the requirements of subparts A and D of this part.

§ 46.206 Research involving, after delivery, the placenta, the dead fetus, or fetal material.

(a) Research involving, after delivery, the placenta; the dead fetus; macerated fetal material; or cells, tissue, or organs excised from a dead fetus, shall be conducted only in accord with any applicable Federal, State, or local laws and regulations regarding such activities.

(b) If information associated with material described in paragraph (a) of this section is recorded for research purposes in a manner that living individuals can be identified, directly or through identifiers linked to those individuals, those individuals are research subjects and all pertinent subparts of this part are applicable.

§ 46.207 Research not otherwise approvable which presents an opportunity to understand, prevent, or alleviate a serious problem affecting the health or welfare of pregnant women or fetuses.

The Secretary will conduct or fund research that the IRB does not believe meets the requirements of § 46.204 only if:

(a) The IRB finds that the research presents a reasonable opportunity to further the understanding, prevention, or alleviation of a serious problem affecting the health or welfare of pregnant women or fetuses; and

(b) The Secretary, after consultation with a panel of experts in pertinent disciplines (for example: science, medicine, ethics, law) and following opportunity for public review and comment, including a public meeting announced in the **Federal Register**, has determined either:

(1) That the research in fact satisfies the conditions of § 46.204, as applicable, or

(2) The following:

(i) The research presents a reasonable opportunity to further the understanding, prevention, or alleviation of a serious problem affecting the health or welfare of pregnant women or fetuses;

(ii) The research will be conducted in accord with sound ethical principles; and

(iii) Informed consent will be obtained in accord with the informed consent provisions of subpart A and other applicable subparts of this part, unless altered or waived in accord with § 46.101(i) or § 46.116(c) or (d).

[FR Doc. 01–1122 Filed 1–16–01; 8:45 am]

BILLING CODE 4140–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 01–43, MM Docket No. 00–179, RM–9947]

Digital Television Broadcast Service; Arkadelphia, AR

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Arkansas Educational Television Commission, licensee of noncommercial educational station KETG(TV), substitutes DTV *13 for DTV channel *46 at Arkadelphia. *See* 65 FR 59389, October 5, 2000. DTV channel *13 can be allotted to Arkadelphia in compliance with the principle community coverage requirements of Section 73.625(a) at reference coordinates (33–54–26 N. and 93–06–46 W.) with a power of 7.3, HAAT of 320.9 meters and with a DTV service population of 277 thousand. With is action, this proceeding is terminated.

DATES: Effective February 26, 2001.

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Mass Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report

and Order, MM Docket No. 00–179, adopted January 10, 2001, and released January 11, 2001. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center 445 12th Street, SW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Services, Inc., (202) 857–3800, 1231 20th Street, NW, Washington, DC 20036.

List of Subjects in 47 CFR Part 73

Television, Digital television broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.622 [Amended]

2. Section 73.622(b), the Table of Digital Television Allotments under Arkansas, is amended by removing DTV channel *46 and adding DTV channel *13 at Arkadelphia.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Services Division, Mass Media Bureau.

[FR Doc. 01–1185 Filed 1–16–01; 8:45 am]

BILLING CODE 6712–01–U

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 73 and 74

[MM Docket No. 95–31, FCC 00–120]

Reexamination of Comparative Standards for Noncommercial Educational Applicants

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: The Commission adopted new rules for selecting among mutually exclusive applicants for noncommercial educational broadcast stations. Certain rules contained new and modified information collection requirements and were published in the **Federal Register** on June 8, 2000. This document announces the effective date of these published rules.

DATES: Effective August 1, 2000 with respect to the amendments to §§ 73.202, 73.3527, and 77.3572 published at 65 FR 36375 (June 8, 2000).

FOR FURTHER INFORMATION CONTACT: Irene Bleiweiss, Mass Media Bureau, Audio Services Division, (202) 418–2700.

SUPPLEMENTARY INFORMATION: On August 1, 2000, the Office of Management and Budget (OMB) approved the information collection requirements contained in Sections 73.202; 73.3527; and 73.3572 pursuant to OMB Control Nos. 3060–0948. Accordingly, the information collection requirements contained in these rules became effective on August 1, 2000.

Federal Communications Commission.

William F. Caton,

Deputy Secretary.

[FR Doc. 01–1308 Filed 1–16–01; 8:45 am]

BILLING CODE 6712–01–U

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 40

[Docket OST–99–6578]

RIN 2105–AAC49

Procedures for Transportation Workplace Drug and Alcohol Testing Programs; Correction

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule; correction.

SUMMARY: In its final drug and alcohol testing rule published on December 19, 2000, the Department made an editorial error in the numbering of a section in the complete new version regulation. This document corrects this error by inserting the proper numbering. In addition, the Department inadvertently omitted one item from its amendments to the existing regulation. This document adds this item, which concerns the responsibilities of the medical review officer in reviewing chain of custody documentation.

EFFECTIVE DATES: The correction to the amendments to the current 49 CFR Part 40 (i.e., the addition of § 40.227) is effective January 18, 2001. The correction to the revised 49 CFR Part 40 (i.e., corrected designation of § 40.33(f)) is effective August 1, 2001.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, Department of Transportation, 400 7th Street, SW., Room 10424, Washington, DC 20590, at (202) 366–9306 (voice), (202) 366–9313 (fax), (202) 755–7687 (TDD), or bob.ashby@ost.dot.gov (e-mail).

SUPPLEMENTARY INFORMATION: In the December 19, 2000, **Federal Register** (65 FR 79462), the Department published a comprehensive revision to its drug and alcohol procedures testing regulation (49 CFR Part 40). This complete revision becomes effective August 1, 2001. In this revision, the Department made an error in numbering § 40.33(f). Following the introductory text of paragraph (f), the Department numbered three paragraphs (i), (ii), and (iii), respectively. They should have been numbered (1), (2), and (3). We are correcting this error.

In the same **Federal Register** document, we also published amendments to the existing 49 CFR Part 40, effective January 18, 2001. We inadvertently omitted from these amendments one provision we intended to make effective on this date. This provision concerns the responsibility of the medical review officer (MRO) to review the chain of custody documentation for a drug test. In § 40.123(b)(1) and § 40.129(a)(2) of the complete revision of Part 40, the Department specifies that MROs are not required to review the laboratory internal chain of custody documentation as part of this process, and that no one is authorized to cancel a test because the MRO does not review the internal laboratory chain of custody documentation.

These provisions of the complete revision of Part 40 are fully consistent with the Department's intent in, and interpretation of, the existing regulation. However, we learned last year that some parties have been confused about this point, and one state court decision—mistakenly, in our view—determined that MROs were required to review internal laboratory chain of custody documentation. We added the cited provisions to the complete revision of Part 40 to emphasize that MRO review of this documentation is not needed.

We intended to add the substance of these provisions to the amendments to the existing Part 40 that become effective January 18, 2001, lest there be any misunderstanding of this point in the interim before August 1, 2001. However, through editorial oversight, we failed to do so. We are correcting this omission by adding a new § 40.227 to Subpart E of the existing Part 40.

The Department finds that there is good cause to issue this correction without a prior notice and opportunity for comment. The underlying regulatory provisions were part of a rulemaking that was promulgated through the

normal notice and comment provisions of the Administrative Procedure Act. The editorial correction to the numbering of § 40.33(f) has no substantive significance. The addition of a provision of the complete revision of Part 40 to the amendments to the existing Part 40 merely ensures that this restatement of the Department's understanding of MRO review responsibilities under the existing rule becomes part of the regulatory text in January as we intended, rather than in August.

The Department would not anticipate receiving any useful public comment on these matters. Therefore, the Department finds that it would be impracticable, unnecessary, and contrary to the public interest to go through a notice-and-comment process to fix a minor editorial mistake. For the same reason, we find good cause to make the correction with respect to MRO review responsibilities effective in less than 30 days.

This is a nonsignificant rule under both Executive Order 12886 and the Department's regulatory policies and procedures. The Department certifies, under the Regulatory Flexibility Act, that the rule will not have a significant economic effect on a substantial number of small entities. This is because we anticipate that this amendment will have no economic effect on anyone. It does not have Federalism impacts sufficient to warrant consultation or the preparation of a Federalism impact statement. It does not impose information collection requirements.

Issued this 4th Day of January 2000, at Washington, DC.

Rosalind A. Knapp,

Acting General Counsel.

Accordingly, in FR Doc. 00–31251, published in 65 FR 79462, December 19, 2000, make the following corrections:

PART 40—[CORRECTED]

1. On page 79521, in the second column, add § 40.227 to Subpart E, to read as follows:

§ 40.227 Is the MRO required to review laboratory internal chain of custody documentation?

(a) As the MRO, you are not required to review laboratory internal chain of custody documentation.

(b) No one is permitted to cancel a test because you have not reviewed this documentation.

§ 40.33 [Corrected]

2. Beginning on page 79533, in the third column, in § 40.33, correctly designate paragraphs (f)(i), (f)(ii), and (f)(iii) as paragraphs (f)(1), (f)(2), and (f)(3), respectively.

[FR Doc. 01–648 Filed 1–16–01; 8:45 am]

BILLING CODE 4910–62–P

Proposed Rules

Federal Register
Vol. 66, No. 11
Wednesday, January 17, 2001

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.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

Public Workshop on Risk-Informed Regulation—Option 2

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of workshop.

SUMMARY: The Nuclear Regulatory Commission (NRC) will host a public workshop to provide an opportunity for discussion of topics raised from the advanced notice of proposed rulemaking on this subject, of the Nuclear Energy Institute's (NEI) guidelines for this issue, and possible alternative approaches to Option 2 in risk-informed regulations. The workshop is open to the public.

DATES: The workshop will be held on Wednesday, February 21, 2001 from 1:00 p.m. to 5:00 p.m. and on Thursday, February 22, 2001 from 8:30 a.m. through 4:00 p.m.

ADDRESSES: Two White Flint North Auditorium, 11545 Rockville Pike, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Joe Golla, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone: (301) 415–1002 email: *JAG2@nrc.gov.*

SUPPLEMENTARY INFORMATION:

This workshop will provide an opportunity to discuss topics related to Option 2 in risk-informed regulations, as discussed in NRC documents SECY–99–256 and SECY–00–0194. The NRC is developing a rulemaking (referred to as Option 2) to revise, using a risk-informed categorization approach, the scope of structures, systems and components (SSC) that are subject to special treatment requirements. Such requirements include quality assurance, testing, qualification and other measures to provide a high degree of assurance that SSC will remain functional.

Based upon the comments received in response to the ANPR, other discussions with stakeholders, and staff views, the following presents the preliminary agenda and set of discussion topics. The discussion topics are tentative and subject to change. Anyone interested in providing a presentation on these or other related topic(s), please contact Joe Golla at (301) 415–1002.

Preliminary Agenda

2/21, 1:00 p.m.–1:30 p.m.; Introduction—purpose, agenda—NRC.

2/21, 1:30 p.m.–2 p.m.; Industry opening remarks—NEI/others?

2/21, 2:00 p.m.–2:30 p.m.; Keynote remarks by Frank Miraglia, Deputy Executive Director for Reactor Programs.

2/21, 2:30 p.m.–2:45 p.m.; Break.

2:45 p.m.–3:15 p.m.; Pilot activities (WOG, BWROG, CEOG).

3:15 p.m.–3:45 p.m.; ASME Code cases.

3:45 p.m.–4:15 p.m.; Industry Guidelines—NEI.

4:15 p.m.–5:00 p.m.; Other speakers?

2/22 8:30 a.m.–10:30 a.m.; SECY–00–194 topics.

8:30 a.m.–9:15 a.m.—Box chart (other categorization topics).

9:15 a.m.–9:30 a.m.—Candidate rules.

9:30 a.m.–10:00 a.m.—Selective implementation (systems).

10:00 a.m.–10:30 a.m.—Other topics as suggested by participants.

2/22 10:30 a.m. –10:45 a.m.; Break.

2/22 10:45 a.m.–12:00 noon—Detail, NRC review, change control.

2/22 12:00 noon–1:00 p.m.; Lunch.

2/22 1:00 p.m.–3:15 p.m.—Treatment requirements.

2/22 3:15 p.m.–3:30 p.m.; Break.

2/22 3:30 p.m.–4:00 p.m.; Closing Remarks/Adjourn.

Dated at Rockville, Maryland, this 7th day of January 2001.

For the Nuclear Regulatory Commission.

Cynthia A. Carpenter,

Chief, Generic Issues, Environmental, Financial and Rulemaking Branch, Division of Regulatory Improvement Programs, Office of Nuclear Reactor Regulation.

[FR Doc. 01–1365 Filed 1–16–01; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 00–AEA–15]

Establishment of Class E Airspace; Seneca Falls, NY

AGENCY: Federal Aviation Administration [FAA], DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to establish Class E airspace at Seneca Falls, NY. An Area Navigation (RNAV) Standard Instrument Approach Procedure (SIAP) has been developed for Finger Lakes Regional Airport (0G7), Seneca Falls, NY. Controlled airspace extending upward from 700 feet Above Ground Level (AGL) is needed to contain aircraft executing the approach. This action proposes to establish Class E airspace to Finger Lakes Regional Airport to contain aircraft executing the approach. The area would be depicted on aeronautical charts for pilot reference.

EFFECTIVE DATE: Comments must be received on or before February 16, 2001.

ADDRESSES: Send comments on the proposal in triplicate to: Manager, Airspace Branch, AEA–520, Docket No. 00–AEA–15, F.A.A. Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434–4809.

The office docket may be examined in the Office of the Regional Counsel, AEA–7, F.A.A., Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434–4809.

An informal docket may also be examined during normal business hours in the Airspace Branch, AEA–520, F.A.A., Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434–4809.

FOR FURTHER INFORMATION CONTACT: Mr. Francis T. Jordan, Jr., Airspace Specialist, Airspace Branch, AEA–520, F.A.A. Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434–4809; telephone: (718) 553–4521.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis

supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, economic, environmental, and energy-related aspects of the proposal. Communications should identify the airspace docket number and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Airspace Docket No. 00–AEA–15''. The postcard will be date/time stamped and returned to the commenter. All communications received on or before the closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of comments received. All comments submitted will be available for examination in the Rules Docket both before and after the closing date for comments. A report summarizing each substantive public contact with the FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Office of the Regional Counsel, AEA–7, F.A.A. Eastern Region, 1 Aviation Plaza, Jamaica, NY, 11434–4809. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRMs should also request a copy of Advisory Circular No. 11–2A, which describes the application procedure.

The Proposal

The FAA is considering an amendment to Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to establish Class E airspace area at Seneca Falls, NY. An Area Navigation SIAP has been developed for Finger Lakes Regional Airport, Seneca Falls, NY. Controlled airspace extending upward from 700 feet AGL is needed to accommodate the approach. Class E airspace designations for airspace areas extending upward from 700 feet or more above the surface are published in Paragraph 6005 of FAA Order 7400.9H, dated September 1, 2000, and effective September 16, 2000, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR Part 71 as follows:

PART 71—[AMENDED]

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

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration order 7400.9F dated September 1, 2000, and effective September 16, 2000, is proposed to be amended as follows:

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

* * * * *

AEA NY E5, Seneca Falls, NY

Finger Lakes Regional Airport
(Lat. 4252.643 N-long 07646.885W)

That airspace extending upward from 700 feet above the surface within a 6 mile radius of Finger Lakes Regional Airport.

* * * * *

Issued in Jamaica, New York on January 2, 2001.

F.D. Hatfield,

Manager, Air Traffic Division, Eastern Region.

[FR Doc. 01–1281 Filed 1–16–01; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 00–AWP–12]

Proposed Modification of Class E Airspace; Molokai, HI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to modify the Class E airspace area at Molokai, HI. The development of an Area Navigation (RNAV) Global Positioning System (GPS)–B Standard Instrument Approach Procedure (SIAP) to Kaunakakai/Molokai Airport has made this proposal necessary. Additional controlled airspace extending upward from 700 feet above the surface is needed to contain aircraft executing the RNAV (GPS)–B SIAP to Kaunakakai/Molokai Airport. The intended effect of this proposal is to provide adequate controlled airspace for Instrument Flight Rules (IFR) operations at Kaunakakai/Molokai Airport, Kaunakakai, HI.

DATES: Comments must be received on or before February 23, 2001.

ADDRESSES: Send comments on the proposal in triplicate to: Federal Aviation Administration, Attn: Manager, Airspace Branch, AWP–520, Docket No. 00–AWP–12, Air Traffic Division, 15000 Aviation Boulevard, Lawndale, California, 90261.

The official docket may be examined in the Office of the Regional Counsel, Western-Pacific Region, Federal Aviation Administration, Room 6007, 15000 Aviation Boulevard, Lawndale, California, 90261.

An informal docket may also be examined during normal business hours at the Office of the Manager, Airspace Branch, Air Traffic Division at the above address.

FOR FURTHER INFORMATION CONTACT: Jeri Carson, Air Traffic Airspace Specialist, Airspace Branch, AWP–520, Air Traffic Division, Western-Pacific Region, Federal Aviation Administration, 15000 Aviation Boulevard, Lawndale, California, 90261, telephone (310) 725–6611.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis

supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify the airspace docket number and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with the comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Airspace Docket No. 00–AWP–12.'' The postcard will be date/time stamped and returned to the commenter. All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of comments received. All comments submitted will be available for examination in the Airspace Branch, Air Traffic Division, 15000 Aviation Boulevard, Lawndale, California 90261, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Airspace Branch, 15000 Aviation Boulevard, Lawndale, California 90261. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRM's should also request a copy of Advisory Circular No. 11–2A, which describes the application procedures.

The Proposal

The FAA is considering an amendment to 14 CFR part 71 by modifying the Class E airspace area at Molokai, HI. The development of an RNAV (GPS)–B SIAP at Kaunakakai/Molokai Airport has made this proposal necessary. Additional controlled airspace extending upward from 700 feet above the surface is needed to contain aircraft executing the RNAV (GPS)–B SIAP to Kaunakakai/Molokai Airport. The intended effect of this proposal is to provide adequate controlled airspace for aircraft executing the RNAV (GPS)–B SIAP at Kaunakakai/Molokai Airport, Kaunakakai, HI. Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9H dated September 1, 2000, and effective September 16, 2000, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in this Order.

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9H, Airspace Designations and Reporting Points, dated September 1, 2000, and effective September 16, 2000, is amended as follows:

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

* * * * *

AWP HI E5 Molokai, HI [Revised]

Kaunakakai/Molokai Airport, HI
(Lat. 21°09′11″N., long. 157°05′47″W
Molokai VORTAC
(Lat. 21°08′17″N., long. 157°10′03″W

That airspace extending upward from 700 feet above the surface within a 6.8-mile radius of the Kaunakakai/Molokai Airport and within 1.8 miles each side of the Molokai VORTAC 268° radial, extending from the 6.8-mile radius of Kaunkakai/Molokai Airport to 4.3 miles west of the Molokai VORTAC.

* * * * *

Issued in Los Angeles, California, on December 27, 2000.

John Clancy,

Manager, Air Traffic Division, Western-Pacific Region.

[FR Doc. 01–1277 Filed 1–16–01; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–106446–98]

RIN 1545–AW64

Relief From Joint and Several Liability

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to relief from joint and several liability under section 6015 of the Internal Revenue Code. The regulations reflect changes in the law made by the IRS Restructuring and Reform Act of 1998. The regulations provide guidance to married individuals filing joint returns who may seek relief from joint and several liability. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written or electronically generated comments and requests to speak (with outlines of oral comments) at the public hearing scheduled for May 30, 2001, must be received by April 27, 2001.

ADDRESSES: Send submissions to: CC:M&SP:RU (REG–106446–98), room 5228, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:M&SP:RU (REG–106446–98), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the ''Tax Regs'' option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at *http://www.irs.gov/tax_regs/regslist.html.*

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Bridget E. Finkenaur, 202–622–4940; concerning submissions of comments, the hearing and/or to be placed on the building access list to attend the hearing, Guy Traynor, 202–622–7190 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, W:CAR:MP:FP:S:O, Washington, DC 20224. Comments on the collection of information should be received by March 19, 2001. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (see below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

The collection of information in this proposed regulation is in § 1.6015–5. Individuals may request relief from joint and several liability by timely filing Form 8857, ''Request for Innocent Spouse Relief (And Separation of Liability and Equitable Relief),'' or a written statement that contains the information required on Form 8857, that is signed under penalties of perjury. This collection of information is required in order for an individual to request relief from joint and several liability. This information will be used to carry out the internal revenue laws. The likely respondents are individuals.

The reporting burden contained in § 1.6015–5 is reflected in the burden of Form 8857. The estimated burden is: learning about the law or the form, 17 min.; preparing the form, 17 min.; and copying, assembling, and sending the form to the IRS, 20 min. The reporting burden contained in § 1.6015–5 for the statement signed under penalties of perjury is estimated as: learning about the law, 20 min.; preparing the statement signed under penalties of perjury, 30 min.; and copying, assembling, and sending the statement to the IRS, 20 min.

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

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

Background

Section 6013(d)(3) provides that spouses who file a joint Federal income tax return are jointly and severally liable for liabilities with respect to tax arising from that return. The term *tax* includes additions to tax, penalties, and interest. See sections 6665(a)(2) and 6601(e)(1). Joint and several liability allows the IRS to collect the entire liability from either spouse signing the joint return, without regard to whom the items of income, deduction, credit, or basis that gave rise to the liability are attributable. Before the enactment of the Internal Revenue Service Restructuring and Reform Act of 1998, Public Law 105–206 (112 Stat. 685) (1998) (RRA), section 6013(e) provided the only relief from joint and several liability, and it only applied in very limited circumstances.

Section 3201 of the RRA repealed section 6013(e) and replaced it with section 6015. Section 6015 applies to liabilities that arise after July 22, 1998, and liabilities that arose prior to July 22, 1998, which remained unpaid as of that date. The provisions of section 6015 expand the relief available to spouses or former spouses who wish to be relieved from all or a portion of the joint and several liability arising from a joint individual Federal income tax return. Section 6015 makes the requirements for relief from joint and several liability, formerly in section 6013(e), less restrictive (section 6015(b)), and adds two other relief provisions. One provision, section 6015(c), permits the allocation of a deficiency between certain estranged spouses or former spouses in proportion to their respective erroneous items or in accordance with other allocation rules. The other provision, section 6015(f), gives the Secretary equitable discretion to grant relief from joint and several liability. The three relief provisions have different eligibility requirements and provide different types of relief.

This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1) that are necessary to carry out the provisions of section 6015. The proposed regulations provide detailed guidance on the three types of relief from joint and several liability under section 6015.

Explanation of Provisions

In General

To qualify for relief from joint and several liability, a *requesting spouse* (as defined in the regulations) must elect the application of section 6015(b) or 6015(c), or request equitable relief under section 6015(f), within 2 years of the first collection activity after July 22, 1998, with respect to the requesting spouse. Relief under section 6015 is only available for income taxes required under Subtitle A (including self-employment taxes). Relief is not available for other taxes reported on a taxpayer's income tax return (e.g., domestic services employment taxes under section 3510).

The proposed regulations define several terms, some of which are unique to specific provisions, and others of which are generally applicable to section 6015. One generally applicable term is an item. An item is generally defined as that which is required to be separately reported on an individual income tax return. However, amounts received from investments that are required to be separately reported on an individual income tax return and that are from the same source are aggregated and treated as one item. For example, assume an individual receives $700 in dividends and $1,000 in interest from X Co. Although dividends and interest are required to be separately reported on the individual's income tax return, they are considered one item for purposes of section 6015 because the dividends and interest are both from X Co. Items include, but are not limited to, gross income, deductions, credits, and basis. An erroneous item is defined as any item resulting in an understatement or deficiency in tax to the extent such item is omitted from, or improperly reported (including improperly characterized) on, an individual income tax return.

Innocent Spouse Relief Under Section 6015(b)

In enacting section 6015, Congress focused, in part, on the limitations of section 6013(e). H.R. Conf. Rep. No. 599, 105th Cong., 2d Sess. 249 (1998). Thus, certain limitations under section 6013(e) have been eliminated in section 6015. For example, section 6013(e) required that there be a substantial understatement attributable to a grossly erroneous item, whereas section 6015(b) only requires that there be an understatement of an erroneous item. Another difference is that, unlike section 6013(e), section 6015(b) expressly provides for partial relief if a requesting spouse did not know, and had no reason to know, of only a portion of the understatement. One procedural difference is that a requesting spouse must now elect the application of section 6015(b).

Otherwise, section 6015(b) provides the same type of relief as was available under section 6013(e). In addition, as with section 6013(e), if a requesting spouse qualifies for relief under section 6015(b), refunds are available for amounts that the requesting spouse paid toward the liability for which relief was granted. Much of the language in section 6015(b) is identical to that of section 6013(e). Accordingly, the case law interpreting this language under section 6013(e) will be applied in interpreting the same language under section 6015(b).

The proposed regulations define *understatement* by reference to section 6662(d)(2)(A). Consistent with the interpretation of section 6013(e), the proposed regulations also clarify that ''knowledge or reason to know'' of an understatement exists only when either the requesting spouse actually knew of the erroneous item giving rise to the understatement, or a reasonable person in similar circumstances would have known of the item.

Allocation of Deficiency Under Section 6015(c)

Section 6015(c) is one of the new relief provisions added by section 3201 of the RRA. Section 6015(c) basically provides relief for an estranged or former spouse by allowing the requesting spouse to elect to limit the requesting spouse's liability for a deficiency to the portion of the deficiency allocated to the requesting spouse. As with section 6015(b), the relief under section 6015(c) must be elected. Unlike section 6015(b), refunds are not available under section 6015(c).

Of the three relief provisions in section 6015, section 6015(c) comes closest to being a mechanical test. Unlike the other two relief provisions, section 6015(c) does not require a determination that it would be inequitable to hold the requesting spouse liable in order for the requesting spouse to obtain relief. Several objective tests apply to determine whether a requesting spouse qualifies for relief. Among the requirements for relief under section 6015(c) is the requirement that the requesting spouse be divorced, widowed, or legally separated, or not have been a member of the same household as the nonrequesting spouse at any time during the 12-month period ending on the date an election for relief is filed. The proposed regulations provide rules for determining whether spouses are members of the same household in particular situations.

Relief under section 6015(c) is not available for the portion of a deficiency attributable to an erroneous item of the nonrequesting spouse if the Secretary demonstrates that the requesting spouse had actual knowledge of that item at the time the requesting spouse signed the joint return. If the requesting spouse had actual knowledge of only a portion of the erroneous item, partial relief may be available for the amount of the deficiency attributable to the portion of the item of which the requesting spouse did not have actual knowledge. Reason to know of an erroneous item or a portion thereof is not sufficient to disqualify a requesting spouse from relief under section 6015(c). Hence, it may be easier to qualify for relief under this provision than under section 6015(b).

Knowledge of an item means knowledge of the receipt or expenditure. It does not mean knowledge of the proper tax treatment of the item or how (or whether) it was actually reported on the return. This knowledge standard is consistent with the knowledge standard adopted by the United States Tax Court and other courts. See *Cheshire* v. *Commissioner,* 115 T.C. No. 15 (August 30, 2000) (knowledge requirement under section 6015(c) does not require requesting spouse to possess knowledge of the tax consequences arising from the erroneous item or that the item reported on the return is incorrect; rather the statute requires only a showing that the requesting spouse actually knew of the erroneous item); *Wiksell* v. *Commissioner,* 215 F.3d 1335 (9th Cir. 2000) (knowledge inquiry in section 6015(c) focuses on whether the taxpayer had knowledge of the erroneous item, not the tax consequences of that item). Also, under the proposed regulations, a requesting spouse could have actual knowledge of an erroneous item without necessarily knowing its source. Thus, if W knew that H received $1,000 of interest income, W would have actual knowledge of that item even if W thought that the interest was tax-exempt, or even if W did not know from whom the interest was received. Similarly, W would have actual knowledge of the item even if W had thought (incorrectly) that H had included the interest income on the return. A requesting spouse's failure to review a completed joint return will not negate a demonstration by the Secretary that the requesting spouse had actual knowledge of an item.

To demonstrate that a requesting spouse had actual knowledge of an erroneous item, the Secretary may rely upon all of the facts and circumstances. One relevant factor is whether the requesting spouse made an effort to be shielded from liability by deliberately avoiding learning about an item. Another relevant factor is whether the requesting spouse had an ownership interest in the property that gave rise to the item. The proposed regulations provide that joint ownership is a factor supporting a finding that the requesting spouse had actual knowledge of an erroneous item.

The proposed regulations also provide that the portion of the deficiency for which the requesting spouse remains liable is increased (up to the entire amount of the deficiency) by the value of any disqualified assets transferred to the requesting spouse by the nonrequesting spouse. Disqualified assets are defined as those assets transferred for the principal purpose of avoidance of tax or payment of tax. Any assets transferred during the period beginning 12 months before the mailing date of the first letter of proposed deficiency and continuing to the present are presumed to be disqualified assets. However, the requesting spouse can rebut the presumption by showing that the principal purpose of the transfer was not the avoidance of tax or payment of tax. In addition, the presumption does not apply to transfers of assets pursuant to a divorce or separate maintenance or child support agreement. The IRS and Treasury Department are particularly interested in receiving comments on whether there should be a de minimis exception to the presumption, and if so, the appropriate amount for such an exception.

If a requesting spouse qualifies to elect the application of section 6015(c), section 6015(d) generally provides that erroneous items are allocated between the spouses as if they had filed separate returns. In addition, section 6015(g) directs the Secretary to establish

alternative methods of allocating erroneous items, other than the method in section 6015(d). Under the proposed regulations, erroneous income items are generally allocated to the spouse who earned the income or who owned the investment or business producing the income. If both spouses had an ownership interest in an investment or business, an erroneous income item from that investment or business is allocated between them in proportion to their respective ownership interests. Erroneous business or investment deductions are generally allocated to the spouse who owned the business or investment. If both spouses had an ownership in the business or investment, an erroneous deduction related to that business or investment is allocated between them in proportion to their respective ownership interests. Personal deductions are generally allocated 50% to each spouse, unless the evidence shows that a different allocation is appropriate.

Section 6015(d) also provides rules for allocating a deficiency. Under the proposed regulations, a portion of the deficiency is allocated under the ''proportionate allocation method,'' that is, in proportion to each spouse's share of erroneous items. The proposed regulations provide additional rules regarding the allocation of other portions of the deficiency. First, any portion of the deficiency attributable to certain disallowed credits and taxes (other than income tax and alternative minimum tax) is allocated entirely to one spouse or the other. Second, any portion of the deficiency attributable to the liability of the child of the requesting or nonrequesting spouse is allocated under special rules. Third, any portion of the deficiency attributable to the alternative minimum tax under section 55 is allocated between the spouses in proportion to their individual shares of the total alternative minimum taxable income as defined under section 55(b)(2). Fourth, any portion of the deficiency attributable to accuracy-related penalties under section 6662 and fraud penalties under section 6663 is allocated to the spouse to whom the item giving rise to the penalty is allocable.

The proposed regulations provide one alternative allocation method, which must be used in place of the general allocation method when there are erroneous items taxed at different rates. This method ensures that the allocation of the liability is not skewed, for example, when the deficiency items consist of ordinary income items and capital gains.

Equitable Relief Under Section 6015(f)

Section 6015(f) is the other new relief provision that was added by section 3201 of the RRA. Section 6015(f) authorizes the Secretary to grant equitable relief from joint and several liability to requesting spouses who do not qualify for relief under section 6015(b) or 6015(c). The proposed regulations provide that the Secretary has the discretion to grant equitable relief and that the discretion may be exercised if it would be inequitable to hold the requesting spouse jointly and severally liable. Equitable relief is only available to requesting spouses who fail to qualify for relief under sections 6015(b) and 6015(c). However, section 6015(f) may not be used to circumvent the ''no refund'' rule of section 6015(c). Therefore, equitable relief under section 6015(f) is not available to refund liabilities already paid, for which the requesting spouse would otherwise qualify for relief under section 6015(c).

Section 6015(f) directs the Secretary to prescribe procedures regarding when equitable relief may be granted. These proposed regulations provide general information on section 6015(f) and refer individuals seeking more detailed guidance to the relevant revenue rulings, revenue procedures, or other published guidance issued on this topic. The detailed guidance on section 6015(f) is currently provided in Revenue Procedure 2000–15 (2000–5 I.R.B. 447).

Other Considerations

In addition to the three types of relief from joint and several liability, section 6015 has many provisions that are relevant when a requesting spouse elects relief under section 6015(b) or 6015(c), or requests relief under section 6015(f). The proposed regulations provide detailed guidance on these other provisions:

1. Types of Relief Considered

There are certain statutory consequences to electing the application of section 6015(b) or section 6015(c) (*e.g.*, suspension of the statute of limitations on collection). Therefore, the IRS will not automatically consider such relief unless the requesting spouse affirmatively elects the application of at least one of those sections. If a spouse requests relief under section 6015(f) alone, relief will only be considered under that section. However, if a requesting spouse elects the application of either section 6015(b) or 6015(c), the IRS will automatically consider whether the requesting spouse qualifies for relief under the other relief provisions of section 6015.

2. Time and Manner of Requesting Relief

Relief under section 6015 must be elected or requested within two years from the first *collection activity* (as defined in the proposed regulations) after July 22, 1998, against the requesting spouse with respect to the joint and several liability. In addition, relief may be elected or requested before the commencement of collection activity. However, the election may not be made, nor may relief be requested, before the taxpayer receives a notification of an audit or a letter or notice from the Secretary indicating that there may be an outstanding liability with regard to the joint return. The proposed regulations provide that the Secretary will not consider premature claims.

3. Determinations

The proposed regulations provide that a requesting spouse generally only receives one final determination of relief under section 6015. However, a second election under section 6015(c) may be considered, and a final determination may be rendered on that election, if, at the time of the second election, but not at the time of the first election, the requesting spouse is divorced, legally separated, widowed, or has not been a member of the same household as the nonrequesting spouse at any time during the 12-month period ending on the date the election was filed.

4. Community Property

Under section 6015 and the proposed regulations, the operation of community property law is not considered in determining to which spouse an erroneous item is allocable.

5. Duress

The proposed regulations amend § 1.6013–4 to clarify that if a spouse asserts and establishes that he or she signed a joint return under duress, then the return is not a joint return, and he or she is not jointly and severally liable for the liability arising from that return. Therefore, in such a case, relief from joint and several liability under section 6015 is not necessary and inapplicable.

Highlighted Issues

These proposed regulations contain detailed guidance on the three types of relief available under section 6015, as well as the other provisions contained in section 6015. Although public comment is sought on all of the issues in the proposed regulations, the IRS and Treasury Department are particularly interested in receiving comments on the issues highlighted below. These issues

present the most challenge in administering section 6015(c).

1. *Knowledge:* The contrasting standards of the relief provisions are most evident in the respective knowledge limitations. Under section 6015(b), relief is not available unless the requesting spouse demonstrates that he or she had no knowledge or reason to know of the item giving rise to the understatement at the time the joint return was signed. In contrast, section 6015(c) provides that, assuming all of the qualifications are met, relief is available unless the Secretary demonstrates that the requesting spouse had actual knowledge of the item giving rise to the deficiency. Actual knowledge cannot be inferred from the requesting spouse's reason to know of the erroneous item. The Secretary bears the burden of proof with respect to the knowledge limitation of section 6015(c). In contrast, the requesting spouse bears the burden of proof with respect to the knowledge and reason to know limitations of section 6015(b). The IRS and Treasury Department are specifically seeking comments on the definition of *item*, because it is knowledge of an item that will disqualify a requesting spouse from receiving relief under sections 6015(b) and 6015(c).

2. *Alternative Allocation Methods:* Section 6015(g)(1) directs the Secretary to prescribe regulations providing alternative allocation methods, and the proposed regulations provide one that is discussed above. The proposed regulations also provide that additional alternative allocation methods may be provided in subsequent guidance. The IRS and Treasury Department are specifically interested in receiving comments about the alternative allocation method provided in the proposed regulations, and any other allocation methods that should be considered.

3. *Interests of the Nonrequesting Spouse:* It is anticipated that relief under section 6015 will be granted more frequently than it was under section 6013(e). Accordingly, section 6015 provides safeguards to protect nonrequesting spouses from erroneous determinations granting relief to their respective requesting spouses. The proposed regulations provide that the Secretary must give a nonrequesting spouse notice that the requesting spouse filed a claim for relief and an opportunity to participate in the determination of whether relief is appropriate.

In fashioning these safeguards, the IRS and Treasury Department are attempting to balance the rights and interests of both the requesting spouse and the nonrequesting spouse. A spouse who signs a joint return is jointly and severally liable for the entire liability, and the Secretary may collect the entire liability from either spouse. Therefore, a determination that one spouse is relieved of joint and several liability may have no legal effect on the amount of the other spouse's liability. However, a nonrequesting spouse does have a practical interest in the outcome of an innocent spouse determination because if the requesting spouse is relieved of liability, the IRS's only recourse is to collect that liability from the nonrequesting spouse. The IRS and Treasury Department recognize that Congress intended that the IRS take into account the nonrequesting spouse's views when it makes a determination of relief. See H.R. Conf. Rep. No. 599, 105th Cong., 2d Sess. 251, 255 (1998). In addition, information provided by a nonrequesting spouse is helpful in many cases to determine the appropriate amount of relief, if any.

Under the proposed regulations, a nonrequesting spouse will have an opportunity to participate in any administrative or judicial determination of relief. At the administrative level, the nonrequesting spouse may submit information relevant to the determination to the IRS employee making the determination. In addition, if the requesting spouse files a petition with the Tax Court, the nonrequesting spouse will be notified, and have an opportunity to become a party to the proceeding. See Interim Tax Court Rule 325.

Nonetheless, the IRS and Treasury Department recognize that some spouses may be reluctant to apply for relief from joint and several liability, or submit information regarding the other spouse's request for relief, due to privacy concerns or for fear of the other spouse's reprisal. To address this concern, the proposed regulations provide that, at the request of one spouse, the Secretary will omit from shared documents any information (*e.g.*, new name, address, employer) that would reasonably identify that spouse's location.

Special Analyses

It has been determined that these regulations are 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) does not apply to the regulations, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f), this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

Comments and Public Hearing

Before the regulations are adopted as final regulations, consideration will be given to any written and electronic comments that are submitted timely to the IRS. The IRS and Treasury Department specifically request comments on the clarity of the proposed regulations, on how the proposed regulations can be made easier to understand, and on the highlighted issues. All comments will be available for public inspection and copying.

A public hearing has been scheduled for May 30, 2001, at 10 a.m., in the IRS Auditorium (7th Floor), 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 will not be admitted 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 preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

Persons who wish to present oral comments at the hearing must submit written comments and an outline of the topics to be discussed at the time to be devoted to each topic (signed original and eight (8) copies) by April 27, 2001.

A period of 10 minutes will be allotted to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of the regulations is Bridget E. Finkenaur of the Office of Associate Chief Counsel, Procedure and Administration (Administrative Provisions and Judicial Practice Division). However, other personnel from the IRS and Treasury Department participated in the development of the regulations.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

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

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

§ 1.6015–1 also issued under 26 U.S.C. 6015(g).

§ 1.6015–2 also issued under 26 U.S.C. 6015(g).

§ 1.6015–3 also issued under 26 U.S.C. 6015(g).

§ 1.6015–4 also issued under 26 U.S.C. 6015(g).

§ 1.6015–5 also issued under 26 U.S.C. 6015(g).

§ 1.6015–6 also issued under 26 U.S.C. 6015(g).

§ 1.6015–7 also issued under 26 U.S.C. 6015(g).

§ 1.6015–8 also issued under 26 U.S.C. 6015(g).

§ 1.6015–9 also issued under 26 U.S.C. 6015(g). * * *

Par. 2. In § 1.6013–4, paragraph (d) is added to read as follows:

§ 1.6013–4 Applicable rules.

* * * * *

(d) *Return signed under duress.* If an individual asserts and establishes that he or she signed a return under legal duress, the return is not a joint return. The individual who signed such return under duress is not jointly and severally liable for the tax shown on the return or any deficiency in tax with respect to the return. The return is adjusted to reflect only the tax liability of the individual who voluntarily signed the return, and the liability is determined at the applicable rates in section 1(d). Section 6212 applies to the assessment of any deficiency in tax on such return.

Par. 3. Sections 1.6015–0 through 1.6015–9 are added to read as follows:

§ 1.6015–0 Table of contents.

This section lists captions contained in §§ 1.6015–1 through 1.6015–9.

§ 1.6015–1 Relief from joint and several liability on a joint return.

(a) In general.
(b) Duress.
(c) Prior closing agreement or offer in compromise.
(d) Fraudulent scheme.
(e) Res judicata and collateral estoppel.
(f) Community property laws.
(1) In general.
(2) Example.
(g) Definitions.
(1) Requesting spouse.
(2) Nonrequesting spouse.
(3) Item.
(4) Erroneous item.
(5) Election or request.
(h) Transferee liability.
(1) In general.
(2) Example.

§ 1.6015–2 Relief from liability applicable to all qualifying joint filers.

(a) In general.
(b) Understatement.
(c) Knowledge or reason to know.
(d) Inequity.
(e) Partial relief.
(1) In general.
(2) Example.

§ 1.6015–3 Allocation of liability for individuals who are no longer married, are legally separated, or are not members of the same household.

(a) Election to allocate liability.
(b) Definitions.
(1) Divorced.
(2) Legally separated.
(3) Not members of the same household.
(i) Temporary absences.
(ii) Separate dwellings.
(c) Limitations.
(1) No refunds.
(2) Actual knowledge.
(3) Disqualified asset transfers.
(i) In general.
(ii) Disqualified asset defined.
(iii) Presumption.
(4) Examples.
(d) Allocation.
(1) In general.
(2) Allocation of erroneous items.
(i) Benefit on the return.
(ii) Fraud.
(iii) Erroneous items of income.
(iv) Erroneous deduction items.
(3) Burden of proof.
(4) General allocation method.
(i) Proportionate allocation.
(ii) Separate treatment items.
(iii) Child's liability.
(iv) Allocation of certain items.
(A) Alternative minimum tax.
(B) Accuracy-related and fraud penalties.
(5) Examples.
(6) Alternative allocation methods.
(i) Allocation based on applicable tax rates.
(ii) Allocation methods provided in subsequent published guidance.
(iii) Example.

§ 1.6015–4 Equitable relief.

§ 1.6015–5 Time and manner for requesting relief.

(a) Requesting relief.
(b) Time period for filing a request for relief.
(1) In general.
(2) Definitions.
(i) Collection activity.
(ii) Date of levy or seizure.
(3) Requests for relief made before commencement of collection activity.
(4) Examples.
(5) Premature requests for relief.
(c) Effect of a final administrative determination.

§ 1.6015–6 Nonrequesting spouse's notice and opportunity to participate in administrative proceedings.

(a) In general.
(b) Information submitted.
(c) Effect of opportunity to participate.

§ 1.6015–7 Tax Court review.

(a) In general.
(b) Time period for petitioning the Tax Court.
(c) Restrictions on collection and suspension of the running of the period of limitations.
(1) Restrictions on collection under § 1.6015–2 or 1.6015–3.
(2) Suspension of the running of the period of limitations.
(i) Relief under § 1.6015–2 or 1.6015–3.
(ii) Relief under § 1.6015–4.
(3) Definitions.
(i) Levy.
(ii) Proceedings in court.
(iii) Assessment to which the election relates.

§ 1.6015–8 Applicable liabilities.

(a) In general.
(b) Liabilities paid on or before July 22, 1998.
(c) Examples.

§ 1.6015–9 Effective date.

§ 1.6015–1 Relief from joint and several liability on a joint return.

(a) *In general.* (1) An individual who qualifies and elects under section 6013 to file a joint Federal income tax return with another individual is jointly and severally liable for the joint Federal income tax liabilities for that year. However, a spouse or former spouse may be relieved of joint and several liability for any Federal income tax, self-employment tax, penalties, additions to tax, and interest for that year under the following three relief provisions:

(i) Innocent spouse relief under § 1.6015–2.

(ii) Allocation of deficiency under § 1.6015–3.

(iii) Equitable relief under § 1.6015–4.

(2) A requesting spouse may submit a single claim electing relief under both or either §§ 1.6015–2 and 1.6015–3, and requesting relief under § 1.6015–4. However, equitable relief under § 1.6015–4 is available only to a requesting spouse who fails to qualify for relief under §§ 1.6015–2 and 1.6015–3. If a requesting spouse elects the application of either § 1.6015–2 or 1.6015–3, the Secretary may consider

whether relief is appropriate under the other elective provision and, to the extent relief is unavailable under either, under § 1.6015–4. If a requesting spouse seeks relief only under § 1.6015–4, the Secretary may not grant relief under § 1.6015–2 or 1.6015–3. A requesting spouse must affirmatively elect the application of § 1.6015–2 or 1.6015–3 in order for the Secretary to grant relief under one of those sections.

(3) Relief is not available for liabilities that are required to be reported on a joint Federal income tax return but are not income taxes imposed under Subtitle A of the Internal Revenue Code (e.g., domestic service employment taxes under section 3510).

(b) *Duress.* For rules relating to the treatment of returns signed under duress, see § 1.6013–4(d).

(c) *Prior closing agreement or offer in compromise.* A requesting spouse is not entitled to relief from joint and several liability under § 1.6015–2, § 1.6015–3, or § 1.6015–4 for any tax year for which the requesting spouse has entered into a closing agreement (other than an agreement entered into pursuant to section 6224(c) relating to partnership items) with the Commissioner that disposes of the same liability that is the subject of the claim for relief. In addition, a requesting spouse is not entitled to relief from joint and several liability under § 1.6015–2, § 1.6015–3, or § 1.6015–4 for any tax year for which the requesting spouse has entered into an offer in compromise with the Commissioner. For rules relating to the effect of closing agreements and offers in compromise, see sections 7121 and 7122, and the regulations thereunder.

(d) *Fraudulent scheme.* If the Secretary establishes that a spouse transferred assets to the other spouse as part of a fraudulent scheme, relief is not available under section 6015, and section 6013(d)(3) applies to the return.

(e) *Res judicata and collateral estoppel.* A requesting spouse is not entitled to relief from joint and several liability under § 1.6015–2 or 1.6015–3 for any tax year for which a court of competent jurisdiction has rendered a final determination on the requesting spouse's tax liability if the requesting spouse materially participated in the proceeding. A requesting spouse has not materially participated in a prior proceeding if, due to the effective date of section 6015, relief under section 6015 was not available in that proceeding. However, any final determinations made by a court of competent jurisdiction regarding issues relevant to § 1.6015–2, § 1.6015–3, or § 1.6015–4 are conclusive and may not be reconsidered, provided the requesting spouse materially participated in the prior court proceeding.

(f) *Community property laws*—(1) *In general.* In determining whether relief is available under § 1.6015–2, § 1.6015–3, or § 1.6015–4, items of income, credits, and deductions are generally allocated to the spouses without regard to the operation of community property laws. An erroneous item is attributed to the individual whose activities gave rise to such item. See § 1.6015–3(d)(2).

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

Example. (i) H and W are married and have lived in State A (a community property state) since 1987. On April 15, 2003, H and W file a joint Federal income tax return for the 2002 taxable year. In August 2005, the Internal Revenue Service proposes a $17,000 deficiency with respect to the 2002 joint return. A portion of the deficiency is attributable to $20,000 of H's unreported interest income from his individual bank account, the remainder of the deficiency is attributable to $30,000 of W's disallowed business expense deductions. Under the laws of State A, H and W each own ½ of all income earned and property acquired during the marriage.

(ii) In November 2005, H and W divorce and W timely elects to allocate the deficiency. Even though the laws of State A provide that ½ of the interest income is W's, for purposes of relief under this section, the $20,000 unreported interest income is allocable to H, and the $30,000 disallowed deduction is allocable to W. The community property laws of State A are not considered in allocating items for this purpose.

(g) *Definitions*—(1) *Requesting spouse.* A requesting spouse is an individual who filed a joint return and elects relief from Federal income tax liability arising from that return under § 1.6015–2 or § 1.6015–3, or requests relief from Federal income tax liability arising from that return under § 1.6015–4.

(2) *Nonrequesting spouse.* A nonrequesting spouse is the individual with whom the requesting spouse filed the joint return for the year for which relief from liability is sought.

(3) *Item.* An item is that which is required to be separately listed on an individual income tax return or any required attachments, subject to one exception: Amounts received from investments that are required to be separately reported on an individual income tax return and that are from the same source are aggregated and treated as a single item. Items include, but are not limited to, gross income, deductions, credits, and basis.

(4) *Erroneous item.* An erroneous item is any item resulting in an understatement or deficiency in tax to the extent that such item is omitted from, or improperly reported (including improperly characterized) on an individual income tax return. For example, unreported income from an investment asset resulting in an understatement or deficiency in tax is an erroneous item. Similarly, ordinary income that is improperly reported as capital gain resulting in an understatement or deficiency in tax is also an erroneous item. An erroneous item is also an improperly reported item that affects the liability on other returns (e.g., an improper net operating loss that is carried back to a prior year's return).

(5) *Election or request.* A qualifying election under § 1.6015–2 or § 1.6015–3, or request under § 1.6015–4, is the first timely claim for relief from joint and several liability for the tax year for which relief is sought. A qualifying election also includes a requesting spouse's second election to seek relief from joint and several liability for the same tax year under § 1.6015–3 when the additional qualifications of paragraph (g)(5) (i) and (ii) of this section are met—

(i) The requesting spouse did not qualify for relief under § 1.6015–3 when the Internal Revenue Service considered the first election because the qualifications of § 1.6015–3(a) were not satisfied; and

(ii) At the time of the second election, the qualifications for relief under § 1.6015–3(a) are satisfied.

(h) *Transferee liability*—(1) *In general.* The relief provisions of section 6015 do not negate liability that arises under the operation of other laws. Therefore, a requesting spouse who is relieved of joint and several liability under § 1.6015–2, § 1.6015–3, or § 1.6015–4 may nevertheless remain liable for the unpaid tax (including additions to tax, penalties, and interest) to the extent provided by Federal or state transferee liability or property laws. For the rules regarding the liability of transferees, see sections 6901 through 6904 and the regulations thereunder. In addition, the requesting spouse's property may be subject to collection under Federal or state property laws.

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

Example. H and W timely file their 1998 joint income tax return on April 15, 1999. H dies in March 2000, and the executor of H's estate transfers all of the estate's assets to W. In July 2001, the Internal Revenue Service assesses a deficiency for the 1998 return. The items giving rise to the deficiency are attributable to H. W is relieved of the liability under § 6015, and H's estate remains solely liable. The Internal Revenue Service may seek to collect the deficiency from W to the

extent permitted under Federal or state transferee liability or property laws.

§ 1.6015–2 Relief from liability applicable to all qualifying joint filers.

(a) *In general.* A requesting spouse may be relieved of joint and several liability for tax (including additions to tax, penalties, and interest) from an understatement for a taxable year under this section if the requesting spouse elects the application of this section in accordance with §§ 1.6015–1(g)(5) and 1.6015–5, and—

(1) A joint return was filed for the taxable year;

(2) On the return there is an understatement attributable to erroneous items of the nonrequesting spouse;

(3) The requesting spouse establishes that in signing the return he or she did not know and had no reason to know of the item giving rise to the understatement; and

(4) It is inequitable to hold the requesting spouse liable for the deficiency attributable to the understatement.

(b) *Understatement.* The term *understatement* has the meaning given to such term by section 6662(d)(2)(A) and the regulations thereunder.

(c) *Knowledge or reason to know.* A requesting spouse has knowledge or reason to know of an erroneous item if he or she either actually knew of the item giving rise to the understatement, or if a reasonable person in similar circumstances would have known of the item giving rise to the understatement. For rules relating to a requesting spouse's actual knowledge, see § 1.6015–3(c)(2). All of the facts and circumstances are considered in determining whether a requesting spouse had reason to know of an erroneous item. The facts and circumstances that are considered include, but are not limited to, the nature of the item and the amount of the item relative to other items; the couple's financial situation; the requesting spouse's educational background and business experience; the extent of the requesting spouse's participation in the activity that resulted in the erroneous item; whether the requesting spouse failed to inquire, at or before the time the return was signed, about items on the return or omitted from the return that a reasonable person would question; and whether the erroneous item represented a departure from a recurring pattern reflected in prior years' returns (e.g., omitted income from an investment regularly reported on prior years' returns).

(d) *Inequity.* All of the facts and circumstances are considered in determining whether it is inequitable to hold a requesting spouse jointly and severally liable for an understatement. One relevant factor for this purpose is whether the requesting spouse significantly benefitted, directly or indirectly, from the understatement. A significant benefit is any benefit in excess of normal support. Evidence of direct or indirect benefit may consist of transfers of property or rights to property, including transfers that may be received several years after the year of the understatement. Thus, for example, if a requesting spouse receives property (including life insurance proceeds) from the nonrequesting spouse that is traceable to items omitted from gross income that are attributable to the nonrequesting spouse, the requesting spouse will be considered to have received significant benefit from those items. Other factors that may also be taken into account include the fact that the nonrequesting spouse has not fulfilled support obligations to the requesting spouse or the fact that the spouses have been divorced, legally separated, or not been members of the same household for at least the 12 months directly preceding the election. For more information on factors relevant to determining whether it is inequitable to hold a requesting spouse liable, see Rev. Proc. 2000–15 (2000–5 I.R.B. 447), or guidance subsequently published by the Secretary as described in § 1.6015–4(c).

(e) *Partial relief*—(1) *In general.* If a requesting spouse had no knowledge or reason to know of only a portion of an erroneous item, the requesting spouse may be relieved of the liability attributable to that portion of that item, if all other requirements are met with respect to that portion.

(2) *Example.* The following example illustrates the rules of this paragraph (e):

Example. H and W are married and file their 2004 joint income tax return in March 2005. In April 2006, H is convicted of embezzling $2 million from his employer during 2004. H kept all of his embezzlement income in an individual bank account, and he used most of the funds to support his gambling habit. However, each month during 2004, H transferred $10,000 from the individual account to H and W's joint bank account. W paid the household expenses using this joint account, and regularly received the bank statements relating to the account. W had no knowledge or reason to know of H's embezzling activities. However, W did have knowledge and reason to know of $120,000 of the $2 million of H's embezzlement income at the time she signed the joint return because that amount passed through the couple's joint bank account. Therefore, W may be relieved of the liability arising from $1,880,000 of the unreported embezzlement income, but she may not be relieved of the liability for the deficiency arising from $120,000 of the unreported embezzlement income of which she knew and had reason to know.

§ 1.6015–3 Allocation of deficiency for individuals who are no longer married, are legally separated, or are not members of the same household.

(a) *Election to allocate deficiency.* A requesting spouse may elect to allocate a deficiency if, as defined in paragraph (b) of this section, the requesting spouse is divorced, widowed, or legally separated, or has not been a member of the same household as the nonrequesting spouse at any time during the 12-month period ending on the date an election for relief is filed. Subject to the restrictions of paragraph (c) of this section, an eligible requesting spouse who elects the application of this section in accordance with §§ 1.6015–1(g)(5) and 1.6015–5 generally may be relieved of joint and several liability for the portion of any deficiency that is allocated to the nonrequesting spouse pursuant to the allocation methods set forth in paragraph (d) of this section. Relief may be available to both spouses filing the joint return if each spouse is eligible for and elects the application of this section.

(b) *Definitions*—(1) *Divorced.* A requesting spouse is divorced if the requesting spouse has a divorce decree that is recognized in the jurisdiction in which the requesting spouse resides.

(2) *Legally separated.* A requesting spouse is legally separated if the separation is recognized under the laws of the jurisdiction in which the requesting spouse resides.

(3) *Not members of the same household*—(i) *Temporary absences.* A requesting spouse and a nonrequesting spouse are considered members of the same household during either spouse's temporary absences from the household if it is reasonable to assume that the absent spouse will return to the household, and the household or a substantially equivalent household is maintained in anticipation of such return. Examples of temporary absences may include, but are not limited to, absence due to incarceration, hospitalization, business travel, vacation travel, military service, or education away from home.

(ii) *Separate dwellings.* A husband and wife who reside in the same dwelling are considered members of the same household. However, a husband and wife who reside in two separate

dwellings, whether or not part of the same structure, are not considered members of the same household unless one is temporarily absent from the other's household within the meaning of paragraph (b)(3)(i) of this section.

(c) *Limitations*—(1) *No refunds.* Relief under this section is only available for unpaid liabilities resulting from understatements of liability. Refunds are not authorized under this section.

(2) *Actual knowledge.* (i) If the Secretary demonstrates that the requesting spouse had actual knowledge at the time the return was signed of an erroneous item that is allocable to the nonrequesting spouse, the election to allocate the deficiency attributable to that item is invalid, and the requesting spouse remains liable for the portion of the deficiency attributable to that item. For example, assume W received $5,000 of dividend income from her investment in X Co. but did not report it on the joint return. H knew that W received $5,000 of dividend income from X Co. that year. H had actual knowledge of the erroneous item (*i.e.*, $5,000 of unreported dividend income from X Co.), and no relief is available under this section for the deficiency attributable to the dividend income from X Co. If a requesting spouse had actual knowledge of only a portion of an erroneous item, then relief is not available for that portion of the erroneous item. For example, if H knew that W received $1,000 of dividend income and did not know that W received an additional $4,000 of dividend income, relief would not be available for the portion of the deficiency attributable to the $1,000 of dividend income of which H had actual knowledge. A requesting spouse's actual knowledge of the proper tax treatment of an item is not relevant for purposes of demonstrating that the requesting spouse had actual knowledge of an erroneous item. For example, assume H did not know W's dividend income from X Co. was taxable, but knew that W received the dividend income. Relief is not available under this provision. In addition, a requesting spouse's knowledge of how an erroneous item was treated on the tax return is not relevant to a determination of whether the requesting spouse had actual knowledge of the item. For example, assume that H knew of W's dividend income, but H failed to review the completed return and did not know that W omitted the dividend income from the return. Relief is not available under this provision.

(ii) Knowledge of the source of an erroneous item is not sufficient to establish actual knowledge. For example, assume H knew that W owned X Co. stock, but H did not know that X Co. paid dividends to W that year. H's knowledge of W's ownership in X Co. is not sufficient to establish that H had actual knowledge of the dividend income from X Co. In addition, a requesting spouse's actual knowledge may not be inferred when the requesting spouse merely had reason to know of the erroneous item. Even if H's knowledge of W's ownership interest in X Co. indicates a reason to know of the dividend income, actual knowledge of such dividend income cannot be inferred from H's reason to know.

(iii) To demonstrate that a requesting spouse had actual knowledge of an erroneous item at the time the return was signed, the Secretary may rely upon all of the facts and circumstances. One factor that may be relied upon in demonstrating that a requesting spouse had actual knowledge of an erroneous item is whether the requesting spouse made a deliberate effort to avoid learning about the item in order to be shielded from liability. This factor, together with all other facts and circumstances, may demonstrate that the requesting spouse had actual knowledge of the item. Another factor that may be relied upon in demonstrating that a requesting spouse had actual knowledge of an erroneous item is whether the requesting spouse and the nonrequesting spouse jointly owned the property that resulted in the erroneous item. Joint ownership is a factor supporting a finding that the requesting spouse had actual knowledge of an erroneous item. For purposes of this paragraph, a requesting spouse will not be considered to have had an ownership interest in an item based solely on the operation of community property law. Rather, a requesting spouse who resided in a community property state at the time the return was signed will be considered to have had an ownership interest in an item only if the requesting spouse's name appeared on the ownership documents, or there otherwise is an indication that the requesting spouse had a direct interest in the item. For example, assume H and W live in State A, a community property state. After their marriage, H opens a bank account in his name. Under the operation of the community property laws of state A, W owns ½ of the bank account. However, W does not have an ownership interest in the account for purposes of this paragraph (c)(2)(iii) because the account is not held in her name and there is no other indication that she has a direct interest in the item.

(3) *Disqualified asset transfers*—(i) *In general.* The portion of the deficiency for which a requesting spouse is liable is increased (up to the entire amount of the deficiency) by the value of any disqualified asset that was transferred to the requesting spouse. For purposes of this paragraph (c)(3), the value of a disqualified asset is the fair market value of the asset on the date of the transfer.

(ii) *Disqualified asset defined.* A disqualified asset is any property or right to property that was transferred from the nonrequesting spouse to the requesting spouse if the principal purpose of the transfer was the avoidance of tax or payment of tax (including additions to tax, penalties, and interest).

(iii) *Presumption.* Any asset transferred from the nonrequesting spouse to the requesting spouse during the 12-month period before the mailing date of the first letter of proposed deficiency (*e.g.,* a 30-day letter or, if no 30-day letter is mailed, a notice of deficiency) is presumed to be a disqualified asset. The presumption also applies to any asset that is transferred from the nonrequesting spouse to the requesting spouse after the mailing date of the first letter of proposed deficiency. However, the presumption does not apply if the requesting spouse establishes that the asset was transferred pursuant to a divorce decree or separate maintenance agreement. In addition, a requesting spouse may rebut the presumption by establishing that the principal purpose of the transfer was not the avoidance of tax or payment of tax.

(4) *Examples.* The following examples illustrate the rules in this paragraph (c):

Example 1. Actual knowledge of an erroneous item. (i) H and W file their 2001 joint Federal income tax return on April 15, 2002. On the return, H and W report W's self-employment income, but they do not report W's self-employment tax on that income. In August 2003, H and W receive a 30-day letter from the Internal Revenue Service proposing a deficiency with respect to W's unreported self-employment tax on the 2001 return. On November 4, 2003, H, who otherwise qualifies under paragraph (a) of this section, files an election to allocate the deficiency to W. The erroneous item is the self-employment income, and it is allocable to W. H knows that W earned income in 2001 as a self-employed musician, but he does not know that self-employment tax must be reported on and paid with a joint return.

(ii) H's election to allocate the deficiency to W is invalid because, at the time H signed the joint return, H had actual knowledge of W's self-employment income. The fact that H was unaware of the tax consequences of that income (i.e., that an individual is required to pay self-employment tax on that income) is not relevant.

Example 2. Actual knowledge not inferred from a requesting spouse's reason to know.

(i) H has long been an avid gambler. H supports his gambling habit and keeps all of his gambling winnings in an individual bank account, held solely in his name.

W knows about H's gambling habit and that he keeps a separate bank account, but she does not know whether he has any winnings because H does not tell her, and she does not otherwise know of H's bank account transactions. H and W file their 2001 joint Federal income tax return on April 15, 2002. On October 31, 2003, H and W receive a 30-day letter proposing a $100,000 deficiency relating to H's unreported gambling income. In February 2003, H and W divorce, and in March 2004, W files an election under section 6015(c) to allocate the $100,000 deficiency to H.

(ii) While W may have had reason to know of the gambling income because she knew of H's gambling habit and separate account, W did not have actual knowledge of the erroneous item (i.e., the gambling winnings). The Internal Revenue Service may not infer actual knowledge from W's reason to know of the income. Therefore, W's election to allocate the $100,000 deficiency to H is valid.

Example 3. Actual knowledge of return reporting position. (i) H and W are legally separated. In February 1999, W signs a blank joint Federal income tax return for 1998 and gives it to H to fill out. The return was timely filed on April 15, 1999. In September 2001, H and W receive a 30-day letter proposing a deficiency relating to $100,000 of unreported dividend income received by H with respect to stock of ABC Co. owned by H. W knew that H received the $100,000 dividend payment in August 1998, but she did not know whether H reported that payment on the joint return.

(ii) On January 30, 2002, W files an election to allocate the deficiency from the 1998 return to H. W claims she did not review the completed joint return, and therefore, she had no actual knowledge that there was an understatement of the dividend income. W's election to allocate the deficiency to H is invalid because she had actual knowledge of the erroneous item (dividend income from ABC Co.) at the time she signed the return. The fact that W signed a blank return is irrelevant. The result would be the same if W had not reviewed the completed return or if W had reviewed the completed return and had not noticed that the item was omitted.

(iii) Assume the same facts as in paragraph (i) of this *Example 3* except that, instead of receiving $100,000 of unreported dividend income, H received $50,000 of interest income from ABC Co. during the year (properly reported on the return) and $25,000 of dividend income from ABC Co. (omitted from the return). W knew that H received both dividend and interest income from ABC Co. but did not know the total was greater than $50,000. W's election to allocate to H the deficiency attributable to the omitted dividend income is valid. Although interest and dividend income are required to be separately stated on a joint Federal income tax return, they are one item in this case because the dividend and interest income are investment income received from the same source (ABC Co.). The erroneous item is the total dividend and interest income from ABC Co. W did not have actual knowledge of the erroneous item (combined dividend and interest income from ABC Co. greater than $50,000). Therefore, her election to allocate to H the deficiency attributable to the erroneous item is valid.

Example 4. Actual knowledge of an erroneous item of income. (i) H and W are legally separated. In June 2004, a deficiency is proposed with respect to H and W's 2002 joint Federal income tax return that is attributable to $30,000 of unreported income from H's plumbing business that should have been reported on a Schedule C. No Schedule C was attached to the return. At the time W signed the return, W knew that H had a plumbing business but did not know whether H received any income from the business. W's election to allocate to H the deficiency attributable to the $30,000 of unreported plumbing income is valid.

(ii) Assume the same facts as in paragraph (i) of this *Example 4* except that, at the time W signed the return, W knew that H received $20,000 of plumbing income. W's election to allocate to H the deficiency attributable to the $20,000 of unreported plumbing income (of which W had actual knowledge) is invalid. W's election to allocate to H the deficiency attributable to the $10,000 of unreported plumbing income (of which W did not have actual knowledge) is valid.

(iii) Assume the same facts as in paragraph (i) of this *Example 4* except that, at the time W signed the return, W did not know the exact amount of H's plumbing income. W did know, however, that H received at least $8,000 of plumbing income. W's election to allocate to H the deficiency attributable to $8,000 of unreported plumbing income (of which W had actual knowledge) is invalid. W's election to allocate to H the deficiency attributable to the remaining $22,000 of unreported plumbing income (of which W did not have actual knowledge) is valid.

(iv) Assume the same facts as in paragraph (i) of this *Example 4* except that H reported $26,000 of plumbing income on the return and omitted $4,000 of plumbing income from the return. At the time W signed the return, W knew that H was a plumber, but she did not know that H earned more than $26,000 that year. W's election to allocate to H the deficiency attributable to the $4,000 of unreported plumbing income is valid because she did not have actual knowledge that H received plumbing income in excess of $26,000.

(v) Assume the same facts as in paragraph (i) of this *Example 4* except that H reported only $20,000 of plumbing income on the return and omitted $10,000 of plumbing income from the return. At the time W signed the return, W knew that H earned at least $26,000 that year as a plumber. However, W did not know that, in reality, H earned $30,000 that year as a plumber. W's election to allocate to H the deficiency attributable to the $6,000 of unreported plumbing income (of which W had actual knowledge) is invalid. W's election to allocate to H the deficiency attributable to the $4,000 of unreported plumbing income (of which W did not have actual knowledge) is valid.

Example 5. Actual knowledge of a deduction that is an erroneous item. (i) H and W are legally separated. In February 2005, a deficiency is asserted with respect to their 2002 joint Federal income tax return. The deficiency is attributable to a disallowed $1,000 deduction for medical expenses H claimed he incurred. At the time W signed the return, W knew that H had not incurred any medical expenses. W's election to allocate to H the deficiency attributable to the disallowed medical expense deduction is invalid because W had actual knowledge that H had not incurred any medical expenses.

(ii) Assume the same facts as in paragraph (i) of this *Example 5* except that, at the time W signed the return, W did not know whether H had incurred any medical expenses. W's election to allocate to H the deficiency attributable to the disallowed medical expense deduction is valid because she did not have actual knowledge that H had not incurred any medical expenses.

(iii) Assume the same facts as in paragraph (i) of this *Example 5* except that the Internal Revenue Service disallowed $400 of the $1,000 medical expense deduction. At the time W signed the return, W knew that H had incurred some medical expenses but did not know the exact amount. W's election to allocate to H the deficiency attributable to the disallowed medical expense deduction is valid because she did not have actual knowledge that H had not incurred medical expenses (in excess of the floor amount under section 213(a)) of more than $600.

(iv) Assume the same facts as in paragraph (i) of this *Example 5* except that H claims a medical expense deduction of $10,000 and the Internal Revenue Service disallows $9,600. At the time W signed the return, W knew H had incurred some medical expenses but did not know the exact amount. W also knew that H incurred medical expenses (in excess of the floor amount under section 213(a)) of no more than $1,000. W's election to allocate to H the deficiency attributable to the portion of the overstated deduction of which she had actual knowledge ($9,000) is invalid. W's election to allocate the deficiency attributable to the portion of the overstated deduction of which she had no knowledge ($600) is valid.

Example 6. Disqualified asset presumption. (i) H and W are divorced. In May 1999, W transfers $20,000 to H, and in April 2000, H and W receive a 30-day letter proposing a $40,000 deficiency on their 1998 joint Federal income tax return. The liability remains unpaid, and in October 2000, H elects to allocate the deficiency under this section. Seventy-five percent of the net amount of erroneous items are allocable to W, and 25% of the net amount of erroneous items are allocable to H.

(ii) In accordance with the proportionate allocation method (see paragraph (d)(4) of this section), H proposes that $30,000 of the deficiency be allocated to W and $10,000 be allocated to himself. H submits a signed statement providing that the principal purpose of the $20,000 transfer was not the avoidance of tax or payment of tax, but he does not submit any documentation indicating the reason for the transfer. H has not overcome the presumption that the $20,000 was a disqualified asset. Therefore, the portion of the deficiency for which H is

liable ($10,000) is increased by the value of the disqualified asset ($20,000). H is relieved of liability for $10,000 of the $30,000 deficiency allocated to W, and remains jointly and severally liable for the remaining $30,000 of the deficiency (assuming that H does not qualify for relief under any other provision).

Example 7. Disqualified asset presumption inapplicable. On May 1, 2001, H and W receive a 30-day letter regarding a proposed deficiency on their 1999 joint Federal income tax return relating to unreported capital gain from H's sale of his investment in Z stock. W had no actual knowledge of the stock sale. The deficiency is assessed in November 2001, and in December 2001, H and W divorce. According to the divorce decree, H must transfer ½ of his interest in mutual fund A to W. The transfer takes place in February 2002. In August 2002, W elects to allocate the deficiency to H. Although the transfer of ½ of H's interest in mutual fund A took place after the 30-day letter was mailed, the mutual fund interest is not presumed to be a disqualified asset because the transfer of H's interest in the fund was made pursuant to a divorce decree.

(d) *Allocation*—(1) *In general.* (i) An election to allocate a deficiency limits the requesting spouse's liability to that portion of the deficiency allocated to the requesting spouse pursuant to this section. Unless relieved of liability under § 1.6015–2 or § 1.6015–4, the requesting spouse remains liable for that portion of the deficiency allocated to the requesting spouse pursuant to this section.

(ii) Only a requesting spouse may receive relief. A nonrequesting spouse who does not also elect relief under this section remains liable for the entire amount of the deficiency, unless the nonrequesting spouse is relieved of liability under § 1.6015–2 or § 1.6015–4. If both spouses elect to allocate a deficiency under this section, there may be a portion of the deficiency that is not allocable, for which both spouses remain jointly and severally liable.

(2) *Allocation of erroneous items.* For purposes of allocating a deficiency under this section, erroneous items are generally allocated to the spouses as if separate returns were filed, subject to the following four exceptions:

(i) *Benefit on the return.* An erroneous item that would otherwise be allocated to the nonrequesting spouse is allocated to the requesting spouse to the extent that the requesting spouse received a tax benefit on the joint return.

(ii) *Fraud.* The Secretary may allocate any item appropriately between the spouses if the Secretary establishes that the allocation is appropriate due to fraud by one or both spouses.

(iii) *Erroneous items of income.* Erroneous items of income are allocated to the spouse who was the source of the income. Wage income is allocated to the spouse who performed the job producing such wages. Items of business or investment income are allocated to the spouse who owned the business or investment. If both spouses owned an interest in the business or investment, the erroneous item of income is generally allocated between the spouses in proportion to each spouse's ownership interest in the business or investment, subject to the limitations of paragraph (c) of this section. In the absence of clear and convincing evidence supporting a different allocation, an erroneous income item relating to an asset that the spouses owned jointly is generally allocated 50% to each spouse, subject to the limitations in paragraph (c) of this section and the exceptions in paragraph (d)(4) of this section. For information regarding the effect of community property laws, see § 1.6015–1(f) and paragraph (c)(2)(iii) of this section.

(iv) *Erroneous deduction items.* Erroneous deductions related to a business or investment are allocated to the spouse who owned the business or investment. If both spouses owned an interest in the business or investment, an erroneous deduction item is generally allocated between the spouses in proportion to each spouse's ownership interest in the business or investment. In the absence of clear and convincing evidence supporting a different allocation, an erroneous deduction item relating to an asset that the spouses owned jointly is generally allocated 50% to each spouse, subject to the limitations in paragraph (c) of this section and the exceptions in paragraph (d)(4) of this section. Personal deduction items are also generally allocated 50% to each spouse, unless the evidence shows that a different allocation is appropriate.

(3) *Burden of proof.* Except for establishing actual knowledge under paragraph (c)(2) of this section, the requesting spouse must prove that all of the qualifications for making an election under this section are satisfied and that none of the limitations (including the limitation relating to transfers of disqualified assets) apply. The requesting spouse must also establish the proper allocation of the erroneous items.

(4) *General allocation method*—(i) *Proportionate allocation.*

(A) The portion of a deficiency allocable to a spouse is the amount that bears the same ratio to the deficiency as the net amount of erroneous items allocable to the spouse bears to the net amount of all erroneous items. This calculation may be expressed as follows:

$$\frac{X}{\text{deficiency}} = \frac{\text{net amount of erroneous items allocable to the spouse}}{\text{net amount of all erroneous items}}$$

where X = the portion of the deficiency allocable to the spouse. Thus,

$$X = (\text{deficiency}) \times \frac{\text{net amount of erroneous items allocable to the spouse}}{\text{net amount of all erroneous items}}$$

(B) The proportionate allocation applies to any portion of the deficiency other than—

(1) Any portion of the deficiency attributable to erroneous items allocable to the nonrequesting spouse of which the requesting spouse had actual knowledge;

(2) Any portion of the deficiency attributable to separate treatment items (as defined in paragraph (d)(4)(ii) of this section);

(3) Any portion of the deficiency relating to the liability of a child (as defined in paragraph (d)(4)(iii) of this section) of the requesting spouse or nonrequesting spouse;

(4) Any portion of the deficiency attributable to alternative minimum tax under section 55;

(5) Any portion of the deficiency attributable to accuracy-related or fraud penalties;

(6) Any portion of the deficiency allocated pursuant to alternative allocation methods authorized under paragraph 6 of this section.

(ii) *Separate treatment items.* Any portion of a deficiency that is attributable to an item allocable solely to one spouse and that results from the disallowance of a credit, or a tax or an addition to tax (other than tax imposed by section 1 or section 55) that is required to be included with a joint return (a separate treatment item) is allocated separately to that spouse. Once the proportionate allocation is made, the liability for the requesting spouse's separate treatment items is added to the requesting spouse's share of the liability.

(iii) *Child's liability.* Any portion of a deficiency relating to the liability of a child of the requesting and nonrequesting spouse is generally allocated jointly to both spouses. However, if one of the spouses had sole custody of the child for the entire tax year for which the election relates, such portion of the deficiency is allocated solely to that spouse. For purposes of this paragraph, a child does not include the taxpayer's stepson or stepdaughter, unless such child was legally adopted by the taxpayer. If the child is the child of only one of the spouses, and the other spouse had not legally adopted such child, any portion of a deficiency relating to the liability of such child is allocated solely to the parent spouse.

(iv) *Allocation of certain items*—(A) *Alternative minimum tax.* Any portion of the deficiency attributable to alternative minimum tax under section 55 is allocated between the spouses in the same proportion as each spouse's share of the total alternative minimum taxable income, as defined in section 55(b)(2).

(B) *Accuracy-related and fraud penalties.* Any portion of the deficiency attributable to accuracy-related or fraud penalties under section 6662 or 6663 is allocated to the spouse whose item generated the penalty.

(5) *Examples.* The following examples illustrate the rules of this paragraph (d). In each example, assume that the requesting spouse or spouses qualify to elect to allocate the deficiency, that any election is timely made, and that the deficiency remains unpaid. In addition, unless otherwise stated, assume that neither spouse has actual knowledge of the erroneous items allocable to the other spouse. The examples are as follows:

Example 1. Allocation of erroneous items. (i) H and W file a 2003 joint Federal income tax return on April 15, 2004. On April 28, 2006, a deficiency is assessed with respect to their 2003 return. Three erroneous items give rise to the deficiency—

(A) Unreported interest income, of which W had actual knowledge, from H and W's joint bank account;

(B) A disallowed business expense deduction on H's Schedule C;

(C) A disallowed Lifetime Learning Credit for W's post-secondary education; and

(ii) H and W divorce in May 2006, and in September 2006, W timely elects to allocate the deficiency. The erroneous items are allocable as follows:

(A) The interest income would be allocated ½ to H and ½ to W, except that W has actual knowledge of it. Therefore, W's election to allocate the portion of the deficiency attributable to this item is invalid, and W remains jointly and severally liable for it.

(B) The business expense deduction is allocable to H.

(C) The Lifetime Learning Credit is allocable to W.

Example 2. Proportionate allocation. (i) W and H timely file their 2001 joint Federal income tax return on April 15, 2002. On August 16, 2004, a $54,000 deficiency is assessed with respect to their 2001 joint return. H and W divorce on October 14, 2004, and W timely elects to allocate the deficiency. Five erroneous items give rise to the deficiency—

(A) A disallowed $15,000 business deduction allocable to H;

(B) $20,000 of unreported income allocable to H;

(C) A disallowed $5,000 deduction for educational expense allocable to H;

(D) A disallowed $40,000 charitable contribution deduction allocable to W; and

(E) A disallowed $40,000 interest deduction allocable to W.

(ii) In total, there are $120,000 worth of erroneous items, of which $80,000 are attributable to W and $40,000 are attributable to H.

W's items		H's items
$40,000	charitable deduction	$15,000 business deduction
$40,000	interest deduction	$20,000 unreported income
$80,000		$ 5,000 education deduction
		$40,000

(iii) The ratio of erroneous items allocable to W to the total erroneous items is ⅔ ($80,000/$120,000). W's liability is limited to $36,000 of the deficiency (⅔ of $54,000). The Internal Revenue Service may collect up to $36,000 from W and up to $54,000 from H (the total amount collected, however, may not exceed $54,000). If H also made an election, there would be no remaining joint and several liability, and the Internal Revenue Service would collect $36,000 from W and $18,000 from H.

Example 3. Proportionate allocation with joint erroneous item. (i) On September 4, 2001, W elects to allocate a $3,000 deficiency for the 1998 tax year to H. Three erroneous items give rise to the deficiency—

(A) Unreported interest in the amount of $4,000 from a joint bank account;

(B) A disallowed deduction for business expenses in the amount of $2,000 attributable to H's business; and

(C) Unreported wage income in the amount of $6,000 attributable to W's second job.

(ii) The erroneous items total $12,000. Generally, income, deductions, or credits from jointly held property that are erroneous items are allocable 50% to each spouse. However, in this case, both spouses had actual knowledge of the unreported interest income. Therefore, W's election to allocate the portion of the deficiency attributable to this item is invalid, and W and H remain jointly and severally liable for this portion. Assume that this portion is $1,000. W may allocate the remaining $2,000 of the deficiency.

H's items	W's items
$2,000 business deduction	$6,000 wage income

Total allocable items: $8,000

(iii) The ratio of erroneous items allocable to W to the total erroneous items is ¾ ($6,000/$8,000). W's liability is limited to $1,500 of the deficiency (¾ of $2,000) allocated to her. The Internal Revenue Service may collect up to $2,500 from W (¾ of the total allocated deficiency plus $1,000 of the deficiency attributable to the joint bank account interest) and up to $3,000 from H (the total amount collected, however, cannot exceed $3,000).

(iv) Assume H also elects to allocate the 1998 deficiency. H is relieved of liability for ¾ of the deficiency, which is allocated to W. H's relief totals $1,500 (¾ of $2,000). H remains liable for $1,500 of the deficiency (¼ of the allocated deficiency plus $1,000 of the deficiency attributable to the joint bank account interest).

Example 4. Separate treatment items (STIs). (i) On September 1, 2006, a $28,000 deficiency is assessed with respect to H and W's 2003 joint return. The deficiency is the result of 4 erroneous items—

(A) A disallowed Lifetime Learning Credit of $2,000 attributable to H;

(B) A disallowed business expense deduction of $8,000 attributable to H;

(C) Unreported income of $24,000 attributable to W; and

(D) Unreported self-employment tax of $14,000 attributable to W.

(ii) H and W both elect to allocate the deficiency.

(iii) The $2,000 Lifetime Learning Credit and the $14,000 self-employment tax are STIs totaling $16,000. The amount of erroneous items included in computing the proportionate allocation ratio is $32,000 ($24,000 unreported income and $8,000 disallowed business expense deduction). The amount of the deficiency subject to proportionate allocation is reduced by the amount of STIs ($28,000–$16,000 = $12,000).

(iv) Of the $32,000 of proportionate allocation items, $24,000 is allocable to W, and $8,000 is allocable to H.

W's share of allocable items	H's share of allocable items
3/4 ($24,000/$32,000)	1/4 ($8,000/$32,000)

(v) W's liability for the portion of the deficiency subject to proportionate allocation is limited to $9,000 (¾ of $12,000) and H's liability for such portion is limited to $3,000 (¼ of $12,000).

(vi) After the proportionate allocation is completed, the amount of the STIs is added to each spouse's allocated share of the deficiency.

W's share of total deficiency	H's share of total deficiency
$ 9,000 allocated deficiency	$3,000 allocated deficiency
$14,000 self-employment tax	$2,000 Lifetime Learning Credit
$23,000	$5,000

(vii) Therefore, W's liability is limited to $23,000 and H's liability is limited to $5,000.

Example 5. Allocation of the alternative minimum tax. (i) H and W file their 2004 joint Federal income tax return on April 15, 2005. During 2004, W's total alternative minimum taxable income was $120,000, and H's total alternative minimum taxable income was $30,000. All of H's income was from his business and was reported on Schedule C. Everything on the 2004 return was properly reported, and there was no alternative minimum tax liability. In 2005, H experienced a net operating loss of $25,000 for regular tax purposes. H did not have a net operating loss for alternative minimum tax purposes. In February 2006, H and W file an amended return for 2004 claiming the net operating loss that was carried back from 2005. The loss is a proper deduction, but it results in an alternative minimum tax liability, which H and W do not report on the amended return. In December 2007, a $5,500 deficiency is assessed on their 2004 joint Federal income tax return resulting from the unreported alternative minimum tax liability.

(ii) W and H divorce in January 2008, and W elects to allocate the deficiency.

W's AMT income for 2004: $120,000
H's AMT income for 2004: $ 30,000
Total AMT income for 2004: $150,000
W's share of AMT income for 2004: ⅘
($120,000/$150,000)
H's share of AMT income for 2004: ⅕
($30,000/$150,000)

(iii) W's liability is limited $4,400 (⅘ × $5,500). H remains liable for the entire deficiency because he did not make an election to allocate the deficiency.

Example 6. Requesting spouse receives a benefit on the joint return from the nonrequesting spouse's erroneous item. (i) In 2001, H earns gross income of $4,000 from his business, and W earns $50,000 of wage income. On their 2001 joint Federal income tax return, H deducts $20,000 of business expenses resulting in a net loss from his business of $16,000. H and W divorce in September 2002, and on May 22, 2003, a $5,200 deficiency is assessed with respect to their 2001 joint return. W elects to allocate the deficiency. The deficiency on the joint return results from a disallowance of all of H's $20,000 of deductions.

(ii) Since H used only $4,000 of the disallowed deductions to offset gross income from his business, W benefitted from the other $16,000 of the disallowed deductions used to offset her wage income. Therefore, $4,000 of the disallowed deductions are allocable to H and $16,000 of the disallowed deductions are allocable to W. W's liability is limited to $3,900 (¾ of $5,200). If H also elected to allocate the deficiency, H's election to allocate the $3,900 of the deficiency to W would be invalid because H had actual knowledge of the erroneous items.

Example 7. Calculation of requesting spouse's benefit on the joint return when the nonrequesting spouse's erroneous item is partially disallowed. Assume the same facts as in example 7, except that H deducts $18,000 for business expenses on the joint return, of which $16,000 are disallowed. Since H used only $2,000 of the $16,000 disallowed deductions to offset gross income from his business, W received benefit on the return from the other $14,000 of the disallowed deductions used to offset her wage income. Therefore, $2,000 of the disallowed deductions are allocable to H and $14,000 of the disallowed deductions are allocable to W. W's liability is limited to $4,550 (⅞ of $5,200).

(6) *Alternative allocation methods—* (i) *Allocation based on applicable tax rates.* If a deficiency arises from two or more erroneous items that are subject to tax at different rates (e.g., ordinary income and capital gain items), the deficiency is allocated after first separating the erroneous items into categories according to their applicable tax rate. After all erroneous items are categorized, a separate allocation is made with respect to each tax rate category using the proportionate allocation method of paragraph (d)(4) of this section.

(ii) *Allocation methods provided in subsequent published guidance.* The Secretary may prescribe alternative methods for allocating erroneous items under section 6015(c) in subsequent revenue rulings, revenue procedures, or other appropriate guidance.

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

Example. Allocation based on applicable tax rates. H and W timely file their 1998 joint Federal income tax return. H and W divorce in 1999. On July 13, 2001, a $5,100

deficiency is assessed with respect to H and W's 1998 return. Of this deficiency, $2,000 results from unreported capital gain of $6,000 that is attributable to W and $4,000 of capital gain that is attributable to H (both gains being subject to tax at the 20% marginal rate). The remaining $3,100 of the deficiency is attributable to $10,000 of unreported dividend income of H that is subject to tax at a marginal rate of 31%. H and W both timely elect to allocate the deficiency, and qualify under this section to do so. There are erroneous items subject to different tax rates; thus, the alternative allocation method of this paragraph (d)(6) applies. The three erroneous items are first categorized according to their applicable tax rates, then allocated. Of the total amount of 20% tax rate items ($10,000), 60% is allocable to W and 40% is allocable to H. Therefore, 60% of the $2,000 deficiency attributable to these items (or $1,200) is allocated to W. The remaining 40% of this portion of the deficiency ($800) is allocated to H. The only 31% tax rate item is allocable to H. Accordingly, H is liable for $3,900 of the deficiency ($800 + $3,100), and W is liable for the remaining $1,200.

§ 1.6015–4 Equitable relief.

(a) A requesting spouse who files a joint return for which a liability remains unpaid and who does not qualify for full relief under § 1.6015–2 or § 1.6015–3 may request equitable relief under this section. The Internal Revenue Service has the discretion to grant equitable relief from joint and several liability to a requesting spouse when, considering all of the facts and circumstances, it would be inequitable to hold the requesting spouse jointly and severally liable.

(b) This section may not be used to circumvent the limitation of § 1.6015–3(c)(1) (*i.e.,* no refunds under § 1.6015–3). Therefore, relief is not available under this section to refund liabilities already paid, for which the requesting spouse would otherwise qualify for relief under § 1.6015–3.

(c) The Secretary will provide the criteria to be used in determining whether it is inequitable to hold a requesting spouse jointly and severally liable under this section in revenue rulings, revenue procedures, or other published guidance.

§ 1.6015–5 Time and manner for requesting relief.

(a) *Requesting relief.* To elect the application of § 1.6015–2 or § 1.6015–3, or to request equitable relief under § 1.6015–4, a requesting spouse must file Form 8857, ''Request for Innocent Spouse Relief (And Separation of Liability and Equitable Relief)''; submit a written statement containing the same information required on Form 8857, which is signed under penalties of perjury; or submit information in the manner as may be prescribed by the Secretary in relevant revenue rulings, revenue procedures, or other published guidance.

(b) *Time period for filing a request for relief*—(1) *In general.* To elect the application of § 1.6015–2 or § 1.6015–3, or to request equitable relief under § 1.6015–4, a requesting spouse must file Form 8857 or other similar statement with the Internal Revenue Service no later than two years from the date of the first collection activity against the requesting spouse after July 22, 1998, with respect to the joint tax liability.

(2) *Definitions*—(i) *Collection activity.* For purposes of this paragraph (b), collection activity means an administrative levy or seizure described by section 6331 to obtain property of the requesting spouse; an offset of an overpayment of the requesting spouse against a liability under section 6402; the filing of a suit by the United States against the requesting spouse for the collection of the joint tax liability; or the filing of a claim by the United States in a court proceeding in which the requesting spouse is a party or which involves property of the requesting spouse. Collection activity does not include a notice of intent to levy under sections 6330 and 6331(d); the filing of a Notice of Federal Tax Lien; or a demand for payment of tax. The term *property of the requesting spouse*, for purposes of this paragraph, means property in which the requesting spouse has an ownership interest (other than solely through the operation of community property laws), including property owned jointly with the nonrequesting spouse.

(ii) *Date of levy or seizure.* For purposes of this paragraph (b), if tangible personal property or real property is seized and is to be sold, a notice of seizure is required under section 6335(a). The date of levy or seizure is the date the notice of seizure is given. For more information on the rules regarding notice of seizure, see section 6502(b) and the regulations thereunder. For purposes of this paragraph (b), if a levy is made on cash or intangible personal property that will not be sold, the date of levy or seizure is the date the notice of levy is made. For more information on the rules regarding levy, see section 6331 and the regulations thereunder. For purposes of this paragraph (b), if a notice of levy is served by mail, the date of levy or seizure is the date of delivery of the notice of levy to the person on whom the levy is made. For more information on notices of levy served by mail, see § 301.6331–1(c) of this chapter.

(3) *Requests for relief made before commencement of collection activity.* An election or request for relief may be made before collection activity has commenced. For example, an election or request for relief may be made in connection with an audit or examination of the joint return, or pursuant to the pre-levy collection due process (CDP) hearing procedures pursuant to sections 6320 and 6330. For more information on the rules regarding pre-levy collection due process, see §§ 301.6320–1T(e)(1) and (2), and 301.6330–1T(e)(1) and (2) of this chapter. However, no request for relief may be made before the date specified in paragraph (b)(5) of this section.

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

Example 1. On January 11, 2000, a notice of intent to levy is mailed to H and W regarding their 1997 joint Federal income tax liability. The Internal Revenue Service levies on W's employer on June 5, 2000. The Internal Revenue Service levies on H's employer on July 10, 2000. W must elect or request relief by June 5, 2002, which is two years after the Internal Revenue Service levied on her wages. H must elect or request relief by July 10, 2002, which is two years after the Internal Revenue Service levied on his wages.

Example 2. The Internal Revenue Service levies on W's bank, in which W maintains a savings account, to collect a joint liability for 1995 on January 12, 1998. The bank complies with the levy, which only partially satisfies the liability. The Internal Revenue Service takes no other collection actions. On July 24, 2000, W elects relief with respect to the unpaid portion of the 1995 liability. W's election is timely because the Internal Revenue Service has not taken any collection activity after July 22, 1998; therefore, the two-year period has not commenced.

Example 3. Assume the same facts as in *Example 2*, except that the Internal Revenue Service delivers a second levy on the bank on July 23, 1998. W's election is untimely because it is filed more than two years after the first collection activity after July 22, 1998.

Example 4. H and W do not remit full payment with their timely filed joint Federal income tax return for the 1989 tax year. No collection activity is taken after July 22, 1998, until the United States files a suit against both H and W to reduce the tax assessment to judgment and to foreclose the tax lien on their jointly held residence on July 1, 1999. H elects relief on October 2, 2000. The election is timely because it is made within two years of the filing of a collection suit by the United States against H.

Example 5. W files a Chapter 7 bankruptcy petition on July 10, 2000. On September 5, 2000, the United States files a proof of claim for her joint 1998 income tax liability. W elects relief with respect to the 1998 liability on August 20, 2002. The election is timely because it is made within two years of the date the United States filed the claim in W's bankruptcy case.

(5) *Premature requests for relief.* The Secretary will not consider premature claims for relief under § 1.6015–2, § 1.6015–3, or § 1.6015–4. A premature claim is a claim for relief that is filed for a tax year prior to the receipt of a notification of an audit or a letter or notice from the Secretary indicating that there may be an outstanding liability with regard to that year. Such notices or letters do not include notices issued pursuant to section 6223 relating to TEFRA partnership proceedings. A premature claim is not considered an election or request under § 1.6015–1(g)(5).

(c) *Effect of a final administrative determination*—(1) *In general.* A requesting spouse is entitled to only one final administrative determination of relief under § 1.6015–1 for a given assessment, unless the requesting spouse properly submits a second request for relief that is described in § 1.6015–1(g)(5).

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

Example. In January 2001, W invests in tax shelter P, and in February 2001, she starts her own business selling crafts, from which she earns $100,000 of net income for the year. H and W file a joint return for tax year 2001, on which they claim $20,000 in losses from their investment in P, and they omit W's self-employment tax. In March 2003, the Internal Revenue Service opens an audit under the provisions of subchapter C of chapter 63 of subtitle F of the Internal Revenue Code (TEFRA partnership proceeding) and sends H and W a notice under section 6223(a)(1). In September 2003, the Internal Revenue Service audits H and W's 2001 joint return regarding the omitted self-employment tax. H may file a claim for relief from joint and several liability for the self-employment tax liability because he has received a notification of an audit indicating that there may be an outstanding liability on the joint return. However, his claim for relief regarding the TEFRA partnership proceeding is premature under paragraph (b)(5) of this section. H will have to wait until the Internal Revenue Service sends him a notice of computational adjustment or assesses the liability from the TEFRA partnership proceeding on H and W's joint return before he files a claim for relief with respect to any such liability. The assessment relating to the TEFRA partnership proceeding is separate from the assessment for the self-employment tax; therefore, H's subsequent claim for relief for the liability from the TEFRA partnership proceeding is not precluded by his previous claim for relief from the self-employment tax liability under this paragraph (c).

§ 1.6015–6 Nonrequesting spouse's notice and opportunity to participate in administrative proceedings.

(a) *In general.* (1) When the Secretary receives an election under § 1.6015–2 or § 1.6015–3, or a request for relief under § 1.6015–4, the Secretary must send a notice to the nonrequesting spouse's last known address that informs the nonrequesting spouse of the requesting spouse's claim for relief. The notice must provide the nonrequesting spouse with an opportunity to submit any information that should be considered in determining whether the requesting spouse should be granted relief from joint and several liability. A nonrequesting spouse is not required to submit information under this section. The Secretary has the discretion to share with one spouse any of the information submitted by the other spouse. At the request of one spouse, the Secretary will omit from shared documents the spouse's new name, address, employer, telephone number, and any other information that would reasonably indicate the other spouse's location.

(2) The Secretary must notify the nonrequesting spouse of the Secretary's final determination with respect to the requesting spouse's claim for relief under section 6015. However, the nonrequesting spouse is not permitted to appeal such determination.

(b) *Information submitted.* The Secretary will consider all of the information (as relevant to each particular relief provision) that the nonrequesting spouse submits in determining whether relief from joint and several liability is appropriate, including information relating to the following—

(1) The legal status of the requesting and nonrequesting spouses' marriage;

(2) The extent of the requesting spouse's knowledge of the erroneous items or underpayment;

(3) The extent of the requesting spouse's knowledge or participation in the family business or financial affairs;

(4) The requesting spouse's education level;

(5) The extent to which the requesting spouse benefitted from the erroneous items;

(6) Any asset transfers between the spouses;

(7) Any indication of fraud on the part of either spouse;

(8) Whether it would be inequitable, within the meaning of §§ 1.6015–2(d) and 1.6015–4(b), to hold the requesting spouse jointly and severally liable for the outstanding liability;

(9) The allocation or ownership of items giving rise to the deficiency; and

(10) Anything else that may be relevant to the determination of whether relief from joint and several liability should be granted.

(c) *Effect of opportunity to participate.* The failure to submit information pursuant to paragraph (b) of this section does not affect the nonrequesting spouse's ability to seek relief from joint and several liability for the same tax year. However, information that the nonrequesting spouse submits pursuant to paragraph (b) of this section is relevant in determining whether relief from joint and several liability is appropriate for the nonrequesting spouse should the nonrequesting spouse also submit an application for relief.

§ 1.6015–7 Tax Court review.

(a) *In general.* Requesting spouses may petition the Tax Court to review the denial of relief under § 1.6015–1.

(b) *Time period for petitioning the Tax Court.* Pursuant to section 6015(e), the requesting spouse may petition the Tax Court to review a denial of relief under § 1.6015–1 within the 90-day period beginning on the date the final determination letter is mailed. If the Secretary does not mail the requesting spouse a final determination letter within 6 months of the date the requesting spouse files an election under § 1.6015–2 or § 1.6015–3, the requesting spouse may petition the Tax Court to review the election at any time after the expiration of the 6-month period, and before the expiration of the 90-day period beginning on the mailing date of the final determination letter. The Tax Court also may review a claim for relief if Tax Court jurisdiction has been acquired under section 6213(a) or 6330(d). For rules regarding petitioning the Tax Court under section 6213(a) or 6330(d), see §§ 301.6213–1, 301.6330–1T(f), and 301.6330–1T(g) of this chapter.

(c) *Restrictions on collection and suspension of the running of the period of limitations*—(1) *Restrictions on collection under § 1.6015–2 or 1.6015–3.* Unless the Secretary determines that collection will be jeopardized by delay, no levy or proceeding in court shall be made, begun, or prosecuted against a requesting spouse electing the application of § 1.6015–2 or § 1.6015–3 for the collection of any assessment to which the election relates until the expiration of the 90-day period described in paragraph (b) of this section, or if a petition is filed with the Tax Court, until the decision of the Tax Court becomes final under section 7481. Notwithstanding the preceding sentence, if the requesting spouse appeals the Tax Court's determination, the Internal Revenue Service may resume collection of the liability from the requesting spouse on the date of the Tax Court's determination unless the requesting spouse files an appeal bond pursuant to the rules of section 7485. For more information regarding the date

on which a decision of the Tax Court becomes final, see section 7481 and the regulations thereunder. Jeopardy under this paragraph (c)(1) means conditions exist that would require an assessment under section 6851 or 6861 and the regulations thereunder.

(2) *Suspension of the running of the period of limitations*— (i) *Relief under § 1.6015–2 or 1.6015–3.* The running of the period of limitations in section 6502 on collection against the requesting spouse of the assessment to which an election under § 1.6015–2 or § 1.6015–3 relates is suspended for the period during which the Commissioner is prohibited by paragraph (c)(1) of this section from collecting by levy or a proceeding in court and for 60 days thereafter.

(ii) *Relief under § 1.6015–4.* If a requesting spouse seeks only equitable relief under § 1.6015–4, the restrictions on collection of paragraph (c)(1) of this section do not apply. The request for relief does not suspend the running of the period of limitations on collection.

(3) *Definitions*—(i) *Levy.* For purposes of this paragraph (c), levy means an administrative levy or seizure described by section 6331.

(ii) *Proceedings in court.* For purposes of this paragraph (c), proceedings in court means suits filed by the United States for the collection of Federal tax. Proceedings in court does not refer to the filing of pleadings and claims and other participation by the Commissioner or the United States in suits not filed by the United States, including Tax Court cases, refund suits, and bankruptcy cases.

(iii) *Assessment to which the election relates.* For purposes of this paragraph (c), the assessment to which the election relates is the entire assessment of the deficiency to which the election relates, even if the election is made with respect to only part of that deficiency.

§ 1.6015–8 Applicable liabilities.

(a) *In general.* Sections 6015(b), 6015(c), and 6015(f) apply to liabilities that arise after July 22, 1998, and to liabilities that arose prior to July 22, 1998, that were not paid on or before July 22, 1998.

(b) *Liabilities paid on or before July 22, 1998.* A requesting spouse seeking relief from joint and several liability for amounts paid on or before July 22, 1998, must request relief under section 6013(e) and the regulations thereunder.

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

Example 1. H and W file a joint income tax return for 1995 on April 15, 1996. There is an understatement on the return attributable to an omission of H's wage income. On October 15, 1998, H and W receive a 30-day letter proposing a deficiency on the 1995 joint return. W pays the outstanding liability in full on November 30, 1998. In March 1999, W files Form 8857, requesting relief from joint and several liability under section 6015(b). Although W's liability arose prior to July 22, 1998, it was unpaid as of that date. Therefore, section 6015 is applicable.

Example 2. H and W file their 1995 joint income tax return on April 15, 1996. On October 14, 1997, a deficiency is assessed regarding a disallowed business expense deduction attributable to H. On June 30, 1998, the Internal Revenue Service levies on W's bank account in full satisfaction of the outstanding liability. On August 31, 1998, W files a request for relief from joint and several liability. The liability arose prior to July 22, 1998, and it was paid as of July 22, 1998. Therefore, section 6015 is not applicable and section 6013(e) is applicable.

§ 1.6015–9 Effective date.

Sections 1.6015–0 through 1.6015–9 are applicable for all elections under § 1.6015–2 or § 1.6015–3 or any request for relief under § 1.6015–4 filed on or after federal regulations are published in the **Federal Register**.

Charles Rossotti,

Commissioner of Internal Revenue.

[FR Doc. 01–8 Filed 1–16–01; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–106030–98]

RIN 1545–AW50

Source of Income from Certain Space and Ocean Activities; Also, Source of Communications Income

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations under section 863(d) governing the source of income from certain space and ocean activities. It also contains proposed regulations under sections 863(a), (d), and (e) governing the source of income from certain communications activity. This document also contains proposed regulations under sections 863(a) and (b), amending the regulations in § 1.863–3 to conform those regulations with these proposed regulations. This document affects persons who conduct activities in space, or on or under water not within the jurisdiction of a foreign country, possession of the United States, or the United States (collectively, in international water). This document also affects persons who derive income from transmission of communications. In addition, this document provides notice of a public hearing on these proposed regulations.

DATES: Comments and outlines of oral comments to be presented at the public hearing scheduled for March 28, 2001, at 10 a.m. must be received by March 7, 2001.

ADDRESSES: Send submissions to: CC:M&SP:RU (Reg–106030–98), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:M&SP:RU (REG–106030–98), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the ''Tax Regs'' option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at: http://www.irs.ustreas.gov/tax__regs/regslist.html. The public hearing will be held in the auditorium, seventh floor, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Anne Shelburne, (202) 874–1490; concerning submissions and the hearing, and/or to be placed on the building access list to attend the hearing, La Nita Van Dyke, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget (OMB) for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)).

Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, W:CAR:MP:FP:S:O, Washington, DC 20224. Comments on the collection of information should be received by March 19, 2001. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (see below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

The collection of information requirements are in proposed § 1.863–8(g) and in § 1.863–9(g). This information is required by the IRS to monitor compliance with the federal tax rules for determining the source of income from space or ocean activities, or from transmission of communications. The likely respondents are taxpayers who conduct space or ocean activities, or who derive communications income. Responses to this collection of information are required to properly determine the source of a taxpayer's income from such transactions.

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

Estimated total annual reporting/recordkeeping burden: 1,200 hours. The estimated annual burden per respondent varies from 3 hours to 7 hours, depending on individual circumstances, with an estimated average of 5 hours.

Estimated number of respondents: 250.

Estimated annual frequency of responses: One time per year.

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

Background

This document contains proposed regulations relating to the Income Tax Regulations (CFR part 1) under sections 863(a), (b), (d), and (e) of the Internal Revenue Code (Code). Congress enacted section 863(d) and section 863(e) as part of the Tax Reform Act of 1986 (Public Law 99–514, 100 Stat. 2085) (the 1986 Act). Section 863(d) governs the source of income derived from certain space and ocean activities. Section 863(e) governs the source of income derived from international communications activity.

Explanation of Provisions

These proposed regulations provide two sets of rules, one in § 1.863–8 for determining the source of income from space and ocean activities, the other in § 1.863-9 for determining the source of income from communications activity. Section 1.863–9 provides rules for both international communications income (ICI) and other communications income. The IRS and Treasury believe it is appropriate to provide source rules for both ICI and other communications income in a single regulation.

The IRS and Treasury are fully aware of the rapid technological evolution in the space and communications industries since Congress enacted sections 863(d) and (e) in 1986, and have attempted to take into account these changes as well as changes in the space and communications industries and business practices and business models. The IRS and Treasury recognize that these regulations address important issues for many different industries and have worked closely with the industries in drafting these rules. The IRS and Treasury are interested in receiving comments from these industries on how to accommodate issues arising from the use of new technologies, consistent with the language and purpose of the statutory provisions.

A. Space and Ocean Activity Under Section 863(d)

1. Scope of § 1.863–8 of the Proposed Regulations

Section 1.863–8 of the proposed regulations provides rules for sourcing income derived from space and ocean activity, notwithstanding other sections. Proposed regulations § 1.863–8(a) provides that a taxpayer derives income from a space or ocean activity only if the taxpayer conducts such activity directly. This is consistent with the approach that IRS and Treasury adopted in the § 1.863–3 regulations sourcing income from inventory sales.

2. Source of Gross Income From Space or Ocean Activity

a. *General.* Section 863(d)(1) states that, except as provided in regulations, any income derived from space or ocean activity by a U.S. person will be U.S. source income, and if derived by a foreign person, foreign source income. Proposed regulations § 1.863-8(b)(1) provides that a U.S. person's space or ocean income is U.S. source. Proposed regulations § 1.863–8(b)(1) also states the general rule that income derived by a foreign person from a space or ocean activity is foreign source income. However, the proposed regulations contain several exceptions to that general rule.

Proposed regulations § 1.863–8(b)(2) provides that if a foreign corporation is 50 percent or more owned by vote or value (directly, indirectly, or constructively) by U.S. persons and is not a controlled foreign corporation within the meaning of section 957 (CFC), all income derived by the corporation from space or ocean activity is U.S. source income. This rule reflects IRS and Treasury's concern that U.S. persons may use a foreign corporation (for example, by incorporating a 50/50 joint venture with a foreign person, thereby avoiding CFC status) to obtain results that are inconsistent with the purposes of this section. The IRS and Treasury believe Congress granted Treasury broad regulatory authority in section 863(d) to prevent taxpayers from circumventing the purposes of this section.

Proposed regulations § 1.863–8(b)(3) provides that if a foreign person is engaged in a U.S. trade or business, the foreign person's income derived from a space or ocean activity is presumed to be U.S. source income. The rule reflects IRS and Treasury's concern that a foreign person could engage in significant economic activities in the United States and avoid U.S. taxation of space or ocean income derived from such activities. For example, a foreign satellite company established in a no-tax jurisdiction could engage in substantial activity in the United States through launch facilities, yet pay no U.S. or foreign tax on income arising from leasing the satellites it launches. The IRS and Treasury believe Congress intended that a foreign person engaged in substantial U.S. business in the United States be subject to U.S. tax on related space or ocean activity.

The IRS and Treasury recognize that the presumption may be over-inclusive in certain cases. Therefore, the proposed regulations provide that if the foreign person can allocate gross space or ocean income between income from sources within the United States, space, or international water, and outside the United States and space and international water, to the satisfaction of the Commissioner, based on the facts and circumstances, which may include functions performed, resources employed, risks assumed, or other contributions to value, income from outside the United States and space and international water will be treated as foreign source income. When a foreign person is entitled to the benefits of a tax

treaty with the United States, such person may elect to be taxed under the rules of that treaty, so that, for example, the United States would tax only income attributable to a permanent establishment of that foreign person, regardless of the amount of income considered effectively connected with a U.S. trade or business.

b. *Source Rules for Sales of Certain Property.* Taxpayers must apply the rules of section 863(d) and these proposed regulations to determine the source of income from sales of property purchased or produced by the taxpayer, either when production occurs in whole or in part in space or in international water, or when the sale occurs in space or in international water. The rules of sections 861, 862, 863(a) and (b), and 865, and the regulations thereunder apply only to the extent provided in proposed regulations § 1.863–8(b)(4).

Proposed regulations § 1.863–8(b)(4)(i) provides that income derived from the sale of purchased property in space or international water is sourced under paragraph (b)(1), (2), or (3) of this section. Proposed regulations § 1.863–8(d)(2)(iii) provides that a sale occurs in space or international water if either property is located in space or international water at the time the rights, title, and interests pass to the purchaser, or the property sold is for use in space or international water. This rule for determining if a sale takes place in space or in international water modifies for space and ocean activity the rule in § 1.861–7(c) for otherwise determining where a sale takes place. The IRS and Treasury believe this rule for determining the place of sale in the case of space or ocean activity is consistent with the legislative history of section 863(d), indicating Congress intended that space and ocean activity be broadly defined. See S. Rept. No. 313, 99th Cong., 2d Sess. 357 (1986) (Senate Report). It is also consistent with the language of the Senate Report stating that the committee did not intend to override the title passage rule for sales of property on the high seas. Consistent with this language, proposed regulations § 1.863–8(d)(1)(ii) excludes from the definition of ocean activity the sale of inventory on international water, and the source of income from such sales continues to be determined under § 1.861–7(c).

Proposed regulations § 1.863–8(b)(4)(ii) provides rules for income derived from the sale of property produced by the taxpayer. To determine the source of income derived from the sale of property produced by the taxpayer, proposed regulations § 1.863–8(b)(4)(ii)(A) provides that the taxpayer must divide gross income from such sale equally between production activity and sales activity. Thus, one-half of the taxpayer's gross income is attributed to production activity, and the other one-half of such gross income is attributed to sales activity.

Proposed regulations § 1.863–8(b)(4)(ii)(A) provides that income attributable to sales activity is sourced applying the rules applicable to the sale of purchased property. If the taxpayer sells such property in space or international water, the source of income attributable to sales activity is determined under paragraph (b)(1), (2), or (3). If the taxpayer sells such property outside space and outside international water, the source of income attributable to sales activity is determined under § 1.863–3(c)(2). Proposed regulations § 1.863–8(b)(4)(ii)(B) provides that income attributable to production activity, when production occurs only in space or in international water, is sourced under paragraphs (b)(1), (2), or (3). When production occurs only outside space and international water, income attributable to production activity is sourced under § 1.863-3(c)(1). When production activity occurs both in space or in international water and outside space and international water, proposed regulations § 1.863–8(b)(4)(ii)(C) splits the income attributed to production activity between production activities occurring in space or in international water, and production activities occurring outside space and international water. Gross income must be allocated to the satisfaction of the Commissioner, based on all relevant facts and circumstances, which may include functions performed, resources employed, risks assumed, and any other contributions to the value of the property. The source of gross income attributable to production activities in space or in international water is sourced under paragraphs (b)(1), (2), or (3). The source of gross income attributable to production activities outside space and international water is determined under § 1.863–3(c)(1).

c. *Special Rule for Determining the Source of Income from Services.* Proposed regulations § 1.863–8(b)(5) provides that income derived from the performance of services in space or in international water is sourced under paragraph (b)(1), (2), or (3). Proposed regulations § 1.863–8(d)(2)(ii)(A) provides that a performance of a service is a space or ocean activity when a part of the service, even if de minimis, is performed in space or in international water. The IRS and Treasury believe that Congress intended a broad range of activities be treated as space or ocean activities.

The IRS and Treasury recognize that this rule may be over-inclusive in certain cases. Therefore, proposed regulations § 1.863–8(b)(5) provides that the taxpayer can allocate gross income derived from the performance of the service between activities that occur in space or international water and activities that occur outside space and international water, to the satisfaction of the Commissioner, based on facts and circumstances, which may include functions performed, resources employed, risks assumed, or other contributions to value. Gross income allocated to activities occurring outside space and international water will be sourced under sections 861, 862, 863, and 865 of the Code.

d. *Special Rule for Determining the Source of Communications Income.* A communications activity, as defined in proposed regulations § 1.863–9(d), also can be a space or ocean activity. Pursuant to the authority granted in section 863(d)(1), proposed regulations § 1.863–8(b)(6) provides that income from communications activity that is also a space or ocean activity is sourced under proposed regulations § 1.863–9(b).

3. Taxable Income

When a taxpayer allocates gross income under paragraph (b)(3) (allocation for certain foreign persons), paragraph (b)(4)(ii)(C) (allocation between production occurring in space or international water and production occurring outside), or paragraph (b)(5) (allocation between services occurring in space or international water and those occurring outside) of this section, the taxpayer must allocate or apportion expenses, losses, and other deductions under §§ 1.861–8 through 1.861–14T of the regulations to the class of gross income, which must include the total income so allocated in each case. A taxpayer must then apply the rules of §§ 1.861–8 through 1.861–14T to properly allocate or apportion amounts of expenses, losses, and other deductions allocated or apportioned to such class of gross income between gross income from sources within the United States and without the United States.

When a taxpayer must allocate gross income to the satisfaction of the Commissioner based on the facts and circumstances, IRS and Treasury believe that such allocations would be based generally on section 482 principles. However, IRS and Treasury solicit comments on this approach, including specific comments and examples on

alternative methods that could be used to make these allocations.

4. *Definition of Space and Ocean Activity*

a. *General Rules.* Section 863(d)(2) provides that space or ocean activity means any activity conducted in space, and any activity conducted in or under water not within the jurisdiction of the United States or a foreign country. Proposed regulations § 1.863–8(d)(1)(i) defines space as any area not within the jurisdiction (as recognized by the United States) of a foreign country, possession of the United States, or the United States, and not in international water.

Proposed regulations § 1.863–8(d)(1)(i) provides that space activity is any activity conducted in space, with certain exceptions. Space activity includes performance and provision of services in space, leasing of equipment or other property, including spacecraft (e.g., satellites) or transponders, located in space, licensing of technology or other intangibles for use in space, and the production, processing, or creation of property in space. Space activity includes the sale of property in space. Space activity also includes underwriting income from the insurance of risks on activities that produce income derived from space activity. The inclusion of such underwriting income is consistent with language in the Senate Report. See Senate Report at 357.

Proposed regulations § 1.863–8(d)(1)(ii) provides that ocean activity is any activity conducted in international water, with certain exceptions. Ocean activity includes performance and provision of services in international water, leasing of equipment or other property located in international water, licensing of technology or other intangibles for use in international water, and the production, processing, or creation of property in international water. Ocean activity includes the sale of property in international water, and the sale of inventory under international water, but does not include the selling of inventory if the sale takes place on international water. Thus, if property sold on international water is inventory property, income attributable to sales activity is sourced under § 1.861–7(c).

Ocean activity also includes underwriting income from the insurance of risks on activities that produce income derived from ocean activity. The inclusion of such underwriting income is consistent with language in the Senate Report. See Senate Report at 357.

Ocean activity also includes any activity performed in Antarctica. Ocean activity further includes the leasing of a vessel if such vessel does not transport cargo or persons for hire between ports-of-call. Thus, for example, income earned by a lessor of a vessel that is to engage only in research activities in international water is ocean income. Ocean activity also includes the leasing of drilling rigs, extraction of minerals, and performance and provision of services related thereto, to the extent the mines, oil and gas wells, or other natural deposits are not within the jurisdiction of the United States, U.S. possessions, or any foreign country (as defined in section 638).

Based on legislative history, the IRS and Treasury believe space and ocean activity should be broadly defined based on legislative history. The legislative history clearly indicates that Congress intended to characterize certain land based activity as space or ocean activity. See Senate Report at 357. Consistent with that determination, the proposed regulations provide that when activities occur both in space or in international water and outside space and international water, and constitute parts of a single transaction described in § 1.863–8(d)(1), the transaction will be characterized as space or ocean activity. Thus, for example, income from the lease of equipment located in space will be sourced in its entirety under section 863(d), even though certain functions associated with the transaction may be performed outside space and international water. The rules of this section for defining space or ocean activity by combining activities occurring both in space or in international water and outside space and international water simply reflect existing principles for characterizing a transaction, and are fully consistent with rules for characterizing income for purposes of other source rules. Taxpayers enjoy flexibility in structuring their transactions that will be characterized under existing principles. To ensure the statutory purpose is not circumvented, the Commissioner may treat parts of a transaction as separate transactions, or combine separate transactions as a single transaction.

Certain activities occurring in space or international water are not considered either space or ocean activity. Proposed regulations § 1.863–8(d)(3)(i) provides that space or ocean activity does not include any activity giving rise to transportation income as defined in section 863(c). Proposed regulations § 1.863–8(d)(3)(ii) provides that space or ocean activity also does not include any activity with respect to mines, oil and gas wells, or other natural deposits to the extent the mines or wells are located within the jurisdiction (as recognized by the United States) of any country, including the United States and its possessions (as defined in section 638). Proposed regulations § 1.863–8(d)(3)(iii) provides that space or ocean activity does not include any activity giving rise to international communications income as defined in proposed regulations § 1.863–9(d)(3)(ii). These exceptions are consistent with section 863(d)(2)(B) of the Code.

b. *Special Rules in Determining Space or Ocean Activity.* Proposed regulations § 1.863–8(d)(2)(ii)(A) provides that services are performed in space or in international water if functions are performed, resources employed, risks assumed, or other contributions to the value of the transaction occur in space or international water, whether such contributions are performed by personnel, or equipment, or otherwise. The IRS and Treasury believe that all contributions to a transaction's value, whether contributed by personnel, equipment, or otherwise, should be considered in determining whether services are performed in space or international water.

Proposed regulations § 1.863–8(d)(2)(ii)(A) provides that the performance of a service is treated as a space or ocean activity if a part of the service is performed in space or international water. The IRS and Treasury recognize that this rule may be over-inclusive in certain cases. Therefore, proposed regulations § 1.863–8(d)(2)(ii)(B) provides that the performance of a service will not be a space or ocean activity if the only activity of the taxpayer in space or in international water is to facilitate the taxpayer's own communications, as part of provision or delivery of a service by the taxpayer, and that service would not otherwise be in whole or in part a space or ocean activity. Several examples in the regulations illustrate this facilitation exception. The IRS and Treasury recognize that taxpayers may use communications services in conducting a business, and the fact that such communications may be routed through space or international water instead of by way of land should not produce differences in the source of the taxpayer's income derived from such service.

5. Treatment of Partnerships

Proposed regulations § 1.863–8(e) provides that for U.S. partnerships, section 863(d) and the regulations thereunder will be applied at the partnership level. The IRS and Treasury believe this rule is consistent with

section 7701(a)(30)(B), which defines a U.S. person as a domestic partnership. For foreign partnerships, section 863(d) and the regulations thereunder will be applied at the partner level. The proposed regulations provide a different rule for foreign partnerships because IRS and Treasury are concerned that U.S. persons may use a foreign partnership to circumvent the purposes of this section. For example, two U.S. persons by the simple expediency of forming a foreign partnership can change significantly the U.S. tax consequences under section 863(d).

6. Reporting and Documentation Requirements

When a taxpayer allocates gross income to the satisfaction of the Commissioner under § 1.863–8(b)(3) (income of certain foreign persons), § 1.863–8(b)(4)(ii)(C) (certain production activity), or under § 1.863–8(b)(5) (services) of the proposed regulations, the taxpayer must do so by making the allocation on a timely filed original return (including extensions). An amended return does not qualify, and section 9100 relief will not be available. In all cases, a taxpayer must maintain contemporaneous documentation regarding the allocation of gross income, and allocation of expenses, losses, and other deductions, the methodology used, and the circumstances justifying use of that methodology. The taxpayer must produce such documentation within 30 days upon request.

B. Communications Activity Under Sections 863(a), (d), and (e)

1. Scope

Section 1.863–9 of the proposed regulations provides rules for sourcing income derived from communications activity, notwithstanding any other section. Pursuant to proposed regulations § 1.863–8, these source rules apply to communications activity that is also space or ocean activity.

2. Source of Gross Income Derived From Communications Activity

a. *International Communications Income.* Section 863(e)(1)(A) states that any international communications income of a U.S. person will be sourced 50 percent to the United States and 50 percent to foreign sources. Proposed regulations § 1.863–9(b)(2)(i) provides that international communications income of a U.S. person will be sourced 50 percent to the United States and 50 percent to foreign sources.

Section 863(e)(1)(B)(i) provides that any international communications income of a foreign person will be foreign source income except as provided in regulations or in section 863(e)(1)(B)(ii). Proposed regulations § 1.863–9(b)(2)(ii)(A) states the general rule that international communications income of a foreign person is foreign source income. However, the proposed regulations contain several exceptions to the general rule.

Proposed regulations § 1.863–9(b)(2)(ii)(B) states that if a foreign corporation is 50 percent or more owned by vote or value (directly, indirectly, or constructively) by U.S. persons, or is a controlled foreign corporation within the meaning of section 957, all international communications income is U.S. source income. This rule reflects IRS and Treasury's concern that U.S. persons may use a foreign corporation to obtain benefits that are inconsistent with the purposes of this section.

Section 863(e)(1)(B)(ii) provides that if a foreign person has a U.S. fixed place of business, international communications income attributable to the fixed place of business is U.S. source income. Consistent with section 863(e)(1)(B)(ii), proposed regulations § 1.863–9(b)(2)(ii)(C) states that if a foreign person, other than a foreign person described in paragraph (b)(2)(ii)(A), maintains an office or other fixed place of business in the United States, any international communications income attributable to the office or other fixed place of business is U.S. source income. The principles of section 864(c)(5) will apply to determine whether a foreign person has an office or fixed place of business in the United States. This rule does not apply if the foreign person is engaged in a U.S. trade or business.

Proposed regulations § 1.863–9(b)(2)(ii)(D) provides that if a foreign person is engaged in a U.S. trade or business, the foreign person's international communications income is presumed to be U.S. source income. The rule reflects IRS and Treasury's concern that a foreign person could avoid a U.S. fixed place of business under section 863(e)(1)(B)(ii), yet engage in significant communications activity in the United States.

The IRS and Treasury believe Congress intended that a foreign person engaged in substantial U.S. business in the United States be subject to U.S. tax on that communications activity.

The IRS and Treasury recognize that this rule may be over-inclusive in certain cases. Therefore, the proposed regulations provide that if the foreign person can allocate income to international communications activity outside the United States and space and international water, to the satisfaction of the Commissioner, based on the facts and circumstances, which may include functions performed, resources employed, risks assumed, or other contributions to value, then the income allocated to such communications activity outside the United States and space and international water will be foreign source income. When a foreign person is entitled to the benefits of a tax treaty with the United States, such person may elect to be taxed under the rules of that treaty, so that, for example, the United States would tax only income attributable to a permanent establishment of that foreign person, regardless of the amount of income considered effectively connected with a U.S. trade or business.

b. *Other Communications Income.* The proposed regulations also provide rules, for both U.S. and foreign persons, for determining the source of income from communications activity that does not qualify as international communications activity. The IRS and Treasury believe rules that address income from other communications activities are necessary based on the legislative history. See Senate Report at 357.

Proposed regulations § 1.863–9(b)(3) states that the source of income derived by either a U.S. or foreign person from U.S. communications activity is U.S. source income. Proposed regulations § 1.863–9(b)(4) states that the source of income derived by either a U.S. or foreign person from foreign communications activity is foreign source income. Proposed regulations § 1.863–9(b)(5) states that the source of income derived from space/ocean communications activity is determined under section 863(d) and the regulations thereunder.

3. Taxable Income

When a taxpayer allocates gross income under paragraph (b)(2)(ii)(D) (certain foreign persons), or (d)(1)(ii) (determining a communications activity), the taxpayer must allocate or apportion expenses, losses, and other deductions as prescribed in §§ 1.861–8 through 1.861–14T of the regulations to the class of gross income, which must include the total income so allocated in each case. A taxpayer must then apply the rules of §§ 1.861–8 through 1.861–14T of the regulations to properly allocate or apportion amounts of expenses, losses, and other deductions allocated or apportioned to such gross income between gross income from sources within the United States and without the United States. For amounts of expenses, losses, and other

deductions allocated or apportioned to gross income derived from international communications activity, when the source of income is determined under the 50/50 method of paragraph (b)(2)(i), taxpayers must apportion expenses and other deductions between U.S. and foreign sources pro rata based on the relative amounts of U.S. and foreign source gross income. Research and experimental expenditures qualifying under § 1.861–17 are allocated under that section.

When a taxpayer must allocate gross income to the satisfaction of the Commissioner based on the facts and circumstances, IRS and Treasury believe that such allocations would be based generally on section 482 principles. However, IRS and Treasury solicit comments on this approach, including specific comments and examples on alternative methods that could be used to make these allocations.

4. Definition of Communications Activity and Income Derived From Communications Activity

a. *Communications Activity.* Proposed regulations § 1.863–9(d)(1) defines a communications activity as an activity consisting solely in the delivery by transmission of communications or data (communications). The definition of a communications activity is limited to the function of transmitting a particular communication from point A to point B. The delivery of communications by means other than transmission, for example, delivery of a letter is not a communications activity. The IRS and Treasury believe that this narrow definition of communications activity is consistent with the legislative history of section 863(e). See Senate Report at 357.

The provision of capacity to transmit communications or data is considered to be a communications activity. For example, the provision of satellite transponder capacity can qualify as a communications activity.

The provision of content or any other additional service will not be treated as a communications activity unless de minimis. For example, changes in the form of a voice communication when switching from analog technology to digital data for Internet telephony would be disregarded in determining whether there has been a transmission of communications within the meaning of proposed regulations § 1.863–9(d). However, payment for information from a data base sent electronically, or for income attributable to an entertainment event transmitted electronically, would not be income derived from a communications activity.

When the provision of content or any other services is de minimis, such content or services are ignored, and the transaction will be treated solely as the transmission of communications within the meaning of proposed regulations § 1.863–9(d)(1). The determination of whether the provision of content or other services is de minimis should be based on all the facts and circumstances. The IRS and Treasury believe the exclusion of content and other services is consistent with the legislative history of section 863(e). No evidence exists in the Congressional testimony or in the legislative history that content provided by transmission was to be considered a communications activity.

Proposed regulations § 1.863–9(d)(1)(ii) requires that a transaction encompassing non-de minimis communications activities and non-de minimis non-communications activities must be broken into parts and each part treated as a separate transaction. Proposed regulations § 1.863–9(d)(1)(ii) states that gross income derived from the activities must be allocated to each separate transaction, to the satisfaction of the Commissioner, based on all relevant facts and circumstances, which may include functions performed, resources employed, risks assumed, and any other contributions to the value of the respective transactions. For example, a payment by an advertiser to a TV broadcast station may be in part a payment for transmission of the advertisement, but could also be a payment for other property or services, for example the transmitter's ability to reach a particular market or audience. Such activities, if not de minimis, must be treated as non-communications activities under § 1.863–9(d)(1)(ii) of the proposed regulations.

To ensure the statutory purposes are not circumvented, the Commissioner may treat parts of a transaction as separate transactions, or construe separate transactions as a single transaction.

b. *Income Derived from Communications Activity.* Income derived from communications activity is defined in proposed regulations § 1.863–9(d)(2) as income derived from the transmission of communications, including income derived from the provision of capacity to transmit communications. There is no requirement that the income recipient perform the transmission function. This rule reflects IRS and Treasury's understanding that those providing communications services often use capacity owned or operated by others. However, income is derived from communications activity only if the taxpayer is paid to transmit, and bears the risk of transmitting, the communications.

c. *Character of Communications Activity.* Proposed regulations § 1.863–9(d)(3) provides rules for characterizing income derived from a communications activity for purposes of sourcing the income derived from such activity. The character of income derived from communications activity is determined by establishing the two points between which the taxpayer is paid to transmit, and bears the risk of transmitting, the communication. Under the paid-to-do rule, the path the communication takes between the two points is not relevant in determining the character of the transmission. If a taxpayer is paid to take a communication from one point to another point, income derived from the transmission is characterized based on the transmission between those two points, even though the taxpayer contracts out part of the transmission to another. This rule reflects IRS and Treasury's recognition that those providing communications often use the network owned or operated by others. Several examples in the proposed regulations illustrate the paid-to-do rule.

Proposed regulations § 1.863–9(d)(3)(ii) defines income derived from international communications activity as the transmission from a point in the United States and a point in a foreign country (or a possession of the United States). Proposed regulations § 1.863–9(d)(3)(iii) defines income derived from U.S. communications activity as the transmission between two points in the United States or a point in the United States and a point in space or international water.

Proposed regulations § 1.863–9(d)(3)(iv) defines income derived from foreign communications activity as the transmission between two points either in a foreign country or in foreign countries or a point in a foreign country and a point in space or international water. Proposed regulations § 1.863–9(d)(3)(v) defines income derived from space/ocean communications activity as the transmission between a point in space or international water and another point in space or international water. The IRS and Treasury believe these rules are consistent with the legislative history. See Senate Report at 357.

When the taxpayer cannot establish the two points between which the taxpayer is paid to transmit, the source of income derived from such activity, for either a U.S. or foreign person, is U.S. source income. Thus, for example, when a provider of communications services provides both local and

international long distance along with cable services in one-price bundles for a set amount each month, tracing each transmission may not be possible or practical. In such cases, the source of income derived from communications activity is U.S. source income. The IRS and Treasury understand that many in the communications industry may not consider it practical or possible to prove the end points of the communications the taxpayer transmits. The IRS and Treasury solicit comments as to proposals for those situations when taxpayers cannot establish the points between which the taxpayer is paid to transmit the communications.

5. Treatment of Partnerships

Proposed regulations § 1.863–9(e) provides, in general, that for U.S. partnerships, section 863(e) and the regulations thereunder will be applied at the partnership level. The IRS and Treasury believe this rule is consistent with section 7701(a)(30)(B), which defines a U.S. person as a domestic partnership. For foreign partnerships, and in the case of a U.S. partnership in which 50 percent or more of the partnership interests are owned by foreign persons, section 863(e) and the regulations thereunder will be applied at the partner level. The proposed regulations provide a different rule for foreign partnerships and for U.S. partnerships with substantial foreign ownership because the IRS and Treasury are concerned that U.S. persons may use such partnerships to circumvent the purposes of this section.

6. Reporting Rules and Documentation Requirements

When a taxpayer allocates gross income to the satisfaction of the Commissioner under proposed regulations § 1.863–9(b)(2)(ii)(D) (certain foreign persons) or -(d)(1)(ii) (determining a communications activity), it does so by making the allocation on a timely filed original return (including extensions). An amended return does not qualify, and section 9100 relief will not be available. In all cases, a taxpayer must maintain contemporaneous documentation regarding the allocation of gross income, and allocation of expenses, losses and other deductions, the methodology used, and the circumstances justifying use of that methodology. The taxpayer must produce such documentation within 30 days upon request.

C. Amendment to the § 1.863–3 Regulations

These proposed regulations amend the regulations under § 1.863–3 for determining the source of income in certain inventory sales.

The regulations provide that in determining the source of income from sales of property when the property is either (i) produced in whole or in part in space or in international water, or (ii) sold in space or in international water, the rules of § 1.863–8 of the proposed regulations apply. The rules of sections 863 (a) and (b), and the regulations under those sections, do not apply to determine the source of income in such cases, except to the extent provided in § 1.863–8 of the proposed regulations. The proposed regulations in § 1.863–8(b)(4)(ii)(A) provide, however, that the source of income from sales of inventory on international water continues to be sourced under § 1.863–3(c)(2). The regulations in § 1.863–3(a)(1) and –3(c)(1)(i)(A) are amended to reflect these provisions.

The proposed regulations also amend § 1.863–3(c)(2) to provide that the place of sale will be presumed to be the United States, for purposes of that section, when property is produced in the United States and the property is sold to a U.S. resident for use, consumption, or disposition in space. See § 1.864–6(b)(3) for determining whether property is used in space and whether the sale is to a U.S. resident.

These rules reflect the views of Treasury and the IRS that sales of satellites or transponders by a U.S. resident in space should produce U.S. source income. These rules also reflect the view that sales of such property by a U.S. resident to a U.S. purchaser should produce U.S. source income. Treasury and the IRS believe that these provisions are consistent with Congress' intent in enacting section 863(d) to tax U.S. persons on a residency basis on income that is not likely to be subject to foreign tax by a foreign country. It is also consistent with the tax policy of the foreign tax credit that income not likely to be subject to foreign tax should not be treated as foreign source income, which would inappropriately allow taxpayers with excess foreign tax credits to shelter this income from U.S. tax.

Proposed Effective Dates

These regulations are proposed to apply for taxable years beginning on or after the date that is 30 days after the date of publication of final regulations in the **Federal Register**.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that the rules of this section principally impact large multinationals who pay foreign taxes on substantial foreign operations and therefore the rules will impact very few small entities. Moreover, in those few instances where the rules of this section impact small entities, the economic impact on such entities is not likely to be significant. Accordingly, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely (in the manner described under the **ADDRESSES** caption) to the IRS. The IRS and Treasury specifically request comments on the clarity of the proposed regulations and how they may be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for March 28, 2001, at 10 a.m., in the auditorium, seventh floor, 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. Because of access restrictions, visitors will not be admitted 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 preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit comments and an outline of topics to be discussed and the time to be devoted to each topic (in the manner described under the **ADDRESSES** caption of this preamble) by March 7, 2001.

A period of 10 minutes will be allotted to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

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

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

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

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

Section 1.863–8 also issued under 26 U.S.C. 863(a), (b) and (d).

Section 1.863–9 also issued under 26 U.S.C. 863(a), (d) and (e). * * *

Par. 2 Section 1.863–3 is amended by:

1. Adding a sentence after the first sentence in paragraph (a)(1).

2. Adding a sentence at the end of paragraph (c)(1)(i)(A).

3. Adding three sentences, one after the current first sentence of paragraph (c)(2), and the other two sentences after the current second sentence of paragraph (c)(2).

The additions read as follows:

§ 1.863–3 Allocation and apportionment of income from certain sales of inventory.

(a) * * * (1) * * *To determine the source of income from sales of property produced by the taxpayer, when the property is either produced in whole or in part in space or on or under water not within the jurisdiction (as recognized by the United States) of a foreign country, possession of the United States, or the United States (in international water), or is sold in space or in international water, the rules of § 1.863–8 apply, and the rules of this section do not apply, except to the extent provided in § 1.863–8. * * *

* * * * *

(c) * * * (1) * * * (i) * * * (A) * * * For rules regarding the source of income when production takes place, in whole or in part, in space or in international water, the rules of § 1.863–8 apply, and the rules of this section do not apply except to the extent provided in § 1.863–8.

* * * * *

(c)(2) * * * Notwithstanding any other provision, for rules regarding the source of income when a sale takes place in space or in international water, the rules of § 1.863–8 apply, and the rules of this section do not apply except to the extent provided in § 1.863–8. * * * The place of sale will be presumed to be the United States under this rule when property is produced in the United States and the property is sold to a U.S. resident, who uses the property in space or in international water. In such cases, the property will be treated as sold for use, consumption, or disposition in the United States.

* * * * *

Par. 3 Section 1.863–8 and 1.863–9 are added to read as follows:

§ 1.863–8 Source of income from space and ocean activity under section 863(d).

(a) *In general.* Income of a U.S. or a foreign person derived from space or ocean activity (space or ocean income) is sourced under the rules of this section, notwithstanding any other provision, including sections 861, 862, 863, and 865. A taxpayer will not be considered to derive income from space or ocean activity, as defined in paragraph (d) of this section, if such activity is performed by another person, subject to the rules for the treatment of consolidated groups in section § 1.1502–13.

(b) *Source of gross income from space or ocean activity*—(1) *In general.* Income derived by a U.S. person from space or ocean activity is income from sources within the United States, except as otherwise provided in this paragraph (b). Income derived by a person other than a United States person from space or ocean activity is income from sources without the United States, except as otherwise provided in this paragraph (b).

(2) *Income derived by certain foreign corporations.* If a U.S. person or U.S. persons own 50 percent or more of the vote or value of the stock of a foreign corporation (directly, indirectly or constructively) that is not a controlled foreign corporation within the meaning of section 957, all income derived by that foreign corporation from space or ocean activity is U.S. source income.

(3) *Income derived by foreign persons engaged in a U.S. trade or business.* If a foreign person, other than a controlled foreign corporation within the meaning of section 957 or a foreign person described in paragraph (b)(2) of this section, is engaged in a U.S. trade or business, all income derived by that person from space or ocean activity is presumed to be U.S. source income. However, if the foreign person can allocate income between sources within the United States, or space, or international water, and sources outside the United States and space and international water, to the satisfaction of the Commissioner, based on the facts and circumstances, which may include functions performed, resources employed, risks assumed, or other contributions to value, then space or ocean income allocated to sources outside the United States and space and international water shall be treated as from sources outside the United States.

(4) *Source rules for income from certain sales of property*—(i) *Sales of purchased property.* When a taxpayer sells property in space or in international water, the source of gross income shall be determined under paragraph (b)(1), (2), or (3) of this section as applicable. However, if inventory, within the meaning of section 1221(1), is sold on international water, the source of income shall be determined under § 1.863–3(c)(2).

(ii) *Sales of property produced by the taxpayer*—(A) *General.* If the taxpayer both produces property and also sells such property, the taxpayer must divide gross income from such sales between production activity and sales activity under the 50/50 method as described in this paragraph (b)(4)(ii)(A). Under the 50/50 method, one-half of the taxpayer's gross income will be considered income attributable to production activity, and the source of that income will be determined under paragraphs (b)(4)(ii)(B) or (C) of this section. The remaining one-half of such gross income will be considered income attributable to sales activity and the source of that income will be determined under paragraph (b)(4)(i) of this section. However, if the taxpayer sells such property outside space and outside international water, the source of gross income attributable to sales activity will be determined under § 1.863–3(c)(2).

(B) *Production only in space or in international water, or only outside space and international water.* When production occurs only in space or in international water, income attributable to production activity is sourced under paragraph (b)(1), (2), or (3) of this section as space or ocean income. When production occurs only outside space and international water, income attributable to production activity is sourced under § 1.863–3(c)(1).

(C) *Production both in space or in international water and outside space and international water.* When property is produced in space or in international

water and outside space and international water, gross income must be allocated to production occurring in space or in international water and production occurring outside space and international water, to the satisfaction of the Commissioner, based on all the facts and circumstances, which may include functions performed, resources employed, risks assumed, and any other contributions to value. The source of gross income allocated to space or international water is determined under paragraph (b)(1), (2), or (3) of this section. The source of gross income allocated outside space and international water is determined under § 1.863–3(c)(1).

(5) *Special rule for determining the source of gross income from services.* If a transaction characterized as the performance of services constitutes a space or ocean activity by reason of the performance of part of the service in space or in international water, as determined under paragraph (d)(2)(ii)(A) of this section, the source of all gross income derived from such transaction of which such performance is a part is determined under paragraph (b)(1), (2), or (3) of this section. However, if the taxpayer can allocate gross income between performance occurring outside space and international water, and performance occurring in space or international water, to the satisfaction of the Commissioner, based on the facts and circumstances, including functions performed, resources employed, risks assumed, or other contributions to value, then the source of income allocated to performance occurring outside space and international water shall be determined under sections 861, 862, 863, and 865.

(6) *Special rule for determining source of income from communications activity (other than income from international communications activity).* Space and ocean activity, as defined in paragraphs (d)(1) and (2) of this section, includes activity occurring in space or in international water that is characterized as a communications activity as defined in § 1.863–9(d). The source of gross income from space or ocean activity that is also a communications activity as defined in § 1.863–9(d) is determined under the rules of § 1.863–9(b), rather than under paragraph (b) of this section.

(c) *Taxable income.* When a taxpayer allocates gross income under paragraph (b)(3), (b)(4)(ii)(C), or (b)(5) of this section, to the satisfaction of the Commissioner, based on all the facts and circumstances, the taxpayer must allocate or apportion expenses, losses, and other deductions as prescribed in §§ 1.861–8 through 1.861–14T to the class of gross income, which must include the total income so allocated in each case. A taxpayer must then apply the rules of §§ 1.861–8 through 1.861–14T to properly allocate or apportion amounts of expenses, losses, and other deductions allocated or apportioned to such gross income between gross income from sources within the United States and without the United States.

(d) *Space and Ocean activity*—(1) *Definition*—(i) *Space activity.* In general, space activity is any activity conducted in space. Space activity includes performance and provision of services in space, as defined in paragraph (d)(2)(ii)(A) of this section, leasing of equipment located in space, including spacecraft (e.g., satellites) or transponders located in space, licensing of technology or other intangibles for use in space, and the production, processing, or creation of property in space, as defined in paragraph (d)(2)(i) of this section. Space activity includes activity occurring in space that is characterized as communications activity (other than international communications activity) under § 1.863–9(d). Space activity also includes underwriting income from the insurance of risks on activities that produce space income. Space activity includes the sale in space of property, as defined in paragraph (d)(2)(iii) of this section. For purposes of this section, space means any area not within the jurisdiction (as recognized by the United States) of a foreign country, possession of the United States, or the United States, and not in international water. For purposes of determining space activity, the Commissioner may separate parts of a single transaction into separate transactions or combine separate transactions as parts of a single transaction. Paragraph (d)(3) of this section lists exceptions to the general rule.

(ii) *Ocean activity.* In general, ocean activity is any activity conducted on or under water not within the jurisdiction (as recognized by the United States) of a foreign country, possession of the United States, or the United States (collectively, in international water). Ocean activity includes performance and provision of services in international water, as defined in paragraph (d)(2)(ii)(A) of this section, leasing of equipment located in international water, including underwater cables, licensing of technology or other intangibles for use in international water, and the production, processing, or creation of property in international water, as defined in paragraph (d)(2)(i) of this section. Ocean activity includes sales of property in international water, as defined in paragraph (d)(2)(iii) of this section, but ocean activity does not include the selling of inventory as defined in section 1221(1) on international water. Ocean activity includes activity occurring in international water that is characterized as communications activity (other than international communications activity) under § 1.863–9(d). Ocean activity also includes underwriting income from the insurance of risks on activities that produce ocean income. Ocean activity also includes any activity performed in Antarctica. Ocean activity further includes the leasing of a vessel if such vessel does not transport cargo or persons for hire between ports-of-call. Thus, for example, the leasing of a vessel that is to engage only in research activities in international water is an ocean activity. Except as provided in paragraph (d)(3)(ii) of this section, ocean activity also includes the leasing of drilling rigs, extraction of minerals, and performance and provision of services related thereto. For purposes of determining ocean activity, the Commissioner may separate parts of a single transaction into separate transactions or combine separate transactions as parts of a single transaction. Paragraph (d)(3) of this section lists exceptions to the general rule.

(2) *Determining a space or ocean activity*—(i) *Production of property in space or in international water.* For purposes of this section, production activity means an activity that creates, fabricates, manufactures, extracts, processes, cures, or ages property within the meaning of sections 864(a) and § 1.864–1.

(ii) *Special rule for performance of services*—(A) *General.* If a transaction is characterized as the performance of a service, then such service will be treated as a space or ocean activity when a part of the service, even if de minimis, is performed in space or in international water. Services are performed in space or in international water if functions are performed, resources employed, risks assumed, or other contributions to value occur in space or in international water, regardless of whether performed by personnel, or equipment, or otherwise.

(B) *Exception to the general rule—facilitating the taxpayer's own communications.* If a taxpayer's only activity in space or in international water is to facilitate the taxpayer's own communications as part of the provision or delivery of a service provided by the taxpayer, and that service would not otherwise be in whole or in part a space

or ocean activity, such service will not be treated as either space or ocean activity because of such facilitation.

(iii) *Sale in space or in international water.* In applying § 1.861–7(c) to determine where a sale takes place, property will be sold in space or in international water if the property is located in space or in international water when rights, title and interest pass to the buyer (or when bare legal title is retained, at the time and place of passage of beneficial ownership and risk of loss), or if property is sold for use in space or in international water.

(3) *Exceptions to space or ocean activity.* Space or ocean activity does not include the following types of activities—

(i) Any activity giving rise to transportation income as defined in section 863(c); or

(ii) Any activity with respect to mines, oil and gas wells, or other natural deposits to the extent the mines or wells are located within the jurisdiction (as recognized by the United States) of any country, including the United States and its possessions; or

(iii) Any activity giving rise to international communications income as defined in § 1.863–9(d)(3)(ii).

(e) *Treatment of partnerships.* In the case of a U.S. partnership, this section will be applied at the partnership level. In the case of a foreign partnership, this section will be applied at the partner level.

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

Example 1. Space activity—activity occurring on land and in space. (i) *Facts.* S owns satellites, and leases one of its satellites to A. S, as lessor, will not operate the satellite. Part of S's performance as lessor in this transaction occurs on land.

(ii) *Analysis.* The combination of S's activities is characterized as the lease of equipment. Since the equipment is located in space, the transaction is defined as space activity under paragraph (d)(1)(i) of this section. Income derived from the lease will be sourced in its entirety under paragraph (b) of this section.

Example 2. Space activity. (i) *Facts.* X is an Internet service provider, offering a service to personal computer users accessing the Internet. This service permits a customer, C, to make a call, initiated by a modem, routed to a control center, for connection to the World Wide Web. X transmits the requested information over its satellite capacity leased from S to C's personal computer. X charges its customers a flat monthly fee. Assume neither X nor S derive international communications income within the meaning of § 1.863–9(d)(3)(ii).

(ii) *Analysis.* In this case, X performs a service, and X's activity in space is not simply facilitation within the meaning of paragraph (d)(2)(ii)(B) of this section, because X's activity is not simply the facilitation of X's own communications and because X's activity is not just part of another service provided by X. Thus, X's activity constitutes space activity in its entirety under paragraph (d)(2)(ii)(A) of this section, and the source of X's income is determined under paragraph (b) of this section. To the extent X derives income from communications activity, within the meaning of § 1.863–9(d), the source of X's income is determined under § 1.863–9(b), as provided in paragraph (b)(6) of this section. S derives communications income within the meaning of § 1.863–9(d), and therefore the source of S's income is determined under § 1.863–9(b), as provided in paragraph (b)(6) of this section.

Example 3. Services as space activity—facilitation of communications. (i) *Facts.* R owns a retail outlet in the United States. R employs S to provide a security system for R's premises. S operates its security system by transmitting images from R's premises to a satellite, and from there to a group of S employees located in Country B, who then monitor the premises by viewing the transmitted images. O provides S with transponder capacity on O's satellite, which S uses to transmit those images.

(ii) *Analysis.* S derives income for providing monitoring services. Because, in this case, S uses O's satellite transponder to transmit images to facilitate S's own communications in space as part of its provision of a security service, S's activity in space is limited to facilitating communications as described in paragraph (d)(2)(ii)(B) of this section. Thus, S is not engaged in a space activity, and none of S's income is space income. Assuming O's provision of capacity is viewed as the provision of a service, O's activity in space is not simply the facilitation of communications as provided in paragraph (d)(2)(ii)(B) of this section, because O is not just facilitating its own communications. Thus, O's activity is characterized as space activity in its entirety under paragraph (d)(2)(ii)(A) of this section (unless O's activity in space qualifies as international communications activity). To the extent O derives income from communications activity, within the meaning of § 1.863–9(d), the source of O's income is determined under § 1863–9(b), as provided in paragraph (b)(6) of this section. On these facts, R does not derive any income from space activity.

Example 4. Space activity. (i) *Facts.* L, a U.S. company, offers programming and also certain services to customers located both in the United States and in foreign countries. Assume L's provision of programming and services in this case was viewed as the provision of a service, with no part of that service occurring in space. L uses satellite capacity acquired from S to deliver the service directly to customers' television sets, so that the delivery of the service occurs in space. Assume the delivery in this case is not considered de minimis. L also acquires programming from H, and L pays H a royalty for use of copyrighted material in the United States and in foreign countries. Customer, C, pays L for delivery of the service to C's residence in the United States. Assume S's provision of capacity in this case was viewed as the provision of a service, and also that S does not derive international communications income within the meaning of § 1.863–9(d)(3)(ii).

(ii) *Analysis.* On these facts, S's activity in space is not just the facilitation of its own communications within the meaning of paragraph (d)(2)(ii)(B) of this section, because S is facilitating the communications of others. To the extent S derives income from a space activity that is also a communications activity under § 1.863–9(d), the source of S's income is determined under § 1.863–9(b), as provided in paragraph (b)(6) of this section. On these facts, L is treated as providing a service and is paid to deliver that service to its customers, and each transaction, i.e., the provision of the service and the delivery of the service, constitutes a separate transaction. L's income derived from provision of the service is not income derived from space activity. L's income derived from delivery of the service is space activity. L's delivery of the service is not just the facilitation of L's own communications within the meaning of paragraph (d)(2)(ii)(B) of this section, because it is not just a part of the provision of a service, but instead the entire service. Since L derives communications income within the meaning of § 1.863–9(d), the source of L's income is determined under § 1.863–9(b), as provided in paragraph (b)(6) of this section. If on other facts, L provides a service and delivers that service, and L treats the provision of the service and the delivery of the service as one separate transaction, then L performs services in space under paragraph (d)(2)(ii)(A) of this section, because the delivery of the service occurs in space. However, L's activity in space would be limited to facilitating its own communications within the meaning of paragraph (d)(2)(ii)(B) of this section, because it is part of another service that would not otherwise be a space activity. As a result, L's provision of the service would not be a space activity under paragraph (d)(2)(ii)(A) of this section.

Example 5. Space activity—treatment of land activity. (i) *Facts.* S, a U.S. person, offers remote imaging products and services to its customers. In year 1, S uses its satellite's remote sensors to gather data on certain geographical terrain. In year 3, C, a construction development company, contracts with S to obtain a satellite image of an area for site development work. S pulls data from its archives and transfers to C the images gathered in year 1, in a transaction that is characterized as a sale of the data. Title to the data passes to C in the United States. Before transferring the images to C, S uses computer software to enhance the images so that the images can be used.

(ii) *Analysis.* The collection of data and creation of images in space is characterized as the creation of property in space. S's income is derived from production of property in part in space, and is, therefore, derived in part from space activity. The source of S's income from production and sale of property is, therefore, determined under paragraph (b)(4) of this section. Since production activity occurs both in space and on land, the source of S's production income is determined under paragraphs (b)(4)(ii)(A) and (C) of this section. The source of S's

income attributable to sales activity is determined under paragraph (b)(4)(ii)(A) of this section and § 1.863–3(c)(2) as U.S. source income.

Example 6. Use of intangible property in space. (i) *Facts.* X acquires a license to use a particular satellite slot or orbit, which X sublicenses to C. C pays X a royalty.

(ii) *Analysis.* Since the royalty is paid for the right to use intangible property in space, the source of X's royalty is determined under paragraph (b) of this section.

Example 7. Performance of services.

(i) *Facts.* E, a U.S. company, operates satellites with sensing equipment that can determine how much heat and light particular plants emit and reflect. Based on the data, E will provide F, a U.S. farmer, a report analyzing the data, which F will use in growing crops. E analyzes the data from U.S. offices.

(ii) *Analysis.* Assume E's combined activities are characterized as the performance of services. Because part of the service is performed in space, all income E derives from the transaction will be treated as derived from space activity under paragraph (d)(2)(ii)(A) of this section. The source of such income will be determined under paragraph (b)(5) of this section. If, however, E can allocate gross income, to the satisfaction of the Commissioner, as prescribed in paragraph (b)(5) of this section, then the source of gross income attributable to services performed outside space may be determined as provided in paragraph (b)(5) of this section.

Example 8. Separate transactions.

(i) *Facts.* The same facts as *Example 7,* except that E provides the raw data to F in a transaction characterized as a sale of a copyrighted article, and in addition also provides an analysis in the form of a report to F, a U.S. farmer who uses the information in growing crops. The price F pays E for the raw data is separately stated.

(ii) *Analysis.* To the extent the provision of raw data and the analysis of the data are each treated as separate transactions, the source of income from the production and sale of data is determined under paragraph (b)(4) of this section. The provision of services would be analyzed in the same manner as in *Example 7.*

Example 9. Sale of property under international water.

(i) *Facts.* T owns transatlantic cable lying under the ocean, which it purchased. T sells the cable to B.

(ii) *Analysis.* Because the property is sold under international water as provided in paragraph (d)(2)(iii) of this section, the transaction is ocean activity under paragraph (d)(1)(ii) of this section, and the source of income is determined under paragraph (b)(4)(i) of this section, by reference to paragraph (b)(1), (2), or (3) of this section.

Example 10. Sales of property in space.

(i) *Facts.* S manufactures a satellite in the United States and sells it to a U.S. customer, with the rights, title, and interest passing to the customer when the satellite is located in space.

(ii) *Analysis.* The source of income derived from the sale of the satellite in space is determined under paragraph (b)(4) of this section, with the source of income attributable to production activity determined under paragraphs (b)(4)(ii)(A) and (B) of this section, and the source of income attributable to sales activity determined under paragraphs (b)(4)(ii)(A) and (b)(4)(i) of this section, by reference to paragraph (b)(1), (2), or (3) of this section.

Example 11. Sale of property located in space.

(i) *Facts.* S has a right to operate from a particular position in space. S sells the right to operate from that satellite slot or orbit to P.

(ii) *Analysis.* Because the sale takes place in space, as provided in paragraph (d)(2)(iii) of this section, gain on the sale of the satellite slot or orbit is income derived from space activity under paragraph (d)(1)(i) of this section, and income from the sale is sourced under paragraph (b)(4)(i) of this section, by reference to paragraph (b)(1), (2), or (3) of this section.

Example 12. Source of income of a foreign person.

(1) *Facts.* FP, a foreign company, not a controlled foreign corporation within the meaning of section 957, derives income from the operation of satellites. FP operates a ground station in the United States and in foreign country, FC.

(ii) *Analysis.* In this case, FP is engaged in a U.S. trade or business of operating the ground station. Thus, under paragraph (b)(3) of this section, all FP's income derived from space activity is presumed to be U.S. source income. However, if FP can allocate space income to contributions occurring outside the United States, space, and international water, as provided in paragraph (b)(3) of this section, for example, to the ground station located in FC, then such space income so allocated will be from sources outside the United States.

Example 13. Source of income of a foreign person.

(i) *Facts.* FP, a foreign company, not a controlled foreign corporation within the meaning of Section 957, operates remote sensing satellites, collecting data and images in space for its customers. FP uses an independent agent, A, in the United States who provides marketing, order taking, and other customer service functions.

(ii) *Analysis.* In this case, FP is engaged in a U.S. trade or business on the basis of A's activities on its behalf in the United States. Therefore, under paragraph (b)(3) of this section, all of FP's income derived from space activity is presumed to be space income. However, if FP can allocate income to contributions occurring outside the United States, space, and international water, as provided in paragraph (b)(3) of this section, then such income so allocated will be from sources outside the United States.

(g) *Reporting and documentation requirements.* When a taxpayer allocates gross income, to the satisfaction of the Commissioner, under paragraph (b)(3), (b)(4)(ii)(C), or (b)(5) of this section, it does so by making the allocation on a timely filed original return (including extensions). An amended return does not qualify for this purpose, nor shall the provisions of § 301.9100–1 of this chapter and any guidance promulgated thereunder apply. In all cases, a taxpayer must maintain contemporaneous documentation in existence when such return is filed regarding the allocation of gross income and allocation or apportionment of expenses, losses and other deductions, the methodology used, and the circumstances justifying use of that methodology. The taxpayer must produce such documentation within 30 days upon request.

(h) *Effective date.* This section applies to taxable years beginning on or after the date that is 30 days after the date of publication of final regulations in the **Federal Register**.

§ 1.863–9 Source of income derived from communications activity under sections 863(a), (d), and (e).

(a) *In general.* Income of a U.S. or foreign person derived from communications activity is sourced under the rules of this section, notwithstanding any other provision including sections 861, 862, 863, and 865.

(b) *Source of gross income derived from communications activity*—(1) *In general.* The source of gross income derived from each type of communications activity, as defined in paragraph (d)(3) of this section, is determined under this paragraph (b). If a communications activity would qualify as space or ocean activity under section 863(d) and the regulations thereunder, the source of income derived from such communications activity is determined under this section, and not under section 863(d) and the regulations thereunder. See § 1.863–8(b)(6).

(2) *Source of international communications income*—(i) *Income derived by a U.S. person.* Under the 50/50 method of this paragraph (b)(2)(i), income derived by a U.S. person from international communications activity is one-half from sources within the United States and one-half from sources without the United States.

(ii) *Income derived by foreign persons*—(A) *General rule.* Income derived by a person other than a U.S. person from international communications activity is, except as otherwise provided in this paragraph (b), wholly from sources without the United States.

(B) *Income derived by certain foreign corporations.* If a foreign corporation, including a controlled foreign corporation within the meaning of section 957, is 50 percent or more owned by vote or value (directly,

indirectly, or constructively) by U.S. persons, all income derived by that corporation from international communications activity is from sources within the United States.

(C) *Income derived by foreign persons with a U.S. fixed place of business.* If a foreign person (other than a foreign person described in paragraph (b)(2)(ii)(B) of this section) maintains an office or other fixed place of business in the United States, the foreign person's international communications income, as determined to the satisfaction of the Commissioner, attributable to the office or other fixed place of business is from sources within the United States. The principles of section 864(c)(5) apply in determining whether a foreign person has an office or fixed place of business in the United States. See § 1.864–6 and –7. This paragraph does not apply if the foreign person is engaged in a U.S. trade or business.

(D) *Income derived by foreign persons engaged in a U.S. trade or business.* If a foreign person (other than a foreign person described in paragraph (b)(2)(ii)(B) of this section) is engaged in a U.S. trade or business, all of the foreign person's international communications income is presumed to be from sources within the United States. However, if the foreign person can allocate income between sources within the United States, or space, or international water and sources outside the United States and space and international water, to the satisfaction of the Commissioner, based on the facts and circumstances, which may include functions performed, resources employed, risks assumed, or other contributions to value, then the income allocated to sources outside the United States and space and international water shall be treated as from sources without the United States.

(3) *Source of U.S. communications income.* The source of income derived by a U.S. or a foreign person from U.S. communications activity is from sources within the United States.

(4) *Source of foreign communications income.* The source of income derived by a U.S. or a foreign person from foreign communications activity is from sources without the United States.

(5) *Source of space/ocean communications income.* The source of income derived by a U.S. or a foreign person from space/ocean communications activity is determined under section 863(d) and the regulations thereunder, without regard to § 1.863–8(b)(6).

(6) *Source of communications income when taxpayer cannot establish the two points between which the taxpayer is paid to transmit the communication.* The income derived by a U.S. person or foreign person from communications activity, when the taxpayer cannot establish the two points between which the taxpayer is paid to transmit the communication as required in paragraph (d)(3)(i) of this section, is from sources within the United States.

(c) *Taxable income.* When a taxpayer allocates gross income under paragraph (b)(2)(ii)(D) or (d)(1)(ii) of this section, to the satisfaction of the Commissioner, based on all the facts and circumstances, the taxpayer must allocate or apportion expenses, losses, and other deductions as prescribed in §§ 1.861–8 through 1.861–14T to the class of gross income, which must include the total income so allocated in each case. A taxpayer must then apply the rules of §§ 1.861–8 through 1.861–14T to properly allocate or apportion amounts of expenses, losses, and other deductions allocated or apportioned to such gross income between gross income from sources within the United States and without the United States. For amounts of expenses, losses, and other deductions allocated or apportioned to gross income derived from international communications activity, when the source of income is determined under the 50/50 method of paragraph (b)(2)(i) of this section, taxpayers must apportion expenses, losses, and other deductions between sources within and sources without pro rata based on the relative amounts of gross income from sources within the United States and without the United States. Research and experimental expenditures qualifying under § 1.861–17 are allocated under that section, and are not allocated and apportioned pro rata under the method of paragraph (b)(2)(i) of this section.

(d) *Communications activity and income derived from communications activity*—(1) *Communications activity*—(i) *General rule.* For purposes of this part, communications activity consists solely of the delivery by transmission of communications or data (communications). Delivery of communications other than by transmission, for example, by delivery of physical packages and letters, is not communications activity within the meaning of this section. Communications activity also includes the provision of capacity to transmit communications. Provision of content or any other additional service provided along with, or in connection with, a non-de minimis communications activity must be treated as a separate non-communications activity unless de minimis.

(ii) *Separate transaction.* To the extent a taxpayer's transaction consists in part of non-de minimis communications activity and in part of non-de minimis non-communications activity, such parts of the transaction must be treated as separate transactions. Gross income must be allocated to each such transaction involving the communications activity and the non-communications activity to the satisfaction of the Commissioner, based on all relevant facts and circumstances, which may include functions performed, resources employed, risks assumed, and any other contributions to the value of the respective transactions. For purposes of determining whether income is derived from communications activity, the Commissioner may treat communications activity and non-communications activity, treated as a single transaction, as separate transactions, or combine separate communications activity and non-communications activity transactions into a single transaction.

(2) *Income derived from communications activity.* Income derived from communications activity (communications income) is income derived from the delivery by transmission of communications, including income derived from the provision of capacity to transmit communications. Income may be considered derived from a communications activity even if the taxpayer itself does not perform the transmission function, but in all cases, the taxpayer derives communications income only if the taxpayer is paid to transmit, and bears the risk of transmitting, the communications.

(3) *Determining the type of communications activity*—(i) *In general.* Whether income is derived from international communications activity, U.S. communications activity, foreign communications activity, or space/ocean communications activity is determined by identifying the two points between which the taxpayer is paid to transmit the communication. The taxpayer must establish to the satisfaction of the Commissioner the two points between which the taxpayer is paid to transmit, and bears the risk of transmitting, the communication. Whether the taxpayer contracts out part or all of the transmission function is not relevant.

(ii) *Income derived from international communications activity.* Income derived by a taxpayer from international communications activity (international communications income) is income derived from communications activity, as defined in paragraph (d)(1) of this

section, when the taxpayer is paid to transmit between a point in the United States and a point in a foreign country (or a possession of the United States).

(iii) *Income derived from U.S. communications activity.* Income derived by a taxpayer from U.S. communications activity (U.S. communications income) is income derived from communications activity, as defined in paragraph (d)(1) of this section, when the taxpayer is paid to transmit—

(A) Between two points in the United States; or

(B) Between the United States and a point in space or in international water.

(iv) *Income derived from foreign communications activity.* Income derived by a taxpayer from foreign communications activity (foreign communications income) is income derived from communications activity, as defined in paragraph (d)(1) of this section, when the taxpayer is paid to transmit—

(A) Between two points in a foreign country or countries (or possession or possessions of the United States); or

(B) Between a foreign country (or a possession of the United States) and a point in space or in international water.

(v) *Income derived from space/ocean communications activity.* Income derived by a taxpayer from space/ocean communications activity (space/ocean communications income) is income derived from a communications activity, as defined in paragraph (d)(1) of this section, when the taxpayer is paid to transmit between a point in space or in international water and another point in space or in international water.

(e) *Treatment of partnerships*—(1) *General.* In the case of a U.S. partnership, this section will be applied at the partnership level. In the case of a foreign partnership, this section will be applied at the partner level.

(2) *Exception.* In the case of a U.S. partnership in which 50 percent or more of the partnership interests are owned by foreign persons, this section will be applied at the partner level.

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

Example 1. Income derived from communications activity. (i) *Facts.* D provides its customers in various foreign countries with access to its data base. A customer, C, places a toll call to D's telephone number, and can then access D's data base to obtain certain information, such as C's customers' health care coverage.

(ii) *Analysis.* D is not paid to transmit communications and does not derive income solely from transmission of communications within the meaning of paragraph (d) of this section. D instead derives income from provision of content or provision of services to its customers.

Example 2. Income derived from U.S. communications activity. (i) *Facts.* Local telephone company (TC) receives access fees from an international carrier for picking up calls from a local telephone customer and delivering the call to a U.S. point of presence (POP) of the international carrier. The international carrier picks up the call from its U.S. POP and delivers the call to a foreign country.

(ii) *Analysis.* TC is not paid to carry the transmission between the United States and a foreign country. It is paid to transmit communications between two points in the United States. TC derives income from U.S. communications activity as defined in paragraph (d)(3)(iii) of this section, which is sourced under paragraph (b)(3) of this section as U.S. source income.

Example 3. Income derived from international communications activity. (i) *Facts.* TC, a U.S. company, owns an underwater fiber optic cable. Pursuant to three year contracts, TC makes capacity to transmit communications via the cable available to its customers. Such customers then solicit telephone customers and arrange for transmitting their calls. The cable runs in part through U.S. waters, through international waters, and in part through foreign country waters.

(ii) *Analysis.* TC derives income from communications activity under paragraph (d)(2) of this section. The income is derived from international communications activity as provided in paragraph (d)(3)(ii) of this section, since TC is paid to make available capacity to transmit between the United States and a foreign country, and vice versa. Since TC is a U.S. person, TC's international communications income is sourced under paragraph (b)(2)(i) of this section as one-half from sources within the United States and one-half from sources without the United States.

Example 4. Character of communications activity: the paid-to-do rule. (i) *Facts.* TC is paid to transmit communications from Toronto, Canada, to Paris, France. TC transmits the communication to New York. TC pays another communications company, IC, to transmit the communications from New York to Paris.

(ii) *Analysis.* Under the paid-to-do rule of paragraph (d)(3)(i) of this section, TC derives income from foreign communications activity under paragraph (d)(3)(iv) of this section, since it is paid to transmit communications between two foreign points, Toronto and Paris. Under paragraph (d)(3)(i) of this section, the character of TC's activity is determined without regard to the fact that TC pays IC to transmit the communication for some portion of the delivery path. IC has international communications income under paragraph (d)(3)(ii) of this section, because it is paid to transmit the communication between a point in the United States and a point in a foreign country.

Example 5. Income derived from international communications activity. (i) *Facts.* S, a U.S. satellite operator, owns satellites and the uplink facilities in Country X, a foreign country. B, a resident of Country X, pays S to deliver its programming from Country X to its downlink facility in the United States, owned by C, a customer of B.

(ii) *Analysis.* S derives communications income under paragraph (d) of this section. S's income is characterized as international communications income under paragraph (d)(3)(ii) of this section, because S is paid to transmit the communication between the beginning point in a foreign country to an end point in the United States. The source of S's international communications income is determined under paragraph (b)(2)(i) of this section as one-half from sources within the United States and one-half from sources without the United States.

Example 6. Character of income derived from communications activity: the paid-to-do rule. (i) *Facts.* TC is paid to take a call from North Carolina to Iowa, two points in the United States, but routes the call through Canada.

(ii) *Analysis.* Under paragraph (d)(3)(i) of this section, the character of the income derived from communications activity is determined by the two points between which the taxpayer is paid to transmit, and bears the risk of transmitting, the communications, without regard to the path of the transmission between those two points. Thus, under paragraph (d)(3)(iii) of this section, TC derives income from U.S. communications activity because it is paid to transmit between two U.S. points.

Example 7. Source of income derived from communications activity. (i) *Facts.* A, a U.S. company, is an Internet access provider. A charges C a lump sum, paid monthly, for Internet access. A transmits a call made by C in France to a recipient in England, over the public Internet. A does not maintain records as to the beginning and end points of the transmission.

(ii) *Analysis.* Although A derives income from communications activity as defined in paragraph (d)(1) of this section, the source of income is determined under paragraph (b)(6) of this section as income from sources within the United States, because A cannot establish the two points between which it is paid to transmit the communications.

Example 8. Income derived from communications and non-communications activity. (i) *Facts.* A, a U.S. company, offers customers local and long distance phone service, video, and Internet services. Customers pay one monthly fee, and in addition 10 cents a minute for all long-distance calls, including international calls.

(ii) *Analysis.* To the extent A derives income from communications activity, A must allocate income to its communications activity as provided in paragraph (d)(1)(ii) of this section. To the extent A can establish that it derives international communications income as defined in paragraph (d)(3)(ii) of this section, A would determine the source of such income under paragraph (b)(2)(i) of this section. If A cannot establish the points between which it is paid to transmit communications, as required in paragraph (d)(3)(i) of this section, the source of A's income must be determined under paragraph (b)(6) of this section as from within the United States.

Example 9. Income derived from communications activity. (i) *Facts.* T

purchases capacity from TC to transmit telephone calls. T sells prepaid telephone calling cards, giving customers access to TC's lines, for a certain number of minutes.

(ii) *Analysis.* T derives income from communications activity, under paragraph (d)(2) of this section, because T makes capacity to transmit available to its customers. In this case, T cannot establish the points between which communications are transmitted. Therefore, the source of its income must be determined under paragraph (b)(6) of this section as U.S. source income.

Example 10. Income derived from communications and non-communications activity. (i) *Facts.* B, a U.S. company, transmits television programs using its satellite transponder, from the United States to downlink facilities in foreign country Y, owned by D, a cable system operator in Country Y. D receives the transmission, unscrambles the signals, and distributes the broadcast to customers in Country Y.

(ii) *Analysis.* B derives income both from communications activity as defined under paragraph (d)(1)(i) of this section, and from non-communications activity. Gross income must be allocated to the communications activity as required in paragraph (d)(1)(ii) of this section. Income derived by B for transmission to D is international communications income within paragraph (d)(3)(ii) of this section, because B is paid to transmit communications from the United States to a foreign country.

Example 11. Income derived from communications activity. (i) *Facts.* TC is paid for Internet access. TC replicates frequently requested sites on its servers, solely to speed up response time.

(ii) *Analysis.* On these facts, the replication service would be treated as de minimis under paragraph (d)(1)(i) of this section, so that TC derives income from communications activity. The type and source of TC's communications income depends on demonstrating the points between which TC is paid by its customer to transmit the communications, under paragraph (d)(3)(i) of this section.

Example 12. Income derived from foreign communications activity. (i) *Facts.* S leases capacity to B, a broadcaster located in Australia. B beams programming to the satellite, and S's satellite picks the communications up in space, and beams the programming over Southeast Asia.

(ii) *Analysis.* S derives income from communications activity under paragraph (d)(2) of this section. S's income is characterized as income derived from foreign communications activity under paragraph (d)(3)(iv) of this section, because S picks up the communication in space, and beams it to a footprint entirely covering a foreign area. The source of S's income is determined under paragraph (b)(4) of this section as from sources without the United States. If S were beaming the programming over a satellite footprint that covered area both in the United States and outside the United States, S would be required to allocate the income derived from the different types of communications activity.

(g) *Reporting rules and disclosure on tax return.* When a taxpayer allocates gross income to the satisfaction of the Commissioner under paragraph (b)(2)(ii)(D) or (d)(1)(ii) of this section, it does so by making the allocation on a timely filed original return (including extensions). An amended return does not qualify for this purpose, nor shall the provisions of § 301.9100–1 of this chapter and any guidance promulgated thereunder apply. In all cases, a taxpayer must maintain contemporaneous documentation in existence when such return is filed regarding the allocation of gross income, and allocation and apportionment of expenses, losses, and other deductions, the methodology used, and the circumstances justifying use of that methodology. The taxpayer must produce such documentation within 30 days of a request.

(h) *Effective date.* This section applies to taxable years beginning on or after the date that is 30 days after the date of publication of final regulations in the **Federal Register**.

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

[FR Doc. 01–7 Filed 1–16–01; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–109481–99]

RIN 1545–AX34

Special Rules Under Section 417(a)(7) for Written Explanations Provided by Qualified Retirement Plans After Annuity Starting Dates

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to the special rule added by the Small Business Job Protection Act of 1996 which permits the required written explanations of certain annuity benefits to be provided by qualified retirement plans to plan participants after the annuity starting date. These regulations affect administrators of, participants in, and beneficiaries of qualified retirement plans.

DATES: Written and electronic comments and requests for a public hearing must be received by April 17, 2001.

ADDRESSES: Send submissions to: CC:M&SP:RU (REG–109481–99), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:M&SP:RU (REG–109481–99), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the ''Tax Regs'' option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at *http://www.irs.gov/tax__regs/regslist.html.*

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Robert M. Walsh, (202) 622–6090; concerning submissions and delivery of comments, Sonya Cruse (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, W:CAR:MP:FP:S:O, Washington, DC 20224. Comments on the collection of information should be received by March 19, 2001. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (see below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

The collection of information in this proposed regulation is in § 1.417(e)–1(b)(3)(iv)(B) and § 1.417(e)–

1(b)(3)(v)(A). This collection of information is required by the IRS to ensure that the participant and the participant's spouse consent to a form of distribution from a qualified retirement plan that may result in reduced periodic payments. This information will be used by the plan administrator to verify that the required consent has been given. The collection of information is required to obtain a benefit. The respondents are individuals who are entitled to receive certain types of distributions from a qualified retirement plan or who are married to individuals entitled to receive certain types of distributions from a qualified retirement plan.

Taxpayers provide the information to administrators of qualified retirement plans when a distribution with a retroactive annuity starting date is elected.

Estimated total annual reporting burden: 12,500 hours.

Estimated average annual burden hours per respondent: 0.25 hours.

Estimated number of respondents: 50,000.

The estimated annual frequency of responses is on occasion.

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

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

Background

This document contains proposed amendments to 26 CFR Part 1 under section 417(a)(7) of the Internal Revenue Code (Code). Section 401(a)(11) provides that, subject to certain exceptions, all distributions from a qualified plan must be made in the form of a qualified joint and survivor annuity (QJSA). One such exception is provided in section 417, which allows a participant to elect to waive the QJSA in favor of another form of distribution. Section 417(a)(2) provides that, for the waiver to be valid, the participant's spouse must consent to the waiver. Section 417(a)(3)(A) requires a qualified plan to provide to each participant, within a reasonable period of time before the annuity starting date, a written explanation (QJSA explanation) that describes the QJSA, the right to waive the QJSA and the rights of the participant's spouse. Under section 417(d), a participant's spouse who has not been married to the participant throughout the 1-year period preceding the annuity starting date is not required to be treated as the spouse for purposes of entitlement to the QJSA. Section 417(a)(2)(B) provides that spousal consent is not required to waive the QJSA if it is established to the satisfaction of a plan representative that such consent may not be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as the Secretary may by regulations prescribe.

Section 417(a)(7), which was added to the Code by section 1451(a) of the Small Business Job Protection Act of 1996, Public Law 104–188 (110 Stat. 1755) (SBJPA), creates an exception to the rules of section 417(a)(3)(A), effective for plan years beginning after December 31, 1996. Section 417(a)(7)(A) provides that, notwithstanding any other provision of section 417(a), a plan may furnish the QJSA explanation after the annuity stating date, as long as the applicable election period is extended for at least 30 days after the date on which the explanation is furnished. Thus, section 417(a)(7)(A) allows the annuity starting date to be a date that is earlier than the date the QJSA explanation is provided, thereby allowing the retroactive payment of benefits that are attributable to the period before the QJSA explanation is provided. Section 417(a)(7)(A)(ii) provides that the Secretary may limit the application of the provision permitting the selection of a retroactive annuity starting date by regulations, except that the regulations may not limit the period of time by which the annuity starting date precedes the furnishing of the written explanation other than by providing that the retroactive annuity starting date may not be earlier than termination of employment.

Section 205(c)(8) of the Employee Retirement Income Security Act of 1974, Public Law 93–406 (88 Stat. 829) (ERISA), provides a parallel rule to section 417(a)(7) of the Code that applies under Title I of ERISA, and authorizes the Secretary of the Treasury to issue regulations limiting the application of the general rule. Thus, Treasury regulations issued under section 417(a)(7) of the Code apply as well for purposes of section 205(c)(8) of ERISA.

On December 18, 1998, final regulations were published in the **Federal Register** (63 FR 70009) which amended § 1.417(e)–1(b)(3)(ii) of the Income Tax Regulations, relating to the timing for the QJSA explanation and the participant waiver of a QJSA form of distribution. The regulations finalized an earlier set of proposed regulations that were issued in 1995. The regulations specified that the QJSA explanation must be provided before the annuity starting date, except as otherwise provided by section 417(a)(7) for plan years beginning after December 31, 1996, but the regulations did not further address section 417(a)(7).

Explanation of Provisions

In accordance with section 417(a)(7)(A), these proposed regulations would provide that the QJSA explanation may be furnished on or after the annuity starting date under certain circumstances. The proposed regulations refer to the annuity starting date in such cases as the ''retroactive annuity starting date'', define how payments are made in the case of a retroactive annuity starting date, and set conditions for the use of retroactive annuity starting dates.

Under the proposed regulations, a retroactive annuity starting date could be used only if the plan provides for it and the participant elects to use the retroactive annuity starting date. The election under the proposed regulations would place the participant in approximately the same situation he or she would have been in had benefit payments actually commenced on the retroactive annuity starting date. Accordingly, the proposed regulations would provide that future periodic payments for a participant who elects a retroactive annuity starting date must be the same as the periodic payments that would have been paid to the participant had payments actually commenced on the retroactive annuity starting date and that the participant must also receive a make-up amount to reflect the missed payments (with an appropriate adjustment for interest from the date the payments would have been made to the date of actual payment).

In addition, because the purpose of a retroactive annuity starting date is to place the participant in approximately the same situation that he or she would have been in had benefits commenced on the retroactive date, the retroactive benefit payments would be required to be based upon the terms of the plan in effect as of the retroactive annuity starting date (taking into account plan amendments executed after the retroactive annuity starting date, but made effective on or before that date). Accordingly, the retroactive annuity starting date could not be earlier than the date the participant could have started receiving benefits if the payments had commenced at the

earliest date permitted under the terms of the plan (*e.g.,* the retroactive annuity starting date could not be before the earlier of the date of the participant's termination of employment or attainment of normal retirement age), and the amount of the benefit must satisfy sections 415 and 417 as of the retroactive annuity starting date.

These proposed regulations would not require plans to provide for a retroactive annuity starting date. Instead, plans could continue to provide that the QJSA explanation is to be provided before the annuity starting date under the rules of section 417(a) without regard to section 417(a)(7)(A). Moreover, if a plan is amended to provide for a retroactive annuity starting date, the plan could impose additional restrictions on availability not imposed under these proposed regulations, provided that the additional restrictions did not violate any of the rules applicable to qualified plans. For example, plans that generally provide benefit options that include annuities and lump sum payments could provide that retroactive annuity starting dates are available only for participants who elect annuities.

These proposed regulations make it clear that the notice, consent, and election rules of section 417(a)(1), (2), and (3), and the regulations thereunder, would apply to the retroactive payment of benefits but with several modifications. These modifications generally reflect the fact that the existing timing rules relating to notice and consent are generally tied to an annuity starting date that is after the furnishing of the QJSA explanation.[1]

Section 417(a)(7)(A) specifically permits the QJSA explanation to be made after the annuity starting date and modifies the participant election period in these situations. These regulations would make a comparable adjustment for the timing rules applicable to spousal consent by providing generally that, for retroactive payments under section 417(a)(7), the first date of actual payment is substituted for the annuity starting date in applying the timing rules for notice and consent. These modifications are intended to ensure that the notice and election are generally contemporaneous with the commencement of benefits, but the modifications recognize the need for flexibility in the timing to take into account administrative delays. In furtherance of that goal, these proposed regulations would modify the general timing rule applicable to the furnishing of notices, and to participant elections and spousal consent. The proposed regulations would provide that the participant's election to waive the QJSA under section 417(a)(1)(A)(i) and the spouse's consent under section 417(a)(2) must generally be made before the annuity starting date, but permits a later election if the distribution commences no more than 90 days after the QJSA explanation required by section 417(a)(3)(A) is furnished to the participant. This modification would apply without regard to the retroactivity of annuity starting dates, but would include an exception for reasonable administrative delay in the distribution of benefits.

Pursuant to the regulatory authority provided in section 417(a)(7)(A)(ii), these proposed regulations include a special spousal consent rule in addition to those rules applicable under section 417(a). Under this special rule, if the spouse's survivor annuity under a QJSA with an annuity starting date after the date the QJSA explanation was provided would be greater than the spouse's survivor annuity pursuant to the participant's election of a retroactive annuity starting date, the participant could not elect a retroactive annuity starting date unless the participant's spouse (determined at the time distributions actually commence) consents to the distribution. This special rule applies even if the form of benefit that the participant elects as of the retroactive annuity starting date is a QJSA. Thus, for example, where a QJSA that begins after the QJSA explanation is furnished would provide $1,000 monthly to the participant with a survivor annuity of $500 monthly to the spouse, and a QJSA with a retroactive annuity starting date would provide $900 monthly to the participant with a survivor annuity of $450 monthly to the spouse, together with a $20,000 make-up payment to the participant, the spouse would be required to consent in order for the participant to elect the retroactive annuity starting date. Spousal consent under this special rule would not be required in this example if the spouse's survivor annuity under the retroactive annuity starting date election is at least $500 per month.

These proposed regulations would also provide that, pursuant to section 417(a)(2)(B), the consent of the participant's spouse as of the retroactive annuity starting would not be required if that spouse is not the participant's spouse as of the date distributions commence, unless otherwise provided in a qualified domestic relations order (as defined in section 414(p)).

The proposed regulations would impose an additional condition on the availability of a retroactive annuity starting date, regarding the permissible amount of the distribution under sections 417(e)(3) (if applicable) and 415. To satisfy this condition, the distribution would be required to be adjusted, if necessary, to satisfy the requirements of sections 417(e)(3) (if applicable) and 415 if the date the distribution commences is substituted for the annuity starting date.

Proposed Effective Date

These regulations are proposed to be applicable for plan years beginning on or after January 1, 2002.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that the regulations require the collection of plan participants' written elections requesting qualified retirement plan distributions, and written spousal consent to these distributions, under limited circumstances. It is anticipated that most small businesses affected by these regulations will be sponsors of qualified retirement plans. Since these written participant elections and written spousal consents are required to be collected only for certain distributions, and since, in the case of a small plan, there will be relatively few distributions per year (and even fewer that are subject to these requirements), small plans that provide distributions for which this collection of information is required will only have to collect a small number of participant elections and spousal consents as a result of these regulations. Accordingly, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations,

[1] For example, section 417(a)(1) provides that a participant may elect to waive the QJSA within the ''applicable election period'' which is defined by section 417(a)(6) as the 90-day period ending on the annuity starting date. Similarly, § 1.417(e)–1(b)(3)(i) provides that the written consent of the plan participant and the participant's spouse must be made no more than 90 days before the annuity staring date. Also, § 1.417(e)–1(b)(3)(ii) provides that the QJSA explanation must generally be provided no less than 30 days and no more than 90 days before the annuity starting date.

consideration will be given to any written comments (a signed original and 8 copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of these regulations are Robert M. Walsh and Linda S. F. Marshall, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

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

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

Par. 2. Section 1.417(e)–1 is amended by:

1. Revising paragraph (b)(3)(i).
2. Revising paragraph (b)(3)(ii) introductory text.
3. Revising paragraph (b)(3)(ii)(C).
4. Redesignating paragraphs (b)(3)(iii) and (b)(3)(iv) as paragraphs (b)(3)(viii) and (b)(3)(ix), respectively.
5. Adding new paragraphs (b)(3)(iii) through (b)(3)(vii).

The additions and revisions read as follows:

§ 1.417(e)–1 Restrictions and valuations of distributions from plans subject to sections 401(a)(11) and 417.

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(b)* * *

(3)* * *

(i) Written consent of the participant and the participant's spouse to the distribution must be made not more than 90 days before the annuity starting date, and, except as otherwise provided in paragraphs (b)(3)(iii) and (b)(3)(iv) of this section, no later than the annuity starting date.

(ii) A plan must provide participants with the written explanation of the QJSA required by section 417(a)(3) no less than 30 days and no more than 90 days before the annuity starting date, except as provided in paragraph (b)(3)(iv) of this section regarding retroactive annuity starting dates. However, if the participant, after having received the written explanation of the QJSA, affirmatively elects a form of distribution and the spouse consents to that form of distribution (if necessary), a plan will not fail to satisfy the requirements of section 417(a) merely because the written explanation was provided to the participant less than 30 days before the annuity starting date, provided that the following conditions are met:

* * * * *

(C) The annuity starting date is after the date that the explanation of the QJSA is provided to the participant.

* * * * *

(iii) The plan may permit the annuity starting date to be before the date that any affirmative distribution election is made by the participant (and before the date that distribution is permitted to commence under paragraph (b)(3)(ii)(D) of this section), provided that, except as otherwise provided in paragraph (b)(3)(vii) of this section regarding administrative delay, distributions commence not more than 90 days after the explanation of the QJSA is provided.

(iv) *Retroactive annuity starting dates.* (A) Notwithstanding the requirements of paragraphs (b)(3)(i) and (ii) of this section, pursuant to section 417(a)(7), a defined benefit plan is permitted to provide benefits based on a retroactive annuity starting date if the requirements described in paragraph (b)(3)(v) of this section are satisfied. A defined benefit plan is not required to provide for retroactive annuity starting dates. If a plan does provide for a retroactive annuity starting date, it may impose conditions on the availability of a retroactive annuity starting date in addition to those imposed by paragraph (b)(3)(v) of this section, provided that imposition of those additional conditions does not violate any of the rules applicable to qualified plans. For example, a plan that includes a single sum payment as a benefit option may limit the election of a retroactive annuity starting date to those participants who do not elect the single sum payment. A defined contribution plan is not permitted to have a retroactive annuity starting date.

(B) For purposes of this section, a ''retroactive annuity starting date'' is an annuity starting date affirmatively elected by a participant that occurs on or before the date the written explanation required by section 417(a)(3) is provided to the participant. In order for a plan to treat a participant as having elected a retroactive annuity starting date, future periodic payments with respect to a participant who elects a retroactive annuity starting date must be the same as the future periodic payments, if any, that would have been paid with respect to the participant had payments actually commenced on the retroactive annuity starting date. The participant must receive a make-up payment to reflect any missed payment or payments for the period from the retroactive annuity starting date to the date of the actual make-up payment (with an appropriate adjustment for interest from the date the missed payment or payments would have been made to the date of the actual make-up payment). Thus, the benefit determined as of the retroactive annuity starting date must satisfy the requirements of sections 417(e)(3), if applicable, and section 415 with the applicable interest rate and applicable mortality table determined as of that date. Similarly, a participant is not permitted to elect a retroactive annuity starting date that precedes the date upon which the participant could have otherwise started receiving benefits (e.g., the earlier of the participant's termination of employment or the participant's normal retirement age) under the terms of the plan in effect as of the retroactive annuity starting date. A plan does not fail to treat a participant as having elected a retroactive annuity starting date as described in this paragraph (b)(3)(iv)(B) merely because the distributions are adjusted to the extent necessary to satisfy the requirements of paragraph (b)(3)(v)(B) of this section relating to sections 415 and 417(e)(3).

(C) If the participant's spouse as of the retroactive annuity starting date would not be the participant's spouse determined as if the date distributions commence were the participant's annuity starting date, consent of that former spouse is not needed to waive the QJSA with respect to the retroactive annuity starting date, unless otherwise provided under a qualified domestic relations order (as defined in section 414(p)).

(D) A distribution payable pursuant to a retroactive annuity starting date election is treated as excepted from the present value requirements of paragraph (d) of this section under paragraph (d)(6) of this section if the distribution form would have been described in paragraph (d)(6) of this section had the distribution

actually commenced on the retroactive annuity starting date.

(v) *Requirements applicable to retroactive annuity starting dates.* A distribution is permitted to have a retroactive annuity starting date with respect to a participant's benefit only if the following requirements are met:

(A) The participant's spouse (including an alternate payee who is treated as the spouse under a qualified domestic relations order (QDRO), as defined in section 414(p)), determined as if the date distributions commence were the participant's annuity starting date, consents to the distribution in a manner that would satisfy the requirements of section 417(a)(2). The spousal consent requirement of this paragraph (b)(3)(v)(A) is satisfied if such spouse consents to the distribution under paragraph (b)(2)(i) of this section. The spousal consent requirement of this paragraph (b)(3)(v)(A) does not apply if the amount of such spouse's survivor annuity payments under the retroactive annuity starting date election is no less than the amount that the payments to such spouse would have been under a QJSA with an annuity starting date after the date that the explanation was provided.

(B) The distribution (including appropriate interest adjustments) provided based on the retroactive annuity starting date would satisfy the requirements of sections 417(e)(3), if applicable, and section 415 if the date the distribution commences is substituted for the annuity starting date for all purposes, including for purposes of determining the applicable interest rate and the applicable mortality table.

(vi) *Timing of notice and consent requirements in the case of retroactive annuity starting dates.* In the case of a retroactive annuity starting date, the date of the first actual payment of benefits based on the retroactive annuity starting date is substituted for the annuity starting date for purposes of satisfying the timing requirements for giving consent and providing an explanation of the QJSA provided in paragraphs (b)(3)(i) and (ii) of this section, except that the substitution does not apply for purposes of paragraph (b)(3)(iii) of this section. Thus, the written explanation required by section 417(a)(3)(A) must generally be provided no less than 30 days and no more than 90 days before the date of the first payment of benefits and the election to receive the distribution must be made after the written explanation is provided and on or before the date of the first payment. Similarly, the written explanation may also be provided less than 30 days prior to the first payment of benefits if the requirements of paragraph (b)(3)(ii) of this section would be satisfied if the date of the first payment is substituted for the annuity starting date.

(vii) *Administrative delay.* A plan will not fail to satisfy the 90-day timing requirements of paragraphs (b)(3)(iii) and (vi) of this section merely because, due solely to administrative delay, a distribution commences more than 90 days after the written explanation of the QJSA is provided to the participant.

* * * * *

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

[FR Doc. 01–132 Filed 1–16–01; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–104876–00]

RIN 1545–AY66

Taxable Years of Partner and Partnership; Foreign Partners

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations on the taxable year of a partnership with foreign partners. The proposed regulations affect partnerships and their partners. This document also contains a notice of public hearing on these proposed regulations.

DATES: Written comments must be received by April 17, 2001. Requests to speak (with outlines of oral comments) at the public hearing scheduled for June 6, 2001, at 10 a.m., must be submitted by May 16, 2001.

ADDRESSES: Send submissions to: CC:M&SP:RU (REG–104876–00), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered between the hours of 8 a.m. and 5 p.m. to: CC:M&SP:RU (REG–104876–00), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the ''Tax Regs'' option of the IRS Home Page or by submitting comments directly to the IRS Internet site at http://www.irs.ustreas.gov/tax__regs/regslist.html. The public hearing will be held in room 4718, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Dan Carmody, (202) 622–3080; concerning specific international issues, Ronald M. Gootzeit, (202) 622–3860; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, LaNita VanDyke, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION: This document proposes to amend section 706 of the Income Tax Regulations (26 CFR part 1) regarding partnership taxable years.

Background

Section 706 governs the taxable years for a partnership and its partners. The partners and the partnership each have their own taxable years, which may or may not coincide. Under section 706(a), for a partner's taxable year, the partner must include in taxable income the partner's share of any income, gain, loss, deduction, or credit of the partnership for the partnership's taxable year that ends within or with the partner's taxable year. Section 706(b) provides rules for determining a partnership's taxable year.

Prior to the Tax Reform Act of 1986, it was possible for partners to create income deferral opportunities through arranging divergent taxable years for a partnership and its partners. For example, under certain circumstances, a partnership could elect a June 30 taxable year while its partners were calendar year taxpayers. Under such an arrangement, the partners would include partnership income earned from July 1, Year 1, to June 30, Year 2, in Year 2, when the partnership's taxable year ended, even though six months of income was generated during Year 1. To prevent this potential for income deferral, Congress amended section 706(b). See generally Staff of the Joint Committee on Taxation, *General Explanation of the Tax Reform Act of 1986, 533–39 (1986).*

Section 706(b) provides that, unless the partnership establishes a business purpose for a different taxable year, a partnership cannot have a taxable year other than: (i) the majority interest taxable year; (ii) if there is no majority interest taxable year, the taxable year of all the principal partners of the partnership; or (iii) if there is no taxable year described in (i) or (ii), the calendar year unless the Secretary by regulation prescribes another period. Section

1.706–1T(a)(1) and (2) provides that if neither (i) nor (ii) is applicable, the partnership's taxable year will be the taxable year that results in the least aggregate deferral of partnership income.

Additionally, § 1.706–3T(a) provides that under certain circumstances, a tax-exempt partner will be disregarded for purposes of section 706(b).

Explanation of Provisions

I. Treatment of Foreign Partners

Currently, foreign partners are taken into consideration when determining a partnership's taxable year under section 706(b). In some circumstances, this could allow the taxable year of a partnership to be determined for Federal tax purposes by reference to the taxable year of one or more partners who may not be subject to U.S. taxation on income earned through the partnership. For instance, assume that a foreign partner owns a majority interest in a partnership that generates only foreign source income that is not effectively connected with a trade or business conducted within the United States. The minority partners are domestic persons subject to tax in the United States on income earned through the partnership. If the taxable year or years of the domestic partners are different from that of the majority partner, the majority partner's taxable year would determine the partnership's taxable year, which would affect the timing of the domestic partners' inclusion of partnership income. Thus, by conforming the partnership's taxable year to the taxable year of foreign partners, the mechanical application of section 706(b) can create deferral for those partners who are subject to tax in the United States on income earned through the partnership, while having no impact on the majority foreign partners who are not subject to tax in the United States on such income. The IRS and the Treasury do not believe that such a result is consistent with the intent of the statute.

A. Disregard Certain Foreign Partners

The proposed regulations generally require foreign partners who are not subject to U.S. taxation on a net basis on income earned through the partnership to be disregarded for purposes of applying section 706(b). For these purposes a foreign partner will be considered subject to Federal income tax only if the partner is allocated gross income of the partnership that is effectively connected (or treated as effectively connected) with the conduct of a trade or business within the United States (effectively connected income or ECI). In the case of a foreign partner claiming benefits under a U.S. income tax treaty, a foreign partner will be disregarded unless it is allocated gross income that is attributable to a permanent establishment in the United States.

A foreign partner also may be subject to U.S. Federal income tax on its distributive share of fixed or determinable annual or periodic income (FDAP income) from U.S. sources. In certain circumstances, the timing for imposing United States withholding tax on FDAP income earned through a partnership may be affected by the partnership's taxable year. See, e.g., § 1.1441–5(b)(2)(i) (providing the timing for withholding under section 1441 in the case of a domestic partnership that has received, but not distributed, FDAP income that is includible in the distributive share of a foreign partner). The IRS and Treasury believe that the withholding provisions of section 1441 provide a more appropriate mechanism than section 706 for addressing timing issues for these partners. Additionally, the IRS and Treasury are concerned that the ability of a partnership to earn small amounts of FDAP income, and thereby alter the determination of its taxable year, may permit inappropriate manipulation of the rule under section 706(b) for the domestic partners. Accordingly, under these proposed regulations, the taxable year of a foreign partner would be disregarded for purposes of section 706(b) if that partner is subject to Federal income tax solely due to the presence of U.S. source income earned through the partnership that is not ECI. In addition, it is irrelevant, for purposes of the proposed regulations, whether the foreign partner is subject to tax in the United States with respect to income other than income earned by the partnership.

The rule for foreign partners provided in these proposed regulations generally is consistent with the present rule under § 1.706–3T for the treatment of partners that are exempt from taxation under section 501(a). The taxable years of tax-exempt partners are not considered for purposes of section 706(b) unless those partners are subject to tax on income from the partnership. One difference between the rules for foreign partners and the rules for tax-exempt partners is that foreign partners will be included in determining a partnership's taxable year where the foreign partner is allocated gross income that is effectively connected with a U.S. trade or business, but actually has a net loss from the partnership for the taxable year (i.e., the foreign partners are not actually subject to tax on their allocable portion of the partnership's income). By contrast, a tax-exempt partner is disregarded where its allocable share of the partnership's tax items produces a net loss for the taxable year even though, if the foreign partner were allocated net income for the taxable year, the tax-exempt entity would have been subject to tax on such income. The IRS and Treasury are considering modifying the tax-exempt rule to conform with the proposed rule for foreign partners and request comments in this regard.

Finally, for purposes of these rules, the proposed regulations generally define a foreign partner as a partner that is not a U.S. person (as defined in section 7701(a)(30)), but provide that controlled foreign corporations (CFCs) and foreign personal holding companies (FPHCs) are not treated as foreign partners. These entities are not treated as foreign for purposes of determining a partnership's taxable year under section 706 because the U.S. owners of such entities may be subject to Federal income taxation on a current basis with respect to income earned by the entities.

The IRS and Treasury also considered, but did not include, a similar rule for passive foreign investment companies (PFICs). The proposed regulations do not include a similar rule for PFICs because, unlike the rules for CFCs and FPHCs, which require that a majority of the ownership be concentrated in a small group of U.S. persons, the PFIC rules apply without regard to the level of ownership of the individual, or of all U.S. owners in the aggregate. Additionally, in most instances where a PFIC does have substantial U.S. ownership, it will also be a CFC or a FPHC.

B. Minority Interest Rule

The IRS and Treasury recognize that requiring a partnership taxable year to be determined without regard to certain foreign partners may present difficulties for minority partners in some cases. If the taxable years of certain foreign partners are disregarded for purposes of section 706(b), it is possible that the taxable year of a partnership may be determined solely by reference to the taxable year of one or more small minority domestic partners. This could create significant administrative burdens for minority partners if the partnership maintains its books and records on a taxable year selected by significant foreign partners that is different from the taxable year of the minority partner or partners.

In order to provide relief in this situation, the proposed regulations contain an exception providing that foreign partners will not be disregarded

for purposes of section 706(b) if the partnership's taxable year would be determined by reference to partners that individually hold less than a 10-percent interest, and in the aggregate hold less than a 20-percent interest, in the capital and profits of the partnership. For purposes of this rule, a partner's interest will include interests held directly and interests held by related partners. In determining whether the minority interest rule applies, the proposed regulations take into account the ownership of tax-exempt entities that are disregarded under § 1.706–3T(a).

Where a domestic tax-exempt entity (or entities) owns a relatively small interest in the partnership, but enough to cause the minority interest rule not to apply, the result may be anomalous, given that the tax-exempt entity has no real interest in a particular taxable year and thus has no incentive to convince significant foreign partners to cause the partnership to determine its taxable year by reference to the domestic partners. However, where such a tax-exempt entity (or entities) owns a majority interest in the partnership, the result may be more appropriate because the domestic partners are more likely to have significant bargaining power regarding the taxable year vis-a-vis the foreign partners. An appropriate solution may be to exclude tax-exempt entities from both the numerator and denominator in applying the de minimis rule. The IRS and Treasury request comments regarding how tax-exempt entities should be treated for purposes of the minority interest rule.

C. Transitional Relief

Under current law, a partnership may have adopted a taxable year that creates deferral by reference to the taxable year of a foreign partner not subject to U.S. net income taxation. In such instances, compliance with these regulations could result in a change in the partnership taxable year which would cause a ''bunching'' of more than 12 months of partnership income into a single taxable year of the partners subject to Federal income tax.

For example, consider a partnership that has a June 30 taxable year because of the presence of a 60-percent foreign partner that is not subject to U.S. net income taxation on income earned through the partnership. This taxable year creates six months of deferral for the 40-percent domestic partner, who is on the calendar year. In the year that these proposed regulations become effective, two partnership taxable years (the taxable year concluding on June 30 and the initial short calendar year concluding December 31) would close during the domestic partner's taxable year. Thus, section 706(a) would require the domestic partner to recognize its distributive share of 18 months of partnership income during a single taxable year. While the historic taxable year of the partnership in this example is inconsistent with the intent of section 706(b), the IRS and Treasury recognize that the potential bunching of income caused by changing to an appropriate taxable year might present an undue hardship for some taxpayers.

In order to alleviate such a hardship, the proposed regulations would permit adversely affected taxpayers to apply the four-year spread provisions of § 1.702–3T. This transitional rule will have limited application; it is intended only to provide relief for bunching of income that occurs in the first taxable year beginning on or after the effective date of these proposed regulations.

II. Application of § 1.701–2

The mechanical rules of section 706(b) operate to limit partners' opportunities to defer the recognition of partnership income. Where partners have different taxable years, eliminating or limiting deferral for one partner may result in increasing deferral for another partner. Such deferral is an anticipated result of section 706(b). However, an application of the mechanical rules of section 706(b) and these proposed regulations remains subject to the anti-abuse rule of § 1.701–2.

For example, assume that these proposed regulations would disregard the taxable year of a 76-percent foreign partner and require the partnership (which only has foreign operations, and therefore does not earn ECI) to adopt the taxable year of the 24-percent domestic partner. Conceivably the partners could attempt to avoid this result by forming a tiered structure where the foreign partner would own a 95-percent interest in an upper-tier domestic partnership that would hold, as its only asset, an 80 percent interest in the lower-tier operating partnership (the domestic partner would own the remaining 5 percent of the upper-tier partnership and the remaining 20 percent of the lower-tier partnership). In substance, this is the same arrangement as the single partnership except that the minority interest rule would generally require the upper-tier partnership to adopt the taxable year of the foreign partner (because the domestic partner owns less than a 10-percent interest in the upper-tier partnership). The upper-tier domestic partnership's taxable year would then be considered the majority interest taxable year of the lower-tier partnership under section 706(b)(1)(B)(i). In these circumstances, the Commissioner may determine that in order to achieve a tax result that is consistent with the intent of section 706, § 1.701–2 should apply. In such event, the Commissioner may disregard the upper-tier partnership and treat the assets thereof (in this case, the interest in the lower-tier partnership) as being owned directly by its partners, with the result that the foreign partner would be disregarded in determining the taxable year of the lower-tier partnership under section 706(b) and these proposed regulations.

III. Finalization of Prior Proposed Regulations

The current temporary regulations under section 706 are the product of three separate Treasury decisions. The text of these Treasury decisions, TD 7991 (adopted November 29, 1984), TD 8169 (adopted December 23, 1987), and TD 8205 (adopted May 24, 1988), were also contemporaneously promulgated as proposed regulations, LR–183–84 (published in the **Federal Register** on November 30, 1984), LR–101–86 (published in the **Federal Register** on December 29, 1987), and LR–53–880 (published in the **Federal Register** on May 27, 1988). These proposed regulations have not been withdrawn, and it is likely that they will be finalized in conjunction with the finalization of the regulations proposed by this document. The IRS and Treasury expect that the finalization of these previously proposed regulations will be accompanied by the withdrawal of the existing temporary regulations. Comments previously received in connection with the prior proposed regulations will be considered as well as new or additional comments with respect to such regulations.

IV. Effective Date

These regulations are proposed to apply to partnership taxable years beginning on or after the date final regulations are published in the **Federal Register**. For example, if the final regulations were published on November 1, 2001, a partnership that historically has determined its taxable year by reference to a 75-percent foreign partner with a March 31 taxable year end rather than by reference to a 25-percent domestic partner that uses the calendar year would be required to change to the calendar year as of April 1, 2002 (the partnership year beginning after the date final regulations were published). This would result in a short taxable year from April 1, 2002, to December 31, 2002.

Special Analyses

It has been determined that this notice of proposed rulemaking 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 on small entities a collection of information requirement, 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, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (preferably a signed original and eight (8) copies) that are submitted timely to the IRS. The IRS and Treasury specifically request comments on the clarity of the proposed regulations and how they may be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for June 6, 2001, beginning at 10 a.m., in room 4718, 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. Because of access restrictions, visitors will not be admitted 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 preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons that wish to present oral comments at the hearing must submit timely written comments and must submit an outline of the topics to be discussed and the time to be devoted to each topic (preferably a signed original and eight (8) copies) by May 16, 2001.

A period of 10 minutes will be allotted to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is Dan Carmody, Office of Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

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

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

Par. 2. Section 1.706–4 is added to read as follows:

§ 1.706–4 Certain foreign partners disregarded.

(a) *General rule*—(1) *Foreign partners not claiming benefits under a U.S. income tax treaty.* In determining the taxable year (the current taxable year) of a partnership under section 706(b) and the regulations thereunder, a foreign partner shall be disregarded unless such partner is allocated any gross income of the partnership that was effectively connected (or treated as effectively connected) with the conduct of a trade or business within the United States during the partnership's taxable year immediately preceding the current taxable year. However, if a foreign partner was not a partner during the partnership's immediately preceding taxable year, such partner will be disregarded for the current taxable year if the partnership reasonably believes that the partner will not be allocated any gross income generated by the partnership during the current taxable year that is effectively connected with the conduct of a trade or business within the United States.

(2) Foreign partners claiming benefits under a U.S. income tax treaty. In the case of a foreign partner claiming benefits under an income tax treaty between the United States and another jurisdiction, a foreign partner will be disregarded under this paragraph (a) unless such partner was allocated any gross income that was attributable to a permanent establishment in the United States during the partnership's taxable year immediately preceding the current taxable year (or, if such partner was not a partner during the immediately preceding taxable year, the partnership reasonably believes that such partner will be allocated such income during the current taxable year).

(b) *Minority interest rule.* If the partners that are not disregarded by paragraph (a) of this section (absent the application of this paragraph (b)) individually hold less than a 10-percent interest, and in the aggregate hold less than a 20-percent interest, in the capital and profits of the partnership, paragraph (a) of this section will not apply. For purposes of determining ownership in the partnership after application of paragraph (a) of this section, the constructive ownership rules of section 318 shall apply, and the attribution rules of section 267(c) also shall apply to the extent they attribute ownership to persons to whom section 318 does not attribute ownership. However, ''10 percent'' shall be substituted for ''50 percent'' in section 318(a)(2)(C) and (3)(C). For purposes of determining if partners hold less than a 20-percent interest in the aggregate, the same interests will not be considered as being owned by more than one partner.

(c) *Definition of foreign partner.* For purposes of this section, a foreign partner is any partner that is not a U.S. person (as defined in section 7701(a)(30)), except that a partner that is a controlled foreign corporation (as defined in section 957(a)) or a foreign personal holding company (as defined in section 552) shall not be treated as a foreign partner.

(d) *Example.* The provisions of this section may be illustrated by the following example:

Example. Partnership B is owned by two partners, F, a foreign corporation that owns a 95-percent interest in the capital and profits of partnership B, and D, a domestic corporation that owns the remaining 5-percent interest in the capital and profits of partnership B. Partnership B is not engaged in the conduct of a trade or business within the United States, and, accordingly, partnership B does not earn any income that is effectively connected with a U.S. trade or business. F uses a March 31 fiscal year, and causes partnership B to maintain its books and records on a March 31 fiscal year as well. D is a calendar year taxpayer. Under paragraph (a) of this section, F would be disregarded and partnership B's taxable year would be determined by reference to D. However, because D owns less than a 10-percent interest in the capital and profits of partnership B, the minority interest rule of paragraph (b) of this section applies, and

partnership B must adopt the March 31 fiscal year.

(e) *Effective date*—(1) *Generally.* The provisions of this section are applicable for partnership taxable years that begin on or after the date final regulations are published in the **Federal Register**.

(2) *Transition rule.* Partners of a partnership that is required to change its taxable year as of the beginning of its first taxable year after the date final regulations are published in the **Federal Register** may apply the provisions of § 1.702–3T if the change in taxable year occurs in the first taxable year following the date final regulations are published in the **Federal Register**.

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

[FR Doc. 01–270 Filed 1–16–01; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[Reg–107175–00]

RIN 1545–AY19

Definition of Disqualified Person

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations to narrow the definition of the term disqualified person for section 1031 like-kind exchanges. The regulations are in response to recent changes in the federal banking law, especially the repeal of section 20 of the Glass-Steagall Act of 1933. The regulations will affect the eligibility of certain persons to serve as escrow holders of qualified escrow accounts, trustees of qualified trusts, or as qualified intermediaries. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by April 17, 2001. Requests to speak and outlines of topics to be discussed at the public hearing scheduled for June 5, 2001, at 10 a.m. must be received by May 15, 2001.

ADDRESSES: Send submissions to: CC:M&SP:RU (REG–107175–00), room 5226, Internal Revenue Service, Post Office Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:M&SP:RU (REG–107175–00), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the ''Tax Regs'' option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at *http://www.irs.ustreas.gov /tax_regs /regslist.html.* The public hearing will be held in room 4718, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, J. Peter Baumgarten, at (202) 622–4950; concerning submissions of comments, the hearing, or to be placed on the building access list to attend the hearing, Treena Garrett, at (202) 622–7190 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1) for the definition of disqualified person under section 1.1031(k)–1(k).

An exchange of property, like a sale, usually results in the current recognition of gain or loss. Section 1031(a) provides an exception to the general rule. Under section 1031(a), no gain or loss is recognized if property held for productive use in a trade or business or for investment is exchanged solely for property of a like kind that is to be held either for productive use in a trade or business or for investment.

Taxpayers may use a qualified escrow account, qualified trust, or qualified intermediary (or any combination of the three) to facilitate a like-kind exchange. A requirement common to qualified escrow accounts, qualified trusts, and qualified intermediaries is that the escrow holder, trustee, or intermediary may not be the taxpayer or a disqualified person.

Section 1.1031(k)-1(k) defines a disqualified person to include a person that is an agent of the taxpayer at the time of the transaction. An agent includes a person that has acted as the taxpayer's employee, attorney, accountant, investment banker or broker, or real estate agent or broker within two years of the taxpayer's transfer of relinquished property. However, in determining whether a person is a disqualified person, services provided by such person for the taxpayer with respect to section 1031 exchanges of property and routine financial, title insurance, escrow, or trust services provided to the taxpayer by a financial institution, title insurance company, or escrow company are not taken into account. A person that is related to a disqualified person, determined by using the attribution rules of sections 267(b) and 707(b) but substituting 10 percent for 50 percent, is also considered a disqualified person.

Under section 20 of the Banking Act of 1933 (12 U.S.C. 377) (the Glass-Steagall Act), banks generally were proscribed from affiliation with any corporation, association, business trust, or other similar organization engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities. However, last year Congress enacted the Gramm-Leach-Bliley Act, Public Law 106–102 (November 12, 1999), 113 Stat. 1341 (the GLB Act). Section 101 of the GLB Act repeals section 20 of the Glass-Steagall Act. In addition, section 103 of the GLB Act amends section 4 of the Bank Holding Company Act of 1956 (12 U.S.C. 1843) by adding new subsection (k). Subsection (k) specifically authorizes qualifying financial institutions to engage in activities that are financial in nature, such as (1) providing financial, investment, or economic advisory services, including advising an investment company (as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3)); (2) issuing and selling instruments representing interests in pools of assets permissible for a bank to hold directly; and (3) underwriting, dealing in, and making a market in securities.

As a consequence of the GLB Act (and other changes in policy by the Federal Reserve System in recent years), many banks and bank holding companies are, or are in the process of becoming, members of controlled groups that include investment banking and brokerage firms. This, in turn, may cause the banks, bank holding companies, and their subsidiaries to be disqualified persons for purposes of section 1031 by virtue of the related party rule of § 1.1031(k)–1(k)(4).

Treasury and the Service believe that, in general, banks should be permitted to serve as qualified intermediaries, escrow holders, or trustees. Banks, as regulated institutions, have historically acted in this role as neutral or independent holders of funds. These regulations permit banks to continue in this role despite recent legislative and regulatory changes.

In order to account for changes in the banking industry, the proposed regulations generally provide that a bank that is a member of a controlled group that includes an investment banking or brokerage firm as a member will not be a disqualified person merely because the investment banking or brokerage firm has provided services to an exchange customer within a two-year period ending on the date of the transfer of the relinquished property by that customer.

Proposed Effective Date

The regulations are applicable for transfers of property made by a taxpayer on or after January 17, 2001.

Special Analyses

It has been determined that this notice of proposed rulemaking 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) does not apply to these regulations, and, because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any electronic or written comments that are submitted timely to the IRS. The IRS and the Treasury Department request comments on the merits of the proposed regulations and how the proposed regulations can be made clearer and easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for June 5, 2001, beginning at 10 a.m. in room 4718 of the Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the main Constitution Avenue entrance between 10th and 12th Streets, NW. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted 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 preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit electronic or written comments and an outline of the topics to be discussed and the time to be devoted to each topic by May 15, 2001. A period of ten (10) minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving the outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is J. Peter Baumgarten of the Office of Associate Chief Counsel (Income Tax & Accounting). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendment to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

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

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

Par. 2. Section 1.1031(k)–1 is amended by adding a sentence to the end of paragraph (k)(4) to read as follows:

§ 1.1031(k)–1 Treatment of deferred exchanges.

* * * * *

(k) * * *

(4) * * * However, with respect to transfers of relinquished property made by a taxpayer on or after the date on which these regulations are published as final regulations, this paragraph (k)(4) does not apply to a bank (as defined in section 581) that is a member of a controlled group (as determined under section 267(f)(1), substituting ''10 percent'' for ''50 percent'' where it appears), where a person described in paragraph (k)(2) of this section is an investment banker or broker that has provided investment banking or brokerage services to the taxpayer within the 2-year period and also is a member of the controlled group.

* * * * *

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

[FR Doc. 01–624 Filed 1–16–01; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 31

[REG–126100–00]

RIN 1545–AY62

Guidance on Reporting of Deposit Interest Paid to Nonresident Aliens

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations that provide guidance on the reporting requirements for interest on deposits maintained at the U.S. office of certain financial institutions and paid to nonresident alien individuals. These proposed regulations affect persons making payments of interest with respect to such a deposit. This document also provides a notice of public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by February 27, 2001. Requests to speak (with outlines of oral comments to be discussed) at the public hearing scheduled for 10 a.m. on March 21, 2001, must be received by February 27, 2001.

ADDRESSES: Send submissions to: CC:M&SP:RU (REG–126100–00), Room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions also may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:M&SP:RU (REG–126100–00), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the ''Tax Regs'' option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at *http://www.irs.gov/tax-regs/regslist.html*. The public hearing will be held in Room 4718, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations,

Kate Y. Hwa, (202) 622–3840 (not a toll free number); concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Lanita Vandyke, (202) 622–7180 (not a toll free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, W:CAR:MP:FP:S:O, Washington, DC 20224. Comments on the collections of information should be received by March 19, 2001. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper operation of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (see below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

The collection of information in these proposed regulations is in §§ 1.6049–4(b)(5)(i), 1.6049–6(e)(4) (i), and (ii). This information is required to determine if taxpayers have properly reported amounts received as income. The collection of information is mandatory. The likely respondents are businesses and other for-profit institutions.

The estimated average annual burden per respondent and/or recordkeeper required by §§ 1.6049–4(b)(5)(i), 1.6049–6(e)(4) (i), and (ii) will be reflected in the burdens of Forms W–8, 1042, 1042–S, and the income tax return of a foreign person.

Further, the estimated average annual burden per respondent and/or recordkeeper for the statement required by § 1.6049–6(e)(4)(i) is as follows:

Estimated total annual reporting burden: 500 hours.

Estimated average annual burden per respondent: 15 minutes.

Estimated number of respondents: 2,000.

Estimated annual frequency of responses: annually.

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

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law.

Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background and Explanation of Provisions

The IRS previously determined that information concerning interest paid on deposits from U.S. bank accounts to nonresident alien individuals who are residents of Canada would be significant in furthering its compliance efforts. Consequently, § 1.6049–8(a) requires the reporting of such interest on a Form 1042–S.

The proposed regulations extend the information reporting requirement for bank deposit interest paid to nonresident alien individuals who are residents of other foreign countries. This extension is appropriate for two reasons. First, requiring routine reporting to the IRS of all bank deposit interest paid within the United States will help to ensure voluntary compliance by U.S. taxpayers by minimizing the possibility of avoidance of the U.S. information reporting system (such as through false claims of foreign status). Second, several countries that have tax treaties or other agreements that provide for the exchange of tax information with the United States have requested information concerning bank deposits of individual residents of their countries. Because of the importance that the United States attaches to exchanging tax information as a way of encouraging voluntary compliance and furthering transparency, see e.g. S. Exec. Rep. No. 106–8, at 15 (1st Sess. 1999), Treasury and the IRS believe it is important for the United States to facilitate, wherever possible, the effective exchange of all relevant tax information with our treaty partners.

In addition to extending the information reporting requirement for interest paid on deposits maintained at a bank's office within the United States to all nonresident alien individuals, the proposed regulations also make the following minor changes and clarifications.

Section 1.6049–6 provides that a copy of Form 1042–S must be furnished to the recipient for interest paid on deposits maintained at a bank's office within the United States. Paragraph (e)(4)(i) of that section has been revised to clarify that the payor or middleman can satisfy this requirement by furnishing a copy of Form 1042–S either in person or to the last known address of the recipient.

A new paragraph (e)(4)(ii) has been added to § 1.6049–6 to provide guidance on the manner in which a Form 1042–S is furnished when there are joint account holders. Specifically, if any joint account holder is a U.S. non-exempt recipient, the payor or middleman must report the entire payment to that person. If all joint account holders are foreign persons, the payor or middleman must report the payment to the nonresident alien individual that is a resident of a country with which the United States has an income tax treaty or a tax information exchange agreement (TIEA). If more than one of the joint account holders is a foreign person and is a resident of a country with which the United States has an income tax treaty or a TIEA, the payor or middleman must report the payment to the person that is the primary account holder. The payor or middleman must, however, furnish a Form 1042–S to any account holder who requests it.

Section 1.6049–8(a) provides that interest paid with respect to a deposit maintained at an office within the United States to individuals who are Canadian residents must be reported. The payor or middleman may rely on the permanent address found on Form W–8 to make the determination of whether the nonresident alien individual resides in Canada. However, the regulation also provides that a payor or middleman may rely on its actual knowledge of the individual's residence address in Canada, even if a valid Form W–8 has not been provided, to make such a determination. This ''actual knowledge of the individual's residence address'' rule has been eliminated because it creates a result that is contrary to the presumption rules contained in § 1.1441–1(b)(3)(iii) (and made applicable to reportable payments by § 1.6049–5(d)(2)). Accordingly, § 1.6049–8(a) has been clarified to

provide that, while amounts described in § 1.6049–8(a) generally are not subject to backup withholding under section 3406, the payor must report the payment on a Form 1099 as made to a U.S. non-exempt recipient in accordance with the presumption rules of §§ 1.6049–5(d)(2) and 1.1441–1(b)(3)(iii) if the payor or middleman does not have either a valid Form W–8 or valid Form W–9. Further, such payment is subject to backup withholding under section 3406.

Proposed Effective Date

These regulations are proposed to apply to payments made after December 31 of the year in which they are published as final regulations in the **Federal Register**.

Special Analyses

It has been determined that this notice of proposed rulemaking 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) does not apply to these regulations, and, because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) that are submitted timely (in the manner described in the **ADDRESSES** portion of this preamble) to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for March 31, 2001, beginning at 10 a.m. in Room 4718, 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. Because of access restrictions, visitors will not be admitted 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** portion of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments must submit written comments and an outline of the topics to be discussed and the time to be devoted to each topic (a signed original and eight (8) copies) by February 27, 2001. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for reviewing outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of the regulations is Kate Y. Hwa, Office of Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in their development.

Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 31 are proposed to be amended as follows:

PART 1—INCOME TAXES

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

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

Par. 2. In section 1.6049–4, paragraph (b)(5) is revised to read as follows:

§ 1.6049–4 Return of information as to interest paid and original issue discount includible in gross income after December 31, 1982.

* * * * *

(b) * * *

(5) *Interest payments to nonresident alien individuals*—(i) *General rule.* In the case of interest aggregating $10 or more paid to a nonresident alien individual (as defined in section 7701(b)(1)(B)) that is reportable under § 1.6049–8(a), the payor shall make an information return on Form 1042–S for the calendar year in which the interest is paid. The payor or middleman shall prepare and file Form 1042–S at the time and in the manner prescribed by section 1461 and the regulations under that section and by the form and its accompanying instructions. See §§ 1.1461–1(b) (rules regarding the preparation of a Form 1042) and 1.6049–6(e)(4) (rules for furnishing a copy of the Form 1042–S to the payee). To determine whether an information return is required for original issue discount, see §§ 1.6049–5(f) and 1.6049–8(a).

(ii) *Effective date.* Paragraph (b)(5)(i) of this section shall be effective for payments made after December 31 of the year in which the final regulations are published in the **Federal Register** with respect to a Form W–8 (Certificate of Foreign Status) furnished to the payor or middleman after that date. (For interest paid to a Canadian nonresident alien individual on or before December 31 of the year in which final regulations are published in the **Federal Register**, see § 1.6049–4(b)(5) as in effect and contained in 26 CFR part 1 revised April 1, 2000.)

* * * * *

Par. 3. Section 1.6049–6 is amended as follows:

1. Paragraph (e)(4) is revised.

2. In paragraph (e)(5), the first sentence is revised and a new sentence is added at the end of the paragraph.

The addition and revisions read as follows:

§ 1.6049–6 Statements to recipients of interest payments and holders of obligations for attributed original issue discount.

* * * * *

(e) * * *

(4) *Special rule for amounts described in § 1.6049–8(a)*—(i) *In general.* In the case of amounts described in § 1.6049–8(a) (relating to payments of deposit interest to nonresident alien individuals) paid after December 31 of the year in which the final regulations are published in the **Federal Register**, any person who makes a Form 1042–S under section 6049(a) and § 1.6049–4(b)(5) shall furnish a statement to the recipient either in person or by first-class mail to the recipient's last known address. The statement shall include a copy of the Form 1042–S required to be prepared pursuant to § 1.6049–4(b)(5) and a statement to the effect that the information on the form is being furnished to the United States Internal Revenue Service and may be furnished to the government of the foreign country where the recipient resides.

(ii) *Joint account holders.* In the case of joint account holders, a payor or middleman must report the entire amount of interest as paid to any joint account holder that provides a valid Form W–9, or, if any account holder has not furnished a Form W–8 or Form W–9, any account holder that is presumed to be a U.S. non-exempt recipient under § 1.6049–5(d)(2) and 1.1441–1(b)(3)(iii). If all of the joint account holders are

foreign persons, then the payor or middleman must report the payment to the nonresident alien individual that is a resident of a country with which the United States has an income tax treaty or a tax information exchange agreement. If more than one of the joint account holders is a foreign person and is a resident of a country with which the United States has an income tax treaty or a tax information exchange agreement, then the payor or middleman may report the interest as paid to any such account holder that is treated as the primary account holder under § 31.3406(h)–2(a) of this chapter. If, however, any account holder requests its own Form 1042–S, the payor or middleman must furnish a Form 1042–S to the account holder who requests it.

(5) *Effective date.* Paragraph (e)(4) is effective for payee statements due after December 31 of the year in which the final regulations are published in the **Federal Register**, without regard to extensions. * * * (For interest paid to a Canadian nonresident alien individual on or before December 31 of the year in which final regulations are published in the **Federal Register**, see § 1.6049–6(e)(4) as in effect and contained in 26 CFR part 1 revised April 1, 2000.)

* * * * *

Par. 4. In section 1.6049–8, the section heading and paragraph (a) are revised to read as follows:

§ 1.6049–8 Interest and original issue discount paid to nonresident alien individuals.

(a) *Interest subject to reporting requirement.* For purposes of §§ 1.6049–4, 1.6049–6, and this section and except as provided in paragraph (b) of this section, the term *interest* means interest paid to a nonresident alien individual after December 31 of the year in which the final regulations are published in the **Federal Register**, where the interest is described in section 871(i)(2)(A) with respect to a deposit maintained at an office within the United States. For purposes of the regulations under section 6049, a nonresident alien individual is a person described in section 7701(b)(1)(B). The payor or middleman may rely upon a valid Form W–8 to determine whether the payment is made to a nonresident alien individual. Generally, amounts described in this paragraph (a) are not subject to backup withholding under section 3406. See § 31.3406(g)–1(d) of this chapter. However, if the payor or middleman does not have either a valid Form W–8 or valid Form W–9, the payor or middleman must report the payment as made to a U.S. non-exempt recipient if it must so treat the payee under the presumption rules of §§ 1.6049–5(d)(2) and 1.1441–1(b)(3)(iii) and must also backup withhold under section 3406. (For interest paid to a Canadian nonresident alien individual on or before December 31 of the year in which final regulations are published in the **Federal Register**, see § 1.6049–8(a) as in effect and contained in 26 CFR part 1 revised April 1, 2000.)

* * * * *

PART 31—EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT SOURCE

Par. 5. The authority citation for part 31 continues to read in part as follows:

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

Par. 6. In § 31.3406(g)–1, paragraph (d) is revised to read as follows:

§ 31.3406(g)–1 Exceptions for payments to certain payees and certain other payment.

* * * * *

(d) *Reportable payments made to nonresident alien individuals.* A payment of interest that is reported on Form 1042–S as paid to a nonresident alien individual under § 1.6049–8(a) of this chapter is not subject to withholding under section 3406. (For interest paid to a Canadian nonresident alien individual on or before December 31 of the year in which final regulations are published in the **Federal Register**, see § 31.3406(g)–1(d) as in effect and contained in 26 CFR part 1 revised April 1, 2000.)

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

[FR Doc. 01–250 Filed 1–16–01; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF TREASURY

Internal Revenue Service (IRS)

26 CFR Parts 1 and 54

[REG–130477–00; REG–130481–00]

RIN 1545–AY69, 1545–AY70

Required Distributions from Retirement Plans

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations relating to required minimum distributions from qualified plans, individual retirement plans, deferred compensation plans under section 457, and section 403(b) annuity contracts, custodial accounts, and retirement income accounts. These regulations will provide the public with guidance necessary to comply with the law and will affect administrators of, participants in, and beneficiaries of qualified plans; institutions that sponsor and individuals who administer individual retirement plans, individuals who use individual retirement plans for retirement income, and beneficiaries of individual retirement plans; and employees for whom amounts are contributed to section 403(b) annuity contracts, custodial accounts, or retirement income accounts and beneficiaries of such contracts and accounts.

DATES: Written and electronic comments must be received by April 17, 2001. Outlines of topics to be discussed at the public hearing scheduled for June 1, 2001, at 10 a.m. must be received by May 11, 2001.

ADDRESSES: Send submissions to: CC:M&SP:RU (REG–130477–00/REG130481–00) room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:M&SP:RU (REG–130477–00/REG–130481–00), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the ''Tax Regs'' option of the IRS Home Page, or by submitting comments directly to the IRS Internet site at: *http://www.irs.gov/tax__regs/reglist.html.* The public hearing on June 1, 2001, will be held in the IRS Auditorium (7th Floor), Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Cathy A. Vohs, 202–622–6090; concerning submissions and the hearing, and/or to be placed on the building access list to attend the hearing, Guy Traynor, 202–622–7180 (not toll-free numbers).

Paperwork Reduction Act

The collections of information contained in these proposed regulations have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545–0996, in conjunction with the notice of proposed rulemaking published on July 27, 1987, 52 FR 28070, REG–EE–113–82, Required Distributions From Qualified Plans and Individual Retirement Plans, and control number 1545–1573, in

conjunction with the notice of proposed rulemaking published on December 30, 1997, 62 FR 67780, REG–209463–82, Required Distributions from Qualified Plans and Individual Retirement Plans.

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

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

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR Part 1) and to the Pension Excise Tax Regulations (26 CFR Part 54) under sections 401, 403, 408, and 4974 of the Internal Revenue Code of 1986. It is contemplated that proposed rules similar to those in these proposed regulations applicable to section 401 will be published in the near future for purposes of applying the distribution requirements of section 457(d). These amendments are proposed to conform the regulations to section 1404 of the Small Business Job Protection Act of 1996 (SBJPA) (110 Stat. 1791), sections 1121 and 1852 of the Tax Reform Act of 1986 (TRA of 1986) (100 Stat. 2464 and 2864), sections 521 and 713 of the Tax Reform Act of 1984 (TRA of 1984) (98 Stat. 865 and 955), and sections 242 and 243 of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) (96 Stat. 521). The regulations provide guidance on the required minimum distribution requirements under section 401(a)(9) for plans qualified under section 401(a). The rules are incorporated by reference in section 408(a)(6) and (b)(3) for individual retirement accounts and annuities (IRAs), section 408A(c)(5) for Roth IRAs, section 403(b)(10) for section 403(b) annuity contracts, and section 457(d) for eligible deferred compensation plans.

For purposes of this discussion of the background of the regulations in this preamble, as well as the explanation of provisions below, whenever the term *employee* is used, it is intended to include not only an employee but also an IRA owner.

Section 401(a)(9) provides rules for distributions during the life of the employee in section 401(a)(9)(A) and rules for distributions after the death of the employee in section 401(a)(9)(B). Section 401(a)(9)(A)(ii) provides that the entire interest of an employee in a qualified plan must be distributed, beginning not later than the employee's required beginning date, in accordance with regulations, over the life of the employee or over the lives of the employee and a designated beneficiary (or over a period not extending beyond the life expectancy of the employee and a designated beneficiary).

Section 401(a)(9)(C) defines required beginning date for employees (other than 5-percent owners and IRA owners) as April 1 of the calendar year following the later of the calendar year in which the employee attains age 70 ½ or the calendar year in which the employee retires. For 5-percent owners and IRA owners, the required beginning date is April 1 of the calendar year following the calendar year in which the employee attains age 70 ½, even if the employee has not retired.

Section 401(a)(9)(D) provides that (except in the case of a life annuity) the life expectancy of an employee and the employee's spouse that is used to determine the period over which payments must be made may be redetermined, but not more frequently than annually.

Section 401(a)(9)(E) provides that the term *designated beneficiary* means any individual designated as a beneficiary by the employee.

Section 401(a)(9)(G) provides that any distribution required to satisfy the incidental death benefit requirement of section 401(a) is a required minimum distribution.

Section 401(a)(9)(B)(i) provides that, if the employee dies after distributions have begun, the employee's interest must be distributed at least as rapidly as under the method used by the employee.

Section 401(a)(9)(B)(ii) and (iii) provides that, if the employee dies before required minimum distributions have begun, the employee's interest must be either: distributed (in accordance with regulations) over the life or life expectancy of the designated beneficiary with the distributions beginning no later than 1 year after the date of the employee's death, or distributed within 5 years after the death of the employee. However, under section 401(a)(9)(B)(iv), a surviving spouse may wait until the date the employee would have attained age 70 ½ to begin taking required minimum distributions.

Comprehensive proposed regulations under section 401(a)(9) were previously published in the **Federal Register** on July 27, 1987, 52 FR 28070. Many of the comments on the 1987 proposed regulations expressed concerns that the required minimum distribution must be satisfied separately for each IRA owned by an individual by taking distributions from each IRA. In response, Notice 88–38 (1988–1 C.B. 524) provided that the amount of the required minimum distribution must be calculated for each IRA, but permitted that amount to be taken from any IRA. Amendments to the 1987 proposed regulations published in the **Federal Register** on December 30, 1997, 62 FR 67780, responded to comments on the use of trusts as beneficiaries. Notice 96–67 (1996–2 C.B. 235) and Notice 97–75 (1997–2 C.B. 337) provided guidance on the changes made to section 401(a)(9) by the SBJPA. The guidance in Notice 88–38, Notice 96–67, and Notice 97–75 is incorporated in these proposed regulations with some modifications.

Even though the distribution requirements added by TEFRA were retroactively repealed by TRA of 1984, the transition election rule in section 242(b) of TEFRA was preserved. Notice 83–23 (1983–2 C.B. 418) continues to provide guidance for distributions permitted by this transition election rule. These proposed regulations retain the additional guidance on the transition rule provided in the 1987 proposed regulations.

As discussed below, in response to extensive comments, the rules for calculating required minimum distributions from individual accounts under the 1987 proposed regulations have been substantially simplified. Certain other 1987 rules have also been simplified and modified, although many of the 1987 rules remain unchanged. In particular, due to the relatively small number of comments on practices with respect to annuity contracts, and the effect of the 1987 proposed regulations on these practices, the basic structure of the 1987 proposed regulation provisions with respect to annuity payments is retained in these proposed regulations. The IRS and Treasury are continuing to study these rules and specifically request updated comments on current practices and issues relating to required minimum distributions from annuity contracts.

Explanation of Provisions

Overview

Many of the comments on the 1987 proposed regulations addressed the rules for required minimum distributions during an employee's life, including calculation of life expectancy and determination of designated beneficiary. In particular, comments raised concerns about the default

provisions, election requirements, and plan language requirements. In general, the need to make decisions at age 70½, which under the 1987 proposed regulations would bind the employee in future years during which financial circumstances could change significantly, was perceived as unreasonably restrictive. In addition, the determination of life expectancy and designated beneficiary and the resulting required minimum distribution calculation for individual accounts were viewed as too complex.

To respond to these concerns, these proposed regulations would make it much easier for individuals—both plan participants and IRA owners—and plan administrators to understand and apply the minimum distribution rules. The new proposed regulations would make major simplifications to the rules, including the calculation of the required minimum distribution during the individual's lifetime and the determination of a designated beneficiary for distributions after death. The new proposed regulations simplify the rules by

- Providing a simple, uniform table that all employees can use to determine the minimum distribution required during their lifetime. This makes it far easier to calculate the required minimum distribution because employees would

—no longer need to determine their beneficiary by their required beginning date, sbull no longer need to decide whether or not to recalculate their life expectancy each year in determining required minimum distributions, and

—no longer need to satisfy a separate incidental death benefit rule.

- Permitting the required minimum distribution during the employee's lifetime to be calculated without regard to the beneficiary's age (except when required distributions can be reduced by taking into account the age of a beneficiary who is a spouse more than 10 years younger than the employee).

- Permitting the beneficiary to be determined as late as the end of the year following the year of the employee's death. This allows

—the employee to change designated beneficiaries after the required beginning date without increasing the required minimum distribution and

—the beneficiary to be changed after the employee's death, such as by one or more beneficiaries disclaiming or being cashed out.

- Permitting the calculation of post-death minimum distributions to take into account an employee's remaining life expectancy at the time of death, thus allowing distributions in all cases to be spread over a number of years after death.

These simplifications would also have the effect of reducing the required minimum distributions for the vast majority of employees.

The Uniform Distribution Period

Under these proposed regulations and the 1987 proposed regulations, for distributions from an individual account, the required minimum distribution is determined by dividing the account balance by the distribution period. For lifetime required minimum distributions, these proposed regulations provide a uniform distribution period for all employees of the same age. The uniform distribution period table is the required minimum distribution incidental benefit (MDIB) divisor table originally prescribed in § 1.401(a)(9)-2 of the 1987 proposed regulations and now included in A–4 of § 1.401(a)-5 of the new proposed regulations. An exception applies if the employee's sole beneficiary is the employee's spouse and the spouse is more than 10 years younger than the employee. In that case, the employee is permitted to use the longer distribution period measured by the joint life and last survivor life expectancy of the employee and spouse.

These changes provide a simple administrable rule for plans and individuals. Using the MDIB table, most employees will be able to determine their required minimum distribution for each year based on nothing more than their current age and their account balance as of the end of the prior year (which IRA trustees report annually to IRA owners). Under the 1987 proposed regulations, some employees already use the MDIB table to determine required minimum distributions. Under the new proposed regulations, they would continue to do so. For the majority of other employees, required minimum distributions would be reduced as a result of the changes.

For years after the year of the employee's death, the distribution period is generally the remaining life expectancy of the designated beneficiary. The beneficiary's remaining life expectancy is calculated using the age of the beneficiary in the year following the year of the employee's death, reduced by one for each subsequent year. If the employee's spouse is the employee's sole beneficiary at the end of the year following the year of death, the distribution period during the spouse's life is the spouse's single life expectancy. For years after the year of the spouse's death, the distribution period is the spouse's life expectancy calculated in the year of death, reduced by one for each subsequent year. If there is no designated beneficiary as of the end of the year after the employee's death, the distribution period is the employee's life expectancy calculated in the year of death, reduced by one for each subsequent year.

The MDIB table is based on the joint life expectancies of an individual and a survivor 10 years younger at each age beginning at age 70. Allowing the use of this table reflects the fact that an employee's beneficiary is subject to change until the death of the employee and ultimately may be a beneficiary more than 10 years younger than the employee. The proposed regulations would allow lifetime distributions at a rate consistent with this possibility. Consistent with the requirements of section 401(a)(9)(A)(ii), the distribution period after death is measured by the life expectancy of the employee's designated beneficiary in the year following death, or the employee's remaining life expectancy if there is no designated beneficiary. This ensures that the employee's entire benefit is distributed over a period described in section 401(a)(9)(A)(ii), i.e., the life expectancy of the employee or the joint life expectancy of the employee and a designated beneficiary.

The approach in these proposed regulations allowing the use of a uniform lifetime distribution period addresses concerns raised in comments on the 1987 proposed regulations that the rules are too complex. It eliminates the use of two tables and the interaction of the multiple beneficiary and change in beneficiary rules. Finally, it generally eliminates the need to fix the amount of the distribution during the employee's lifetime based on the beneficiary designated on the required beginning date and eliminates the need to elect recalculation or no recalculation of life expectancies at the required beginning date.

Suggestions have been received that the life expectancy table used to calculate required minimum distributions should be revised to reflect recent increases in longevity. These proposed regulations instead provide authority for the Commissioner to issue guidance of general applicability revising the life expectancy tables and the uniform distribution table in the future if it becomes appropriate. While life expectancy has increased in the 14 years since the issuance of the section 72 life expectancy tables, those tables may already overstate the average life expectancy of the class of individuals who are subject to these required

minimum distribution rules (qualified plan participants, IRA owners, et al.). That is because those existing section 72 tables were derived from the particular mortality experience of the select population of individuals who purchase individual annuities, as opposed to the population who are subject to the required minimum distribution rules. In any event, as noted earlier, the new proposed uniform distribution period—equal to the joint life expectancy of an individual and a survivor 10 years younger at each age—would lengthen the lifetime distribution period for most employees and beneficiaries. In fact, the new proposed regulations would lengthen that period more for many individuals than would an update to reflect recent increases in longevity. The IRS and Treasury believe that this lengthening of the distribution period for most employees provides further justification for retaining the existing life expectancy tables at this time.

Some commentators suggested that the calculation of required minimum distributions include credit for any distribution in a prior year that exceeded that year's required minimum distribution. However, such a ''credit'' carryforward would require significant additional data retention and would add substantial complexity to the calculation of required minimum distributions. By using the prior year's ending account balance for calculating required minimum distributions, distribution of amounts in excess of the required minimum distribution has the effect of reducing future required minimum distributions over the remaining distribution period to some extent. Accordingly, these proposed regulations do not provide for a credit carryforward.

Determination of the Designated Beneficiary

These proposed regulations provide that, generally, the designated beneficiary is determined as of the end of the year following the year of the employee's death rather than as of the employee's required beginning date or date of death, as under the 1987 proposed regulations. Thus, any beneficiary eliminated by distribution of the benefit or through disclaimer (or otherwise) during the period between the employee's death and the end of the year following the year of death is disregarded in determining the employee's designated beneficiary for purposes of calculating required minimum distributions. If, as of the end of the year following the year of the employee's death, the employee has more than one designated beneficiary and the account or benefit has not been divided into separate accounts or shares for each beneficiary, the beneficiary with the shortest life expectancy is the designated beneficiary, consistent with the approach in the 1987 proposed regulations.

This approach for determining the designated beneficiary following the death of an employee after the employee's required beginning date is simpler in several respects than the approach in the 1987 proposed regulations and responds to concerns raised with respect to the effects of beneficiary designation at the required beginning date. Under this approach, the determination of the designated beneficiary and the calculation of the beneficiary's life expectancy generally are contemporaneous with commencement of required distributions to the beneficiary. Any prior beneficiary designation is irrelevant for distributions from individual accounts, unless the employee takes advantage of a lifetime distribution period measured by the joint life expectancy of the employee and a spouse more than 10 years younger than the employee. Further, for an employee with a designated beneficiary, this approach provides the same rules for distributions after the employee's death, regardless of whether death occurs before or after an employee's required beginning date. Finally, in the case of an employee who elects or defaults into recalculation of life expectancy and who dies without a designated beneficiary, the requirement that the employee's entire remaining account balance be distributed in the year after an employee's death has been eliminated and replaced with a distribution period equal to the employee's remaining life expectancy recalculated immediately before death.

Default Rule for Post-Death Distributions

As requested by some commentators, these proposed regulations would change the default rule in the case of death before the employee's required beginning date for a nonspouse designated beneficiary from the 5-year rule in section 401(a)(9)(B)(ii) to the life expectancy rule in section 401(a)(9)(B)(iii). Thus, absent a plan provision or election of the 5-year rule, the life expectancy rule would apply in all cases in which the employee has a designated beneficiary. As in the case of death on or after the employee's required beginning date, the designated beneficiary whose life expectancy is used to determine the distribution period would be determined as of the end of the year following the year of the employee's death, rather than as of the employee's date of death (as would have been required under the 1987 proposed regulations). The 5-year rule would apply automatically only if the employee did not have a designated beneficiary as of the end of the year following the year of the employee's death. Finally, in the case of death before the employee's required beginning date, these proposed regulations allow a waiver, unless the Commissioner determines otherwise, of any excise tax resulting from the life expectancy rule during the first five years after the year of the employee's death if the employee's entire benefit is distributed by the end of the fifth year following the year of the employee's death.

Annuity Payments

These proposed regulations make several changes to the rules for determining whether annuity payments satisfy section 401(a)(9). The changes are designed to make these rules more administrable without adverse effects on the basic structure and application of the rules. The IRS and Treasury are continuing to study and evaluate whether additional changes would be appropriate for determining whether annuity payments satisfy section 401(a)(9). Some comments were received on the annuity rules in 1987, but updated comments that include a discussion of current industry practices, products, and concerns would be helpful.

These proposed regulations provide that the designated beneficiary for determining the distribution period for annuity payments generally is the beneficiary as of the annuity starting date, even if that date is after the required beginning date. Thus, if annuity payments commence after the required beginning date, the determination of the designated beneficiary is contemporaneous with the annuity starting date and any intervening changes in the beneficiary designation since the required beginning date are ignored. Second, as requested in comments, these regulations extend to all annuity payment streams the rule in the 1987 proposed regulations that allows a life annuity with a period certain not exceeding 20 years to commence on the required beginning date with no makeup for the first distribution calendar year. For this purpose, the regulations clarify that only accruals as of the end of the prior calendar year must be taken into account in calculating the amount of an annuity

commencing on the required beginning date. Subsequent accruals are treated as additional accruals that must be taken into account in the next calendar year. Also as requested in comments, the regulations provide that, although additional accruals need to be taken into account in the first payment in the calendar year following the year of the accrual, actual payment in the form of a make-up payment need only be completed by the end of that calendar year.

The permitted increase in annuity payments to an employee upon the death of the survivor annuitant has been expanded to cover the elimination of the survivor portion of a joint and survivor annuity due to a qualified domestic relations order. Further, in response to comments, in the case of an annuity contract purchased from an insurance company, an exception to the nonincreasing-payment requirement in these proposed regulations has been added to accommodate a cash refund upon the employee's death of the amount of the premiums paid for the contract.

One of the rules in the 1987 proposed regulations that the IRS and Treasury are continuing to study and evaluate is the rule providing that if the distributions from a defined benefit plan are not in the form of an annuity, the employee's benefit will be treated as an individual account for purposes of determining required minimum distributions. The IRS and Treasury are continuing to consider whether retention of this rule is appropriate for defined benefit plans. Similarly, the IRS and Treasury are continuing to consider whether the rule permitting the benefit under a defined benefit plan to be divided into segregated shares for purposes of section 401(a)(9) is useful and appropriate for defined benefit plans.

Trust as Beneficiary

These proposed regulations retain the provision in the proposed regulations, as amended in 1997, allowing an underlying beneficiary of a trust to be an employee's designated beneficiary for purposes of determining required minimum distributions when the trust is named as the beneficiary of a retirement plan or IRA, provided that certain requirements are met. One of these requirements is that documentation of the underlying beneficiaries of the trust be provided timely to the plan administrator. In the case of individual accounts, unless the lifetime distribution period for an employee is measured by the joint life expectancy of the employee and the employee's spouse, the deadline under these proposed regulations for providing the beneficiary documentation would be the end of the year following year of the employee's death. This is consistent with the deadline for determining the employee's designated beneficiary. Because the designated beneficiary during an employee's lifetime is not relevant for determining lifetime required minimum distributions in most cases under these proposed regulations, the burden of lifetime documentation requirements contained in the previous proposed regulations is significantly reduced.

A significant number of commentators on the 1997 amendment to the proposed regulations requested clarification that a testamentary trust named as an employee's beneficiary is a trust that qualifies for the look-through rule to the underlying beneficiaries, as permitted in the 1997 proposed regulations. These proposed regulations provide examples in which a testamentary trust is named as an employee's beneficiary and the look-through trust rules apply. As previously illustrated in the facts of Rev. Rul. 2000–2, 2000–3 I.R.B. 305, the examples also clarify that remaindermen of a ''QTIP'' trust must be taken into account as beneficiaries in determining the distribution period for required minimum distributions if amounts are accumulated for their benefit during the life of the income beneficiary under the trust.

Rules for Qualified Domestic Relations Orders

These proposed regulations retain the basic rules in the 1987 proposed regulation for a qualified domestic relations order (QDRO). Thus, for example, the proposed regulations continue to provide that a former spouse to whom all or a portion of the employee's benefit is payable pursuant to a QDRO will be treated as a spouse (including a surviving spouse) of the employee for purposes of section 401(a)(9), including the minimum distribution incidental benefit requirement, regardless of whether the QDRO specifically provides that the former spouse is treated as the spouse for purposes of sections 401(a)(11) and 417. This rule applies regardless of the number of former spouses an employee has who are alternate payees with respect to the employee's retirement benefits. Further, for example, if a QDRO divides the individual account of an employee in a defined contribution plan into a separate account for the employee and a separate account for the alternate payee, the required minimum distribution to the alternate payee during the lifetime of the employee must nevertheless be determined using the same rules that apply to distribution to the employee. Thus, required minimum distributions to the alternate payee must commence by the employee's required beginning date. However, the required minimum distribution for the alternate payee will be separately determined. The required minimum distributions for the alternate payee during the lifetime of the employee may be determined either using the uniform distribution period discussed above based on the age of the employee in the distribution calendar year, or, if the alternate payee is the employee's former spouse and is more than 10 years younger than the employee, using the joint life expectancy of the employee and the alternate payee.

Election of Surviving Spouse To Treat an Inherited IRA as Spouse's Own IRA

These proposed regulations clarify the rule in the 1987 proposed regulations that allows the surviving spouse of a decedent IRA owner to elect to treat an IRA inherited by the surviving spouse from that owner as the spouse's own IRA. The 1987 proposed regulations provide that this election is deemed to have been made if the surviving spouse contributes to the IRA or does not take the required minimum distribution for a year under section 401(a)(9)(B) as a beneficiary of the IRA. These new proposed regulations clarify that this deemed election is permitted to be made only after the distribution of the required minimum amount for the account, if any, for the year of the individual's death. Further these new proposed regulations clarify that this deemed election is permitted only if the spouse is the sole beneficiary of the account and has an unlimited right to withdrawal from the account. This requirement is not satisfied if a trust is named as beneficiary of the IRA, even if the spouse is the sole beneficiary of the trust. These clarifications make the election consistent with the underlying premise that the surviving spouse could have received a distribution of the entire decedent IRA owner's account and rolled it over to an IRA established in the surviving spouse's own name as IRA owner.

These new proposed regulations also clarify that, except for the required minimum distribution for the year of the individual's death, the spouse is permitted to roll over the post-death required minimum distribution under section 401(a)(9)(B) for a year if the spouse is establishing the IRA rollover account in the name of the spouse as

IRA owner. However, if the surviving spouse is age 70½ or older, the minimum lifetime distribution required under section 401(a)(9)(A) must be made for the year and, because it is a required minimum distribution, that amount may not be rolled over. These proposed regulations provide that this election by a surviving spouse eligible to treat an IRA as the spouse's own may also be accomplished by redesignating the IRA with the name of the surviving spouse as owner rather than beneficiary.

IRA Reporting of Required Minimum Distributions

Because these regulations substantially simplify the calculation of required minimum distributions from IRAs, IRA trustees determining the account balance as of the end of the year can also calculate the following year's required minimum distribution for each IRA. To improve compliance and further reduce the burden imposed on IRA owners and beneficiaries, under the authority provided in section 408(i), these proposed regulations would require the trustee of each IRA to report the amount of the required minimum distribution from the IRA to the IRA owner or beneficiary and to the IRS at the time and in the manner provided under IRS forms and instructions. This reporting would be required regardless of whether the IRA owner is planning to take the required minimum distribution from that IRA or from another IRA, and would indicate that the IRA owner is permitted to take the required minimum distribution from any other IRA of the owner. During year 2001, the IRS will be receiving public comments and consulting with interested parties to assist the IRS in evaluating what form best accommodates this reporting requirement, what timing is appropriate (e.g., the beginning of the calendar year for which the required amount is being calculated), and what effective date would be most appropriate for the reporting requirement. In this context, after thorough consideration of comments and consultation with interested parties, the IRS intends to develop procedures and a schedule for reporting that provides adequate lead time, and minimizes the reporting burden, for IRA trustees, issuers, and custodians in complying with this new reporting requirement while providing the most useful information to the IRA owners and beneficiaries.

The IRS and Treasury are also considering whether similar reporting would be appropriate for section 403(b) contracts.

Permitted Delays Relative to QDROs and State Insurer Delinquency Proceedings

The regulations permit the required minimum distribution for a year to be delayed to a later year in certain circumstances. Specifically, commentators requested a delay during a period of up to 18 months during which an amount is segregated in connection with the review of a domestic relations order pursuant to section 414(p)(7). Commentators also requested that a delay be permitted while annuity payments under an annuity contract issued by a life insurance company in state insurer delinquency proceedings have been reduced or suspended by reason of state proceedings. These proposed regulations allow delay in these circumstances.

Correction of Failures Under Section 401(a)(9)

The proposed regulations do not set forth the special rule relieving a plan from disqualification for isolated instances of failure to satisfy section 401(a)(9) because all failures for qualified plans and section 403(b) accounts under section 401(a)(9) are now permitted to be corrected through the Employee Plans Compliance Resolution System (EPCRS). See Rev. Proc. 2000–16 (2000–6 I.R.B. 518).

Amendment of Qualified Plans

These regulations are proposed to be effective for distributions for calendar years beginning on or after January 1, 2002. For distributions for calendar years beginning before the effective date of final regulations, plan sponsors can continue to rely on the 1987 proposed regulations, to the extent those proposed regulations are not inconsistent with the changes to section 401(a)(9) made by the Small Business Job Protection Act of 1996 (SBJPA) and guidance related to those changes. Alternatively, for distributions for the 2001 and subsequent calendar years beginning before the effective date of final regulations, plan sponsors are permitted, but not required, to follow these proposed regulations in the operation of their plans by adopting the model amendment set forth below.

The Treasury Department and the IRS are making the model amendment set forth below available to plan sponsors to permit them to apply these proposed regulations in the operation of their plans without violating the requirement that a plan be operated in accordance with its terms. Plan sponsors who adopt the model amendment will have reliance that, during the term of the amendment, operation of their plans in a manner that satisfies the minimum distribution requirements in these proposed regulations will not cause their plans to fail to be qualified. In addition, distributees will have reliance that distributions that are made during the term of the amendment that satisfy the minimum distribution requirements in these proposed regulations. The model amendment may be adopted by plan sponsors, practitioners who sponsor volume submitter specimen plans and sponsors of master and prototype (M&P) plans.

These proposed regulations permit plans to make distributions under either default provisions or under permissible optional provisions. A plan that has been amended by adoption of the model amendment will be treated as operating in conformance with a requirement of the proposed regulations that permits the use of either default or optional provisions if the plan is operated consistently in accordance with either the default rule or a specific permitted alternative, notwithstanding the plan's terms.

The Service will not issue determination, opinion or advisory letters on the basis of the changes in these proposed regulations until the publication of final regulations. Until such time, the IRS will continue to issue such letters on the basis of the 1987 proposed regulations and SBJPA. Although the IRS will not issue determination, opinion or advisory letters with respect to the model amendment, the adoption of the model amendment will not affect a determination letter issued for a plan whose terms otherwise satisfy the 1987 proposed regulations and SBJPA. Plan sponsors should not adopt other amendments to attempt to conform their plans to the changes in these proposed regulations before the publication of final regulations. The IRS intends to publish procedures at a later date that will allow qualified plans to be amended to reflect the regulations under section 401(a)(9) when they are finalized.

Qualified plans are required to be amended for changes in the plan qualification requirements made by GUST by the end of the GUST remedial amendment period under section 401(b), which is generally the end of the first plan year beginning on or after January 1, 2001, or, if applicable, a later date determined under the provisions of section 19 of Rev. Proc. 2000–20 (2000–6 I.R.B. 553). Many plans have been operated in a manner that reflects the changes to section 401(a)(9) made by SBJPA and will have to be amended for

these changes by the end of the GUST remedial amendment period. The IRS intends that its procedures for amending qualified plans for the final regulations under section 401(a)(9) will generally avoid the need for plan sponsors, volume submitter practitioners and M&P plan sponsors to request another determination, opinion or advisory letter subsequent to their application for a GUST letter. In addition, to the extent such a subsequent letter is needed or desired, the IRS intends that its procedures will provide that the application for the letter will not have to be submitted prior to the next time the plan is otherwise amended or required to be amended.

The model amendment described above is set forth below:

With respect to distributions under the Plan made in calendar years beginning on or after January 1, 2000 (ALTERNATIVELY, SPECIFY A LATER CALENDAR YEAR FOR WHICH THE AMENDMENT IS TO BE INITIALLY EFFECTIVE), the Plan will apply the minimum distribution requirements of section 401(a)(9) of the Internal Revenue Code in accordance with the regulations under section 401(a)(9) that were proposed in January 2001, notwithstanding any provision of the Plan to the contrary. This amendment shall continue in effect until the end of the last calendar year beginning before the effective date of final regulations under section 401(a)(9) or such other date specified in guidance published by the Internal Revenue Service.

Amendment of IRAs and Effective Date

These regulations are proposed to be effective for distributions for calendar years beginning on or after January 1, 2002. For distributions for the 2001 calendar year, IRA owners are permitted, but not required, to follow these proposed regulations in operation, notwithstanding the terms of the IRA documents. IRA owners may therefore rely on these proposed regulations for distributions for the 2001 calendar year. However, IRA sponsors should not amend their IRA documents to conform their IRAs to the changes in these proposed regulations before the publication of final regulations. The IRS will not issue model IRAs on the basis of the changes in these proposed regulations until the publication of final regulations. Until such time, IRA owners can continue to use the current model IRAs which are based on the 1987 proposed regulations under section 401(a)(9). The IRS will publish procedures at a later date that will allow IRAs to be amended to reflect final regulations under section 401(a)(9).

Proposed Effective Date

The regulations are proposed to be applicable for determining required minimum distributions for calendar years beginning on or after January 1, 2002. For determining required minimum distributions for calendar year 2001, taxpayers may rely on these proposed regulations or on the 1987 proposed regulations. If, and to the extent, future guidance is more restrictive than the guidance in these proposed regulations, the future guidance will be issued without retroactive effect.

Special Analyses

It has been determined that this notice of proposed rulemaking 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 the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, these proposed regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any electronic or written comments (preferably a signed original and eight (8) copies) that are submitted timely to the IRS. In addition to the other requests for comments set forth in this document, the IRS and Treasury also request comments on the clarity of the proposed rule and how it may be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for June 1, 2001, at 10 a.m. in the IRS Auditorium (7th Floor), 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. Because of access restrictions, visitors will not be admitted 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 preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

Persons who wish to present oral comments at the hearing must submit written comments and an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by May 11, 2001.

A period of 10 minutes will be allotted to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal authors of these regulations are Marjorie Hoffman and Cathy A. Vohs of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 54

Excise taxes, Pensions, Reporting and recordkeeping requirements.

Adoption of Amendments of 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 entries in numerical order to read in part as follows:

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

§ 1.401(a)(9)–1 is also issued under 26 U.S.C. 401(a)(9).

§ 1.401(a)(9)–2 is also issued under 26 U.S.C. 401(a)(9).

§ 1.401(a)(9)–3 is also issued under 26 U.S.C. 401(a)(9).

§ 1.401(a)(9)–4 is also issued under 26 U.S.C. 401(a)(9).

§ 1.401(a)(9)–5 is also issued under 26 U.S.C. 401(a)(9).

§ 1.401(a)(9)–6 is also issued under 26 U.S.C. 401(a)(9).

§ 1.401(a)(9)–7 is also issued under 26 U.S.C. 401(a)(9).

§ 1.401(a)(9)–8 is also issued under 26 U.S.C. 401(a)(9).* * *

§ 1.403(b)–2 is also issued under 26 U.S.C. 403(b)(10).* * *

§ 1.408–8 is also issued under 26 U.S.C. 408(a)(6) and (b)(3).* * *

Par. 2. Sections 1.401(a)(9)–0 through 1.401(a)(9)–8 are added to read as follows:

§ 1.401(a)(9)–0 Required minimum distributions; table of contents.

This table of contents lists the regulations relating to required minimum distributions under section 401(a)(9) of the Internal Revenue Code as follows:

§ 1.401(a)(9)–0 Required minimum distributions; table of contents.
§ 1.401(a)(9)–1 Required minimum distribution requirement in general.
§ 1.401(a)(9)–2 Distributions commencing before an employee's death.
§ 1.401(a)(9)–3 Death before required beginning date.
§ 1.401(a)(9)–4 Determination of the designated beneficiary.
§ 1.401(a)(9)–5 Required minimum distributions from defined contribution plans.
§ 1.401(a)(9)–6 Required minimum distributions from defined benefit plans.
§ 1.401(a)(9)–7 Rollovers and transfers.
§ 1.401(a)(9)–8 Special rules.

§ 1.401(a)(9)–1 Required minimum distribution requirement in general.

Q–1. What plans are subject to the required minimum distribution requirement under section 401(a)(9) and §§ 1.401(a)(9)–1 through 1.401(a)(9)–8?

A–1. All stock bonus, pension, and profit-sharing plans qualified under section 401(a) and annuity contracts described in section 403(a) are subject to the required minimum distribution rules in section 401(a)(9) and §§ 1.401(a)(9)–1 through 1.401(a)(9)–8. See § 1.403(b)–2 for the distribution rules applicable to annuity contracts or custodial accounts described in section 403(b), see § 1.408–8 for the distribution rules applicable to individual retirement plans, see § 1.408A–6 described for the distribution rules applicable to Roth IRAs under section 408A, and see section 457(d)(2)(A) for distribution rules applicable to certain deferred compensation plans for employees of tax exempt organizations or state and local government employees.

Q–2. Which employee account balances and benefits held under qualified trusts and plans are subject to the distribution rules of section 401(a)(9) and §§ 1.401(a)(9)–1 through 1.401(a)(9)–8?

A–2. The distribution rules of section 401(a)(9) apply to all account balances and benefits in existence on or after January 1, 1985. Sections 1.401(a)(9)–1 through 1.401(a)(9)–8 apply for purposes of determining required minimum distributions for calendar years beginning on or after January 1, 2002.

Q–3. What specific provisions must a plan contain in order to satisfy section 401(a)(9)?

A–3. (a) *Required provisions.* In order to satisfy section 401(a)(9), the plan must include several written provisions reflecting section 401(a)(9). First, the plan must generally set forth the statutory rules of section 401(a)(9), including the incidental death benefit requirement in section 401(a)(9)(G). Second, the plan must provide that distributions will be made in accordance with §§ 1.401(a)(9)–1 through 1.401(a)(9)–8. The plan document must also provide that the provisions reflecting section 401(a)(9) override any distribution options in the plan inconsistent with section 401(a)(9). The plan also must include any other provisions reflecting section 401(a)(9) as are prescribed by the Commissioner in revenue rulings, notices, and other guidance published in the Internal Revenue Bulletin. See § 601.601(d)(2)(ii)(b) of this chapter.

(b) *Optional provisions.* The plan may also include written provisions regarding any optional provisions governing plan distributions that do not conflict with section 401(a)(9) and the regulations thereunder.

(c) *Absence of optional provisions.* Plan distributions commencing after an employee's death will be required to be made under the default provision set forth in § 1.401(a)(9)–3 for distributions unless the plan document contains optional provisions that override such default provisions. Thus, if distributions have not commenced to the employee at the time of the employee's death, distributions after the death of an employee are to be made automatically in accordance with the default provisions in A–4(a) of § 1.401(a)(9)–3 unless the plan either specifies in accordance with A–4(b) of § 1.401(a)(9)–3 the method under which distributions will be made or provides for elections by the employee (or beneficiary) in accordance with A–4(c) of § 1.401(a)(9)–3 and such elections are made by the employee or beneficiary.

§ 1.401(a)(9)–2 Distributions commencing before an employee's death.

Q–1. In the case of distributions commencing before an employee's death, how must the employee's entire interest be distributed in order to satisfy section 401(a)(9)(A)?

A–1. (a) In order to satisfy section 401(a)(9)(A), the entire interest of each employee must be distributed to such employee not later than the required beginning date, or must be distributed, beginning not later than the required beginning date, over the life of the employee or joint lives of the employee and a designated beneficiary or over a period not extending beyond the life expectancy of the employee or the joint life and last survivor expectancy of the employee and the designated beneficiary.

(b) Section 401(a)(9)(G) provides that lifetime distributions must satisfy the incidental death benefit requirements.

(c) The amount required to be distributed for each calendar year in order to satisfy section 401(a)(9)(A) and (G) generally depends on whether a distribution is in the form of distributions under a defined contribution plan or annuity payments under a defined benefit plan. For the method of determining the required minimum distribution in accordance with section 401(a)(9)(A) and (G) from an individual account under a defined contribution plan, see § 1.401(a)(9)–5. For the method of determining the required minimum distribution in accordance with section 401(a)(9)(A) and (G) in the case of annuity payments from a defined benefit plan or an annuity contract, see § 1.401(a)(9)–6.

Q–2. For purposes of section 401(a)(9)(C), what does the term *required beginning date* mean?

A–2. (a) Except as provided in paragraph (b) of this A–2 with respect to a 5-percent owner, as defined in paragraph (c), the term *required beginning date* means April 1 of the calendar year following the later of the calendar year in which the employee attains age 70½, or the calendar year in which the employee retires from employment with the employer maintaining the plan.

(b) In the case of an employee who is a 5-percent owner, the term *required beginning date* means April 1 of the calendar year following the calendar year in which the employee attains age 70½.

(c) For purposes of section 401(a)(9), a 5-percent owner is an employee who is a 5-percent owner (as defined in section 416) with respect to the plan year ending in the calendar year in which the employee attains age 70½.

(d) Paragraph (b) of this A–2 does not apply in the case of a governmental plan (within the meaning of section 414(d)) or a church plan. For purposes of this paragraph, the term *church plan* means a plan maintained by a church for church employees, and the term *church* means any church (as defined in section 3121(w)(3)(A)) or qualified church-controlled organization (as defined in section 3121(w)(3)(B)).

(e) A plan is permitted to provide that the required beginning date for purposes of section 401(a)(9) for all employees is April 1 of the calendar year following the calendar year in which the employee attained age 70½ regardless of whether the employee is a 5-percent owner.

Q–3. When does an employee attain age 70½?

A–3. An employee attains age 70½ as of the date six calendar months after the 70th anniversary of the employee's birth. For example, if an employee's date of birth was June 30, 1932, the 70th anniversary of such employee's birth is June 30, 2002. Such employee attains age 70½ on December 30, 2002. Consequently, if the employee is a 5-percent owner or retired, such employee's required beginning date is April 1, 2003. However, if the employee's date of birth was July 1, 1932, the 70th anniversary of such employee's birth would be July 1, 2002. Such employee would then attain age 70½ on January 1, 2003 and such employee's required beginning date would be April 1, 2004.

Q–4. Must distributions made before the employee's required beginning date satisfy section 401(a)(9)?

A–4. Lifetime distributions made before the employee's required beginning date for calendar years before the employee's first distribution calendar year, as defined in A–1(b) of § 1.401(a)(9)–5, need not be made in accordance with section 401(a)(9). However, if distributions commence before the employee's required beginning date under a particular distribution option, such as in the form of an annuity, the distribution option fails to satisfy section 401(a)(9) at the time distributions commence if, under terms of the particular distribution option, distributions to be made for the employee's first distribution calendar year or any subsequent distribution calendar year will fail to satisfy section 401(a)(9).

Q–5. If distributions have begun to an employee before the employee's death (in accordance with section 401(a)(9)(A)(ii)), how must distributions be made after an employee's death?

A–5. Section 401(a)(9)(B)(i) provides that if the distribution of the employee's interest has begun in accordance with section 401(a)(9)(A)(ii) and the employee dies before his entire interest has been distributed to him, the remaining portion of such interest must be distributed at least as rapidly as under the distribution method being used under section 401(a)(9)(A)(ii) as of the date of his death. The amount required to be distributed for each distribution calendar year following the calendar year of death generally depends on whether a distribution is in the form of distributions from an individual account under a defined contribution plan or annuity payments under a defined benefit plan. For the method of determining the required minimum distribution in accordance with section 401(a)(9)(B)(i) from an individual account, see A–5(a) of § 1.401(a)(9)–5 for the calculation of the distribution period that applies when an employee dies after the employee's required beginning date. In the case of annuity payments from a defined benefit plan or an annuity contract, see § 1.401(a)(9)–6.

Q–6. For purposes of section 401(a)(9)(B), when are distributions considered to have begun to the employee in accordance with section 401(a)(9)(A)(ii)?

A–6. (a) *General rule.* Except as otherwise provided in A–10 of § 1.401(a)(9)–6, distributions are not treated as having begun to the employee in accordance with section 401(a)(9)(A)(ii) until the employee's required beginning date, without regard to whether payments have been made before that date. For example, if employee A upon retirement in 2002, the calendar year A attains age 65½, begins receiving installment distributions from a profit-sharing plan over a period not exceeding the joint life and last survivor expectancy of A and A's beneficiary, benefits are not treated as having begun in accordance with section 401(a)(9)(A)(ii) until April 1, 2008 (the April 1 following the calendar year in which A attains age 70½). Consequently, if such employee dies before April 1, 2008 (A's required beginning date), distributions after A's death must be made in accordance with section 401(a)(9)(B)(ii) or (iii) and (iv) and § 1.401(a)(9)–4, and not section 401(a)(9)(B)(i). This is the case without regard to whether the plan has distributed the minimum distribution for the first distribution calendar year (as defined in A–1(b) of § 1.401(a)(9)–5) before A's death.

(b) If a plan provides, in accordance with A–2(e) of this section, that the required beginning date for purposes of section 401(a)(9) for all employees is April 1 of the calendar year following the calendar year in which the employee attains age 70½, an employee who dies after the required beginning date determined under the plan terms is treated as dying after the employee's required beginning date for purposes of A–5(a) of this section even though the employee dies before the April 1 following the calendar year in which the employee retires.

§ 1.401(a)(9)–3 Death before required beginning date.

Q–1. If an employee dies before the employee's required beginning date, how must the employee's entire interest be distributed in order to satisfy section 401(a)(9)?

A–1. (a) Except as otherwise provided in A–10 of § 1.401(a)(9)–6, if an employee dies before the employee's required beginning date (and, thus, generally before distributions are treated as having begun in accordance with section 401(a)(9)(A)(ii)), distribution of the employee's entire interest must be made in accordance with one of the methods described in section 401(a)(9)(B)(ii) or (iii). One method (the five-year rule in section 401(a)(9)(B)(ii)) requires that the entire interest of the employee be distributed within five years of the employee's death regardless of who or what entity receives the distribution. Another method (the life expectancy rule in section 401(a)(9)(B)(iii)) requires that any portion of an employee's interest payable to (or for the benefit of) a designated beneficiary be distributed, commencing within one year of the employee's death, over the life of such beneficiary (or over a period not extending beyond the life expectancy of such beneficiary). Section 401(a)(9)(B)(iv) provides special rules where the designated beneficiary is the surviving spouse of the employee, including a special commencement date for distributions under section 401(a)(9)(B)(iii) to the surviving spouse.

(b) See A–4 of this section for the rules for determining which of the methods described in paragraph (a) applies. See A–3 of this section to determine when distributions under the exception to the five-year rule in section 401(a)(9)(B)(iii) and (iv) must commence. See A–2 of this section to determine when the five-year period in section 401(a)(9)(B)(ii) ends. For distributions using the life expectancy rule in section 401(a)(9)(B)(iii) and (iv), see § 1.401(a)(9)–4 in order to determine the designated beneficiary under section 401(a)(9)(B)(iii) and (iv), see § 1.401(a)(9)–5 for the rules for determining the required minimum distribution under a defined contribution plan, and see § 1.401(a)(9)–6 for required minimum distributions under defined benefit plans.

Q–2. By when must the employee's entire interest be distributed in order to satisfy the five-year rule in section 401(a)(9)(B)(ii)?

A–2. In order to satisfy the five-year rule in section 401(a)(9)(B)(ii), the employee's entire interest must be distributed by the end of the calendar year which contains the fifth anniversary of the date of the employee's death. For example, if an employee dies on January 1, 2002, the entire interest must be distributed by the end of 2007, in order to satisfy the five-year rule in section 401(a)(9)(B)(ii).

Q–3. When are distributions required to commence in order to satisfy the life expectancy rule in section 401(a)(9)(B)(iii) and (iv)?

A–3. (a) *Nonspouse beneficiary.* In order to satisfy the life expectancy rule in section 401(a)(9)(B)(iii), if the designated beneficiary is not the employee's surviving spouse, distributions must commence on or before the end of the calendar year immediately following the calendar year in which the employee died. This rule also applies to the distribution of the entire remaining benefit if another individual is a designated beneficiary in addition to the employee's surviving spouse. See A–2 and A–3 of § 1.401(a)(9)–8, however, if the employee's benefit is divided into separate accounts (or segregated shares, in the case of a defined benefit plan).

(b) *Spousal beneficiary.* In order to satisfy the rule in section 401(a)(9)(B)(iii) and (iv), if the sole designated beneficiary is the employee's surviving spouse, distributions must commence on or before the later of—

(1) The end of the calendar year immediately following the calendar year in which the employee died; and

(2) The end of the calendar year in which the employee would have attained age 70½.

Q–4. How is it determined whether the five-year rule in section 401(a)(9)(B)(ii) or the life expectancy rule in section 401(a)(9)(B)(iii) and (iv) applies to a distribution?

A–4. (a) *No plan provision.* If a plan does not adopt an optional provision described in paragraph (b) or (c) of this A–4 specifying the method of distribution after the death of an employee, distribution must be made as follows:

(1) If the employee has a designated beneficiary, as determined under § 1.401(a)(9)–4, distributions are to be made in accordance with the life expectancy rule in section 401(a)(9)(B)(iii) and (iv).

(2) If the employee has no designated beneficiary, distributions are to be made in accordance with the five-year rule in section 401(a)(9)(B)(ii).

(b) *Optional plan provisions.* The plan may adopt a provision specifying either that the five-year rule in section 401(a)(9)(B)(ii) will apply to certain distributions after the death of an employee even if the employee has a designated beneficiary or that distribution in every case will be made in accordance with the five-year rule in section 401(a)(9)(B)(ii). Further, a plan need not have the same method of distribution for the benefits of all employees.

(c) *Elections.* A plan may adopt a provision that permits employees (or beneficiaries) to elect on an individual basis whether the five-year rule in section 401(a)(9)(B)(ii) or the life expectancy rule in section 401(a)(9)(B)(iii) and (iv) applies to distributions after the death of an employee who has a designated beneficiary. Such an election must be made no later than the earlier of, the end of the calendar year in which distribution would be required to commence in order to satisfy the requirements for the life expectancy rule in section 401(a)(9)(B)(iii) and (iv) (see A–3 of this section for the determination of such calendar year), or the end of the calendar year which contains the fifth anniversary of the date of death of the employee. As of the date determined under the life expectancy rule, the election must be irrevocable with respect to the beneficiary (and all subsequent beneficiaries) and must apply to all subsequent calendar years. If a plan provides for the election, the plan may also specify the method of distribution that applies if neither the employee nor the beneficiary makes the election. If neither the employee nor the beneficiary elects a method and the plan does not specify which method applies, distribution must be made in accordance with paragraph (a).

Q–5. If the employee's surviving spouse is the employee's designated beneficiary and such spouse dies after the employee, but before distributions have begun to the surviving spouse under section 401(a)(9)(B)(iii) and (iv), how is the employee's interest to be distributed?

A–5. Pursuant to section 401(a)(9)(B)(iv)(II), if the surviving spouse dies after the employee, but before distributions to such spouse have begun under section 401(a)(9)(B)(iii) and (iv), the five-year rule in section 401(a)(9)(B)(ii) and the life expectancy rule in section 401(a)(9)(B)(iii) are to be applied as if the surviving spouse were the employee. In applying this rule, the date of death of the surviving spouse shall be substituted for the date of death of the employee. However, in such case, the rules in section 401(a)(9)(B)(iv) are not available to the surviving spouse of the deceased employee's surviving spouse.

Q–6. For purposes of section 401(a)(9)(B)(iv)(II), when are distributions considered to have begun to the surviving spouse?

A–6. Distributions are considered to have begun to the surviving spouse of an employee, for purposes of section 401(a)(9)(B)(iv)(II), on the date, determined in accordance with A–3 of this section, on which distributions are required to commence to the surviving spouse, even though payments have actually been made before that date. See A–11 of § 1.401(a)(9)–6 for a special rule for annuities.

§ 1.401(a)(9)–4 Determination of the designated beneficiary.

Q–1. Who is a designated beneficiary under section 401(a)(9)(E)?

A–1. A designated beneficiary is an individual who is designated as a beneficiary under the plan. An individual may be designated as a beneficiary under the plan either by the terms of the plan or, if the plan so provides, by an affirmative election by the employee (or the employee's surviving spouse) specifying the beneficiary. A beneficiary designated as such under the plan is an individual who is entitled to a portion of an employee's benefit, contingent on the employee's death or another specified event. For example, if a distribution is in the form of a joint and survivor annuity over the life of the employee and another individual, the plan does not satisfy section 401(a)(9) unless such other individual is a designated beneficiary under the plan. A designated beneficiary need not be specified by name in the plan or by the employee to the plan in order to be a designated beneficiary so long as the individual who is to be the beneficiary is identifiable under the plan as of the date the beneficiary is determined under A–4 of this section. The members of a class of beneficiaries capable of expansion or contraction will be treated as being identifiable if it is possible, as of the date the beneficiary is determined, to identify the class member with the shortest life expectancy. The fact that an employee's interest under the plan passes to a certain individual under applicable state law does not make that individual a designated beneficiary unless the individual is designated as a beneficiary under the plan.

Q–2. Must an employee (or the employee's spouse) make an affirmative election specifying a beneficiary for a person to be a designated beneficiary under section 40l(a)(9)(E)?

A–2. No. A designated beneficiary is an individual who is designated as a beneficiary under the plan whether or not the designation under the plan was made by the employee. The choice of beneficiary is subject to the requirements of sections 401(a)(11), 414(p), and 417.

Q–3. May a person other than an individual be considered to be a designated beneficiary for purposes of section 401(a)(9)?

A–3. (a) No. Only individuals may be designated beneficiaries for purposes of section 401(a)(9). A person that is not an individual, such as the employee's estate, may not be a designated beneficiary, and, if a person other than an individual is designated as a beneficiary of an employee's benefit, the employee will be treated as having no designated beneficiary for purposes of section 401(a)(9). However, see A–5 of this section for special rules which apply to trusts.

(b) If an employee is treated as having no designated beneficiary, for distributions under a defined contribution plan, the distribution period under section 401(a)(9)(A)(ii) after the death of the employee is limited to the period described in A–5(a)(2) of § 1.401(a)(9)–5 (the remaining life expectancy of the employee determined in accordance with A–5(c)(3) of § 1.401(a)(9)–5). Further, in such case, except as provided in A–10 of § 1.401(a)(9)–6, if the employee dies before the employee's required beginning date, distribution must be made in accordance with the 5-year rule in section 401(a)(9)(B)(ii).

Q–4. When is the designated beneficiary determined?

A–4. (a) *General rule.* Except as provided in paragraph (b) and § 1.401(a)(9)–6, the employee's designated beneficiary will be determined based on the beneficiaries designated as of the last day of the calendar year following the calendar year of the employee's death. Consequently, except as provided in § 1.401(a)(9)–6, any person who was a beneficiary as of the date of the employee's death, but is not a beneficiary as of that later date (*e.g.,* because the person disclaims entitlement to the benefit in favor of another beneficiary or because the person receives the entire benefit to which the person is entitled before that date), is not taken into account in determining the employee's designated beneficiary for purposes of determining the distribution period for required minimum distributions after the employee's death.

(b) *Surviving spouse.* As provided in A–5 of § 1.401(a)(9)–3, in the case in which the employee's spouse is the designated beneficiary as of the date described in paragraph (a) of this A–5, and the surviving spouse dies after the employee and before the date on which distributions have begun to the spouse under section 401(a)(9)(B)(iii) and (iv), the rule in section 40l(a)(9)(B)(iv)(II) will apply. Thus, the relevant designated beneficiary for determining the distribution period is the designated beneficiary of the surviving spouse. Such designated beneficiary will be determined as of the last day of the calendar year following the calendar year of surviving spouse's death. If, as of such last day, there is no designated beneficiary under the plan with respect to that surviving spouse, distribution must be made in accordance with the 5-year rule in section 401(a)(9)(B)(ii) and A–2 of § 1.401(a)(9)–3.

(c) *Multiple beneficiaries.* Notwithstanding anything in this A–4 to the contrary, the rules in A–7 of § 1.401(a)(9)–5 apply if more than one beneficiary is designated with respect to an employee as of the date on which the designated beneficiary is to be determined in accordance with paragraphs (a) and (b) of this A–4.

Q–5. If a trust is named as a beneficiary of an employee, will the beneficiaries of the trust with respect to the trust's interest in the employee's benefit be treated as having been designated as beneficiaries of the employee under the plan for purposes of determining the distribution period under section 401(a)(9)?

A–5. (a) Only an individual may be a designated beneficiary for purposes of determining the distribution period under section 401(a)(9). Consequently, a trust is not a designated beneficiary even though the trust is named as a beneficiary. However, if the requirements of Paragraph (b) of this A–5 are met, the beneficiaries of the trust will be treated as having been designated as beneficiaries of the employee under the plan for purposes of determining the distribution period under section 401(a)(9).

(b) The requirements of this paragraph (b) are met if, during any period during which required minimum distributions are being determined by treating the beneficiaries of the trust as designated beneficiaries of the employee, the following requirements are met:

(1) The trust is a valid trust under state law, or would be but for the fact that there is no corpus.

(2) The trust is irrevocable or will, by its terms, become irrevocable upon the death of the employee.

(3) The beneficiaries of the trust who are beneficiaries with respect to the trust's interest in the employee's benefit are identifiable from the trust instrument within the meaning of A–1 of this section.

(4) The documentation described in A–6 of this section has been provided to the plan administrator.

(c) In the case of payments to a trust having more than one beneficiary, see A–7 of § 1.401(a)(9)–5 for the rules for determining the designated beneficiary whose life expectancy will be used to determine the distribution period. If the beneficiary of the trust named as beneficiary is another trust, the beneficiaries of the other trust will be treated as having been designated as beneficiaries of the employee under the plan for purposes of determining the distribution period under section 401(a)(9)(A)(ii), provided that the requirements of paragraph (b) of this A–5 are satisfied with respect to such other trust in addition to the trust named as beneficiary.

Q–6. If a trust is named as a beneficiary of an employee, what documentation must be provided to the plan administrator?

A–6. (a) *Required minimum distributions before death.* In order to satisfy the documentation requirement of this A–6 for required minimum distributions under section 401(a)(9) to commence before the death of an employee, the employee must comply with either paragraph (a)(1) or (2) of this A–6:

(1) The employee provides to the plan administrator a copy of the trust instrument and agrees that if the trust instrument is amended at any time in the future, the employee will, within a reasonable time, provide to the plan administrator a copy of each such amendment.

(2) The employee—

(i) Provides to the plan administrator a list of all of the beneficiaries of the trust (including contingent and remaindermen beneficiaries with a description of the conditions on their entitlement);

(ii) Certifies that, to the best of the employee's knowledge, this list is correct and complete and that the requirements of paragraphs (b)(1), (2), and (3) of A–5 of this section are satisfied;

(iii) Agrees that, if the trust instrument is amended at any time in the future, the employee will, within a reasonable time, provide to the plan administrator corrected certifications to the extent that the amendment changes any information previously certified; and

(iv) Agrees to provide a copy of the trust instrument to the plan administrator upon demand.

(b) *Required minimum distributions after death.* In order to satisfy the documentation requirement of this A–6 for required minimum distributions after the death of the employee, by the last day of the calendar year immediately following the calendar year in which the employee died, the trustee of the trust must either—

(1) Provide the plan administrator with a final list of all beneficiaries of the trust (including contingent and remaindermen beneficiaries with a description of the conditions on their entitlement) as of the end of the calendar year following the calendar year of the employee's death; certify that, to the best of the trustee's knowledge, this list is correct and complete and that the requirements of paragraph (b)(1), (2), and (3) of A–5 of this section are satisfied; and agree to provide a copy of the trust instrument to the plan administrator upon demand; or

(2) Provide the plan administrator with a copy of the actual trust document for the trust that is named as a beneficiary of the employee under the plan as of the employee's date of death.

(c) *Relief for discrepancy between trust instrument and employee certifications or earlier trust instruments.* (1) If required minimum distributions are determined based on the information provided to the plan administrator in certifications or trust instruments described in paragraph (a)(1), (a)(2) or (b) of this A–6, a plan will not fail to satisfy section 401(a)(9) merely because the actual terms of the trust instrument are inconsistent with the information in those certifications or trust instruments previously provided to the plan administrator, but only if the plan administrator reasonably relied on the information provided and the required minimum distributions for calendar years after the calendar year in which the discrepancy is discovered are determined based on the actual terms of the trust instrument.

(2) For purposes of determining the amount of the excise tax under section 4974, the required minimum distribution is determined for any year based on the actual terms of the trust in effect during the year.

§ 1.401(a)(9)–5 Required minimum distributions from defined contribution plans.

Q–1. If an employee's benefit is in the form of an individual account under a defined contribution plan, what is the amount required to be distributed for each calendar year?

A–1. (a) *General rule.* If an employee's accrued benefit is in the form of an individual account under a defined contribution plan, the minimum amount required to be distributed for each distribution calendar year, as defined in paragraph (b) of this A–1, is equal to the quotient obtained by dividing the account (determined under A–3 of this section) by the applicable distribution period (determined under A–4 of this section). However, the required minimum distribution amount will never exceed the entire vested account balance on the date of the distribution. Further, the minimum distribution required to be distributed on or before an employee's required beginning date is always determined under section 401(a)(9)(A)(ii) and this A–1 and not section 401(a)(9)(A)(i).

(b) *Distribution calendar year.* A calendar year for which a minimum distribution is required is a distribution calendar year. If an employee's required beginning date is April 1 of the calendar year following the calendar year in which the employee attains age 70½, the employee's first distribution calendar year is the year the employee attains age 70½. If an employee's required beginning date is April 1 of the calendar year following the calendar year in which the employee retires, the calendar year in which the employee retires is the employee's first distribution calendar year. In the case of distributions to be made in accordance with the life expectancy rule in § 1.401(a)(9)–3 and in section 401(a)(9)(B)(iii) and (iv), the first distribution calendar year is the calendar year containing the date described in A–3(a) or A–3(b) of § 1.401(a)(9)–3, whichever is applicable.

(c) *Time for distributions.* The distribution required to be made on or before the employee's required beginning date shall be treated as the distribution required for the employee's first distribution calendar year (as defined in paragraph (b) of this A–1). The required minimum distribution for other distribution calendar years, including the required minimum distribution for the distribution calendar year in which the employee's required beginning date occurs, must be made on or before the end of that distribution calendar year.

(d) *Minimum distribution incidental benefit requirement.* If distributions are made in accordance with this section, the minimum distribution incidental benefit requirement of section 401(a)(9)(G) will be satisfied.

(e) *Annuity contracts.* Instead of satisfying this A–1, the required minimum distribution requirement may be satisfied by the purchase of an annuity contract from an insurance company in accordance with A–4 of § 1.401(a)(9)–6 with the employee's entire individual account. If such an annuity is purchased after distributions are required to commence (the required beginning date, in the case of distributions commencing before death, or the date determined under A–3 of § 1.401(a)(9)–3, in the case of distributions commencing after death), payments under the annuity contract purchased will satisfy section 401(a)(9) for distribution calendar years after the calendar year of the purchase if payments under the annuity contract are made in accordance with § 1.401(a)(9)–6. In such a case, payments under the annuity contract will be treated as distributions from the individual account for purposes of determining if the individual account satisfies section 401(a)(9) for the calendar year of the purchase. An employee may also purchase an annuity contract for a portion of the employee's account under the rules of A–2(c) of § 1.401(a)(9)–8

Q–2. If an employee's benefit is in the form of an individual account and, in any calendar year, the amount distributed exceeds the minimum required, will credit be given in subsequent calendar years for such excess distribution?

A–2. If, for any distribution calendar year, the amount distributed exceeds the minimum required, no credit will be given in subsequent calendar years for such excess distribution.

Q–3. What is the amount of the account of an employee used for determining the employee's required minimum distribution in the case of an individual account?

A–3. (a) In the case of an individual account, the benefit used in determining the required minimum distribution for a distribution calendar year is the account balance as of the last valuation date in the calendar year immediately preceding that distribution calendar year (valuation calendar year) adjusted in accordance with paragraphs (b) and (c) of this A–3.

(b) The account balance is increased by the amount of any contributions or forfeitures allocated to the account balance as of dates in the valuation calendar year after the valuation date. Contributions include contributions made after the close of the valuation calendar year which are allocated as of dates in the valuation calendar year.

(c)(1) The account balance is decreased by distributions made in the

valuation calendar year after the valuation date.

(2)(i) The following rule applies if any portion of the required minimum distribution for the first distribution calendar year is made in the second distribution calendar year (*i.e.*, generally, the distribution calendar year in which the required beginning date occurs). In such case, for purposes of determining the account balance to be used for determining the required minimum distribution for the second distribution calendar year, distributions described in paragraph (c)(1) shall include an additional amount. This additional amount is equal to the amount of any distribution made in the second distribution calendar year on or before the required beginning date that is not in excess (when added to the amounts distributed in the first calendar year) of the amount required to meet the required minimum distribution for the first distribution calendar year.

(ii) This paragraph (c)(2) is illustrated by the following example:

Example. (i) Employee X, born October 1, 1931, is an unmarried participant in a qualified defined contribution plan (Plan Z). After retirement, X attains age 70½ in calendar year 2002. X's required beginning date is April 1, 2003. As of the last valuation date under Plan Z in calendar year 2001, which was on December 31, 2001, the value of X's account balance was $25,300. No contributions are made or amounts forfeited after such date which are allocated in calendar year 2001. No rollover amounts are received after such date by Plan Z on X's behalf which were distributed by a qualified plan or IRA in calendar years 2001, 2002, or 2003. The applicable distribution period from the table in A–4(a)(2) for an individual age 71 is 25.3 years. The required minimum distribution for calendar year 2002 is $1,000 ($25,300 divided by 25.3). That amount is distributed to X on April 1, 2003.

(ii) The value of X's account balance as of December 31, 2002 (the last valuation date under Plan Z in calendar year 2002) is $26,400. No contributions are made or amounts forfeited after such date which are allocated in calendar year 2002. In order to determine the benefit to be used in calculating the required minimum distribution for calendar year 2003, the account balance of $26,400 will be reduced by $1,000, the amount of the required minimum distribution for calendar year 2002 made on April 1, 2003. Consequently, the benefit for purposes of determining the required minimum distribution for calendar year 2003 is $25,400.

(iii) If, instead of $1,000 being distributed to X, $20,000 is distributed on April 1 2003, the account balance of $26,400 would still be reduced by $1,000 in order to determine the benefit to be used in calculating the required minimum distribution for calendar year 2003. The amount of the distribution made on April 1, 2003, in order to meet the required minimum distribution for 2002 would still be $1,000. The remaining $19,000 ($20,000—$1,000) of the distribution is not the required minimum distribution for 2002. Instead, the remaining $19,000 of the distribution is sufficient to satisfy the required minimum distribution requirement with respect to X for calendar year 2003. The amount which is required to be distributed for calendar year 2003 is $1,040.10 ($25,400 divided by 24.4, the applicable distribution period for an individual age 72). Consequently, no additional amount is required to be distributed to X in 2003 because $19,000 exceeds $1,040.10. However, pursuant to A–2 of this section, the remaining $17,959.90 ($19,000 − $1,040.10) may not be used to satisfy the required minimum distribution requirements for calendar year 2004 or any subsequent calendar years.

(d) If an amount is distributed by one plan and rolled over to another plan (receiving plan), A–2 of § 1.401(a)(9)–7 provides additional rules for determining the benefit and required minimum distribution under the receiving plan. If an amount is transferred from one plan (transferor plan) to another plan (transferee plan), A–3 and A–4 of § 1.401(a)(9)–7 provide additional rules for determining the amount of the required minimum distribution and the benefit under both the transferor and transferee plans.

Q–4. For required minimum distributions during an employee's lifetime, what is the applicable distribution period?

A–4. (a) *General rule*—(1) *Applicable distribution period.* Except as provided in paragraph (b) of this A–4, the applicable distribution period for required minimum distributions for distribution calendar years up to and including the distribution calendar year that includes the employee's date of death is determined using the table in paragraph (a)(2) for the employee's age as of the employee's birthday in the relevant distribution calendar year.

(2) *Table for determining distribution period*—(i) *General rule.* The following table is used for determining the distribution period for lifetime distributions to an employee.

Age of the employee	Distribution period
70	26.2
71	25.3
72	24.4
73	23.5
74	22.7
75	21.8
76	20.9
77	20.1
78	19.2
79	18.4
80	17.6
81	16.8
82	16.0
83	15.3
84	14.5
85	13.8
86	13.1
87	12.4
88	11.8
89	11.1
90	10.5
91	9.9
92	9.4
93	8.8
94	8.3
95	7.8
96	7.3
97	6.9
98	6.5
99	6.1
100	5.7
101	5.3
102	5.0
103	4.7
104	4.4
105	4.1
106	3.8
107	3.6
108	3.3
109	3.1
110	2.8
111	2.6
112	2.4
113	2.2
114	2.0
115 and older	1.8

(ii) *Authority for revised table.* The table in A–4(a)(2)(i) of this section may be replaced by any revised table prescribed by the Commissioner in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin. See § 601.601(d)(2)(ii)(b) of this chapter.

(b) *Spouse is sole beneficiary.* If the sole designated beneficiary of an employee is the employee's surviving spouse, for required minimum distributions during the employee's lifetime, the applicable distribution period is the longer of the distribution period determined in accordance with paragraph (a) of this A–4 or the joint life expectancy of the employee and spouse using the employee's and spouse's attained ages as of the employee's and the spouse's birthdays in the distribution calendar year. The spouse is sole designated beneficiary for purposes of determining the applicable distribution period for a distribution calendar year during the employee's lifetime if the spouse is the sole beneficiary of the employee's entire interest at all times during the distribution calendar year.

Q–5. For required minimum distributions after an employee's death, what is the applicable distribution period?

A–5. (a) *Death on or after the employee's required beginning date.* If an employee dies on or after

distribution has begun as determined under A–6 of § 1.401(a)(9)–2 (generally after the employee's required beginning date), in order to satisfy section 401(a)(9)(B)(i), the applicable distribution period for distribution calendar years after the distribution calendar year containing the employee's date of death is either—

(1) If the employee has a designated beneficiary as of the date determined under A–4 of § 1.401(a)(9)–4, the remaining life expectancy of the employee's designated beneficiary determined in accordance with paragraph(c)(1) or (2) of A–5; or

(2) If the employee does not have a designated beneficiary as of the date determined under A–4(a) of § 1.401(a)(9)–4, the remaining life expectancy of the employee determined in accordance with paragraph (c)(3) of this A–5.

(b) *Death before an employee's required beginning date.* If an employee dies before distribution has begun as determined under A–5 of § 1.401(a)(9)–2 (generally before the employee's required beginning date), in order to satisfy section 401(a)(9)(B)(iii) or (iv) and the life expectancy rule described in A–1 of § 1.401(a)(9)–3, the applicable distribution period for distribution calendar years after the distribution calendar year containing the employee's date of death is the remaining life expectancy of the employee's designated beneficiary, determined in accordance with paragraph(c)(1) or (2) of this A–5.

(c) *Life expectancy*—(1) *Nonspouse designated beneficiary.* The applicable distribution period measured by the beneficiary's remaining life expectancy is determined using the beneficiary's age as of the beneficiary's birthday in the calendar year immediately following the calendar year of the employee's death. In subsequent calendar years the applicable distribution period is reduced by one for each calendar year that has elapsed since the calendar year immediately following the calendar year of the employee's death.

(2) *Spouse designated beneficiary.* If the surviving spouse of the employee is the employee's sole beneficiary, the applicable period is measured by the surviving spouse's life expectancy using the surviving spouse's birthday for each distribution calendar year for which a required minimum distribution is required after the calendar year of the employee's death. For calendar years after the calendar year of the spouse's death, the spouse's remaining life expectancy is the life expectancy of the spouse using the age of the spouse as of the spouse's birthday in the calendar year of the spouse's death. In subsequent calendar years, the applicable distribution period is reduced by one for each calendar year that has elapsed since the calendar year immediately following the calendar year of the spouse's death.

(3) *No designated beneficiary.* The applicable distribution period measured by the employee's remaining life expectancy is the life expectancy of the employee using the age of the employee as of the employee's birthday in the calendar year of the employee's death. In subsequent calendar years the applicable distribution period is reduced by one for each calendar year that has elapsed since the calendar year of death.

Q–6. What life expectancies must be used for purposes of determining required minimum distributions under section 401(a)(9)?

A–6. (a) *General rule.* Unless otherwise prescribed in accordance with paragraph (b) of this A–6, life expectancies for purposes of determining required minimum distributions under section 401(a)(9) must be computed using of the expected return multiples in Tables V and VI of § 1.72–9.

(b) *Revised expected return table.* The expected return multiples described in paragraph (a) of this A–6 may be replaced by revised expected return multiples prescribed for use for purposes of determining required minimum distributions under section 401(a)(9) by the Commissioner in revenue rulings, notices, and other guidance published in the Internal Revenue Bulletin. See § 601.601(d)(2)(ii)(b) of this chapter.

Q–7. If an employee has more than one designated beneficiary, which designated beneficiary's life expectancy will be used to determine the applicable distribution period?

A–7. (a) *General rule.* (1) Except as otherwise provided in paragraph (c) of this A–7, if more than one individual is designated as a beneficiary with respect to an employee as of any applicable date for determining the designated beneficiary, the designated beneficiary with the shortest life expectancy will be the designated beneficiary for purposes of determining the distribution period. However, except as otherwise provided in A–5 of § 1.401(a)(9)–4 and paragraph (c)(1) of this A–7, if a person other than an individual is designated as a beneficiary, the employee will be treated as not having any designated beneficiaries for purposes of section 401(a)(9) even if there are also individuals designated as beneficiaries.

(2) See A–2 of § 1.401(a)(9)-8 for special rules which apply if an employee's benefit under a plan is divided into separate accounts (or segregated shares in the case of a defined benefit plan) and the beneficiaries with respect to a separate account differ from the beneficiaries of another separate account.

(b) *Contingent beneficiary.* Except as provided in paragraph (c)(1) of this A–7, if a beneficiary's entitlement to an employee's benefit is contingent on an event other than the employee's death or the death of another beneficiary, such contingent beneficiary is considered to be a designated beneficiary for purposes of determining which designated beneficiary has the shortest life expectancy under paragraph (a) of this A–7.

(c) *Death contingency.* (1) If a beneficiary (subsequent beneficiary) is entitled to any portion of an employee's benefit only if another beneficiary dies before the entire benefit to which that other beneficiary is entitled has been distributed by the plan, the subsequent beneficiary will not be considered a beneficiary for purposes of determining who is the designated beneficiary with the shortest life expectancy under paragraph (a) of this A–7 or whether a beneficiary who is not an individual is a beneficiary. This rule does not apply if the other beneficiary dies prior to the applicable date for determining the designated beneficiary.

(2) If the designated beneficiary whose life expectancy is being used to calculate the distribution period dies on or after the applicable date, such beneficiary's remaining life expectancy will be used to determine the distribution period whether or not a beneficiary with a shorter life expectancy receives the benefits.

(3) This paragraph (c) is illustrated by the following examples:

Example 1. Employer L maintains a defined contribution plan, Plan W. Unmarried Employee C dies in calendar year 2001 at age 30. As of December 31, 2002, D, the sister of C, is the beneficiary of C's account balance under Plan W. Prior to death C has designated that, if D dies before C's entire account balance has been distributed to D, E, mother of C and D, will be the beneficiary of the account balance. Because E is only entitled, as a beneficiary, to any portion of C's account if D dies before the entire account has been distributed, E is disregarded in determining C's designated beneficiary. Accordingly, even after D's death, D's life expectancy continues to be used to determined the distribution period.

Example 2. (i) Employer M maintains a defined contribution plan, Plan X. Employee A, an employee of M, died in 2001 at the age of 55, survived by spouse, B, who was 50 years old. Prior to A's death, M had

established an account balance for A in Plan X. A's account balance is invested only in productive assets. A named the trustee of a testamentary trust (Trust P) established under A's will as the beneficiary of all amounts payable from the A's account in Plan X after A's death. A copy of the Trust P and a list of the trust beneficiaries were provided to the plan administrator of Plan X by the end of the calendar year following the calendar year of A's death. As of the date of A's death, the Trust P was irrevocable and was a valid trust under the laws of the state of A's domicile. A's account balance in Plan X was includible in A's gross estate under § 2039.

(ii) Under the terms of Trust P, all trust income is payable annually to B, and no one has the power to appoint Trust P principal to any person other than B. A's children, who are all younger than B, are the sole remainder beneficiaries of the Trust P. No other person has a beneficial interest in Trust P. Under the terms of the Trust P, B has the power, exercisable annually, to compel the trustee to withdraw from A's account balance in Plan X an amount equal to the income earned on the assets held in A's account in Plan X during the calendar year and to distribute that amount through Trust P to B. Plan X contains no prohibition on withdrawal from A's account of amounts in excess of the annual required minimum distributions under section 401(a)(9). In accordance with the terms of Plan X, the trustee of Trust P elects, in order to satisfy section 401(a)(9), to receive annual required minimum distributions using the life expectancy rule in section 401(a)(9)(B)(iii) for distributions over a distribution period equal to B's life expectancy. If B exercises the withdrawal power, the trustee must withdraw from A's account under Plan X the greater of the amount of income earned in the account during the calendar year or the required minimum distribution. However, under the terms of Trust P, and applicable state law, only the portion of the Plan X distribution received by the trustee equal to the income earned by A's account in Plan X is required to be distributed to B (along with any other trust income.)

(iii) Because some amounts distributed from A's account in Plan X to Trust P may be accumulated in Trust P during B's lifetime for the benefit of A's children, as remaindermen beneficiaries of Trust P, even though access to those amounts are delayed until after B's death, A's children are beneficiaries of A's account in Plan X in addition to B and B is not the sole beneficiary of A's account. Thus the designated beneficiary used to determine the distribution period from A's account in Plan X is the beneficiary with the shortest life expectancy. B's life expectancy is the shortest of all the potential beneficiaries of the testamentary trust's interest in A's account in Plan X (including remainder beneficiaries). Thus, the distribution period for purposes of section 401(a)(9)(B)(iii) is B's life expectancy. Because B is not the sole beneficiary of the testamentary trust's interest in A's account in Plan X, the special rule in 401(a)(9)(B)(iv) is not available and the annual required minimum distributions from the account to Trust M must begin no later than the end of the calendar year immediately following the calendar year of A's death.

Example 3. (i) The facts are the same as Example 2 except that the testamentary trust instrument provides that all amounts distributed from A's account in Plan X to the trustee while B is alive will be paid directly to B upon receipt by the trustee of Trust P.

(ii) In this case, B is the sole beneficiary of A's account in Plan X for purposes of determining the designated beneficiary under section 401(a)(9)(B)(iii) and (iv). No amounts distributed from A's account in Plan X to Trust P are accumulated in Trust P during B's lifetime for the benefit of any other beneficiary. Because B is the sole beneficiary of the testamentary trust's interest in A's account in Plan X, the annual required minimum distributions from A's account to Trust P must begin no later than the end of the calendar year in which A would have attained age 70½. rather than the calendar year immediately following the calendar year of A's death.

(d) *Designations by beneficiaries.* (1) If the plan provides (or allows the employee to specify) that, after the end of the calendar year following the calendar year in which the employee died, any person or persons have the discretion to change the beneficiaries of the employee, then, for purposes of determining the distribution period after the employee's death, the employee will be treated as not having designated a beneficiary. However, such discretion will not be found to exist merely because a beneficiary may designate a subsequent beneficiary for distributions of any portion of the employee's benefit after the beneficiary dies.

(2) This paragraph (d) is illustrated by the following example:

Example. The facts are the same as in *Example 1* in paragraph (c)(3) of this A–7, except that, as permitted under the plan, D designates E as the beneficiary of any amount remaining after the death of D rather than C making this designation. E is still disregarded in determining C's designated beneficiary for purposes of section 401(a)(9).

Q–8. If a portion of an employee's individual account is not vested as of the employee's required beginning date, how is the determination of the required minimum distribution affected?

A–8. If the employee's benefit is in the form of an individual account, the benefit used to determine the required minimum distribution for any distribution calendar year will be determined in accordance with A–1 of this section without regard to whether or not all of the employee's benefit is vested. If any portion of the employee's benefit is not vested, distributions will be treated as being paid from the vested portion of the benefit first. If, as of the end of a distribution calendar year (or as of the employee's required beginning date, in the case of the employee's first distribution calendar year), the total amount of the employee's vested benefit is less than the required minimum distribution for the calendar year, only the vested portion, if any, of the employee's benefit is required to be distributed by the end of the calendar year (or, if applicable, by the employee's required beginning date). However, the required minimum distribution for the subsequent distribution calendar year must be increased by the sum of amounts not distributed in prior calendar years because the employee's vested benefit was less than the required minimum distribution (subject to the limitation that the required minimum distribution for that subsequent distribution calendar year will not exceed the vested portion of the employee's benefit). In such case, an adjustment for the additional amount distributed which corresponds to the adjustment described in A–3(c)(2) of this section will be made to the account used to determine the required minimum distribution for that calendar year.

§ 1.401(a)(9)–6 Required minimum distributions as annuity payments.

Q–1. How must annuity distributions under a defined benefit plan be paid in order to satisfy section 401(a)(9)?

A–1. (a) In order to satisfy section 401(a)(9), annuity distributions under a defined benefit plan must be paid in periodic payments made at intervals not longer than one year (payment intervals) for a life (or lives), or over a period certain not longer than a life expectancy (or joint life and last survivor expectancy) described in section 401(a)(9)(A)(ii) or section 401(a)(9)(B)(iii), whichever is applicable. The life expectancy (or joint life and last survivor expectancy) for purposes of determining the length of the period certain will be determined in accordance with A–3 of this section. Once payments have commenced over a period certain, the period certain may not be lengthened even if the period certain is shorter than the maximum permitted. Life annuity payments must satisfy the minimum distribution incidental benefit requirements of A–2 of this section. All annuity payments (life and period certain) also must either be nonincreasing or increase only as follows:

(1) With any percentage increase in a specified and generally recognized cost-of-living index;

(2) To the extent of the reduction in the amount of the employee's payments to provide for a survivor benefit upon death, but only if the beneficiary whose life was being used to determine the

period described in section 401(a)(9)(A)(ii) over which payments were being made dies or is no longer the employee's beneficiary pursuant to a qualified domestic relations order within the meaning of section 414(p);

(3) To provide cash refunds of employee contributions upon the employee's death; or

(4) Because of an increase in benefits under the plan.

(b) The annuity may be a life annuity (or joint and survivor annuity) with a period certain if the life (or lives, if applicable) and period certain each meet the requirements of paragraph (a) of this A–1. For purposes of this section, if distribution is permitted to be made over the lives of the employee and the designated beneficiary, references to life annuity include a joint and survivor annuity.

(c) Distributions under a variable annuity will not be found to be increasing merely because the amount of the payments varies with the investment performance of the underlying assets. However, the Commissioner may prescribe additional requirements applicable to such variable life annuities in revenue rulings, notices, and other guidance published in the Internal Revenue Bulletin. See § 601.601(d)(2)(ii)(b) of this chapter.

(d)(1) Except as provided in (d)(2) of this A–1, annuity payments must commence on or before the employee's required beginning date (within the meaning of A–2 of § 1.401(a)(9)–2). The first payment which must be made on or before the employee's required beginning date must be the payment which is required for one payment interval. The second payment need not be made until the end of the next payment interval even if that payment interval ends in the next calendar year. Similarly, in the case of distributions commencing after death in accordance with section 401(a)(9)(B)(iii) and (iv), the first payment that must be made on or before the date determined under A–3(a) or (b) (whichever is applicable) of § 1.401(a)(9)–3 must be the payment which is required for one payment interval. Payment intervals are the periods for which payments are received, *e.g.*, bimonthly, monthly, semi-annually, or annually. All benefit accruals as of the last day of the first distribution calendar year must be included in the calculation of the amount of the life annuity payments for payment intervals ending on or after the employee's required beginning date.

(2) In the case of an annuity contract purchased after the required beginning date, the first payment interval must begin on or before the purchase date and the payment required for one payment interval must be made no later than the end of such payment interval.

(3) This paragraph (d) is illustrated by the following example:

Example. A defined benefit plan (Plan X) provides monthly annuity payments of $500 for the life of unmarried participants with a 10-year period certain. An unmarried participant (A) in Plan X attains age 70 ½ in 2001. In order to meet the requirements of this paragraph, the first payment which must be made on behalf of A on or before April 1, 2002, will be $500 and the payments must continue to be made in monthly payments of $500 thereafter for the life and 10-year certain period.

(e) If distributions from a defined benefit plan are not in the form of an annuity, the employee's benefit will be treated as an individual account for purposes of determining the required minimum distribution. See § 1.401(a)(9)–5.

Q–2. How must distributions in the form of a life (or joint and survivor) annuity be made in order to satisfy the minimum distribution incidental benefit (MDIB) requirement of section 401(a)(9)(G)?

A–2. (a) *Life annuity for employee.* If the employee's benefit is payable in the form of a life annuity for the life of the employee satisfying section 401(a)(9), the MDIB requirement of section 401(a)(9)(G) will be satisfied.

(b) *Joint and survivor annuity, spouse beneficiary.* If the employee's sole beneficiary, as of the annuity starting date for annuity payments, is the employee's spouse and the distributions satisfy section 401(a)(9) without regard to the MDIB requirement, the distributions to the employee will be deemed to satisfy the MDIB requirement of section 401(a)(9)(G). For example, if an employee's benefit is being distributed in the form of a joint and survivor annuity for the lives of the employee and the employee's spouse and the spouse is the sole beneficiary of the employee, the amount of the periodic payment payable to the spouse may always be 100 percent of the annuity payment payable to the employee regardless of the difference in the ages between the employee and the employee's spouse. However, the amount of the payments under the annuity must be nonincreasing unless specifically permitted under A–1 of this section.

(c) *Joint and survivor annuity, nonspouse beneficiary*—(1) *Explanation of rule.* If distributions commence under a distribution option that is in the form of a joint and survivor annuity for the joint lives of the employee and a beneficiary other than the employee's spouse, the MDIB requirement will not be satisfied as of the date distributions commence unless the distribution option provides that annuity payments to be made to the employee on and after the employee's required beginning date will satisfy the conditions of this paragraph. The periodic annuity payment payable to the survivor must not at any time on and after the employee's required beginning date exceed the applicable percentage of the annuity payment payable to the employee using the table below. Thus, this requirement must be satisfied with respect to any benefit increase after such date, including increases to reflect increases in the cost of living. The applicable percentage is based on the excess of the age of the employee over the age of the beneficiary as of their attained ages as of their birthdays in a calendar year. If the employee has more than one beneficiary, the applicable percentage will be the percentage using the age of the youngest beneficiary. Additionally, the amount of the annuity payments must satisfy A–1 of this section.

(2) *Table.*

Excess of age of employee over age of beneficiary	Applicable percentage
10 years or less	100
11	96
12	93
13	90
14	87
15	84
16	82
17	79
18	77
19	75
20	73
21	72
22	70
23	68
24	67
25	66
26	64
27	63
28	62
29	61
30	60
31	59
32	59
33	58
34	57
35	56
36	56
37	55
38	55
39	54
40	54
41	53
42	53
43	53
44 and greater	52

(3) *Example.* This paragraph (c) is illustrated by the following example:

Example. Distributions commence on January 1, 2001 to an employee (Z), born March 1, 1935, after retirement at age 65. Z's daughter (Y), born February 5, 1965, is Z's beneficiary. The distributions are in the form of a joint and survivor annuity for the lives of Z and Y with payments of $500 a month to Z and upon Z's death of $500 a month to Y, i.e., the projected monthly payment to Y is 100 percent of the monthly amount payable to Z. There is no provision under the option for a change in the projected payments to Y as of April 1, 2006, Z's required beginning date. Consequently, as of January 1, 2001, the date annuity distributions commence, the plan does not satisfy the MDIB requirement in operation because, as of such date, the distribution option provides that, as of Z's required beginning date, the monthly payment to Y upon Z's death will exceed 60 percent of Z's monthly payment (the maximum percentage for a difference of ages of 30 years).

(d) *Period certain and annuity features.* If a distribution form includes a life annuity and a period certain, the amount of the annuity payments payable to the employee must satisfy paragraph (c) of this A–2, and the period certain may not exceed the period determined under A–3 of this section.

Q–3. How long is a period certain under an annuity contract permitted to extend?

A–3. (a) *Distributions commencing during the employee's life*—(1) *Spouse beneficiary.* If an employee's spouse is the employee's sole beneficiary as of the annuity starting date, the period certain for annuity distributions commencing during the life of an employee with an annuity starting date on or after the employee's required beginning date is not permitted to exceed the joint life and last survivor expectancy of the employee and the spouse using the age of the employee and spouse as of their birthdays in the calendar year that contains the annuity starting date.

(2) *Nonspouse beneficiary.* If an employee's surviving spouse is not the employee's sole beneficiary as of the annuity starting date, the period certain for any annuity distributions during the life of the employee with an annuity starting date on or after the employee's required beginning date is not permitted to exceed the shorter of the applicable distribution period for the employee (determined in accordance with the table in A–4(a)(2) of § 1.401(a)(9)–5) for the calendar year that contains on the annuity starting date or the joint life and last survivor expectancy of the employee and the employee's designated beneficiary, determined using the designated beneficiary as of the annuity starting date and using their ages as of their birthdays in the calendar year that contains the annuity starting date. See A–10 for the rule for annuity payments with an annuity starting date before the required beginning date.

(b) *Life expectancy rule.* (1) If annuity distributions commence after the death of the employee under the life expectancy rule (under section 401(a)(9)(iii) or (iv)), the period certain for any distributions commencing after death cannot exceed the applicable distribution period determined under A–5(b) of § 1.401(a)(9)–5 for the distribution calendar year that contains the annuity starting date.

(2) If the annuity starting date is in a calendar year before the first distribution calendar year, the period certain may not exceed the life expectancy of the designated beneficiary using the beneficiary's age in the year that contains the annuity starting date.

Q–4. May distributions be made from an annuity contract which is purchased from an insurance company?

A–4. Yes. Distributions may be made from an annuity contract which is purchased with the employee's benefit by the plan from an insurance company and which makes payments that satisfy the provisions of this section. In the case of an annuity contract purchased from an insurance company, there is also an exception to the nonincreasing requirement in A–1(a) of this section for an increase to provide a cash refund upon the employee's death equal to the excess of the amount of the premiums paid for the contract over the prior distributions under the contract. If the payments actually made under the annuity contract do not meet the requirements of section 401(a)(9), the plan fails to satisfy section 401(a)(9).

Q–5. In the case of annuity distributions under a defined benefit plan, how must additional benefits which accrue after the employee's required beginning date be distributed in order to satisfy section 401(a)(9)?

A–5. (a) In the case of annuity distributions under a defined benefit plan, if any additional benefits accrue after the employee's required beginning date, distribution of such amount as a separate identifiable component must commence in accordance with A–1 of this section beginning with the first payment interval ending in the calendar year immediately following the calendar year in which such amount accrues.

(b) A plan will not fail to satisfy section 401(a)(9) merely because there is an administrative delay in the commencement of the distribution of the separate identifiable component, provided that the actual payment of such amount commences as soon as practicable but not later than by the end of the first calendar year following the calendar year in which the additional benefit accrues, and that the total amount paid during such first calendar year is not less than the total amount that was required to be paid during that year under A–5(a) of this section.

Q–6. If a portion of an employee's benefit is not vested as of the employee's required beginning date, how is the determination of the required minimum distribution affected?

A–6. In the case of annuity distributions from a defined benefit plan, if any portion of the employee's benefit is not vested as of December 31 of a distribution calendar year (or as of the employee's required beginning date in the case of the employee's first distribution calendar year), the portion which is not vested as of such date will be treated as not having accrued for purposes of determining the required minimum distribution for that distribution calendar year. When an additional portion of the employee's benefit becomes vested, such portion will be treated as an additional accrual. See A–5 of this section for the rules for distributing benefits which accrue under a defined benefit plan after the employee's required beginning date.

Q–7. If an employee retires after the calendar year in which the employee attains age 70½, for what period must the employee's accrued benefit under a defined benefit plan be actuarially increased?

A–7. (a) *Actuarial increase starting date.* If an employee (other than a 5-percent owner) retires after the calendar year in which the employee attains age 70½, in order to satisfy section 401(a)(9)(C)(iii), the employee's accrued benefit under a defined benefit plan must be actuarially increased to take into account any period after age 70½ in which the employee was not receiving any benefits under the plan. The actuarial increase required to satisfy section 401(a)(9)(C)(iii) must be provided for the period starting on April 1 following the calendar year in which the employee attains age 70½.

(b) *Actuarial increase ending date.* The period for which the actuarial increase must be provided ends on the date on which benefits commence after retirement in an amount sufficient to satisfy section 401(a)(9).

(c) *Nonapplication to plan providing same required beginning date for all employees.* If as permitted under A–2(e) of § 1.401(a)(9)–2, a plan provides that the required beginning date for purposes of section 401(a)(9) for all employees is April 1 of the calendar year following the calendar year in which the employee attained age 70½ (regardless of whether the employee is a 5-percent owner) and the plan makes distributions

in an amount sufficient to satisfy section 401(a)(9) using that required beginning date, no actuarial increase is required under section 401(a)(9)(C)(iii).

(d) *Nonapplication to defined contribution plans.* The actuarial increase required under this A–7 does not apply to defined contribution plans.

(e) *Nonapplication to governmental and church plans.* The actuarial increase required under this A–7 does not apply to a governmental plan (within the meaning of section 414(d)) or a church plan. For purposes of this paragraph, the term *church plan* means a plan maintained by a church for church employees, and the term *church* means any church (as defined in section 3121(w)(3)(A)) or qualified church-controlled organization (as defined in section 3121(w)(3)(B)).

Q–8. What amount of actuarial increase is required under section 401(a)(9)(C)(iii)?

A–8. In order to satisfy section 401(a)(9)(C)(iii), the retirement benefits payable with respect to an employee as of the end of the period for actuarial increases (described in A–7 of this section) must be no less than: the actuarial equivalent of the employee's retirement benefits that would have been payable as of the date the actuarial increase must commence under A–7(a) of this section if benefits had commenced on that date; plus the actuarial equivalent of any additional benefits accrued after that date; reduced by the actuarial equivalent of any distributions made with respect to the employee's retirement benefits after that date. Actuarial equivalence is determined using the plan's assumptions for determining actuarial equivalence for purposes of satisfying section 411.

Q–9. How does the actuarial increase required under section 401(a)(9)(C)(iii) relate to the actuarial increase required under section 411?

A–9. In order for any of an employee's accrued benefit to be nonforfeitable as required under section 411, a defined benefit plan must make an actuarial adjustment to an accrued benefit the payment of which is deferred past normal retirement age. The only exception to this rule is that generally no actuarial adjustment is required to reflect the period during which a benefit is suspended as permitted under section 203(a)(3)(B) of the Employee Retirement Income Security Act of 1974 (ERISA). The actuarial increase required under section 401(a)(9) for the period described in A–7 of this section is generally the same as, and not in addition to, the actuarial increase required for the same period under section 411 to reflect any delay in the payment of retirement benefits after normal retirement age. However, unlike the actuarial increase required under section 411, the actuarial increase required under section 401(a)(9)(C) must be provided even during the period during which an employee's benefit has been suspended in accordance with ERISA section 203(a)(3)(B).

Q–10. What rule applies if distributions commence to an employee on a date before the employee's required beginning date over a period permitted under section 401(a)(9)(A)(ii) and the distribution form is an annuity under which distributions are made in accordance with the provisions of A–1 (and if applicable A–4) of this section?

A–10. (a) *General rule.* If distributions irrevocably (except for acceleration) commence to an employee on a date before the employee's required beginning date over a period permitted under section 401(a)(9)(A)(ii) and the distribution form is an annuity under which distributions are made in accordance with the provisions of A–1 (and, if applicable, A–4) of this section, the annuity starting date will be treated as the required beginning date for purposes of applying the rules of this section and § 1.401(a)(9)–3. Thus, for example, the designated beneficiary distributions will be determined as of the annuity starting date. Similarly, if the employee dies after the annuity starting date but before the annuity starting date determined under A–2 of § 1.401(a)(9)–2, after the employee's death, the remaining portion of the employee's interest must continue to be distributed in accordance with this section over the remaining period over which distributions commenced (single or joint lives and, if applicable, period certain). The rules in § 1.401(a)(9)–3 and section 401(a)(9)(B)(ii) or (iii) and (iv) do not apply.

(b) *Period certain.* If as of the employee's birthday in the year that contains the annuity starting date, the age of the employee is under 70, the following rule applies in applying the rule in paragraph (a)(2) of A–3 of this section. The applicable distribution period for the employee (determined in accordance with the table in A–4(a)(2) of § 1.401(a)(9)–5) is 26.2 plus the difference between 70 and the age of the employee as of the employee's birthday in the year that contains the annuity starting date.

Q–11. What rule applies if distributions commence irrevocably (except for acceleration) to the surviving spouse of an employee over a period permitted under section 401(a)(9)(B)(iii)(II) before the date on which distributions are required to commence and the distribution form is an annuity under which distributions are made as of the date distributions commence in accordance with the provisions of A–1 (and if applicable A–4) of this section,

A–11. If distributions commence irrevocably (except for acceleration) to the surviving spouse of an employee over a period permitted under section 401(a)(9)(B)(iii)(II) before the date on which distributions are required to commence and the distribution form is an annuity under which distributions are made as of the date distributions commence in accordance with the provisions of A–1 (and if applicable A–4) of this section, distributions will be considered to have begun on the actual commencement date for purposes of section 401(a)(9)(B)(iv)(II). Consequently, in such case, A–5 of § 1.401(a)(9)–3 and section 401(a)(9)(B)(ii) and (iii) will not apply upon the death of the surviving spouse as though the surviving spouse were the employee. Instead, the annuity distributions must continue to be made, in accordance with the provisions of A–1 (and if applicable A–4) of this section over the remaining period over which distributions commenced (single life and, if applicable, period certain).

§ 1.401(a)(9)–7 Rollovers and Transfers.

Q–1. If an amount is distributed by one plan (distributing plan) and is rolled over to another plan, is the benefit or the required minimum distribution under the distributing plan affected by the rollover?

A–1. No. If an amount is distributed by one plan and is rolled over to another plan, the amount distributed is still treated as a distribution by the distributing plan for purposes of section 401(a)(9), notwithstanding the rollover.

Q–2. If an amount is distributed by one plan (distributing plan) and is rolled over to another plan (receiving plan), how are the benefit and the required minimum distribution under the receiving plan affected?

A–2. If an amount is distributed by one plan (distributing plan) and is rolled over to another plan (receiving plan), the benefit of the employee under the receiving plan is increased by the amount rolled over. However, the distribution has no impact on the required minimum distribution to be made by the receiving plan for the calendar year in which the rollover is received. But, if a required minimum distribution is required to be made by the receiving plan for the following calendar year, the rollover amount must be considered to be part of the

employee's benefit under the receiving plan. Consequently, for purposes of determining any required minimum distribution for the calendar year immediately following the calendar year in which the amount rolled over is received by the receiving plan, in the case in which the amount rolled over is received after the last valuation date in the calendar year under the receiving plan, the benefit of the employee as of such valuation date, adjusted in accordance with A–3 of § 1.401(a)(9)–5, will be increased by the rollover amount valued as of the date of receipt. For purposes of calculating the benefit under the receiving plan pursuant to the preceding sentence, if the amount rolled over is received by the receiving plan in a different calendar year from the calendar year in which it is distributed by the distributing plan, the amount rolled over is deemed to have been received by the receiving plan in the calendar year in which it was distributed by the distributing plan.

Q–3. In the case of a transfer of an amount of an employee's benefit from one plan (transferor plan) to another plan (transferee plan), are there any special rules for satisfying the required minimum distribution requirement or determining the employee's benefit under the transferor plan?

A–3. (a) In the case of a transfer of an amount of an employee's benefit from one plan to another, the transfer is not treated as a distribution by the transferor plan for purposes of section 401(a)(9). Instead, the benefit of the employee under the transferor plan is decreased by the amount transferred. However, if any portion of an employee's benefit is transferred in a distribution calendar year with respect to that employee, in order to satisfy section 401(a)(9), the transferor plan must determine the amount of the required minimum distribution with respect to that employee for the calendar year of the transfer using the employee's benefit under the transferor plan before the transfer. Additionally, if any portion of an employee's benefit is transferred in the employee's second distribution calendar year but on or before the employee's required beginning date, in order to satisfy section 401(a)(9), the transferor plan must determine the amount of the required minimum distribution requirement for the employee's first distribution calendar year based on the employee's benefit under the transferor plan before the transfer. The transferor plan may satisfy the required minimum distribution requirement for the calendar year of the transfer (and the prior year if applicable) by segregating the amount which must be distributed from the employee's benefit and not transferring that amount. Such amount may be retained by the transferor plan and distributed on or before the date required.

(b) For purposes of determining any required minimum distribution for the calendar year immediately following the calendar year in which the transfer occurs, in the case of a transfer after the last valuation date for the calendar year of the transfer under the transferor plan, the benefit of the employee as of such valuation date, adjusted in accordance with A–3 of § 1.401(a)(9)–5, will be decreased by the amount transferred, valued as of the date of the transfer.

Q–4. If an amount of an employee's benefit is transferred from one plan (transferor plan) to another plan (transferee plan), how are the benefit and the required minimum distribution under the transferee plan affected?

A–4. In the case of a transfer from one plan (transferor plan) to another (transferee plan), the general rule is that the benefit of the employee under the transferee plan is increased by the amount transferred. The transfer has no impact on the required minimum distribution to be made by the transferee plan in the calendar year in which the transfer is received. However, if a required minimum distribution is required from the transferee plan for the following calendar year, the transferred amount must be considered to be part of the employee's benefit under the transferee plan. Consequently, for purposes of determining any required minimum distribution for the calendar year immediately following the calendar year in which the transfer occurs, in the case of a transfer after the last valuation date of the transferee plan in the transfer calendar year, the benefit of the employee under the receiving plan valued as of such valuation date, adjusted in accordance with A–3 of § 1.401(a)(9)–5, will be increased by the amount transferred valued as of the date of the transfer.

Q–5. How are a spinoff, merger or consolidation (as defined in § 1.414(l)–1) treated for purposes of determining an employee's benefit and required minimum distribution under section 401(a)(9)?

A–5. For purposes of determining an employee's benefit and required minimum distribution under section 401(a)(9), a spinoff, a merger, or a consolidation (as defined in § 1.414(l)–1) will be treated as a transfer of the benefits of the employees involved. Consequently, the benefit and required minimum distribution of each employee involved under the transferor and transferee plans will be determined in accordance with A–3 and A–4 of this section.

§ 1.401(a)(9)–8 Special rules.

Q–1. What distribution rules apply if an employee is a participant in more than one plan?

A–1. If an employee is a participant in more than one plan, the plans in which the employee participates are not permitted to be aggregated for purposes of testing whether the distribution requirements of section 401(a)(9) are met. The distribution of the benefit of the employee under each plan must separately meet the requirements of section 401(a)(9). For this purpose, a plan described in section 414(k) is treated as two separate plans, a defined contribution plan to the extent benefits are based on an individual account and a defined benefit plan with respect to the remaining benefits.

Q–2. If an employee's benefit under a plan is divided into separate accounts (or segregated shares in the case of a defined benefit plan), do the distribution rules in section 401(a)(9) and these regulations apply separately to each separate account (or segregated share)?

A–2. (a) Except as otherwise provided in paragraphs (b) and (c) of this A–2, if an employee's account under a defined contribution plan plan is divided into separate accounts (or if an employee's benefit under a defined benefit plan is divided into segregated shares in the case of a defined benefit plan) under the plan, the separate accounts (or segregated shares) will be aggregated for purposes of satisfying the rules in section 401(a)(9). Thus, except as otherwise provided in paragraphs (b) and (c) of this A–2, all separate accounts, including a separate account for nondeductible employee contributions (under section 72(d)(2)) or for qualified voluntary employee contributions (as defined in section 219(e)), will be aggregated for purposes of section 401(a)(9).

(b) If, for lifetime distributions, as of an employee's required beginning date (or the beginning of any distribution calendar year beginning after the employee's required beginning date), or in the case of distributions under section 401(a)(9)(B)(ii) or (iii) and (iv), as of the end of the year following the year containing the employee's (or spouse's, where applicable) date of death, the beneficiaries with respect to a separate account (or segregated share in the case of a defined benefit plan) under the plan differ from the beneficiaries with respect to the other separate accounts (or segregate shares)

of the employee under the plan, such separate account (or segregated share) under the plan need not be aggregated with other separate accounts (or segregated shares) under the plan in order to determine whether the distributions from such separate account (or segregated share) under the plan satisfy section 401(a)(9). Instead, the rules in section 401(a)(9) may separately apply to such separate account (or segregated share) under the plan. For example, if, in the case of a distribution described in section 401(a)(9)(B)(iii) and (iv), the only beneficiary of a separate account (or segregated share) under the plan is the employee's surviving spouse, and beneficiaries other than the surviving spouse are designated with respect to the other separate accounts of the employee, distribution of the spouse's separate account (or segregated share) under the plan need not commence until the date determined under the first sentence in A–3(b) of § 1.401(a)(9)–3, even if distribution of the other separate accounts (or segregated shares) under the plan must commence at an earlier date. In the case of a distribution after the death of an employee to which section 401(a)(9)(B)(i) does not apply, distribution from a separate account (or segregated share) of an employee may be made over a beneficiary's life expectancy in accordance with section 401(a)(9)(B)(iii) and (iv) even through distributions from other separate accounts (or segregated shares) under the plan with different beneficiaries are being made in accordance with the five-year rule in section 401(a)(9)(B)(ii).

(c) A portion of an employee's account balance under a defined contribution plan is permitted to be used to purchase an annuity contract with a remaining amount maintained in the separate account. In that case, the separate account under the plan must be distributed in accordance with § 1.401(a)(9)–5 in order to satisfy section 401(a)(9) and the annuity payments under the annuity contract must satisfy § 1.401(a)(9)–6 in order to satisfy section 401(a)(9).

Q–3. What is a separate account or segregated share for purposes of section 401(a)(9)?

A–3. (a) For purposes of section 401(a)(9), a separate account in an individual account is a portion of an employee's benefit determined by an acceptable separate accounting including allocating investment gains and losses, and contributions and forfeitures, on a pro rata basis in a reasonable and consistent matter between such portion and any other benefits. Further, the amounts of each such portion of the benefit will be separately determined for purposes of determining the amount of the required minimum distribution in accordance with § 1.401(a)(9)–5.

(b) A benefit in a defined benefit plan is separated into segregated shares if it consists of separate identifiable components which may be separately distributed.

Q–4. Must a distribution that is required by section 401(a)(9) to be made by the required beginning date to an employee or that is required by section 401(a)(9)(B)(iii) and (iv) to be made by the required time to a designated beneficiary who is a surviving spouse be made notwithstanding the failure of the employee, or spouse where applicable, to consent to a distribution while a benefit is immediately distributable?

A–4. Yes. Section 411(a)(11) and section 417(e) (see §§ 1.411(a)(11)–1(c)(2) and 1.417(e)–1(c)) require employee and spousal consent to certain distributions of plan benefits while such benefits are immediately distributable. If an employee's normal retirement age is later than the required beginning date for the commencement of distributions under section 401(a)(9) and, therefore, benefits are still immediately distributable, the plan must, nevertheless, distribute plan benefits to the participant (or where applicable, to the spouse) in a manner that satisfies the requirements of section 401(a)(9). Section 401(a)(9) must be satisfied even though the participant (or spouse, where applicable) fails to consent to the distribution. In such a case, the plan may distribute in the form of a qualified joint and survivor annuity (QJSA) or in the form of a qualified preretirement survivor annuity (QPSA) and the consent requirements of sections 411(a)(11) and 417(e) are deemed to be satisfied if the plan has made reasonable efforts to obtain consent from the participant (or spouse if applicable) and if the distribution otherwise meets the requirements of section 417. If, because of section 401(a)(11)(B), the plan is not required to distribute in the form of a QJSA to a participant or a QPSA to a surviving spouse, the plan may distribute the required minimum distribution amount required at the time required to satisfy section 401(a)(9) and the consent requirements of sections 411(a)(11) and 417(e) are deemed to be satisfied if the plan has made reasonable efforts to obtain consent from the participant (or spouse if applicable) and if the distribution otherwise meets the requirements of section 417.

Q–5. Who is an employee's spouse or surviving spouse for purposes of section 401(a)(9)?

A–5. Except as otherwise provided in A–6(a) (in the case of distributions of a portion of an employee's benefit payable to a former spouse of an employee pursuant to a qualified domestic relations order), for purposes of section 401(a)(9), an individual is a spouse or surviving spouse of an employee if such individual is treated as the employee's spouse under applicable state law. In the case of distributions after the death of an employee, for purposes of determining whether, under the life expectancy rule in section 401(a)(9)(B)(iii) and (iv), the provisions of section 401(a)(9)(B)(iv) apply, the spouse of the employee is determined as of the date of death of the employee.

Q–6. In order to satisfy section 401(a)(9), are there any special rules which apply to the distribution of all or a portion of an employee's benefit payable to an alternate payee pursuant to a qualified domestic relations order as defined in section 414(p) (QDRO)?

A–6. (a) A former spouse to whom all or a portion of the employee's benefit is payable pursuant to a QDRO will be treated as a spouse (including a surviving spouse) of the employee for purposes of section 401(a)(9), including the minimum distribution incidental benefit requirement, regardless of whether the QDRO specifically provides that the former spouse is treated as the spouse for purposes of sections 401(a)(11) and 417.

(b)(1) If a QDRO provides that an employee's benefit is to be divided and a portion is to be allocated to an alternate payee, such portion will be treated as a separate account (or segregated share) which separately must satisfy the requirements of section 401(a)(9) and may not be aggregated with other separate accounts (or segregated shares) of the employee for purposes of satisfying section 401(a)(9). Except as otherwise provided in paragraph

(b)(2) of this A–6, distribution of such separate account allocated to an alternate payee pursuant to a QDRO must be made in accordance with section 401(a)(9). For example, in general, distribution of such account will satisfy section 401(a)(9)(A) if required minimum distributions from such account during the employee's lifetime begin not later than the employee's required beginning date and the required minimum distribution is determined in accordance with § 1.401(a)(9)–5 for each distribution calendar year using an applicable distribution period determined under A–4 of § 1.401(a)(9)–5 using the age of the employee in the distribution calendar year for purposes of using the

table in A–4(a)(2) of § 1.401(a)(9)–5 if applicable or ages of the employee and spousal alternate payee if their joint life expectancy is longer than the distribution period using that table. The determination of whether distribution from such account after the death of the employee to the alternate payee will be made in accordance with section 401(a)(9)(B)(i) or section 401(a)(9)(B)(ii) or (iii) and (iv) will depend on whether distributions have begun as determined under A–5 or § 1.401(a)(9)–2 (which provides, in general, that distributions are not treated as having begun until the employee's required beginning date even though payments may actually have begun before that date). For example, if the alternate payee dies before the employee and distribution of the separate account allocated to the alternate payee pursuant to the QDRO is to be made to the alternate payee's beneficiary, such beneficiary may be treated as a designated beneficiary for purposes of determining the required minimum distribution required from such account after the death of the employee if the beneficiary of the alternate payee is an individual and if such beneficiary is a beneficiary under the plan or specified to or in the plan. Specification in or pursuant to the QDRO will also be treated as specification to the plan.

(2) Distribution of the separate account allocated to an alternate payee pursuant to a QDRO satisfy the requirements of section 401(a)(9)(A)(ii) if such account is to be distributed, beginning not later than the employee's required beginning date, over the life of the alternate payee (or over a period not extending beyond the life expectancy of the alternative payee). Also, if the plan permits the employee to elect whether distribution upon the death of the employee will be made in accordance with the five-year rule in section 401(a)(9)(B)(ii) or the life expectancy rule in section 401(a)(9)(B)(iii) and (iv) pursuant to A–4(c) of § 1.401(a)(9)–3, such election is to be made only by the alternate payee for purposes of distributing the separate account allocated to the alternate payee pursuant to the QDRO. If the alternate payee dies after distribution of the separate account allocated to the alternate payee pursuant to a QDRO has begun (determined under A–5 of § 1.401(a)(9)–2) but before the employee dies, distribution of the remaining portion of that portion of the benefit allocated to the alternate payee must be made in accordance with the rules in § 1.401(a)(9)–5 or § 1.401(a)(9)–6 for distributions during the life of the employee. Only after the death of the employee is the amount of the required minimum distribution determined in accordance with the rules that apply after the death of the employee.

(c) If a QDRO does not provide that an employee's benefit is to be divided but provides that a portion of an employee's benefit (otherwise payable to the employee) is to be paid to an alternate payee, such portion will not be treated as a separate account (or segregated share) of the employee. Instead, such portion will be aggregated with any amount distributed to the employee and will be treated as having been distributed to the employee for purposes of determining whether the required minimum distribution requirement has been satisfied with respect to that employee.

Q–7. Will a plan fail to satisfy section 401(a)(9) where it is not legally permitted to distribute to an alternate payee all or a portion of an employee's benefit payable to an alternate payee pursuant to a QDRO within the period specified in section 414(p)(7)?

A–7. A plan will not fail to satisfy section 401(a)(9) merely because it fails to distribute a required amount during the period in which the issue of whether a domestic relations order is a QDRO is being determined pursuant to section 414(p)(7), provided that the period does not extend beyond the 18-month period described in section 414(p)(7)(E). To the extent that a distribution otherwise required under section 401(a)(9) is not made during this period, this amount and any additional amount accrued during this period will be treated as though it is not vested during the period and any distributions with respect to such amounts must be made under the relevant rules for nonvested benefits described in either A–8 of § 1.401(a)(9)–5 or A–6 of § 1.401(a)(9)–6.

Q–8. Will a plan fail to satisfy section 401(a)(9) where an individual's distribution from the plan is less than the amount otherwise required to satisfy section 401(a)(9) under § 1.401(a)(9)–5 or § 1.401(a)(9)–6 because distributions were being paid under an annuity contract issued by a life insurance company in state insurer delinquency proceedings and have been reduced or suspended by reasons of such state proceedings?

A–8. A plan will not fail to satisfy section 401(a)(9) merely because an individual's distribution from the plan is less than the amount otherwise required to satisfy section 401(a)(9) under § 1.401(a)(9)–5 or § 1.401(a)(9)–6 because distributions were being paid under an annuity contract issued by a life insurance company in state insurer delinquency proceedings and have been reduced or suspended by reasons of such state proceedings. To the extent that a distribution otherwise required under section 401(a)(9) is not made during the state insurer delinquency proceedings, this amount and any additional amount accrued during this period will be treated as though it is not vested during the period and any distributions with respect to such amounts must be made under the relevant rules for nonvested benefits described in either A–8 of § 1.401(a)(9)–5 or A–6 of § 1.401(a)(9)–6.

Q–9. Will a plan fail to qualify as a pension plan within the meaning of section 401(a) solely because the plan permits distributions to commence to an employee on or after April 1 of the calendar year following the calendar year in which the employee attains age 70½ even though the employee has not retired or attained the normal retirement age under the plan as of the date on which such distributions commence?

A–9. No. A plan will not fail to qualify as a pension plan within the meaning of section 401(a) solely because the plan permits distributions to commence to an employee on or after April 1 of the calendar year following the calendar year in which the employee attains age 70½ even though the employee has not retired or attained the normal retirement age under the plan as of the date on which such distributions commence. This rule applies without regard to whether or not the employee is a 5-percent owner with respect to the plan year ending in the calendar year in which distributions commence.

Q–10. Is the distribution of an annuity contract a distribution for purposes of section 401(a)(9)?

A–10. No. The distribution of an annuity contract is not a distribution for purposes of section 401(a)(9).

Q–11. Will a payment by a plan after the death of an employee fail to be treated as a distribution for purposes of section 401(a)(9) solely because it is made to an estate or a trust?

A–11. A payment by a plan after the death of an employee will not fail to be treated as a distribution for purposes of section 401(a)(9) solely because it is made to an estate or a trust. As a result, the estate or trust which receives a payment from a plan after the death of an employee need not distribute the amount of such payment to the beneficiaries of the estate or trust in accordance with section 401(a)(9)(B). However, pursuant to A–3 of § 1.401(a)(9)–4, distribution to the estate must satisfy the five-year rule in section 401(a)(9)(B)(iii) if the distribution to the employee had not begun (as defined in

A–6 of § 1.401(a)(9)–2) as of the employee's date of death, and pursuant to A–3 of § 1.401(a)(9)–4, an estate may not be a designated beneficiary. See A–5 and A–6 of § 1.401(a)(9)–4 for provisions under which beneficiaries of a trust with respect to the trust's interest in an employee's benefit are treated as having been designated as beneficiaries of the employee under the plan.

Q–12. Will a plan fail to satisfy section 411 if the plan is amended to eliminate benefit options that do not satisfy section 401(a)(9)?

A–12. Nothing in section 401(a)(9) permits a plan to eliminate for all participants a benefit option that could not otherwise be eliminated pursuant to section 411(d)(6). However, a plan must provide that, notwithstanding any other plan provisions, it will not distribute benefits under any option that does not satisfy section 401(a)(9). See A–3 of § 1.401(a)(9)–1. Thus, the plan, notwithstanding section 411(d)(6), must prevent participants from electing benefit options that do not satisfy section 401(a)(9).

Q–13. Is a plan disqualified merely because it pays benefits under a designation made before January 1, 1984, in accordance with section 242(b)(2) of the Tax Equity and Fiscal Responsibility Act (TEFRA)?

A–13. No. Even though the distribution requirements added by TEFRA were retroactively repealed by the Tax Reform Act of 1984 (TRA of 1984), the transitional election rule in section 242(b) was preserved. Satisfaction of the spousal consent requirements of section 417(a) and (e) (added by the Retirement Equity Act of 1984) will not be considered a revocation of the pre-1984 designation. However, sections 401(a)(11) and 417 must be satisfied with respect to any distribution subject to those sections. The election provided in section 242(b) of TEFRA is hereafter referred to as a section 242(b)(2) election.

Q–14. In the case in which an amount is transferred from one plan (transferor plan) to another plan (transferee plan), may the transferee plan distribute the amount transferred in accordance with a section 242(b)(2) election made under either the transferor plan or under the transferee plan?

A–14. (a) In the case in which an amount is transferred from one plan to another plan, the amount transferred may be distributed in accordance with a section 242(b)(2) election made under the transferor plan if the employee did not elect to have the amount transferred and if the amount transferred is separately accounted for by the transferee plan. However, only the benefit attributable to the amount transferred, plus earnings thereon, may be distributed in accordance with the section 242(b)(2) election made under the transferor plan. If the employee elected to have the amount transferred, the transfer will be treated as a distribution and rollover of the amount transferred for purposes of this section.

(b) In the case in which an amount is transferred from one plan to another plan, the amount transferred may not be distributed in accordance with a section 242(b)(2) election made under the transferee plan. If a section 242(b)(2) election was made under the transferee plan, the amount transferred must be separately accounted for. If the amount transferred is not separately accounted for under the transferee plan, the section 242(b)(2) election under the transferee plan is revoked and section 401(a)(9) will apply to subsequent distributions by the transferee plan.

(c) A merger, spinoff, or consolidation, as defined in § 1.414(l)–1(b), will be treated as a transfer for purposes of the section 242(b)(2) election.

Q–15. If an amount is distributed by one plan (distributing plan) and rolled over into another plan (receiving plan), may the receiving plan distribute the amount rolled over in accordance with a section 242(b)(2) election made under either the distributing plan or the receiving plan?

A–15. No. If an amount is distributed by one plan and rolled over into another plan, the receiving plan must distribute the amount rolled over in accordance with section 401(a)(9) whether or not the employee made a section 242(b)(2) election under the distributing plan. Further, if the amount rolled over was not distributed in accordance with the election, the election under the distributing plan is revoked and section 401(a)(9) will apply to all subsequent distributions by the distributing plan. Finally, if the employee made a section 242(b)(2) election under the receiving plan and such election is still in effect, the amount rolled over must be separately accounted for under the receiving plan and distributed in accordance with section 401(a)(9). If amounts rolled over are not separately accounted for, any section 242(b)(2) election under the receiving plan is revoked and section 401(a)(9) will apply to subsequent distributions by the receiving plan.

Q–16. May a section 242(b)(2) election be revoked after the date by which distributions are required to commence in order to satisfy section 401(a)(9) and this section of the regulations?

A–16. Yes. A section 242(b)(2) election may be revoked after the date by which distributions are required to commence in order to satisfy section 401(a)(9) and this section of the regulations. However, if the section 242(b)(2) election is revoked after the date by which distributions are required to commence in order to satisfy section 401(a)(9) and this section of the regulations and the total amount of the distributions which would have been required to be made prior to the date of the revocation in order to satisfy section 401(a)(9), but for the section 242(b)(2) election, have not been made, the trust must distribute by the end of the calendar year following the calendar year in which the revocation occurs the total amount not yet distributed which was required to have been distributed to satisfy the requirements of section 401(a)(9) and continue distributions in accordance with such requirements.

Par. 3–4. Section 1.403(b)–2 is added to read as follows:

§ 1.403(b)–2 Required minimum distributions from annuity contracts purchased, or custodial accounts or retirement income accounts established, by a section 501(c)(3) organization or a public school.

Q–1. Are section 403(b) contracts subject to the distribution rules provided in section 401(a)(9)?

A–1. (a) Yes. Section 403(b) contracts are subject to the distribution rules provided in section 401(a)(9). For purposes of this section the term *section 403(b) contract* means an annuity contract described in section 403(b)(1), custodial account described in section 403(b)(7), or a retirement income account described in section 403(b)(9).

(b) For purposes of applying the distribution rules in section 401(a)(9), section 403(b) contracts will be treated as individual retirement annuities described in section 408(b) and individual retirement accounts described in section 408(a) (IRAs). Consequently, except as otherwise provided in paragraph (c), the distribution rules in section 401(a)(9) will be applied to section 403(b) contracts in accordance with the provisions in § 1.408–8.

(c)(1) The required beginning date for purposes of section 403(b)(9) is April 1, of the calendar year following the later of the calendar year in which the employee attains 70½ or the calendar year in which the employee retires from employment with the employer maintaining the plan. The concept of 5-percent owner has no application in the case of employees of employers described in section 403(b)(1)(A).

(2) The rule in A–5 of § 1.408–8 does not apply to section 403(b) contracts. Thus, the surviving spouse of an employee is not permitted to treat a section 403(b) contract of which the spouse is the sole beneficiary as the spouse's own section 403(b) contract.

Q–2. To what benefits under section 403(b) contracts, do the distribution rules provided in section 401(a)(9) apply?

A–2. (a) The distribution rules provided in section 401(a)(9) apply to all benefits under section 403(b) contracts accruing after December 31, 1986 (post-'86 account balance). The distribution rules provided in section 401(a)(9) do not apply to the balance of the account balance under the section 403(b) contract valued as of December 31, 1986, exclusive of subsequent earnings (pre-'87 account balance). Consequently, the post-'86 account balance includes earnings after December 31, 1986 on contributions made before January 1, 1987, in addition to the contributions made after December 31, 1986 and earnings thereon. The issuer or custodian of the section 403(b) contract must keep records that enable it to identify the pre-'87 account balance and subsequent changes as set forth in paragraph (b) of this A–2 and provide such information upon request to the relevant employee or beneficiaries with respect to the contract. If the issuer does not keep such records, the entire account balance will be treated as subject to section 401(a)(9).

(b) In applying the distribution rules in section 401(a)(9), only the post-'86 account balance is used to calculate the required minimum distribution required for a calendar year. The amount of any distribution required to satisfy the required minimum distribution requirement for a calendar year will be treated as being paid from the post-'86 account balance. Any amount distributed in a calendar year in excess of the required minimum distribution requirement for a calendar year will be treated as paid from the pre-'87 account balance. The pre-'87 account balance for the next calendar year will be permanently reduced by the deemed distributions from the account.

(c) The pre-'86 account balance and the post-'87 account balance have no relevance for purposes of determining the amount includible in income under section 72.

Q–3. Must the value of the account balance under a section 403(b) contract as of December 31, 1986 be distributed in accordance with the minimum distribution incidental benefit requirement?

A–3. Distributions of the entire account balance of a section 403(b) contract, including the value of the account balance under the contract or account as of December 31, 1986, must satisfy the minimum distribution incidental benefit requirement. However, distributions attributable to the value of the account balance under the contract or account as of December 31, 1986 is treated as satisfying the minimum distribution incidental benefit requirement if such distributions satisfy the rules in effect as of July 27, 1987, interpreting 1.401–1(b)(1)(i).

Q–4. Is the required minimum distribution from one section 403(b) contract of an employee permitted to be distributed from another section 403(b) contract in order to satisfy section 401(a)(9)?

A–4. Yes. The required minimum distribution must be separately determined for each section 403(b) contract of an employee. However, such amounts may then be totaled and the total distribution taken from any one or more of the individual section 403(b) contracts. However, under this rule, only amounts in section 403(b) contracts that an individual holds as an employee may be aggregated. Amounts in section 403(b) contracts that an individual holds as a beneficiary of the same decedent may be aggregated, but such amounts may not be aggregated with amounts held in section 403(b) contracts that the individual holds as the employee or as the beneficiary of another decedent. Distributions from section 403(b) contracts or accounts will not satisfy the distribution requirements from IRAs, nor will distributions from IRAs satisfy the distribution requirements from section 403(b) contracts or accounts.

Par. 5. Section § 1.408–8 is added to read as follows:

§ 1.408–8 Distribution requirements for individual retirement plans.

The following questions and answers relate to the distribution rules for IRAs provided in sections 408(a)(6) and 408(b)(3).

Q–1. Are individual retirement plans (IRAs) subject to the distribution rules provided in section 401(a)(9) and §§ 1.401(a)(9)–1 through 1.401(a)(9)–8 for qualified plans?

A–1. (a) Yes. Except as otherwise provided in this section, IRAs are subject to the required minimum distribution rules provided in section 401(a)(9) and §§ 1.401(a)(9)–1 through 1.401(a)(9)–8 for qualified plans. For example, whether the five year rule or the life expectancy rule applies to distribution after death occurring before the IRA owner's required beginning date will be determined in accordance with § 1.401(a)(9)–3, the rules of § 1.401(a)(9)–4 apply for purposes of determining an IRA owner's designated beneficiary, the amount of the required minimum distribution required for each calendar year from an individual account will be determined in accordance with § 1.401(a)(9)–5, and whether annuity payments from an individual retirement annuity satisfy section 401(a)(9) will be determined under § 1.401(a)(9)–6. For this purpose the term IRA means an individual retirement account or annuity described in section 408(a) or (b).

(b) For purposes of applying the required minimum distribution rules in §§ 1.401(a)(9)–1 through 1.401(a)(9)–8 for qualified plans, the IRA trustee, custodian, or issuer is treated as the plan administrator, and the IRA owner is substituted for the employee

Q–2. Are employer contributions under a simplified employee pension (defined in section 408(k)) or a SIMPLE IRA (defined in section 408(p)) treated as contributions to an IRA?

A–2. Yes. IRAs that receive employer contributions under a simplified employee pension (defined in section 408(k)) or a SIMPLE plan (defined in section 408(p)) are treated as IRAs for purposes of section 401(a) and are, therefore, subject to the distribution rules in this section.

Q–3. In the case of distributions from an IRA, what does the term *required beginning date* mean?

A–3. In the case of distributions from an IRA, the term *required beginning date* means April 1 of the calendar year following the calendar year in which the individual attains age 70½.

Q–4. When is the amount of a distribution from a IRA not eligible for rollover because the amount is a required minimum distribution?

A–4. The amount of a distribution that is a required minimum distribution from an IRA and thus not eligible for rollover is determined in the same manner as provided in Q&A–7 of § 1.402(c)–2 for distributions from qualified plans. For example, if a required minimum distribution is required for a calendar year, the amounts distributed during a calendar year from an IRA are treated as required minimum distributions under section 401(a)(9) to the extent that the total required minimum distribution for the year under section 401(a)(9) for that IRA has not been satisfied. This requirement may be satisfied by a distribution from the IRA or, as permitted under A–8 of this section, from another IRA.

Q–5. May an individual's surviving spouse elect to treat such spouse's entire interest as a beneficiary in an individual's IRA upon the death of the individual (or the remaining part of such interest if distribution to the spouse has commenced) as the spouse's own account?

A–5. (a) The surviving spouse of an individual may elect in the manner described in paragraph (b) of this A–5 to treat the spouse's entire interest as a beneficiary in an individual's IRA (or the remaining part of such interest if distribution thereof has commenced to the spouse) as the spouse's own IRA. This election is permitted to be made at any time after the distribution of the required minimum amount for the account for the calendar year containing the individual's date of death. In order to make this election, the spouse must be the sole beneficiary of the IRA and have an unlimited right to withdrawal amounts from the IRA. This requirement is not satisfied if a trust is named as beneficiary of the IRA even if the spouse is the sole beneficiary of the trust. If the surviving spouse makes such an election, the surviving spouse's interest in the IRA would then be subject to the distribution requirements of section 401(a)(9)(A) applicable to the spouse as the IRA owner rather than those of section 401(a)(9)(B) applicable to the surviving spouse as the decedent IRA owner's beneficiary. Thus, the required minimum distribution for the year of the election and each subsequent year would be determined under section 401(a)(9)(A) with the spouse as IRA owner and not section 401(a)(9)(B).

(b) The election described in paragraph (a) of this A–5 is made by the surviving spouse redesignating the account as the account in the name of the surviving spouse as IRA owner rather than as beneficiary. Alternatively, a surviving spouse eligible to make the election is deemed to have made the election if, at any time, either of the following occurs:

(1) Any required amounts in the account (including any amounts that have been rolled over or transferred, in accordance with the requirements of section 408(d)(3)(A)(i), into an individual retirement account or individual retirement annuity for the benefit of such surviving spouse) have not been distributed within the appropriate time period applicable to the surviving spouse as beneficiary under section 401(a)(9)(B); or

(2) Any additional amounts are contributed to the account (or to the account or annuity to which the surviving spouse has rolled such amounts over, as described in (1) above) which are subject, or deemed to be subject, to the distribution requirements of section 401(a)(9)(A).

(c) The result of an election described in paragraph (b) of this A–5 is that the surviving spouse shall then be considered the IRA owner for whose benefit the trust is maintained for all purposes under the Code (*e.g.* section 72(t)).

Q–6. How is the benefit determined for purposes of calculating the required minimum distribution from an IRA?

A–6. For purposes of determining the required minimum distribution required to be made from an IRA in any calendar year, the account balance of the IRA as of the December 31 of the calendar year immediately preceding the calendar year for which distributions are being made will be substituted in A–3 of § 1.401(a)(9)–5 for the account of the employee. The account balance as of December 31 of such calendar year is the value of the IRA upon close of business on such December 31. However, for purposes of determining the required minimum distribution for the second distribution calendar year for an individual, the account balance as of December 31 of such calendar year must be reduced by any distribution (as described in A–3(c)(2) of § 1.401(a)(9)–5) made to satisfy the required minimum distribution requirements for the individual's first distribution calendar year after such date.

Q–7. What rules apply in the case of a rollover to an IRA of an amount distributed by a qualified plan or another IRA?

A–7. If the surviving spouse of an employee rolls over a distribution from a qualified plan, such surviving spouse may elect to treat the IRA as the spouse's own IRA in accordance with the provisions in A–5 of this section. In the event of any other rollover to an IRA of an amount distributed by a qualified plan or another IRA, the rules in § 1.401(a)(9)–3 will apply for purposes of determining the account balance for the receiving IRA and the required minimum distribution from the receiving IRA. However, because the value of the account balance is determined as of December 31 of the year preceding the year for which the required minimum distribution is being determined and not as of a valuation date in the preceding year, the account balance of the receiving IRA need not be adjusted for the amount received as provided in A–2 of § 1.401(a)(9)–7 in order to determine the required minimum distribution for the calendar year following the calendar year in which the amount rolled over is received, unless the amount received is deemed to have been received in the immediately preceding year, pursuant to A–2 of § 1.401(a)(9)–7. In that case, for purposes of determining the required minimum distribution for the calendar year in which such amount is actually received, the account balance of the receiving IRA as of December 31 of the preceding year must be adjusted by the amount received in accordance with A–2 of § 1.401(a)(9)–7.

Q–8. What rules apply in the case of a transfer from one IRA to another?

A–8. In the case of a transfer from one IRA to another IRA, the rules in A–3 or A–4 of § 1.401(a)(9)–7 will apply for purposes of determining the account balance of, and the required minimum distribution from, the IRAs involved. Thus, the transferor IRA must distribute in the year of the transfer any amount required determined without regard to the transfer. For purposes of determining the account balance of the transferee IRA and the transferor IRA, the account balance need not be adjusted for the amount transferred as provided in A–4(a) of § 1.401(a)(9)–7 in order to calculate the required minimum distribution for the calendar year following the calendar year of the transfer, because the account balance is determined as of December 31 of the calendar year immediately preceding the calendar year for which the required minimum distribution is being determined.

Q–9. Is the required minimum distribution from one IRA of an owner permitted to distributed from another IRA in order to satisfy section 401(a)(9).

A–9. Yes. The required minimum distribution must be calculated separately for each IRA. However, such amounts may then be totaled and the total distribution taken from any one or more of the individual IRAs. However, under this rule, only amounts in IRAs that an individual holds as the IRA owner may be aggregated. Amounts in IRAs that an individual holds as a beneficiary of the same decedent may be aggregated, but such amounts may not be aggregated with amounts held in IRAs that the individual holds as the IRA owner or as the beneficiary of another decedent. Distributions from section 403(b) contracts or accounts will not satisfy the distribution requirements from IRAs, nor will distributions from IRAs satisfy the distribution requirements from section 403(b) contracts or accounts. Distributions from Roth IRAs (defined in section 408A) will not satisfy the distribution requirements applicable to IRAs or section 403(b) accounts or contracts and distributions from IRAs or section 403(b) contracts or accounts will not

satisfy the distribution requirements from Roth IRAs.

Q–10. Is the trustee of an IRA required to report the amount that is required to be distributed from that IRA?

A–10. Yes. The trustee of an IRA is required to report to the Internal Revenue Service and to the IRA owner the amount required to be distributed from the IRA for each calendar year at the time and in the manner prescribed in the instructions to the applicable Federal tax forms, as well as any additional information as required by such forms or such instructions.

PART 54—PENSION EXCISE TAXES

Par. 6. The authority citation for part 54 is amended by adding the following citation to read as follows:

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

§ 54.4974–2 is also issued under 26 U.S.C. 4974.

Par. 7. Section after § 54.4974–2 is added to read as follows:

§ 54.4974–2 Excise tax on accumulations in qualified retirement plans.

Q–1. Is any tax imposed on a payee under any qualified retirement plan or any eligible deferred compensation plan (as defined in section 457(b)) to whom an amount is required to be distributed for a taxable year if the amount distributed during the taxable year is less than the required minimum distribution?

A–1. Yes. If the amount distributed to a payee under any qualified retirement plan or any eligible deferred compensation plan (as defined in section 457(b)) for a calendar year is less than the required minimum distribution for such year, an excise tax is imposed on such payee under section 4974 for the taxable year beginning with or within the calendar year during which the amount is required to be distributed. The tax is equal to 50 percent of the amount by which such required minimum distribution exceeds the actual amount distributed during the calendar year. Section 4974 provides that this tax shall be paid by the payee. For purposes of section 4974, the term *required minimum distribution* means the required minimum distribution amount required to be distributed pursuant to section 401(a)(9), 403(b)(10), 408(a)(6), 408(b)(3), or 457(d)(2), as the case may be, and the regulations thereunder. Except as otherwise provided in Q&A–6, the required minimum distribution for a calendar year is the required minimum distribution amount required to be distributed during the calendar year. Q&A–6 provides a special rule for amounts required to be distributed by an employee's (or individual's) required beginning date.

Q–2. For purposes of section 4974, what is a qualified retirement plan?

A–2. For purposes of section 4974, each of the following is a qualified retirement plan—

(a) A plan described in section 401(a) which includes a trust exempt from tax under section 501(a);

(b) An annuity plan described in section 403(a);

(c) An annuity contract, custodial account, or retirement income account described in section 403(b);

(d) An individual retirement account described in section 408(a);

(e) An individual retirement annuity described in section 408(b); or

(f) Any other plan, contract, account, or annuity that, at any time, has been treated as a plan, account, or annuity described in (a) through (e) of this A–2, whether or not such plan, contract, account, or annuity currently satisfies the applicable requirements for such treatment.

Q–3. If a payee's interest under a qualified retirement plan is in the form of an individual account, how is the required minimum distribution for a given calendar year determined for purposes of section 4974?

A–3. (a) *General rule.* If a payee's interest under a qualified retirement plan is in the form of an individual account and distribution of such account is not being made under an annuity contract purchased in accordance with A–4 of § 1.401(a)(9)–6, the amount of the required minimum distribution for any calendar year for purposes of section 4974 is the required minimum distribution amount required to be distributed for such calendar year in order to satisfy the required minimum distribution requirements in § 1.401(a)(9)–5 as provided in the following (whichever is applicable)—

(1) Section 401(a)(9) and §§ 1.401(a)(9)–1 through 1.401(a)(9)–8 in the case of a plan described in section 401(a) which includes a trust exempt under section 501(a) or an annuity plan described in section 403(a));

(2) Section 403(b)(10) and § 1.403(b)–2 (in the case of an annuity contract, custodial account, or retirement income account described in section 403(b)); or

(3) Section 408(a)(6) or (b)(3) and § 1.408–8 (in the case of an individual retirement account or annuity described in section 408(a) or (b)).

(b) *Default provisions.* Unless otherwise provided under the qualified retirement plan (or, if applicable, the governing instrument of the qualified retirement plan), the default provisions in A–4(a) of § 1.401(a)(9)–3 apply in determining the required minimum distribution for purposes of section 4974.

(c) *Five year rule.* If the five-year rule in section 401(a)(9)(B)(ii) applies to the distribution to a payee, no amount is required to be distributed for any calendar year to satisfy the applicable enumerated section in paragraph (a) of this A–3 until the calendar year which contains the date five years after the date of the employee's death. For the calendar year which contains the date five years after the employee's death, the required minimum distribution amount required to be distributed to satisfy the applicable enumerated section is the payee's entire remaining interest in the qualified retirement plan.

Q–4. If a payee's interest in a qualified retirement plan is being distributed in the form of an annuity, how is the amount of the required minimum distribution determined for purposes of section 4974?

A–4. If a payee's interest in a qualified retirement plan is being distributed in the form of an annuity (either directly from the plan, in the case of a defined benefit plan, or under an annuity contract purchased from an insurance company), the amount of the required minimum distribution for purposes of section 4974 will be determined as follows:

(a) *Permissible annuity distribution option.* A permissible annuity distribution option is an annuity contract (or, in the case of annuity distributions from a defined benefit plan, a distribution option) which specifically provides for distributions which, if made as provided, would for every calendar year equal or exceed the required minimum distribution amount required to be distributed to satisfy the applicable section enumerated in paragraph (a) of A–2 of this section for every calendar year. If the annuity contract (or, in the case of annuity distributions from a defined benefit plan, a distribution option) under which distributions to the payee are being made is a permissible annuity distribution option, the required minimum distribution for a given calendar year will equal the amount which the annuity contract (or distribution option) provides is to be distributed for that calendar year.

(b) *Impermissible annuity distribution option.* An impermissible annuity distribution option is an annuity contract (or, in the case of annuity distributions from a defined benefit plan, a distribution option) under which distributions to the payee are being made that specifically provides for

distributions which, if made as provided, would for any calendar year be less than the required minimum distribution amount required to be distributed to satisfy the applicable section enumerated in paragraph (a) of A–2 of this section. If the annuity contract (or, in the case of annuity distributions from a defined benefit plan, the distribution option) under which distributions to the payee are being made is an impermissible annuity distribution option, the required minimum distribution for each calendar year will be determined as follows:

(1) If the qualified retirement plan under which distributions are being made is a defined benefit plan, the required minimum distribution amount required to be distributed each year will be the amount which would have been distributed under the plan if the distribution option under which distributions to the payee were being made was the following permissible annuity distribution option:

(i) In the case of distributions commencing before the death of the employee, if there is a designated beneficiary under the impermissible annuity distribution option for purposes of section 401(a)(9), the permissible annuity distribution option is the joint and survivor annuity option under the plan for the lives of the employee and the designated beneficiary which provides for the greatest level amount payable to the employee determined on an annual basis. If the plan does not provide such an option or there is no designated beneficiary under the impermissible distribution option for purposes of section 401(a)(9), the permissible annuity distribution option is the life annuity option under the plan payable for the life of the employee in level amounts with no survivor benefit.

(ii) In the case of distributions commencing after the death of the employee, if there is a designated beneficiary under the impermissible annuity distribution option for purposes of section 401(a)(9), the permissible annuity distribution option is the life annuity option under the plan payable for the life of the designated beneficiary in level amounts. If there is no designated beneficiary, the five-year rule in section 401(a)(9)(B)(ii) applies. See paragraph (b)(3) of this A–4. The determination of whether or not there is a designated beneficiary and the determination of which designated beneficiary's life is to be used in the case of multiple beneficiaries will be made in accordance with § 1.401(a)(9)–4 and A–7 of § 1.401(a)(9)–5. If the defined benefit plan does not provide for distribution in the form of the applicable permissible distribution option, the required minimum distribution for each calendar year will be an amount as determined by the Commissioner.

(2) If the qualified retirement plan under which distributions are being made is a defined contribution plan and the impermissible annuity distribution option is an annuity contract purchased from an insurance company, the required minimum distribution amount required to be distributed each year will be the amount which would have been distributed in the form of an annuity contract under the permissible annuity distribution option under the plan determined in accordance with paragraph (b)(1) of this A–4 for defined benefit plans. If the defined contribution plan does not provide the applicable permissible annuity distribution option, the required minimum distribution for each calendar year will be the amount which would have been distributed under an annuity described below in paragraph (b)(2)(i) or (ii) of this A–4 purchased with the employee's or individual's account used to purchase the annuity contract which is the impermissible annuity distribution option.

(i) In the case of distributions commencing before the death of the employee, if there is a designated beneficiary under the impermissible annuity distribution option for purposes of section 401(a)(9), the annuity is a joint and survivor annuity for the lives of the employee and the designated beneficiary which provides level annual payments and which would have been a permissible annuity distribution option. However, the amount of the periodic payment which would have been payable to the survivor will be the applicable percentage under the table in A–2(b) of § 1.401(a)(9)–6 of the amount of the periodic payment which would have been payable to the employee or individual. If there is no designated beneficiary under the impermissible distribution option for purposes of section 401(a)(9), the annuity is a life annuity for the life of the employee with no survivor benefit which provides level annual payments and which would have been a permissible annuity distribution option.

(ii) In the case of a distribution commencing after the death of the employee, if there is a designated beneficiary under the impermissible annuity distribution option for purposes of section 401(a)(9), the annuity option is a life annuity for the life of the designated beneficiary which provides level annual payments and which would have been permissible annuity distribution option. If there is no designated beneficiary, the five year rule in section 401(a)(9)(B)(ii) applies. See paragraph (b)(3) of this A–4. The amount of the payments under the annuity contract will be determined using the interest rate and actuarial tables prescribed under section 7520 determined using the date determined under A–3 of 1.401(a)(9)–3 when distributions are required to commence and using the age of the beneficiary as of the beneficiary's birthday in the calendar year that contains that date. The determination of whether or not there is a designated beneficiary and the determination of which designated beneficiary's life is to be used in the case of multiple beneficiaries will be made in accordance with § 1.401(a)(9)–3 and A–7 of § 1.401(a)(9)–5.

(3) If the five-year rule in section 401(a)(9)(B)(ii) applies to the distribution to the payee under the contract (or distribution option), no amount is required to be distributed to satisfy the applicable enumerated section in paragraph (a) of this A–4 until the calendar year which contains the date five years after the date of the employee's death. For the calendar year which contains the date five years after the employee's death, the required minimum distribution amount required to be distributed to satisfy the applicable enumerated section is the payee's entire remaining interest in the annuity contract (or under the plan in the case of distributions from a defined benefit plan).

Q–5. If there is any remaining benefit with respect to an employee (or IRA owner) after any calendar year in which the entire remaining benefit is required to be distributed under section, what is the amount of the required minimum distribution for each calendar year subsequent to such calendar year?

A–5. If there is any remaining benefit with respect to an employee (or IRA owner) after the calendar year in which the entire remaining benefit is required to be distributed, the required minimum distribution for each calendar year subsequent to such calendar year is the entire remaining benefit.

Q–6. If a payee has an interest under an eligible deferred compensation plan (as defined in section 457(b)), how is the required minimum distribution for a given taxable year of the payee determined for purposes of section 4974?

A–6. If a payee has an interest under an eligible deferred compensation plan (as defined in section 457(b)), the required minimum distribution for a given taxable year of the payee

determined for purposes of section 4974 is determined under section 457(d).

Q–7. With respect to which calendar year is the excise tax under section 4974 imposed in the case in which the amount not distributed is an amount required to be distributed by April 1 of a calendar year (by the employee's or individual's required beginning date)?

A–7. In the case in which the amount not paid is an amount required to be paid by April 1 of a calendar year, such amount is a required minimum distribution for the previous calendar year, *i.e.,* for the employee's or the individual's first distribution calendar year. However, the excise tax under section 4974 is imposed for the calendar year containing the last day by which the amount is required to be distributed, *i.e.,* the calendar year containing the employee's or individual's required beginning date, even though the preceding calendar year is the calendar year for which the amount is required to be distributed. Pursuant to A–2 of § 1.401(a)(9)–5, amounts distributed in the employee's or individual's first distribution calendar year will reduce the amount required to be distributed in the next calendar year by the employee's or individual's required beginning date. There is also a required minimum distribution for the calendar year which contains the employee's required beginning date. Such distribution is also required to be made during the calendar year which contains the employee's required beginning date.

Q–8. Are there any circumstances when the excise tax under section 4974 for a taxable year may be waived?

A–8. (a) *Reasonable cause.* The tax under section 4974(a) may be waived if the payee described in section 4974(a) establishes to the satisfaction of the Commissioner the following—

(1) The shortfall described in section 4974(a) in the amount distributed in any taxable year was due to reasonable error; and

(2) Reasonable steps are being taken to remedy the shortfall.

(b) *Automatic Waiver.* The tax under section 4974 will be automatically waived, unless the Commissioner determines otherwise, if—

(1) The payee described in section 4974(a) is an individual who is the sole beneficiary and whose required minimum distribution amount for a calendar year is determined under the life expectancy rule described in § 1.401(a)(9)–3 A–3 in the case of an employee's death before the employee's required beginning date; and

(2) The employee's or individual's entire benefit to which that beneficiary is entitled is distributed by the end of the fifth calendar year following the calendar year that contains the employee's date of death.

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 601

[REG–129608–00]

RIN 1545–AY68

Notice to Interested Parties

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to the notice to interested parties. Before the IRS can issue an advance determination regarding the qualification of a retirement plan, a plan sponsor must provide evidence that it has notified all persons who qualify as interested parties that an application for an advance determination will be filed. These proposed regulations set forth standards by which a plan sponsor may satisfy the notice to interested parties requirement. The proposed regulations affect retirement plan sponsors, plan participants and other interested parties with respect to an application for a determination letter, and certain representatives of interested parties.

DATES: Written or electronic comments and requests for a public hearing must be received by April 17, 2001.

ADDRESSES: Send submissions to: CC:M&SP:RU (REG–129608–00), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:M&SP:RU (REG–129608–00), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the ''Tax Regs'' option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at *http://www.irs.gov/tax_regs/reglist.html.*

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, contact Pamela R. Kinard, (202) 622–6060; concerning the submission of comments, contact LaNita VanDyke, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR parts 1 and 601) under section 7476 of the Internal Revenue Code of 1986 (Code).

Section 7476(b)(2) provides that, with respect to a pleading filed by a petitioner for a request for a determination on the qualified status of a retirement plan under section 7476(a), the Tax Court may find the pleading to be premature unless the petitioner establishes to the satisfaction of the court that he has complied with the requirements prescribed by the regulations of the Secretary regarding the notice to interested parties.

On May 21, 1976, Final Income Tax Regulations (TD 7421) under section 7476 were published in the **Federal Register** (41 FR 20874). The final regulations provide guidance on the nature and method of giving notice to interested parties. Existing § 1.7476–1(a)(1) provides that in order to receive a determination on the qualified status of a retirement plan, the applicant must provide evidence that individuals who qualified as interested parties received notification of the determination letter application. In general, interested parties are defined in § 1.7476–1(b)(1) as all present employees of the employer eligible to participate in the plan, and all other present employees whose principal place of employment is the same as the principal place of employment of the employees eligible to participate. For plan terminations, § 1.7476–1(b)(5) defines interested parties as all present employees with accrued benefits, all former employees with vested benefits, and all beneficiaries of deceased former employees currently receiving benefits under the plan.

Existing § 1.7476–2(b) provides that the notice must be given in writing, must contain the information in § 601.201(o)(3) (Statement of Procedural Rules) and must be given in the manner prescribed in § 1.7476–2(c). For present employees, § 1.7476–2(c)(1) provides that the notice must be given in person, by mailing, by posting, or by printing it in a publication of the employer or an employee organization that is reasonably available to employees. For interested parties who are in a unit of employees covered by a collective-bargaining agreement, the notice must also be given in person or by mail to the collective-bargaining representative of the interested parties. For former

employees and beneficiaries who qualify as interested parties, § 1.7476–2(c)(2)(i) provides that notice shall be given in person or by mail to the last known address of the interested party.

On February 8, 2000, the IRS and Treasury published Final Income Tax Regulations (TD 8873) in the **Federal Register** (65 FR 6001) that provide safe harbor methods for plan sponsors and administrators using electronic media to transmit notices and consents required under sections 402(f), 411(a)(11), or 3405(e)(10)(B). Notice 99–1 (1999–2 I.R.B. 8) and Announcement 99–6 (1999–4 I.R.B. 24) also provide guidance on the use of electronic media by retirement plans.

In order to continue to advance the goal of permitting plan sponsors to use electronic media in administering their retirement plans, this amendment to the regulations eliminates the writing requirement for the notice to interested parties. Instead, the proposed regulations set forth new standards for satisfying the notice requirement that would ensure that interested parties will receive timely and adequate notice.

Explanation of Provisions

This notice of proposed rulemaking would amend §§ 1.7476–2 and 601.201 regarding the nature and method of giving notices to interested parties. The proposed regulations do not change the information that the notice must contain or the time period in which the notice must be given. These regulations continue to provide that the notice to interested parties must contain the information and be given within the time period prescribed in § 601.201(o)(3) (Statement of Procedural Rules). The proposed regulations would set forth new standards for providing the notice to interested parties. These new standards permit greater flexibility in the manner in which the notice may be provided.

The proposed regulations provide that, in the case of a present employee, former employee, or beneficiary who is an interested party, the notice may be provided by any method that reasonably ensures that all interested parties will receive the notice. The method used must be reasonably calculated to provide timely and adequate notice to all interested parties. In addition, the proposed regulations provide that if an interested party who is a present employee is in a unit of employees covered by a collective-bargaining agreement between employee representatives and one or more employers, notice shall also be given to the collective-bargaining representative of such interested party by any method that reasonably ensures that the collective-bargaining representative will receive the notice. The proposed regulations also provide if the notice to interested parties is delivered using an electronic medium under a system that satisfies the requirements of Q&A–5 of § 1.402(f)–1, the notice will be deemed to be provided in a manner that satisfies the notice to interested parties requirement.

The proposed regulations provide that whether the notice to interested parties is given in a manner that satisfies the requirements under these regulations will be determined on the basis of all the facts and circumstances. These regulations further provide that since the facts and circumstances will differ depending on the interested party, it is possible that more than one method of delivery (including nonelectronic writing) must be used in order to ensure timely and adequate notice to all interested parties.

The proposed regulations also revise § 601.201 (Statement of Procedural Rules) to conform to the changes in § 1.7476–2.

Proposed Effective Date

These regulations are proposed to be effective with respect to applications made on or after the date they are published in the **Federal Register** as final regulations. Plan sponsors may rely on these proposed regulations for guidance pending the issuance of final regulations. If, and to the extent, future guidance is more restrictive than the guidance in these proposed regulations, the future guidance will be applied without retroactive effect.

Special Analyses

It has been determined that this notice of proposed rulemaking 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. Pursuant to section 7805(f) of the Code, these proposed regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury specifically request comments on the clarity of the proposed rule and how it may be made easier to understand. All comments will be available for public inspection and copying.

A public hearing may be scheduled if requested in writing by a person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these regulations is Pamela R. Kinard of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), IRS. However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

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

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

Par. 2. Section 1.7476–2 is amended as follows:

1. Paragraphs (b) and (c) are revised.

2. Paragraph (d) is redesignated as paragraph (e) and a new paragraph (d) is added.

3. Paragraph (e)(1) is revised.

The revisions and additions read as follows:

§ 1.7476–2 Notice to interested parties.

* * * * *

(b) *Nature of notice.* The notice required by this section shall —

(1) Contain the information and be given within the time period prescribed in § 601.201(o)(3) of this chapter (Statement of Procedural Rules); and,

(2) Be given in a manner prescribed in paragraph (c) of this section.

(c) *Method of giving notice.* (1) In the case of a present employee, former employee, or beneficiary who is an interested party, the notice may be provided by any method that reasonably ensures that all interested parties will

receive timely and adequate notice. If an interested party who is a present employee is in a unit of employees covered by a collective-bargaining agreement between employee representatives and one or more employers, notice shall also be given to the collective-bargaining representative of such interested party by any method that satisfies this paragraph. Whether the notice is provided in a manner that satisfies the requirements of this paragraph will be determined on the basis of all the facts and circumstances. Because the facts and circumstances will differ depending on the interested party, it is possible that more than one method of delivery must be used in order to ensure timely and adequate notice to all interested parties.

(2) If the notice to interested parties is delivered using an electronic medium under a system that satisfies the requirements of Q&A–5 of § 1.402(f)–1, the notice will be deemed to be provided in a manner that satisfies the requirements of paragraph (c)(1) of this section.

(d) *Examples.* The principles of this section are illustrated by the following examples:

Example 1. (i) Employer A is amending Plan C and applying for a determination letter. Plan C is not maintained pursuant to one or more collective-bargaining agreements and is not being terminated. As part of the determination letter application process, Employer A provides the notice required under this section to interested parties. For present employees, Employer A provides the notice by posting the notice at those locations within the principal places of employment of the interested parties which are customarily used for employer notices to employees with regard to labor-management relations matters.

(ii) In this *Example 1,* Employer A satisfies the notice to interested parties requirement described in this section.

Example 2. (i) Employer B is amending Plan D and applying for a determination letter. As part of the determination letter application process, Employer B provides the notice required under this section to interested parties.

(ii) Employer B has multiple worksites. Employer B's employees located at worksites 1 through 4 have access to computers at their workplace. However, Employer B's employees located at worksite 5 do not have access to computers.

(iii) For present employees with access to computers (worksites 1 through 4), Employer B provides the notice by posting the notice on Employer B's web site (Internet or intranet). Employer B customarily posts employer notices to employees at worksites 1 through 4 with regard to labor-management relations matters on its web site. For present employees without access to computers (worksite 5), Employer B provides the notice by posting the notice at worksite 5 in a location that is customarily used for employer notices to employees with regard to labor-management relations matters.

(iv) Employer B also sends the notice by e-mail to each collective-bargaining representative of interested parties who are present employees of Employer B covered by a collective-bargaining agreement between employee representatives and Employer B, using the e-mail address previously provided to Employer B by such collective-bargaining representative.

(v) In this *Example 2,* Employer B satisfies the notice to interested parties requirement described in this section.

Example 3. (i) Employer C is terminating Plan E and applying for a determination letter as to whether the plan termination affects the continuing qualification of Plan E. As part of the determination letter application process, Employer C provides the notice required under this section to interested parties.

(ii) All of Employer C's employees have access to computers. Each employee has an e-mail address where he or she can receive messages from Employer C. Employer C has set up kiosks for employees' use. The kiosks are located within the principal places of employment of the employees and are customarily used for employer notices to employees with regard to labor-management relations matters.

(iii) For present employees, Employer C provides the notice by sending the notice by e-mail.

(iv) Employer C also sends the notice by e-mail to each collective-bargaining representative of interested parties who are present employees of Employer C covered by a collective-bargaining agreement between employee representatives and Employer C, using the e-mail address previously provided to Employer C by such collective-bargaining representative.

(v) In addition, Employer C sends the notice by e-mail to each interested party who is a former employee or beneficiary, using the e-mail address previously provided to Employer C by such interested party. For any former employee or beneficiary who did not provide an e-mail address, Employer C sends the notice by regular mail to the last known address of such former employee or beneficiary.

(vi) In this *Example 3,* Employer C satisfies the notice to interested parties requirement described in this section.

(e) *Effective date.* (1) The provisions of this section shall apply to applications referred to in paragraph (a) of § 1.7476–1 made on or after the date the regulations are published in the **Federal Register** as final regulations.

PART 601—STATEMENT OF PROCEDURAL RULES

Paragraph 1. The authority citation for part 601 continues to read, in part, as follows:

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

Par. 2. Section 601.201 is amended as follows:

1. In paragraph (o)(3)(xv), the first sentence is replaced by two new sentences.

2. In paragraph (o)(3)(xvi), introductory text is revised.

The revisions read as follows:

§ 601.201 Rulings and determination letters.

* * * * *

(o) * * * (3) * * *

(xv) When the notice referred to in paragraph (o)(3)(xiv) of this section is given in the manner set forth in § 1.7476–2(c), the following time limitations for providing the notice apply. When the notice is given other than by mailing, it should be given not less than 7 days nor more than 21 days prior to the date that the application for a determination is made. * * *

(xvi) The notice referred to in paragraph (o)(3)(xiv) of this section shall be given in the manner prescribed in § 1.7476–2 and shall contain the following information:

* * * * *

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

[FR Doc. 01–131 Filed 1–16–01; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 31

[REG–110374–00]

RIN 1545–AY21

Interest-free adjustments with respect to underpayments of employment taxes

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains a proposed amendment to the regulations relating to interest-free adjustments with respect to underpayments of employment taxes. The proposed amendment reflects changes to the law made by the Taxpayer Relief Act of 1997. The proposed amendment affects employers that are the subject of IRS examinations involving determinations by the IRS that workers are employees for purposes of subtitle C or that the employers are not entitled to relief from employment taxes under section 530 of the Revenue Act of 1978 (section 530).

DATES: Written and electronic comments and requests for a public hearing must be received by April 17, 2001.

ADDRESSES: Send submissions to: CC:M&SP:RU (REG–110374–00), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: Unit CC:M&SP:RU (REG–110374–00), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the ''Tax Regs'' option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at *http://www.irs.gov/taxregs/reglist.html.*

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Lynne Camillo of the Office of Associate Chief Counsel (Tax Exempt and Government Entities), (202) 622–6040.

SUPPLEMENTARY INFORMATION:

Background

This document contains a proposed amendment to the Employment Tax Regulations (26 CFR part 31) under section 6205. Section 6205 allows employers that have paid less than the correct amount of employment taxes to make adjustments without interest, provided the error is reported and the taxes are paid by the last day for filing the return for the quarter in which the error was ascertained. However, no interest-free adjustments are permitted pursuant to section 6205 after receipt of notice and demand for payment thereof based upon an assessment. § 31.6205–1(a)(6).

The Taxpayer Relief Act of 1997, Public Law 105–34 (111 Stat. 788), effective August 5, 1997, created new section 7436 of the Internal Revenue Code (Code), which provides the Tax Court with jurisdiction to review determinations by the IRS that workers are employees for purposes of subtitle C, or that the employer is not entitled to relief from employment taxes under section 530. Section 7436 resulted in a change in the way employment tax examinations involving worker classification and section 530 issues are conducted insofar as notice and demand for payment of an employment tax underpayment based upon an assessment cannot be made until after the taxpayer under examination receives notice of the IRS's determination and has been given an opportunity to file a petition in the Tax Court contesting such determination.

Explanation of Provisions

This document contains a proposed amendment to the regulations under section 6205. The proposed amendment clarifies the period for adjustments of employment tax underpayments without interest under section 6205 following the expansion of Tax Court review to certain employment tax determinations.

As a general rule, under section 6601, all taxpayers who fail to pay the full amount of a tax due under the Code must pay interest at the applicable rate on the unpaid amount from the last date prescribed for payment of the tax until the date the tax is paid. However, section 6205 allows employers that have paid less than the correct amount of certain employment taxes [1] with respect to any payment of wages or compensation to make adjustments to returns without interest pursuant to the regulations. The employment tax regulations under section 6205 generally allow employers to make adjustments to returns without interest until the last day for filing the return for the quarter in which the error was ascertained. An error is ascertained when the employer has sufficient knowledge of the error to be able to correct it. § 31.6205–1(a)(4). Section 31.6205–1(a)(6) provides that no interest-free adjustments can be made after receipt of a statement of notice and demand for payment based upon an assessment.

In Revenue Ruling 75–464 (1975–2 C.B. 474), the IRS further clarified the time for adjustments under section 6205. The ruling clarifies that employers can still make interest-free adjustments where the underpayment is discovered during an audit or examination (i.e., where the employer has not independently ascertained the underpayment). The ruling sets forth situations illustrating when an error is ascertained with respect to returns under audit by the IRS. Under the facts in the revenue ruling, an error is ascertained when the employer signs an ''Agreement to Adjustment and Collection of Additional Tax'', Form 2504, either at the examination level or the appeals level, when the taxpayer pays the full amount due so as to file a refund claim (if paid prior to notice and demand), or at the conclusion of internal IRS appeal rights if no agreement is reached. Under the factual situations in Revenue Ruling 75–464, the employment taxes can be paid free of interest at the time the employer signs Agreement Form 2504 or at the time it pays the tax preparatory to filing a claim to contest the liability in court, after having exhausted all appeal rights within the IRS, provided the payment is made before the taxpayer receives notice and demand for payment.

The Taxpayer Relief Act of 1997, Public Law 105–34 (111 Stat. 788), created new section 7436 of the Code which provides the Tax Court with jurisdiction to review determinations by the IRS that workers are employees for purposes of subtitle C of the Code, or that the organization for which services are performed is not entitled to relief from employment taxes under section 530. Section 7436(a) requires that the determination involve an actual controversy and that it be made as part of an examination. Subsequent to enactment of section 7436 of the Code, the IRS created a standard notice, the ''Notice of Determination Concerning Worker Classification Under Section 7436'' (notice of determination) to serve as the ''determination'' that is a prerequisite to invoking the Tax Court's jurisdiction under section 7436. Notice 98–43 (1998–33 I.R.B. 13).

Section 7436(d)(1) provides that the suspension of the limitations period for assessment in section 6503(a) applies in the same manner as if a notice of deficiency had been issued. Thus, pursuant to section 6503(a), the mailing of the notice of determination by certified or registered mail will suspend the statute of limitations for assessment of taxes attributable to the worker classification and section 530 issues. Generally, the statute of limitations for assessment of taxes attributable to the worker classification and section 530 issues is suspended for the 90-day period during which the taxpayer can begin a suit in Tax Court, plus an additional 60 days thereafter. Moreover, if the taxpayer does file a timely petition in the Tax Court, the statute of limitations for assessment of taxes attributable to the worker classification and section 530 issues is suspended under section 6503(a) during the Tax Court proceedings, and for sixty days after the Tax Court decision becomes final.

Current IRS guidance provides for interest-free adjustments under section 6205 prior to assessment and notice and demand. Because of the prohibition on assessment for cases pending in the Tax Court, this creates a potential for inconsistent application of interest depending upon whether an employer files a claim in the Tax Court or in

[1] Section 6205 applies to underpayments of taxes under the Federal Insurance Contributions Act (FICA), the Railroad Retirement Tax Act (RRTA), and income tax withholding. Section 6205 does not apply to underpayments of taxes under Federal Unemployment Tax Act (FUTA), as such underpayments are not subject to interest under section 6601(i).

another court of Federal jurisdiction. The legislative history of section 7436 shows no intent to create an advantage for taxpayers who choose to litigate their cases in Tax Court as opposed to another court of Federal jurisdiction. H.R. No. 105–148, 105th Cong., 1st Sess., at 639–640 (1997). Taxpayers who choose to petition the Tax Court under section 7436 still have the benefit of all of the inherent advantages of litigating in the Tax Court, including the ability to obtain judicial review without prior payment of the additional tax the IRS has determined to be due.

Judicial and administrative precedents provide that an error is ascertained for purposes of section 6205 (ending the period for interest-free adjustments) when the taxpayer has exhausted all internal appeal rights with the Service. *Eastern Investment Corp.* v. *United States,* 49 F. 3d 651 (10th Cir. 1995); Rev. Rul. 75–464 (1975–2 C.B. 474). In the context of refund litigation, where a taxpayer whose erroneous underpayment of employment taxes is discovered during an examination pays only the required divisible portion of employment tax prior to filing a claim for refund in order to satisfy the jurisdictional requirements for filing suit in district court, interest continues to accrue on the unpaid portion of employment tax from the date upon which the tax is assessed after the taxpayer has exhausted all appeal rights within the IRS until the date such tax is paid. *See Eastern Investment Corp., supra* (rejecting taxpayer's argument that the error could not have been ''ascertained'' until a decision was made by the court and the liability was no longer being contested). Moreover, in Tax Court deficiency proceedings that do not involve employment taxes, unless the taxpayer makes a deposit to stop the running of interest, interest continues to accrue on the deficiency during the course of the Tax Court proceeding. Rev. Rul. 56–501 (1956–2 C.B. 954).

In employment tax examinations that do not involve worker classification or section 530 issues, the taxpayer has exhausted all internal appeal rights by the time a notice and demand for payment thereof based upon an assessment is received. Similarly, in employment tax examinations involving worker classification or section 530 issues, the taxpayer has already had the benefit of all of the same internal appeal rights by the time a notice of determination is received.

These proposed regulations provide that, in employment tax examinations involving worker classification or section 530 issues, as in other types of employment tax examinations, the error is ascertained for purposes of section 6205 when the employer has exhausted all internal appeals within the IRS. The fact that notice and demand for payment based upon an assessment cannot be made in cases involving worker classification and section 530 issues until the suspension of the statute of limitations is lifted, following issuance of a notice of determination, does not result in an extension of the period during which interest-free adjustments can be made under section 6205. Accordingly, in order to clarify that the error is ascertained for purposes of section 6205 once a taxpayer has exhausted all internal appeal rights with the IRS, the existing regulations would be modified by prohibiting interest-free adjustments after receipt of the notice of determination.

However, if, prior to receipt of a notice of determination, a taxpayer makes a remittance which is equal to the amount of the proposed liability, the IRS considers the remittance a payment and assesses it. Rev. Proc. 84–58 (1984–2 C.B. 501). In such a situation, no notice of determination would be sent to the taxpayer. If a taxpayer wants to stop the running of interest and contest the adjustment in the Tax Court, the taxpayer may make a remittance, designating it in writing as a deposit in the nature of a cash bond. If the taxpayer makes such a deposit, the IRS does not consider the remittance a payment. Id. at § 4.02. The deposit stops the running of interest and, if the taxpayer does not waive the restrictions on assessment, the IRS will send the taxpayer a notice of determination, thus permitting the taxpayer the option of Tax Court review.

In order to provide a mechanism for taxpayers to make a remittance to stop the accrual of interest, yet still receive a notice of determination and retain the right to petition the Tax Court, these proposed regulations would further modify the existing regulations to provide that, prior to receipt of a notice of determination, the taxpayer may, in lieu of making a payment, make a cash bond deposit which would have the effect of stopping the accrual of any interest, but would not deprive the taxpayer of its right to receive a notice of determination and to petition the Tax Court under section 7436.

Proposed Effective Date

These regulations are proposed to be applicable with respect to notices of determination issued on or after March 19, 2001. Interest will be computed under the rule in this regulation on any claims for refund of interest pending on January 12, 2001. No inference is intended that the rule set forth in these proposed regulations is not current law. Taxpayers may rely on these proposed regulations for guidance pending the issuance of final regulations. If, and to the extent, future guidance is more restrictive than the guidance in the proposed regulations, the future guidance will be applied without retroactive effect.

Special Analyses

It has been determined that this notice of proposed rulemaking 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 on small entities a collection of information requirement, 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 Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any electronic and written comments that are submitted timely to the IRS. The IRS and Treasury Department specifically request comments on the clarity of the proposed regulations and how they may be made easier to understand. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is Lynne Camillo, Office of the Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 31

Employment taxes, Income taxes, Penalties, Pensions, Railroad retirement, Reporting and recordkeeping requirements, Social Security, Unemployment compensation.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 31 is proposed to be amended as follows:

PART 31—EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT THE SOURCE

Paragraph 1. The authority for part 31 continues to read in part as follows:

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

Par. 2. In § 31.6205–1, paragraph (a)(6) is revised to read as follows:

§ 31.6205–1 Adjustments of underpayments.

(a) * * *

(6) No underpayment shall be reported pursuant to this section after the earlier of the following—

(i) Receipt from the Commissioner of notice and demand for payment thereof based upon an assessment; or

(ii) Receipt from the Commissioner of a Notice of Determination Concerning Worker Classification Under Section 7436 (Notice of Determination). (Prior to receipt of a Notice of Determination, the taxpayer may, in lieu of making a payment, make a cash bond deposit which would have the effect of stopping the accrual of any interest, but would not deprive the taxpayer of its right to receive a Notice of Determination and to petition the Tax Court under section 7436).

* * * * *

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

[FR Doc. 01–273 Filed 1–16–01; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[REG–110659–00]

RIN 1545–AY16

Amendment, Check the Box Regulations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations that provide guidance relating to elective changes in entity classification. The proposed regulations apply to subsidiary corporations that elect to change their classification for Federal tax purposes from a corporation to either a partnership or disregarded entity.

DATES: Written or electronic comments, or requests for a public hearing must be received by February 2, 2001.

ADDRESSES: Send submissions to: CC:M&SP:RU (REG–110659–00), room 5226, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:M&SP:RU (REG–110659–00), Courier's desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the ''Tax Regs'' option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at *http://www.irs.ustreas.gov /tax—regs/regslist.html.*

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, David J. Sotos, (202) 622–3050; concerning submissions of comments, or to request a hearing, Sonya Cruse, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

On November 29, 1999, Treasury and the IRS published final regulations (TD 8844) describing the transactions that are deemed to occur when an entity elects to change its classification for Federal tax purposes. Those regulations did not address certain requirements of section 332 as applied to the deemed liquidation incident to an association's election to be classified as a partnership or to be disregarded as an entity separate from its owner. This amendment to the final regulations addresses those requirements.

On January 20, 2000, Treasury and the IRS issued final regulations relating to qualified subchapter S subsidiaries. In order to permit the deemed transaction resulting from a QSub election to comply with the requirement of section 332 that a plan of liquidation have been adopted at the time of a liquidating distribution, the final regulations provide that a plan of liquidation is deemed adopted immediately before the deemed liquidation incident to the QSub election, unless a formal plan of liquidation that contemplates the filing of a QSub election is adopted on an earlier date. The preamble to the QSub regulations provided that Treasury and the IRS intend to amend the section 7701 regulations regarding elective changes in entity classification to provide a similar rule concerning the timing of the plan of liquidation.

Explanation of Provisions

A. In General

Section 301.7701–3(g)(1) describes how elective changes in the classification of an entity will be treated for tax purposes. Section 301.7701–3(g)(1)(ii) provides that an elective conversion of an association to a partnership is deemed to have the following form: the association distributes all of its assets and liabilities to its shareholders in liquidation of the association, and immediately thereafter, the shareholders contribute all of the distributed assets and liabilities to a newly formed partnership. Section 301.7701–3(g)(1)(iii) provides that an elective conversion of an association to an entity that is disregarded as an entity separate from its owner is deemed to have the following form: the association distributes all of its assets and liabilities to its single owner in liquidation of the association.

Section 332 may be relevant to the deemed liquidation of an association if it has a corporate owner. Under section 332, no gain or loss is recognized on the receipt by a corporation of property distributed in complete liquidation of another corporation if the requirements of section 332(b) are satisfied. Those requirements include the adoption of a plan of liquidation at a time when the corporation receiving the distribution owns stock of the liquidating corporation meeting the requirements of section 1504(a)(2) (i.e., 80 percent of vote and value). The elective changes from association to a partnership and to a disregarded entity result in a constructive liquidation of the association for Federal tax purposes. Formally adopting a plan of liquidation for the entity, however, is potentially incompatible with an elective change under § 301.7701–3, which allows the local law entity to remain in existence while liquidating only for Federal tax purposes. Accordingly, to provide tax treatment of an association's deemed liquidation that is compatible with the requirements of section 332, the proposed regulations state that, for purposes of satisfying the requirement of adoption of a plan of liquidation under section 332(b), a plan of liquidation is deemed adopted immediately before the deemed liquidation incident to an elective change in entity classification, unless a formal plan of liquidation that contemplates the filing of the elective change in entity classification is adopted on an earlier date.

B. Proposed Effective Dates

These regulations are proposed to apply to elections occurring on or after the date final regulations are published in the **Federal Register**; however, it is also proposed that taxpayers may elect to apply the amendments retroactively.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. It also has been determined that section 533(b) of the Administrative Procedures Act (5 U.S.C. chapter 5) does not apply to these regulations, and because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) that are submitted timely to the IRS. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the ''Tax Regs'' option on the IRS Home Page, or by submitting comments directly to the IRS Internet Site at *http://www.irs.ustreas.gov/tax—regs/comments.html.* All comments will be available for public inspection and copying. The Treasury Department and IRS specifically request comments on the clarity of the proposed regulations and how they may be made easier to understand. A public hearing may be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of these proposed regulations are David J. Sotos, and Jeanne M. Sullivan of Associate Chief Counsel (Passthroughs & Special Industries). However, other personnel from the Treasury Department and IRS participated in their development.

List of Subjects in 26 CFR Part 301

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

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 301 is proposed to be amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

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

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

Par. 2. Section 301.7701–3 is amended as follows:

1. Redesignating the text of paragraph (g)(2) as paragraph (g)(2)(i) and adding a heading for paragraph (g)(2)(i).

2. Adding a new paragraph (g)(2)(ii).

3. Revising the first sentence of paragraph (g)(4).

The addition and revision read as follows:

§ 301.7701–3 Classification of certain business entities.

* * * * *

(g) * * *

(2) *Effect of elective changes*—(i) *In general.* * * *

* * * * *

(ii) *Adoption of plan of liquidation.* For purposes of satisfying the requirement of adoption of a plan of liquidation under section 332, unless a formal plan of liquidation that contemplates the election to be classified as a partnership or to be disregarded as an entity separate from its owner is adopted on an earlier date, the making, by an association, of an election under paragraph (c)(1)(i) of this section to be classified as a partnership or to be disregarded as an entity separate from its owner is considered to be the adoption of a plan of liquidation immediately before the deemed liquidation described in paragraph (g)(1)(ii) or (iii) of this section. This paragraph (g)(2)(ii) applies to elections effective on or after the date these regulations are published as final regulations in the **Federal Register**. Taxpayers may apply this paragraph (g)(2)(ii) retroactively to elections filed before these regulations are published as final regulations in the **Federal Register** if the corporate owner claiming treatment under section 332 and its subsidiary making the election take consistent positions with respect to the Federal tax consequences of the election.

* * * * *

(4) *Effective date.* Except as otherwise provided in paragraph (g)(2)(ii) of this section, this paragraph (g) applies to elections that are filed on or after November 29, 1999. * * *

* * * * *

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue Service.

[FR Doc. 01–272 Filed 1–16–01; 8:45 am]

BILLING CODE 4830–01–U

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 25

[IB Docket 99–67; DA 00–2826]

911 Requirements for Satellite Services

AGENCY: Federal Communications Commission.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: In this public notice, the Chief of the FCC's International Bureau invites public comment in answer to a series of questions pertaining to implementation of emergency-calling services for people using commercial mobile radio services provided via satellite. The purpose for issuing the public notice is to elicit information that will help the Commission determine whether it would serve the public interest to adopt rules to require or facilitate provision of such services to mobile satellite-service customers.

DATES: Comments due on or before February 19, 2001. Reply Comments due on or before March 6, 2001.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: William Bell, Satellite Policy Branch, (202) 418–0741.

SUPPLEMENTARY INFORMATION:

Background

In 1996, the Commission adopted rules for the provision of basic and Enhanced 911 (E911) service by terrestrial commercial mobile radio service (CMRS) carriers. Basic 911 is the delivery of emergency 911 calls to a Public Safety Answering Point (PSAP).[1] E911 includes additional features, including automatically reporting the

[1] ''PSAP'' is a point that has been designated to receive 911 calls and route them to emergency service personnel. A ''Designated PSAP'' is a PSAP that is designated by the local or state entity that has the authority and responsibility to designate the PSAP to receive wireless 911 calls. We use the term in this notice to refer to any local facility performing such functions, whether or not pursuant to a state-government mandate. See 47 CFR 20.3.

caller's location and telephone number. The Commission concluded that requiring wireless carriers to provide these 911 services helped implement its statutory mandate to ''promot[e] safety of life and property through the use of wire and radio communication.'' [2] Specifically, the Commission adopted rules requiring cellular licensees, broadband PCS licensees, and other terrestrial wireless carriers providing two-way voice communication via interconnection with the public switched telephone network to offer basic 911 and E911 under a phased schedule.[3]

In the 1996 Order, the Commission exempted providers of Mobile Satellite Service (MSS) from these rules. While the Commission expressed its belief that the public interest will ordinarily require that providers of real time two-way voice services offer emergency service, it reasoned that adding specific regulatory requirements to MSS at that time might impede development of a service then in early development stages.[4] Further, the Commission agreed with commenters who maintained that emergency-service requirements for global MSS systems should be developed in an international forum in the first instance. The Commission stated that it expected that CMRS voice MSS carriers would eventually provide appropriate access to emergency services, however, and it urged carriers and other interested parties to do so as soon as feasible.[5]

In 1999, Congress enacted the Wireless Communications and Public Safety Act of 1999, with the purpose of ''facilitat[ing] the prompt deployment * * * of a seamless, ubiquitous, and reliable end-to-end infrastructure for communications, including wireless communications, to meet the Nation's public safety * * * needs.'' To implement parts of this Act, the Commission has designated 911 as the universal emergency telephone number in the United States for both wireline and wireless telephone service and requested comment, inter alia, on what actions to take to encourage and support coordinated statewide deployment plans for wireless emergency communications networks that include E911 service.[6] The Act also contains provisions granting liability protection or immunity to wireless carriers, and to users of wireless 911 services, not less than that granted to providers and users of wireline services.[7]

The Commission revisited the subject of emergency-call service for MSS users in the current rulemaking in IB Docket No. 99–67, which primarily concerns adoption of rules to facilitate and promote international circulation of customer-operated satellite earth terminals used for Global Mobile Personal Communications by Satellite (GMPCS). In the initial Notice of Proposed Rulemaking in that proceeding, issued last year, the Commission sought comment as to whether, in light of recent technological developments, it should require MSS providers to implement 911 features, subject to transitional measures to avert adverse impact on systems already in operation or at an advanced stage of development.[8]

In the Notice of Proposed Rulemaking proposing licensing and service rules for the 2 GHz MSS, the Commission more narrowly inquired as to whether it should require licensees in that particular MSS service to implement basic and/or enhanced 911 capabilities.[9] In the *2 GHz Report and Order,* the Commission acknowledged that 911 services can save lives and that significant strides had been made in developing location technology, but found that the information in the record was insufficient to support adoption of specific 911 requirements in the 2 GHz MSS service rules proceeding. Therefore, the Commission decided that it would be better to address issues concerning 911 requirements for 2 GHz MSS in the more-general 911 inquiry conducted in the *GMPCS* proceeding.[10] To that end, the Commission directed the International Bureau to issue a public notice in the *GMPCS* proceeding requesting additional information ''regarding the technological, regulatory, and international aspects of Basic 911 and E911 for satellite services.'' [11]

Request for Further Comment

In accordance with the Commission's instruction in the *2 GHz Report and Order,* and in order to obtain a more substantial record, we seek additional comment from interested parties and members of the general public in response to the following questions. We also encourage commenters to identify and discuss any other issues relevant to the implementation of 911 services by MSS licensees.

General Considerations

The general issues on which we seek comment and information are: first, whether it would improve public safety and promote the overall public interest to eliminate the exception allowed to MSS carriers under the wireless 911 rules and require MSS carriers to provide 911 emergency services; and, second, if rules are warranted, what the terms of those rules should be, including relevant implementation time frames.

We recognize that there are operational differences between MSS systems and terrestrial wireless systems that may have a bearing on resolution of these issues. MSS can provide voice service at locations where no terrestrial service is available, for instance, such as in maritime environments and remote areas. Cellular carriers interconnect with local wireline carriers at many points throughout their service areas and can generally make use of existing facilities to route 911 calls directly to local PSAPs in the areas where the calls are placed. MSS carriers, on the other hand, interconnect with the public switched telephone network at only a few points in the United States and do not interconnect directly with most local wireline carriers. Routing emergency MSS calls to the appropriate local emergency service providers may therefore present special challenges. To route MSS calls automatically to the

[2] Section 1 of the Communications Act, 47 U.S.C. 151.

[3] Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems (First Report and Order and Further Notice of Proposed Rulemaking), 11 FCC Rcd 18676 (1996), 61 FR 40374 and 40348 (August 2, 1996) (''Wireless E911 Order''), on recon., 12 FCC Rcd 22665 (1997), 63 FR 2631 (January 16, 1998) (''Wireless E911 Recon Order''), on further recon., 14 FCC Rcd 20850 (1999), 64 FR 72951 (December 29, 1999) (''Wireless E911 Second Recon Order''). See, also, Second Report and Order, 14 FCC Rcd 10954 (1999), 64 FR 34564 (June 8, 1999); and Third Report and Order, 14 FCC Rcd 17388 (1999), 64 FR 60126 (November 4, 1999), on recon. FCC 00–326, released Sept. 8, 2000, 65 FR 58657 (October 2, 2000). For further information on the wireless 911 proceeding and rules, see www.fcc.gov/e911.

[4] Wireless E911 Order at paragraph 83; Wireless E911 Recon Order at paragraph 87.

[5] Wireless E911 Recon Order at paragraph 88.

[6] Wireless Communications and Public Safety Act of 1999, 113 Stat 1286, amending 47 U.S.C. 222 and 251(e); see also Implementation of 911 Act (Fourth Report and Order and Notice of Proposed Rulemaking), FCC 00–327, 65 FR 56751 (September 19, 2000).

[7] Wireless Communications and Public Safety Act of 1999, at Section 4.

[8] Amendment of Parts 2 and 25 to Implement the Global Mobile Personal Communications by Satellite (GMPCS) Memorandum of Understanding and Arrangements; Petition of the National Telecommunications and Information Administration to Amend Part 25 of the Commission's Rules to Establish Emissions Limits for Mobile and Portable Earth Stations Operating in the 1610–1660.5 MHz Band, 14 FCC Rcd 5871 (1999), at paragraph 98.

[9] Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band, 14 FCC Rcd 4843, 4885 (1999), paragraph 94 (''2 GHz NPRM'').

[10] Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band, Report and Order, 1B Docket No. 99–81, paragraph 125, FCC 00–302, (rel. Aug. 25, 2000), 65 FR 59140 (October 4, 2000) (''2 GHz Report and Order'').

[11] *Id.* Paragraph 125.

most appropriate PSAP may require location information for each call and a national database to correlate callers' geographic positions with the service areas of local PSAPs and identify locations where no PSAP operates. Alternatively, emergency MSS calls might be routed to central operators, who could redirect the calls to the appropriate emergency response agencies in the caller's area. In some cases, public safety needs may best be met by routing MSS emergency calls to someone other than a local PSAP, for instance to the Coast Guard.

For terrestrial wireless emergency 911 calls, several technologies are being developed to identify the caller's location, including solutions that employ equipment in the wireless network and technologies employing upgraded handsets, with features such as Global Positioning System (GPS) capability.[12] Location solutions relying on facilities in terrestrial networks may not be available for MSS providers, however, and incorporation of handset-based position determination might affect MSS providers and terrestrial services differently with regard to such matters as handset performance, bulk, weight, battery life, cost, and price.

The National Telecommunications and Information Administration (NTIA) and the National Emergency Number Association (NENA) have recommended that we seek input on these issues from an ad hoc fact-finding committee. We request comment on this suggestion and, if this approach appears useful, how it might best be implemented.[13] For example, would it be more productive to postpone consideration of information gathered from this Public Notice until after such a group has provided a report to the Commission identifying or addressing relevant issues? We note that a Consensus Agreement that helped form the basis of the wireless 911 rules was developed by a voluntary ad hoc group with representatives of both the public safety and the wireless communities.

Specific Issues

Scope. The 911 rules for terrestrial wireless systems apply only to commercial mobile radio service involving provision of ''real-time, two-way switched voice service * * * utiliz[ing] an in-network switching facility which enables the subscriber to reuse frequencies and accomplish seamless handoffs of subscriber calls.'' [14] Should 911 rules for satellite services, if adopted, be limited to the same extent? Are any MSS services analogous to the maritime and aeronautical services that are exempt from the 911 requirements for terrestrial wireless systems? [15] Does the rationale for exempting ''SMR licensees offering mainly dispatch services to specialized customers in a more localized, non-cellular system configuration'' [16] apply to any MSS providers?

If the Commission were to adopt 911 rules for MSS, should it adopt uniform requirements for all covered MSS, or should it develop varying requirements for different types of MSS systems or services? Should the rules distinguish, for instance, between provision of service to callers with single-mode MSS terminals and service to callers equipped with dual-mode terminals incorporating cellular or PCS transceivers?

Are there safety needs that MSS systems are uniquely or especially capable of meeting? How do MSS providers currently serve those or other public safety needs, or plan to serve them? [17] Are there relevant differences in the public safety needs that different MSS services and providers provide?

Basic 911 issues. Would it serve the public interest to require MSS licensees to provide basic 911 service [18] at this time? If not, please explain in detail why the public interest would not be served. If so, should MSS licensees be required to route 911 calls directly to PSAPs in the caller's vicinity, or should they have the option of initially routing the calls to special operators at central emergency-call bureaus for relay to PSAPs based on information obtained from the callers? What would be the impact, if any, of requiring basic 911 automatic routing on the cost and price of, and demand for, MSS?

Has a nationwide database been developed that emergency-call operators could use to ascertain which PSAP to contact in any given instance? If so, does the database include long-distance telephone numbers for contacting emergency-call handlers at each PSAP? [19]

If the Commission were to adopt a basic 911 requirement for MSS, how much lead time would be needed for compliance? How much more lead time, if any, would MSS providers need for achieving compliance with a rule requiring provision of basic 911 by automatic routing to PSAPs than with a rule permitting implementation by means of operator-assisted connection?

E911 issues. Should the Commission require MSS licensees to implement Automatic Number Identification (ANI) [20] for 911 calls and, if so, by what date? Would compliance with such a requirement be more problematic for MSS providers than for terrestrial wireless carriers subject to the ANI requirement in Section 20.18(d) of the Commission's rules and, if so, why? How much lead-time would be appropriate?

Is there any reason why implementation of *handset-based* Automatic Location Identification (ALI) [21] would be more problematic for MSS licensees than for terrestrial wireless carriers? Has handset-based ALI technology been developed for terrestrial wireless systems that is readily adaptable for use in MSS systems? Is it likely that such technology would be available to MSS licensees from competing commercial suppliers at prices comparable to prices charged for supplying equivalent technology to terrestrial carriers?

To what extent would incorporation, either internal or external (*e.g.,* GPS), of components for reception and correlation of satellite radiolocation signals affect the size, weight, battery life, and/or per-unit cost of new MSS handsets? What expenses, if any, aside from additional handset costs, would ALI implementation entail for MSS providers? How would implementation of ALI affect market demand for MSS and the commercial viability of MSS?

Is it feasible for some MSS systems to provide ALI without installing separate

[12] The Global Position System (GPS) is a network of U.S. government satellites that transmit signals that can be used to calculate the location of receivers.

[13] Comments of National Emergency Number Association in IB Docket No. 99–67, filed May 3, 1999 at page 2; Reply Comments of the National Telecommunications and Information Administration in IB Docket No. 99–67, filed July 21, 1999, at page 10.

[14] 47 CFR 20.18(a).

[15] Wireless E911 Order, at paragraph 82.

[16] *Id.* at paragraph 81.

[17] Although the Coast Guard has provided information on these points in previous comments, we would welcome additional comments in this regard, particularly from service providers. *See* Comments of the United States Coast Guard in IB Docket No. 99–67, Attachment 1 (''Search and Rescue Disaster Support MSS Capabilities Comparison Developed by the ISCAR CMSS Working Group''), filed June 21, 1999.

[18] See 47 CFR 20.18(b).

[19] In earlier comments, The Association of Public-Safety Communications Officials International, Inc. (APCO) and the National Emergency Number Association (NENA) have acknowledged that development of a national PSAP database is necessary to enable GMPCS licensees to provide 911 services. In reply comments filed in July 1999 NENA reported that it was compiling a national PSAP database but had not finished the task.

[20] ANI, *i.e.,* Automatic Number Identification, in this context, means automatic transmission of a callback number that a call-handler at a PSAP could dial to re-establish contact with a 911 caller in the event of a broken connection. See 47 CFR 20.3.

[21] ALI, *i.e.,* Automatic Location Identification, means automatic transmission of information specifying the caller's location.

satellite radiolocation receivers (*e.g.,* GPS) in user terminals? [22] If so, what degree of accuracy can be achieved by this means, expressed in terms allowing comparison with the accuracy specifications for terrestrial wireless systems in section 20.18 of the Commission's rules? How would the cost of implementing ALI by this means compare with the cost of implementation based on reception of satellite radionavigation signals?

Would it serve the public interest to adopt a flexible rule requiring MSS providers to make their systems ALI-capable and offer ALI-capable terminals for sale or lease to customers who want them without barring continued provision of non-ALI-capable terminals to customers who prefer them? How would adoption of such a rule affect the cost, price, and demand for MSS?

How much lead-time should the Commission allow for meeting a flexible or other E911 ALI requirement for MSS, if adopted?

Compliance with other 911 and E911 rules and policies. If the Commission were to adopt 911 rules for GMPCS, would there be any need to devise special regulatory policies regarding any of the matters listed below, or should uniform policies apply alike to GMPCS and terrestrial wireless 911 services in these respects?

- Call priority (discussed in Wireless E911 Order at paragraphs 117–19)
- Calls from unauthorized and unidentified users (see Wireless E911 Recon Order at paragraphs 13–41)
- ALI interoperability (see Wireless E911 Third Report and Order at paragraphs 59–61)
- Compliance verification (*see id.* paragraphs 83–85 and OET Bulletin No. 71, *Guidelines for Testing and Verifying the Accuracy of E911 Location Systems, http://www.fcc.gov/oet/info/documents/bulletins)*
- Coordination with LECs and PSAPs (see Wireless E911 Second Recon Order at paragraphs 75–103 and Public Notice, DA 00–1875, in Docket No. 94–102 (released August 16, 2000), 65 FR 51831 (August 25, 2000).
- TTY access
- Waivers (see Wireless E911 Fourth Memorandum Opinion and Order [23] at paragraphs 42–45)
- Cooperation with the Coast Guard.[24]

Consumer notification. Should the Commission adopt a disclosure rule requiring manufacturers or sellers of GMPCS terminals that cannot be used for 911 emergency calls or with full E911 features to apprise users and potential purchasers of the functional limitations? If so, should the Commission require the notice to be affixed to the equipment or would another means of notification suffice? [25]

International issues. Three years ago, the Commission urged the public safety community and participants in the MSS industry ''to continue their efforts to develop and establish . . . standards [for emergency calling] along with the international standards bodies.'' [26] What pertinent efforts, if any, have interested parties put forth, and with what result? What remains to be done, and how might the Commission promote its accomplishment?

What specific effect(s), if any, would FCC adoption of 911 requirements for MSS systems, including a requirement allowing operator-assisted connection, have on the use of U.S.-certified GMPCS terminals for calling in other countries and on the use of terminals imported from other countries for emergency calling in the U.S.? How likely would it be that other countries will adopt inconsistent emergency calling requirements or different protocols for ALI signals, and, if so, what issues and difficulties would be raised? Would it be feasible, in that event, to achieve systemwide ALI compatibility in a global or regional MSS system by means of processing at the gateway stations? How might such regulatory divergence affect handset design and marketing and what bearing would it have on domestic enforcement of technical and/or legal requirements for GMPCS handsets?

Would there be any need for special provisions pertaining to emergency MSS calls placed from within the U.S. but routed via foreign gateway stations?

Procedural Matters

Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested persons may file Supplemental Comments limited to the issues addressed in this Public Notice no later than February 26, 2001. Supplemental Comments should reference IB Docket No. 99–67 and the DA number shown on this Public Notice. Supplemental Comments may be filed using the Commission's Electronic Comment Filing System (ECFS).[27] Supplemental Comments filed through the ECFS can be sent as an electronic file via Internet to *http://www.fcc.gov/e-file/ecfs.html.* In completing the ECFS transmittal screen, parties responding should include their full name, mailing address, and the applicable docket number, IB Docket No. 99–67.

The Commission presented an Initial Regulatory Flexibility Analysis, as required by the Regulatory Flexibility Act (RFA),[28] in the Notice of Proposed Rulemaking in IB Docket 99–67, 64 FR 16687 (April 6, 1999).[29] If commenters believe that the proposals discussed in this Public Notice require additional RFA analysis, they may state their reasons for concluding so in their Supplemental Comments.

For *ex parte* purposes, this proceeding continues to be a ''permit-but-disclose'' proceeding, in accordance with section 1.1200(a) of the Commission's rules, and is subject to the requirements set forth in section 1.1206(b) of the Commission's rules.

For further information, please contact: William Bell, Satellite Policy Branch, (202) 418–0741.

Federal Communications Commission.

Shirley Suggs,

Chief, Publications Group.

[FR Doc. 01–1087 Filed 1–16–01; 8:45 am]

BILLING CODE 6712–01–P

[22] Orbcomm, a Little LEO licensee, has reported that it can automatically ascertain the location of a user terminal that has remained stationary for ten minutes within a 500-meter error radius 95% of the time, using calculations based on Doppler variations in the signals received from its low-orbit satellites. Comments of Orbital Communications Corporation in IB Docket No. 99–67, filed May 3, 1999. Globalstar, L.P. asserted that its Big LEO system has inherent position-location capability with an error radius of approximately 10 kilometers and that it expects to improve positioning accuracy over time. Comments of Globalstar, L.P. in IB Docket No. 99–81, filed July, 26, 1999.

[23] FCC 00–326 (released September 8, 2000) 65 FR 58657 (October 2, 2000).

[24] The Coast Guard has recommended adoption of a rule requiring providers of two-way mobile radio services to furnish coverage maps on request showing the areas where they provide emergency-calling service in order to facilitate enforcement of certain Coast Guard regulations. Comments of the U.S. Coast Guard in IB Docket No. 99–67, filed June 21, 1999.

[25] Compare Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band, FCC 00–302 (released August 25, 2000) at paragraph 126, 65 FR 59140 (October 4, 2000) (imposing interim requirement to affix notification stickers to 2 GHz GMPCS handsets without 911 capability) with Wireless E911 Recon Order, supra, at paragraph 80 (allowing affected carriers to choose among various ways of notifying dispatch customers that their 911 calls will not be directly routed to PSAPs).

[26] Wireless E911 Recon Order, at paragraph 89.

[27] *See* Electronic Filing of Documents in Rulemaking Proceeding, 63 FR 24121 (May 1, 1998).

[28] *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. § 601 et seq. seq., has been amended by the Contract With America Advancement Act of 1996, Public Law No. 104–121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[29] 14 FCC Rcd at 5871, paragraph 101.

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AG23

Endangered and Threatened Wildlife and Plants; Proposed Endangered Status for 12 Species of Picture-wing Flies From the Hawaiian Islands

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose endangered status pursuant to the Endangered Species Act of 1973, as amended (Act), for 12 species of Hawaiian picture-wing flies—*Drosophila aglaia, D. differens, D. hemipeza, D. heteroneura, D. montgomeryi, D. mulli, D. musaphilia, D. neoclavisetae, D. obatai, D. ochrobasis, D. substenoptera, and D. tarphytrichia.* These species are found on one or more of the following Hawaiian Islands: Kaua'i, O'ahu, Moloka'i, Mau'i, and Hawai'i. These 12 species face substantial threats from one or more of the following: habitat degradation, loss of host plants, biological pest control, and predation from alien arthropods. Due to the restricted distributions and small populations, three species (*D. heteroneura, D. mullia, and D. neoclavisetae*) are in danger of extinction from naturally occurring random events. This proposal, if made final, would implement the protection provisions provided by the Act for these Hawaiian picture-wings.

DATES: Comments from all interested parties must be received by March 19, 2001. Requests for public hearings must be received by March 5, 2001.

ADDRESSES: If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods.

(1) You may submit written comments to the Field Supervisor, U.S. Fish and Wildlife Service, Pacific Islands Office, P.O. Box 50088, Honolulu, HI 96850–0001.

(2) You may send comments by e-mail to pwflies_pr@fws.gov (see **SUPPLEMENTARY INFORMATION** for file formats and other information about electronic filing); or

(3) You may hand-deliver comments to our Pacific Islands Office at 300 Ala Moana Blvd., Room 3–122, Honolulu, HI.

Comments and materials received, as well as supporting documentation used in the preparation of this proposed rule, will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Paul Henson, Field Supervisor, at the above address (telephone 808/541–3441, facsimile 808/541–2756).

SUPPLEMENTARY INFORMATION:

Background

Many of the major ecological zones of the earth are represented in Hawai'i, from coral reef systems through rain forests to high alpine deserts, in less than 10,800 square kilometers (6,500 square miles) of land. The range of topographies creates a great diversity of climates. Windward (northeastern) slopes can receive up to 1,000 centimeters (cm) (400 inches (in.)) of rain per year, while some leeward coasts that lie in the rain shadow of the high volcanoes are classified as deserts, receiving as little as 25 cm (10 in.) of rain annually. This topographic and climatic regime has given rise to a rich diversity of plant communities, including coastal, dryland, montane, subalpine, and alpine; dry, mesic, and wet; and herblands, grasslands, shrublands, forests, and mixed communities (Gagne and Cuddihy 1990). These habitats and plant communities in turn support one of the most unique arthropod faunas in the world, with an estimated 10,000 endemic species (Howarth 1990). Unusual characters of the arthropod fauna of Hawai'i include the presence of relict species; the absence of social insects, such as ants and termites; endemic genera; extremely small geographic ranges; adaptation of species to very specific conditions or environments; novel ecological shifts; flightlessness; and loss of certain antipredator behaviors (Zimmerman 1948, 1970, Simon *et al.* 1984, Howarth 1990).

Perhaps the most remarkable group of Hawaiian insects, and that which most typifies insect evolution in Hawai'i, is the flies in the family Drosophilidae (Williamson 1981). To date, 511 species of Hawaiian Drosophilidae have been named and described. An additional 250–300 species are already in the collection at the University of Hawai'i and await identification and description, and new species are still being discovered from localities not previously sampled. It is estimated that as many as 1,000 species may be present in native Hawaiian ecosystems (Kaneshiro 1993). The Drosophilidae family in Hawai'i represents one of the most remarkable cases of specific adaption to local conditions that has been found in any group of animals over the entire world (Hardy and Kaneshiro 1981). They are distributed throughout the high islands of the Hawaiian archipelago, each species displaying not only a highly characteristic trait of being found only on a single island, but also extraordinary physical diversity and adaptations that show their intimate ecological relationship to the native flora (Carson and Yoon 1982).

Drosophilidae are similar in structure to other flies in that adults have three main body parts: a head, thorax, and abdomen. A pair of antennae arises from the front of the head, between the eyes. The single pair of wings and three pairs of legs are attached to the thorax. The abdomen is composed of multiple segments. The general life cycle of Hawaiian Drosophilidae is typical of that of most flies: after mating, females lay eggs from which larvae (immature stage) hatch; as larvae grow they molt (shed their skin) through three successive stages (instars); when fully grown, the larvae change into pupae (a resting form) in which they metamorphose and emerge as adults.

The Hawaiian Drosophilidae have also developed and adapted ecologically to a tremendous diversity of ecosystems ranging from desert-like habitats where the soil is powdery dry, to rain forests with lush, tree-fern jungles, and in swampland perpetually shadowed by rain clouds and with vegetation burdened with dripping, moss-laden branches. While the larval stages of most species are saprophytic (feeding on decaying vegetation, such as rotting leaves, bark, flowers, and fruits), some have become highly specialized, being carnivorous on egg masses of spiders, or feeding on green algae growing underwater on boulders in streams. As a group, the Hawaiian Drosophilidae appear to be widespread and can be found in most of the natural communities in Hawai'i.

Unlike most Hawaiian insects that remain obscure, typically known only from their original taxonomic descriptions, most aspects of Hawaiian Drosophilidae biology have been researched, including their internal and external morphology, behavior, ecology, physiology, biochemistry, the banding sequence of giant chromosomes, as well as detailed analyses of the structure of the DNA molecules. More than 80 research scientists and over 350 undergraduates, graduate students, and post-doctoral fellows have participated in research on the Hawaiian Drosophilidae, resulting in over 600 scientific publications on the biology of these flies. The Hawaiian Drosophilidae

is arguably the most intensively studied group of all terrestrial Hawaiian organisms.

Research on Hawaiian Drosophilidae has resulted in the development and testing of new theories of evolutionary biology (Bradley *et al.* 1991, Carson 1971, 1982a, Kaneshiro 1976, 1980, 1987, 1989). Ideas on the development of species and island evolution developed from studies on Hawaiian Drosophilidae are now referenced in most modern textbooks of biology and evolution (*e.g.,* Ridley 1993). These flies have also been the subject of numerous television programs produced by the BBC (British Broadcasting Corporation), NOVA, National Geographic Society, and other educational film makers. The BBC, in conjunction with the Open University in England, has also produced several programs focused on the research of the Hawaiian Drosophilidae, and these programs are being used in educational courses about evolution.

The Hawaiian Drosophila Project at the University of Hawai'i has coordinated and cooperated in most of the research on the Hawaiian Drosophilidae. It has also maintained extensive collection records of these species. These records form the basis for much of the data used to develop this proposed rulemaking. Three decades of collection work are maintained in permanent files of the Hawaiian Drosophila Project within the University of Hawai'i's Center for Conservation Research and Training. Also, collection notes of the individual researchers on the project contain extensive records of host plant associations of most of these species. Understanding the host plant association is important due to the fact that all of these flies appear to be closely linked with one or more particular host plant species. These host plant species provide necessary habitat requirements for the flies, including shelter, food, and areas for courtship. The host plants, and suitable habitat for the host plants, are absolutely essential for the flies' survival and recovery.

Biologists have observed a general decline of the Hawaiian Drosophilidae along with other components of the native ecosystem. As noted by Spieth (1980), during the early part of the century, the Tantalus area behind the city of Honolulu was the major spot for collecting *Drosophila* species. By 1963, the majority of the native *Drosophila* species in this area had been exterminated, apparently due to intrusion of exotic vegetation and predation by ants. Quantitative sampling since 1971 has demonstrated dramatic declines in the abundance of some species and in other cases local extirpations (Foote and Carson 1995). A review of the data collected by the Hawai'i Drosophila Project and assessment of the threats to remaining populations suggests that at least 12 species of these flies are presently threatened with extinction.

All 12 species in this proposed rulemaking belong to the species group commonly known as the picture-wings *Drosophila.* This group consists of 106 known species, most of which are large with elaborate markings on otherwise clear wings of both sexes, the pattern of which varies among species (Hardy and Kaneshiro 1981, Carson 1992). The picture-wing *Drosophila* have been referred to as the ''birds of paradise'' of the insect world because of the males' extremely elaborate and spectacular courtship displays and territorial defense behavior. Males occupy territories that serve as mating arenas to which receptive females are attracted for mating. The males fight among themselves for the best territories and establish a dominance hierarchy like some birds and mammals. Native Hawaiians apparently did not differentiate among the different species, but referred to flies collectively as *nalo.* Recognizing that some or all of these species may belong in the genus *Idiomyia* (Grimaldi 1990), we accept the most recent taxonomic description of the Hawaiian taxa as *Drosophila* (Nishida 1994) and will refer to the species in this proposed rule collectively as ''Hawaiian picture-winged *Drosophila*,'' or ''Hawaiian picture-wings.'' There has also been no traditional Hawaiian or European use of common names for individual species of Hawaiian picture-wings.

Each species of Hawaiian picture-wing in this proposed rulemaking is found only on a single island, and each breeds only in a single or a few related species of plants (see Table 1).

TABLE 1.—SUMMARY OF ISLAND DISTRIBUTION OF THE PROPOSED SPECIES

Species	Kaua'i	O'ahu	Moloka'i	Mau'i	Hawai'i	Primary host plants
Drosophila aglaia	.....	current	.....	.....	.....	*Urera glabra* (ōpuhe)
Drosophila differens.	.....	current	.....	.....	*Clermontia* spp. ('ōhā wai).	
Drosophila hemipeza.	.....	current	.....	.....	.....	*Urera* spp. (ōpuhe) and *Lobelia* spp. (ōhā)
Drosophila heteroneura.	.....	.....	.....	.....	current	*Clermontia* spp., *Delissea* spp., and *Cheirodendron* spp. (ōlapa)
Drosophila montgomeryi.	.....	current	.....	.....	.....	*Urera Ka'ala e* (ōpuhe)
Drosophila mulli ..	.....	.....	.....	.....	current	*Pritchardia beccariana* (loulu)
Drosophila musaphilia.	current	.....	.....	.....	.....	*Acacia koa* (koa)
Drosophila neoclavisetae.	.....	.....	.....	current	.....	*Cyanea* spp. (hāhā)
Drosophila obatai	.....	current	.....	.....	.....	*Pleomele forbesii* (hala pepe)
Drosophila ochrobasis.	.....	.....	.....	.....	current	*Myrsine* spp. (kōlea), *Marattia* spp. and *Clermontia* spp.
Drosophila substenoptera.	.....	current	.....	.....	.....	*Cheirodendron* spp. and *Tetraplasandra* spp. ('ohe mauka)
Drosophila tarphytrichia.	.....	current	.....	.....	.....	*Charpentiera* spp. (pāpala)

current = population observed within the past 20 years.

Discussion of the 12 Species Proposed for Listing

Drosophila aglaia

Drosophila aglaia was first collected in 1946 on Mount Ka'ala on the island of O'ahu, and described by Elmo Hardy in 1965 (Hardy 1965). *Drosophila aglaia* is a small species, 4.0 mm (0.15 in.) in length, with wings 5.0 mm (0.2 in.) long. It has a yellow head that is approximately one-third wider than long. The eyes are brown, and the antennae are yellow, tinged with brown. The thorax is clear yellow with three broad brown stripes on the top, and the legs are yellow. The abdomen is brown with a large yellow spot on each of the hind corners. The wings are predominantly clear with irregular but characteristic brown markings, and are about two and three-quarter times longer than wide.

Drosophila aglaia is known only from six localities in the Wai'anae Mountains of O'ahu. It has been recorded on land owned by the State of Hawai'i Department of Land and Natural Resources (DLNR) at Makaleha Valley, Peacock Flats Trail, and Pu'u Kaua. Additionally, this species is known from private land holdings at Palikea Ridge, Pu'u Kaua, and Kalua'a gulch, and is also found on Federal land owned by the United States Army at Pu'u Pane. The occurrence of *D. aglaia* is restricted to the patchy distribution of its host plant, *Urera glabra*), a small endemic tree. The larvae of *D. aglaia* develop in the bark and stem of *U. glabra*. This tree does not form large stands, but is scattered throughout slopes and valley bottoms in mesic and wet forest habitat on all the main islands. In the Wai'anae Mountains on O'ahu, this tree occurs infrequently in mesic forest. Because *D. aglaia* is reliant on an infrequently occurring host plant, it is difficult to estimate the size of the land area on which this species occurs. Each site is probably less than several acres. The major threats to *D. aglaia* are predation by ants and habitat degradation from feral ungulates, alien plants, and fire.

Drosophila differens

Drosophila differens was described by Elmo Hardy and Kenneth Kaneshiro (1975) from specimens collected at South Hanalilolilo, Moloka'i, in 1972. Previous to the description, *D. differens* was referred to as ''*Idiomyia planitibia* from Moloka'i.'' This species is large, approximately 7.0 mm (0.3 in.) in length, with wings 8.3 mm (0.33 in.) long. *Drosophila differens* looks very similar to *D. planitibia* of Mau'i, but can be differentiated from *D. planitibia* by its entirely or predominantly yellow face. There is also a difference in the markings found on the leading edge of the wings. In *D. planitibia* males, the marking extends about two-thirds the distance to the tip of the wings, while in *D. differens* males, it extends nearly to the marking at the tip of the wing. Hybridization experiments have demonstrated that *D. planitibia* from Mau'i and *D. differens* from Moloka'i represent distinct species as they are incapable of inter-breeding (Kaneshiro and Kaneshiro 1995). Crosses have been done in both directions and have resulted in fertile females, but sterile males. Other than differences in color, no morphological characters separate these species, and they are, therefore, considered to be sibling species.

Drosophila differens is restricted to the island of Moloka'i where it is known from three populations on private land: Kaunu O Hua, Pu'u Kolekole, and south Hanalilolilo where it was last observed on July 22, 1986. Montgomery (1975) found *D. differens* to breed in the bark, stems, and leaves of *Clermontia* spp. in wet rainforest habitat. This species is endangered by habitat degradation from feral ungulates and alien weeds, and predation by ants and alien wasps.

Drosophila hemipeza

Elmo Hardy (1965) described Drosophila hemipeza from specimens collected at Pūpūkea, O'ahu, in 1952. Drosophila hemipeza is most closely related to *D. planitibia* and *D. differens.* The key differences among these species is in the color of the face, which in *D. hemipeza* is pale yellow and densely covered with white fuzz. The thorax of *D. hemipeza* is predominantly yellow with two brown stripes on the top, and the legs are entirely yellow. This species is 5.0 mm (0.2 in.) long; the front legs are very slender with short straight bristles; and the wings are 6.0 mm (0.2 in.) in length, slender, and somewhat pointed.

Drosophila hemipeza is restricted to the island of O'ahu where it is known from six localities. In the Wai'anae Mountains, it is known from privately owned land at Palikea Ridge, Kalua'a Gulch, and Mauna Kapu. The species is also known from State of Hawai'i DLNR land in Makaleha and Wai'anae Valleys as well as from City and County of Honolulu holdings in Wai'anae Valley. The only occurrence of this species in the Ko'olau Range is from City and County of Honolulu property at Pauoa Flats on Mt. Tantalus.

Montgomery (1975) determined that *Drosophila hemipeza* utilizes several different mesic forest plants as larval breeding substrates. It breeds in the bark of *Urera kaalae,* a Federal endangered species (56 FR 55770), in the stems of *Lobelia* spp., and in the bark and stems of *Cyanea* spp., in mesic forest habitat. This Hawaiian picture-wing is endangered by habitat degradation from feral ungulates, alien weeds, and fire, and predation by ants and alien wasps.

Drosophila heteroneura

R.C.L. Perkins described *Idiomyia heteroneura,* based on specimens from 'Ōla'a on Hawai'i island (Perkins 1910). This taxon was later transferred to the genus *Drosophila* (Hardy 1969), forming its presently accepted name, *D. heteroneura. Drosophila heteroneura* has very large spots on the bases of the wings. However, the most characteristic feature of this species is the broad head of the male with the eyes situated laterally, thus giving it a hammer-head appearance. The hammer-head and entirely yellow face differentiate it from the closely related species, *D. silvestris.* The thorax is predominantly yellow with several black streaks and markings on top. The legs are yellow except for slight tinges of brown on the ends of the middle and hind femora and tibiae. The wings are hyaline (transparent) and are very similar in markings and venation to those of *D. silvestris,* except that the marking in the front margin of the wing of *D. heteroneura* extends nearly to the marking at the end of the wing. The abdomen is shining black with a large yellow spot on the top of each segment. This species is about 5.7 mm (0.22 in.) in length with wings approximately 7.0 mm (0.3 in.) long.

Drosophila heteroneura is restricted to the island of Hawai'i where it was historically known from 16 localities, on 4 of the island's 5 volcanoes (Hualālai, Mauna Kea, Mauna Loa, and Kīlauea). This species has never been found on the Kohala Mountains. The species was believed to be extinct in the late 1980s, until it was rediscovered on private acreage at Hualālai Volcano in 1993. The remaining population is extremely small, with a 90 percent reduction from historical abundance (Kaneshiro and Kaneshiro 1995).

Drosophila heteroneura breeds primarily in the bark and stems of *Clermontia* spp. and *Delissea* spp., but it is also known to utilize *Cheirodendron* spp. in open rain forest habitat. This Hawaiian picture-wing is endangered by habitat degradation from ungulates and alien weeds, predation by ants and alien wasps, and an extremely small remaining population.

Drosophila montgomeryi

Named after Dr. Steven L. Montgomery in honor of his work on

Hawaiian picture-wings, *Drosophila montgomeryi* was described by Elmo Hardy and Kenneth Kaneshiro (1971) from specimens collected in the Wai'anae Mountains of O'ahu in 1970. This species morphologically appears to be most closely related to *D. pisonia* from the island of Hawai'i. It can be distinguished by the narrow, pale brown stripe on each side of the top of the thorax, the long hairs on the front legs, and the second antennal segment, which is yellow, tinged with brown on the top.

Drosophila montgomeryi is restricted to the Wai'anae Mountains on the island of O'ahu, where it is known from private holdings at Pu'u Kaua and Kalua'a Gulch, and State of Hawai'i DLNR property at Pu'u Kaua and Alaiheihe Gulch. Montgomery (1975) reported that the larvae of this species feed in the decaying bark of *Urera kaalae,* which grows on slopes and in gulches of diverse mesic forest. This Hawaiian picture-wing is endangered by habitat degradation from feral ungulates, alien weeds, and fire, and predation by ants and alien wasps.

Drosophila mulli

Drosophila mulli was described by William Perreira and Kenneth Kaneshiro (1990) and named for the eminent Hawaiian naturalist, William P. Mull, who first discovered this species. The head of *D. mulli* is yellow on the front, covered with a light, silvery grey fuzz. The face of the male is characteristically white, while that of the female is brown. The top of the thorax is brownish yellow and lacks conspicuous markings or stripes. The legs are predominantly yellow, and the front legs of males bear three distinct rows of long, curled hairs. The wings are two and one-half times longer than wide with distinct brown markings at the base and the tip. The length of the body is 4.3–5.0 mm (0.17–0.2 in.), and the wings are 4.3–4.8 mm (0.17–0.19 in.) long.

Drosophila mulli is restricted to the island of Hawai'i and is known only from the State of Hawai'i DLNR-owned 'Ōla'a Forest Reserve at an elevation of 985 meters (m) (3,200 feet (ft)). Adults are found only on the undersides of leaves of *Pritchardia beccariana,* an endemic fan palm, but the larval feeding site is still unknown. Attempts to rear this species from decaying parts of *P. beccariana* have been unsuccessful (W.P. Mull, Volcano, Hawai'i, pers. comm., 1995). However, because of the extremely localized population within a relatively small patch of *P. beccariana,* that a strong association between *D. mulli* and this plant is likely. This Hawaiian picture-wing is endangered by habitat degradation from feral pigs and alien weeds, limited numbers, and predation by ants and alien wasps.

Drosophila musaphilia

Elmo Hardy (1965) formally described *Drosophila musaphilia* from specimens at Kōke'e, Kaua'i, in 1952. Although Hardy (1965) indicated that D. musaphilia is very similar to *D. villosipedis,* based on both chromosomal data, as well as comparison of the male genitalia, *D. musaphilia* is clearly most closely related to *D. hawaiiensis* (Kaneshiro et al. 1995).

Drosophila musaphilia is characterized by a predominantly black thorax with gray fuzz and a very narrow gray stripe extending down the top. The legs are dark brown to yellow, with the front tibia devoid of ornamentation, and the tips of the legs have abundant long black hairs on top. The wings are three times longer than wide with characteristic markings of the *D. hawaiiensis* group. The abdomen is dark brown to black and densely covered with brown fuzz. The body length is about 5.0 mm (0.2 in.) and the wings 5.25 mm (0.207 in.) long.

Drosophila musaphilia is restricted to the island of Kaua'i where it is known from State of Hawai'i DLNR-owned land at Alexander Reservoir, Kōke'e State Park, and Halemanu. This species is extremely rare and has been observed only five times in the last 25 years. Montgomery (1975) determined that the host plant for *D. musaphilia* is *Acacia koa.* The females lay their eggs, and the larvae develop in the sap seeping from injured trees. This Hawaiian picture-wing is endangered by habitat degradation from feral ungulates, alien weeds, hurricanes, and fire, and predation by ants and alien wasps.

Drosophila neoclavisetae

Drosophila neoclavistae was described by William Perreira and Kenneth Kaneshiro (1990) from specimens collected at Pu'u Kukui, West Mau'i, in 1969. The species appears to be restricted to a ridge top at an elevation of 1,371 m (4,500 ft) (Kaneshiro and Kaneshiro 1995). It was named for its obvious affinities with *D. clavistae* from East Mau'i. Both species are similar in wing and thoracic markings as well as sharing one of the most bizarre courtship dances in the family. The male bends its abdomen up over its head, produces a bubble of liquid from its anal gland believed to be a sex pheromone, and then vibrates the abdomen, fanning the scent toward the female. Both *D. neoclavistae* and *D. clavistae* are members of the *D. adiastola* species group (Perreira and Kaneshiro 1990), and, while other species in this group perform similar mating behaviors, they are highly exaggerated in *D. clavistae* and *D. neoclavistae*.

Drosophila neoclavistae is between 6.0–6.4 mm (0.2–0.25 in.) in length, with wings 6.5–7.0 mm (0.26–0.3 in.) long. It is distinguished by its amber brown head and yellow face, with the middle portion raised to form a prominent ridge. The thorax is predominantly reddish brown with a distinct brown median stripe, bordered on each side by two brown stripes. The legs are yellow, with brown on the femora and a distinct brown band on the tips of the tibiae. The wings are broad and rounded, more than twice as long as wide, and with the front portion covered with brown markings and large clear spots tinged light yellow. It shares with *D. clavistae* an extra crossvein in the wing, which sets both these species apart from the other species of the *D. adiastola* species group. The abdomen is dark brown and black with numerous long hairs on the hind segments of the male.

Drosophila neoclavistae is restricted to the island of Mau'i where it is known only from State of Hawai'i DLNR property at Pu'u Kukui. The host plant of this species has not yet been confirmed, although it is believed to be associated with *Cyanea* sp.. All collections of this species have come from within a small patch of *Cyanea* spp., and many other species in the *D. adiastola* species group utilize these and other plants in the family Campanulaceae. This Hawaiian picture-wing is endangered by habitat degradation from feral ungulates and alien weeds, limited numbers, and predation by ants and alien wasps.

Drosophila obatai

Drosophila obatai was described by Elmo Hardy and Kenneth Kaneshiro in 1972, from specimens collected in the Wai'anae Mountains of O'ahu. This species was named for Mr. John Obata, who has made significant contributions to the study of Hawaiian *Drosophila* because of his knowledge of the native plants and habitats where these insects are found. *Drosophila obatai* resembles *D. sodomae* from Mau'i and Moloka'i, and is distinguished by small differences in wing markings and the black coloration of the abdomen.

Drosophila obatai is restricted to the island of O'ahu where it is known from State of Hawai'i DLNR-owned land at Makaleha Valley in the Mokul''ia Forest Reserve in the Wai'anae Mountains, and

Wailupe Gulch located in the Honolulu Watershed Forest Reserve in the southern Ko'olau Mountains. This species is also known from Federal land owned by the Army at Pu'u Pane, and from City and County of Honolulu and private holdings at Wai'alae Nui. *Drosophila obatai* use *Pleomele forbesii* as a host plant (Montgomery 1975). This host plant, growing on slopes in dry forest and diverse mesic forest, occurs singly or in small clusters and does not form large stands of many individuals (Wagner et al. 1990). Threats to this Hawaiian picture-wing include habitat degradation from feral ungulates, alien weeds, and fire, and predation by ants and alien wasps.

Drosophila ochrobasisn

Drosophila ochrobasis was originally described by Elmo Hardy and Kenneth Kaneshiro (1968) based on a specimen collected from Pu'u Hualālai at an elevation of 1,692 m (5,550 ft). Based on chromosomal studies, D. ochrobasis appears to be most closely related to *D.setosimentum* (Kaneshiro *et al.* 1995).

Both the body and wings are approximately 4.6 mm (0.18 in.) in length. The head is yellow in front and brown on top, and the face is white with a prominent ridge running down the middle. The thorax is yellow except for a large brown spot on each side. The legs are yellow tinged with brown. In males, the basal three-fifths of the wing is predominantly clear to translucent with faint transverse streaks of brown. The outer two-thirds of the wing is dark brown with large clear spots similar to that portion of the wings in *Drosophila setosimentum*. The females of D. ochrobasis are virtually indistinguishable from those of *D.setosimentum* females.

Drosophila ochrobasis is restricted to the island of Hawai'i and has been found on State of Hawai'i DLNR property at Kīpuka and Alakahi Stream. It has also been observed at Kīpuka Pāhipa and Hualālai, both of which are privately owned. *Drosophila ochrobasis* was collected almost every year from 1967 to 1975, sometimes in large numbers, but has now virtually disappeared (Kaneshiro and Kaneshiro 1995). It was last observed at Kīpuka on February 14, 1986. This species has been reported to utilize several host plants, including *Myrsine* spp., *Clermontia* spp., and *Marattia* spp. (Montgomery 1975). Threats to this Hawaiian picture-wing include habitat degradation from ungulates and alien weeds, and predation by ants and alien wasps.

Drosophila substenoptera

Elmo Hardy described *Idiomyia substenoptera* in 1965. He then later determined the genus *Idiomyia* to be synonymous with Drosophila (Hardy 1969), thus creating the current name of *Drosophila substenoptera*. This species is closely related to *D. planitibia* and other closely related flies (Kaneshiro *et al.* 1995) but is quite distinctive from all the other species in this group because of characteristic markings on the wings, the narrow wing shape, and the complex structures of the male genitalia. *Drosophila substenoptera* is predominantly yellow with two black stripes extending down the entire length of the top surface of the thorax. The legs are yellow and lack long hairs on the dorsal surfaces. Body length is 4.35 mm (0.171 in.), and the wings are 5.0–5.3 mm (0.2–0.21 in.) long.

Drosophila substenoptera is restricted to the island of O'ahu where it is known from the following private holdings: Wiliwili Nui Ridge, Castle Trail, Hālawa Ridge Trail, and Palikea Ridge. *Drosophila substenoptera* is also found on State of Hawai'i DLNR property at Mt. Ka'ala and the DuPont trail as well as on City and County of Honolulu owned acreage at Ka'au Crater. This species has never been abundant at any of these locations, but now appears to be extant only on the summit of Mt. Ka'ala , despite intensive efforts to relocate it at other sites. Montgomery (1975) determined that this Hawaiian picture-wing breeds in the bark of *Cheirodendron* spp. and *Tetraplasandra* spp. trees in wet forest habitat. Threats to this species include habitat degradation from feral ungulates and alien weeds, and predation by ants and alien wasps.

Drosophila tarphytrichia

Drosophila tarphytrichia was described by Elmo Hardy (1965) from specimens collected from Mānoa Falls on O'ahu, in 1949. This species is closely related to *D. vesciseta* based on the structure of the male genitalia (Kaneshiro *et al.* 1995), but can be differentiated by distinct wing markings and the ornamentation of the front legs of the male. The thorax is almost entirely yellow to red with a tinge of brown on the top. The legs are yellow, with the tip of the front leg strongly flattened laterally and with a dense clump of black hairs. This species is 3.70 mm (0.148 in.) long with wings 4.0 mm (0.2 in.) long.

Drosophila tarphytrichia is restricted to the island of O'ahu where it was historically known from both the Ko'olau and Wai'anae mountain ranges. It is now apparently extinct in the Ko'olau range and presently known from four localities in the Wai'anae Mountains. Three populations are found on privately owned lands at Mauna Kapu, Palikea ridge, and Kalua'a Gulch. The fourth is known from private and State of Hawai'i DLNR land at Pu'u Kaua. This species breeds on the stems and branches of *Charpentiera spp.* trees in mesic forest habitat (Montgomery 1975). Threats to this species include habitat degradation from feral ungulates and alien weeds, and predation by ants and alien wasps.

Previous Federal Action

Ten of these proposed species were classified as candidates for listing in the February 28, 1996, Notice of Review of Plant and Animal Taxa That Are Candidates for Listing as Endangered or Threatened Species (Notice of Review) (61 FR 7596). The remaining two species, *Drosophila differens* and *D. ochrobasis*, were classified as candidates for listing in the Notice of Review dated September 19, 1997 (62 FR 49398). Candidates are those taxa for which the Service has on file substantial information on biological vulnerability and threats to support preparation of listing proposals.

The processing of this proposed rule conforms with our Listing Priority Guidance published in the **Federal Register** on October 22, 1999 (64 FR 57114). The guidance clarifies the order in which we will process rulemakings. Highest priority is processing emergency listing rules for any species determined to face a significant and imminent risk to its well-being (Priority 1). Second priority (Priority 2) is processing final determinations on proposed additions to the lists of endangered and threatened wildlife and plants. Third priority (Priority 3) is processing new proposals to add species to the lists. The processing of administrative petition findings (petitions filed under section 4 of the Act) is the fourth priority (Priority 4). The processing of this proposed rule is a Priority 3 action.

Summary of Factors Affecting These Species

The procedures for adding species to the Federal Lists are found in section 4 of the Endangered Species Act (16 U.S.C. 1531 *et seq.*) and the accompanying regulations (50 CFR part 424). A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1). Threats to these 12 species are summarized in Table 2.

TABLE 2. SUMMARY OF THREATS TO 12 HAWAIIAN PICTURE-WING FLIES

Species	Threats							
	Major alien plants	Feral animal activity				Fire	Alien insects	Limited numbers*
		Pigs	Goats	Deer	Cattle			
Drosophila aglaia	1,2,3,6	X	X			X	X	
Drosophila differens	2	X	X	X			X	
Drosophila hemipeza	1,2,3,5,6	X	X				X	
Drosophila heteroneura	2,4,8,9	X			X		X	X
Drosophila montgomeryi	1,2,3,6		X			X	X	
Drosophila mulli	2,8,9	X					X	X
Drosophila musaphilia	2,3,6,7,8	X	X	X		X	X	
Drosophila neoclavisetae	2,8	X					X	X
Drosophila obatai	1,2,3,5,6	X	X			X	X	
Drosophila ochrobasis	2,4,8,9	X			X		X	
Drosophila substenoptera	2,5,6	X					X	
Drosophila tarphytrichia	1,2,3,5,6	X	X				X	

[1] *-Schinus terebinthifolius* [2] *-Psidium cattleianum* [3] *-Melinus minutiflora* [4] *-Pennisetum setaceum* [5] *-Clidemia hirta* [6] *-Lantana camara* [7] *-Rubus argutus* [8] *-Passiflora mollissima* [9] *Rubus ellipticus*

* Fewer than three populations

The five factors and their application to *Drosophila aglaia, D. differens, D. hemipeza, D. heteroneura, D. montgomeryi, D. mulli, D. musaphilia, D. neoclavisetae, D. obatai, D. ochrobasis, D. substenoptera, and D. tarphytrichia* are as follows:

A. The Present or Threatened Destruction, Modification, or Curtailment of its Habitat or Range

Native vegetation on all the main Hawaiian islands has undergone extreme alteration because of past and present land management practices, including ranching, deliberate introduction of alien plants and animals, and agricultural development (Cuddihy and Stone 1990). Some of the primary threats facing the 12 Hawaiian picture-wing species proposed for listing are ongoing and threatened destruction and adverse alteration of habitat by feral animals and alien plants.

All 12 of the proposed species are endangered by feral animals to various degrees. The early human inhabitants of the Hawaiian Islands introduced Polynesian pigs (*Sus spp.*), and more recently European settlers introduced more ungulate species, such as goats (*Capra hircus*), axis deer (*Axis axis*), black-tailed deer (*Odocoileus hemionus*), cattle (*Bos taurus*), and other domesticated pigs (*S. scrofa*), for food, commercial ranching activities, and hunting. Over the 200 years following the introduction of these animals, their numbers increased, and the adverse impacts of these feral ungulates on native vegetation have become increasingly apparent. Beyond the direct effect of trampling and grazing native plants, these feral ungulates have contributed significantly to the heavy erosion taking place on most of the main Hawaiian islands.

Pigs that were introduced to the Hawaiian Islands have escaped domestication and successfully established feral populations in wet and mesic forests and grasslands of Kaua'i, O'ahu, Moloka'i, Mau'i, and Hawai'i. Their presence on these islands threatens the existence of at least 11 of the proposed Hawaiian picture-wing species (see Table 2). Foote and Carson (1995) experimentally demonstrated the detrimental impact of feral pigs on Hawaiian picture-wings by showing that areas that had been fenced to exclude pigs supported higher numbers of flies and the plants they require for habitat. Conversely, areas of the same habitat that were not fenced were altered by pig-foraging activities resulting in the direct destruction of host plants. Furthermore, the foraging activities modified the habitat by making it more suitable for invasive plants that could crowd out host plants. While foraging, pigs root and trample the forest floor, encouraging the establishment of alien plants in the newly disturbed soil. Pigs also disperse alien plant seeds through their feces and on their bodies, accelerating the spread of alien plants through native forest (Cuddihy and Stone 1990, Stone 1985).

Goats native to the Middle East and India were first successfully introduced to the Hawaiian Islands in 1792. Feral goats now occupy a wide variety of habitats from lowland dry forests to montane grasslands on Kaua'i, O'ahu, Moloka'i, Mau'i, and Hawai'i, where they consume native vegetation, trample roots and seedlings, accelerate erosion, and promote the invasion of alien plants (Stone 1985, van Riper and van Riper 1982). Goats are significantly degrading the habitat of at least seven species proposed in this rule (see Table 2). On Kaua'i, goats contribute to the substantial decline of *Drosophila musaphilia*. On O'ahu, encroaching urbanization and hunting pressure tend to concentrate the goat population in the dry upper slopes of the Wai'anae Mountains, where populations of *D. aglaia, D. hemipeza, D. montgomeryi, D. obatai,* and *D. tarphytrichia* exist (Kaneshiro and Kaneshiro 1995). The goat population in the Wai'anae area is apparently increasing, becoming an even greater threat to the native habitat there. On Moloka'i, at least one population of *D. differens* at Pu'u Kolekole is presently endangered by goats.

Eight axis deer were introduced to the island of Moloka'i in 1868. By the turn of the century, their numbers had increased to thousands of animals (Tomich 1986). The herds had so damaged the vegetation on Moloka'i that professional hunters were hired to control their numbers (Tomich 1986). However, by then, the native vegetation had suffered irreparable damage from overgrazing by axis deer. These deer continue to degrade the habitat by trampling and overgrazing vegetation, which removes ground cover and exposes the soil to erosion. Activity of deer on Moloka'i has resulted in loss of habitat for *Drosophila differens*. The axis deer population is not presently managed by the State of Hawai'i DLNR or any other agency.

Black-tailed deer were first introduced to Kaua'i in 1961 for the purpose of sport hunting, and today probably number well over 500 animals. The deer are presently confined to the western side of the island, where they feed on a variety of native and alien

plants (van Riper and van Riper 1982). The presence of these deer on Kaua'i is endangering some *Drosophila musaphilia* habitat.

Large-scale ranching of cattle in the Hawaiian Islands began in the middle of the 19th century on the islands of Kaua'i, O'ahu, Mau'i, and Hawai'i. Large ranches, tens of thousands of acres in size, developed on East Mau'i and Hawai'i (Cuddihy and Stone 1990) where most of the State's large ranches still exist today. Degradation of native forests used for ranching activities became evident soon after full-scale ranching began. The negative impact of cattle on Hawai'i's ecosystem is similar to that described for goats and deer (Cuddihy and Stone 1990, Stone 1985). Cattle grazing continues in several lowland regions in the northern portion of the Wai'anae Mountains of O'ahu. On Mau'i, cattle ranching is the primary agricultural activity in many areas and presently threatens populations of Drosophila heteroneura and D. ochrobasis.

Most of the plants that serve as breeding sites for these proposed Hawaiian picture-wings occur as understory vegetation beneath the canopy of the *Metrosideros polymorpha* (*'ohi'a*) and *Acacia koa,* and are affected by competition with alien weeds. All of the 12 Hawaiian picture-wing species being proposed for listing are endangered by loss of host plants due to competition with one or more alien plant species. The most significant of these alien plants appear to be *Schinus terebinthifolius* (Christmasberry), *Psidium cattleianum* (strawberry guava), *Melinus minutiflora* (molasses grass), *Pennisetum setaceum* (fountain grass), *Clidemia hirta* (Koster's curse), *Lantana camara* (lantana), *Passiflora mollissima* (banana poka), *Rubus argutus* (prickly Florida blackberry), and *R. ellipticus* (Himalayan raspberry).

Many noxious alien plants, such as *Schinus terebinthifolius,* have invaded the dry to mesic lowland regions of the Hawaiian Islands. Introduced to Hawai'i before 1911, *S. terebinthifolius* forms dense thickets that shade out and displace other plants (Cuddihy and Stone 1990). This fast-growing tree or shrub is found in lowland areas of the major Hawaiian Islands and is currently expanding its range (Smith 1985). *Schinus terebinthifolius* is now a major component of the mesic forests of the Wai'anae and Ko'olau mountains of O'ahu and currently threatens the habitat of *Drosophila aglaia, D. hemipeza, D. montgomeryi, D. obatai,* and *D. tarphytrichia.*

Psidium cattleianum, an invasive shrub or small tree native to tropical America, has become naturalized on all of the main Hawaiian islands. Like *Schinus terebinthifolius, P. cattleianum* is capable of forming dense stands that exclude other plant species (Cuddihy and Stone 1990). This alien plant grows primarily in mesic and wet habitats and provides food for several alien animal species, including feral pigs and game birds, which disperse the plant's seeds through the forest (Smith 1985, Wagner *et al.* 1985). Psidium cattleianum is considered one of the greatest alien plant threats to Hawai'i's rainforests. *Psidium cattleianum* is a major invader of forests in the Wai'anae and Ko'olau Mountains of O'ahu, where it often forms single-species stands. It poses a threat to all proposed species of Hawaiian picture-wings on O'ahu. *Psidium cattleianum* also threatens *D. musaphilia* on Kaua'i, *D. differens* on Moloka'i, *D. neoclavisetae* on Mau'i, and *D. heteroneura, D. mulli,* and *D. ochrobasis* on the island of Hawai'i.

First introduced to the Hawaiian Islands as cattle fodder, *Melinus minutiflora* (molasses grass) was later planted for erosion control (Cuddihy and Stone 1990). This alien grass quickly spread to dry and mesic forests previously disturbed by ungulates. *Melinus minutiflora* produces a dense mat capable of smothering plants (Smith 1985), essentially preventing seedling growth and native plant reproduction (Cuddihy and Stone 1990). Because it burns readily and often grows at the border of forests, this grass tends to carry fire into areas with woody native plants (Cuddihy and Stone 1990, Smith 1985). It is able to spread prolifically after a fire and effectively compete with less fire-adapted native plant species, ultimately creating a stand of alien grass where forest once stood. *Melinus minutiflora* is becoming a major threat to six of the proposed species on four islands. On Kaua'i it threatens the habitat of *Drosophila musaphilia.* In the Wai'anae Mountains of O'ahu, M. minutiflora threatens the habitat of *D. aglaia, D. hemipeza, D. montgomeryi, D. obatai,* and *D. tarphytrichia.*

Pennisetum setaceum has greatly increased fire risk in some regions, especially on the dry slopes of Hual'lai, K'lauea, and Mauna Loa volcanoes on the island of Hawai'i. The effects of *P. setaceum* invasion are similar to those discussed above for *Melinus minutiflora. Pennisetum setaceum* threatens the native vegetation on the leeward slopes of Hual'lai in a region where Drosophila heteroneura and *D. ochrobasis* occur.

Clidemia hirta, a noxious shrub native to tropical America, was first reported on O'ahu in 1941. It had spread through much of the Ko'olau Mountains by the early 1960s, and spread to the Wai'anae Mountains by 1970 (Cuddihy and Stone 1990). It poses a serious threat to *Drosophila hemipeza, D. obatai,* D. substenoptera, and *D. tarphytrichia* by displacing native plants used by these Hawaiian picture-wings as breeding sites.

Lantana camara, a native of the West Indies, became naturalized in dry to mesic forests and shrublands of the Hawaiian Islands before 1871 (Cuddihy and Stone 1990). This shrub often forms thick cover and produces chemicals that inhibit the growth of other plant species (Smith 1985). On Kaua'i, L. camara is a major component of the vegetation around the east and west rims of Waimea Canyon and the western ridges, and threatens the habitat of *Drosophila musaphilia.* It poses a threat to all proposed species of Hawaiian picture-wings on O'ahu.

Rubus argutus was introduced to the Hawaiian Islands in the late 1800s (Haselwood and Motter 1976). The fruit and seeds of this plant are easily spread by birds to open areas where this plant can form dense, impenetrable thickets (Smith 1985). On Kaua'i, the habitat of *Drosophila musaphilia* is endangered by this noxious weed.

Passiflora mollissima, a vine in the passionflower family, was introduced to the islands in the 1920s, probably as an ornamental. This vine is extremely detrimental to certain wet forest habitats of Kaua'i, Mau'i, and Hawai'i. Heavy growth of this vine can cause damage or death to the native trees by overloading branches, causing breakage, or by forming a dense canopy cover, intercepting sunlight and shading out native plants below. This weed threatens *Drosophila musaphilia* on Kaua'i, *D. neoclavisetae* on Mau'i, and *D. heteroneura, D. mulli,* and *D. ochrobasis* on the island of Hawai'i.

A recent introduction to the Hawaiian Islands, *Rubus ellipticus* is rapidly becoming a major weed pest in wet forests, pastures, and other open areas on the island of Hawai'i. It forms large thorny thickets and displaces native plants. Its ability to invade the understory of wet forests enables it to fill a niche presently unoccupied by any other major wet forest weed in Hawai'i. This has resulted in an extremely rapid population expansion of this alien plant in recent years. *Rubus ellipticus* threatens the habitat of Drosophila heteroneura, *D. mulli,* and *D. ochrobasis.*

Fire threatens species of Hawaiian picture-wings living in dry to mesic grassland, shrubland, and forests on two islands. On Kaua'i, fire is a significant

threat to *Drosophila musaphilia.* Hurricane Iniki, in 1992, resulted in an enormous fuel load of downed woody debris and significantly raised the potential for serious fires on the western slopes of Kaua'i (Hawai'i DLNR-Department of Forestry and Wildlife 1993) . On O'ahu, fire is a potential threat to *D. montgomeryi*, *D. aglaia*, and *D. obatai* in the Wai'anae Mountains. The effects of fires on native Hawaiian vegetation are largely deleterious, tipping the competitive balance toward alien species. Unlike native plant species, many alien plant species recover quickly and increase in cover following fires (Cudihy and Stone 1990). Hawaiian picture-wing habitat that is damaged or destroyed by fire is likely to be invaded and revegetated by alien plants that cannot be used as host plants by picture-wings.

Two Hawaiian picture wings, *Drosophila obatai* and D. *aglaia*, occur on Federal property at Pu'u Pane, a part of the United States Army's Schofield Barracks Military Reservation. The gently sloping lands below Pu'u Pane are used as a live firing range, and ordnance-induced fires are a common occurrence. Although firebreak roads have been constructed around the perimeter of the firing range, uncontrollable fire still remains a threat to these species and their habitat.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Overutilization is not a threat to any of the proposed Hawaiian picture-wings. While these and other species are valuable and popular as scientific research subjects, only a small number of researchers actively engage in field collections of these taxa. The individuals involved in this activity are professional biologists, knowledgeable and cognizant of the biology and conservation status of these animals. Because of the special collecting techniques involved, the use of these flies by more people for any purpose is highly unlikely. In addition, the collection of small numbers of adult flies would have little impact on the viability of a population, and such collection is necessary for accurate identification and conservation research.

C. Disease or Predation

Over 2,500 alien arthropods are now established in Hawai'i (Howarth 1990, Howarth *et al.* 1995, Nishida 1994), with a continuing establishment rate of 10-20 new species per year (Beardsley 1962, 1979). Many of these alien species have severe effects on the native Hawaiian insect fauna (Asquith 1995). Species of social Hymenoptera (ants and some wasps) and parasitic wasps pose the greatest threat to the Hawaiian picture-wings. Ants and other social insects frequently dominate the ecologies of tropical ecosystems and strongly influence the evolution of certain plants and animals. However, all of the native Hawaiian arthropods, including the Hawaiian picture-wings, evolved without the predation influence of ants or social wasps, and the subsequent arrival of these new groups to the Hawaiian islands has been devastating to the relatively defenseless native Hawaiian invertebrate flora.

Ants can be particularly destructive predators because of their high densities, recruitment behavior, aggressiveness, and broad range of diet (Reimer 1993). These attributes allow some ants to affect prey populations independent of prey density; thus ants can locate and destroy isolated populations and individuals (Nafus 1993). At least 36 species of ants are known to be established in the Hawaiian Islands, and particularly aggressive species have had severe effects on the native insect fauna (Zimmerman 1948). By the late 1870s, the big-headed ant (*Pheidole megacephala*) was present in Hawai'i, and its predation on native insects was noted by the early Hawaiian naturalist R.C.L. Perkins (1913), ''It may be said that no native Hawaiian Coleoptera insect can resist this predator, and it is practically useless to attempt to collect where it is well established. Just on the limits of its range, one may occasionally meet with a few native beetles (e.g., species of *Plagithmysus*), often with these ants attached to their legs and bodies, but sooner or later they are quite exterminated from these localities.'' With few exceptions, native insects have been eliminated from areas where the big-headed ant is present (Perkins 1913, Gagne 1979, Gillespie and Reimer 1993), and it has been documented to completely exterminate populations of native insects.

The Argentine ant (*Iridomyrmex humilis*) was discovered on the island of O'ahu in 1940 and is now established on all the main islands. Unlike the big-headed ant, the Argentine ant is primarily confined to higher elevations (Reimer *et al.* 1990). This species has been demonstrated to reduce populations or even eliminate native arthropods at high elevations in Haleakala National Park on Mau'i (Cole *et al.* 1992). While this species does not disperse by flight, colonies are moved about with soil and construction material; a colony was recently discovered on an isolated peak on the island of O'ahu under a radio tower.

The long-legged ant (*Anoplolepis longipes*) appeared in Hawai'i in 1952 and now occurs on O'ahu, Mau'i, and Hawai'i (Reimer *et al.* 1990). It inhabits low-elevation (less than 600 m (2,000 ft)), rocky areas of moderate rainfall (less than 250 cm (100 in.) annually) (Reimer *et al.* 1990). Direct observations indicate that Hawaiian arthropods are susceptible to predation by this species (Gillespie and Reimer 1993), and Hardy (1979) documented the disappearance of most native insects from Kipahulu Stream on Mau'i after the area was invaded by the long-legged ant.

At least two species of fire ants, *Solenopsis geminita* and S. papuana, are also important threats (Reagan 1986; Gillespie and Reimer 1993) and occur on all the major islands (Reimer *et al.* 1990). *Solenopsis geminita* is known to be a significant predator on pest fruit flies (Diptera: Tephritidae) in Hawai'i (Wong and Wong 1988). *Solenopsis papuana* is the only abundant, aggressive ant that has invaded intact mesic forest above 600 m (2,000 ft) and is still expanding its range in Hawai'i (Reimer 1993).

Numerous other ant species are recognized as threats to native invertebrates, and additional species become established almost yearly. While the larvae of most of the Hawaiian picture-wings feed deep in the substrate of the host plant, they emerge and move away to pupate in the ground, thus exposing themselves to predation by ants. Upon newly emerging as adults, these flies are particularly susceptible to predation. Adult picture-wings have been observed with ants attached to their legs (Kaneshiro and Kaneshiro 1995).

Another group of social insects that are voracious predators and were originally absent from Hawai'i are yellowjacket wasps (Hymenoptera: Vespidae). In 1977, an aggressive race of the western yellowjacket (*Paravespula pennsylvanica*) became established in Hawai'i and is now abundant at most higher elevations (Gambino *et al.* 1990). In Haleakala National Park on Mau'i, yellowjackets were found to forage predominantly on native arthropods (Gambino *et al.* 1987, 1990, Gambino and Loope 1992). Overwintering yellowjacket colonies in Hawai'i can produce over half a million foragers that consume tens of millions of arthropods, and evidence exists for localized reduction in native arthropod abundance (Gambino and Loope 1992). Yellowjackets have been observed preying on Hawaiian picture-wings (Kaneshiro and Kaneshiro 1995), and

the establishment of this species on the island of Hawai'i corresponded with a significant decline in several species of Hawaiian picture-wings (Carson 1982b, 1986, Foote and Carson 1995). Yellowjackets pose a serious threat to all Hawaiian picture-wing species in this proposed rulemaking.

Hawai'i also has a limited number of native parasitic Hymenoptera (wasps), with only species of Eucoiliidae recorded to utilize Hawaiian picture-wings as hosts. Several species of alien braconid wasps, *Diaschasmimorpha tryoni, D. longicaudatus, Opius vandenboschi, and Biosteres arisanus,* were purposefully introduced into Hawai'i to control several species of pest tephritid fruit flies (Funasaki *et al.* 1988). However, none of these parasitic wasps are specific to the pest flies, but are known to attack other species of flies, including native Hawaiian Tephritidae. While these wasps have not been recorded parasitizing Hawaiian picture-wings, and may not successfully develop in Drosophilidae, females will sting any fly larva available and can cause significant mortality (T. Duan, University of Hawai'i, pers. comm., 1995). Large extensive releases of these wasps or introductions of new species pose potential threats to Hawaiian picture-wings.

D. The Inadequacy of Existing Regulatory Mechanisms

Currently, no Federal, State, or local laws, treaties, and/or regulations specifically apply to the 12 proposed species of Hawaiian picture-wings. Some of the species may indirectly receive some protection under Federal and State laws because they utilize host plants that are protected under the Federal Endangered Species Act and the State of Hawai'i's Endangered Species Act. This indirect protection, however, is not sufficient since the species of Hawaiian picture-wings that utilize protected host plants may not be physically present on the host plants at all times and because some threats to these Hawaiian picture-wings can occur regardless of their presence on a protected host plant.

As stated above, alien parasitic wasps pose a threat to the Hawaiian picture-wings. Some alien wasp species have been introduced by Federal and State agencies for biological control of pest flies. The U.S. Environmental Protection Agency (EPA), under the authority of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), regulates biological control agents as pesticides. However, EPA only regulates microorganisms (*i.e.,* bacteria, fungi, protozoa, and viruses). EPA has exempted all other organisms from requirements of FIFRA, because it has determined that they are regulated by the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (USDA–APHIS). The State of Hawai'i requires that new introductions be reviewed by special committees before release (HRS Chapt. 150A), and current USDA–APHIS policy is to submit permit application materials, including an environmental assessment or environmental impact statement, to the Service's Pacific Islands Office for review under section 7 of the Act and National Environmental Policy Act (NEPA). However, predicting from laboratory studies the impacts introduced species may have on an ecosystem is difficult (Kauffman and Nechols 1992) and the purposeful release or augmentation of any Dipteran predator or parasitoid is a potential threat to these 12 species of Hawaiian picture-wing flies.

Federal listing would automatically invoke listing under Hawai'i State law, which prohibits taking and encourages conservation by State government agencies. Hawai'i's Endangered Species Act (HRS, Sect. 195D–4(a)) states, ''Any species of aquatic life, wildlife, or land plant that has been determined to be an endangered species pursuant to the (Federal) Endangered Species Act shall be deemed to be an endangered species under the provisions of this chapter and any indigenous species of aquatic life, wildlife, or land plant that has been determined to be a threatened species pursuant to the (Federal) Endangered Species Act shall be deemed to be a threatened species under the provisions of this chapter.'' State regulations prohibit the removal, destruction, or damage of federally listed animals found on State lands (HRS, Sect. 195D–4(e)). Further, the State may enter into agreements with Federal agencies to administer and manage any area required for the conservation, management, enhancement, or protection of endangered species (HRS, Sect. 195D–5(c)). Funds for these activities could be made available under section 6 (Cooperation with the States) of the Act. Federal listing of these species will, therefore, trigger the protection available under State law.

E. Other Natural or Manmade Factors Affecting Its Continued Existence

The small number of populations of *Drosophila neoclavisetae, D. mulli,* and *D. heteroneura* puts these species at risk of extinction from naturally occurring, yet relatively common, events such as hurricanes and landslides. A hurricane could cause total population loss by causing direct mortality, habitat destruction or modification, and the spread of invasive alien plants. The continued existence of these picture-wings is further complicated by their limited habitat. *Drosophila mulli* is only found at one location on the island of Hawai'i within a localized patch of *Pritchardia beccariana.* Adults are found only on the undersides of this plant, and further associations between *D. mulli* and this host plant are likely. *Drosophila neoclavisetae* is restricted to a ridgetop on the island of Mau'i where it has been found only within a small patch of endemic *Cyanea* spp. *Drosophila heteroneura* was believed to be extinct until it was rediscovered on private acreage at Hualālai Volcano in 1993. This remaining population is extremely small, with a 90 percent reduction from historical abundance (Kaneshiro and Kaneshiro 1995). Naturally occurring random events such as hurricanes or landslides may destroy vital *P. beccariana* or *Cyanea* spp., thus placing *D. mulli* and *D. neoclavisetae* at significant risk of extinction by eliminating the only habitat in which they have been found. Additionally, the destruction of native plants opens a niche for the establishment of introduced alien plant species. Once alien species are established, it is difficult for native plants, including host plants for *Drosophila* spp., to recover and thrive successfully.

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by the 12 species in determining to propose this rule. Based on this evaluation, the proposed action is to list *Drosophila aglaia, D. differens, D. hemipeza, D. heteroneura, D. montgomeryi, D. mulli, D. musaphilia, D. neoclavisetae, D. obatai, D. ochrobasis, D. substenoptera,* and *D. tarphytrichia,* as endangered. All 12 species are endangered by one or more of the following: habitat degradation by pigs, goats, deer, cattle, and alien plants; habitat loss from fire; predation by ants and alien wasps; and biological pest control. Three species are known from less than three populations, making them susceptible to extinction from naturally occurring random events. Because these 12 species are in danger of extinction throughout all or a significant portion of their ranges, they fit the definition of endangered as defined in the Act. Therefore, the Service proposes to list these species as endangered.

Critical Habitat

In the last few years, a series of court decisions has overturned our

determinations regarding a variety of species that designation of critical habitat would not be prudent (*e.g., Natural Resources Defense Council* v. *U.S. Department of the Interior* 113 F. 3d 1121 (9th Cir. 1997); *Conservation Council for Hawaii* v. *Babbitt,* 2 F. Supp. 2d 1280 (D. Hawaii 1998)). Based on the standards applied in those judicial opinions, we have examined the question of whether critical habitat for the 12 species of *Drosophila* flies would be prudent.

Although the 12 species have small population sizes, they do not appear to be vulnerable to unrestricted collection, vandalism, or other intentional disturbance at this time. We remain concerned that these threats might be exacerbated by the publication of critical habitat maps and further dissemination of locational information. However, we have examined the evidence available and have not found specific evidence of taking, vandalism, collection, or trade of this species or any similarly situated species. Consequently, consistent with applicable regulations (50 CFR 424.12(a)(1)(i)) and recent case law, we do not expect that the identification of critical habitat will increase the degree of threat to this species of taking or other human activity.

In the absence of a finding that critical habitat would increase threats to a species, if any benefits would result from critical habitat designation, then a prudent finding is warranted. In the case of these species, some benefits may result from designation of critical habitat. The primary regulatory effect of critical habitat is the section 7 requirement that Federal agencies refrain from taking any action that destroys or adversely modifies critical habitat. While a critical habitat designation for habitat currently occupied by these species would not be likely to change the section 7 consultation outcome, because an action that destroys or adversely modifies such critical habitat would also be likely to result in jeopardy to the species, in some instances section 7 consultation might be triggered only if critical habitat is designated. Examples include unoccupied habitat or occupied habitat that may become unoccupied in the future. Designating critical habitat may also provide some educational or informational benefits. Therefore, we propose that critical habitat is prudent for *Drosophila aglaia, D. differens, D. hemipeza, D. heteroneura, D. montgomeryi, D. mulli, D. musaphilia, D. neoclavisetae, D. obatai, D. ochrobasis, D. substenoptera,* and *D. tarphytrichia.*

Critical habitat is not determinable when one or both of the following situations exist: the information needed to analyze the impacts of the designation is lacking, or the biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat (50 CFR 424.12). Currently, we have found that critical habitat for the 12 *Drosophila* flies is not determinable based on our inadequate knowledge about the relationship of the flies to their primary and secondary host plant(s), the distributions of these host plant(s), the bacteria and fungal communities necessary for successful *Drosophila* larval development, and the relationship of these flies to other native and nonnative flies.

As discussed in the Background section of this proposed rule, each of the twelve species of *Drosophila* proposed for listing is restricted geographically to a single island; six species are reported from Oahu, three species are reported from the island of Hawaii, and one species, each, is reported from Kauai, Molokai, and Maui. All twelve species appear to have highly specialized breeding sites; they use small sections of fermenting or rotting areas on their host plant(s). The host plants are also, in many cases, ''single-island endemics''. Some, in fact, have already been independently listed as endangered or threatened and their locations are available through various government and privately-sponsored databases and from individual botanists. Unfortunately, information on the specific locations of other host plants may not be known, making determination of critical habitat difficult. In addition, we do not currently understand the relationship between the primary and the secondary host plant(s) and their associated *Drosophila* species. Factors that determine host suitability may include host plant size, the size and age of a rotting area upon which the larvae feed, the position of the rotting area with respect to the surrounding vegetation, soil moisture, relative humidity, frequency of rainfall and fog drip, and the presence or absence of other detritus (decaying organic matter) feeders, such as slugs and earthworms. However, it is not clear from currently available information which, or if all, of these factor(s) are essential for the long-term conservation of each *Drosophila* species.

We are also unable to determine critical habitat for these flies based on the lack of information on the bacteria and fungal communities necessary for successful *Drosophila* larval development. The larvae of all twelve *Drosophila* species are microbivores (fungus feeders) and little is known about their bacteria and fungal requirements or about the ability of host plant species to support them. This information is needed to determine what primary constituent elements are needed for fly larvae to survive.

Finally, we are currently unable to determine the inter-specific relationships between these species and other, more common species of *Drosophila,* introduced tipulids (crane flies), and other non-native fly species. Preliminary research strongly suggests that inter-generic competition is potentially an important limiting factor for the picture-wing *Drosophila* and may inhibit or limit their use of certain host plants. Additional information on these interrelationships will assist in determining what impacts these relationships have on the habitat requirements of these 12 flies.

When we find that critical habitat is not determinable, our regulations (50 CFR 424.17) provide that, within one year of the date of the final rule listing the species, we must publish a final rule designating critical habitat, based on the best information available at the time. Due to a limited listing budget, we plan to employ a priority system for deciding which outstanding critical habitat designations should be addressed first. We will focus our efforts on those designations that will provide the most conservation benefit, taking into consideration the efficacy of critical habitat designation in addressing the threats to the species, and the magnitude and immediacy of those threats. Therefore, if these species are listed, we will develop a proposal to designate critical habitat for the 12 species of *Drosophila* flies as soon as feasible, considering our workload priorities, as outlined in our priority system, and available funding.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain activities. Recognition through listing encourages public awareness and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Act provides for possible land acquisition and cooperation with the State and requires that recovery actions be carried out for all listed species. Funding may be available through section 6 of the Act for the State to conduct recovery activities. The

protection required of Federal agencies and the prohibitions against certain activities involving listed animals are discussed, in part, below.

Listing the 12 *Drosophila* species provides for the development and implementation of recovery plans for these species. These plans will bring together Federal, State, and regional agency efforts for the conservation of the species. Recovery plans will establish a framework for agencies to coordinate their recovery efforts. The plans will set recovery priorities and estimate the costs of the tasks necessary to accomplish the priorities. They will also describe the site-specific management actions necessary to achieve conservation and survival of these species.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer informally with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) requires Federal agencies to insure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with us.

Federal agency actions that may require conference and/or consultation as described in the preceding paragraph include, but are not limited to: Army Corps of Engineers involvement in projects, such as the construction of roads, bridges, and dredging projects, subject to section 404 of the Clean Water Act (33 U.S.C. 1344 *et seq.*) and section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*); U.S. Environmental Protection Agency authorized discharges under the National Pollutant Discharge Elimination System (NPDES); U.S. Department of Agriculture involved in release or permitting release of biological control agents under the Plant Pest Act; military training and activity carried out by the U.S. Department of Defense; and projects by the Natural Resources Conservation Service and U.S. Department of Housing and Urban Development.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered wildlife. The prohibitions of section 9(a)(2) of the Act, implemented by 50 CFR 17.21 for endangered species, make it illegal for any person subject to the jurisdiction of the United States to take (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these), import or export, ship in interstate or foreign commerce in the course of a commercial activity, or sell or offer for sale in interstate or foreign commerce any endangered wildlife species. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies.

Permits may be issued to carry out otherwise prohibited activities involving endangered wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22 and 17.23. Such permits are available for scientific purposes, to enhance the propagation or survival of the species, and/or for incidental take in the course of otherwise lawful activities. Requests for copies of the regulations regarding listed wildlife and inquiries about permits and prohibitions may be addressed to the U.S. Fish and Wildlife Service, Endangered Species Permits, 911 Northeast 11th Avenue, Portland, Oregon 97232–4181 (telephone 503/231–6241; facsimile 503/231–6243).

As published in the **Federal Register** on July 1, 1994, (59 FR 34272), our policy is to identify, to the maximum extent practicable at the time a species is listed, those activities that would or would not be likely to constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of the listing on proposed and ongoing activities within a species' range. Likely activities that we believe could potentially result in a violation of section 9 of the Act include, but are not limited to, the following: road and firebreak construction; military troop movements; loss of habitat due to fire resulting from the use of military ammunition; intentional release or augmentation of biological control agents; introduction of other alien species; and collection of individuals for any purpose without a permit. Activities that we believe would not likely result in a violation of section 9 of the Act include, but are not limited to, non-destructive activities in areas occupied by these species, such as hiking, collecting non-host plants for cultural usage (e.g., hula halau), and hunting. Activities that occur under a valid incidental take permit or in accordance with a section 7 consultation would not violate section 9.

Questions regarding whether specific activities will constitute a violation of section 9 of the Act should be directed to the Manager of the Pacific Islands Ecoregion (see **ADDRESSES** section).

If these Hawaiian picture-wing flies are listed under the Act, the State of Hawai'i Endangered Species Act (HRS, Sect. 195D–4(a)) is automatically invoked, prohibiting taking and encouraging conservation by State government agencies. Further, the State may enter into agreements with Federal agencies to administer and manage any area required for the conservation, management, enhancement, or protection of endangered species (HRS, Sect. 195D–5(c)). Funds for these activities could be made available under section 6 of the Act (State Cooperative Agreements). Thus, the Federal protection afforded to these species by listing them as endangered species will be reinforced and supplemented by protection under State law.

Public Comments Solicited

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule are hereby solicited. Comments particularly are sought concerning:

(1) Biological, commercial, or other relevant data concerning any threat (or lack thereof) to these species;

(2) The location of any additional populations of these species;

(3) Identification of habitat that should be designated as critical habitat and the reasons why this habitat should be determined to be critical habitat pursuant to section 4 of the Act or any reasons why critical habitat should not be designated;

(4) Additional information concerning the range, distribution, and population size of these species; and

(5) Current or planned activities in the subject area and their possible impacts on these species.

Final issuance of regulations on these species will take into consideration the comments and any additional information received by the Service, and such communications may lead to a final regulation that differs from this proposal. In accordance with interagency policy published on July 1,

1994 (59 FR 34270), upon publication of this proposed rule in the **Federal Register** we will solicit expert reviews by at least three specialists regarding pertinent scientific or commercial data and assumptions relating to the taxonomic, biological, and ecological information for the three species. The purpose of such a review is to ensure that listing decisions are based on scientifically sound data, assumptions, and analyses, including the input of appropriate experts. We will summarize the opinions of these reviewers in the final decision document. The final determination may differ from this proposal based upon the information we receive.

You may request a public hearing on this proposal. Your request for a hearing must be made in writing and filed within 45 days of the date of publication of this proposal in the **Federal Register**. Address your requests to the Field Supervisor (see **ADDRESSES** section).

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

Electronic Access and Filing

You may send comments by e-mail to pwflies__pr@fws.gov. Please submit these comments as an ASCII file and avoid the use of special characters and any form of encryption. Please also include ''Attn: 1018–AG23'' and your name and return address in your e-mail message. If you do not receive a confirmation from the system that we have received your e-mail message, contact us directly by calling our Pacific Islands Office at phone number 808–541–3441.

National Environmental Policy Act

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of all references and data cited herein, as well as others, is available upon request from Pacific Islands Ecoregion (see **ADDRESSES** section).

Author

The primary author of this document is Dr. Adam Asquith, U.S. Fish and Wildlife Service, Pacific Islands Ecoregion (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

Proposed Regulation Promulgation

Accordingly, the Service hereby proposes to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

1. The authority citation for Part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500, unless otherwise noted.

2. Section 17.11(h) is amended by adding the following, in alphabetical order under the family indicated, to the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat
Common name	Scientific name					
INSECTS						
*	*	*	*	*	*	
Fly, Hawaiian picture-wing	*Drosophila aglaia*	U.S.A. (HI)	NA	E	NA	NA
Fly, Hawaiian picture-wing	*Drosophila differens*	U.S.A. (HI)	NA	E	NA	NA
Fly, Hawaiian picture-wing	*Drosophila hemipeza*	U.S.A. (HI)	NA	E	NA	NA
Fly, Hawaiian picture-wing	*Drosophila heteroneura*	U.S.A. (HI)	NA	E	NA	NA
Fly, Hawaiian picture-wing	*Drosophila montgomeryi*	U.S.A. (HI)	NA	E	NA	NA
Fly, Hawaiian picture-wing	*Drosophila mulli*	U.S.A. (HI)	NA	E	NA	NA
Fly, Hawaiian picture-wing	*Drosophila musaphilia*	U.S.A. (HI)	NA	E	NA	NA
Fly, Hawaiian picture-wing	*Drosophila neoclavisetae*	U.S.A. (HI)	NA	E	NA	NA
Fly, Hawaiian picture-wing	*Drosophila obatai*	U.S.A. (HI)	NA	E	NA	NA
Fly, Hawaiian picture-wing	*Drosophila ochrobasis*	U.S.A. (HI)	NA	E	NA	NA
Fly, Hawaiian picture-wing	*Drosophila substenoptera*	U.S.A. (HI)	NA	E	NA	NA

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat
Common name	Scientific name					
Fly, Hawaiian picture-wing	*Drosophila tarphytrichia* ...	U.S.A. (HI)	NA	E	NA	NA
*	*	*	*	*	*	*

Dated: December 15, 2000.

Jamie Rappaport Clark,

Director, Fish and Wildlife Service.

[FR Doc. 01–1338 Filed 1–16–01; 8:45 am]

BILLING CODE 4310–55–U

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[I.D. 010301D]

RIN 0648-AL95

Fisheries of the Exclusive Economic Zone Off Alaska; Amendments to Alaska Groundfish and Crab Fishery Management Plans to Revise the License Limitation Program

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

ACTION: Notice of availability of amendments to fishery management plans; request for comments.

SUMMARY: The North Pacific Fishery Management Council (Council) has submitted Amendment 60 to the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area, Amendment 58 to the Fishery Management Plan for Groundfish of the Gulf of Alaska and Amendment 10 to the Fishery Management Plan for the Commercial King and Tanner Crab Fisheries in the Bering Sea and the Aleutian Islands (FMPs). These plan amendments are necessary to implement changes to the License Limitation Program (LLP) as recommended by the Council and are intended to further the objectives of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and the FMPs.

DATES: Comments on Amendments 60, 58, and 10 must be submitted by March 19, 2001.

ADDRESSES: Comments on the proposed plan amendments should be submitted to Sue Salveson, Assistant Regional Administrator for Sustainable Fisheries, Alaska Region, NMFS, P.O. Box 21668, Juneau, Alaska, 99802, Attn: Lori Gravel, or delivered to the Federal Building, 709 West 9th Street, Juneau, AK. Comments may also be sent by facsimile (fax) to 907-586-7465. Comments will not be accepted if submitted via e-mail or Internet. Copies of Amendments 60, 58, and 10 and the Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis prepared for the proposed plan amendments are available from the North Pacific Fishery Management Council, 605 West 4th Ave., Suite 306, Anchorage, AK 99501-2252; telephone 907-271-2809.

FOR FURTHER INFORMATION CONTACT: Jim Hale, 907-586-7228.

SUPPLEMENTARY INFORMATION:

Background

The Magnuson-Stevens Act requires that each Regional Fishery Management Council submit any fishery management plan or plan amendment it prepares to NMFS for review and approval, disapproval, or partial approval. The Magnuson-Stevens Act also requires that NMFS, after receiving a fishery management plan or plan amendment, immediately publish a notice in the **Federal Register** that the fishery management plan or plan amendment is available for public review and comment. This action constitutes such notice for Amendments 60, 58, and 10 to the FMPs. NMFS will consider public comments received during the comment period in determining whether to approve these proposed plan amendments. To be considered, a comment must be received by the close of business on the last day of the comment period.

In June 1995, the Council recommended that NMFS implement the LLP to address concerns of excess capital in the groundfish and crab fisheries off Alaska. The LLP is the second stage of a multi-staged process to reduce capacity in the affected fisheries. The LLP will replace the Vessel Moratorium Program (VMP), a program implemented by NMFS on January 1, 1996, to impose a temporary moratorium on the entry of new capacity in the groundfish and crab fisheries off Alaska and to define the class of entities that would be eligible for licenses under the LLP. The VMP expired on December 31, 1999 (64 FR 3651). The final rule implementing the LLP specifies that fishing will begin under the LLP on January 1, 2000 (63 FR 52642, October 1, 1998).

If approved, Amendments 60, 58, and 10 would make several changes to the final rule implementing the LLP. First, the Council recommended that recent participation criteria be added to the eligibility requirements for a crab species license. Originally, a person applying for a crab species license had to demonstrate that documented harvests were made from a qualifying vessel during two periods, the general qualification period (GQP) and the endorsement qualification period (EQP). If approved, Amendment 10 would add a third period, the recent participation period (RPP), in which a person would have to demonstrate that documented harvests of crab were made from a qualifying vessel. The RPP was added to the eligibility requirements for a crab species license because of the Council's concern that a crab species license could be issued to a person whose eligibility was based on participation that has been inactive since 1995. These ''latent licenses'' could be transferred to persons who would become active in the fishery. Such transfers would be contrary to the purpose of the LLP because it would create the potential to increase fishing effort above the current levels in the crab fisheries. Except under specific exemptions provided in the FMP amendments, the RPP would require that a person demonstrate that at least one documented harvest of any crab species was made during the period beginning January 1, 1996, through February 7, 1998.

The Council's second recommendation is to require that the vessel designated on the LLP license be transferred with the LLP license, if that LLP license was issued based on documented harvests made from a vessel without a Federal Fisheries Permit. A Federal Fisheries Permit is required for any vessel that participates in a Federal groundfish fishery off Alaska. If a vessel did not participate in Federal groundfish fisheries off Alaska, its qualifying documented harvests must have occurred in waters of the State of

Alaska or other waters shoreward of the exclusive economic zone (EEZ) off Alaska. Groundfish fisheries in state waters or other waters shoreward of the EEZ off Alaska will not be managed under the LLP. The Council reasoned that if a person is licensed to participate in a Federally managed fishery on the basis of participation in a State-managed fishery, certain restrictions should be placed on that license. Therefore, NMFS would restrict the transfer of a license issued to a vessel without a Federal Fishery Permit unless the licensed vessel is transferred with the license. The Council did not consider it a hardship to the license recipient to directly link the transfer of a license to the vessel, whether the recipient decides to keep or to transfer the license and vessel.

Third, the Council recommended that a gear designation be added to a groundfish license. The gear designation is intended to prevent movement between the trawl sector and the non-trawl sector. A license would be issued with a ''trawl,'' ''non-trawl,'' or ''trawl/non-trawl'' gear designation based on gear participation before June 17, 1995, with two exceptions. Under the first exception, a person could exercise a one-time option to switch gear designations if that person used a new gear between June 18, 1995, and February 7, 1998. For example, a person used only trawl gear before June 17, 1995. However, in 1997, that person used pot gear to catch Pacific cod. The use of a new gear in 1997 would allow the person to exercise a one-time option to change the gear designation from trawl gear to non-trawl gear. A person could not qualify for a trawl/non-trawl gear designation by use of this exception. Under the second exception, a person could request a gear designation change based on a significant financial investment. To qualify under the second exception, a person would have to (1) demonstrate that a significant financial investment was made in converting a vessel or purchasing fishing gear on or before February 7, 1998, and (2) demonstrate that a documented harvest was made from the qualifying vessel with the new gear type on or before December 31, 1998. A significant financial investment is defined as at least $100,000 toward vessel conversion or gear to change from a non-trawl to a trawl gear designation, or having acquired groundline, hooks or pots, and hauling equipment to change from a trawl to a non-trawl gear designation.

Fourth, the Council recommended that a community development quota (CDQ) vessel exemption, which originally had no ending date for eligibility, be limited to a specific time period (November 18, 1992, through October 9, 1998). The exemption was intended to facilitate the ability of CDQ organizations to enter and conduct groundfish fisheries through the purchase of new vessels that may not meet eligibility criteria. Concerns over excess capacity in the groundfish fisheries, and acknowledgment that CDQ organizations are integrating into the existing fishing industry at a reasonable pace, prompted the Council's recommendation. Further support for limiting this exemption came from public testimony that CDQ organizations did not use this exemption under the VMP.

Fifth, the Council recommended that limited processing ability, defined as 1 metric ton of round fish per day, be granted to a person deploying a vessel that is less that 60 ft (18.3 m) length overall, based on a groundfish license with a catcher vessel designation. This limited processing exemption is intended to assist small catcher vessels in exploiting niche markets not otherwise available.

Sixth, although not formally part of Amendments 60/58/10, the Council recommended that the name of the vessel to be deployed by the LLP license holder must be designated on the license. The Council recommended this change to address concerns about the movement of license holders among vessels contributing to excess capacity in the fisheries. The ability to move among vessels would have contributed to excess capacity by allowing a license holder to deploy a second vessel to fish while the first vessel was in port, or by allowing a license holder to alternate between vessels in different fisheries in different geographical locations. In both cases, a license holder could engage in uninterrupted fishing because breaks for unloading, vessel repairs, or running time could be eliminated through the use of another vessel. The Council recommended that NMFS make this change as a regulatory amendment.

Public comments will be accepted on these proposed amendments through the end of the comment period specified in this notification. A proposed rule that would implement the amendments may be published in the Federal Register for public comment following NMFS's evaluation under the Magnuson-Stevens Act procedures. All comments received by the end of the comment period specified in this notice, whether specifically directed to the amendments or to the proposed rule, will be considered in the decision to approve, disapprove, or partially approve these amendments.

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

Dated: January 11, 2001.

Bruce C. Morehead,

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

[FR Doc. 01–1380 Filed 1–16–01; 8:45 am]

BILLING CODE: 3510–22–S

Notices

Federal Register
Vol. 66, No. 11
Wednesday, January 17, 2001

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Agricultural Research Service

Notice of Federal Invention Available for Licensing and Intent To Grant an Exclusive License

AGENCY: Agricultural Research Service, USDA.

ACTION: Notice of availability and intent.

SUMMARY: Notice is hereby given that a Federally owned invention, U.S. Patent Application No. 09/304,352 filed May 4, 1999, entitled ''Chemical Compositions That Attract Arthropods,'' is available for licensing and the U.S. Department of Agriculture, Agricultural Research Service, intends to grant to the University of Florida Research Foundation, Inc., of Gainesville, Florida, an exclusive license to this invention.

DATES: Comments must be received on or before April 17, 2001.

ADDRESSES: Send comments to: USDA, ARS, Office of Technology Transfer, 5601 Sunnyside Avenue, Room 4–1158, Beltsville, Maryland 20705–5131.

FOR FURTHER INFORMATION CONTACT: June Blalock of the Office of Technology Transfer at the Beltsville address given above; telephone: 301–504–5257.

SUPPLEMENTARY INFORMATION: The Federal Government's patent rights to this invention are assigned to the United States of America, as represented by the Secretary of Agriculture. The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within ninety (90) days from the date of this published Notice, the Agricultural Research Service receives written evidence and argument which establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Richard M. Parry, Jr.,
Assistant Administrator.
[FR Doc. 01–1264 Filed 1–16–01; 8:45 am]
BILLING CODE 3410–03–P

DEPARTMENT OF AGRICULTURE

Agricultural Research Service

Notice of Intent to Grant Exclusive License

AGENCY: Agricultural Research Service, USDA.

ACTION: Notice of intent.

SUMMARY: Notice is hereby given that the U.S. Department of Agriculture, Agricultural Research Service (USDA), intends to grant to Viral Therapeutics of Ithaca, New York, an exclusive license to the invention disclosed in U.S. Patent No. 6,017,713 issued on January 25, 2000, entitled ''Ferritin Formation as a Predictor of Iron Availability in Foods.'' Notice of Availability was published in the **Federal Register** on November 3, 1999.

DATES: Comments must be received on or before March 19, 2001.

ADDRESSES: Send comments to: USDA, ARS, Office of Technology Transfer, 5601 Sunnyside Avenue, Rm. 4–1158, Beltsville, Maryland 20705–5131.

FOR FURTHER INFORMATION CONTACT: June Blalock of the Office of Technology Transfer at the Beltsville address given above; telephone: 301–504–5989.

SUPPLEMENTARY INFORMATION: The Federal Government's patent rights in this invention are assigned to the United States of America, as represented by the Secretary of Agriculture. It is in the public interest to so license the U.S. Government's rights in this invention as Viral Therapeutics has submitted a complete and sufficient application for a license. The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within sixty (60) days from the date of this published Notice, the Agricultural Research Service receives written evidence and argument which establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Richard M. Parry, Jr.,
Assistant Administrator.
[FR Doc. 01–1265 Filed 1–16–01; 8:45 am]
BILLING CODE 3410–03–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. 00–091–2]

Secretary's Advisory Committee on Foreign Animal and Poultry Diseases; Solicitation for Membership

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of intent.

SUMMARY: We are giving notice that the Secretary anticipates reestablishing the Advisory Committee on Foreign Animal and Poultry Diseases for a 2-year period. The Secretary is soliciting nominations for membership for this Committee. This is the second notice calling for nominations. Previous nominations need not be resubmitted.

DATES: Consideration will be given to nominations received on or before March 5, 2001.

ADDRESSES: Nominations should be addressed to the person listed under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: Dr. Joe Annelli, Chief Staff Veterinarian, Emergency Programs, VS, APHIS, 4700 River Road Unit 41, Riverdale, MD 20737–1231; (301) 734–8073.

SUPPLEMENTARY INFORMATION: The Secretary's Advisory Committee on Foreign Animal and Poultry Diseases (the Committee) advises the Secretary of Agriculture on actions necessary to keep foreign diseases of livestock and poultry from being introduced into the United States. In addition, the Committee advises on contingency planning and on maintaining a state of preparedness to deal with these diseases, if introduced.

The Committee Chairperson and Vice Chairperson shall be elected by the Committee from among its members.

Terms expired for the current members of the Committee in December 2000. We are soliciting nominations from interested organizations and individuals to replace members on the

Committee. An organization may nominate individuals from within or outside its membership. This is a second notice soliciting nominations. Previous nominations need not be resubmitted. The Secretary will select members to obtain the broadest possible representation on the Committee, in accordance with the Federal Advisory Committee Act (Pub. L. No. 92–463) and U.S. Department of Agriculture (USDA) Regulation 1041–1. Equal opportunity practices, in line with USDA policies, will be followed in all appointments to the Committee. To ensure that the recommendations of the Committee have taken into account the needs of the diverse groups served by the Department, membership should include, to the extent practicable, individuals with demonstrated ability to represent minorities, women, and persons with disabilities.

Done in Washington, DC, this 10th day of January 2001.

Bobby R. Acord,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 01–1313 Filed 1–16–01; 8:45 am]

BILLING CODE 3410–34–U

DEPARTMENT OF AGRICULTURE

Forest Service

Pink Stone Fire Recovery; Kootenai National Forest, Lincoln County, MT

AGENCY: Forest Service USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: In August, 2000, two lightning-caused wildfires burned about 16,100 acres in the Pinkham and Sutton Creek drainages between 7 and 14 miles southwest of Eureka, Montana. The fires threatened private property and resulted in significant tree mortality and increased future fuel levels. Increases in spring-time peak water flows in a few streams are expected to approach maximum levels allowed by the Kootenai Forest Plan as a result of vegetation loss. The USDA Forest Service will prepare an Environmental Impact Statement (EIS) for the Pink Stone Fire Recovery Decision Area, which encompasses the two fire areas. The EIS will disclose the effects of fire recovery opportunities designed to meet the Purpose and Need for taking action, which is to (1) reduce existing and future fuel accumulations, the corresponding risk of reburn, and the risk to private property; (2) recover the economic value of fire-killed timber; (3) restore vegetative species diversity appropriate to the sites; and (4) restore affected watersheds to properly functioning conditions.

Fuel reduction and economic opportunities would be accomplished through salvage harvest of fire-killed timber and jackpot burning of harvest-created slash. Vegetation and watershed restoration opportunities would be accomplished through hand planting and natural regeneration in harvested, riparian and burned areas, and improving water drainage systems through road, ditch and culvert improvements. Additional fire recovery opportunities proposed include visual quality improvements using unit shapes and sizes designed to imitate patterns created by the fires, improvements to fire-affected trails, and provisions for adequate snag and coarse woody debris following recovery treatments.

The Proposed Action would reduce existing and future fuels and recover the economic value of burned timber on about 4,003 acres of land burned during the fires, producing about 89,488 hundred cubic feet (CCF), or 36.7 million board feet (MMBF), of forest product. Treatment types include about 1,663 acres of regeneration harvest, 1,522 acres of shelterwood harvest, 464 acres of seed tree harvest, and 354 acres of commercial thinning using tractor, cable and forwarded harvest systems. Jackpot burning would be used to reduce residual fuels. Watershed recovery actions would include about 315 acres of riparian planting, about 2,791 acres of hand planting in addition to expected natural regeneration, and roadside drainage improvements on approximately 76 miles of forest roads. Visual quality improvements involve unit size, shapes and treatments that imitate fire patterns and decrease the visual effect of previous unit edges and fire-killed trees. Fire-created trail hazards on three trials would be removed.

The Proposed Action would require Kootenai National Forest Plan project-specific exceptions to harvest in big game movement corridors and to temporarily exceed open road density standards in Management Area 12 (Big Game Summer Range with Timber Management). The Proposed Action would also create openings over 40 acres, which is allowable under catastrophic conditions such as large wildfires.

The proposed activities are considered together because they represent either connected or cumulative actions as defined by the Council on Environmental Quality (40 CFR 1508.23).

The EIS will tier to the Kootenai National Forest Land and Resource Management Plan, as amended, and the Final Environmental Impact Statement (FEIS), and Record of Decision (ROD) of September 1987, which provides overall guidance for forest management of the area.

DATES: Written comments and suggestions should be received on or before February 16, 2001.

ADDRESSES: The Responsible Official is Bob Castaneda, the Kootenai National Forest Supervisor, 1101 U.S. Highway 2 West, Libby, MT 59923. Written comments and suggestions concerning the scope of the analysis should be sent to Glen M. McNitt, District Ranger, Rexford Ranger District, 1299 U.S. Highway 93 N, Eureka, MT 59917.

FOR FURTHER INFORMATION CONTACT: Ron Komac, Acting NEPA Coordinator, Rexford Ranger District, Phone: (406) 296–2536.

SUPPLEMENTARY INFORMATION: The Decision Area is located on the Rexford Ranger District of the Kootenai National Forest in northwest Montana. Two fire areas, the Stone Hill Fire (10,960 acres) and the Lydia Fire (5,434 acres) make up the almost 16,200-acre Decision Area. All but some high-elevation ridgetops have favorable climate and good site conditions for forest vegetation. Proposed activities within the Decision Area include all or portions of T34–35N; R27–29W.

Average annual precipitation ranges from 14 to 100 inches. At higher elevations, most precipitation falls as snow. The Decision Area contains a combination of open-grown ponderosa pine and Douglas-fir in the lower elevations adjacent to Lake Koocanusa in the Store Hill fire area; upland areas in both fires that contain multistoried western larch/Douglas-fir intermixed with lodgepole pine; and mid to high to elevation areas in both fires that produce Englemann spruce, subalpine fir and lodgepole pine stands.

Some of the Stone Hill portion of the Decision Area is highly visible from a designated Scenic Byway (State Highway 37 and Forest Development Road #228) and from the Webb Mountain rental lookout.

The Kootenai National Forest Land and Resource Management Plan provides overall management objectives in individual delineated management areas (MAs). Almost all of the proposed fire recovery activities occur in MA 12 and 15. Briefly described, MA 12 is managed to maintain or enhance the summer range habitat effectiveness for big game species and produce a programmed yield of timber. MA 15

focuses upon timber production using various silvicultural practices while providing for other resource values. Planting disease-resistant white-bark in suitable habitat and removing trail hazards along three trails are recovery activities proposed in MA 2 (non-motorized recreation, no timber harvest).

Purpose and Need

The Purpose and Need for taking action in the Decision Area is to (1) reduce existing and future fuel accumulations, the corresponding risk of reburn, and the risk to private property by removing dead and dying trees and jackpot burning residual fuels; (2) recover the economic value of fire-killed timber by harvesting merchantable trees; (3) restore vegetative species diversity by hand planting a variety of species appropriate to the sites in addition to natural regeneration; and (4) restore affected watersheds to properly functioning conditions by providing short- and long-term large woody debris recruitment, improving road-related drainage problems, and reducing the risk of additional watershed impacts from future reburns.

Proposed Activities

The Forest Service proposes to reduce existing and accumulating fuels and recover the economic value of burned timber on about 4,003 acres of fire-affected forest lands. About 1,663 acres of regeneration harvest would occur, where all trees would be harvested except about 5 moderately sized reserve trees. About 464 acres of seed tree harvest would occur, where 5–20 reserve trees would be retained to provide a seed source for natural regeneration. About 1,522 acres would be treated with a shelterwood harvest, where about 20–50 reserve trees per acre would be retained. Commercial thinning would occur on about 354 acres, with 30–100 trees per acre remaining. These treatments would recover an expected 89,488 CCF (36.7 MMBF) of commercial forest product from the fire-effected areas. A tractor harvest system would be used on about 1,270 acres where access and slope were favorable. On about 98 acres a cable system would be used, mostly due to steep slopes. A forwarded harvest system would be used on about 471 acres due to long skidding distances, steep slopes and soil concerns. Approximately 0.4 miles of temporary road would be needed to access one unit to be harvested with ground-based systems. This temporary road would be removed from the landscape after harvest activities were accomplished. No underburning is proposed due to the effects of the fires, however, residual fuels after the fires and harvest-generated fuels would be piled and burned as necessary (referred to as jackpot burning). Restoring vegetation as soon as possible would be supported by about 2,791 acres of hand planting western larch, western white pine and ponderosa pine in addition to expected natural regeneration. Selected sites over about 650 acres of high elevation land would be planted with disease-resistant white-barked pine. In addition to reforestation, watershed recovery actions would include providing species diversity and future large woody debris recruitment by planting aspen, black cottonwood, western redcedar, Englemann spruce and western hemlock up to 100 feet on both sides of about 13 mines of streams, or about 315 acres of riparian habitat; improving inadequate road-related drainage by upgrading roads to current Best Management Practices, increasing the size of stream crossing culverts, and improving road drainage; and reducing fuels in order to reduce the risk of additional impacts to watersheds from a future reburn. Visual quality improvements involve unit size, shapes and treatments that imitate fire patterns and decrease the visual effect of previous unit edges and fire-killed trees. Fire-created hazards on portions of three trails totaling about 7 miles would be removed.

The proposed activities were focused in high fire severity areas where large openings were created or will eventually be created by the fires. The Proposed Action contains 32 units that would exceed 40 acres and create immediate openings, ranging from 45 to 246 acres. Many are adjacent to other pre-fire openings or other Proposed Action units, and cumulatively with fire-affected stands could eventually result in very large openings exceeding 1,000 acres or more.

The proposal also includes 1.1 mile of permanent road construction, 0.4 miles of temporary road construction, and approximately 67 miles of reconstruction to meet Best Management Practices requirements. The temporary road would be obliterated following management actions.

Implementation of this proposal would require opening several miles of road currently restricted to public access. Depending on sale scheduling, some roads may be open to the public during activities. Restrictions for motorized access would be restored following the conclusion of the management activities.

Forest Plan Amendments

The proposed action includes several project-specific forest plan amendments and a programmatic amendment to meet the goals of the Kootenai National Forest Plan:

A project-specific amendment to MA 12 Wildlife and Fish Standard #7 and Timber Standard #2 would be needed to allow harvest adjacent to existing openings in big game movement corridors in MA 12. The wildfires burned around some pre-fire openings, removing cover in corridors and creating larger openings. The Proposed Action would remove much of the burned material that previously provided corridor cover. Surviving live trees and some snags and down woody material would be left to provide wildlife habitat and maintain soil productivity. In the larger openings, patches and corridors would be left to provide some level of security for big game movement through the fire areas.

A project-specific amendment to allow MA 12 open road densities would be needed to temporarily exceed the MA 12 Facilities Standard #3 of 1.15 miles/square mile (as previously amended by the Pinkham Timber Sale and Associated Activities Record of Decision, 1999). In order to recover forest products in a timely manner, several roads may be opened at the same time which would increase open road densities above the current standard. Open road densities would return to existing MA standards following activities.

Range of Alternatives

The Forest Service will consider a range of alternatives to the Proposed Action. One of these will be a ''no action'' alternative, in which none of the proposed activities would be implemented. Additional alternatives will be considered to achieve the project's purpose and need for action and to respond to specific resource issues and public concerns.

Preliminary Issues

Several issues of concern have been identified. These are briefly described below:

Future fire risk: The Lydia and Stone Hill fires killed many trees over large areas. Over the next 20 years most of these dead trees will fall over, creating high fuel levels. Reburns are anticipated with this kind of fuel load in intensities higher than what would normally be expected. In the aftermath of threats to private property this summer, public comments expressed concern over fuel loads and the potential for fires to again

threaten private land ownership. There are also internal concerns that such a reburn would cause more severe effects to soils, watershed resources, vegetation and specialized habitat such as old-growth, snags and coarse woody debris.

Timber supply: Many preliminary public comments expressed concern that the value of burned timber will be lost if nothing is done to recover the area. Additional comments have voiced concern over the time frame proposed for addressing fire recovery, and expressed the urgency to recover the economic value of affected trees in a timely manner.

Water quality: Streams in or downstream of the fire areas have been impacted by past management and large wildfires. Several streams are nearing maximum allowable peak flow levels. Although the Proposed Action is expected to have long-term benefits, there are concerns that cumulative effects of past harvest, the fires and the Proposed Action may have short-term negative impacts to some watersheds.

Lynx habitat: Both fire areas impacted suitable habitat for Canada lynx. Coarse woody debris is an important component of denning habitat, and if a reburn does not occur, the fire areas are expected to produce denning and foraging habitat in about 15 years. Some comments expressed concern that post-fire recovery of timber products would reduce or remove important denning habitat.

Visual recovery: The Stone Hill fire is highly visible from a designated Scenic Byway and several scenic viewpoints. Preliminary comments have expressed concern over the visual appearance of burned landscapes, including blackened bark, red needles and large areas of dead and dying trees. Other comments expressed concern about the potential for management activities to create sharp lines or unnatural patterns and decrease visual quality.

Permanent road construction: The Lydia fire burned through a large area which currently has no suitable road access. About 1.1 mile of permanent road construction is proposed to provide reasonable access to the proposed treatment areas. There is a public concern that the Forest Service does not have enough funding to justify building a permanent road and maintaining it through time.

Decisions To Be Made

The Kootenai Forest Supervisor will decide the following:

- Whether or not to reduce existing and expected fuels create by the fires in order to reduce the risk of a reburn, and if so, identify the selection and site-specific location of such actions, and the fuel treatments necessary to reduce those fuels.
- Whether or not to recover the economic value of burned trees in a timely manner, and if so, identify the selection, site-specific location and timing of such actions, and appropriate timber management practices (silvicultural prescription, logging system, fuels treatment, and reforestation), road construction/reconstruction necessary to provide access, and appropriate mitigation measures.
- Whether or not hand planting should be used to supplement natural regeneration and increase diversity in burned, harvested and riparian areas, and if so, identify the selection and site-specific locations of such actions, and the appropriate species and reforestation methods needed.
- Whether or not short-term impacts to watersheds should be allowed in order to improve long-term watershed conditions.
- Whether or not watershed recovery activities (large woody debris recruitment provisions, improved road drainages, reduced risk of reburn) to improve long-term conditions should be implemented, and if so, identify the selection and site-specific locations of such actions.
- Whether or not project-specific Forest Plan exceptions are necessary to meet the specific purpose and need of this project, and whether those exceptions are significant under NFMA.
- What, if any, specific-project monitoring requirements would be needed to assure mitigation measures are implemented and effective.

Public Involvement and Scoping

In November, 2000 preliminary efforts were made to involve the public in considering management opportunities within the Pink Stone Fire Recovery Decision Area. Comments received prior to this notice will be included in the documentation for the EIS. The public is encouraged to take part in the process and is encouraged to visit with Forest Service officials at any time during the analysis and prior to the decision. The Forest Service will be seeking information, comments, and assistance from Federal, State, and local agencies, Indian tribes, individuals, and organizations who may be interested in, or affected by, the Proposed Action. The input will be used in preparation of the draft and final EIS.

The scoping process will assist in identifying potential issues, identifying major issues to be analyzed in depth, identifying alternatives to the proposed action, and identifying potential environmental effects of this project and alternatives (i.e., direct, indirect, and cumulative effects and connected actions).

Estimated Dates for Filing

While public participation in this analysis is welcome at any time, comments received within 30 days of the publication of this notice will be especially useful in the preparation of the Draft EIS. The Draft EIS is expected to be filed with the Environmental Protection Agency (EPA) and to be available for public review by April, 2001. At that time EPA will publish a Notice of Availability of the draft EIS in the **Federal Register**. The comment period on the draft EIS will be 45 days from the date the EPA publishes the Notice of Availability in the **Federal Register**.

The final EIS is scheduled to be completed by September, 2001. In the final EIS, the Forest Service is required to respond to comments and responses received during the comment period that pertain to the environmental consequences discussed in the draft EIS, and applicable laws, regulations, and policies considered in making a decision regarding the proposal.

Reviewer's Obligations

The Forest Service believes it is important to give reviewers notice at this early stage of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions (*Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 553 [1978]). Also, environmental objections that could be raised at the draft environmental impact statement stage may be waived or dismissed by the courts (*City of Angoon* v. *Hodel,* 803, F.2d 1016, 1022 [9th Cir. 1986] and *Wisconsin Heritages, Inc.* v. *Harris,* 490 F. Supp. 1334, 1338 [E.D. Wis. 1980]). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 30-day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider and respond to them in the final EIS.

To be most helpful in assisting the Forest Service to identify and consider issues and concerns on the Proposed Action, comments on the draft EIS

should be as specific as possible and may address the adequacy of the statement or the merit of the alternatives discussed. Reference to specific pages or chapters of the draft EIS would also be helpful. Reviewers may wish to refer to the Council on Environmental Quality regulations (40 CFR 1503.3) for implementing the procedural provisions of the National Environmental Policy Act.

Responsible Official

As the Forest Supervisor of the Kootenai National Forest, 1101 U.S. Highway 2 West, Libby, MT 59923, I am the Responsible Official. As the Responsible Official I will decide if the proposed project will be implemented. I will document the decision and reasons for the decision in the Record of Decision. I have delegated the responsibility for preparing the EIS to Glen M. McNitt, District Ranger, Rexford Ranger District.

Dated: January 10, 2001.

Greg Kujawa,

Planning, Public Affairs, Recreation and Heritage Staff Officer, Kootenai National Forest.

[FR Doc. 01–1295 Filed 1–16–01; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

National Agricultural Statistics Service

Notice of Intent to Seek Approval to Extend an Information Collection

AGENCY: National Agricultural Statistics Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Pub. L. No. 104–13) and Office of Management and Budget regulations at 5 CFR part 1320 (60 FR 44978, August 29, 1995), this notice announces the intent of the National Agricultural Statistics Service (NASS) to extend a currently approved information collection, the Milk and Milk Products Surveys.

DATES: Comments on this notice must be received by March 23, 2001 to be assured of consideration.

ADDITIONAL INFORMATION OR COMMENTS: Contact Rich Allen, Associate Administrator, National Agricultural Statistics Service, U.S. Department of Agriculture, Room 4117 South Building, 1400 Independence Avenue SW, Washington, D.C. 20250–2000, (202) 720–4333.

SUPPLEMENTARY INFORMATION:

Title: Milk and Milk Products Surveys.

OMB Control Number: 0535–0020.

Expiration Date of Approval: 03/31/01.

Type of Request: Intent to Seek Approval to Extend an Information Collection.

Abstract: The primary objective of the National Agricultural Statistics Service is to prepare and issue state and national estimates of crop and livestock production. The Milk and Milk Products Surveys obtain basic agricultural statistics on milk production and manufactured dairy products from farmers and processing plants throughout the nation. Data are gathered for milk production, dairy products, evaporated and condensed milk, manufactured dry milk, and manufactured whey products. Milk production and manufactured dairy products statistics are used by the U.S. Department of Agriculture to help administer programs and by the dairy industry in planning, pricing, and projecting supplies of milk and milk products. This is a request to extend approval for the information collection for 3 years, including the recent addition of cream/milkfat to the dairy product prices surveys.

These data will be collected under the authority of 7 U.S.C. 2204(a). Individually identifiable data collected under this authority are governed by section 1770 of the Food Security Act of 1985, 7 U.S.C. 2276, which requires USDA to afford strict confidentiality to non-aggregated data provided by respondents.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 8 minutes per response.

Respondents: Farms and businesses.

Estimated Number of Respondents: 44,689.

Estimated Total Annual Burden on Respondents: 24,223 hours.

Copies of this information collection and related instructions can be obtained without charge from Ginny McBride, the Agency OMB Clearance Officer, at (202) 720–5778.

Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of 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 may be sent to: Ginny McBride, Agency OMB Clearance Officer, U.S. Department of Agriculture, Room 5336A South Building, 1400 Independence Avenue SW., Washington, DC 20250–2009 or gmcbride@nass.usda.gov.

All responses to this notice will become a matter of public record and be summarized in the request for OMB approval.

Signed at Washington, D.C., January 2, 2001.

Rich Allen,

Associate Administrator.

[FR Doc. 01–1266 Filed 1–16–01; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF COMMERCE

[I.D. 011001C]

Submission for OMB Review; Comment Request

The Department of Commerce has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Licensing of Private Land Remote-Sensing Space Systems.

Form Number(s): None.

OMB Approval Number: 0648-0174.

Type of Request: Regular submission.

Burden Hours: 314.

Number of Respondents: 13.

Average Hours Per Response: 40 hours for a license application, 10 hours for a license amendments, 2 hours for a notification of a foreign agreement, 1 hour for an executive summary, 2 hours for a notification of the demise of a systems or of a decision to discontinue operations, 2 hours for a notification of any operational deviation, 5 hours for a submission of a data collection restriction plan, 3 hours for submission of an operational plan for restricting collection or dissemination of information of Israeli territory, 3 hours for submission of a data flow diagram, 1 hour for submission of satellite sub-system drawings, 3 hours for submission of final imaging system specifications, 2 hours for submission of

spacecraft operational information, 2 hours for notification of a disposition/orbital debris change, 2 hours for notification of planned purges of information, 3 hours for an operational quarterly report, 8 hours for an annual compliance audit, and 10 hours for an annual operational audit.

Needs and Uses: NOAA has established requirements for the licensing of private operators of remote-sensing space systems. The information in applications and subsequent reports is needed to ensure compliance with the Land remote-Sensing Policy Act of 1992 and with the national security and international obligations of the United States.

Affected Public: Business and other for-profit organizations.

Frequency: On occasion, quarterly, annually.

Respondent's Obligation: Mandatory.

OMB Desk Officer: David Rostker, (202) 395-3897.

Copies of the above information collection proposal can be obtained by calling or writing Madeleine Clayton, Departmental Forms Clearance Officer, (202) 482-3129, Department of Commerce, Room 6086, 14th and Constitution Avenue, NW, Washington, DC 20230 (or via the Internet at MClayton@doc.gov).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, Washington, DC 20503.

Dated: January 9, 2001.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 01–1372 Filed 1–16–01; 8:45am]

BILLING CODE 3510–HR–S

DEPARTMENT OF COMMERCE

[I.D. 011001D]

Submission for OMB Review; Comment Request

The Department of Commerce has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Applications and Reporting Requirements for Small Takes of Marine Mammals by Specified Activities Under the Marine Mammal Protection Act.

Form Number(s): None.

OMB Approval Number: 0648-0151.

Type of Request: Regular submission.

Burden Hours: 7,512.

Number of Respondents: 44.

Average Hours Per Response: 483 hours for a request for new or renewal of regulations, 25.8 hours for an application for a Letter of Authorization, 200 hours for an application for Incidental Harassment Authorizations, 120 hours for a report for Incidental Harassment, and 93.6 hours for a report under a Letter of Authorization.

Needs and Uses: The taking by harassment, injury, or mortality of marine mammals is prohibited by the Marine Mammal Protection Act (MMPA) unless exempted or authorized by permit. The small-take program authorized the taking of marine mammals incidental to maritime activities (military, oil industry, shipping). It is the responsibility of the activity to determine if it might have a ''taking'' and, if it does, to apply for an authorization. Applications are necessary for NMFS to know that an authorization is needed and to determine whether authorization can be made under the MMPA. Reporting requirements are mandated by the MMPA and are necessary to ensure that determinations made in regard to the impact on marine mammals are valid.

Affected Public: Business and other for-profit organization, not-for-profit institutions, Federal government, and State, Local, or Tribal government.

Frequency: On occasion, annual, 90 days.

Respondent's Obligation: Mandatory.

OMB Desk Officer: David Rostker, (202) 395-3897.

Copies of the above information collection proposal can be obtained by calling or writing Madeleine Clayton, Departmental Forms Clearance Officer, (202) 482-3129, Department of Commerce, Room 6086, 14th and Constitution Avenue, NW, Washington, DC 20230 (or via the Internet at MClayton@doc.gov).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, Washington, DC 20503.

Dated: January 9, 2001

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 01–1373 Filed 1–16–01; 8:45am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

DOC has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act of 1995, Public Law 104–13.

Bureau: International Trade Administration.

Title: Information for Certification Under FAQ 6 of the Safe Harbor Privacy Principles.

Agency Form Number: N/A.

OMB Number: 0625–0239.

Type of Request: Regular Submission.

Burden: 550 hours.

Number of Respondents: 1500.

Avg. Hours Per Response: 20–40 minutes.

Needs and Uses: In response to the European Commission Directive on Data Protection that restricts transfers of personal information from Europe to countries whose privacy practices are not deemed ''adequate,'' the U.S. Department of Commerce has developed a ''safe harbor'' framework that will allow U.S. organizations to satisfy the European Directive's requirements and ensure that personal data flows to the United States are not interrupted. In this process, the Department of Commerce repeatedly consulted with U.S. organizations affected by the European directive and interested non-government organizations. On July 27, 2000, the European Commission issued its decision in accordance with Article 25.6 of the Directive that the Safe Harbor Privacy Principles provide adequate privacy protection. The safe harbor framework bridges the differences between the European Union (EU) and U.S. approaches to privacy protection. Under the safe harbor privacy framework, information is being collected in order to create a list of the organizations that have self-certified to the Principles. Organizations that have signed up to this list are deemed ''adequate'' under the Directive and do not have to provide further documentation to European officials. This list will be used by European Union organizations to determine whether further information and contracts will be needed for a U.S. organization to receive personally identifiable information. The decision to enter the safe harbor is entirely voluntary. Organizations that decide to participate in the safe harbor must comply with the safe harbor's requirements and publicly declare that they do so. To be assured of safe harbor

benefits, an organization needs to self certify annually to the Department of Commerce in writing that it agrees to adhere to the safe harbor's requirements, which includes elements such as notice, choice, access, and enforcement. It must also state in its published privacy policy statement that it adheres to the safe harbor. This list will be used by European Union organizations to determine whether further information and contracts will be needed by a U.S. organization to receive personally identifiable information. It will be used by the European Data Protection Authorities to determine whether a company is providing ''adequate'' protection, and whether a company has requested to cooperate with the Data Protection Authority. The list will also be accessed when there is a complaint logged in the EU against a U.S. organization, and used by the Federal Trade Commission and the Department of Transportation to determine whether a company is part of the safe harbor. It will be accessed if a company is practicing ''unfair and deceptive'' practices and has misrepresented itself to the public. In addition, the list will be used by the Department of Commerce and the European Commission to determine if organizations are signing up to the list on a regular basis.

Affected Public: Businesses or other for-profit.

Frequency: Annually.

Respondent's Obligation: Voluntary.

OMB Desk Officer: David Rostker, (202) 395–7340.

Copies of the above information collection proposal can be obtained by calling or writing Madeleine Clayton, Departmental Forms Clearance Officer, (202) 482–3129, Department of Commerce, Room 6086, 14th and Constitution, NW., Washington, DC 20230 (or via the Internet at MClayton@doc.gov.

Written comments and recommendations for the proposed information collection should be sent to David Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, Washington, DC 20503 within 30 days of the publication of this notice in the **Federal Register**.

Dated: January 11, 2001.

Madeleine Clayton,

Departmental Forms Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 01–1386 Filed 1–16–01; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 1–2001]

Foreign-Trade Zone 82—Mobile, AL; Application for Subzone Status Austal USA, LLC (Shipbuilding and Repair)

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the City of Mobile, Alabama, grantee of FTZ 82, requesting special-purpose subzone status for the shipbuilding facility of Austal USA LLC (Austal) [an Austal Holdings, Inc. (of Australia)/Bender Shipbuilding, Inc. joint venture] in Mobile, Alabama. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on January 9, 2001.

The Austal shipyard (13 acres, 200,000 sq.ft.) is located at 100 Dunlap Drive in Mobile, Alabama. The facility (150 employees) is used for the construction of aluminum commercial and military vessels for domestic and international customers. Foreign components that may be used at the Austal shipyard (representing up to 9% of vessel value) include propulsion units, engines and control systems, generators, pumps, air-conditioning systems, pipes, iron and steel mill products, aluminum bars/rods/profiles/plates/sheets/wire/tanks/containers, solenoids, valves, multimeters, signaling equipment, articles of rubber, twine, glass, prefabricated structures, stoves/ranges, electric motors, navigation and electronic equipment, propellers, transmission shafts, lighting and electrical equipment, panels, consoles, printed circuit assemblies, regulating/controlling equipment, and telephonic apparatus (2000 duty rate range: free—14.9%, *ad valorem*).

FTZ procedures would exempt Austal from Customs duty payments on the foreign components (except steel mill products) used in export activity. On its domestic sales, the company would be able to choose the duty rate that applies to finished oceangoing vessels (duty free) for the foreign-origin components noted above. The manufacturing activity conducted under FTZ procedures would be subject to the ''standard shipyard restriction'' applicable to foreign-origin steel mill products (*e.g.*, angles, pipe, plate), which requires that Customs duties be paid on such items. The application indicates that the savings from FTZ procedures would help improve the facility's international competitiveness.

In accordance with the Board's regulations, a member of the FTZ Staff has been designated examiner to investigate the application and report to the Board.

Public comment on the application is invited from interested parties. Submissions (original and three copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is March 19, 2001. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period (to April 3, 2001).

A copy of the application will be available for public inspection at the following locations:

Office of the Port Director, U.S. Customs Service, Suite 3004, 150 North Royal Street, Mobile, AL 36602

Office of the Executive Secretary, Foreign-Trade Zones Board, room 4008, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW., Washington, DC 20230

Dated: January 9, 2001.

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 01–1384 Filed 1–16–01; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 2–2001]

Foreign-Trade Zone 29—Louisville, KY; Application for Subzone ISP Chemicals Inc. (Chemical Plant) Calvert City, KY

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Louisville & Jefferson County Riverport Authority, grantee of FTZ 29, requesting special-purpose subzone status for the chemical plant facilities of ISP Chemicals Inc., located in Calvert City, Kentucky. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on January 9, 2001.

The facility is located on Highway 95, Calvert City, Kentucky. The application is requesting the use of zone procedures only for the portion of the facility that processes butanediol (B1D) into butyrolactone (BLO). This portion of the facility (4 acres, 525 employees) has the capacity to produce 210,000 pounds per day of BLO (HTS 2932.29.50 and 3824.90.47; duty rate 3.7%). Some 60 percent of the B1D is sourced from

abroad (HTS 2905.39.10; duty rate 7.9%).

FTZ procedures would exempt ISP from Customs duty payments on the foreign components used in export production. Some 35 percent of the BLO produced from the imported B1D in 1999 was exported. On its domestic sales, ISP would be able to choose the duty rates during Customs entry procedures that apply to BLO (3.7%) for the foreign input noted above. The request indicates that the savings from FTZ procedures would help improve the plant's international competitiveness.

In accordance with the Board's regulations, a member of the FTZ Staff has been designated examiner to investigate the application and report to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is March 19, 2001. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to April 3, 2001.

A copy of the application and the accompanying exhibits will be available for public inspection at each of the following locations:

U.S. Department of Commerce, Export Assistance Center, 601 West Broadway, Room, 634B, Louisville, KY 40202

Office of the Executive Secretary, Foreign-Trade Zones Board, Room 4008, U.S. Department of Commerce, 14th and Pennsylvania Avenue, NW., Washington, DC 20230

Dated: January 10, 2001.

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 01–1385 Filed 1–16–01; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1135]

Expansion of Foreign-Trade Zone 46, Cincinnati, OH Area

Pursuant to its authority under the Foreign-Trade Zones Act (the 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 Greater Cincinnati Foreign Trade Zone, Inc. (GCFTZ), grantee of FTZ 46, submitted an application to the Board for authority to expand FTZ 46—Site 3 (Clermont County Industrial Park) to include three additional parcels (FTZ Doc. 44–2000, filed 7–27–00);

WHEREAS, notice inviting public comment was given in the **Federal Register** (64 FR 47712, 8–3–00) 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 Act and the Board's regulations are satisfied, and that the proposal is in the public interest;

NOW, THEREFORE, the Board hereby authorizes the grantee to expand its zone as requested in the application, subject to the Act and the Board's regulations, including Section 400.28.

Signed at Washington, DC, this 29th day of December 2000.

Richard W. Moreland,

Acting Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Pierre V. Duy,

Acting Executive Secretary.

[FR Doc. 01–1383 Filed 1–16–01; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–428–817]

Certain Cut-to-Length Carbon Steel Plate from Germany; Final Results of Countervailing Duty Administrative Reviews

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Final Results of Countervailing Duty Administrative Reviews.

SUMMARY: On September 8, 2000, the Department of Commerce (the Department) published in the **Federal Register** its preliminary results of administrative reviews of the countervailing duty order on certain cut-to-length carbon steel plate from Germany for the periods calendar year 1997 and calendar year 1998 (65 FR 54496). The Department has now completed these administrative reviews in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act). For information on the net subsidy for each reviewed company, and for all non-reviewed companies, please see the ''Final Results of Review'' section of this notice. We will instruct the U.S. Customs Service (Customs) to assess countervailing duties as detailed in the ''Final Results of Review'' section of this notice.

EFFECTIVE DATE: January 17, 2001.

FOR FURTHER INFORMATION CONTACT: Robert Copyak, Office of AD/CVD Enforcement VI, Group II, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–2786.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to 19 CFR 351.213(b), these administrative reviews cover only those producers or exporters of the subject merchandise for which the administrative reviews were specifically requested. Accordingly, these administrative reviews cover exporter Novosteel SA and producer Reiner Brach GmbH and Co. KG. We received timely allegations of additional subsidies, including allegations of upstream subsidies. We initiated examinations of three of these alleged subsidy programs and determined not to initiate examinations of the alleged upstream subsidy programs. *See* memorandum to Melissa G. Skinner, Director, Office of AD/CVD Enforcement VI, from Team, entitled *1997 and 1998 Administrative Reviews of the Countervailing Duty Order on Certain Cut-to-Length Carbon Steel Plate from Germany: Memorandum Regarding Affiliation, Cross-ownership, Upstream Subsidy Allegations, and Other Subsidy Allegations,* dated August 23, 2000. (This memorandum is on file in public version form in the public file room of room B–099 of the main Commerce building.) These administrative reviews cover 39 programs and the periods calendar year 1997 and calendar year 1998.

On September 8, 2000, the Department published in the **Federal Register** its preliminary results of administrative reviews. *See Certain Cut-to-Length Carbon Steel Plate From Germany; Preliminary Results of Countervailing Duty Administrative Reviews,* 65 FR 54496 (*Preliminary Results*). We invited interested parties to comment on the *Preliminary Results.* We received comments on October 10, 2000, and on October 27, 2000.

Applicable Statute and Regulations

Unless otherwise indicated, all citations to the statute are references to the provisions of the Act, as amended by the Uruguay Round Agreements Act (URAA) effective January 1, 1995. The

Department is conducting these administrative reviews in accordance with section 751(a) of the Act. In addition, unless otherwise indicated, all citations to the Department's regulations reference 19 CFR part 351 (1999).

Scope of the Review

The merchandise subject to these administrative reviews includes hot-rolled carbon steel universal mill plates (*i.e.,* flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 millimeters but not exceeding 1,250 millimeters and of a thickness of not less than 4 millimeters, not in coils and without patterns in relief), of rectangular shape, neither clad, plated nor coated with metal, whether or not painted, varnished, or coated with plastics or other nonmetallic substances; and certain hot-rolled carbon steel flat-rolled products in straight lengths, of rectangular shape, hot rolled, neither clad, plated, nor coated with metal, whether or not painted, varnished, or coated with plastics or other nonmetallic substances, 4.75 millimeters or more in thickness and of a width which exceeds 150 millimeters and measures at least twice the thickness, as currently classifiable in the HTSUS under item numbers (7208.40.3030), (7208.40.3060), (7208.51.0030), (7208.51.0045), (7208.51.0060), (7208.52.0000), (7208.53.0000), (7208.90.0000), (7210.70.3000), (7210.90.9000), (7211.13.0000), (7211.14.0030), (7211.14.0045), (7211.90.0000), (7212.40.1000), (7212.40.5000), (7212.50.0000). Included in these administrative reviews are flat-rolled products of non-rectangular cross-section where such cross-section is achieved subsequent to the rolling process (*i.e.,* products which have been ''worked after rolling'')—for example, products which have been beveled or rounded at the edges. Excluded from these reviews is grade X–70 plate. Also excluded from these administrative reviews is certain carbon cut-to-length steel plate with a maximum thickness of 80 mm in steel grades BS 7191, 355 EM, and 355 EMZ, as amended by Sable Offshore Energy Project specification XB MOO Y 15 0001, types 1 and 2.

Analysis of Programs

Programs Determined To Be Not Used

We examined the following programs and determined, based on the questionnaire responses, that the producer and/or exporter of the subject merchandise did not apply for or receive benefits under these programs during the periods of review:

1. Capital Investment Grants
2. Investment Premium Act
3. Joint Scheme: Improvement of Regional Economic Structure—GA Investment Grants and Other GA Subsidies
4. Ruhr District Action Program
5. Aid for Closure of Steel Operations
6. Joint Program: Upswing East
7. Freight Programs under the Special Subsidies for Companies in the Zonal Border Area
8. Loan Guarantees under Treuhandanstalt Subsidies
9. Long-term Loans from the Kreditanstalt fur Wiederaufbau (KfW)
10. Tax Programs under Special Subsidies for Companies in the Zonal Border Area
11. Structural Improvement Aids
12. ECSC Article 54 Loans
13. ECSC Article 54 Interest Rebates
14. ECSC Redeployment Aid Under Article 56(2)(b)
15. ECSC Article 54 Loans
16. ECSC Article 54 Interest Rebates
17. Loans with Reduced Interest Rates under the Steel Restructuring Plan
18. Federal and State Government Loan Guarantees under the Steel Restructuring Plan
19. Special Ruhr Plan
20. Zukunftsinitiative Montaregionen (ZIM)
21. Kreditanstalt fur Wiederaufbau (KfW) Investment Loans for Eastern Germany
22. Deutsche Ausglechsbank Investment Loans for Eastern Germany
23. European Recovery Program Loans for Eastern Germany
24. Loan Guarantee Program Loans for Eastern Germany
25. Peine-Salzgitter Profit Transfer Agreement and Other Operation Loss Subsidies
26. Elimination of Duisburg Harbor Tolls
27. Export Credits at Preferential Rates
28. Miscellaneous Tax Subsidies
29. Loans from the Government of Nordrhein-Westphalen
30. Tax Subsidies for Eastern Germany
31. European Investment Bank Loans and Loan Guarantees
32. New Community Instrument Loans
33. European Regional Development Fund Aid
34. Nordrhein-Westphalen's Air Pollution Control Program
35. ECSC Article 54 Loan Guarantees
36. ECSC Article 56 Conversion Loans
37. European Social Funds Grants
38. Assistance Measures for the Companies within the Steel Industry to Partially Compensate for Costs of the Social Plans
39. Social Aid for the Workers in the Coal and Steel Industries

Analysis of Comments Received

The comments submitted by interested parties are addressed in the ''Issues and Decision Memorandum'' (Decision Memorandum) from Holly A. Kuga, Acting Deputy Assistant Secretary, Import Administration, to Troy H. Cribb, Assistant Secretary for Import Administration, dated January 8, 2000, which is hereby adopted by this notice. A list of the issues addressed is attached to this notice as Appendix I. The Decision Memorandum is a public document which is on file in room B–099 of the Main Commerce Building and can be accessed via the internet at the website *http://ia.ita.doc.gov/frn* and under the heading ''Germany.'' The paper copy and electronic version of the Decision Memorandum are identical in content.

Final Results of Administrative Reviews

In accordance with 19 CFR 351.221(b)(5), we calculated an individual subsidy rate for the producer/exporter subject to these administrative reviews. For the periods calendar year 1997 and calendar year 1998, we determine the net subsidy for Novosteel SA/Reiner Brach GmbH and Co. KG to be 0.00 percent *ad valorem*.

As provided for in the Act and 19 CFR 351.106(c)(1), any rate less than 0.5 percent *ad valorem* in an administrative review is *de minimis.* Accordingly, no countervailing duties will be assessed. The Department will instruct Customs to liquidate, without regard to countervailing duties, shipments of the subject merchandise from Novosteel SA produced by Reiner Brach GmbH and Co. KG, exported on or after January 1, 1997 through December 31, 1997 and January 1, 1998 through December 31, 1998. Also, the cash deposits for this producer will be zero.

Because the URAA replaced the general rule in favor of a country-wide rate with a general rule in favor of individual rates for investigated and reviewed companies, the procedures for establishing countervailing duty rates, including those for non-reviewed companies, are now essentially the same as those in antidumping cases, except as provided for in section 777A(e)(2)(B) of the Act. The requested review will normally cover only those companies specifically named. *See* 19 CFR 351.213(b). Pursuant to 19 CFR 351.212(c), for all companies for which a review was not requested, duties must be assessed at the cash deposit rate, and cash deposits must continue to be collected, at the rate previously ordered. As such, the countervailing duty cash deposit rate applicable to a company

can no longer change, except pursuant to a request for a review of that company. *See Federal-Mogul Corporation and The Torrington Company* v. *United States,* 822 F.Supp. 782 (CIT 1993) and *Floral Trade Council* v. *United States,* 822 F.Supp. 766 (CIT 1993) (interpreting 19 CFR 353.22(e), the prior antidumping regulation on automatic assessment, which was identical to 19 CFR 355.22(g)). Therefore, the cash deposit rates for all companies except those covered by these reviews will be unchanged by the results of these reviews.

We will instruct Customs to continue to collect cash deposits for non-reviewed companies at the most recent company-specific or country-wide rate applicable to the company. Accordingly, the cash deposit rates that will be applied to non-reviewed companies covered by this order will be the rate for that company established in the most recently completed administrative proceeding conducted under the URAA. If such a review has not been conducted, the rate established in the most recently completed administrative proceeding pursuant to the statutory provisions that were in effect prior to the URAA amendments is applicable. *See Final Affirmative Countervailing Duty Determinations: Certain Steel Products from Germany,* 58 FR 37315 (July 9, 1993). This rate shall apply to the non-reviewed companies until a review of a company assigned these rates is requested. In addition, for the periods calendar year 1997 and calendar year 1998, the assessment rates applicable to all non-reviewed companies covered by this order are the cash deposit rates in effect at the time of entry.

This notice serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

These administrative reviews and this notice are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: January 8, 2001.

Troy H. Cribb,

Assistant Secretary for Import Administration.

APPENDIX 1—Issues Discussed in Decision Memorandum

Analysis of Comments

1. Upstream Subsidy Allegations
2. Need to Conduct Verification
3. Attribution of Subsidies

[FR Doc. 01–1382 Filed 1–16–01; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 011001A]

Small-craft Facility Questionnaire

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Proposed information collection; comment request.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before March 19, 2001.

ADDRESSES: Direct all written comments to Madeleine Clayton, Departmental Forms Clearance Officer, Department of Commerce, Room 6086, 14th and Constitution Avenue NW, Washington, DC 20230 (or via Internet at MClayton@doc.gov).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Lyn Preston, Chief, Nautical Data Branch, Marine Chart Division, N/CS26, Room 7350, 1315 East-West Highway, Silver Spring, MD 20910-3282 (phone 301-713-2737, ext. 123 or e-mail Lyn.Preston@noaa.gov).

SUPPLEMENTARY INFORMATION:

I. Abstract

NOAA's National Ocean Services produces nautical charts to ensure safe navigation. Small-craft charts are designed for recreational boaters and include information on local marine facilities and the services they provide (fuel, repairs, etc.). Information must be gathered from marinas to update the information provided to the public.

II. Method of Collection

Forms are sent to marinas when the relevant chart is to be updated. Forms are also made available at boat shows.

III. Data

OMB Number: 0648-0021.
Form Number: NOAA Form 77-1.
Type of Review: Regular submission.
Affected Public: Business or other for-profit organizations.
Estimated Number of Respondents: 1,600.
Estimated Time Per Response: 8 minutes.
Estimated Total Annual Burden Hours: 213.
Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) 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.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: January 9, 2001

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 01–1370 Filed 1–16–01; 8:45 am]

BILLING CODE 3510–JT–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 011001B]

Observer Workshop Survey

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Proposed information collection; comment request.

SUMMARY: The Department of Commerce, as part of its continuing

effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before March 19, 2001.

ADDRESSES: Direct all written comments to Madeleine Clayton, Departmental Forms Clearance Officer, Department of Commerce, Room 6086, 14th and Constitution Avenue NW, Washington, DC 20230 (or via Internet at MClayton@doc.gov).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Vicki Cornish or Margaret Toner, NMFS, F/ST1, 1315 East-West Highway; Silver Spring, MD 20910 (phone 301-713-2328, ext. 163).

SUPPLEMENTARY INFORMATION:

I. Abstract

NOAA Fisheries hosted two observer workshops, in 1998 and 2000, which brought together managers and scientists from the United States, Canada and other countries to share ideas and resolve key issues of common interest regarding fishery observer programs. In 2002, NOAA Fisheries will be hosting another observer workshop. The purpose of the collection is to gather information from participants in the previous workshops and from new potential participants in order to plan the format and content for the next observer workshop such that it will provide the greatest benefit to the performance of the NOAA Fisheries observer program.

II. Method of Collection

The information will be collected by having a survey form available on a NOAA web site.

III. Data

OMB Number: None.

Form Number: None.

Type of Review: Regular submission.

Affected Public: State, local, or tribal government; business and other for-profit organizations; not-for-profit institutions, individuals.

Estimated Number of Respondents: 350 (every two years).

Estimated Time Per Response: 15 minutes.

Estimated Total Annual Burden Hours: 44.

Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) 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.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: January 9, 2001.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 01–1371 Filed 1–16–01; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 011001E]

Coast Pilot Report

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Proposed information collection; comment request.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before March 19, 2001.

ADDRESSES: Direct all written comments to Madeleine Clayton, Departmental Forms Clearance Officer, Department of Commerce, Room 6086, 14th and Constitution Avenue NW, Washington DC 20230 (or via Internet at MClayton@doc.gov).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Oren Stembel, N/CS51, Room 7532, 1315 East-West Highway, Silver Spring, MD 20910-3282 (phone 301-713-2750, ext. 204; e-mail Oren.Stembel@noaa.gov).

SUPPLEMENTARY INFORMATION:

I. Abstract

NOAA produces the U.S. Coast Pilot, a series of nine books that supplement marine nautical charts. The Coast Pilot contains information essential to navigators in U.S. coastal and intra-coastal waters but that cannot be shown graphically on charts. The Coast Pilot Report form is offered to the public as a means for recommending changes to the publication.

II. Method of Collection

A paper form is used.

III. Data

OMB Number: 0648-0007.

Form Number: NOAA Form 77-6.

Type of Review: Regular submission.

Affected Public: Individuals or households.

Estimated Number of Respondents: 100.

Estimated Time Per Response: 30 minutes.

Estimated Total Annual Burden Hours: 50.

Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) 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.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: January 9, 2001.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 01–1374 Filed 1–16–01; 8:45 am]

BILLING CODE 3510–JT–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 010901C]

Marine Mammals: Draft Environmental Assessment on Allocating Gray Whales to the Makah Tribe for the years 2001 and 2002

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

ACTION: Notice of availability and request for comments.

SUMMARY: NMFS announces the availability of a Draft Environmental Assessment (EA) that examines the environmental consequences of issuing the International Whaling Commission (IWC) quota for gray whales to the Makah Tribe for the years 2001 and 2002. NMFS has not identified a preferred alternative in this draft EA and is soliciting comments on the draft EA. The Draft EA considers four alternatives regarding the issuance of the IWC quota to the Makah Tribe.

DATES: Comments on the EA must be received by February 16, 2001. A public hearing on this draft EA will be held in Seattle, WA on Thursday, February 1, 2001, at 6:00 p.m. The public hearing will be held at the Sand Point Magnuson Park Auditorium, 74th Street Entrance, 7400 Sand Point Way NE, Seattle, Washington.

ADDRESSES: Comments on the draft EA should be addressed to Cathy E. Campbell, NOAA/NMFS, Office of Protected Resources, 13th Floor, 1315 East-West Hwy, Silver Spring, MD 20910. Mark the outside of the envelope with ''Comments on Makah EA.'' Comments received over the Internet or by electronic mail will not be accepted. Copies of the EA and directions to the public hearing may be obtained over the internet at http://www.nmfs.noaa.gov/prot—res/prot—res.html under ''New Arrivals''.

FOR FURTHER INFORMATION CONTACT: Cathy Campbell, 301–713–2322.

SUPPLEMENTARY INFORMATION: Prior to the 1997 Annual International Whaling Commission (IWC) Meeting, NMFS formally analyzed the environmental impacts of a decision to support or not support whaling, and to determine whether an annual subsistence quota of up to five Eastern Pacific gray whales would significantly affect the quality of the human environment. A draft EA was distributed for public comment on August 22, 1997. After reviewing and addressing the comments received, NMFS issued a final EA and Finding of No Significant Impact on October 17, 1997.

At its 1997 annual meeting, the IWC approved a quota of 620 gray whales for an aboriginal subsistence harvest during the years 1998 through 2002. The basis for the quota was a joint request by the Russian Federation (for a total of 600 whales) and the United States (for a total of 20 whales). In 1998 and 1999, NOAA granted an allocation of up to five whales a year to the Makah Indian Tribe, whose subsistence and ceremonial needs had been the foundation of the U.S. request to the IWC.

U.S. Congressman Jack Metcalf, Breach Marine Protection, and several other plaintiffs brought a lawsuit, *Metcalf* v. *Daley*, in October 1997, alleging that the U.S. Government had violated the National Environmental Policy Act (NEPA), the Whaling Convention Act, and other statutes. In September 1998, the U.S. District Court for the Western District of Washington ruled in favor of the U.S. Government on all issues.

On June 9, 2000, the Ninth Circuit Court of Appeals overturned one aspect of that decision, ruling that the 1997 EA should have been completed before the U.S. and the Makah Tribe entered into a cooperative agreement. That agreement had provided that, if the Tribe prepared an adequate needs statement documenting a cultural and subsistence need to harvest gray whales, NOAA would request a quota of gray whales from the IWC. Two judges on a three-judge panel held that the timing of the EA, which was completed after the 1996 agreement was signed and before the 1997 annual meeting of the IWC, may have predisposed the preparers to find that the whaling proposal would not significantly affect the environment. The Court ordered NOAA to set aside that finding and comply with NEPA under circumstances that would ensure an objective evaluation of the environmental consequences of the gray whale harvest.

Following the Court action, NOAA rescinded its cooperative agreement with the Makah Tribe on August 11, 2000. NOAA subsequently set the gray whale quota for 2000 at zero (65 FR 75186, December 1, 2000), pending completion of its NEPA analysis.

The National Environmental Policy Act (NEPA) requires that federal agencies conduct an environmental analysis of their actions to determine if the actions may affect the environment. Accordingly, NMFS prepared a draft EA that explores the environmental consequences of four alternatives: (1) Granting the Makah Tribe the IWC quota with restrictions to target the hunt on migrating whales (similar to the 1999 regime); (2) Granting the Makah Tribe the IWC quota with restrictions that would allow a limited hunt on the gray whale summer feeding aggregation; (3) Granting the Makah Tribe the IWC quota without time-area restrictions; and (4) (No Action) - not granting the Makah Tribe the IWC quota.

The draft EA was prepared in accordance with NEPA and implementing regulations at 40 CFR parts 1500 through 1508 and NOAA guidelines concerning implementation of NEPA found in NOAA Administrative Order 216–6.

NMFS is soliciting public comments on this draft EA. Oral and written comments may be presented at the public hearing [see **DATES** and **ADDRESSES**]. Written comments on the draft EA may also be sent to the previously listed address by February 16, 2001. Further details or a copy of the EA can be obtained from the internet address above [see **ADDRESSES**].

Special Accommodations

The public hearing will be physically accessible to those with disabilities. Requests for sign language interpretation or other aids should be directed to C. Campbell at least 10 days prior to the hearing date (see **ADDRESSES**).

Dated: January 10, 2001.

Wanda L. Cain,

Acting Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 01–1354 Filed 1–11–01; 3:33 pm]

BILLING CODE: 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 120400B]

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Fishery Management Plan for the Dolphin and Wahoo Fishery of the Atlantic, Caribbean, and Gulf of Mexico

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

Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of intent to prepare a draft environmental impact statement (DEIS); request for comments.

SUMMARY: The South Atlantic Fishery Management Council (South Atlantic Council) intends to prepare a DEIS to assess the impacts on the natural and human environment of the dolphin and wahoo fishery and of the management measures proposed for this fishery under the draft Fishery Management Plan for the Dolphin and Wahoo Fishery of the Atlantic, Caribbean and Gulf of Mexico. The purpose of this notice is to solicit public comments on the scope of the issues to be addressed in the DEIS.

ADDRESSES: Written comments on the scope of the DEIS and requests for additional information on the management measures proposed for the management of dolphin and wahoo in the Atlantic Ocean, Caribbean Sea, and Gulf of Mexico should be sent to the South Atlantic Fishery Management Council, One Southpark Circle, Suite 306, Charleston, SC 29407-4699; phone: 843-571-4366; fax: 843-769-4520.

DATES: Written comments on the scope of the issues to be addressed by the DEIS should be received by the Council by February 16, 2001.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, 843-571-4366, or Steve Branstetter, 727-570-5305.

SUPPLEMENTARY INFORMATION: The South Atlantic Council is jointly preparing with the Gulf of Mexico Fishery Management Council (Gulf of Mexico Council) and the Caribbean Fishery Management Council (Caribbean Council) a draft Fishery Management Plan for the Dolphin and Wahoo Fishery of the Atlantic, Caribbean and Gulf of Mexico (FMP) The New England Fishery Management Council and the Mid-Atlantic Fishery Management Council are also cooperating in the FMP preparation.

The South Atlantic, Gulf of Mexico, and Carribean Councils intend that the FMP take a precautionary approach in conserving the dolphin and wahoo fishery resources throughout their range in the exclusive economic zone (EEZ) of the Atlantic, Gulf of Mexico, and Caribbean Sea. The FMP would have management objectives for the achievement of optimum yield from the dolphin and wahoo resources and the maintenance of current allocations among user groups. A draft environmental impact statement (DEIS) will be integrated into the draft FMP document.

The DEIS will describe the FMP's proposed management measures and their reasonable alternatives and will assess the environmental impacts of these proposed and alternative measures. Based on considerable previous public input (see reference below to public hearings held to date on a preliminary draft of the FMP/DEIS), the South Atlantic, Gulf of Mexico, and Caribbean Councils have already identified a number of proposed FMP measures and their alternatives. The proposed management units for dolphin and wahoo would be defined as the populations of each species throughout their full management range in the Atlantic, Gulf of Mexico, and Caribbean EEZ. Alternative management units considered will include the establishment of three separate units for each species based on each Council's geographical area of jurisdiction. The DEIS will assess the environmental impacts of the FMP's considered options for requiring dealer, vessel, and operator permits to participate in the fishery as well as the effects of any qualifying criteria, such as prior levels of participation in the fishery, for obtaining and maintaining permits. The DEIS will also evaluate the environmental impacts of the FMP's considered alternatives for reporting requirements. The DEIS will assess the impacts of the FMP's proposed and alternative biologically acceptable values, based on either biomass or fishing mortality rates, that define maximum sustainable yield, optimum yield, and overfishing and overfished conditions. The FMP and DEIS will identify and describe essential fish habitat (EFH) and EFH Habitat Areas of Particular Concern (EFH HAPCs) for dolphin and wahoo. The DEIS will assess the environmental impacts associated with the proposed and alternative EFH and EFH HAPCs; EFH/EFH HAPCs alternatives considered may include specific locales that are important to the continued health of the dolphin and wahoo stocks or areas of importance to a critical life stage of these species.

The FMP would establish a framework procedure allowing the South Atlantic, Gulf of Mexico, and Caribbean Councils to recommend new management measures and adjustments for existing measures, within specified limits, that could be approved and implemented (under the framework procedure) without having to amend the FMP. Also, the South Atlantic, Gulf of Mexico, and Caribbean Councils intend that the FMP provide each Council with the authority to recommend independently the establishment of harvesting restrictions for its respective area of jurisdiction. Such area-specific measures generally would be proposed, approved, and implemented under the FMP's framework procedure. The environmental impacts of measures proposed later under the framework procedure would be assessed at the time of proposal.

To maintain healthy stocks of both dolphin and wahoo in the Atlantic, the South Atlantic Council intends that the FMP initially propose commercial trip limits, recreational bag and boat limits, minimum size limits, and allowable gears for the dolphin and wahoo fishery within its area of the EEZ. The Gulf of Mexico Council is considering several measures that would apply only to the Gulf of Mexico EEZ; these include establishment of specific dates for the fishing year and prohibition of the sale of recreationally caught fish. The DEIS will assess the environmental impacts of all of the FMP's proposed area-specific measures and their considered alternatives.

The DEIS will evaluate the impacts of the FMP's proposed allocation of the majority of the catch to the recreational sector. This allocation is intended to preserve the historical contribution of the recreational sector to the total fishery. To ensure economic stability for the established commercial fishery, the FMP would propose a restriction on or a prohibition of the sale of fish caught in the recreational fishery.

Based on input received during 17 public hearings held to date on a preliminary draft of the FMP/DEIS, the South Atlantic Council intends to prepare a revised draft FMP and to finalize the DEIS covering its environmental impacts. Because of the previous considerable opportunities for public input, the South Atlantic Council has scheduled no specific scoping meetings for the DEIS. However, the South Atlantic Council is requesting written comments on the scope of the issues to be addressed in the DEIS.

Once the South Atlantic Council completes the DEIS, it will submit it to NMFS for filing with the Environmental Protection Agency (EPA). EPA will publish in the **Federal Register** a notice of availability of the DEIS for public comment. This procedure is pursuant to the Council on Environmental Quality's regulations for implementing the procedural provisions of The National Environmental Policy Act (NEPA; 40 CFR Parts 1500–1508) and to NOAA's Administrative Order 216-6 regarding NOAA's compliance with NEPA.

The South Atlantic, Gulf of Mexico, and Caribbean Fishery Management

Councils intend to consider public comments received on the DEIS before adopting final management measures for a final FMP. The South Atlantic Council intends to prepare a final environmental impact statement (FEIS) in support of the final FMP. The three Councils would then submit the final FMP/FEIS to NMFS for Secretarial review, approval, and implementation under the Magnuson-Stevens Act. During Secretarial review, NMFS will file the FEIS with EPA for announcement of a final comment period on the FEIS (again, through publication of a notice in the **Federal Register**). This comment period will be concurrent with the Secretarial review period, during which NMFS will invite public comment on the final FMP and proposed implementing regulations (Secretarial review comment periods are announced through publication in the **Federal Register**). NMFS will consider all public comment received during the Secretarial review period, whether on the FMP, FEIS, or proposed regulations, prior to taking final agency action to approve, disapprove, or partially approve the FMP.

Copies of the draft FMP may be obtained by contacting Kim Iverson at the Council (see **ADDRESSES**).

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

Dated: January 10, 2001.

Bruce C. Morehead,

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

[FR Doc. 01–1378 Filed 1–16–01; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 000202023-1001-02; I.D. No.110200C]

RIN 0648-ZA78

Announcement of Funding Opportunity to Submit Proposals for the Coastal Ecosystem Research Project in the Northern Gulf of Mexico

AGENCY: Center for Sponsored Coastal Ocean Research/Coastal Ocean Program (CSCOR/COP), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Announcement of funding opportunity for financial assistance for project grants and cooperative agreements.

SUMMARY: The purpose of this document is to advise the public that CSCOR/COP is soliciting 1-year and 2-year proposals for modeling, monitoring and retrospective studies of coastal ecosystem research in the Northern Gulf of Mexico (N-GOMEX). Funding is contingent upon the availability of Federal appropriations. It is anticipated that projects funded under this announcement will have an August 1, 2001, start date.

DATES: The deadline for receipt of proposals at the COP office is 3 p.m, EST, March 14, 2001. Note that late-arriving applications provided to a delivery service, on or before, March 13, 2001, with delivery guaranteed before 3 p.m.,EST, on March 14, 2001, will be accepted for review if the applicant can document that the application was provided to the delivery service with delivery to the address listed below (see **ADDRESSES**) guaranteed prior to the specified closing date and time; and in any event, the proposals are received in the COP office by 3 p.m. EST, no later than two business days following the closing date.

ADDRESSES: Submit the original and 10 copies of your proposal to Coastal Ocean Program Office (N-GOMEX 2001), SSMC3, 9th Floor, Station 9700, 1315 East-West Highway, Silver Spring, MD 20910. NOAA and COP Standard Form Applications with instructions are accessible on the COP Internet site (http://www.cop.noaa.gov) under the COP Grants Support Section, Part D, Application Forms for Initial Proposal Submission. Forms may be viewed, and in most cases, filled in by computer. All forms must be printed, completed, and mailed to CSCOR/COP with original signatures. Blue ink for original signatures is recommended but not required. If you are unable to access this information, you may call CSCOR/COP at 301-713-3338 to leave a mailing request.

FOR FURTHER INFORMATION CONTACT: Technical Information: Kenric Osgood, N-GOMEX 2001 Program Manager, COP Office, 301-713-3338/ext 135, Internet: Kenric.Osgood@noaa.gov

Business Management Information: Leslie McDonald, COP Grants Administrator, 301-713-3338/ext 137, Internet: Leslie.McDonald@noaa.gov

See **SUPPLEMENTARY INFORMATION** under the heading, ELECTRONIC ACCESS, for a listing of web sites pertaining to period hypoxia in the northern Gulf of Mexico.

SUPPLEMENTARY INFORMATION:

Electronic Access

The following web sites furnish results of studies concerning the periodic hypoxia associated with the northern Gulf of Mexico: http://www.aoml.noaa.gov/ocd/necop/, for results from the Nutrient Enhanced Coastal Ocean Productivity (NECOP) study and, http://www.nos.noaa.gov/Products/pubs—hypox.html for Gulf of Mexico hypoxia reports produced by the Committee on Environment and Natural Resources (CENR). Hard copies of reports from these studies can be obtained from the COP office.

A workshop report, U.S. GLOBEC report No. 19, is available from the following address or homepage: U.S. GLOBEC Coordinating Office, UMCES, Chesapeake Biological Laboratory, P.O. Box 38, Solomons, MD 20688; Phone: 410-326-7370; Fax: 410-326-7341; Internet: fogarty@usglobec.org and http://www.usglobec.org.

A listing of ongoing projects in the northern Gulf of Mexico funded by the COP are provided within the COP Internet Site at http://www.cop.noaa.gov/projects/GMX.htm

Background

Program Description

For complete Program Description and Other Requirements for the COP, see the General Grant Administration Terms and Conditions of the Coastal Ocean Program published in the **Federal Register** (65 FR 62706, October 19, 2000) and at the COP home page.

Coastal regions dominated by large rivers are disproportionately important to the biological production of the world's oceans, primarily because these rivers carry large amounts of ''new'' nitrogen. An important river-dominated coastal ecosystem in the U.S., which supports high primary and secondary production, is the one dominated by the Mississippi River in the northern Gulf of Mexico. Approximately 20 percent of the U.S. commercial fishery landings by dollar value are from the northern Gulf. Major recreational fisheries also exist in this region.

There is a strong relationship between riverine inputs (especially nutrients) and primary production, followed in turn by zooplankton production and fish production in a classic nutrient-phytoplankton-zooplankton-fish (NPZF) food web. Anthropogenic nitrogen loadings from the Mississippi River to the Gulf of Mexico have increased dramatically during the past several decades, which has led to changes in the ecosystem of the northern Gulf, including (1) an initial increase in overall biological production; (2) the annual development of an extensive zone of bottom water hypoxia during the summer stratified period; and (3) an apparent shift from a balanced pelagic/

demersal fish community to one significantly more dominated by pelagic fisheries.

Several past and present programs have studied the seasonal hypoxia associated with the northern Gulf of Mexico. Notably, from 1990 to 1997, the COP supported a study on Nutrient Enhanced Coastal Ocean Productivity (NECOP); and the Committee on Environment and Natural Resources (CENR) recently completed an integrated assessment of Gulf of Mexico hypoxia. Results and reports of these studies can be found on the web sites or obtained from CSCOR/COP as listed under ''Electronic Access'' in the **SUPPLEMENTARY INFORMATION**section of this document.

A workshop was held in January 1999 to discuss relationships between the Mississippi River, the production of marine populations, and ecosystem parameters in the Gulf of Mexico; and to discuss how these relationships might be affected by changes in weather and climate. A report of the workshop, U.S. GLOBEC report No. 19, is available from the address or homepage provided under ''Electronic Access'' in the **SUPPLEMENTARY INFORMATION** section of this document

This solicitation for proposals will augment the initial phase of a program, started in fiscal year 2000, to examine the inter-relationships driving the Mississippi River-dominated Gulf of Mexico ecosystem. Abstracts of ongoing studies funded by CSCOR/COP in the northern Gulf of Mexico are available on the COP internet site that is provided in this document under ''Electronuc Access'' in the **SUPPLEMENTARY INFORMATION** section of this document. The planned suite of studies will enable improved predictions about future effects of nutrient loading, eutrophication, hypoxia, and climate change on the Gulf of Mexico ecosystem.

In order to fully develop a predictive capability, a more intensive 5-7 year program is being planned when additional funding becomes available. This complete program will include monitoring, retrospective studies, modeling and process field studies to identify relationships among ecosystem constituents.

The process studies will be nested within monitoring efforts which identify and measure important ecosystem components, and retrospective and modeling efforts which will place the field measurements into broader temporal and theoretical context.

The overall goal of the entire program is to understand and ultimately predict how changes in the physical, chemical and biological environment, including changes in climate, nutrient loading and hypoxia, will affect populations of marine animal species, especially economically and ecologically important species, in the northern Gulf of Mexico. The projects conducted as a result of this current solicitation for proposals will help guide the evolution of the future program.

Structure of the Research Program

CSCOR/COP intends to expand the initial research program, which was initiated in fiscal year 2000, with additional projects. Possible types of new projects include, in priority order, modeling, monitoring and retrospective studies. Subsequent announcements may solicit further proposals in these areas and for process field studies in the region, depending on the outcome of the proposed research solicited here and the levels of future appropriated funding.

Modeling studies are needed to provide a framework for studies in the northern Gulf of Mexico. Modeling activities will be used to guide further program development and identify important processes for the extensive fieldwork anticipated to follow this preliminary phase. Modeling studies may include: models that simulate impacts of varying nutrient flux on productivity and trophic response in the northern Gulf of Mexico ecosystem, including impacts to and responses of commercially and recreationally important fisheries; NPZF models; physical-biological coupled models of processes in the Gulf ecosystem influenced by the Mississippi River discharge, including transport and population dynamics of key zooplankton and fishery populations; models of oceanographic and climate influences on nutrients and their impact on Gulf productivity; models of biogeochemical cycling of nutrients within the Gulf and its relationship to the dynamics of organic carbon flux in the Gulf; and models of water column stability and hypoxic zone dynamics.

It is desirable for the modeling studies to be integrative or designed so that they can be fitted with other models to form an integrative whole. The goal is to build a predictive capability for the northern Gulf of Mexico ecosystem.

Proposed monitoring studies should provide calibration and validation data for modeling activities, but not duplicate ongoing activities. Monitoring studies could include shipboard surveys, multi-disciplinary mooring observations, drifters, and analysis of regional satellite data. Possible monitoring activities responsive to this announcement include physical or chemical observations or biological observations of distribution and abundance of key species, and their relation to hypoxia.

Proposed retrospective analyses should provide quantitative and detailed information on issues relevant to the objectives listed in the recent CENR reports. Examples include retrospective analyses of biological data concerning key animal populations; retrospective analyses of the coupling between transport and population dynamics of key species; and retrospective analyses of coupling between climate, drainage basin, and shelf oceanography. A better definition of the past, current, and potential impacts of hypoxia on both commercially and ecologically important species and ecosystems is needed.

Part I: Schedule and Proposal Submission

This announcement requests full proposals only. The provisions for proposal preparation provided here are mandatory. Proposals received after the published deadline or proposals that deviate from the prescribed format will be returned to the sender without further consideration. Information regarding this announcement, additional background information, and required Federal forms are available on the COP home page.

Full Proposals

Applications submitted in response to this announcement require an original proposal and 10 proposal copies at time of submission. This includes color or high-resolution graphics, unusually-sized materials (not 8.5'' x 11'' or 21.6 cm x 28 cm), or otherwise unusual materials submitted as part of the proposal. For color graphics, submit either color originals or color copies. The stated requirements for the number of proposal copies provide for a timely review process. Facsimile transmissions and electronic mail submission of full proposals will not be accepted.

Required Elements

All recipients must follow the instructions in the preparation of the CSCOR/COP application forms referenced later in this document in Part II: Further Supplementary Information, (10) Application forms. Each proposal must also include the following seven elements:

(1) *Signed summary title page*: The title page should be signed by the Principal Investigator (PI) and the institutional representative. The Summary Title page identifies the

project's title starting with the acronym N-GOMEX 2001, a short title (less than 50 characters), and the lead PI's name and affiliation, complete address, phone, FAX, and E-mail information. The requested budget for each fiscal year should be included on the Summary Title page. Multi-institution proposals must include signed Summary Title pages from each institution.

(2) *One-page abstract/project summary*: The Project Summary (Abstract) Form, which is to be submitted at time of application, must include an introduction of the problem, rationale, scientific objectives and/or hypotheses to be tested, and a brief summary of work to be completed. The prescribed COP format for the Project Summary Form can be found on the COP Internet site under the COP Grants Support section, Part D.

The summary should appear on a separate page, headed with the proposal title, institution(s), investigator(s), total proposed cost, and budget period. It should be written in the third person. The summary is used to help compare proposals quickly and allows the respondents to summariz e these key points in their own words.

(3) *Statement of work/project description*: The proposed statement of work/project must be completely described, including identification of the problem, scientific objectives, proposed methodology, relevance to the program goals, and its scientific priorities. The project description section (including Relevant Results from Prior Support) should not exceed fifteen pages. Page limits are inclusive of figures and other visual materials, but exclusive of references and milestone chart.

Project management should be clearly identified with a description of the functions of each PI within a team. Environmental data must be submitted to the NOAA National Oceanographic Data Center. It is important to provide a full scientific justification for the research; do not simply reiterate justifications presented in this document. This section should also include:

(a) The objective for the period of proposed work and its expected significance;

(b) The relation to the present state of knowledge in the field and relation to previous work and work in progress by the proposing principal investigator(s);

(c) A discussion of how the proposed project lends value to the program goals, and

(d) Potential coordination with other investigators.

(e) References cited: Reference information is required. Each reference must include the name(s) of all authors in the same sequence in which they appear in the publications, the article title, volume number, page numbers, and year of publications. While there is no page limitation, this section should include bibliographic citations only and should not be used to provide parenthetical information outside of the 15-page project description.

(4) *Milestone chart*: Provide time lines of major tasks covering the duration of the proposed project, up to 24 months.

(5) *Budget and Application Forms*: Both NOAA and COP-specific application forms may be obtained at the COP Grants website. Forms may be viewed, and in most cases, filled in by computer. All forms must be printed, completed, and mailed to CSCOR/COP; original signatures in blue ink are encouraged. If applicants are unable to access this information they may call the CSCOR/COP grants administrator listed in the section **FOR FURTHER INFORMATION CONTACT**.

At time of proposal submission, all applicants must submit the Standard Form, SF-424 (Rev 7-97) Application for Federal Assistance, to indicate the total amount of funding proposed for the whole project period. Applicants must also submit a COP Summary Proposal Budget Form for each fiscal year increment. Multi-institution proposals must include a Summary Proposal Budget Form for each institution. Use of this budget form will provide for a detailed annual budget and for the level of detail required by the COP program staff to evaluate the effort to be invested by investigators and staff on a specific project. The COP budget form is compatible with forms in use by other agencies that participate in joint projects with COP and can be found on the COP home page under COP Grants Support, Part D. All applications must include a budget narrative and a justification to support all proposed budget categories. Ship time needs should be identified in the proposed budget. The SF-424A, Budget Information (Non-Construction) Form, will be requested only from those applicants subsequently recommended for award.

(6) *Biographical sketch*: Abbreviated curriculum vitae, two pages per investigator, must be included with each proposal. Include a list of up to five publications most closely related to the proposed project and up to five other significant publications. A list of all persons (including their organizational affiliation), in alphabetical order, who have collaborated on a project, book, article, or paper within the last 48 months must be included. If there are no collaborators, this should be so indicated. Students, post-doctoral associates, and graduate and postgraduate advisors of the PI must also be disclosed. This information is needed to help identify potential conflicts of interest or bias in the selection of reviewers.

(7) *Proposal format and assembly*: The original proposal should be clamped in the upper left-hand corner, but left unbound. The 10 copies can be stapled in the upper left-hand corner or bound on the left edge. The page margin must be one inch (2.5 cm) at the top, bottom, left and right, and the type face standard 12 points size must be clear and easily legible.

Part II: Further Supplementary Information

(1) *Program authorities*: For a list of all program authorities for the Coastal Ocean Program, see General Grant Administration Terms and Conditions of the Coastal Ocean Program published in the Federal Register (65 FR 62706, October 19, 2000) and at the COP home page. The specific authority cited for this announcement is 33 U.S.C. 1442.

(2) *Catalog of Federal Domestic Assistance Number*: 11.478 Coastal Ocean Program and 47.050 for the Directorate for Geosciences, National Science Foundation.

(3) *Program description*: For complete COP program descriptions, see General Grant Administration Terms and Conditions of the Coastal Ocean Program published in the **Federal Register** (65 FR 62706, October 19, 2000).

(4) *Funding availability*: Funding is contingent upon the availability of Federal appropriations. It is estimated that approximately $400,000 per fiscal year will be available for supporting studies proposed by submissions to this announcement. Priority for these funds will be given to proposals that promote balanced coverage of the science objectives stated under **SUPPLEMENTARY INFORMATION**, Structure of the Research Program.

If an application is selected for funding, NOAA has no obligation to provide any additional prospective funding in connection with that award in subsequent years. Renewal of an award to increase funding or extend the period of performance is based on satisfactory performance and is at the total discretion of the funding agency.

Publication of this document does not obligate the COP to any specific award or to any part of the entire amount of funds available. Recipients and

subrecipients are subject to all Federal laws and agency policies, regulations, and procedures applicable to Federal financial assistance awards.

(5) *Matching requirements*: None.

(6) *Type of funding instrument*: Project Grants for non-Federal applicants; interagency transfer agreements or other appropriate mechanisms other than project grants or cooperative agreements for Federal applicants.

(7) *Eligibility criteria*: For complete eligibility criteria for the COP, see COP's General Grant Administration Terms and Conditions annual document in the **Federal Register** (65 FR 62706, October 19, 2000) and the COP home page. Eligible applicants are institutions of higher education, not-for-profit institutions, international organizations, state, local and Indian tribal governments and Federal agencies. COP will accept proposals that include foreign researchers as collaborators with a researcher who is affiliated with a U.S. academic institution, Federal agency, or other non-profit organization.

Applications from non-Federal and Federal applicants will be competed against each other. Proposals selected for funding from non-Federal applicants will be funded through a project grant or cooperative agreement under the terms of this notice. Proposals selected for funding from NOAA employees shall be effected by an intra-agency fund transfer. Proposals selected for funding from a non-NOAA Federal agency will be funded through an inter-agency transfer. PLEASE NOTE: Before non-NOAA Federal applicants may be funded, they must demonstrate that they have legal authority to receive funds from another Federal agency in excess of their appropriation. Because this announcement is not proposing to procure goods or services from applicants, the Economy Act (31 USC 1535) is not an appropriate legal basis.

(8) *Award period*: Full proposals should cover a project period of up to 2 years, with a start date of August 1, 2001. Multi-year project period funding may be funded incrementally on an annual basis; but once awarded, multi-year projects will not compete for funding in subsequent years. Each award shall require a Statement of Work which represents substantial accomplishments that can be easily separated into annual increments if prospective funding is not made available, or is discontinued.

(9) *Indirect costs*: If indirect costs are proposed, the total dollar amount of the indirect costs proposed in an application must not exceed the indirect cost rate negotiated and approved by a cognizant Federal agency prior to the proposed effective date of the award.

(l0) *Application forms*: For complete information on application forms for the COP, see COP's General Grant Administration Terms and Conditions document in the Federal Register (65 FR 62706, October 19, 2000); the COP home page; and the information given under *Required Elements*, paragraph (5) Budget.

(11) *Project funding priorities*: For description of project funding priorities, see COP's General Grant Administration Terms and Conditions document in the **Federal Register** (65 FR 62706, October 19, 2000) and at the COP home page.

(12) *Evaluation criteria*: For complete information on evaluation criteria, see COP's General Grant Administration Terms and Condition document in the **Federal Register** (65 FR 62706, October 19, 2000) and at the COP home page.

(13) *Selection procedures*: For complete information on selection procedures, see COP's General Grant Administration Terms and Conditions Document in the **Federal Register** (65 FR 62706, October 19, 2000) and at the COP home page. All proposals received under this specific Document will be evaluated and ranked individually in accordance with the assigned weights of the above evaluation criteria by independent peer mail review.

(14)*Other requirements*: For a complete description of other requirements, see COP's General Grant Administration Terms and Conditions document in the **Federal Register** (65 FR 62706, October 19, 2000) and at the COP home page.

(15) *Pursuant to Executive Orders 12876, 12900 and 13021, the Department of Commerce, National Oceanic and Atmospheric Administration (DOC/NOAA) is strongly committed to broadening the participation of Historically Black Colleges and Universities, Hispanic Serving Institutions and Tribal Colleges and Universities in its educational and research programs. The DOC/NOAA vision, mission and goals are to achieve full participation by Minority Serving Institutions (MSI) in order to advance the development of human potential, to strengthen the nation's capacity to provide high-quality education, and to increase opportunities for MSIs to participate in, and benefit from, Federal financial assistance programs.* DOC/NOAA encourages all applicants to include meaningful participation of MSIs.

(16) Applicants are hereby notified that they are encouraged, to the greatest practicable extent, to purchase American-made equipment and products with funding provided under this program.

(17) Intergovernmental Review: Applications under this program are not subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs.''

(18) This notification involves collection-of-information requirements subject to the Paperwork Reduction Act (PRA). The use of Standard Forms 424, 424A, 424B, and SF-LLL has been approved by the Office of Management and Budget (OMB) under control numbers 0348-0043, 0348-0044, 0348-0040 and 0348-0046.

The following requirements have been approved by OMB under control number 0648-0384; a Summary Proposal Budget Form (30 minutes per response), a Project Summary Form (30 minutes per response), a standardized format for the annual Performance Report (5 hours per response), a standardized format for the Final Report (10 hours per response), and the submission of up to 20 copies of proposals (10 minutes per response). The response estimates include 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 these requirements and the burden estimate, or any other aspect of this collection of information, including suggestions for reducing this burden, to Leslie.McDonald@noaa.gov. Copies of these forms and formats can be found on the COP home page under Grants Support sections, Parts D and F.

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act, unless that collection displays a currently valid OMB control number.

Dated: January 10, 2001.

John Oliver

Director, Management and Budget Office, National Ocean Service.

[FR Doc. 01–1381 Filed 1–16–01; 8:45 am]

BILLING CODE 3510–JS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 010901G]

Mid-Atlantic Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's (Council) Black Sea Bass Advisors and other members of the commercial fishing industry will hold a public meeting.

DATES: The meeting will be held on Thursday, February 1, 2001, from 10 a.m. until 4 p.m.

ADDRESSES: This meeting will be held at the Sheraton International Hotel, BWI Airport, 7032 Elm Road, Baltimore, MD; telephone: 410-859-3300.

Council address: Mid-Atlantic Fishery Management Council, Room 2115, 300 S. New Street, Dover, DE 19904.

FOR FURTHER INFORMATION CONTACT: Daniel T. Furlong, Executive Director, Mid-Atlantic Fishery Management Council; telephone: 302-674-2331, ext. 19.

SUPPLEMENTARY INFORMATION: The purpose of this meeting is to discuss the problems and possible solutions associated with the commercial management system for black sea bass.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice 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 Joanna Davis at the Mid-Atlantic Council Office at least 5 days prior to the meeting date.

Dated: January 10, 2001.

Richard W. Surdi,

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

[FR Doc. 01–1377 Filed 1–16–01; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 010901F]

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 Pacific Fishery Management Council's (Council) Groundfish Management Team (GMT) will hold a working meeting which is open to the public.

DATES: The GMT working meeting will begin Tuesday, February 6, 2001 at 8 a.m. and may go into the evening until business for the day is completed. The meeting will reconvene from 8 a.m. to 5 p.m. Wednesday, February 7 and Thursday, February 8, from 8 a.m. to 4 p.m.

ADDRESSES: The meeting will be held at the Council office, Conference Room, 2130 SW Fifth Avenue, Suite 224, Portland, OR; telephone: 503-326-6352.

Council address: Pacific Fishery Management Council, 2130 SW Fifth Avenue, Suite 224, Portland, OR 97201.

FOR FURTHER INFORMATION CONTACT: Jim Glock, Groundfish Fishery Management Coordinator; telephone: (503) 326-6352.

SUPPLEMENTARY INFORMATION: The primary purpose of the GMT meeting is to review the groundfish management measures in place for the summer months and prepare recommendations for Council consideration, respond to assignments relating to implementation of the Council's groundfish strategic plan, and address other assignments relating to the groundfish management. The following specific items comprise the draft agenda (1) evaluate 2001 trip limits and other management measures; (2) assignments relating to the groundfish strategic plan, which may include limited entry for the open access fishery and permit stacking for limited entry trawl vessels; (3) complete and/or review rebuilding plans for canary rockfish, cowcod, lingcod, Pacific Ocean perch; (4) begin preparation of widow and darkblotched rockfish rebuilding plans; (5) evaluate management options for 2001; (6) review the fixed gear sablefish permit stacking proposal and analysis; (7) elect chair and vice chair for 2001; and (8) prepare a draft work plan for 2001.

Although non-emergency issues not contained in this agenda may come before the GMT for discussion, those issues may not be the subject of formal GMT action during this meeting. GMT 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 GMT's intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Ms. Carolyn Porter at (503) 326-6352 at least 5 days prior to the meeting date.

Dated: January 10, 2001.

Richard W. Surdi,

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

[FR Doc. 01–1376 Filed 1–16–01; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 010901D]

South Atlantic Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The South Atlantic Fishery Management Council (Council) will hold a meeting of its Marine Reserves Committee in Charleston, SC.

DATES: The Marine Reserves Committee will meet February 6, 2001, from 7 p.m until 9 p.m., on February 7, from 8:30 a.m. until 5 p.m., and on February 8, from 8:30 a.m. until 10:30 a.m.

ADDRESSES: These meetings will be held at the Town and Country Inn, 2008 Savannah Highway, Charleston, SC 29407; telephone: 843-571-1000.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer;

telephone: (843) 571-4366; fax: (843) 769-4520; email: kim.iverson@noaa.gov.

SUPPLEMENTARY INFORMATION: The Marine Reserves Committee will meet to develop recommendations to send to the full Council. The Committee will review the Council's current definition of a marine reserve, review the Council's goals for marine reserves, establish criteria necessary to meet the goals and draft an outline for the scoping document that will be used in the next phase of the process for utilizing marine reserves.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice 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

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) by February 1, 2001.

Dated: January 10, 2001.

Richard W. Surdi,

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

[FR Doc. 01–1375 Filed 1–16–01; 8:45 am]

BILLING CODE 3510–22–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Amendment of Coverage of Import Limits for Certain Part-Categories Produced or Manufactured in the People's Republic of China and Uruguay

January 10, 2001.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs amending coverage for import limits.

EFFECTIVE DATE: December 1, 2000.

FOR FURTHER INFORMATION CONTACT: Lori E. Mennitt, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–3400.

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.

Certain tariff and statistical annotations have been amended in the Harmonized Tariff Schedule of the United States (HTS) in implementing Title V of the Trade and Development Act of 2000 (Public Law 106–2000). To facilitate implementation of the Uruguay Round Agreement on Textiles and Clothing and other textile agreements based upon the HTS, the tariff numbers in part-Category 410 B, which apply to imports from China and Uruguay, are being changed, as is a number in Category 440–M, which applies to imports from China. This change applies to imports entered for consumption or withdrawn from warehouse for consumption on and after December 1, 2000, regardless of the date of export.

In the letter published below, the Chairman of CITA directs the Commissioner of Customs to amend import controls for 2000 and 2001 for China and Uruguay and the current visa arrangement for China.

Richard B. Steinkamp,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

January 10, 2001.

Commissioner of Customs,
Department of the Treasury, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directives issued to you on December 6, 1999, and December 20, 2000, by the Chairman, Committee for the Implementation of Textile Agreements, which established import controls for the People's Republic of China for agreement years 2000 and 2001, respectively. This directive also amends, but does not cancel, the directive issued to you on March 27, 1997, by the Chairman, Committee for the Implementation of Textile Agreements. That directive established an export visa arrangement for certain silk apparel, cotton, wool, man-made fiber, silk blend, and other vegetable fiber textiles and textile products, produced or manufactured in the People's Republic of China.

In addition, this directive amends, but does not cancel, the directives issued to you on October 21, 1999, and on November 2, 2000, by the Chairman, Committee for the Implementation of Textile Agreements, which established import controls for Uruguay for agreement years 2000 and 2001, respectively.

Effective on December 1, 2000, you are directed to make the changes shown below in the aforementioned directives for products entered in the United States for consumption or withdrawn from warehouse for consumption on and after December 1, 2000, for part-Categories 410–B and 440–M, regardless of the date of export:

Category	HTS change
410–B	
.....	Delete 5112.11.2030 and replace with 5112.11.3030 and 5112.11.3060.
.....	Delete 5112.11.2060 and replace with 5112.11.6030 and 5112.11.6060.
.....	Delete 5112.19.9010 and replace with 5112.19.6010 and 5112.19.9510.
.....	Delete 5112.19.9020 and replace with 5112.19.6020 and 5112.19.9520.
.....	Delete 5112.19.9030 and replace with 5112.19.6030 and 5112.19.9530.
.....	Delete 5112.19.9040 and replace with 5112.19.6040 and 5112.19.9540.
.....	Delete 5112.19.9050 and replace with 5112.19.6050 and 5112.19.9550.
.....	Delete 5112.19.9060 and replace with 5112.19.6060 and 5112.19.9560.
440–M	Delete 6203.21.0030 and replace with 6203.21.9030.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to 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. 01–1314 Filed 1–16–01; 8:45 am]

BILLING CODE 3510–DR–F

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Amendment of Coverage of an Import Limit and Visa and Certification Requirements for a Certain Part-Category Produced or Manufactured in the People's Republic of China

January 10, 2001.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs amending coverage for an import limit and visa and certification requirements.

EFFECTIVE DATE: January 1, 2001.

FOR FURTHER INFORMATION CONTACT: Lori E. Mennitt, International Trade Specialist, Office of Textiles and

Apparel, U.S. Department of Commerce, (202) 482–3400.

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.

To facilitate implementation of the Bilateral Textile Memorandum of Understanding dated February 1, 1997 between the Governments of the United States and the People's Republic of China (see 64 FR 69228, published on December 10, 1999) and the export visa arrangement dated February 1, 1997 (see 62 FR 15465, published on April 1, 1997) based upon the Harmonized Tariff Schedule (HTS), a certain HTS classification number is being changed for products in part-Category 666–C which are entered into the United States for consumption or withdrawn from warehouse for consumption on and after January 1, 2001, regardless of the date of export.

In the letter published below, the Chairman of CITA directs the Commissioner of Customs to amend all import controls and all visa and certification requirements for products exported from China in part-Category 666–C.

Richard B. Steinkamp,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

January 10, 2001.

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 December 6, 1999 by the Chairman, Committee for the Implementation of Textile Agreements, which includes man-made fiber textile products in part-Category 666–C, produced or manufactured in China and imported into the United States on and after January 1, 2001, regardless of the date of export.

Also, this directive amends, but does not cancel, the directive issued to you on March 27, 1997 establishing visa and certification requirements for part-Category 666–C.

Effective on January 1, 2001, you are directed to make the changes shown below in the aforementioned directives for products entered in the United States for consumption or withdrawn from warehouse for consumption on and after January 1, 2001 for part-Category 666–C, regardless of the date of export:

Category	HTS change
666 C	Replace 6303.92.2000 with 6303.92.2010 and 6303.92.2020.

The Committee for the Implementation of Textile Agreements has determined that this action falls within the foreign affairs exception to the rulemaking provisions of 5 U.S.C.553(a)(1).

Sincerely,

Richard B. Steinkamp,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 01–1315 Filed 1–16–01; 8:45 am]

BILLING CODE 3510–DR–F

CONSUMER PRODUCT SAFETY COMMISSION

[CPSC Docket No. 01–C0003]

Tensor Corporation, Provisional Acceptance of a Settlement Agreement and Order

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: It is the policy of the Commission to publish settlements which it provisionally accepts under the Consumer Product Safety Act in the **Federal Register** in accordance with the terms of 16 CFR § 1118.20. Published below is a provisionally-accepted Settlement Agreement with Tensor Corporation, continuing a civil penalty of $125,000.

DATES: Any interested person may ask the Commission not to accept this agreement or otherwise comment on its contents by filing a written request with the Office of the Secretary by February 1, 2001.

ADDRESSES: Persons wishing to comment on this Settlement Agreement should send written comments to the Comment 01–C0003, Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207.

FOR FURTHER INFORMATION CONTACT: William J. Moore, Jr., Trial Attorney, Office of Compliance and Enforcement, Consumer Product Safety Commission, Washington, D.C. 20207; telephone (301) 504–0626, 1348.

SUPPLEMENTARY INFORMATION: The text of the Agreement and Order appears below.

Dated: January 10, 2001.

Sadye E. Dunn,

Secretary.

Settlement Agreement and Order

1. This Settlement Agreement, made by and between the staff (''the staff'') of the U.S. Consumer Product Safety Commission (the ''Commission'') and Tensor Corporation (''Tensor''), a corporation, in accordance with 16 CFR 1118.20 of the Commission's Procedures for Investigations, Inspections, and Inquiries under the Consumer Product Safety Act (''CPSA''), is a settlement of the staff allegations set forth below.

The Parties

2. The Commission is an independent federal regulatory agency responsible for the enforcement of the Consumer Product Safety Act, 15 U.S.C. 2051–2084.

3. Tensor is a corporation organized and existing under the laws of the Commonwealth of Massachusetts. Its principal office is located at 100 Everett Avenue, Chelsea, Massachusetts.

Staff Allegations

4. Section 15(b) of the CPSA, 15 U.S.C. 2064(b), requires a manufacturer of a consumer product distributed in commerce who obtains information which reasonably supports the conclusion that such product contains a defect which could create a substantial product hazard, or creates an unreasonable risk of serious injury or death, to immediately inform the Commission of the defect or risk.

5. Between May 1993 and December 1996, Tensor manufactured and sold throughout the United States approximately 600,000 ''Halogen Floor Lamps, models LT609A, LT609N, and LT609P,'' equipped with 500 watt halogen light bulbs (hereinafter ''halogen lamps'').

6. A halogen lamp is a ''consumer product'' and Tensor is a ''manufacturer'' of a ''consumer product'', which is ''distributed in commerce'' as those terms are defined in Sections 3 (a)(1),(4), (11) and (12) of the CPSA, 15 U.S.C. 2052 (a)(1),(4), (11) and (12).

7. The halogen lamps are defective because the 500 watt halogen bulbs contained therein can spontaneously explode during normal use, creating a risk of fire, serious injury and death.

8. Between late 1993 and December 1996, Tensor received approximately 330 incidents of exploding halogen bulbs, some causing extensive property damage and personal injuries.

9. Not until June 1996, after receiving a letter from the staff requesting information about bulb explosion incidents, did Tensor provide any information about the exploding halogen lamp bulbs. The information initially provided by Tensor was very limited however.

10. Tensor's acts and omissions constitute a violation of its duty under Section 15(b) of the CPSA, 15 U.S.C. 2064(b), to report information that its lamps contained defects which could

create a substantial product hazard and that said lamps created an unreasonable risk of serious injury or death. Tensor thereby committed a prohibited act under Section 19(a)(4) of the CPSA, 15 U.S.C. 2068(a)(4).

11. The staff alleges this violation, this prohibited act, was committed ''knowingly'' as that term is defined in Section 20 (d) of the CPSC, 15 U.S.C. 2069 (d), and Tensor is subject to civil penalties under Section 19 of the CPSA, 15 U.S.C. 2068.

Allegations of Tensor

12. Tensor denies all the staff allegations numbered four through eleven above. It denies that the halogen lamps contained a defect that created a substantial product hazard or an unreasonable risk of serious injury or death pursuant to Section 15 of the CPSA, 15 U.S.C. 2064.

13. Tensor further denies that it violated the reporting requirements of Section 15(b) of the CPSA, 15 U.S.C. 2064(b), or that it committed a prohibited act, knowingly or otherwise, as defined in Sections 19(a)(4) and 20(d) of the CPSA, 15 U.S.C. 2068(a)(4) and 2069(d). Tensor alleges, among other things, that it had no duty to report the halogen lamps but that it did report information in a timely and appropriate manner.

Agreement of the Parties

14. The Commission has jurisdiction over this matter and over Tensor under the CPSA, 15 U.S.C. 2051 *et seq.*

15. This Settlement Agreement and Order is in resolution of all staff's allegations concerning Tensor's failure to report any incidents or defects associated with exploding or shattering halogen bulbs through March 27, 2000, the date on which the staff examined documents at Tensor's headquarters. This Settlement Agreement and Order does not constitute an admission by Tensor that the law has been violated.

16. Tensor agrees to pay a civil penalty in the amount of one hundred twenty-five thousand and no/dollars ($125,000.00), payable to the ''U.S. Treasury'' and delivered to the attention of William J. Moore, Jr. as follows: if hand delivered, to Office of Compliance, Legal Division, 4330 East West Highway, Bethesda, MD 20814; if by U.S. Mail, to CPSC, Washington, DC 20207. Tensor shall pay sixty-two thousand five hundred dollars ($62,500.00) within 10 calendar days of receiving service of the final Settlement Agreement and Order, and sixty-two thousand five hundred dollars ($62,500.00) to be paid no later than one year from the date on which this Settlement Agreement and Order became final. If Tensor fails to make a full payment on schedule, the unpaid balance of the entire civil penalty shall be due and payable immediately and interest on the unpaid balance shall accrue and be paid at the federal legal rate of interest under the provisions of 28 U.S.C. 1961 (a) and (b), from the date the payment was due under the terms of this Settlement Agreement and Order.

17. Tensor knowingly, voluntarily and completely waives any rights it may have in the above captioned case (1) to the issuance of a Complaint in this matter; (2) to an administrative or judicial hearing with respect to the staff allegations cited herein; (3) to judicial review or other challenge or contest of the validity of the Settlement Agreement or the Commission's Order; (4) to a determination by the Commission as to whether a violation of Section 15(b) of the CPSA, 15 U.S.C. 2064(b), has occurred, and (5) to a statement of findings of fact and conclusions of law with regard to the staff allegations.

18. Upon provisional acceptance of this Settlement Agreement and Order by the Commission, this Settlement Agreement and Order shall be placed on the public record and shall be published in the **Federal Register** in accordance with 16 CFR 1118.20. If the Commission does not receive any meritorious written request not to accept the Settlement Agreement and Order within 15 days, the Settlement Agreement and Order shall be deemed finally accepted on the 16th day after the date it is published in the **Federal Register**, in accordance with 16 CFR 1118.20(f).

19. The Settlement Agreement and Order becomes effective upon its final acceptance by the Commission.

20. The Commission may publicize the terms of the Settlement Agreement and Order.

21. Tensor agrees to the entry of the attached Order, which is incorporated herein by reference, and agrees to be bound by its terms.

22. The Commission's Order in this matter is issued under the provisions of the CPSA, 15 U.S.C. 2051 *et seq.* and a violation of this Order may subject Tensor to appropriate legal action.

23. This Settlement Agreement and Order is binding upon Tensor, its parent and each of its assigns or successors.

24. Agreements, understandings, representations, or interpretations made outside this Settlement Agreement and Order may not be used to vary or to contradict its terms.

25. If, after the effective date hereof, any provision of this Settlement Agreement and Order is held to be illegal, invalid, or unenforceable under present or future laws effective during the terms of the Settlement Agreement and Order, such provision shall be fully severable. The rest of the Settlement Agreement and Order shall remain in full effect, unless the Commission and Tensor determine that severing the provision materially impacts the purpose of the Settlement Agreement and Order.

26. This Settlement Agreement and Order shall not be waived, changed, amended, modified, or otherwise altered, except in writing executed by the party against whom such amendment, modification, alteration, or waiver is sought to be enforced and approved by the Commission.

27. This Settlement Agreement may be used in interpreting the Order. Agreements, understandings, representations, or interpretations made outside of this Settlement Agreement and Order may not be used to vary or contradict its terms.

Dated: September 22, 2000.

Tensor Corporation.

Roger Sherman,

President.

The U.S. Consumer Product Safety Commission.

Alan H. Schoem,

Assistant Executive Director, Office of Compliance.

Eric L. Stone,

Director, Legal Division, Office of Compliance.

Dated: September 19, 2000.

William J. Moore, Jr.,

Trial Attorney.

Belinda V. Mitchell,

Trial Attorney, Legal Division, Office of Compliance.

Order

Under consideration of the Settlement Agreement entered into between Tensor Corporation, a corporation, and the staff of the U.S. Consumer Product Safety Commission; and the Commission having jurisdiction over the subject matter and Tensor Corporation, and it appearing that the Settlement Agreement and Order is in the public interest, it is

Ordered, that the Settlement Agreement be, and hereby is, accepted, and it is

Further Ordered, That Tensor Corporation, shall pay the Commission a civil penalty in the amount of *One Hundred Twenty-Five Thousand and 00/100* dollars, ($125,000.00) payable to the U.S. Treasury as follows: delivered to the Commission, sixty-two thousand five hundred dollars ($62,500.00) within 10 calendar days of the service of the Final Order upon Tensor Corporation

and sixty-two thousand five hundred dollars ($62,500.00) to be paid one year from the date on which this Settlement Agreement and Order became final.

Upon failing to make a payment or upon making a payment that is at least five days late, the outstanding balance of the civil penalty shall become due and payable by Tensor Corporation, and the interest on the outstanding balance shall accrue and be paid at the federal legal rate under the provisions of 27 U.S.C. sections 1961 (a) and (b).

In the Matter of Tensor Corporation

[CPSC DOCKET NO. 01–C0003]

Provisionally accepted and Provisional Order issued on the 10th day of January, 2001.

By Order of the Commission.

Sadye E. Dunn,

Secretary, U.S. Consumer Product Safety Commission.

[FR Doc. 01–1252 Filed 1–16–01; 8:45 am]

BILLING CODE 6355–01–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Proposed Collection; Comment Request

AGENCY: Department of Defense, Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics)/Defense Technical Information Center.

ACTION: Notice.

In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics)/Defense Technical Information Center (DTIC), announces the proposed extension of a currently approved collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by March 19, 2001.

ADDRESSES: Interested parties should submit written comments and recommendations on the proposed information collection to: ATTN: DTIC–BC, Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, VA 22060–6218; E-mail comments submitted via the Internet should be addressed to: laxe@dtic.mil.

FOR FURTHER INFORMATION CONTACT: To request further information on this proposed information collection, or to obtain a copy of the proposal and associated collection instrument, please write to the above address or call Ms. Linda Axe at (703) 767–8194.

Title, Associated Form, and OMB Number: Registration for Scientific and Technical Information Services, DD Form 1540, OMB Control Number 0704–0264.

Needs and Uses: The data that the Defense Technical Information Center handles is controlled, either because of distribution limitations or security classification. For this reason, all potential users are required to register for service. DODI 3200.14, Principles and Operational Parameters of the DOD Scientific and Technical Information Program, mandates the registration procedure. Federal Government agencies and their contractors are required to complete the DD Form 1540, Registration for Scientific and Technical Information Services (OMB Number 0704–0264). The contractor community completes a separate DD Form 1540 for each contract or grant and registration is valid until the contract expires.

Affected Public: Businesses or other for-profit; Small Businesses or organizations; Non-profit institutions.

Annual Burden Hours: 833.

Number of Annual Respondents: 2,000.

Annual Responses to Respondent: 1.

Average Burden Per Response: 25 minutes.

Frequency: On occasion.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

The DOD Scientific and Technical Information Program (STIP) requires the exchange of scientific and technical information within and among Federal Government agencies and their contractors. The DD Form 1540 serves as a registration tool for Federal Government agencies and their contractors to access DTIC services. The contractors, subcontractors, and potential contractors are required to obtain certification from designated approving officials. Federal Government agencies need certification from approving officials and security offices only when requesting access to classified data. All collected information is verified by DTIC's Marketing and Registration Division.

Dated: January 10, 2001.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 01–1316 Filed 1–16–01; 8:45 am]

BILLING CODE 5001–10–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense will submit to OMB for emergency processing, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Title and OMB Number: Foreign Sourcing for Defense Application; OMB Number 0704—[To Be Determined].

Type of Request: New Collection; Emergency processing requested with a shortened public comment period ending February 7, 2001. An approval date by February 15, 2001 has been requested.

Number of Respondents: 3,205.

Responses Per Respondent: 1.

Annual Responses: 3,205.

Average Burden Per Response: 5 hours.

Annual Burden Hours: 16,025.

Needs and Uses: The information is required for the Department of Defense (DoD) to evaluate, for certain defense programs, the: (1) Extent of foreign sourcing within the defense products; (2) impact such foreign sourcing has on military readiness and the related domestic industrial infrastructure; and, (3) extent to which DoD or contractor policies, procedures, practices, or actions encourage or discourage consideration of foreign sources for defense products. The evaluation is required by section 831 of the National Defense Authorization Act for Fiscal Year 2001. Section 831 requires the Secretary of Defense to conduct a study analyzing the impact that foreign sources have on six specific defense systems to include the AH–64D Apache helicopter, F/A–18E/F aircraft, M1A2 Abrams tank, AIM 120 AMRAAM missile, Patriot missile ground station, and Hellfire missile. To ensure it can address emerging foreign sourcing issues, DoD will also evaluate foreign

sourcing on the Joint Direct Attack Munition and the Advanced Amphibious Assault Vehicle. Section 831 requires that the information to be analyzed shall be collected from prime contractors and first and second tier subcontractors.

Affected Public: Business or Other For-Profit.

Frequency: One-Time.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Mr. Lew Oleinick. Written comments and recommendations on the proposed information collection should be sent to Mr. Oleinick at the Office of Management and Budget, Desk Officer for Acquisitions (DoD), Room 10236, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Mr. Robert Cushing. Written requests for copies of the information collection proposal should be sent to Mr. Cushing, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202–4302, or by fax at (703) 604–6270.

Dated: January 8, 2001.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 01–1318 Filed 1–16–01; 8:45 am]

BILLING CODE 5001–10–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Title, Form, and OMB Number: Application for Department of Defense Common Access Card—DEERS Enrollment; DD Form 1172–2; OMB Number 0704–0415.

Type of Request: Extension.

Number of Respondents: 300,000.

Responses Per Respondent: 1.

Annual Responses: 300,000.

Average Burden Per Response: 20 minutes.

Annual Burden Hours: 100,000.

Needs and Uses: This information collection is needed to obtain the necessary data to establish eligibility for the DoD Common Access Card for those individuals not pre-enrolled in the DEERS, and to maintain a centralized database of eligible individuals. This information is used to establish eligibility for the DoD Common Access Card for individuals either employed by or associated with the Department of Defense; is used to control access to DoD facilities and systems; and it provides a source of data for demographic reports and mobilization dependent support.

Affected Public: Individuals or Households.

Frequency: On Occasion.

Respondent's Obligation: Required to Obtain or Retain Benefits.

OMB Desk Officer: Mr. Edward C. Springer. Written comments and recommendations of the proposed information collection should be sent to Mr. Springer at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Mr. Robert Cushing. Written requests for copies of the information collection proposal should be sent to Mr. Cushing, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202–4302.

Dated: January 10, 2001.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 01–1317 Filed 1–16–01; 8:45 am]

BILLING CODE 5001–10–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Title, Form Number, and OMB Number: Civil Aircraft Landing Permit System; DD Form 2400, 2401, 2402; OMB Number 0701–0050.

Type of Request: Reinstatement.

Number of Respondents: 3,600.

Responses per Respondent: 1.

Annual Responses: 3,600.

Average Burden Per Response: 30 minutes.

Annual Burden Hours: 1,800.

Needs and Uses: The Information collection requirement is necessary to ensure that the security and operational integrity of military airfields are maintained; to identify the aircraft operator and the aircraft to be operated; to avoid competition with the private sector by establishing the purpose for use of military airfields; and to ensure the U.S. Government is not held liable if the civil aircraft becomes involved in an accident or incident while using military airfields, facilities, and services.

Affected Public: Business or Other For-Profit; Not-For-Profit Institutions; Individuals or Households.

Frequency: On Occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Mr. Edward C. Springer. Written comments and recommendations on the proposed information collection should be sent to Mr. Springer at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Mr. Robert Cushing. Written requests for copies of the information collection proposal should be sent to Mr. Cushing. WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202–4302.

Dated: January 8, 2001.

Patricia L. Toppings,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 01–1319 Filed 1–16–01; 8:45 am]

BILLING CODE 5001–10–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Title, Form Number, and OMB Number: Description of Vessels, Description of Operations; ENG Form 3931, 3932; OMB Number 0710–0009.

Type of Request: Revision.

Number of Respondents: 2,500.

Responses Per Respondent: 1.

Annual Responses: 2,500.

Average Burden Per Response: 48 minutes.

Annual Burden Hours: 2,000.

Needs and Uses: The data collected provide information on vessel operators and their American Flag vessels operating or available for operation on the inland waterways of the United States in the transportation of freight and passengers. The information provides accurate U.S. Flag fleet

statistics for use by the Army Corps of Engineers and other agencies, such as the U.S. Coast Guard and Federal and State agencies involved in transportation.

Affected Public: Business or Other For-Profit.

Frequency: Annually.

Respondent's Obligation: Mandatory.

OMB Desk Officer: Mr. Jim Laity.

Written comments and recommendations on the proposed information collection should be sent to Mr. Laity at the Office of Management and Budget, Desk Officer for the U.S. Army Corps of Engineers, Room 10202, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Mr. Robert Cushing. Written requests for copies of the information collection proposal should be sent to Mr. Cushing, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202–4302.

Dated: January 8, 2001.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 01–1320 Filed 1–16–01; 8:45 am]

BILLING CODE 5001–10–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Title, Form, and OMB Number: Personnel Security Clearance Change Notification; DISCO Form 562; OMB Number 0704–[To Be Determined].

Type of Request: New Collection.

Number of Respondents: 11,290.

Responses Per Respondent: 20.

Annual Responses: 225,800.

Average Burden Per Response: 12 minutes.

Annual Burden Hours: 45,160.

Needs and Uses: The DISCO Form 562 is used by contractors participating in the National Industrial Security Program to report various changes in employee personnel clearance status or identification information. The execution of the form is a factor in making a determination as to whether a contractor employee is eligible to have a security clearance.

Affected Public: Business or Other For-Profit; Not-For-Profit Institutions.

Frequency: On Occasion.

Respondents Obligation: Required to Obtain or Retain Benefits.

OMB Desk Officer: Mr. Edward C. Springer.

Written comments and recommendations on the proposed information collection should be sent to Mr. Springer at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Mr. Robert Cushing. Written requests for copies of the information collection proposal should be sent to Mr. Cushing, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202–4302.

Dated: January 8, 2001.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 01–1321 Filed 1–16–01; 8:45 am]

BILLING CODE 5001–10–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Intelligence Agency, Science and Technology Advisory Board Closed Panel Meeting

AGENCY: Defense Intelligence Agency, Department of Defense.

ACTION: Notice.

SUMMARY: Pursuant to the provisions of subsection (d) of section 10 of Public Law 92–463, as amended by section 5 of Public Law 94–409, notice is hereby given that a closed meeting of the DIA Science and Technology Advisory Board has been scheduled as follows:

DATES: January 9, and 10, 2001 (800 am to 1600 pm).

ADDRESSES: The Defense Intelligence Agency, 200 MacDill BLVD, Washington, DC, 20340.

FOR FURTHER INFORMATION CONTACT: Victoria J. Prescott, Executive Secretary, DIA Science and Technology Advisory Board, Washington, DC 20340–1328 (202) 231–4930.

SUPPLEMENTARY INFORMATION: The entire meeting is devoted to the discussion of classified information as defined in section 552b(c)(l), title 5 of the U.S. Code, and therefore will be closed to the public. The Board will receive briefings on and discuss several current critical intelligence issues and advise the Director, DIA, on related scientific and technical matters.

Dated: January 10, 2001.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 01–1274 Filed 1–16–01; 8:45 am]

BILLING CODE 5001–10–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Intelligence Agency, Science and Technology Advisory Board Closed Panel Meeting

AGENCY: Defense Intelligence Agency, Department of Defense.

ACTION: Notice.

SUMMARY: Pursuant to the provisions of subsection (d) of section 10 of Public Law 92–463, as amended by section 5 of Public Law 94–409, notice is hereby given that a closed meeting of the DIA Science and Technology Advisory board has been scheduled as follows:

DATES: January 30, 2001 (0800 am–1600 pm).

ADDRESSES: The Defense Intelligence Agency, 200 MacDill Blvd, Washington, DC 20340.

DATES: January 31 2001 (0800 am–1600 pm).

ADDRESSES: National Reconnaissance Office (NRO) Headquarters, 14675 Lee Road, Chantilly, VA.

FOR FURTHER INFORMATION CONTACT: Ms. Victoria J. Prescott, Director/Executive Secretary, DIA Science and Technology Advisory Board, Washington, D.C.20340–1328 (202) 231—4930.

SUPPLEMENTARY INFORMATION: The entire meeting is devoted to the discussion of classified information as defined in section 552b(c)(1), title 5 of the U.S. Code, and therefore will be closed to the public. The Board will receive briefings on and discuss several current critical intelligence issues and advise the Director, DIA, on related scientific and technical matters.

Dated: January 10, 2001.

L.M. Bynum,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 01–1275 Filed 1–16–01; 8:45 am]

BILLING CODE 5001–01–M

DEPARTMENT OF DEFENSE

Office of the Secretary of Defense

Meeting of the DOD Advisory Group on Electron Devices

AGENCY: Advisory Group on Election Devices, Department of Defense.

ACTION: Notice.

SUMMARY: The DoD Advisory Group on Electron Devices (AGED) announces a closed session meeting.

DATES: The meeting will be held at 0900, Tuesday, February 13, 2001.

ADDRESSES: The meeting will be held at Palisades Institute for Research Services, 1745 Jefferson Davis Highway, Suite 500, Arlington, VA 22202.

FOR FURTHER INFORMATION CONTACT: Mr. Eliot Cohen, AGED Secretariat, 1745 Jefferson Davis Highway, Crystal Square Four, Suite 500, Arlington, Virginia 22202.

SUPPLEMENTARY INFORMATION: The mission of the Advisory Group is to provide advice to the Under Secretary of Defense for Acquisition and Technology, to the Director of Defense Research and Engineering (DDR&E), and through the DDR&E to the Director, Defense Advanced Research Projects Agency and the Military Departments in planning and managing an effective and economical research and development program in the area of electron devices.

The AGED meeting will be limited to review of research and development programs which the Military Departments propose to initiate with industry, universities or in their laboratories. The agenda for this meeting will include programs on Radiation Hardened Devices, Microwave Tubes, Displays and Lasers. The review will include details of classified defense programs throughout.

In accordance with Section 10(d) of Pub. L. No. 92–463, as amended (5 U.S.C. App. § 10(d) (1994)), it has been determined that this Advisory Group meeting concerns matters listed in 5 U.S.C. 552b(c)(1) (1994), and that accordingly, this meeting will be closed to the public.

Dated: January 10, 2001.

L.M. Bynum,

Alternate, OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 01–1270 Filed 1–16–01; 8:45 am]

BILLING CODE 5001–10–M

DEPARTMENT OF DEFENSE

Office of the Secretary of Defense

Meeting of the DOD Advisory Group on Electron Devices

AGENCY: Advisory Group on Electron Devices, Department of Defense.

ACTION: Notice.

SUMMARY: Working Group A (Microwave Devices) of the DoD Advisory Group on Electron Devices (AGED) announces a closed session meeting.

DATES: The meeting will be held at 0900, Thursday, February 15, 2001.

ADDRESSES: The meeting will be held at Palisades Institute for Research Services, Inc. 1745 Jefferson Davis Highway, Suite 500, Arlington, VA 22202.

FOR FURTHER INFORMATION CONTACT: David Cox, AGED Secretariat, 1745 Jefferson Davis Highway, Crystal Square Four, Suite 500, Arlington, Virginia 22202.

SUPPLEMENTARY INFORMATION: The mission of the Advisory Group is to provide advice to the Under Secretary of Defense for Acquisition and Technology, to the Director of Defense Research and Engineering (DDR&E), and through the DDR&E to the Director, Defense Advanced Research Projects Agency (ARPA) and the Military Departments in planning and managing an effective and economical research and development program in the area of electron devices.

The Working Group A meeting will be limited to review of research and development programs which the Military Departments propose to initiate with industry, universities or in their laboratories. This microwave device area includes programs on developments and research related to microwave tubes, solid state microwave devices, electronic warfare devices, millimeter wave devices, and passive devices. The review will include details of classified defense programs throughout.

In accordance with Section 10(d) of Pub. L. No. 92–463, as amended (5 U.S.C. App. § 10(d) (1994)), it has been determined that this Advisory Group meeting concerns matters listed in 5 U.S.C. 552b(c)(1) (1994), and that accordingly, this meeting will be closed to the public.

Dated: January 10, 2001.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 01–1271 Filed 1–16–01; 8:45 am]

BILLING CODE 5001–10–M

DEPARTMENT OF DEFENSE

Office of the Secretary of Defense

Meeting of the DOD Advisory Group on Electron Devices

AGENCY: Advisory Group on Electron Devices, Department of Defense.

ACTION: Notice.

SUMMARY: Working Group C (Electro-Optics) of the DoD Advisory Group on Electron Devices (AGED) announces a closed session meeting.

DATES: The meeting will be held at 0900, Wednesday, January 31, 2001.

ADDRESSES: The meeting will be held at Palisades Institute for Research Services, 1745 Jefferson Davis Highway, Suite 500, Arlington, VA 22202.

FOR FURTHER INFORMATION CONTACT: Elise Rabin, AGED Secretariat, 1745 Jefferson Davis Highway, Crystal Square Four, Suite 500, Arlington, Virginia 22202.

SUPPLEMENTARY INFORMATION: The mission of the Advisory Group is to provide advice to the Under Secretary of Defense for Acquisition and Technology, to the Director of Defense Research and Engineering (DDR&E), and through the DDR&E to the Director, Defense Advanced Research Projects Agency and the Military Departments in planning and managing an effective and economical research and development program in the area of electron devices.

The Working Group C meeting will be limited to review of research and development programs which the Military Departments propose to initiate with industry, universities or in their laboratories. This opto-electronic device area includes such programs as imaging device, infrared detectors and lasers. The review will include details of classified defense programs throughout.

In accordance with Section 10(d) of Pub. L. No. 92–463, as amended, (5 U.S.C. App. 10(d) (1994)), it has been determined that this Advisory Group meeting concerns matters listed in 5 U.S.C. 552b(c)(1) (1994), and that accordingly, this meeting will be closed to the public.

Dated: January 10, 2001.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 01–1272 Filed 1–16–01; 8:45 am]

BILLING CODE 5001–10–M

DEPARTMENT OF DEFENSE

Office of the Secretary of Defense

Change in Meeting Date of the DOD Advisory Group on Electron Devices

AGENCY: Advisory Group on Electron Devices, Department of Defense.

ACTION: Notice.

SUMMARY: Working Group B (Microelectronics) of the DoD Advisory Group on Electron Devices (AGED)

announces a change to a closed session meeting.

DATES: The meeting will be held at 0900, Wednesday, February 14, 2001.

ADDRESSES: The meeting will be held at Palisades Institute for Research Services, 1745 Jefferson Davis Highway, Suite 500, Arlington, VA 22202.

FOR FURTHER INFORMATION CONTACT: Elise Rabin, AGED Secretariat, 1745 Jefferson Davis Highway, Crystal Square Four, Suite 500, Arlington, Virginia 22202.

SUPPLEMENTARY INFORMATION: The mission of the Advisory Group is to provide advice to the Under Secretary of Defense for Acquisition and Technology, to the Director Defense Research and Engineering (DDR&E), and through the DDR&E, to the Director Defense Advanced Research Projects Agency and the Military Departments in planning and managing an effective research and development program in the field of electron devices.

The Working Group B meeting will be limited to review of research and development programs which the military proposes to initiate with industry, universities or in their laboratories. The microelectronics area includes such programs on semiconductor materials, integrated circuits, charge couple devices and memories. The review will include classified program details throughout.

In accordance with section 10(d) of Pub. L. No. 92–463, as amended, (5 U.S.C. App. 10(d) (1994)), it has been determined that this Advisory Group meeting concerns matters listed in 5 U.S.C. 552b(c)(1) (1994), and that accordingly, this meeting will be closed to the public.

Dated: January 10, 2001.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 01–1273 Filed 1–16–01; 8:45 am]

BILLING CODE 5001–10–M

DEPARTMENT OF DEFENSE

Office of the Secretary of Defense

Department of Defense Wage Committee; Notice of Closed Meetings

Pursuant to the provisions of section 10 of Public Law 92–463, the Federal Advisory Committee Act, notice is hereby given that closed meetings of the Department of Defense Wage Committee will be held on February 6, 2001; February 13, 2001; February 20, 2001; and February 27, 2001, at 10:00 a.m. in Room A105, The Nash Building, 1400 Key Boulevard, Rosslyn Virginia.

Under the provisions of section 10(d) of Public Law 92–463, the Department of Defense has determined that the meetings meet the criteria to close meetings to the public because the matters to be considered are related to internal rules and practices of the Department of Defense and the detailed wage data to be considered were obtained from officials of private establishments with a guarantee that the data will be held in confidence.

However, members of the public who may wish to do so are invited to submit material in writing to the chairman concerning matters believed to be deserving of the Committee's attention.

Additional information concerning the meetings may be obtained by writing to the Chairman, Department of Defense Wage Committee, 4000 Defense Pentagon, Washington, DC 20301–4000.

Dated: January 10, 2001.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 01–1269 Filed 1–16–01; 8:45 am]

BILLING CODE 5001–10–M

DEPARTMENT OF ENERGY

Energy Employees Occupational Illness Compensation Act of 2000; List of Covered Facilities

AGENCY: Department of Energy.

ACTION: Notice of listing of covered facilities.

SUMMARY: The Energy Employees Occupational Illness Compensation Act of 2000 (''Act''), Public Law 106–398, establishes a program to provide compensation to individuals who developed illnesses as a result of their employment in nuclear weapons production-related activities and at certain federally-owned facilities in which radioactive materials were used. On December 7, 2000, the President issued Executive Order 13179 (''Order'') directing the Department of Energy (''Department'' or ''DOE'') to list covered facilities in the **Federal Register**. This notice responds to both the Act and the Order.

FOR FURTHER INFORMATION CONTACT: Office of Worker Advocacy, 1–877–447–9756.

ADDRESSES: The Department welcomes comments on this list. Individuals who wish to suggest additional facilities for inclusion on the list, indicate why one or more facilities should be removed from the list, or provide other information may contact: Office of Worker Advocacy (EH–8), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, email: worker_advocacy@eh.doe.gov, toll-free: 1–877–447–9756.

SUPPLEMENTARY INFORMATION:

Purpose: The Energy Employees Occupational Illness Compensation Act of 2000 (''Act''), Public Law 106–398, establishes a program to provide compensation to individuals who developed illnesses as a result of their employment in nuclear weapons production-related activities and at certain federally-owned facilities in which radioactive materials were used. On December 7, 2000, the President issued Executive Order 13179 (''Order'') directing the Department of Energy (''Department'' or ''DOE'') to list covered facilities in the **Federal Register**. Section 2. c. vii of the Order instructs the Department to list three types of facilities:

(1) Atomic weapons employer facilities, as defined in section 3621 (4) of the Act;

(2) Department of Energy facilities, as defined by section 3621 (12) of the Act; and

(3) Beryllium vendors, as defined by section 3621 (6) of the Act.

Compensation options and mechanisms are defined differently for each of these facility categories. The atomic weapons employer category includes facilities in which the primary work was not related to atomic weapons, and consequently these facilities are not commonly known as atomic weapons facilities. Their inclusion in this list is consistent with the Act, and is not intended as a classification for any other purpose.

The list at the end of this notice represents the Department's best efforts to date to compile a list of facilities in these three categories. Reconstructing the operational history of the nuclear weapons system over a sixty-year period is a complex and sometimes imprecise undertaking. Some list entries are based on records that contain the names and addresses of companies and facilities at the time work was performed for the Department and its predecessor federal agencies. The list may identify a corporate headquarters facility as a production location, or may contain some inadvertent duplication because of changes in names, ownership, and addresses. Similarly, attempts to minimize duplication may have resulted in the inadvertent omission of subsidiaries and satellite locations that should be included. Accordingly, the

Department is continuing its research efforts in order to better understand past production activities, and DOE intends to update this list at least once annually so long as new information becomes available. The public is invited to comment on the list and to provide additional information.

In addition to continuing its research efforts, the Department is developing information dissemination mechanisms to make facility-specific data available to the public, including a publicly accessible database of site-related information. This database will help ensure that the Department keeps track of facilities involved in atomic weapons and other work potentially resulting in contamination or exposure. The site database will include, among other information, the type of nuclear weapons-related production work done, the dates such work occurred, and available health and safety data concerning the facility. The listing of facility name and location in this notice represents only a first step in providing information to the public.

The Act does not cover workers involved in uranium mining and milling, or those who worked in support of naval nuclear propulsion programs. Consequently, facilities associated with this type of work are not listed in this notice. Some workers who became ill as a result of their employment at these facilities may be covered by other programs such as the Radiation Exposure Compensation Act (RECA), the Federal Exposure Compensation Act (FECA), or other jurisdictions' worker compensation programs.

Introduction to the Covered Facility List

The list that follows covers the three categories of employers defined by the Act: atomic weapons employers (''AWE''), Department of Energy facilities (''DOE''), and beryllium vendors (''BE''). Some facilities fall into more than one category. For example, if a private contractor facility handled both radioactive materials and beryllium, it will have ''AWE'' and ''BE'' in the ''facility type'' column. For another example, a facility will have both ''DOE'' and ''AWE'' codes if ownership changed between the DOE and another entity. The Department intends to provide facility-specific explanations of the applicability of these categories through the database mentioned above.

Each of the categories is defined below:

1. Atomic Weapons Employers

Section 3621 (4) of the Act defines an atomic weapons employer as ''an entity that—

(A) processed or produced, for the use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining and milling; and

(B) is designated as an atomic weapons employer for purposes of this title by the Secretary of Energy.''

Most facilities listed as an AWE conducted nuclear weapons-related work for a limited period of time or in certain select areas of the plant. For example, some sites worked with radioactive materials to evaluate processing machinery that was being considered for use in atomic weapons production. Radioactive materials may not have been used as a routine part of the facility's operations. The Act covers those workers who became sick as a consequence of their work in support of nuclear weapons production activities, and was not intended to cover all workers at each site named.

The lines between research, atomic weapons production, and non-weapons production are often difficult to draw. For the purposes of this notice, and as directed by the Act, only those facilities whose work involved radioactive material that was connected to the weapons production chain are included. Available information about many of these facilities is incomplete or unclear, and the Department welcomes comments or additional information regarding facilities that may have supported atomic weapons production that are not on this list, as well as information that clarifies the work done at facilities named below.

2. Department of Energy Facilities

Section 3621 (12) of the Act defines a DOE facility as ''any building, structure, or premise, including the grounds upon which such building, structure, or premise is located—

(A) in which operations are, or have been, conducted by, or on behalf of, the Department of Energy (except for buildings, structures, premises, grounds, or operations covered by Executive Order 12344, pertaining to the Naval Nuclear Propulsion Program); and

(B) with regard to which the Department of Energy has or had—

(i) A proprietary interest; or

(ii) Entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services.''

Consistent with this definition, the Department has taken a broad view of where operations have been conducted by DOE or its predecessor agencies. The list includes any facility handling radioactive materials or beryllium in which the Department had management and operations, management and integration, environmental remediation, or construction and maintenance contracts. This broad definition includes many facilities which are not generally thought of as Departmental facilities, as well as facilities which are not necessarily involved with weapons-related work. For example, some universities and private companies are included because the Department contracted for environmental remediation services at these sites, even though the Department did not own the facility. Also, some DOE-owned laboratories are included because they do work involving radioactive materials, even though that work is not related to nuclear weapons production.

The Act covers production workers at the gaseous diffusion plants at Paducah, KY and Piketon, OH. Production workers at these facilities are covered for work conducted until July 28, 1998, when the facilities were privatized under the control of the United States Enrichment Corporation (USEC, Inc.)

The listing of Department of Energy facilities is only intended for the context of implementing this Act and does not create or imply any new Departmental obligations or ownership at any of the facilities named on this list.

3. Beryllium Vendors

Section 3621(6) of the Act defines beryllium vendor as the following:

''(A) Atomics International.

(B) Brush Wellman, Incorporated, and its predecessor, Brush Beryllium Company.

(C) General Atomics.

(D) General Electric Company.

(E) NGK Metals Corporation and its predecessors, Kawecki-Berylco, Cabot Corporation, BerylCo, and Beryllium Corporation of America.

(F) Nuclear Materials and Equipment Corporation.

(G) StarMet Corporation, and its predecessor, Nuclear Metals, Incorporated.

(H) Wyman Gordan, Incorporated.

(I) Any other vendor, processor, or producer of beryllium or related products designated as a beryllium vendor for purposes of this title under Section 3622.''

Beryllium metal has been an important material for atomic weapons production, and it was used at many places throughout the production

system. The list indicates private firms that processed, produced, or provided beryllium metal for the Department, as defined by the Act. This information is drawn from a variety of historical documents, and much data remains incomplete. The Department welcomes comments or additional information about its beryllium vendors.

Covered Facility List

Jurisdiction	Facility name	Location	Facility type
AL	Southern Research Institute	Sylacauga	AWE
AL	Speed Ring Experimental & Tool Company	Culman	BE
AL	Tennessee Valley Authority	Muscle Shoals	AWE
AK	Amchitka Island Nuclear Explosion Site	Amchitka Island	DOE
AK	Project Chariot Site	Cape Thompson	DOE
CA	Arthur D. Little Co.	San Francisco	AWE
CA	Atomics International	Canoga Park	BE
CA	Burris Park Field Station	Kingsburg	AWE
CA	Ceradyne, Inc.	Santa Ana	BE
CA	Dow Chemical Co.	Walnut Creek	AWE
CA	Electro Circuits, Inc.	Pasadena	AWE
CA	Energy Technology Engineering Center	Santa Susana	DOE
CA	General Atomics	La Jolla	AWE/BE/DOE
CA	General Electric Vallecitos	Pleasanton	AWE
CA	Hunter Douglas Aluminum Corp.	Riverside	AWE
CA	Laboratory for Energy-Related Health Research	Davis	DOE
CA	Laboratory of Biomedical and Environmental Sciences	Los Angeles	DOE
CA	Laboratory of Radiobiology and Environmental Health	San Francisco	DOE
CA	Lawrence Berkeley National Laboratory	Berkeley	DOE
CA	Lawrence Livermore National Laboratory	Livermore	DOE
CA	Sandia Laboratory, Salton Sea Base	Imperial County	DOE
CA	Sandia National Laboratories—Livermore	Livermore	DOE
CA	Stanford Linear Accelerator Center	Palo Alto	DOE
CA	Stauffer Metals, Inc.	Richmond	AWE
CA	University of California	Berkeley	AWE/DOE
CO	Coors Porcelain	Golden	BE
CO	Project Rio Blanco Nuclear Explosion Site	Rifle	DOE
CO	Project Rulison Nuclear Explosion Site	Grand Valley	DOE
CO	Rocky Flats Plant	Golden	DOE
CO	Shattuck Chemical	Denver	AWE
CO	University of Denver Research Institute	Denver	AWE/BE
CT	American Chain and Cable Co.	Bridgeport	AWE
CT	Anaconda Co.	Waterbury	AWE
CT	Bridgeport Brass Co., Havens Lab.	Bridgeport	AWE
CT	Combustion Engineering	Windsor	AWE/DOE
CT	Connecticut Aircraft Nuclear Engine Lab. (CANEL)	Middletown	BE/DOE
CT	Dorr Corp.	Stamford	AWE
CT	Fenn Machinery Co.	Hartford	AWE
CT	New England Lime Co.	Canaan	AWE
CT	Seymour Specialty Wire	Seymour	AWE/DOE
CT	Sperry Products, Inc.	Danbury	AWE
CT	Torrington Co.	Torrington	AWE
DE	Allied Chemical and Dye Corp.	North Claymont	AWE
DC	National Bureau of Standards, Van Ness Street	Washington	AWE
DC	Naval Research Laboratory	Washington	AWE/DOE
FL	American Beryllium Co.	Sarasota	BE
FL	Armour Fertilizer Works	Bartow	AWE
FL	C.F. Industries, Inc.	Bartow	AWE
FL	Gardinier, Inc.	Tampa	AWE
FL	International Minerals and Chemical Corp	Mulberry	AWE
FL	Pinellas Plant	Clearwater	DOE
FL	University of Florida	Gainesville	AWE
FL	Virginia-Carolina Chemical Corp	Nichols	AWE
FL	W.R. Grace Co., Agricultural Chemical Div	Ridgewood	AWE
ID	Argonne National Laboratory—West	Scoville	DOE
ID	Idaho National Engineering Laboratory	Scoville	DOE
IL	Allied Chemical Corp.	Metropolis	AWE
IL	American Machine and Metals, Inc.	E. Moline	AWE
IL	Argonne National Laboratory-East	Argonne	DOE
IL	Armour Research Foundation	Chicago	AWE
IL	Blockson Chemical Co	Joliet	AWE
IL	C–B Tool Products Co.	Chicago	AWE
IL	Crane Co.	Chicago	AWE
IL	ERA Tool and Engineering Co.	Chicago	AWE
IL	Fansteel Metallurgical Corp.	North Chicago	BE
IL	Fermi National Accelerator Laboratory	Batavia	DOE
IL	Granite City Steel	Granite City	AWE/DOE
IL	Great Lakes Carbon Corp.	Chicago	AWE
IL	GSA 39th Street Warehouse	Chicago	AWE

Jurisdiction	Facility name	Location	Facility type
IL	International Register	Chicago	AWE
IL	Kaiser Aluminum Corp.	Dalton	AWE
IL	Lindsay Light and Chemical Co.	W. Chicago	AWE
IL	Madison Site (Speculite)	Madison	AWE/DOE
IL	Midwest Manufacturing Co.	Galesbury	AWE
IL	Museum of Science and Industry	Chicago	AWE
IL	National Guard Armory	Chicago	AWE/DOE
IL	Podbeliniac Corp.	Chicago	AWE
IL	Precision Extrusion Co.	Bensenville	AWE
IL	Quality Hardware and Machine Co.	Chicago	AWE
IL	R. Krasburg and Sons Manufacturing Co.	Chicago	AWE
IL	Sciaky Brothers, Inc.	Chicago	AWE
IL	Swenson Evaporator Co.	Harvey	AWE
IL	University of Chicago	Chicago	AWE/DOE
IL	W.E. Pratt Manufacturing Co.	Joliet	AWE
IL	Wycoff Drawn Steel Co.	Chicago	AWE
IN	American Bearing Corp.	Indianapolis	AWE
IN	Dana Heavy Water Plant	Dana	DOE
IN	General Electric Plant	Shelbyville	AWE
IN	Joslyn Manufacturing and Supply Co	Ft. Wayne	AWE
IN	Purdue University Van der Graaf Lab	Lafayette	AWE
IN	Washrite	Indianapolis	AWE
IA	Ames Laboratory	Ames	DOE
IA	Iowa Ordnance Plant	Burlington	DOE
IA	Titus Metals	Waterloo	AWE
KS	Spencer Chemical Co., Jayhawks Works	Pittsburg	AWE
KY	Paducah Gaseous Diffusion Plant	Paducah	DOE
MR*	Eniwetok Test Site	Marshall Islands	DOE
MD	Armco-Rustless Iron & Steel	Baltimore	AWE
MD	W.R. Grace and Company	Curtis Bay	AWE/DOE
MA	American Potash & Chemical	West Hanover	AWE
MA	C.G. Sargent & Sons	Graniteville	AWE
MA	Chapman Valve	Indian Orchard	AWE/DOE
MA	Edgerton Germeshausen & Grier, Inc.	Boston	AWE
MA	Fenwal, Inc.	Ashland	AWE
MA	Franklin Institute	Boston	BE
MA	Heald Machine Co.	Worcester	AWE
MA	La Pointe Machine and Tool Co.	Hudson	AWE
MA	Massachusetts Institute of Technology	Cambridge	AWE/BE
MA	Metals and Controls Corp.	Attleboro	AWE
MA	National Research Corp.	Cambridge	AWE
MA	Norton Co.	Worcester	AWE/BE
MA	Nuclear Metals, Inc.	Concord	AWE/BE
MA	Reed Rolled Thread Co.	Worcester	AWE
MA	Shpack Landfill	Norton	AWE/DOE
MA	Ventron Corporation	Beverly	AWE/DOE
MA	Winchester Engineering and Analytical Center	Winchester	DOE
MA	Woburn Landfill	Woburn	AWE
MA	Wyman Gordon Inc.	Grayton, North Grafton	BE
MI	AC Spark Plug	Flint	BE
MI	Baker-Perkins Co.	Saginaw	AWE
MI	Carboloy Co.	Detroit	AWE
MI	Extruded Metals Co.	Grand Rapids	AWE
MI	General Motors	Adrian	AWE/DOE
MI	Gerity-Michigan Corp.	Adrian	BE
MI	Mitts & Merrel Co.	Saginaw	AWE
MI	Oliver Corp.	Battle Creek	AWE
MI	Revere Copper and Brass	Detroit	AWE/BE
MI	Speed Ring Experimental & Tool Company	Detroit	BE
MI	Star Cutter Corp.	Farmington	AWE
MI	University of Michigan	Ann Arbor	AWE
MI	Wolverine Tube Division	Detroit	AWE
MN	Elk River Reactor	Elk River	DOE
MS	Salmon Nuclear Explosion Site	Hattiesburg	DOE
MO	Kansas City Plant	Kansas City	DOE
MO	Latty Avenue Properties	Hazelwood	AWE/DOE
MO	Mallinckrodt Chemical Co., Destrehan St. Plant	St. Louis	AWE/DOE
MO	Medart Co.	St. Louis	AWE
MO	Roger Iron Co.	Joplin	AWE
MO	Spencer Chemical Co.	Kansas City	AWE
MO	St. Louis Airport Site	St. Louis	AWE/DOE
MO	Tyson Valley Powder Farm	St. Louis	AWE
MO	United Nuclear Corp.	Hematite	AWE
MO	Weldon Spring Plant	Weldon Spring	DOE

Jurisdiction	Facility name	Location	Facility type
NE	Hallam Sodium Graphite Reactor	Hallam	DOE
NV	Nevada Test Site	Mercury	DOE
NV	Project Faultless Nuclear Explosion Site	Central Nevada Test Site	DOE
NV	Project Shoal Nuclear Explosion Site	Fallon	DOE
NV	Yucca Mountain Site Characterization Project	Yucca Mountain	DOE
NJ	Aluminum Co. of America (Alcoa)	Garwood	AWE
NJ	American Peddinghaus Corp.	Moonachle	AWE
NJ	Baker and Williams Co.	Newark	AWE
NJ	Bell Telephone Laboratories	Murray Hill	AWE
NJ	Bloomfield Tool Co.	Bloomfield	AWE
NJ	Bowen Lab.	North Branch	AWE
NJ	Callite Tungsten Co.	Union City	AWE
NJ	Chemical Construction Co.	Linden	AWE
NJ	Du Pont Deepwater Works	Deepwater	AWE/DOE
NJ	International Nickel Co., Bayonne Laboratories	Bayonne	AWE
NJ	J.T. Baker Chemical Co.	Phillipsburg	AWE
NJ	Kellex/Pierpont	Jersey City	AWE/DOE
NJ	Maywood Chemical Works	Maywood	AWE/DOE
NJ	Middlesex Municipal Landfill	Middlesex	AWE/DOE
NJ	Middlesex Sampling Plant	Middlesex	DOE
NJ	National Beryllia	Haskell	BE
NJ	New Brunswick Laboratory	New Brunswick	DOE
NJ	Picatinny Arsenal	Dover	AWE
NJ	Princeton Plasma Physics Laboratory	Princeton	DOE
NJ	Rare Earths/ W.R. Grace	Wayne	AWE/DOE
NJ	Standard Oil Development Co. of NJ	Linden	AWE
NJ	Tube Reducing Co.	Wallington	AWE
NJ	U.S. Pipe and Foundry	Burlington	BE
NJ	United Lead Co.	Middlesex	AWE
NJ	Vitro Corp. of America	West Orange	AWE
NJ	Westinghouse Electric Corp.	Bloomfield	AWE
NJ	Wykoff Steel Co.	Newark	AWE
NM	Chupadera Mesa	Chupadera Mesa	DOE
NM	Los Alamos Medical Center	Los Alamos	DOE
NM	Los Alamos National Laboratory	Los Alamos	DOE
NM	Lovelace Respiratory Research Institute	Albuquerque	DOE
NM	Project Gasbuggy Nuclear Explosion Site	Farmington	DOE
NM	Project Gnome Nuclear Explosion Site	Carlsbad	DOE
NM	Sandia National Laboratories	Albuquerque	DOE
NM	South Albuquerque Works	Albuquerque	DOE
NM	Trinity Nuclear Explosion Site	White Sands Missile Range.	DOE
NM	Waste Isolation Pilot Plant	Carlsbad	DOE
NY	Allegheny-Ludlum Steel	Watervliet	AWE
NY	American Machine and Foundry	Brooklyn	AWE
NY	Ashland Oil	Tonawanda	AWE/DOE
NY	Baker and Williams Warehouses	New York	AWE/DOE
NY	Bethlehem Steel	Lackawana	AWE
NY	Bliss & Laughlin Steel	Buffalo	AWE/DOE
NY	Brookhaven National Laboratory	Upton	DOE
NY	Burns & Roe, Inc.	Maspeth	BE
NY	Colonie Site (National Lead)	Colonie	AWE/DOE
NY	Columbia University	New York City	AWE/DOE
NY	Electro Metallurgical	Niagara Falls	AWE
NY	General Astrometals	Yonkers	BE
NY	Hooker Electrochemical	Niagara Falls	AWE
NY	International Rare Metals Refinery, Inc	Mt. Kisko	AWE
NY	Ithaca Gun Co.	Ithaca	AWE
NY	Lake Ontario Ordnance Works	Niagara Falls	DOE
NY	Ledoux and Co.	New York	AWE
NY	Linde Air Products	Buffalo	AWE
NY	Linde Ceramics Plant	Tonawanda	AWE/DOE
NY	New York University	New York	AWE
NY	Peek Street Facility**	Schenectady	DOE
NY	Radium Chemical Co.	New York	AWE
NY	Rensselaer Polytechnic Institute	Troy	AWE
NY	Sacandaga Facility**	Glenville	DOE
NY	Seaway Industrial Park	Tonawanda	AWE/DOE
NY	Seneca Army Depot	Romulus	AWE
NY	Separations Process Research Unit (at Knolls Lab.)**	Schenectady	DOE
NY	Simonds Saw and Steel Co.	Lockport	AWE
NY	Staten Island Warehouse	New York	AWE
NY	Sylvania Corning Nuclear Corp.	Hicksville	AWE/DOE
NY	Sylvania Products Corp.	Bayside	AWE/BE

Jurisdiction	Facility name	Location	Facility type
NY	Titanium Alloys Manufacturing	Niagara Falls	AWE
NY	Trudeau Foundation	Saranac Lake	BE
NY	University of Rochester Medical Laboratory	Rochester	AWE/DOE
NY	Utica St. Warehouse	Buffalo	AWE
NY	West Valley Demonstration Project	West Valley	DOE
NC	Beryllium Metals and Chemical Corp	Bessemer City	BE
NC	University of North Carolina	Chapel Hill	BE
OH	Air Force Plant 36	Evandale	AWE
OH	Ajax Magnathermic Corp.	Youngstown	AWE
OH	Alba Craft	Oxford	AWE/DOE
OH	Associated Aircraft Tool and Manufacturing Co	Fairfield	AWE/DOE
OH	B & T Metals	Columbus	AWE/DOE
OH	Baker Brothers	Toledo	AWE/DEL
OH	Battelle Columbus Laboratories	Columbus	AWE
OH	Battelle Memorial Institute	Columbus	AWE/BE/DOE
OH	Beryllium Production Plant (Brush)	Luckey	BE/DOE
OH	Brush Beryllium Co.	Elmore	AWE/BE
OH	Brush Beryllium Co.	Cleveland	AWE/BE
OH	Brush Beryllium Co.	Loraine	AWE/BE
OH	Cincinnati Milling Machine Co.	Cincinnati	AWE
OH	Clifton Products Co.	Clifton	BE
OH	Clifton Products Co.	Painesville	BE
OH	Copperweld Steel	Warren	AWE
OH	Du Pont-Grasselli Research Laboratory	Cleveland	AWE
OH	Extrusion Plant	Ashtabula	DOE
OH	Feed Materials Production Center	Fernald	DOE
OH	General Electric Company	Cincinnati/Evendale	AWE/BE/DOE
OH	Gruen Watch	Norwood	AWE
OH	Harshaw Chemical Co.	Cleveland	AWE
OH	Herring-Hall Marvin Safe Co.	Hamilton	AWE/DOE
OH	Horizons, Inc.	Cleveland	AWE
OH	Kettering Laboratory, University of Cincinnati	Cincinnati	BE
OH	Magnus Brass Co.	Cincinnati	AWE
OH	McKinney Tool and Manufacturing Co.	Cleveland	AWE
OH	Mitchell Steel Co.	Cincinnati	AWE
OH	Monsanto Chemical Co.	Dayton	AWE
OH	Mound Plant	Miamisburg	DOE
OH	Painesville Site (Diamond Magnesium Co.)	Painesville	AWE/DOE
OH	Piqua Organic Moderated Reactor	Piqua	DOE
OH	Portsmouth Gaseous Diffusion Plant	Piketon	DOE
OH	R. W. Leblond Machine Tool Co.	Cincinnati	AWE
OH	Tech-Art, Inc.	Milford	AWE
OH	Tocco Induction Heating Div.	Cleveland	AWE
OH	Vulcan Tool Co.	Dayton	AWE
OK	Kerr-McGee	Guthrie	AWE
OR	Albany Research Center	Albany	AWE/DOE
OR	Wah Chang	Albany	AWE
PA	Aeroprojects, Inc.	West Chester	AWE
PA	Aliquippa Forge	Aliquippa	AWE/DOE
PA	Aluminum Co. of America (Alcoa)	New Kensington	AWE
PA	Babcock & Wilcox	Parks Township	AWE
PA	Beryllium Corp. of America	Hazleton	BE
PA	Beryllium Corp. of America	Reading	BE
PA	Birdsboro Steel & Foundry	Birdsboro	AWE
PA	C.H. Schnoor	Springdale	AWE/DOE
PA	Carnegie Mellon Cyclotron Facility	Saxonburg	AWE
PA	Carpenter Steel Co.	Reading	AWE
PA	Chambersburg Engineering Co.	Chambersburg	AWE
PA	Foote Mineral Co.	East Whiteland Twp.	AWE
PA	Frankford Arsenal	Philadelphia	AWE
PA	Heppenstall Co.	Pittsburgh	AWE
PA	Jessop Steel Co.	Washington	AWE
PA	Koppers Co., Inc.	Pittsburgh	AWE
PA	Landis Machine Tool Co.	Waynesboro	AWE
PA	McDaniel Refractory Co.	Beaver Falls	BE
PA	Nuclear Materials and Equipment Corp.	Apollo	AWE/BE
PA	Penn Salt Co.	Philadelphia	AWE
PA	Philadelphia Naval Yard	Philadelphia	AWE
PA	Shippingport Atomic Power Plant	Shippingport	DOE
PA	Superior Steel Co.	Carnegie	AWE
PA	U.S. Steel Co., National Tube Division	McKeesport	AWE
PA	Vitro Manufacturing	Cannonsburg	AWE/BE
PA	Westinghouse Atomic Power Development Plant	East Pittsburgh	AWE
PR	BONUS Reactor Plant	Punta Higuera	DOE

Jurisdiction	Facility name	Location	Facility type
PR	Puerto Rico Nuclear Center	Mayaguez	DOE
RI	C.I. Hayes, Inc.	Cranston	AWE
SC	Savannah River Site	Aiken	DOE
TN	Clarksville Facility	Clarksville	DOE
TN	Oak Ridge Gaseous Diffusion Plant (K–25)	Oak Ridge	DOE
TN	Oak Ridge Hospital	Oak Ridge	DOE
TN	Oak Ridge Institute for Science Education	Oak Ridge	DOE
TN	Oak Ridge National Laboratory (X–10)	Oak Ridge	DOE
TN	Vitro Corp. of America	Chattanooga	AWE/BE
TN	W. R. Grace	Erwin	AWE
TN	Y–12 Plant	Oak Ridge	DOE
TX	AMCOT	Forth Worth	AWE
TX	Mathieson Chemcial Co	Pasadena	AWE
TX	Medina Facility	San Antonio	DOE
TX	Pantex Plant	Amarillo	DOE
TX	Sutton, Steele and Steele Co.	Dallas	AWE
TX	Texas City Chemicals, Inc.	Texas City	AWE
VA	Babcock & Wilcox Co.	Lynchburg	AWE
VA	Thomas Jefferson National Accelerator Facility	Newport News	DOE
VA	University of Virginia	Charlottesville	AWE
WA	Hanford	Richland	DOE
WA	Pacific Northwest National Laboratory	Richland	DOE
WV	Huntington Pilot Plant	Huntington	AWE/DOE
WI	Allis-Chalmers Co.	West Allis, Milwaukee	AWE
WI	Besley-Wells	South Beloit	AWE
WI	LaCrosse Boiling Water Reactor	LaCrosse	DOE
WI	Ladish Co.	Cudahy	BE

*Marshall Islands.
**Consistent with the Act, coverage is limited to activities not performed under the responsibility of the Naval Nuclear Propulsion program.

Issued in Washington, D.C. January 10, 2001.

David M. Michaels,

Assistant Secretary, Environment, Safety and Health.

[FR Doc. 01–1329 Filed 1–16–01; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00–544–001]

Carnegie Interstate Pipeline Company; Notice of Compliance Filing

January 10, 2001.

Take notice that on November 13, 2000, Carnegie Interstate Pipeline Company (CIPCO) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, the following tariff sheets, with an effective date of October 1, 2000:

Second Revised Sheet No. 76
Second Revised Sheet No. 87

CIPCO states that the purpose of this filing is to comply with the Commission's Order issued on October 26, 2000.

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 January 17, 2001. 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. 01–1258 Filed 1–16–01; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL01–27–000]

Dominion Retail, Inc., Complainant, vs. FirstEnergy Corp., Cleveland Electric Illuminating Company, Ohio Edison Company, Toledo Edison Company, and American Transmission Systems, Inc., Respondent; Notice of Complaint

January 10, 2001.

Take notice that on January 9, 2001, the above listed entity, Dominion Retail, Inc. (Dominion Retail or Complainant), tendered for filing a complaint under the Federal Energy Regulatory Commission's (Commission) fast-track procedures against FirstEnergy Corp., Cleveland Electric Illuminating Company, Ohio Edison Company, Toledo Edison Company and American Transmission Systems, Inc. (FirstEnergy).

Complainant has requested that the Commission: (1) find that this complaint merits Fast Track Processing as provided by Section 206(h) of the Commission's Rules of Practice and Procedures; (2) find that the exclusion of FirstEnergy's marketing affiliates from the conditions contained in Paragraph V of the Stipulation and Recommendation is in violation of Section 205 of the Federal Power Act; and of the Commission's Rules related

to affiliated entities, and of FirstEnergy's Code of Conduct as filed with and approved by this Commission; (3) find that the conditions imposed upon affiliated marketers in Paragraph V of the Stipulation and Recommendation is in violation of Section 205 of the Federal Power Act, or in the alternative, that FirstEnergy's interpretation and application of those conditions so as to disqualify Dominion Retail from qualifying to receive an allocation of MSG power is in violation of Section 205 of the Federal Power Act; and (4) provide such other and further relief as may be appropriate under the circumstances.

Any person desiring to be heard or to protest this filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with 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 must be filed on or before January 29, 2001. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may also be viewed on the Internet at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222) for assistance. Answers to the complaint shall also be due on or before January 29, 2001. 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. 01–1259 Filed 1–16–01; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00–337–001]

Kern River Gas Transmission Company; Notice of Proposed Pro Forma Changes in FERC Gas Tariff

January 10, 2001.

Take notice that on January 5, 2001, Kern River Gas Transmission Company (Kern River) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following pro forma tariff sheets:

Sheet No. 76, Sheet No. 106, Sheet No. 125, Sheet No. 125–A, Sheet No. 126, Sheet No. 135, Sheet No. 147, Sheet No. 148, Sheet No. 200, Sheet No. 201, Sheet No. 202, Sheet No. 501, Sheet No. 601, Sheet No. 701, Sheet No. 815, Sheet No. 825, Sheet No. 826, and Sheet No. 901

Kern River states that the purpose of this filing is to submit pro forma tariff sheets reflecting a proposed segmentation policy to be added to Kern River's tariff.

Kern River states that it has served copy of this filing upon each person designated on the official service list compiled by the Secretary 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 on or before January 19, 2001. 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. 01–1257 Filed 1–16–01; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER01–372–001]

New England Power Company; Notice of Filing

January 10, 2001.

Take notice that on December 29, 2000, New England Power Company (NEP), pursuant to section 205 of the Federal Power Act, 16 U.S.C. 824d (1994) and section 35.13 of the Commission's Rules and Regulations, 18 CFR 35.13, withdraws its service agreement filed with the Commission on November 6, 2000 in Docket No. ER01–372–000, and submits for filing a First Revised Service Agreement No. 124 between NEP and ANP Bellingham Energy Company for Firm Local Generation Delivery Service under NEP's Open Access Transmission Tariff, FERC Electric Tariff, Original Volume No. 9.

Copies of the filing were served upon ANP Bellingham Energy Company and regulators in the Commonwealth of Massachusetts.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions and protests should be filed on or before January 19, 2001. 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. 01–1312 Filed 1–16–01; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER01–904–000]

North Carolina Power Holdings, LLC; Notice of Filing

January 10, 2001.

Take notice that on January 8, 2001, North Carolina Power Holdings, LLC (NCPH), tendered for filing an application for waivers and blanket approvals under various regulations of the Commission and for an order accepting NCPH's FEFC Electric Rate Schedule No. 1 and accompanying Code of Conduct.

NCPH requests waiver of the 60-day prior notice requirement to permit NCPH's Rate Schedule and Code of Conduct to be effective January 19, 2001.

NCPH intends to engage in electric power and energy transactions as a marketer. In transactions where NCPH sells electric energy, it proposes to make such sales on rates, terms and conditions to be mutually agreed to with the purchasing party. NCPH's proposed Rate Schedule also permits it to reassign transmission capacity.

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 January 18, 2001. 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. 01–1311 Filed 1–16–01; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP01–63–000]

Trunkline LNG Company; Notice of Application

January 10, 2001.

Take notice that on January 5, 2001, Trunkline LNG Company (Trunkline LNG), P.O. Box 4967, Houston, Texas 77210–4967, filed an application with the Commission in Docket No. CP01–63–000 pursuant to section 7 of the Natural Gas Act (NGA) for a certificate of public convenience and necessity requesting authorization to perform minor modifications to its liquefied natural gas (LNG) terminal near Lake Charles, Louisiana, all as more fully set forth in the application which is on file with the Commission and open to public inspection. This filing may be viewed on the web at *http://www.ferc.fed.us/online/htm* (call 202–208–2222 for assistance).

Specifically, Trunkline LNG requests authorization to install approximately 80 feet of 16-inch insulated stainless steel by-pass piping and valve actuator around the existing recondenser to increase the LNG throughput to the second stage pumps; modify the seven vaporizer air blowers and motors by replacing the existing air blowers with new air blowers and removing the existing 359 HP motors, installing new 500 HP motors to increase the air capabilities and, installing new burner nozzles and NO_X controls on vaporizers to reduce emissions. Trunkline LNG states that the proposed modifications will eliminate operational bottlenecks in the re-gasification process and permit the terminal to increase the daily sendout capability from 700 MMscf/d to 1 Bscf/d at an estimated cost of approximately $1.25 million.

Any questions regarding this application should be directed to William W. Grygar, Vice President of Rates and Regulatory Affairs, 5444 Westheimer Road, Houston, Texas 77056–5306 at (713) 989–7000.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before January 31, 2001, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC. 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the Trunkline LNG and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the Trunkline LNG and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission may issue a preliminary determination on non-environmental issues prior to the completion of its review of the environmental aspects of the project. This preliminary determination typically considers such issues as the need for the project and its economic effect on existing customers of the Trunkline LNG, on other pipelines in the area, and on landowners and communities. For example, the Commission considers the extent to which the Trunkline LNG may need to exercise eminent domain to obtain rights-of-way for the proposed project and balances that against the non-environmental benefits to be provided by the project. Therefore, if a person has comments on community and landowner impacts from this proposal, it is important either to file comments or to intervene as early in the process as possible.

Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(ii) and the instructions on the Commission's web site at *http://www.ferc.fed.us/efi/doorbell.htm.*

If the Commission decides to set the application for a formal hearing before an Administrative Law Judge, the Commission will issue another notice describing that process. At the end of

the Commission's review process, a final Commission order approving or denying a certificate will be issued.

David P. Boergers,

Secretary.

[FR Doc. 01–1255 Filed 1–16–01; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–381–007]

Wyoming Interstate Company, Ltd,; Notice of Compliance Filing

January 10, 2001.

Take notice that on January 5, 2001, Wyoming Interstate Company, Ltd. (WIC) tendered for filing as part if its FERC Gas Tariff, Second Revised Volume No. 2, the sheets listed on Appendix A and Appendix B to the filing, to become effective on the dates indicated on each sheet.

WIC asserts that the purpose of this filing is to comply with the Commission's order issued September 27, 2000 in Docket No. RP99–381 approving settlement and granting interlocutory appeal. Specifically, this filing reflects the transportation rates from January 1, 2000 forward for consenting and contesting parties.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 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. 01–1256 Filed 1–16–01; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC01–34–000, et al.]

Delmarva Power & Light Company, et al.; Electric Rate and Corporate Regulation Filings

January 9, 2001.

Take notice that the following filings have been made with the Commission:

1. Delmarva Power & Light Company and Conectiv Energy Supply, Inc.

[Docket No. EC01–34–000]

Take notice that on January 5, 2001, Delmarva Power & Light Company (Delmarva) and Conectiv Energy Supply, Inc. (CESI) (collectively Applicant) submitted Exhibit H to supplement their application under the provisions of Section 203 of the Federal Power Act involving the assignment of Delmarva's rights and obligations under certain wholesale power sales agreements (Agreements) to CESI. Exhibit H includes the executed assignment and assumption agreement between Delmarva and CESI.

The Applicants state that copies of this joint application have been served upon Delmarva's counterparties in the Agreements and the pertinent state regulatory commissions.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

2. Calumet Energy Team, LLC

[Docket No. EG01–26–000]

Take notice that on December 15, 2000, Calumet Energy Team, LLC, c/o Wisvest Corporation, N16 W23217 Stone Ridge Drive, Suite 100, Waukesha, WI 53188, filed with the Federal Energy Regulatory Commission an amended application for determination of exempt wholesale generator status pursuant to section 32(a)(1) of the Public Utility Holding Company Act of 1935. The applicant is a limited liability company organized under the laws of the State of Delaware that is engaged directly and exclusively in developing, owning, and operating a gas-fired, nominally 300 MW simple-cycle peaking power plant in Chicago, Illinois. The applicant's power plant will be an eligible facility.

Comment date: January 23, 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. City of Kechikan, Alaska

[Docket No. EL01–26–000]

Take notice that on January 2, 2001, the City of Ketchikan, Alaska, d/b/a Ketchikan Public Utilities (Petitioner or Ketchikan), submitted an Application for Limited Waiver of Regulations Implementing PURPA § 210, or in the Alternative, Request for Confirmation of Treatment of Avoided Cost, pursuant to Section 402 of the Commission's Regulations under Sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA). Ketchikan is seeking a limited waiver of any obligation that it may have under PURPA to displace purchases from the Four Dam Pool Initial Project, with purchases from a project certified under PURPA as a qualifying facility. Alternatively, Ketchikan requests that the Commission confirm that a proper calculation of ''avoided costs'' under PURPA reflect the avoided costs of the Four Dam Pool Initial Project Joint Action Agency, and any waivers necessary to permit the requested confirmation of the avoided cost calculation.

Comment date: February 8, 2001, in accordance with Standard Paragraph E at the end of this notice.

4. ISO New England Inc.

[Docket No. EL00–62–016]

Take notice that on December 28, 2000, ISO New England Inc. submitted an Interim Report of Compliance in response to the Commission's June 28, 2000 Order in this proceeding.

Copies of said filing have been served upon all parties to this proceeding and upon the utility regulatory agencies of the six New England States.

Comment date: February 8, 2001, in accordance with Standard Paragraph E at the end of this notice.

5. ISO New England Inc.

[Docket Nos. EL00–62–017 and EL00–62–018]

Take notice that on January 2, 2001, ISO New England Inc. made a compliance filing as required in the Commission's December 15, 2000 Order in these proceedings. Copies of said filing have been served upon all parties to this proceeding, upon NEPOOL Participants, as well as upon the utility regulatory agencies of the six New England States.

Comment date: February 8, 2001, in accordance with Standard Paragraph E at the end of this notice.

6. Potomac Electric Power Company

[Docket No. ER00–3727–002]

Take notice that on December 22, 2000, Potomac Electric Power Company (Pepco), tendered for filing an executed Service Agreement No. 20 under Pepco's FERC Electric Tariff, First Revised Volume No. 5 with Southern Company Energy Marketing L.P. (SCEM). The unexecuted service agreement had been previously accepted for filing by the Commission in Potomac Electric Power Company, et al, 93 FERC ¶ 61,240 (2000).

The service agreement became effective on December 19, 2000.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

7. Cinergy Services, Inc.

[Docket No. ER01–500–001]

Take notice that on December 27, 2000, Cinergy Services, Inc. (Cinergy), tendered for filing a Service Agreement under Cinergy's Resale, Assignment or Transfer of Transmission Rights and Ancillary Service Rights Tariff (Tariff) entered into between Cinergy and Wabash Valley Power Association, Inc.

Comment date: January 19, 2001, in accordance with Standard Paragraph E at the end of this notice.

8. Outback Power Marketing Inc.

[Docket No. ER01–297–001]

Take notice that on January 5, 2001, Outback Power Marketing Inc. (OPMI), tendered for filing with the Federal Energy Regulatory Commission a compliance filing pursuant to the Commission's order in OPMI Docket No ER01–297–000 (Letter Order issued December 12, 2000).

Outback Power Marketing Inc. stated that it served a copy of its filing upon each person designated on the official service list compiled by the Secretary in this proceeding.

Comment date: January 26, 2001, in accordance with Standard Paragraph E at the end of this notice.

9. Fulton Cogeneration Associates, L.P.

[Docket No. ER01–324–001]

Take notice that on January 4, 2001, Fulton Cogeneration Associates, L.P. (Fulton), tendered for filing First Revised Sheet No. 1, FERC Electric Tariff, Original Volume No. 1.

Comment date: January 25, 2001, in accordance with Standard Paragraph E at the end of this notice.

10. Mississippi Power Company

[Docket No. ER01–866–000]

Take notice that on January 2, 2001, Mississippi Power Company (Mississippi), tendered for filing a request for a waiver of certain requirements of the Fuel Adjustment Clause of its FERC Electric Tariff, First Revised Volume I (Tariff), to allow Mississippi Power to pass through the fuel adjustment clause its displaced energy cost instead of the cost of test energy from its new combined cycle units, Plant Daniel 3 & 4.

Copies of the filing were served on all customers taking service under the Tariff and on the Mississippi Public Service Commission and the Mississippi Public Utilities Staff.

Comment date: January 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

11. Indeck Pepperell Power Associates

[Docket No. ER01–867–000]

Take notice that on January 2, 2001, Indeck Pepperell Power Associates, Inc. (Indeck Pepperell), tendered for filing with the Federal Energy Regulatory Commission a Power Purchase and Sale Transaction (Transaction) between Indeck Pepperell and Calpine Energy Services, L.P. (Calpine), dated January 28, 2000, for service under Rate Schedule FERC No. 1.

Indeck Pepperell requests that the Service Agreement be made effective as of January 1, 2001.

Comment date: January 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

12. Western Resources, Inc.

[Docket No. ER01–868–000]

Take notice that on January 2, 2001, Western Resources, Inc.(WR), tendered for filing a Service Agreement between WR and East Kentucky Power Cooperative (EKPC). WR states that the purpose of this agreement is to permit EKPC to take service under WR's Market Based Power Sales Tariff on file with the Commission.

This agreement is proposed to be effective December 5, 2000.

Copies of the filing were served upon EKPC and the Kansas Corporation Commission.

Comment date: January 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

13. Geothermal Properties, Inc.

[Docket No. ER01–869–000]

Take notice that on January 2, 2001, Geothermal Properties, Inc. (GPI), petitioned the Commission for acceptance of GPI Rate Schedule FERC No. 1; the granting of certain blanket approvals, including the authority to sell electricity at market-based rates; and the waiver of certain Commission Regulations.

GPI intends to engage in wholesale electric power and energy purchases and sales as a marketer through a wholly-owned, special purpose vehicle. GPI is not currently in the business of generating or transmitting electric power, however, GPI intends to continue the exploration and development of its geothermal leases within the Coso KGRA with a view towards developing 10 MW of capacity by December 2002 and a minimum of 40 MW of capacity by December 2004. GPI is an affiliate of the Grace Family (Grace), which has been involved in geothermal projects in The Geysers area of California having total capacity of 240 MW.

Comment date: January 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

14. Alliant Energy Corporate Services, Inc.

[Docket No. ER01–870–000]

Take notice that on January 2, 2001, Alliant Energy Corporate Services, Inc. (Alliant Energy) on behalf of IES Utilities Inc. (IESU) and Wisconsin Power & Light (WPL), tendered for filing a Negotiated Capacity Transaction (Agreement) between IESU and WPL for the period January 1, 2001 through January 31, 2001. The Agreement was negotiated to provide service under the Alliant Energy System Coordination and Operating Agreement among IES Utilities Inc., Interstate Power Company, Wisconsin Power & Light Company and Alliant Energy.

Comment date: January 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

15. Cabrillo Power I LLC and Cabrillo Power II LLC

[Docket No. ER01–887–000]

Take notice that on January 3, 2001, Cabrillo Power I LLC and Cabrillo Power II LLC, tendered for filing their Reliability Must Run (RMR) Agreements conformed to the terms of the Second Stipulation in Docket No. ER98–445, et al., and the Commission's Order No. 614.

This filing has been served on the California ISO, San Diego Gas & Electric Company, the California Electricity Oversight Board and the California Public Utilities Commission.

Pursuant to the terms of the Second Stipulation, these changes should be made effective as of June 1, 1999.

Comment date: January 24, 2001, in accordance with Standard Paragraph E at the end of this notice.

16. California Independent System Operator Corporation

[Docket No. ER01–871–000]

Take notice that on January 3, 2001, the California Independent System Operator Corporation (ISO), tendered for filing and acceptance a Utility Distribution Company Operating Agreement (UDC Operating Agreement) between the ISO and the City of Vernon, California (Vernon).

The ISO requested waiver of the Commission's 60-day prior notice requirement to allow the UDC Operating Agreement to be made effective as of January 1, 2001, the date on which Vernon has requested to become a Participating TO.

The ISO states that this filing has been served upon all parties in this proceeding.

Comment date: January 24, 2001, in accordance with Standard Paragraph E at the end of this notice.

17. Central Maine Power Company

[Docket No. ER01–872–000]

Take notice that on January 3, 2001, Central Maine Power Company (CMP), tendered for filing a service agreement for Long Term Firm Local Point-to-Point Transmission Service entered into with Regional Waste System, Inc. Service will be provided pursuant to CMP's Open Access Transmission Tariff, designated rate schedule CMP—FERC Electric Tariff, Original Volume No. 3, as supplemented.

Comment date: January 24, 2001, in accordance with Standard Paragraph E at the end of this notice.

18. Entergy Services, Inc.

[Docket No. ER01–873–000]

Take notice that on January 3, 2001, Entergy Services, Inc., on behalf of Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana, Inc., Entergy Mississippi, Inc., and Entergy New Orleans, Inc., (collectively, the Entergy Operating Companies) tendered for filing a Non-Firm Point-To-Point Transmission Service Agreement and a Short-Term Firm Point-To-Point Transmission Service Agreement both between Entergy Services, Inc., as agent for the Entergy Operating Companies, and The Legacy Energy Group, LLC.

Comment date: January 24, 2001, in accordance with Standard Paragraph E at the end of this notice.

19. California Independent System Operator Corporation

[Docket No. ER01–889–000]

Take notice that on January 4, 2001, the California Independent System Operator Corporation (ISO), tendered for filing Amendment No. 36 to the ISO Tariff. The ISO states that Amendment No. 36 is intended to provide a temporary exemption from creditworthiness requirements for Schedule Coordinators that had an Approved Credit Rating on January 3, 2001, and are either Original Participating Transmission Owners or schedule on behalf of Original Participating Transmission Owners. The ISO will extend the temporary exemption on a day to day basis, but in no event beyond March 3, 2001.

The ISO states that this filing has been served on the California Public Utilities Commission, the California Electricity Oversight Board and all California ISO Scheduling Coordinators.

Comment date: January 25, 2001, 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. 01–1254 Filed 1–16–01; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[PF–959; FRL–6599–5]

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–959, must be received on or before February 16, 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–959 in the subject line on the first page of your response.

FOR FURTHER INFORMATION CONTACT: By mail: Mary Waller, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 308–9354; e-mail address: waller.mary@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	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–959. 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–959 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–959. 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 supports 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: January 2, 2001.

James Jones,

Director, Registration Division, Office of Pesticide Programs.

Summary of Petition

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 views 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 method available to EPA for the detection and measurement of the pesticide chemical residues or an explanation of why no such method is needed.

Gowan Company

PP 7F4879

EPA has received a pesticide petition (PP 7F4879) from Gowan Company, P.O. Box 5569, Yuma, AZ 85366–5569 proposing, pursuant to section 408(d) of the FFDCA, 21 U.S.C. 346a(d), to amend 40 CFR part 180 by establishing a tolerance for residues of dicloran (2,6-dichloro-4-nitroaniline) in or on the raw agricultural commodities peanuts at 3 parts per million (ppm), in peanut oil at 6 ppm. EPA received an amendment for two additional tolerances. The existing tolerances for dicloran on carrots is limited to residues resulting from post-harvest use only and the existing tolerance for dicloran on tomatoes is

limited to residues from pre-harvest use only. Gowan has proposed to expand the tolerances to permit residues resulting from pre-harvest use on carrots and post-harvest use on tomatoes. No numerical change in the current tolerance of 10 ppm on carrots and 5 ppm on tomatoes is proposed. 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

1. *Plant metabolism*. The metabolism of dicloran in peaches, lettuce and potatoes has been studied. Parent compound and numerous metabolites derived by hydroxylation and acetylation of the nitro group, along with deamination and hydroxylation of the amino group, were seen in all crops. Glutathione conjugation with simultaneous removal of one or both chlorine atoms was shown to occur.

2. *Analytical method*. An adequate analytical method (EC GLC) is available for enforcement purposes. Parent compound is the only analyte in the tolerance expression.

3. *Magnitude of residues*. Twenty-five residue trials were conducted over 4 years. Average residues of 0.61 ppm were observed in peanuts and the highest average residue observed was 2.85 ppm. An average concentration factor of 1.6X in refined peanut oil was observed.

Five pre-harvest and three combined pre-harvest plus post-harvest carrot residue trials were conducted. Residues from the proposed pre-harvest use pattern were in all cases well below the existing post-harvest tolerance of 10 ppm.

Post-harvest tomato residue studies were conducted. Variables including dilution rates, application techniques and the composition and concentration of various wax emulsions were investigated. It was concluded that the proposed post-harvest use pattern will result in residues which are below the existing tolerance of 5 ppm for pre-harvest use.

B. Toxicological Profile

1. *Acute toxicity*. The acute oral LD_{50} of technical dicloran is greater than 10,000 milligrams/kilograms (mg/kg), the acute dermal LD_{50} is greater than 2,000 mg/kg, and the 4-hour acute inhalation LC_{50} is greater than 2 milligrams/liter (mg/L). Dicloran is not a dermal irritant but is a sensitizer. Dicloran is a mild eye irritant.

2. *Genotoxicity*. The following genotoxicity tests were conducted: gene mutation (Ames tests), structural chromosome aberration (*in vivo* cytogenetic assay using human lymphocytes) and unscheduled DNA synthesis using rat hepatocytes. Results were generally negative; however, some Ames tests with the bacterium *S. typhimurium* showed a positive response. Ames tests with *E. coli* were negative. In view of the results of mammalian chronic, oncogenic and developmental studies, however, it is considered that the results of the positive Ames tests are not relevant to human toxicity.

3. *Reproductive and developmental toxicity*. In a rabbit developmental toxicity study, the maternal no observed adverse effect level (NOAEL) was 8 mg/kg/day and the maternal lowest observed adverse effect level (LOAEL) as 20 mg/kg/day. The developmental NOAEL was greater than or equal to 50 mg/kg/day, the highest dose tested.

In a rat developmental toxicity study, the maternal and embryotoxic NOAEL was 100 mg/kg/day, and the maternal and embryotoxic LOAEL was 200 mg/kg/day. The teratological NOAEL was greater than or equal to 400 mg/kg/day, the highest dose tested (HDT).

In a 2-generation rat reproduction study, the NOAEL for systemic toxicity was 250 ppm (21 mg/kg/day) on the basis of reduced bodyweight gain and increased liver and kidney weights. The NOAEL for reproductive and developmental toxicity was also 250 ppm on the basis of reduced pup weights. No other reproductive or developmental parameters were affected at any treatment level. The highest dose tested was 1,250 ppm (110 mg/kg/day).

4. *Subchronic toxicity*. In 90-day rat studies, the NOAEL was determined to be 500 ppm in the diet (44 mg/kg/day), and the LOAEL was based upon increased liver weights in both sexes and centrilobular hepatocyte enlargement in males. Similar effects, as well as an increase in blood cholesterol concentration, were observed in 90-day mouse studies, and the NOAEL was 15 mg/kg/day.

5. *Chronic toxicity*. EPA has established the reference dose (RfD) for dicloran at 0.025 mg/kg/day. The RfD for dicloran is based on a 2-year dog feeding study with a NOAEL of 2.5 mg/kg/day and an uncertainty factor of 100. The effect of concern was increased liver weight and histological changes in hepatocytes.

6. *Animal metabolism*. Dicloran is rapidly excreted by rats, goats, and hens. Numerous metabolites derived by reduction, acetylation, hydroxylation, deamination and dechlorination were observed.

7. *Carcinogenicity*. In an 80-week mouse study, dicloran was not oncogenic when administered at dose levels up to 600 ppm (103 mg/kg/day). Heptotoxicity indicated this to be the approximate maximum tolerance dose. In a 2-year rat study, dicloran was not oncogenic when administered at 1,000 ppm (59 mg/kg/day for males and 71 mg/kg/day for females).

8. *Endocrine disruption*. Developmental toxicity studies in rats and rabbits and a reproduction study in rats gave no indication of any effects on endocrine function related to development and reproduction. Subchronic and chronic treatment did not induce any morphological changes in endocrine organs and tissues.

C. Aggregate Exposure

1. *Dietary exposure*— i. *Chronic exposure.* In a theoretical maximum residue concentration (TMRC) worse-case analysis, it was assumed that dicloran is used on 100% of the acreage of all crops on which it is registered, and that residues on these crops are equal to the tolerance levels. It was calculated that the chronic dietary exposure to the general U.S. population would be 0.0265 mg/kg/day, or 106% of the chronic RfD. For non-nursing infants, the most highly exposed subgroup, the chronic dietary exposure from all crops is calculated to be 409% of the RfD.

Actual dietary chronic exposure is known to be much lower. The U.S. Department of Agriculture, the U.S. Food and Drug Administration, and California have monitored residues of dicloran in foods, and tens of thousands of analyses have been performed. These databases are readily examined using the Agency's own dietary exposure software, DEEM. It is concluded that the current actual chronic dietary exposure to dicloran from all foods is less than 0.002 mg/kg/day (less than 8% of the RfD) for non-nursing infants, the most highly exposed subgroup, and less than 0.001 mg/kg/day (less than 4% of the RfD) for the general U.S. population and all other subgroups.

Novigen Sciences DEEM software was used to perform a theoretical maximum residue concentration (TMRC) analysis for peanuts, carrots, and tomatoes. Actual results of peanut and tomato processing studies with dicloran were incorporated. Dietary exposure was calculated to be equivalent to 24% of the RfD for the U.S. population, 14% for non-nursing infants and 49% for

children 1–6, the most heavily-exposed population subgroup. Given these assumptions, the total dietary exposure from all current and proposed uses would be equivalent to no more than 28% of the RfD for the U.S. population, 22% for non-nursing infants and 53% for children 1–6. These levels of exposure are acceptable.

ii. *Acute exposure.* No developmental or reproductive effects have been observed which indicate special perinatal sensitivity. Therefore, an analysis of acute exposure has not been conducted.

a. *Food.* Dicloran is registered for use on apricots, snap beans, carrots, celery, sweet cherries, cucumbers, endive, garlic, grapes, lettuce, nectarines, onions, peaches, plums, potatoes, rhubarb, sweet potatoes and tomatoes. (See 40 CFR 180.200 for specific tolerances.) The metabolism of dicloran in plants and animals is adequately understood for the purposes of these tolerances. There is a practical analytical method for detecting and measuring levels of dicloran in or on food with a limit of detection that allows monitoring of food with residues at or above the levels set in this tolerance.

b. *Drinking water.* Dicloran was not reported in the Agency's survey of pesticides in ground water from 1971–1991, nor in the Agency's 1988–1990 survey of pesticides in drinking water wells. The compound has not been reported in surface water. A small scale prospective ground water study suggests that the average residue in ground water is well below 0.001 ppm. The Agency has not conducted a detailed analysis of potential exposure to dicloran via drinking water; however, it is believed that chronic exposure from this source is very small.

2. *Non-dietary exposure.* Dicloran has no aquatic, lawn or residential uses.

D. Cumulative Effects

At this time the Agency has not reviewed available information concerning the potentially cumulative effects of dicloran and other substances that may have a common mechanism of toxicity. For purposes of this petition only, the Agency is considering only the potential risks of dicloran in its aggregate exposure.

E. Safety Determination

1. *U.S. population—Chronic risk.* If it is assumed that all crops on which dicloran is registered are treated, and if all residues on crops are assumed to be equal to the tolerance levels, then it can be calculated that the theoretical maximum residue concentration (TMRC) is equal to 106% of the RfD for the general U.S. population and 408% of the RfD for non-nursing infants, the most highly exposed group.

Actual chronic risk is known to be much lower. Using anticipated residue concentrations, it was concluded that chronic dietary exposure to dicloran will be no more than 28% of the RfD. Exposures from drinking water and all other routes is expected to be negligible.

2. *Infants and children.* In assessing the potential for additional sensitivity of infants and children to residues of dicloran, EPA considered data from developmental toxicity studies in the rat and rabbit and reproduction studies in the rat. The developmental toxicity studies are designed to evaluate adverse effects on the developing organism resulting from pesticide exposure during prenatal development to one or both parents. Reproduction studies provide information relating to effects from exposure to the pesticide on the reproductive capability of mating animals and data on systemic toxicity.

No teratological effects have been observed with dicloran. The lowest embryotoxic NOAEL in these studies was 100 mg/kg/day, compared to a chronic NOAEL of 2.5 mg/kg/day. There is no indication of special perinatal sensitivity in the absence of maternal toxicity and thus no suggestion of special sensitivity of infants and children. It is concluded that there is a reasonable certainty of no harm to infants and children from aggregate exposure to dicloran residues.

F. International Tolerances

There are no Codex, Canadian or Mexican maximum residue levels for dicloran in peanuts. Although no numerical revisions of existing tolerance levels are proposed for carrots or tomatoes, it is noted that Canadian MRL's of 5 ppm exist for both carrots and tomatoes. Codex MRL's of 10 ppm for carrots and 0.5 ppm for tomatoes exist.

[FR Doc. 01–1352 Filed 1–16–01; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

[PF–986; FRL–6755–1]

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–986, must be received on or before February 16, 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–961 in the subject line on the first page of your response.

FOR FURTHER INFORMATION CONTACT: By mail: Sharlene Matten, Biopesticides and Pollution Prevention Division (7511C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 605–0514; e-mail address: matten.sharlene@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'' 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–986. 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–986 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–986. 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 certain pesticide chemical in or on various food commodities under section 408 of the Federal Food, Drug, and Cosmetic 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: January 5, 2001.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention 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. 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.

EPA has received a pesticide petition PP 0F6191 from Platte Chemical Company, j419 18th Street, Greeley, CO 80632–0667, proposing pursuant to section 408(d) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(d), to amend 40 CFR part 180 to establish an exemption from the requirement of a tolerance for the microbial pesticide *Alternaria destruens*.

Pursuant to section 408(d)(2)(A)(i) of the FFDCA, as amended, Platte

Chemical Company has submitted the following summary of information, data, and arguments in support of their pesticide petition. This summary was prepared by Platte Chemical Company and EPA has not fully evaluated the merits of the pesticide petition. The summary may have been edited by EPA if the terminology used was unclear, the summary contained extraneous material, or the summary unintentionally made the reader conclude that the findings reflected EPA's position and not the position of the petitioner.

Platte Chemical Company

PP 0F6191

A. Product Name and Proposed Use Practices

Alternaria destruens is a naturally occurring fungus that is pathogenic to *Cuscuta* spp., often referred to as dodder, swamp dodder, largeseed dodder, field dodder or small seed dodder. The active ingredient will infect and suppress dodder at early stages of growth. Dodder is a leafless, rootless weed that is parasitic on cranberries and other crops, directly reducing vigor. Dodder generally germinates in late spring, twining stems around the host to derive its nutrients from that plant.

Two formulations of *Alternaria destruens* are proposed, one for the control of emerging dodder and one for the control of dodder that has attached to and infested the host plant. Smolder L G, a granular product, is proposed for use on known sites of dodder infestation, as it emerges in the spring, to suppress dodder growth and seed production. Smolder L WP, a sprayable product, is proposed for use on growing dodder, as spot or area treatment to control further growth. Use sites include vegetables, fruits, field crops and non-agricultural areas such as uncultivated rights-of-way, roadsides and fallow areas.

B. Product Identity/Chemistry

1. *Identity of the pesticide and corresponding residues. Alternaria destruens* is a naturally occurring fungus that is pathogenic to *Cuscuta* spp., often referred to as dodder, swamp dodder, largeseed dodder, field dodder or small seed dodder. The active ingredient will infect and suppress dodder at early stages of growth. *Alternaria destruens* requires adequate moisture and temperature during the infection period (3 to 4 hours). In very dry or drought conditions, when dew is absent, the onset of the infection process might be delayed until moisture conditions return. *Alternaria destruens* has been shown to survive in nature only on live or dead tissue of the host weed species. Survival on soil or non-susceptible plant tissue would be limited.

2. *A statement of why an analytical method for detecting and measuring the levels of the pesticide residue are not needed.* An analytical method for residues is not applicable. The use of *Alternaria destruens* calls for application to field crops at an early stage for control of dodder species. Consequently, there is a considerable time lag between application and harvesting of crops. Since survival of the organism is in part dependent on existence of the host plant, it is unlikely that application will result in the presence of *Alternaria destruens* in food crops. Residues of *Alternaria destruens* are not expected on agricultural commodities.

C. Mammalian Toxicological Profile

The active ingredient *Alternaria destruens* has been evaluated for toxicity through oral, dermal, pulmonary, intraperitoneal, and eye routes of exposure. The results of the studies have indicated there are no significant human health risks.

For the active ingredient, acute oral toxicity/pathogenicity in rats is greater than 1×10^7 cfu/animal, acute pulmonary toxicity/pathogenicity in rats is greater than 5×10^5 cfu/animal, and acute intraperitoneal toxicity/pathogenicity in rats is greater than 9.6×10^6 cfu/animal. No pathogenic or infective effects were observed in the studies. For the end-use wettable powder formulation, acute dermal toxicity in rats is greater than 5,000 mg/kg (Toxicity Category IV), acute inhalation toxicity in rats is greater than 2.03 mg/l (Toxicity Category IV), minimal eye irritation in rabbits was observed at a dose of 0.1 ml (Toxicity Category III) and no skin irritation in rabbits was observed at a dose of 0.5 ml (Toxicity Category IV). Since its discovery, no incidents of hypersensitivity have been reported by researchers, manufacturers or users.

D. Aggregate Exposure

1. *Dietary exposure*—i. *Food.* Dietary exposure from use of *Alternaria destruens*, as proposed, is minimal. The use of *Alternaria destruens* calls for application to field crops at an early stages for control of dodder species. Consequently, there is a considerable time lag between application and harvesting of crops. Since survival of the organism is in part dependent on existence of the host plant, it is unlikely that application will result in the presence of *Alternaria destruens* in food crops. Residues of *Alternaria destruens* are not expected on agricultural commodities.

ii. *Drinking water.* Similarly, exposure to humans from residues of *Alternaria destruens* in consumed drinking water would be unlikely. *Alternaria destruens* is a naturally-occurring microorganism known to exist in terrestrial habitats in the presence of a host plant, it is not known to grow or thrive in aquatic environments.

2. *Non-dietary exposure.* The potential for non-dietary exposure to the general population, including infants and children, is unlikely as the proposed use sites are agricultural settings. However, non-dietary exposures would not be expected to pose any quantifiable risk due to a lack of residues of toxicological concern.

Person Protective Equipment (PPE) mitigates the potential for exposure to applicators and handlers of the proposed products, when used in agricultural settings.

E. Cumulative Exposure

It is not expected that, when used as proposed, *Alternaria destruens* would result in residues that would remain in human food items.

F. Safety Determination

1. *U.S. population. Alternaria destruens* is not pathogenic or infective to mammals. There have been no reports of toxins or secondary metabolites associated with the organism, and acute toxicity studies have shown that *Alternaria destruens* is non-toxic, non-pathogenic, and non-irritating. Residues of *Alternaria destruens* are not expected on agricultural commodities, and therefore, exposure to the general U.S. population, from the proposed uses, is not anticipated.

2. *Infants and children.* As mentioned above, residues of *Alternaria destruens* are not expected on agricultural commodities. There is a reasonable certainty of no harm for infants and children from exposure to *Alternaria destruens* from the proposed uses.

G. Effects on the Immune and Endocrine Systems

Alternaria destruens is a naturally-occurring microorganism. To date there is no evidence to suggest that *Alternaria destruens* functions in a manner similar to any known hormone, or that it acts as an endocrine disrupter.

H. Existing Tolerances

There is no U.S. EPA Tolerance for *Alternaria destruens*.

I. International Tolerances

A Codex Alimentarium Commission Maximum Residue Level (MRL) is not required for *Alternaria destruens*.

[FR Doc. 01–1353 Filed 1–16–01; 8:45 am]
BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–50873; FRL–6740–2]

Issuance of Experimental Use Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has granted experimental use permits (EUPs) to the following pesticide applicants and amended certain previously granted EUPs. An EUP permits use of a pesticide for experimental or research purposes only in accordance with the limitations in the permit.

FOR FURTHER INFORMATION CONTACT: By mail: Biopesticides and Pollution Prevention Division (7511C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

In person or by telephone: Contact the designated person at the following address at the office location, telephone number, or e-mail address cited in each EUP: 1921 Jefferson Davis Hwy., Arlington, VA.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. Although this action may be of particular interest to those persons who conduct or sponsor research on pesticides, 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 information in this action, consult the designated contact person listed for the individual EUP.

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

You may obtain electronic copies of this document 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/.

II. EUPs

EPA has issued the following EUPs: *524–EUP–90, 524–EUP–92*, and *524–EUP–93*. Issuance. Monsanto Company, 700 Chesterfield Parkway North, St. Louis, MO 63198. The issuance of these EUPs allows the use of the plant-pesticides *Bacillus thuringiensis* Cry3Bb protein and the genetic material necessary for its production (vector ZMIR14L) in corn, *Bacillus thuringiensis* Cry3Bb protein and the genetic material necessary for its production (vector ZMIR12L) in corn, and *Bacillus thuringiensis* Cry3Bb protein and the genetic material necessary for its production (vector ZMIR13L) in corn, respectively . A notice of receipt for these EUPs was published in the **Federal Register** on December 8, 1999 (64 FR 68681) (FRL–6398–3). The EUPs were granted on April 6, 2000 and amended on May 15, 2000. *524–EUP–90* allows the planting of 1,343 acres of corn to test and evaluate genetically modified corn that has been developed to provide control of corn rootworm (*Diabrotica spp.*). The program is authorized only in the States of California, Colorado, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Kansas, Michigan, Minnesota, Missouri, North Carolina, Nebraska, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Puerto Rico, South Dakota, Tennessee, Texas, Virginia, and Wisconsin. *524–EUP–92* allows the planting of 416 acres of corn to test and evaluate genetically modified corn that has been developed to provide control of corn rootworm (*Diabrotica spp.*). The program is authorized only in the States of California, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Kansas, Michigan, Minnesota, Missouri, North Carolina, Nebraska, Oklahoma, Puerto Rico, South Dakota, Tennessee, Texas, Virginia, and Wisconsin. *524–EUP–93* allows the planting of 1,092 acres of corn to test and evaluate genetically modified corn that has been developed to provide control of corn rootworm (*Diabrotica spp.*). The program is authorized only in the States of California, Colorado, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Kansas, Michigan, Minnesota, Missouri, North Carolina, Nebraska, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Puerto Rico, South Dakota, Tennessee, Texas, Virginia, and Wisconsin. These EUPs are effective from April 6, 2000 to April 31, 2001. These permits are issued with the limitation that all treated crops will be genetically contained and destroyed or used for research purposes only. Nine comments were received in reply to the **Federal Register** notice announcing receipt of these applications. Non-target insect risks, ecological effects of biopesticides, the need for a transparent and scientifically rigorous process for setting conditions for registration and use of independent expert advice, insect resistance management, contamination levels of neighboring crops, and the participation of land grant university corn IPM experts in the EUP were concerns expressed during the comment period. Health, environmental, and agricultural benefits of corn rootworm protected Bt corn were also noted.

Insect resistance management and non-target organism research will be part of the testing taking place under these EUPs. Researchers will be looking at field and population levels for a wide variety of soil and surface dwelling organisms, including all major coleopteran species that are found in corn systems. This will include work on insects like collembola, carabids, and other soil invertebrates like earthworms. Land grant university researchers are involved in many of these investigations. Testing is not permitted in the vicinity of endangered beetle habitats. Based on the information submitted, no significant or irreversible hazards from Cry3Bb corn to non-target organisms are anticipated for the duration of these limited acreage programs. These EUPs are crop destruct and genetically contained. (Mike Mendelsohn; Rm. 910W16, Crystal Mall #2; telephone number: (703) 308–8715; e-mail address: mendelsohn.mike@epa.gov).

68467–EUP–2. Extensions/Amendments. Mycogen Seeds c/o Dow AgroSciences LLC, 9330 Zionsville Road, Indianapolis, IN 46268. The amendments and extensions to this EUP allow the use of the plant–pesticide *Bacillus thuringiensis* Cry1F protein and the genetic material necessary for its production (plasmid insert PHI8999) in corn plants. Notice of the original issuance of the EUP was published in the **Federal Register** on May 5, 1999 (64 FR 24161) (FRL–6078–2). Notices of receipt for several amendments were published in the **Federal Register** on February 25, 2000 (65 FR 10081) (FRL–6492–1) and on March 3, 2000 (65 FR 11575) (FRL–6495–8). On May 11, 1999, the EUP was amended to modify the containment provisions. On June 18, 1999, the EUP was amended to switch acreage between different protocols in the program at the same sites. On January 27, 2000, the EUP was amended to permit the planting of 55 acres in Puerto Rico for agronomic observation

and Liberty herbicide tolerance studies. On February 4, 2000, the EUP was amended to permit the planting of 5 acres in Hawaii for agronomic observation studies. Planting dates for all amendments mentioned above remained the same as permitted in the original EUP issuance and genetic isolation and crop destruct provisions still applied. On March 31, 2000, the EUP was extended/amended to allow the planting of 145 acres of field corn to evaluate the control of European corn borer, Southwestern corn borer, fall armyworm and black cutworm; to perform agronomic and herbicide tolerance observations; and to do breeding and observation. The program is authorized only in the States of Colorado, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Missouri, North Carolina, Nebraska, North Dakota, Pennsylvania, Ohio, Puerto Rico, South Dakota, Tennessee, Texas, and Wisconsin. This amendment/extension of the EUP is effective from March 31, 2000 to March 31, 2001. This amendment/extension to the permit is issued with the limitation that all treated crops will be genetically contained and destroyed or used for research purposes only. On April 21, 2000, the EUP was extended/amended to allow the planting of an additional 947 acres of field corn to evaluate the control of European corn borer, Southwestern corn borer, fall armyworm and black cutworm; to perform agronomic and herbicide tolerance observations; to do hybrid production, breeding and observation; to study anthesis length; and to study insect resistance management. Additional acreage under this amendment/extension to the program is authorized only in the States of Hawaii, Iowa, Minnesota, and Nebraska. This amendment/extension of the EUP is effective from April 21, 2000 to March 31, 2001. This amendment/extension to the permit is issued with the limitation that all treated crops will be genetically contained and destroyed or used for research purposes only. Thirteen comments were received in reply to the **Federal Register** notice announcing receipt of this amendment/extension. Comments raised concerns about the labeling of food resulting from Bt corn, food safety, pollen shed/drift contamination of adjacent organic crops, the development of resistance to foliar Bt, the impact of testing on the Hawaiian environment, the impact on Bt corn on farmers in Puerto Rico, and the impact to non-target insects. Based on the information submitted, no significant or irreversible hazards from Cry1F corn to non-target organisms are anticipated for the duration of this limited acreage program. This EUP and the extension/amendments are crop destruct and genetically contained. (Mike Mendelsohn; Rm. 910W16, Crystal Mall #2; telephone number: (703) 308–8715; e-mail address: mendelsohn.mike@epa.gov).

Persons wishing to review these EUPs are referred to the designated contact person. Inquiries concerning these permits should be directed to the persons cited above. It is suggested that interested persons call before visiting the EPA office, so that the appropriate file may be made available for inspection purposes from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

Authority: 7 U.S.C. 136.

List of Subjects

Environmental protection, Experimental use permits.

Dated: January 10, 2001.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. 01–1351 Filed 1–16–01; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6933–5]

Accidental Release Prevention Requirements; Risk Management Programs Under the Clean Air Act Section 112(r)(7); Distribution of Off-Site Consequence Analysis Information; Development of Read-Only Information Technology System and Qualified Researcher System

AGENCY: Environmental Protection Agency.

ACTION: Notice of availability.

SUMMARY: The Environmental Protection Agency (EPA) is developing two systems for providing access to information about the potential off-site consequences of accidental chemical releases from industrial facilities. One system would provide the public with ''read-only'' access to the information in electronic database form. The other system would provide qualified researchers with access to the information in paper or electronic database form. Both systems are required by section 112(r) of the Clean Air Act, as revised by the Chemical Safety Information, Site Security and Fuels Regulatory Relief Act (CSISSFRRA) of 1999. In this document we describe draft plans for these systems and request public comment on the plans and related issues.

DATES: Comments should be submitted by March 19, 2001.

ADDRESSES: Comments should be mailed to: Environmental Protection Agency, Office of Air and Radiation, Docket and Information Center, Ariel Rios Building, M6102, 1200 Pennsylvania Avenue, NW., Washington DC, 20460, Attn: Docket No. A–2000–58. By Federal Express or Courier: Waterside Mall, Room M1500, 401 M Street, SW, Washington DC 20460, Attn: Docket No. A–2000–58. Comments may be submitted on a disk in Wordperfect or Word formats. Please submit comments in duplicate. The draft plan for a qualified researcher system and supporting information used to develop that plan and the draft plan for a ''read-only'' information system are contained in Docket No. A–2000–58. The docket is available for public inspection and copying between 8 a.m. and 5:30 p.m., Monday through Friday (except government holidays), at Waterside Mall, Room M1500, 401 M Street, S.W., Washington, DC 20460. A reasonable fee may be charged for copying. The draft qualified researcher plan and the supporting information are also available on the Internet at http://www.epa.gov/ceppo or by calling the Emergency Planning and Community Right-to-Know Hotline at (800) 424–9346 (in the Washington, DC metropolitan area, (703) 412–9810).

FOR FURTHER INFORMATION CONTACT: Dorothy McManus, Program Analyst, (202) 564–8606, or Vanessa Rodriguez, Chemical Engineer, (202) 564–7913, Chemical Emergency Preparedness and Prevention Office, Environmental Protection Agency (5104), 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

I. Background

Section 112(r)(7) of the Clean Air Act (CAA) establishes a program for the prevention and mitigation of industrial chemical accidents that could harm the surrounding community and environment. Facilities subject to the program are required to prepare risk management plans (RMPs) that include an analysis of the potential off-site consequences of hypothetical worst-case and alternative scenario chemical releases.

Under section 112(r)(7) as originally enacted, RMPs—including the off-site

consequence analysis (OCA) portions—were to be available to the public. However, concerns were raised that potential Internet distribution of the OCA portions of RMPs would pose law enforcement and national security risks. In response to these concerns, CSISSFRRA was enacted in 1999. CSISSFRRA amended the Clean Air Act by adding a new subparagraph (H) to section 112(r)(7).

Under CAA section 112(r)(7)(H)(ii), EPA assessed the benefits of public access to the OCA portions of the RMPs and EPA's database compiled from those portions (''OCA information''), while the Department of Justice (DOJ) assessed the risks of Internet dissemination of the same information. Based on the assessments, both agencies issued a rule on August 4, 2000, governing the distribution of paper copies of OCA information (65 FR 48108) to the public.

The rule, which is fully described and explained in the **Federal Register** notice cited above, provides two ways for the public to obtain limited access to paper copies of OCA information. First, at 50 or more federal reading rooms located across the country, any member of the public may view a paper copy of the OCA information for the facilities located in the jurisdiction of the Local Emergency Planning Committee (LEPCs) where the person lives or works. (LEPCs are established under the federal Emergency Planning and Community Right-to-Know Act (EPCRA) and generally cover one or more counties.) In addition, a member of the public may see a paper copy of the OCA information for up to 10 facilities per month without regard to where the facility is located. Reading rooms may allow the public to read and take notes from, but not remove or mechanically copy, the paper copies of OCA information.

The rule's second avenue for the public to obtain paper copies of OCA information is through state and local agencies. The rule authorizes LEPCs and related local and state agencies to provide the public with read-only access to a paper copy of the OCA information for local facilities.

Apart from the rule, CSISSFRRA provides several other avenues for the public to access OCA information. In particular, CAA section 112(r)(7)(H)(viii) requires EPA, ''[i]n consultation with the Attorney General and the heads of other appropriate Federal agencies, [to] establish an information technology system that provides for the availability to the public of off-site consequence analysis information by means of a central data base under the control of the Federal Government that contains information that users may read, but that provides no means by which an electronic or mechanical copy of the information may be made.'' This provision, in short, calls on EPA to provide public access to OCA information for all facilities in electronic, read-only form.

CSISSFRRA also includes a provision for making OCA information available to ''qualified researchers.'' CAA section 112(r)(7)(H)(vii) requires EPA , ''[i]n consultation with the Attorney General, [to] develop and implement a system for providing [OCA] information, including facility identification, to any qualified researcher, including a qualified researcher from industry or any public interest group.'' That section further provides that ''[t]he system shall not allow the researcher to disseminate, or make available on the Internet, the [OCA] information, or any portion of the [OCA] information, received'' under the system.

II. Draft System for Public Information Technology System

A. Description of Draft System

After consulting with DOJ and other appropriate agencies, EPA is considering an information technology (IT) system that would provide the public with read-only access to OCA information in electronic form by means of stand-alone or restricted computers. The computers would contain a database compiled from all of the RMPs submitted to EPA. The database would include the OCA portions of RMPs along with information about facilities' accident prevention programs, accident history and emergency response plans.

An IT system computer would provide no more than read-only access by having all of its external communication ports and disk drives removed or physically disabled so that there would be no way to attach the computer to a printer or other external device. Essentially, the only items on the computer would be a monitor, hard disk, and CD–ROM reader. There also would be locks on the case of the computer so that the hard drive could not be removed and stolen, and the case would be bolted to the desk or located in a locked room, so that the computer could not be stolen.

The same precautions would maintain EPA control of the IT system's database. That database would not be connected to EPA's central database because of the potential for hacking. However, EPA would periodically update the IT system's database to keep it reasonably current.

To make the IT system user-friendly, EPA would equip it with software that would allow users to query on various types of information, such as chemical name and industry sector. For example, users could ask the system to pull up the RMPs, including OCA information, for facilities that use a particular chemical or belong to the same industry sector. At the same time, the software would not allow queries on any OCA data elements.

EPA would introduce the IT system in one location at EPA Headquarters in Washington, D.C. That location would be open to the public during normal working hours on Mondays through Fridays. Currently, members of the public visiting EPA's headquarters must sign in and show identification to gain entry to the building. The same would be true for users of the IT system.

B. Facility Identification Issue

An important remaining issue in EPA's development of an IT system is whether the system should identify facilities by providing the name and address. The system would include all of the data in the OCA sections of RMPs (sections 2 through 5). It would also include the information in RMPs about prevention programs, accident history and emergency response plans. Members of the public using the system would thus be able to view OCA information in the context of a facility's overall risk management program. They would also be allowed to view an unlimited number of facilities' information. The issue is whether the system should reveal the names or locations of facilities.

As noted above, EPA and DOJ issued a rule that provides any member of the public with read-only access to paper copies of OCA information for facilities in the LEPC jurisdiction where the person lives or works and for up to 10 facilities per month regardless of where the facility is located. The agencies based the rule on assessments of the risks and benefits of broad public dissemination of OCA information, including facility identification. The agencies concluded that posting of a large OCA database on the Internet would pose a significant national security and law enforcement risk, while public access to OCA information would provide significant chemical safety benefits. The agencies thus decided to reduce the risk of Internet posting while preserving the public availability of OCA information by providing any member of the public with read-only access to paper copies of OCA information for a limited number of facilities.

In light of the rule and assessments underlying it, EPA is considering whether the IT system should include facility identification information. A database including that information would provide users with an efficient means of identifying and learning about facilities that may put them at risk. At the same time, such a database could undercut the security purposes that the rule's limits on public access to paper copies of OCA information are intended to serve. A database excluding the information, while not permitting users to access RMPs for named facilities, could allow users to identify and study trends in chemical safety among facilities using the same chemical or process. It could also allow users to identify facilities similar to ones for which the user had obtained read-only access to OCA information in paper form. Comparing similar facilities would allow members of the public to assess a particular facility's chemical safety practices.

EPA requests comment on the issue of whether the IT system should include facility identification information and how useful such a system would be without that information. EPA also requests comment on whether we could address any security concerns raised by an IT system with facility identification information by limiting the number of outlets for the system and adequately securing those outlets.

III. Draft System for Qualified Researcher Access to OCA Information

A. Description of Draft System

EPA has developed draft guidance, in consultation with DOJ, for implementing a qualified researcher (QR) system. The draft guidance describes the background of the RMP program, CSISSFRRA and the QR provision, the factors EPA considered relevant to developing a QR system, and the potential terms of the system itself.

As noted above, CSISSFRRA requires that the QR system not allow researchers to disseminate the OCA information, or any portion of the OCA information, they receive under the system. This restriction reflects the fact that under the system, qualified researchers are to receive the most comprehensive and manipulable form of OCA information—EPA's OCA database containing OCA data and identification information for all covered facilities. QR access to EPA's OCA database thus entails some risk of a large OCA database becoming broadly available, the same risk the rule for public access is designed to address. Consequently, EPA has sought to develop a system that would adequately screen applicants to identify only bona fide researchers and preclude the release of OCA information in a form or to an extent that could pose that same risk.

The system described in the draft QR guidance contains potential criteria for identifying a QR, including experience in conducting research in relevant subject matter areas and ability to protect OCA information from dissemination. The draft system also calls for any QR to sign a consent agreement acknowledging that dissemination of OCA information except as authorized by law is a crime and committing the QR to protect OCA information from unauthorized dissemination. The draft consent agreement provides for significant financial penalties for failure to meets its terms.

A copy of the draft guidance is contained in Docket No. A–2000–58 and may be viewed at EPA's website or obtained by calling the EPCRA Hotline. The addresses and numbers for these outlets are provided in the ''Addresses'' section of this notice.

B. Facility Identification Issue

Like the IT system, the QR system raises an issue related to facility identification. As noted above, a QR will have access to OCA information, including facility identification information. A QR will also be subject to the prohibition in CSISSFRRA and the public access rule against distributing OCA information except as authorized by the law and regulations. The question EPA must still address is whether a QR should be allowed to publish OCA data, as distinct from ''OCA information,'' for identified facilities.

''OCA information'' is defined by CSISSFRRA and the public access rule as the OCA portions of RMPs and any EPA database derived from those portions. CSISSFRRA and the rule make clear that while OCA information may not be disseminated to the public except in specified ways, there is no restriction on the dissemination of the data reported in the OCA portions of RMPs so long as the data is conveyed in a format different than the OCA portions of RMPs or EPA's OCA database. (The rule captures this distinction by defining a new term, ''OCA data elements,'' to refer to OCA data in a format other than the restricted RMP and EPA database formats.) The distinction reflects that fact that the RMP and EPA database formats are relatively easy to post on the Internet and thus pose the greatest risk of broad dissemination of a large OCA database.

At the same time, the QR provision in CSISSFRRA provides that the system ''shall not allow the researcher to disseminate * * * the [OCA] information, or any portion of the [OCA] information,'' the researcher receives under the system. There is also concern that a QR could potentially defeat the purpose of the statutory and regulatory limits on the dissemination of ''OCA information'' by publishing OCA data for a large number of identified facilities. We are thus considering whether the QR system should place limits on a QR's ability to publish OCA data for identified facilities. Among the limits being considered are a bar on publication of OCA data for identified facilities and a numerical limit on the number of identified facilities for which OCA data could be published. Under either of these alternatives, there would be no limit on the amount of OCA data that a QR could publish *without* facility identification. We are also considering the alternative of not restricting the publication of OCA data for identified facilities.

We request comment on this issue and the alternatives being considered for addressing it. In particular, we would like to know why researchers might find it necessary to publish OCA data for identified facilities and the number of facilities that might be involved. Our review of past publications on chemical safety indicates that much useful research on chemical safety has been published without naming the facilities that were studied. We are aware, however, that some researchers, especially those affiliated with public interest groups, are interested in identifying facilities in an industry or geographical area that have notably good or bad safety records or programs. We are therefore interested in receiving comments on how useful a QR system would be if it were to include one or the other of the restrictions being considered.

In considering this question, it should be noted that CSISSFRRA and the rule prohibit ''covered persons,'' including a QR, from publishing statewide or national rankings of RMP facilities based on OCA information. This prohibition is likely to lead researchers themselves to limit the number of facilities they identify, with or without OCA data. It is also worth noting that the draft QR system defines ''research'' as more than regurgitation or reformatting of available information. Consequently, a QR applicant must show that he or she needs OCA information to learn something new, such as industry averages and ranges. In short, an applicant cannot obtain OCA

information merely to publicize OCA data. We welcome comments on whether the QR system should include restrictions on publication of OCA data for identified facilities and, if so, what those restrictions should be. We also welcome comment on any other aspect of the draft guidance.

Dated: December 28, 2000.

Timothy Fields, Jr.,

Assistant Administrator for Solid Waste and Emergency Response.

[FR Doc. 01–1349 Filed 1–16–01; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OPP–34191A FRL–6756–8]

PR Notice on Worker Risk Mitigation for Organophosphate Pesticides; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of a Pesticide Registration (PR) Notice describing EPA's approach for managing risk to workers who may be exposed to organophosphate (OP) pesticide products by mixing, loading, applying, flagging, or otherwise handling OP pesticides, or are exposed to residues of these pesticides while performing tasks in recently treated areas. This approach generally provides for basic protective measures such as closed mixing and loading systems, enclosed cab equipment, or personal protective equipment, as well as increased restricted-entry intervals for occupational situations where revised risk assessments indicate that they are necessary and where these measures are feasible. Further, this PR Notice outlines the steps that EPA intends to take to address situations where baseline mitigation measures are not feasible, or situations where maximum feasible mitigation is still inadequate to protect workers.

FOR FURTHER INFORMATION CONTACT: Jacqueline Gwaltney, Special Review and Reregistration Division (7508C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 305–6792; fax number: (703) 308–8041; e-mail address: gwaltney.jackie@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 environmental, human health, agricultural, and agricultural worker advocates; pesticide users; and persons who are or may be required to conduct testing of chemical substances under 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/.

The OP worker risk mitigation PR notice is available on the Home Page for the Office of Pesticide Programs at http://www.epa.gov/PR—Notices/pr2000-9.pdf. EPA's response to public comments received on the August 6, 1999, draft PR notice is available at http://www.epa.gov/PR—Notices/draftprworker-response.htm . You may access information about the organophosphate pesticides at http://www.epa.gov/pesticides/op.

2. *In person*. The Agency has established an official record for this action under docket control number OPP–34191A. EPA previously established an official record under docket control number OPP–34191 when the Agency published an FR notice on August 6, 1999 (64 FR 41934) (FRL–6093–8), announcing the availability of the draft OP worker risk mitigation PR notice for public comment. 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.

II. What Action is the Agency Taking?

This notice announces the availability of Pesticide Registration (PR) Notice 2000–9, which presents EPA's approach for managing risks from organophosphate (OP) pesticides to occupational users. The approach described in this PR Notice applies to workers who may be exposed to OP pesticide products by mixing, loading, applying, flagging, or otherwise handling them, or by performing tasks in recently treated areas. The PR Notice outlines the six steps that EPA will follow in assessing and managing the human health risks of an OP pesticide, to evaluate risks to workers and mitigate risks of concern. It explains the protective measures that the Agency is recommending to reduce OP worker risk including use of personal protective equipment; use of engineering controls such as closed mixing and loading systems and enclosed cabs and cockpits; application modifications such as reducing the rate or frequency of pesticide applications; mechanical harvesting; and longer Restricted Entry Intervals. The PR Notice also addresses situations where the maximum feasible mitigation still is inadequate to protect workers, or where the baseline risk mitigation measures are not feasible.

The guidance set forth in this PR Notice is intended to inform manufacturers, formulators, and users of the type of risk management decisions EPA is likely to develop for the OP pesticides. These chemicals are being reviewed by the Agency as part of the larger process of implementing the Food Quality Protection Act of 1996 amendments to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Federal Food, Drug, and Cosmetic Act (FFDCA). Implementation of the FQPA amendments has been the

subject of a joint effort by EPA, USDA, and interested stakeholders known as the Tolerance Reassessment Advisory Committee (TRAC), recently replaced by the Committee to Advise on Reassessment and Transition (CARAT). Among other initiatives, TRAC established a process for public participation in the review and refinement of risk assessments for the OP pesticides and for developing risk management options. USDA, stakeholders, and the public have the opportunity to participate by submitting comments on EPA's preliminary and revised risk assessments and by providing risk management proposals. During the final phase of this process, EPA prepares an Interim Reregistration Eligibility Decision (IRED) or a Report on FQPA Tolerance Reassessment Progress and Interim Risk Management Decision (TRED) document for each OP pesticide, to implement interim risk management measures. Worker risk mitigation is but one aspect of the comprehensive mitigation strategy that is developed in concluding each individual OP assessment.

In a number of cases, the OP risk assessments show that, even with maximum feasible personal protective equipment and engineering controls, including all provisions required by the Worker Protection Standard (WPS), risks to workers still exceed EPA's levels of concern. Although each OP risk management decision and any associated mitigation measures will be implemented on a case-by-case basis, the Agency is outlining its decision process in the PR Notice because early notification to registrants will help to ensure that occupational risk management decisions for the OPs will be approached consistently and implemented quickly and equitably. EPA encourages registrants to demonstrate stewardship of their OP pesticides by adopting the protective measures described in this PR Notice prior to the Agency's completion of IRED and TRED documents for the OP chemicals, and to develop new packaging and application technologies that reduce worker exposure to pesticides. Further mitigation may be needed when the Agency issues its final, cumulative decision on the OP class of chemicals.

The PR Notice does not impose binding obligations on registrants or the Agency. The measures described will be implemented as appropriate based on chemical-specific reviews, including risk/benefit balancing where necessary, through pesticide reregistration and other decision-making processes. EPA is proposing specific worker risk mitigation measures for individual OP pesticides in completing interim risk management decisions for these chemicals, and will implement these measures shortly thereafter. The Agency envisions managing risks to workers exposed to other classes of pesticides posing similar risks, such as the carbamates, in a similar manner.

List of Subjects

Environmental protection, Chemicals, Pesticides and pests.

Dated: January 8, 2001.

Lois Rossi,

Director, Special Review and Reregistration Division.

[FR Doc. 01–1201 Filed 1–16–01; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–00652A; FRL–6761–8]

First Aid Statements on Pesticide Product Labels, Pesticide Registration Notice; Update to Guidance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces an update to EPA guidance regarding the format and content of first aid statements on all federally regulated pesticide product labels. This notice addresses what the Agency believes is the appropriate first aid language for pesticide product labels to ensure that they continue to adequately protect the public. This notice supersedes Pesticide Registration Notice 2000–3, published in the **Federal Register** on April 19, 2000.

FOR FURTHER INFORMATION CONTACT: Amy Breedlove, Field and External Affairs Division (7506C), Policy and Regulatory Services Branch, Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 308–9069; fax number: (703) 305–5884; e-mail address: breedlove.amy@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 people who are responsible for developing, reviewing, or approving first aid information on pesticide labels. 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/. You may also obtain copies of the PR Notice by going directly to the Home Page for the Office of Pesticide Programs at http://www.epa.gov/pesticides. Under ''What's New,'' select ''Draft PR Notices,'' then select PR Notice 2000–1 ''First Aid Statements on Pesticide Product Labels.''

2. *Fax on Demand*. You may request a faxed copy of the PR Notice titled ''First Aid Statements on Pesticide Product Labels,'' by using a faxphone to call (202) 401–0527 and selecting item 6135. You may also follow the automated menu.

3. *In person*. The Agency has previously established an official record for this action under docket control number OPP–00652. 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.

II. What Action is the Agency Taking?

The Agency is publishing guidance for appropriate first aid language for pesticide product labels. The Agency has received updated information for first aid statements and believes current pesticide product labels should be revised to reflect this information. The Agency, as a result of comments submitted in response to an earlier PR notice published in the **Federal Register** on April 19, 2000 (65 FR 20978) (FRL–6552–2), has extended the deadline until October 1, 2003, for when the Agency expects to see these revised statements and has made other changes to clarify the Agency's intent.

List of Subjects

Environmental protection, Administrative practice and procedure, Agricultural commodities, First aid, Labeling, Pesticides and pests.

Dated: December 28, 2000.

Marcia E. Mulkey

Director, Office of Pesticide Programs.

[FR Doc. 01–1053 Filed 1–16–01; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6933–7]

Ward Transformer Superfund Site Notice of Prospective Purchaser Agreement Raleigh, Wake County, NC

AGENCY: Environmental Protection Agency.

ACTION: Notice of proposed settlement.

SUMMARY: Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the United States Environmental Protection Agency (EPA) proposes to enter into a ''Prospective Purchaser Agreement'' (P.A.) concerning property that has been potentially contaminated by releases from the Ward Transformer Superfund Site (Ward Site) in Raleigh, Wake County, North Carolina (P.A. Property). EPA proposes to enter into the P.A. with Brier Creek Commons LP (Brier Creek LP). The P.A. obligates Brier Creek LP to cooperate fully with any response action EPA may take on the P.A. Property. The P.A. resolves Brier Creek LP's potential liability for the Existing Contamination at the Ward Site and/or the P.A. Property which may otherwise result from it obtaining an easement across the P.A. Property and constructing a roadway. This protection is contingent upon Brier Creek LP fulfilling its obligations under the P.A. EPA will consider public comments on the proposed settlement for thirty (30) days.

EPA may withdraw from or modify the proposed settlement should such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper or inadequate. Copies of the proposed settlement are available from: Ms. Paula V. Bachelor, Waste Management Division, U.S. EPA, Region 4, Atlanta Federal Center, 61 Forsyth Street, SW., Atlanta, Georgia 30303–3104, 404/562–8887.

Written comments may be submitted to Ms. Bachelor at the address noted above within thirty (30) calendar days of the date of this publication.

Dated: December 27, 2000.

James T. Miller,

Acting Chief, CERCA Program Services Branch, Waste Management Division.

[FR Doc. 01–1348 Filed 1–16–01; 8:45 am]

BILLING CODE 6560–50–P

GENERAL SERVICES ADMINISTRATION

Office for Civil Rights; Title VI of the Civil Rights Act of 1964; Limited English Proficiency Policy Guidance for Recipients of Federal Financial Assistance

AGENCY: Office of Civil Rights, GSA.

ACTION: Notice of policy guidance with request for comment.

SUMMARY: The General Services Administration (GSA) is publishing policy guidance on Title VI's prohibition against national origin discrimination as it affects limited English proficient persons. GSA provides this policy guidance for its recipients of Federal financial assistance to ensure meaningful access to federally assisted programs and activities for persons with Limited English Proficiency (LEP). This policy guidance does not create new obligations, but rather, clarifies existing responsibilities under Title VI of the Civil Rights Act of 1964, as amended, its implementing regulations and relevant case law.

DATES: This guidance is effective immediately. Comments must be submitted on or before March 20, 2001. The Office of Civil Rights (OCR) will review all comments and will determine what modifications to the policy guidance, if any, are necessary.

ADDRESSEES: Interested persons should submit written comments to Office of Civil Rights (AK), Room 5127, General Services Administration, 1800 F Street, NW., Washington, DC 20405. Comments may also be submitted by e-mail at evelyn.britton@gsa.gov.

FOR FURTHER INFORMATION CONTACT: James M. Taylor or K. Evelyn Britton, Office of Civil Rights, Room 5127, General Services Administration, 1800 F Street, NW., Washington, DC 20405, telephone 202–501–0767 or 1–800–662–6376; TDD 1–888–267–7660. Arrangements to receive the policy guidance in an alternative format may be made by contacting the named individuals.

Dated: January 10, 2001.

Madeline Caliendo,

Associate Administrator, Office of Civil Rights, General Services Administration.

Policy Guidance

1. *Subject.* Limited English proficiency policy guidance for recipients of Federal financial assistance.

2. *Purpose.* General Services Administration (GSA) provides this policy guidance for its recipients of Federal financial assistance to ensure meaningful access to federally assisted programs and activities for persons with Limited English Proficiency (LEP). This policy guidance does not create new obligations, but rather, clarifies existing responsibilities under Title VI of the Civil Rights Act of 1964, as amended, its implementing regulations and relevant case law.

3. *Dates:* This guidance is effective immediately. Comments are welcome and must be submitted on or before sixty (60) days from the date of this publication. GSA will review all comments and will determine what modifications to the policy guidance, if any, are necessary.

4. *Policy.* To improve access to federally assisted programs and activities for persons who, as a result of national origin, are limited in their English proficiency.

5. *Action Required.* All recipients of Federal financial assistance from GSA are to develop an effective plan, in writing, for ensuring meaningful access to their programs and activities by LEP persons, consistent with this guidance.

6. *Background Information.* English is the predominant language of the United States. According to the 1990 Census, English is spoken by 95% of its residents. Of those U.S. residents who speak languages other than English at home, the 1990 Census reports that 57%

above the age of four speak English ''well to very well.''

The United States is also home to millions of national origin minority individuals who are LEP. That is, their primary language is not English and they cannot speak, read, write or understand the English language at a level that permits them to interact effectively with recipients of Federal financial assistance. Because of language differences and the inability to effectively speak or understand English, persons with LEP may be subject to exclusion from programs or activities, experience delays or denials of services/benefits, or receive care and services/benefits from recipients of Federal financial assistance based on inaccurate or incomplete information.

Executive Order 13166 (65 FR 50119) dated August 11, 2000 and policy guidance issued by Department of Justice (DOJ) on August 11, 2000 (65 FR 50123), address the responsibility of all recipients of Federal financial assistance to ensure meaningful access for persons with LEP. GSA refers to and incorporates DOJ's policy guidance for recipients as part of this policy guidance, and for the purpose of determining compliance with this policy guidance, within the scope of Title VI of the Civil Rights of 1964, as amended, its implementing regulations and relevant case law.

This policy guidance establishes a four-step process that recipients should follow in developing an effective LEP assistance plan. A key element in this process is stakeholder input. Therefore, recipients should coordinate with local community-based organizations (i.e., stakeholders) that represent populations of LEP persons. These organizations can provide valuable input and assistance in identifying and addressing the LEP needs of the serviced population. This coordinated effort will assist in developing a practical approach in providing appropriate LEP assistance that is reasonable and cost-effective.

Some organizations representing LEP persons may include the National Council of La Raza (NCLR), the League of United Latin American Citizens (LULAC), the National Council of Asian Pacific Americans (NCAPA), the Organization of Chinese Americans (OCA), the National Congress of American Indians (NCAI), the National Urban League (NUL), the National Association for the Advancement of Colored People (NAACP), Mexican American Legal Defense and Educational Fund, Arab American Anti-Discrimination Committee and National Coalition for Haitian Rights. This is not meant to be an exhaustive listing, and different community-based or national origin minority organizations may be available in a recipient's serviced area.

7. *Legal Authority.* The legal authority for OCR's enforcement actions is Title VI of the Civil Rights Act of 1964, GSA's implementing regulations, and a consistent body of case law, and is further described below.

Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d et. seq. states: ''No person in the United States shall on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.''

State and local laws may provide additional obligations to serve LEP individuals, but cannot compel recipients of Federal financial assistance to violate Title VI. For instance, given our constitutional structure, State or local ''English-only'' laws do not relieve an entity that receives Federal funding from its responsibilities under Federal anti-discrimination laws. Entities in States and localities with ''English-only'' laws are certainly not required to accept Federal funding—but if they do, they have to comply with Title VI, including its prohibition against national origin discrimination by recipients of Federal assistance. Thus, failing to make federally assisted programs and activities accessible to individuals who are LEP will, in certain circumstances, violate Title VI.

GSA's implementation regulations provide, in part, at 41 CFR 101–6.204–1:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this subpart applies.

Specific discriminatory actions prohibited are addressed at 41 CFR 101–6.204–2:

> (a)(1) In connection with any program to which this subpart applies, a recipient may not, directly or through contractual or other arrangements, on the ground of race, color, or national origin:
>
> (i) Deny an individual any services/benefits, financial aid, or other benefit provided under the program;
>
> (ii) Provide any service, financial aid, or other benefit to any individual which is different, or is provided in a different manner, from that provided to others under the program;
>
> (iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;
>
> (iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;
>
> (v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program;
>
> (vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise, or afford him an opportunity to do so which is different from that afforded others under the program * * *

Furthermore, the DOJ coordination regulations for Title VI, located at 28 CFR 42.405(d)(1), provide that:

> (1) Where a significant number or proportion of the population eligible to be served or likely to be directly affected by a federally assisted program (e.g., affected by relocation) needs service or information in a language other than English in order effectively to be informed of or to participate in the program, the recipient shall take reasonable steps, considering the scope of the program and the size and concentration of such population, to provide information in appropriate languages to such persons. This requirement applies with regard to written material of the type which is ordinarily distributed to the public.

Extensive case law affirms the obligation of recipients of Federal financial assistance to ensure that persons with LEP can meaningfully access federally assisted programs. Specifically, in the case of *Lau* v. *Nichols,* 414 U.S. 563 (1974), the U.S. Supreme Court ruled that a public school system's failure to provide English language instruction to students of Chinese ancestry who do not speak English denied the students a meaningful opportunity to participate in a public educational program in violation of Title VI of the Civil Rights Act of 1964.

More recently, the Eleventh Circuit in *Sandoval* v. *Hagan,* 197 F.3d 484 (11th Cir. 1999), cert. granted sub. Nom., *Alexander* v. *Sandoval,* 147 L. Ed. 2d 1051 (U.S. Sept. 26, 2000) (No. 99–1908), held that the State of Alabama's policy of administering a driver's license examination in English only was a facially neutral practice that had an adverse effect on the basis of national origin, in violation of Title VI. Title VI regulations prohibit both intentional discrimination and policies and practices that appear neutral but have a discriminatory effect. Thus, a recipient's policies or practices regarding the provision of benefits and services to persons with LEP need not be

intentional to be discriminatory, but may constitute a violation of Title VI where they have an adverse effect on the ability of national origin minorities to meaningfully access programs and services.

The DOJ states in its policy guidance that Title VI does not require recipients to remove language barriers when English is an essential aspect of the program, or there is another ''substantial legitimate justification for the challenged practice.'' See Footnote 13 of DOJ's policy guidance.

8. *Federal Financial Assistance Programs.* GSA administers two major Federal financial assistance programs, in addition to other programs of Federal financial assistance, such as the direct transfer of personal property and the allotment of space in GSA buildings. The two major programs of Federal financial assistance are the Federal Surplus Personal Property Donation Programs and the Disposal of Federal Surplus Real Property for Public Use.

a. *Federal Surplus Personal Property Donation Program.* Enables certain non-Federal agencies, institutions, organizations and certain small businesses to obtain property that the Federal Government no longer needs. The personal property includes all types and categories of property, such as hand and machine tools, office machines and supplies, furniture, appliances, medical supplies, hardware, clothing, motor vehicles, boats, airplanes, construction equipment, textiles, communications and electronic equipment and gifts or decorations given to Government officials by foreign dignitaries.

(1) Federal surplus personal property may be donated to nonprofit educational and public health activities exempt from taxation under Section 501 of the Internal Revenue Code. The property must be used to aid education or public health, and includes programs for the homeless. Eligible recipients include nonprofit educational and public health activities, such as medical institutions, hospitals, clinics, health centers, and drug abuse treatment centers; schools, colleges and universities; schools for persons with mental or physical disabilities; child care centers; educational radio and televisions licensed by the Federal Communications Commission; museums attended by the public; and libraries. Nonprofit, tax-exempt organizations that provide food, shelter, or support services to homeless people may also be eligible to receive surplus property through the donation program (i.e., soup kitchens, day centers for the homeless, food banks, shelters for battered spouses, half-way houses).

(2) Additionally, public agencies involved in such activities as conservation, economic development, education, park and recreation programs, public safety, public health, programs for the elderly, and programs for the homeless may be eligible for donations of surplus personal property. Public agencies generally include States, their departments, divisions and other instrumentalities; political subdivisions of States, including cities, counties, and other local Government units and economic development districts; instrumentalities created by compact or other agreement between State or political subdivisions; and Indian tribes, bands, groups, pueblos, or communities located on State reservations.

b. *Disposal of Federal Surplus Real Property for Public Use.* Under existing Federal law, States and local government bodies and certain nonprofit institutions may acquire Federal surplus real property at discounts of up to 100% for various types of public use. These uses include: homeless services, airports/ports, correctional, educational, historic monument, parks/recreation, public health and wildlife conservation. These disposals are usually accomplished in coordination with other Federal agencies (i.e., Department of Education (DOE), Department of Health and Human Services (DHHS), Department of Transportation (DOT), Department of Interior (DOI), Department of Housing and Urban Development (HUD).

c. *GSA Personal Property Utilization Program.* Government regulations mandate that Federal agencies, to the fullest extent practicable, use excess personal property as the first source of supply in meeting their requirements. However, certain laws provide Federal agencies with the ability to directly transfer certain excess property to non-Federal entities. For example, Executive Order 12999 (61 FR 17227, 3 CFR, 1996 comp., p. 180) provides that all Federal agencies, to the extent permitted by law, shall give highest preference to schools and nonprofit organizations, including community-based educational organizations, in the transfer of educationally useful Federal equipment. Thus, GSA recipients in this program include schools and certain community-based educational organizations.

d. *Allotment of Space.* Under existing Federal law, GSA may allot space for little or no costs to Federal Credit Unions, vending stands operated by blind persons and child care centers.

9. *Definition of Terms.* The following definitions are provided for reference.

a. *Federal financial assistance.* Grants and loan of Federal funds; grants or donation of Federal property and interests in property; detail of Federal personnel; sale and lease of, and the permission to use (on other than a casual or transient basis) Federal property or any interest in the property without consideration or at a nominal consideration, or at a consideration which is reduced for the purposes of assisting the recipient, or in recognition of the public interest to be served by the sale or lease to the recipient; or any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

b. *Recipient:* Any State or political subdivision, any instrumentality of a State or political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended, directly or through another recipient, except that such term does not include any ultimate beneficiary of the assistance.

c. *Person with Limited English Proficiency:* A person whose primary language is not English and whose ability to speak, read, write or understand the English language does not permit effective interaction with recipients of Federal financial assistance.

d. *Vital Documents:* A document or information will be considered vital if it contains information that is critical for accessing the recipient's program(s) and/or activities, or is required by law. Thus, vital documents include, for example, applications; consent forms; letters and notices pertaining to the reduction, denial or termination of services or benefits; and letters or notices that require a response from the beneficiary or client. Generally, entire web sites need not be translated. Only the vital information or documents within the web site should be translated. See subparagraph 11b(3) below for further discussion about web sites.

e. *Beneficiary:* Individuals and/or entities that directly or indirectly receive an advantage through the operation of a Federal program, (i.e., one who is within the serviced population of the recipient of Federal financial assistance and who ultimately benefits from those services.)

10. *LEP Procedures and Guidelines:* Executive Order 13166 (65 FR 50119) provides for a flexible standard stating that recipients of Federal financial assistance are to take reasonable steps to ensure meaningful access to their programs and activities by LEP persons. Thus, it is important that all recipients take the following steps in determining their LEP responsibilities and providing

appropriate LEP assistance. These four steps are more fully explained below, and include: (1) Conduct an assessment of the serviced population, (2) develop written LEP assistance plans, (3) implement the LEP plan, and (4) monitor the effectiveness of the LEP plan.

a. *Step 1.* Conduct an assessment of the serviced population. This assessment includes identifying the types of service(s) being provided by the recipient and determining the serviced population (i.e., individuals served by the recipient's program(s) and activities).

b. *Step 2.* Develop written LEP assistance plans. These plans should address the recipient's LEP responsibilities and the types of LEP assistance that the recipient will provide, consistent with this policy guidance. Recipients are to develop a written plan based on a balanced analysis of the following four factors, to ensure meaningful access for eligible LEP persons.

(1) *Factor 1: Number or Proportion of LEP Persons.* One factor in determining the reasonableness of a recipient's efforts in providing LEP assistance is the number or proportion of people who will be excluded from the benefits or services absent efforts to remove language barriers. The key here is to focus on persons who are eligible to access the recipient's program or activity.

The steps reasonable for a recipient that serves one LEP person a year may be different than those expected of a recipient that serves several LEP persons per day. However, those who serve a few are still subject to the requirements of Title VI of the Civil Rights Act of 1964 and Executive Order 13166 (65 FR 50119). This plan need not be intricate, and may be as simple as being prepared to use one of the commercially available language lines to obtain interpreter services within a reasonable period of time.

Methods of obtaining estimates of serviced LEP population include taking a census of contacts with LEP persons over a given period of time or using demographic data of the service area. The 1990 U. S. Census information may be found at a local library or on the Internet at www.Census.gov. The 2000 Census data may not be available until the 2001–02 timeframe. In addition to the U. S. Census, other potential resources include State and local government offices; the Mayor's office; the local school superintendent's office; the State education department; the State social services department, and local hospitals; or other elected officials offices. Combining these methods will probably result in the most realistic and accurate estimates.

Local or State Yellow Pages may also be helpful in identifying organizations that serve or represent particular language minority populations. Local national origin minority organizations may be able to provide, or assist in obtaining, certain demographic information regarding LEP populations in the local area. The information that can be obtained and the network established in coordinating this type of effort with members of local and State government offices and minority organizations may prove to be valuable resources for recipients into the future.

(2) *Factor 2: Frequency of Contact with the Program.* Frequency of contacts between the recipient's program or activity and LEP persons is another factor to be weighed. For example, if LEP persons must access the program or activity on a daily basis, the recipient has a greater LEP responsibility than if such contact is unpredictable or infrequent.

Recipients should take into account local or regional conditions when determining frequency of contact.

Although past experience may be helpful in determining the frequency of contact, it should not be used as the exclusive criteria since the lack of prior LEP notice and assistance may have contributed to such minimal or non-existent contact.

(3) *Factor 3: Nature and Importance of the Program.* The importance of the services or benefits provided to the beneficiaries will affect the determination of the reasonable steps required. More affirmative steps are required in those programs where the denial or delay of access may have life or death implications than in programs that are not as crucial to one's day-to-day existence. For example, fire protection services are of more importance to the serviced population than access to a museum.

Recipients must also consider the importance of the program or activity to the eligible LEP population, both immediately, as well as the long-term. (i.e., what is the short-term and long-term impact to the LEP population if translation assistance is not provided?)

(4) *Factor 4: Resources Available.* The resources available to a recipient of Federal financial assistance may impact the steps that recipients take. For example, a small recipient with limited resources may not need to take the same steps as a larger recipient to provide LEP assistance in programs that have a limited number of eligible LEP persons or where the contact is infrequent. However, small recipients are still subject to this policy guidance, although the type of LEP mitigation measures may differ from that of larger recipients. Claims of limited resources from larger entities should be well substantiated.

A recipient that has limited resources may consider exploring whether State and local government offices provide translation assistance. These offices may provide resources for the recipient's use. Also, recipients may consider contacting local minority organizations for possible translation assistance.

c. *Step 3*: Implement the LEP plan. The key to successful implementation of an effective LEP assistance plan is to ensure that the serviced population is notified regarding the availability of free LEP assistance. Also, it is important that a recipient's staff is aware of LEP responsibilities and the recipient's LEP assistance plan.

(1) Notice of LEP assistance to be provided. Each recipient of Federal financial assistance is to notify the public of available LEP assistance at no cost to the LEP person. This may be done through a brochure or poster in the language(s) identified in the location(s) where the recipient's federally assisted service(s) and/or benefits are being provided. Posters should be placed in a conspicuous place to ensure LEP persons will see it. It may also include posting such notice on the recipient's internet site(s). Sample language to use for such notice is as follows: ''Language assistance is available upon request if you cannot speak or write English very well.''

(2) Ensure staff is aware of LEP responsibilities. Recipients are to ensure that GSA's policy regarding LEP responsibilities is communicated to all staff members whose duties may bring them in contact with LEP persons accessing the services and/or benefits of the recipient. This communication should ensure an understanding of the types of LEP assistance being offered by the recipient, and the mechanisms in place for the staff to use when a request for LEP assistance is made.

d. *Step 4*: Monitor the effectiveness of the LEP plan. LEP assistance requirements may change over a period of time. Therefore, it is important to regularly monitor, and when appropriate, adjust the LEP procedures to ensure meaningful access for persons with LEP. New programs, activities, forms, outreach documents, etc. should be considered for translation services as they arise. In addition, to be effective, it is crucial for recipients to re-assess language assistance services at least every three years to determine the effectiveness of existing assistance. This

assessment should include a review of LEP policies and procedures (i.e., the LEP plan) with the recipient's staff. Feedback from LEP persons and community-based organizations will also provide helpful insights into the effectiveness of LEP assistance procedures.

11. *Translation Requirements.* In determining what is reasonable, the analysis should address the appropriate mix of written and oral language assistance. This includes information provided using the Internet, video and audio. When applying the four factors as outlined above, decisions should be made regarding which documents must be translated, when is oral translation necessary and whether such assistance (i.e., oral or written translation) should be immediately available or provided within a reasonable period of time.

a. *Oral Communication:* Depending on the need, options for providing oral language assistance range from hiring bilingual staff or on-staff interpreters to contracting for interpreter services as needed, engaging community volunteers, or contracting with a telephone interpreter services. Oral communication between recipients and beneficiaries often is a necessary part of the exchange of information. Proper analysis should include looking at what kind of communication (oral or written) you normally provide to an English speaking person in order to fully communicate the program to them. Thus, there may be instances where simply providing written translation may not be providing meaningful access to persons with LEP in the same manner as that provided to non-LEP beneficiaries.

b. *Written Communication:* As part of its overall language assistance program, a recipient's LEP assistance plan should provide for the translation of certain written materials in languages other than English, where a significant number or percentage of the population eligible to be served or likely to be directly affected by the program, needs services or information in a language other than English to communicate effectively. See 28 CFR 42.405(d)(1).

(1) In determining what should be translated, identify vital documents and non-vital documents. Vital documents must be translated when a significant number or percentage of the population eligible to be served, or likely to be directly affected by the recipient's program(s) or activities, seeks services or information in a language other than English to communicate effectively. For many larger documents, translation of vital information contained within the document will suffice and the documents need not be translated in their entirety. Non-vital documents/information need not be translated.

(2) OCR recognizes that it may sometimes be difficult to draw a distinction between vital and non-vital documents, particularly when considering outreach or awareness documents. Although meaningful access to a program or activity requires an awareness of the program's existence, OCR recognizes that it would be impossible, from a practical and cost-based perspective, to translate every piece of outreach material into every language. Title VI does not require this of its recipients. However, lack of awareness regarding the existence of a particular program may effectively deny LEP persons meaningful access. Thus, it is important that recipients continually survey and assess the needs of the eligible serviced populations in order to determine whether certain critical outreach materials should be translated into other languages.

(3) The same analysis is to be used in determining the translation of web site information, forms, etc. The decision to place a document or information on the Internet will not affect whether the document or information must be translated. For example, placement on the web site should not change the recipient's original assessment regarding the number or proportion of LEP persons that comprise the intended audience for that document or information. Generally, entire web sites need not be translated. Only the vital information or documents within the web site should be translated. The four-factor analysis as outlined above determines the appropriate language(s) for translation. If the four-factor analysis determines that written information or a document should be translated, the same written document or information should be translated on the recipient's web site—if the recipient's English version of the information or document is on the web site. A notice regarding the presence of a translated document or information on the web site should be posted at an initial entry point onto the site (usually the homepage).

(4) Oral translation assistance will be provided to those persons with LEP whose language does not exist in written form. This oral translation assistance will explain the contents of vital documents.

c. *Reliability of Translation Resources and Interpretive Services:* In order to provide effective services to LEP persons, it is important to ensure the use of competent interpreters. Although it is not a requirement, membership in or accreditation by the American Translators Association (ATA) is one indicator regarding the reliability and professionalism of language assistance vendors. However, competency does not necessarily mean formal certification as an interpreter, although certification is helpful. Yet, competency refers to more than being bilingual. It refers to demonstrated proficiency in both English and the other language, orientation and training that includes the skills and ethics of interpreting (i.e., issues of confidentiality), fundamental knowledge in both languages of terms or concepts peculiar to the program or activity, and sensitivity to the LEP person's culture.

It is also important to note that in some circumstances, verbatim translation of materials may not accurately and appropriately convey the substance of what is contained in the written language. An effective way to address this concern is to reach out to community-based organizations to review translated materials to ensure that the translation is accurate and easily understood by LEP persons.

It is recommended that a different contractor conduct a second review of a translated document, when such document is of a highly technical or complex nature. Another method of ensuring reliability of such documents is to have the document translated back into English to determine if the source document lost important meaning in its foreign translation.

Generally, it is not acceptable for recipients to rely upon an LEP individual's family members or friends to provide the interpreter services. The recipient should meet its obligations under Title VI by supplying competent language services free of cost. In rare emergency situations, the recipient may have to rely on an LEP person's family members or other persons whose language skills and competency in interpreting have not been established. Proper planning by recipients is important in order to ensure that those situations rarely occur. Therefore, it is not acceptable to rely upon an LEP person to provide his/her own interpreter, unless the LEP person requests the use of his/her own interpreter or in the case of an emergency.

12. *Examples.* The following examples are being provided to facilitate the assessment, planning and implementation of a successful LEP plan.

a. *Examples of problem areas include:* Providing services and/or benefits to LEP persons that are more limited in scope or lower in quality than those provided to other individuals;

subjecting LEP persons to unreasonable delays; limiting participation in a recipient's program(s) or activities on the basis of English proficiency; providing services and/or benefits to LEP persons that are not as effective as those provided to persons proficient in English; failing to inform LEP persons of the right to receive free interpreter services; or requiring LEP persons to provide their own interpreter.

b. *Examples of satisfactory LEP assistance include:* Having policies and procedures in place for identifying and assessing the language needs of the recipient's serviced LEP population; providing a range of oral language assistance options, appropriate to each of the recipient's circumstances; providing notice to LEP persons of the right to free language services; communicating LEP responsibilities and available services to staff members; program monitoring; establishing a plan for providing written materials in languages other than English where a significant number or percentage of the affected population needs services or information in a language other than English.

c. *Examples of applying the 4 factors:* The following are examples of how meaningful access will be assessed by OCR:

(1) *Example 1.* A small child care center has three LEP parents (two who are Chinese and one who is Cuban) whose English-speaking children attend its child care center on a regular basis. The center has a staff of six, and has limited financial resources to afford to hire bilingual staff, contract with a professional interpreter service, or translate written documents. To accommodate the language needs of their LEP parents, the Center made arrangements with a Chinese and a Hispanic community organization for trained and competent volunteer interpreters, and with a telephone interpreter language line, to interpret during parent meetings and to orally translate written documents. There have been no client complaints of inordinate delays or other service related problems with respect to LEP clients.

Application of the 4 factors to Example 1: Factor 1: The center has three LEP parents (a small number); Factor 2: The frequency of contact is every day, but mostly for greeting; Factor 3: The nature and importance of the recipient's program to the serviced population relates to the health, safety and welfare of their children (i.e., child care); Factor 4: The child care center has limited resources and a small staff.

The assistance that the child care center is providing will probably be considered appropriate, given the center's resources, the size of staff, and the size of the LEP population. Thus, OCR would find the center in compliance with Title VI.

(2) *Example 2.* A county social service program has a large budget and serves 500,000 beneficiaries. Of the beneficiaries eligible for its services/benefits, 3,500 are LEP Chinese persons, 4,000 are LEP Hispanic persons, 2000 are LEP Vietnamese persons and about 400 are LEP Laotian persons. The county frequently encounters an LEP client, but has no policy regarding language assistance to LEP persons other than telling LEP clients to bring their own interpreters. LEP clients are provided with application and consent forms in English and, if unaccompanied by their own interpreters, must solicit the help of other clients or must return at a later date with an interpreter.

Application of the 4 factors to Example 2: Factor 1: The eligible LEP population is significant; Factor 2: The frequency of contact is frequent; Factor 3: The nature and importance of the county's program relates to the social welfare of the community it serves; Factor 4: The county has a large budget.

Given the size of the county program, its resources, the size of the eligible LEP population, the frequency of contact and the nature of the program, OCR would likely find the county in violation of Title VI and would require it to develop a comprehensive language assistance program.

d. The intent of this guidance is to provide recipients with information regarding the requirements of Title VI and its implementing regulations for providing meaningful access for LEP persons to federally assisted services and/or benefits. The examples and framework outlined above are not intended to be exhaustive. Thus, recipients have considerable flexibility in determining how to comply with their legal obligation in meeting their LEP responsibilities, and are not required to use all of the suggested methods and options listed. However, recipients must establish and implement policies and procedures for providing language assistance sufficient to fulfill their Title VI responsibilities.

13. *Compliance.* All recipients must take reasonable steps (consistent with this policy guidance) to overcome language differences that result in barriers and provide the language assistance needed to ensure that persons with LEP have meaningful access to services and benefits.

a. The failure to take all of the steps as outlined herein will not necessarily mean that a recipient has failed to provide meaningful access to LEP persons. OCR will make assessments on a case by case basis and will consider several factors in determining whether the steps taken by a recipient provide meaningful access. (i.e., nature and importance of recipient's services to the serviced population, recipient's size, availability of financial and other resources, and frequency of contact with LEP persons).

b. Those factors include the size of the recipient and the eligible LEP population, the nature of the program or service, the objectives of the program, the total resources available, the frequency with which particular languages are encountered, and the frequency with which LEP persons come into contact with the recipient's program.

c. There are instances where recipients of Federal financial assistance from GSA may also be recipients of Federal financial assistance from other Federal agencies. For instance, hospitals and health clinics may receive financial assistance from the Department of Health and Human Services (DHHS); schools and universities may receive financial assistance from the Department of Education (DOE); police departments and other law enforcement agencies/organizations may receive financial assistance from Department of Justice (DOJ). In order to avoid the potential for confusion with such recipient organizations as to their LEP responsibilities, OCR will apply, where appropriate, the Federal agency's LEP guidance that is more specific and/or stringent regarding LEP responsibilities and assistance.

14. *Enforcement.* OCR will enforce Title VI, and the recipient's responsibility to establish LEP procedures and provide appropriate LEP assistance, consistent with enforcement procedures as provided in Title VI regulations. These procedures include complaint investigations, compliance reviews, efforts to secure voluntary compliance, and technical assistance.

GSA's Title VI regulations provide that OCR will investigate whenever it receives a complaint, report or other information that alleges or indicates possible noncompliance with Title VI. If the investigation results in a finding of compliance, OCR will inform the recipient in writing of this determination, including the basis for the determination. If the investigation results in a finding of noncompliance, OCR will inform the recipient of the noncompliance through a Letter of Findings that identifies the areas of noncompliance and the steps that must be taken to correct the noncompliance,

and will attempt to secure voluntary compliance through informal means. If the matter cannot be resolved informally, the procedure for effecting compliance as described at 41 CFR 101–6.211–2, et. seq. will be followed.

15. *Technical Assistance.* A program of language assistance should provide for effective communication between the recipient and the person with LEP so as to facilitate participation in, and meaningful access to the services and/or benefits provided by the recipient. The key to ensuring meaningful access for LEP persons is effective communication.

OCR is available to provide assistance to recipients seeking to ensure that they operate an effective language assistance program. In addition, during its investigative process, OCR is available to provide technical assistance to enable recipients to come into voluntary compliance. OCR may be reached at 202–501-0767 or toll free 1–800–662–6376, or by mail at General Services Administration, Office of Civil Rights, Title VI, 1800 F Street NW, Suite 5127, Washington, DC, 20405, for further assistance. Arrangements to receive this policy guidance in alternative format may be made by contacting OCR.

[FR Doc. 01–1268 Filed 1–16–01; 8:45 am]

BILLING CODE 6820–34–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30DAY–01–01]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–7090. Send written comments to CDC, Desk Officer; Human Resources and Housing Branch, New Executive Office Building, Room 10235; Washington, DC 20503. Written comments should be received within 30 days of this notice.

Proposed Project

Evaluating CDC Funded Health Department HIV Prevention Programs—New—The Centers for Disease Control and Prevention (CDC), National Center for HIV, STD, and TB Prevention (NCHSTP), proposes a collection of standardized HIV evaluation data from health department grantees to ensure delivery of the best possible HIV prevention services. The CDC needs standardized evaluation data from health department grantees for the following reasons: (1) To determine the extent to which HIV prevention efforts have contributed to a reduction in HIV transmission, (2) to improve programs to better meet that goal, (3) to help focus technical assistance and support and (4) to be accountable to stakeholders by informing them of progress made in HIV prevention nationwide.

CDC and its prevention partners have specifically identified the types of standardized evaluation data they need to be accountable for the use of federal funds and to conduct systematic analysis of HIV prevention to improve policies and programs. Generally, evaluation data that are needed (but not yet available at the national level) include the types and quality of HIV prevention interventions provided by CDC health department grantees and their grantees, the characteristics of clients targeted and reached by the interventions, and the effects of interventions on client behavior and HIV transmission.

The annual burden hours are estimated to be 1248.

Respondents	No. of respondents	No. of forms per jurisdiction	No. of responses per respondent (per yr.)	Average burden per response (in hrs.)
Health Department Grantees	65	16	1	1.2

Dated: January 10, 2001.

Nancy E. Cheal,

Acting Associate Director for Policy, Planning and Evaluation, Centers for Disease Control and Prevention (CDC).

[FR Doc. 01–1297 Filed 1–16–01; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30DAY–06–01]

Agency Forms Undergoing Paperwork Reduction Act Review; Correction

A notice announcing Jail STD Prevalence Monitoring System was published in the **Federal Register** on November 6, 2000, (65 FR 66546). This notice is a correction.

On page 66546, in the third column of the notice, the last line of the last paragraph, the burden hours should be changed from 1248 to 3296.

On page 66546, at the end of the notice, the burden table should be replaced with the following table:

Respondents	No. of respondents	Avg. No. of forms/respondent	No. of responses/respondent	Avg. burden/response (in hrs.)
State/local health departments ...	.....	4 datasets/year	.....	
A. With access to electronic data	A. 8 health departments	.....	A. 3/dataset	A. 96
B. Without access to electronic data.	B. 8 health departments	.....	B. 100/dataset	B. 3,200

All other information and requirements of the November 6, 2000, notice remain the same.

Dated: January 10, 2001.

Nancy E. Cheal,

Acting Associate Director for Policy, Planning and Evaluation, Centers for Disease Control and Prevention (CDC).

[FR Doc. 01–1296 Filed 1–16–01; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Advisory Committee; Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Public Law 92–463), announcement is made of the following National Advisory body scheduled to meet during the month of January 2001.

Name: Advisory Committee on Training in Primary Care Medicine and Dentistry

Date and Time: January 31, 2001; 8:30 a.m.–5:30 p.m.

Place: The Hilton Washington Embassy Row, 2015 Massachusetts Avenue, NW., Washington, D.C. 20036.

The meeting is open to the public.

Purpose: The Advisory Committee shall (1) provide advice and recommendations to the Secretary concerning policy and program development and other matters of significance concerning activities under section 747 of the Public Health Service Act; and (2) prepare and submit to the Secretary, the Committee on Health, Education, Labor and Pensions (formerly the Committee on Labor and Human Resources) of the Senate, and the Committee on Commerce of the House of Representatives a report describing the activities of the Advisory Committee, including findings and recommendations made by the Committee concerning the activities under section 747 of the PHS Act. The Advisory Committee will meet twice each year and submit its first report to the Secretary and the Congress by November 2001.

Agenda: Discussion of the focus of the programs and activities authorized under section 747 of the Public Health Service Act. Review of the work completed to date by the two workgroups will be reviewed. Funding issues and recommendations for the future will be addressed. There will be finalization of an outline and specific content areas to be included in the Committee's first report.

Anyone interested in obtaining a roster of members, minutes of the meeting, or other relevant information should write or contact Dr. Stan Bastacky, Deputy Executive Secretary, Advisory Committee on Training in Primary Care Medicine and Dentistry, Parklawn Building, Room 9A–21, 5600 Fishers Lane, Rockville, Maryland 20857, phone (301) 443–6326, e-mail sbastacky@hrsa.gov. The web address for the Advisory Committee is http://158.72.83.3/bhpr/dm/new__advisory__committee__on__primar.htm.

Dated: January 9, 2001.

Jane M. Harrison,

Director, Division of Policy Review and Coordination.

[FR Doc. 01–1248 Filed 1–16–01; 8:45 am]

BILLING CODE 4160–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer on (301) 443–7978.

Comments are invited on: (a) whether the proposed collections of information are 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 Project

Evaluation of the CMHS/CSAT Collaborative Program On Homeless Families: Women With Psychiatric, Substance Use, Or Co-Occurring Disorders and Their Dependent Children, Phase II—New—SAMHSA's Center for Mental Health Services (CMHS) and Center for Substance Abuse Treatment (CSAT), through a set of cooperative agreements, proposes to conduct a longitudinal, multi-site evaluation study assessing mental health, substance abuse, and trauma interventions received by homeless mothers with psychiatric, substance use, or co-occurring disorders and their dependent children. The study will advance knowledge on appropriate and effective approaches to improving families residential stability, overall functioning, and ultimate self-sufficiency.

Data collection will be conducted over a 33-month period. A total of 2,000 participants will be recruited from eight to ten sites. At each site, a documented treatment intervention will be tested in comparison to an alternative treatment condition. Participants will be interviewed at baseline (within two weeks of entering a program) as well as three additional times (3 months after program entry, 9 months after program entry, and 15 months after program entry). Trained interviewers will administer the interviews to participating mothers. Information on the children will be obtained from the mother.

Key outcomes for the mothers are increased residential stability, decreased substance use, decreased psychological distress, improved mental health functioning, increased trauma recovery, improved health, improved functioning as a parent, and decreased personal violence. Outcomes for the children are reduced emotional/behavioral problems and improved school attendance.

To reduce burden and increase uniformity across the study sites, a central Coordinating Center will develop and administer common data entry and tracking computer programs. A variety of quality control procedures will also be implemented to ensure the integrity and uniformity of the data collected. Data will be submitted to the Coordinating Center via electronic means. Training and technical assistance will be provided to all sites on data submission. Sites will be asked to follow uniform procedures for submitting their data.

The estimated response burden is as follows:

Interview	Number of respondents	Responses per respondent	Burden per response (hrs.)	Total burden horus
Baseline	2,000	1	1.58	3,160
Follow-Up 1 (3 months)	2,000	1	1.25	2,500
Follow-Up 2 (9 months)	2,000	1	1.25	2,500

Interview	Number of respondents	Responses per respondent	Burden per response (hrs.)	Total burden horus
Follow-Up 3 (15 months)	2,000	1	1.25	2,500
Total	2,000			10,660
3-yr annual average	2,000			3,553

Send comments to Nancy Pearce, SAMHSA Reports Clearance Officer, Room 16–105, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: January 10, 2001.

Richard Kopanda,

Executive Officer, SAMHSA.

[FR Doc. 01–1298 Filed 1–16–01; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a list of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (301) 443–7978.

State Prevention Needs Assessments: Alcohol and Other Drugs—(OMB No. 0930–0185, Extension)—SAMHSA's Center for Substance Abuse Prevention (CSAP) has awarded contracts to eight States in Cohorts III and IV of the State Prevention Needs Assessment Program to collect data to assess the nature and extent of substance abuse prevention services needs. The family of prevention needs assessment studies applies a core set of measures, instruments, and methodologies developed and standardized under prior State needs assessment state contracts. These needs assessment studies will permit cross-State comparison of risk and protection variables to assist State services planning and allocation of State Block Grant funds.

CSAP is seeking a one year extension of OMB approval for the Virginia student survey to allow the second administration of the student survey and for completion of the Hawaii Community Resource Assessment survey. The annual response burden for this extension is as follows:

Respondent	Number of respondents	Average number of responses/respondent	Average burden/response (hours)	Total burden hours
Currently approved:				
Student Survey	27,120	1	.75	20,340
Young Adult Surveys	5,870	1	.50	2,935
Community Resource Assessment Studies	851	1	10	851
Special Population Studies	1,800	1	.50	900
Current Total	35,641			25,026
Virginia Student Survey Continuation	3,400	1	.75	2,550
Hawaii Community Resource Assessment	190	1	1.00	190
New Total	3,590			2,740

Written comments and recommendations concerning the proposed information collection should be sent within 30 days of this notice to: Stuart Shapiro, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, D.C. 20503.

Dated: January 10, 2001.

Richard Kopanda,

Executive Officer, SAMHSA.

[FR Doc. 01–1299 Filed 1–16–01; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Endangered and Threatened Species Permit Application

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of application.

The following applicant has applied for a permit to conduct certain activities with endangered species. This notice is provided pursuant to section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531, *et seq.*).

Permit Number TE839777

Applicant: Don R. Helms, Bellevue, Iowa

The applicant requests a permit to take (capture, handle and release) the following federally listed unionid mussel species in Illinois, Indiana, Iowa, Kentucky, Minnesota, Missouri, Ohio, West Virginia, and Wisconsin: Fanshell (*Cyprogenia stegaria*), Fat pocketbook (*Potamilus capax*), Higgins' eye pearlymussel (*Lampsilis higginsi*), Scaleshell mussel (*Leptodea leptodon*), and Winged mapleleaf mussel (*Quadrula fragosa*), Clubshell (*Pleurobema clava*), Cracking pearlymussel (*Hemistena lata*),

Northern riffleshell (*Epioblasma torulosa rangiana*), Orange-footed pimpleback pearlymussel (*Plethobasus cooperianus*), Pink mucket pearlymussel (*Lampsilis orbiculata*), Ring pink mussel (*Obovaria retusa*), Rough pigtoe (*Pleurobema plenum*), Tubercled-blossom pearlymussel (*Epioblasma torulosa torulosa*), Purple cat's paw pearlymussel (*Epioblasma obliquata obliquata*), White cat's paw pearlymussel (*Epioblasma obliquata perobliqua*), and White wartyback pearlymussel (*Plethobasus cicatricosus*). The applicant requests the permit to collect the threatened and endangered mussel species in all areas located within the Upper Mississippi, Illinois, and Ohio River watersheds. Activities are proposed for studies to identify populations of listed mussel species, develop methods to minimize or avoid project related impacts to those populations, and to identify new populations of listed unionid species. The scientific research is aimed at enhancement of survival of the species in the wild.

Written data or comments should be submitted to the Regional Director, U.S. Fish and Wildlife Service, Ecological Services Operations, 1 Federal Drive, Fort Snelling, Minnesota 55111–4056, and must be received within 30 days of the date of this publication.

Documents and other information submitted with this application are available for review by any party who requests a copy of such documents from the following office within 30 days of the date of publication of this notice: U.S. Fish and Wildlife Service, Ecological Services Operations, 1 Federal Drive, Fort Snelling, Minnesota 55111–4056, peter—fasbender@fws.gov, telephone (612) 713–5343, or FAX (612) 713–5292.

Dated: January 8, 2001.

Charlie Wooley,

Assistant Regional Director, Ecological Services, Region 3, Fort Snelling, Minnesota.

[FR Doc. 01–1300 Filed 1–16–01; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Availability of an Environmental Assessment/Habitat Conservation Plan

Notice of availability of an environmental assessment/habitat conservation plan and receipt of an application for a permit for the incidental take of the Houston toad (*Bufo houstonensis*) during construction of one single-Family residence on approximately 0.5 acres of the 10.02-Acre property out of the Daniel M. Wisaman survey, abstract no. A–341, Bastrop County, Texas (Vasquez).

SUMMARY: Arturo and Yolanda Vasquez (Applicants) have applied to the U.S. Fish and Wildlife Service (Service) for an incidental take permit pursuant to section 10(a) of the Endangered Species Act (Act). The Applicants have been assigned permit number TE–037190–0. The requested permit, which is for a period of 5 years, would authorize the incidental take of the endangered Houston toad (*Bufo houstonensis*). The proposed take would occur as a result of the construction of one single-family residence on approximately 0.5 acres of the 10.02-acre property out of the Daniel M. Wisaman Survey, Abstract No. A–341, Bastrop County, Texas.

The Service has prepared the Environmental Assessment/Habitat Conservation Plan (EA/HCP) for the incidental take application. A determination of jeopardy to the species or a Finding of No Significant Impact (FONSI) will not be made until at least 30 days from the date of publication of this notice. This notice is provided pursuant to section 10(c) of the Act and National Environmental Policy Act regulations (40 CFR 1506.6).

DATES: Written comments on the application should be received on or before February 16, 2001.

ADDRESSES: Persons wishing to review the application may obtain a copy by writing to the Regional Director, U.S. Fish and Wildlife Service, P.O. Box 1306, Room 4102, Albuquerque, New Mexico, 87103. Persons wishing to review the EA/HCP may obtain a copy by contacting Tannika Engelhard, U.S. Fish and Wildlife Service, 10711 Burnet Road, Suite 200, Austin, Texas 78758 (512/490–0057, Ex. 242). Documents will be available for public inspection by written request, by appointment only, during normal business hours (8:00 to 4:30) at the U.S. Fish and Wildlife Service, Austin, Texas. Written data or comments concerning the application and EA/HCP should be submitted to the Supervisor, U.S. Fish and Wildlife Service, Austin, Texas, at the above address. Please refer to permit number TE–037190–0 when submitting comments.

FOR FURTHER INFORMATION CONTACT: Tannika Engelhard at the above U.S. Fish and Wildlife Service, Austin Office.

SUPPLEMENTARY INFORMATION: Section 9 of the Act prohibits the ''taking'' of endangered species such as the Houston toad. However, the Service, under limited circumstances, may issue permits to take endangered wildlife species incidental to, and not the purpose of, otherwise lawful activities. Regulations governing permits for endangered species are at 50 CFR 17.22.

Applicant: Arturo and Yolanda Vasquez plan to construct a single-family residence on approximately 0.5 acres of the 10.02-acre property out of the Daniel M. Wisaman Survey, Abstract No. A–341, Bastrop County, Texas. This action will eliminate 0.5 acres or less of Houston toad habitat and result in indirect impacts within the lot. The Applicants propose to compensate for this incidental take of the Houston toad by providing $2,000.00 to the National Fish and Wildlife Foundation for the specific purpose of land acquisition and management within Houston toad habitat, as identified by the Service.

Bryan Arroyo,

Acting Regional Director, Region 2, Albuquerque, New Mexico.

[FR Doc. 01–1301 Filed 1–16–01; 8:45 am]

BILLING CODE 4510–55–U

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Availability of an Environmental Assessment/Habitat Conservation Plan

Notice of availability of an environmental assessment/habitat conservation plan and receipt of an application for a permit for the incidental take of the Houston toad (*Bufo houstonensis*) during construction of one single-family residence on approximately 0.5 acres of the 15.245-acre property on McBride Lane, Bastrop County, Texas (Wirries).

SUMMARY: James and Bernice Wirries (Applicants) have applied to the U.S. Fish and Wildlife Service (Service) for an incidental take permit pursuant to section 10(a) of the Endangered Species Act (Act). The Applicants have been assigned permit number TE–037191–0. The requested permit, which is for a period of 7 years, would authorize the incidental take of the endangered Houston toad (*Bufo houstonensis*). The proposed take would occur as a result of the construction and occupation of one single-family residence on approximately 0.5 acres of the 15.245-acre property on McBride Lane, Bastrop County, Texas.

The Service has prepared the Environmental Assessment/Habitat Conservation Plan (EA/HCP) for the incidental take application. A

determination of jeopardy to the species or a Finding of No Significant Impact (FONSI) will not be made until at least 30 days from the date of publication of this notice. This notice is provided pursuant to section 10(c) of the Act and National Environmental Policy Act regulations (40 CFR 1506.6).

DATES: Written comments on the application should be received on or before February 16, 2001.

ADDRESSES: Persons wishing to review the application may obtain a copy by writing to the Regional Director, U.S. Fish and Wildlife Service, P.O. Box 1306, Room 4102, Albuquerque, New Mexico, 87103. Persons wishing to review the EA/HCP may obtain a copy by contacting Clayton Napier, U.S. Fish and Wildlife Service, 10711 Burnet Road, Suite 200, Austin, Texas, 78758 (512/490–0057). Documents will be available for public inspection by written request, by appointment only, during normal business hours (8:00 to 4:30) at the U.S. Fish and Wildlife Service, Austin, Texas. Written data or comments concerning the application and EA/HCP should be submitted to the Supervisor, U.S. Fish and Wildlife Service, Austin, Texas, at the above address. Please refer to permit number TE–037191–0 when submitting comments.

FOR FURTHER INFORMATION CONTACT: Clayton Napier at the above U.S. Fish and Wildlife Service, Austin Office.

SUPPLEMENTARY INFORMATION: Section 9 of the Act prohibits the ''taking'' of endangered species such as the Houston toad. However, the Service, under limited circumstances, may issue permits to take endangered wildlife species incidental to, and not the purpose of, otherwise lawful activities. Regulations governing permits for endangered species are at 50 CFR 17.22.

Applicants: James and Bernice Wirries plan to construct a single-family residence on approximately 0.5 acres of the 15.245-acre property on McBride Lane, Bastrop County, Texas. This action will eliminate 0.5 acres or less of Houston toad habitat and result in indirect impacts within the property. The Applicants propose to compensate for this incidental take of the Houston toad by providing $2,000.00 to the National Fish and Wildlife Foundation for the specific purpose of land acquisition and management within Houston toad habitat, as identified by the Service.

Bryan Arroyo,

Acting Regional Director, Region 2, Albuquerque, New Mexico.

[FR Doc. 01–1302 Filed 1–16–01; 8:45 am]

BILLING CODE 4510–55–U

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Availability of a Draft Environmental Assessment and Preliminary Finding of No Significant Impact, and Receipt of an Application for an Incidental Take Permit for Gopher Tortoises by the Board of Water and Sewer Commissioners of the City of Mobile, Mobile County, Alabama

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

The Board of Water and Sewer Commissioners of the City of Mobile (''Board'' or ''Applicant'') has requested an incidental take permit (ITP) pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973 (U.S.C. 1531 *et seq.*), as amended (Act). The Applicant anticipates taking the threatened gopher tortoise (*Gopherus polyphemus*) over the next 99 years. The proposed taking is incidental to the establishment of a conservation bank to mitigate take of up to 128 tortoises for residential, commercial and other development by private property owners throughout Mobile County. Under the proposed plan, the Board will sell mitigation credits to private landowners seeking incidental take of occupied gopher tortoise habitat in Mobile County. The private landowners will pay a mutually agreeable mitigation fee to the Board and allow for the relocation of the affected tortoises to the conservation bank. For each tortoise taken, private landowners will be required to cover costs associated with protecting, managing, and monitoring 1.5 acres of habitat at the conservation bank.

A more detailed description of the mitigation and minimization measures to address the effects of the Project to the gopher tortoise is provided in the Applicant's habitat conservation plan (HCP), the Service's draft Environmental Assessment (EA), and in the **SUPPLEMENTARY INFORMATION** section below.

The Service announces the availability of a draft EA and HCP for the incidental take application. Copies of the draft EA and/or HCP may be obtained by making a request to the Regional Office (see **ADDRESSES**). Requests must be in writing to be processed. This notice also advises the public that the Service has made a preliminary determination that issuing the ITP is not a major Federal action significantly affecting the quality of the human environment within the meaning of Section 102(2)(C) of the National Environmental Policy Act of 1969, as amended (NEPA). The preliminary Finding of No Significant Impact (FONSI) is based on information contained in the draft EA and HCP. The final determination will be made no sooner than 60 days from the date of this notice. This notice is provided pursuant to section 10 of the Act and NEPA regulations (40 CFR 1506.6).

The Service specifically requests information, views, and opinions from the public via this Notice on the federal action, including the identification of any other aspects of the human environment not already identified in the Service's draft EA. Further, the Service specifically solicits information regarding the adequacy of the HCP as measured against the Service's ITP issuance criteria found in 50 CFR Parts 13 and 17.

If you wish to comment, you may submit comments by any one of several methods. Please reference permit number TE035340–0 in such comments. You may mail comments to the Service's Regional Office (see **ADDRESSES**). You may also comment via the internet to ''david__dell@fws.gov''. Please submit comments over the internet as an ASCII file avoiding the use of special characters and any form of encryption. Please also include your name and return address in your internet message. If you do not receive a confirmation from the Service that we have received your internet message, contact us directly at either telephone number listed below (see **FURTHER INFORMATION**). Finally, you may hand deliver comments to either Service office listed below (see **ADDRESSES**). Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the administrative record. We will honor such requests to the extent allowable by law. There may also be other circumstances in which we would withhold from the administrative record a respondent's identity, as allowable by law. If you wish us to withhold your name and address, you must state this prominently at the beginning of your comments. We will not; however, consider anonymous comments. We

will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

DATES: Written comments on the ITP application, draft EA, and HCP should be sent to the Service's Regional Office (see **ADDRESSES**) and should be received on or before March 19, 2001.

ADDRESSES: Persons wishing to review the application, HCP, and EA may obtain a copy by writing the Service's Southeast Regional Office, Atlanta, Georgia. Documents will also be available for public inspection by appointment during normal business hours at the Regional Office, 1875 Century Boulevard, Suite 200, Atlanta, Georgia 30345 (Attn: Endangered Species Permits), or Field Supervisor, U.S. Fish and Wildlife Service, P. O. Drawer 1190, Daphne, Alabama 36526. Written data or comments concerning the application, or HCP should be submitted to the Regional Office. Please reference permit number TE035340–0 in requests of the documents discussed herein.

FOR FURTHER INFORMATION CONTACT: Mr. David Dell, Regional HCP Coordinator, (see **ADDRESSES** above), telephone: 404/679–7313, facsimile: 404/679–7081; or Ms. Barbara Allen, Fish and Wildlife Biologist, Daphne Field Office, Alabama (see **ADDRESSES** above), telephone: 334/441–5181.

SUPPLEMENTARY INFORMATION: The gopher tortoise was listed in 1987 as a threatened species in the western part of its geographic range, west of the Tombigbee and Mobile Rivers in Alabama, Mississippi and Louisiana. The gopher tortoise is a burrowing animal that historically inhabited fire-maintained longleaf pine communities on moderately well drained to xeric soils in the Coastal Plain. These longleaf pine communities consisted of relatively open fire-maintained forests, without a closed overstory, with a well developed herbaceous plant layer of grasses and forbs. About 80% of the original habitat for gopher tortoises was lost by the time the species was listed due to conversions to urban and agricultural land use. On remaining forests, management practices converting longleaf pine to densely planted pine stands for pulpwood production, fire exclusion, and infrequently prescribed fire further reduced the open forest with grasses and forbs that tortoises need for burrowing, nesting, and feeding. Over 19,000 gopher tortoises have been estimated to occur in the listed range. The tortoise, however, is a long-lived animal with low reproductive rates. Remaining populations, though relatively widespread, are individually small, fragmented, and usually in poor habitat without adequate reproduction for a self-sustaining viable population.

In Mobile County, Alabama, development and fragmentation of tortoise habitat are a significant threat to the remaining tortoise population of the project area. The Applicant proposes to establish a conservation bank on land owned by the Board to benefit the federally threatened gopher tortoise. This HCP provides a mechanism to address development threats to the tortoise, to provide private landowners in Mobile County with viable gopher tortoise mitigation alternatives, and to provide the Board with a financial incentive to manage its lands for the benefit of this species.

Under section 9 of the Act and its implementing regulations, ''taking'' of endangered and threatened wildlife is prohibited. However, the Service, under limited circumstances, may issue permits to take such wildlife if the taking is incidental to and not the purpose of otherwise lawful activities. The Applicant has prepared an HCP as required for the incidental take permit application.

Under this HCP, the Board is applying for a 10(a)(1)(B) permit which would then be extended to private landowners who have tortoises on their property through a Certificate of Inclusion. Those landowners would purchase mitigation credit(s) from the Board after review and approval by the Service. After allowing for the relocation of affected tortoises onto Board property, they would have authorization to develop their property. The 222-acre conservation bank site occurs on lands (over 7,000 acres in total) owned by the Board that are permanently protected from development and that surround Big Creek Land in western Mobile County. A significant proportion of the site contains mature longleaf pine forest on well-drained, sandy soils. The site is in need of management activities that restore more open, longleaf-pine canopy conditions, reduce hardwood encroachment, reduce invasive exotic species, and restore more natural fire regimes. In addition, the resident tortoise population is significantly depleted, thus requiring translocation of tortoises to the site in order to establish a viable population. Should conservation banking prove to be a viable strategy for the Board and conservation of the tortoise, the Board is open to considering devoting more of the remaining 7,000 acres to serve as a gopher tortoise conservation bank.

The EA considers the environmental consequences of 5 alternatives, including the proposed action and no-action alternatives. The proposed action alternative is the issuance of a permit under section 10(a) of the Act that would authorize incidental take of up to 128 gopher tortoises from private landowners who would be required to obtain a certificate of inclusion from the Board. The proposed action would require the Applicant to implement their Habitat Conservation Plan which requires that for each tortoise taken, 1.5 acres of longleaf pine habitat at the conservation bank is restored, protected, and managed for a period of 99 years. Under the no-action alternative, the Incidental Take Permit would not be issued. There will be no concerted effort to restore, enhance, or maintain longleaf pine forest at the conservation bank owned by the Board. There is no legal obligation under the ESA for private property owners to actively manage their property for the benefit of the gopher tortoise. In the absence of this proposed ITP, much of the occupied habitat in Mobile County will be lost to benign neglect as the canopy becomes too dense to support gopher tortoises. The third alternative is to offer financial incentives to protect existing gopher tortoise habitat on private lands. This would be a useful approach for those landowners with sizeable tracts of fire-maintained longleaf pine that contain occupied habitat or habitat that is readily restorable. For this reason, in part, the Service maintaines the ability to deny Certificates of Inclusion under this HCP when the agency deems that large tracts of occupied, suitable gopher tortoise habitat in Mobile County can and should be addressed through other appropriate means. The fourth alternative is to require on-site mitigation by issuing individual HCPs to landowners in Mobile county, requiring each to mitigate such take on the property where take occurs.

As stated above, the Service has made a preliminary determination that the issuance of the ITP is not a major Federal action significantly affecting the quality of the human environment within the meaning of section 102(2)(C) of NEPA. This preliminary information may be revised due to public comment received in response to this notice and is based on information contained in the draft EA and HCP.

The Service will also evaluate whether the issuance of a section 10(a)(1)(B) ITP complies with section 7 of the Act by conducting an intra-Service section 7 consultation. The

results of the biological opinion, in combination with the above findings, will be used in the final analysis to determine whether or not to issue the ITP.

Dated: January 9, 2001.

Sam D. Hamilton,

Regional Director.

[FR Doc. 01–1303 Filed 1–16–01; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Gaming

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Approved Tribal-State Compact.

SUMMARY: Pursuant to Section 11 of the Indian Gaming Regulatory Act of 1988 (IGRA), Pub. L. 100–497, 25 U.S.C. 2710, the Secretary of the Interior shall publish, in the **Federal Register**, notice of approved Tribal-State Compacts for the purpose of engaging in Class III gaming activities on Indian lands. The Assistant Secretary—Indian Affairs, Department of the Interior, through his delegated authority, has approved the Second Amendment between the Eastern Band of Cherokee Indians and the State of North Carolina, which was executed on November 14, 2000.

DATES: This action is effective January 17, 2001.

FOR FURTHER INFORMATION CONTACT: George T. Skibine, Director, Office of Indian Gaming Management, Bureau of Indian Affairs, Washington, DC 20240, (202) 219–4066.

Dated: December 28, 2000.

Kevin Gover,

Assistant Secretary—Indian Affairs.

[FR Doc. 01–1260 Filed 1–16–01; 8:45 am]

BILLING CODE 4310–02–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Gaming

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Approved Tribal-State Compact.

SUMMARY: Pursuant to Section 11 of the Indian Gaming Regulatory Act (IGRA), Pub. L. 100–497, 25 U.S.C. 2710, the Secretary of the Interior shall publish, in the **Federal Register**, notice of approved Tribal-State Compacts for the purpose of engaging in Class III gaming activities on Indian lands. The Assistant Secretary—Indian Affairs, Department of the Interior, through his delegated authority, has approved the Tribal-State Compact for Class III Gaming Between the Hoh Indian Tribe and the State of Washington, which was executed on May 25, 2000.

DATES: This action is effective January 17, 2001.

FOR FURTHER INFORMATION CONTACT: George T. Skibine, Director, Office of Indian Gaming Management, Bureau of Indian Affairs, Washington, DC 20240, (202) 219–4066.

Dated: December 22, 2000.

Kevin Gover,

Assistant Secretary—Indian Affairs.

[FR Doc. 01–1263 Filed 1–16–01; 8:45 am]

BILLING CODE 4310–02–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Gaming

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Approved Tribal-State Compact.

SUMMARY: Pursuant to Section 11 of the Indian Gaming Regulatory Act of 1988 (IGRA), Pub. L. 100–497, 25 U.S.C. 2710, the Secretary of the Interior shall publish, in the **Federal Register**, notice of approved Tribal-State Compacts for the purpose of engaging in Class III gaming activities on Indian lands. The Assistant Secretary—Indian Affairs, Department of the Interior, through his delegated authority, has approved the Gaming Compact between the Lower Brule Sioux Tribe and the State of South Dakota, which was executed on November 6, 2000.

DATES: This action is effective January 17, 2001.

FOR FURTHER INFORMATION CONTACT: George T. Skibine, Director, Office of Indian Gaming Management, Bureau of Indian Affairs, Washington, DC 20240, (202) 219–4066.

Dated: January 3, 2001.

Kevin Gover,

Assistant Secretary—Indian Affairs.

[FR Doc. 01–1261 Filed 1–16–01; 8:45 am]

BILLING CODE 4310–02–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Gaming

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Approved Tribal-State Compact Extension.

SUMMARY: Pursuant to Section 11 of the Indian Gaming Regulatory Act of 1988 (IGRA), Pub. L. 100–497, 25 U.S.C. 2710, the Secretary of the Interior shall publish, in the **Federal Register**, notice of approved Tribal-State Compacts for the purpose of engaging in Class III gaming activities on Indian lands. The Assistant Secretary—Indian Affairs, Department of the Interior, through his delegated authority, has approved the Tribal-State Compact Extension Between the Tunica-Biloxi Tribe of Louisiana and the State of Louisiana, which was executed on November 9, 2000.

DATES: This action is effective upon date of publication.

FOR FURTHER INFORMATION CONTACT: George T. Skibine, Director, Office of Indian Gaming Management, Bureau of Indian Affairs, Washington, DC 20240, (202) 219–4066.

Dated: December 27, 2000.

Kevin Gover,

Assistant Secretary—Indian Affairs.

[FR Doc. 01–1262 Filed 1–16–01; 8:45 am]

BILLING CODE 4310–02–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AK–962–1410–HY–P]

Notice for Publication; F–14870–A; Alaska Native Claims Selection

In accordance with Departmental regulation 43 CFR 2650.7(d), notice is hereby given that a decision to issue conveyance under the provisions of section 14(a) of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. 1613(a), will be issued to Kaktovik Inupiat Corporation for 60,000 square feet (1.3774 acres). The lands, located within T. 9 N., R. 34 E., Umiat Meridian, Alaska, are more particularly described as: Lot 6, Block 1, U.S. Survey No. 4234, Townsite of Kaktovik, Alaska.

Notice of the decision will be published once a week, for four (4) consecutive weeks, in the *Arctic Sounder*. Copies of the decision may be obtained by contacting the Alaska State Office of the Bureau of Land

Management, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7599 ((907) 271–5960).

Any party claiming a property interest which is adversely affected by the decision, an agency of the Federal government or regional corporation, shall have until February 16, 2001 to file an appeal. However, parties receiving service by certified mail shall have 30 days from the date of receipt to file an appeal. Appeals must be filed in the Bureau of Land Management at the address identified above, where the requirements for filing an appeal may be obtained. Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4, subpart E, shall be deemed to have waived their rights.

Ronald E. Royer,

Land Law Examiner, Branch of ANCSA Adjudication.

[FR Doc. 01–1304 Filed 1–16–01; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–029–1610–DH CBMP]

Extension of Scoping Period, Montana

AGENCY: Bureau of Land Management, Miles City and Billings Field Offices, Interior.

ACTION: Notice.

SUMMARY: The BLM issued a Notice of Intent to Plan in a December 19, 2000 **Federal Register** notice. This notice is to inform the public that the scoping period has been extended to January 31, 2001.

BLM is preparing an Oil and Gas Resource Management Plan (RMP) Amendment and Environmental Impact Statement (EIS) jointly with the State of Montana (State). The planning area for the BLM will be the BLM-administered oil and gas estate within the Powder River and Billings RMP areas. The planning area for the State will be potential coal bed methane development areas around the state. The RMP Amendment will be based on the existing statutory requirements and will meet the requirements of the Federal Land Policy and Management Act (FLPMA) of 1976. The RMP Amendment will guide BLM's oil and gas decisions within the Powder River and Billings RMP areas and help the State evaluate effects of further oil and gas permit applications. The Draft EIS and RMP Amendment is scheduled for completion by September 2001. The Final EIS and Proposed RMP Amendment is scheduled for March 2002.

The public has been asked to help BLM and the State identify issues, concerns and alternatives. Draft Planning Criteria to help guide the effort have also been developed for public comment.

DATES: Any issues, concerns, or alternatives should be submitted to BLM on or before January 31, 2001.

ADDRESSES: All submissions should be sent to the following address: BLM, Mary Bloom, BLM Project Leader, 111 Garryowen Road, Miles City, Montana, 59301.

FOR FURTHER INFORMATION CONTACT: Mary Bloom, BLM Project Leader, (406) 233–3649.

SUPPLEMENTARY INFORMATION: Supplementary information is described in **Federal Register** Notice of Intent to Plan dated December 19, 2000, Volume 65, Number 244, pages 79422–79423.

The BLM and the State are seeking information from individuals, organizations, and agencies that may be affected by the plan. Specifically, we request any issues, concerns or alternatives that should be addressed in the plan amendment.

This notice meets the requirements of 40 CFR 1501.7 and 43 CFR 1610.2(c).

Dated: January 3, 2001.

Aden L. Seidlitz,

Associate Field Manager.

[FR Doc. 01–1355 Filed 1–16–01; 8:45 am]

BILLING CODE 4310–DN–P

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before January 6, 2001. Pursuant to section 60.13 of 36 CFR part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, 1849 C St. NW, NC400, Washington, DC 20240. Written comments should be submitted by February 1, 2001.

Carol D. Shull,

Keeper of the National Register.

ALASKA

Anchorage Borough-Census Area

Gill, Oscar, House, 1344 W. 10th Ave., Anchorage, 01000022

Kenai Peninsula Borough-Census Area

Thorn—Stingley House, 1660 E. End Rd., Homer, 01000023

Southeast Fairbanks Borough-Census Area

Rapids Roadhouse, Mile 227.4 Richardson Hwy., Delta, 01000021

Valdez-Cordova Borough-Census Area

Gakona Historic District, Mile 2, Tok Cutoff—Glenn Hwy, Gakona, 01000024

CALIFORNIA

Alameda County

Horner, William, House, 3101 Driscoll Rd., Fremont, 01000026

San Bernardino County

Atchison, Topeka and Santa Fe Railway Passenger and Freight Depot, 1170 W. 3rd St., San Bernardino, 01000025

San Diego County

Lindstrom House, 4669 E. Talmadge Dr., San Diego, 01000027

San Francisco County

Coffin—Redington Building, 301 Folsom St. and 300 Beale St., San Francisco, 01000028

COLORADO

Denver County

Midland Savings Building, 444 17th St., Denver, 01000030

Ray Apartments Buildings, 1550 and 1560 Ogden St., Denver, 01000029

Jefferson County

Bradford House II, N of Killdeer Ln., Littleton, 01000031

Park County

Colorado Salt Works, 3858 US 285, Hartsel, 01000033

Salt Works Ranch,

(Ranching Resources of South Park, Colorado) 3858 US 285, Hartsel, 01000032

FLORIDA

Alachua County

Waldo Historic District, Roughly bounded by NW 1st Ave., Main St., SW 5th Blvd., and SW 4th St., Waldo, 01000034

GEORGIA

Chatham County

Bonaventure Cemetery, Bonaventure Rd., 1 mi. N of US 80, Savannah, 01000035

MISSOURI

St. Louis Independent city

City Hospital Historic District, Roughly bounded by Lafayette Ave., Grattan St.,

Carroll St., Dillon St., St. Ange St., 14th St., and Carroll St., St. Louis (Independent City), 01000036

MONTANA

Flathead County

Lincoln Creek Snowshoe Cabin, (Glacier National Park MPS) US 2, Glacier National Park, W. Glacier, 01000037

Powell County

Charter Oak Miner and Mill, Forest Rd. 227 B–1, Helena National Forest, USDA Forest Service, Elliston, 01000038

NEW JERSEY

Atlantic County

St. Nicholas of Tolentine Church, 1409 Pacific Ave., Atlantic City, 01000039

Burlington County

Red Dragon Canoe Club, 221 Edgewater Ave., Edgewater Park, 01000041

Salem County

Lawson, James and Mary, House, 209 N. Main St., Woodstown Borough, 01000042

NEW YORK

Broome County

Johnson City Square Deal Arch, Main St., W of Floral Ave., Johnson City, 01000044

Clinton County

Peru Community Church, 12 Elm St., Peru, 01000054

Erie County

Trico Plant #1, 817 Washinton St., Buffalo, 01000053

Oswego County

Mount Adnah Cemetery, 706 East Broadway, Fulton, 01000046

Sullivan County

Rialto Theatre, Broadway, Monticello, 01000043

Ulster County

Ulster Heights Synagogue, Ulter Heights Rd. and Beaver Dam Rd., Ulster Heights, 01000045

NORTH CAROLINA

Washington County

Garrett's Island House, 1445 Garrett's Island Rd., Plymouth, 01000047

OHIO

Butler County

Notre Dame Academy and Notre Dame High School, 926 Second St., Hamilton, 01000048

Clark County

Thomas Manufacturing Company Warehouse, 360 S. Limestone St., Springfield, 01000055

Cuyahoga County

Kundtz, Theodor, Company Building, 2249 Elm St., Cleveland, 01000051

Montgomery County

East Third Street Historic District, (Webster Station Area, Dayton, Ohio MPS) 424–520 East Third St. (S side only), Dayton, 01000049

McCormick Manufacturing Company Building, (Webster Station Area, Dayton, Ohio MPS) 434–438 E. First St., Dayton, 01000050

Scioto County

Anderson Brothers Department Store, (Boneyfiddle MRA) 301–307 Chillicothe St., Portsmouth, 01000052

Stark County

Clearview Golf Club, 8410 Lincoln St. SE, East Canton, 01000056

PENNSYLVANIA

Chester County

White Horse Historic District, Jct. of Goshen and Providence Rds., Willistown Township, 01000058

Lancaster County

Columbia Wagon Works, 920 Plane St., Columbia Borough, 01000057

Schuylkill County

Tamaqua Historic District, Roughly bounded by the Odd Fellows Cemetery, Rowe & Mauch Sts., East End Ave., Mountain Ave., and West Cottage Ave., Tamaqua, 01000059

TEXAS

Atascosa County

Lyons, Frederick and Sallie, House, 801 Live Oak St., Pleasanton, 01000061

Polk County

Polk County Courthouse and 1905 Courthouse Annex, Washington at Church St., Livingston, 01000060

VIRGINIA

Richmond Independent city

Tuckahoe Apartments, 5621 Cary Street Rd., Richmond (Independent City), 01000065

WASHINGTON

Spokane County

City of Cheney, Roughly bounded by Fifth St., C St., Front St., and F St., Cheney, 01000062

Millwood Historic District, Roughly bounded by Argonne and Sargent Rds., and by Euclid and Liberty Aves., Millwood, 01000064

Whatcom County

Sehome Hill Historic District, Portions of Jersey, Key, Liberty, Mason, Newell, E. Myrtle, E. Laurel, and E. Maple Sts., Sehome, 01000063

WEST VIRGINIA

Mason County

Maplewood, 1951 US 35, Pliny, 01000066

A Request for REMOVAL for Procedural Error has been made for the following resource:

COLORADO

El Paso County

North End Historic District, Roughly bounded by Monument Valley Wood, Nevada Ave., Madison and Unitah Sts., Colorado Springs, 82001017

[FR Doc. 01–1327 Filed 1–16–01; 8:45 am]

BILLING CODE 4310–70–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

Agency Information Collection Activities: Proposed Collection; Comment Request

ACTION: Extension of Existing Collection: Summary of Sentenced Population Movement Annual Data Collection National Prisoner Statistics.

Office of Management and Budget approval is being sought for the information collection listed below. This proposed collection was previously published in the **Federal Register** on October 19, 2000, Vol. 65, page 62751, allowing for a 60-day public comment period.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted for ''thirty days'' until February 16, 2001. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points;

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

Overview of this Information Collection

(1) *Type of Information Collection:* Revision of a currently approved collection.

(2) *Title of the Form/Collection:* Summary of Sentenced Population Movement—National Prisoner Statistics.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* NPS–1. Bureau of Justice Statistics.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Federal, State, and Local or Tribal Government. The National Prisoner Statistics—1 form is the only national source of information on the number of persons under jurisdiction or in custody at midyear and yearend; the number and type of admissions and releases; the number of inmate deaths by cause; counts by sex, race and Hispanic origin; number of inmates with HIV/AIDS, and prison capacity and jail backups due to crowding.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* the estimated total number of respondents is 52.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The estimated total number of annual burden hours for this collection is 338.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instruction, or additional information, please contact Ms. Brenda E. Dyer, Deputy Clearance Officer, United States Department of Justice, Information Management and Security Staff, Justice Management Division, Suite 1220, 1331 Pennsylvania Ave. NW, National Place Building, Washington, DC 20530.

Dated: January 10, 2001.

Brenda E. Dyer,

Department Deputy Clearance Officer, United States Department of Justice.

[FR Doc. 01–1309 Filed 1–16–01; 8:45 am]

BILLING CODE 4410–18–M

DEPARTMENT OF JUSTICE

Office of Justice Programs

Bureau of Justice Statistics; Agency Information Collection Activities: Extension of a Currently Approved Collection; Comment Request

ACTION: Notice of Information Collection; Extension of a currently approved collection; Capital punishment report of inmates under sentence of death.

The Department of Justice, Bureau of Justice Statistics has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. Office of Management and Budget (OMB) approval is being sought for the information collection listed below. This proposed information collection was previously published in the **Federal Register** on October 19, 2000, at 65 FR 62752–62753, allowing for a 60-day public comment period on this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted for ''thirty days'' until February 16, 2001. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attn.: Department of Justice Desk Officer, Office of Management and Budget, Washington, DC 20530. Additionally, comments may be submitted to OMB via facsimile to 202–395–7285.

If you have additional comments, suggestions, or additional information, please write Jan M. Chaiken, Director, Bureau of Justice Statistics, 810 Seventh St. NW, Washington, DC 20531. If you need a copy of the collection instrument with instructions, or have additional information, please contact Tracy L. Snell at 202–616–3288, or via facsimile at 202–514–1757.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

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

(2) evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

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

(4) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g. permitting electronic submission of responses.

Overview of this Information Collection

(1) *Type of information collection*: Extension of a currently approved collection.

(2) *The title of the Form/Collection*: Capital Punishment Report of Inmates Under Sentence of Death.

(3) *The agency form number and the applicable component of the Department sponsoring the collection. Form*: NPS–8 Report of Inmates Under Sentence of Death; NPS–8A Update Report of Inmates Under Sentence of Death; NPS–8B Status of Death Penalty—No Statute in Force; and NPS–8C Status of Death Penalty—Statute in Force. Corrections Unit, Bureau of Justice Statistics, Office of Justice Programs, United States Department of Justice.

(4) *Affected public who will be asked to respond, as well as a brief abstract:* Primary: State Departments of Corrections and Attorneys General. Others: The Federal Bureau of Prisons. Approximately 104 respondents (two from each State, the District of Columbia, and the Federal Bureau of Prisons) responsible for keeping records on inmates under sentence of death in their jurisdiction and in their custody will be asked to provide information for the following categories: condemned inmates' demographic characteristics, legal status at the time of capital offense, capital offense for which imprisoned, number of death sentences imposed, criminal history information, reason for removal and current status if no longer under sentence of death, method of execution, and cause of death by other than by execution. The Bureau of Justice Statistics uses this information in published reports and for the U.S. Congress, Executive Office of the President, State officials, international organizations, researchers, students, the media, and others interested in criminal justice statistics.

(5) *An estimate of the total number of responses and the amount of time estimated for an average response:* 292 responses at 30 minutes each for the NPS–8; 3,452 responses at 30 minutes each for the NPS–8A; and 52 responses at 15 minutes each for the NPS–8B or NPS–8C. The 44 respondents for the NPS–8/8A and the 52 respondents for NPS–8B/8C totals 96 respondents for this data collection.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 1,885 annual burden hours.

If additional information is required contact: Ms. Brenda E. Dyer, Deputy Clearance Officer, United States Department of Justice, Information Management and Security Staff, Justice Management Division, Suite 1220, National Place Building, 1331 Pennsylvania Ave. NW, Washington, DC 20530.

Dated: January 10, 2001.

Brenda E. Dyer,

Department Deputy Clearance Officer, United States Department of Justice.

[FR Doc. 01–1310 Filed 1–16–01; 8:45 am]

BILLING CODE 4410–18–M

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 2001–01; Exemption Application Nos. D–10713, D–10714, D–10715, D–10716, and D–10717 et al.]

Grant of Individual Exemptions; General Motors Hourly-Rate Employees Pension Plan; General Motors Retirement Program for Salaried Employees; Saturn Individual Retirement Plan for Represented Team Members; Saturn Personal Choices Retirement Plan for Non-Represented Team Members; Employees' Retirement Plan for GMAC Mortgage Group; Delphi Hourly-Rate Employees Pension Plan; and Delphi Retirement Program for Salaried Employees (Collectively, the Plans)

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Grant of Individual Exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Notices were published in the **Federal Register** of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, D.C. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of proposed exemption were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemptions are administratively feasible;

(b) They are in the interests of the plans and their participants and beneficiaries; and

(c) They are protective of the rights of the participants and beneficiaries of the plans.

General Motors Hourly-Rate Employees Pension Plan; General Motors Retirement Program for Salaried Employees; Saturn Individual Retirement Plan for Represented Team Members; Saturn Personal Choices Retirement Plan for Non-Represented Team Members; Employees' Retirement Plan for GMAC Mortgage Group; Delphi Hourly-Rate Employees Pension Plan; and Delphi Retirement Program for Salaried Employees (Collectively, the Plans) Located in New York, New York

[Prohibited Transaction Exemption 2001–01; Exemption Application Nos. D–10713; D–10714; D–10715; D–10716; and D–10717]

Exemption

The restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to (1) the past and continuing lease (the Lease) by the Plans to CB Richard Ellis, Inc. (CB Richard Ellis), a party in interest with respect to the Plans, of commercial space in a certain office building; and (2) the exercise, by CB Richard Ellis, of an option to renew the Lease for one additional term, provided that the following conditions are met:

(a) All the terms and conditions of the Lease, including those providing CB Richard Ellis with an option to renew the Lease, are at least as favorable to the Plans as terms and conditions the Plans could have obtained in an arm's length transaction with an unrelated party;

(b) The interests of the Plans for all purposes under the Lease, including any renewal thereof, are represented by a qualified, independent fiduciary;

(c) The rent paid by CB Richard Ellis under the Lease, including any renewal thereof, is, at all times, no less than the fair market rental value of the leased space; and

(d) The independent fiduciary monitors the Lease, and any renewal thereof, on behalf of the Plans, and takes whatever actions necessary to safeguard the interests of the Plans and their participants and beneficiaries.

EFFECTIVE DATE: This exemption is effective as of December 17, 1998, the date on which CB Richard Ellis entered into the Lease.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption (the Notice) published on October 19, 2000 at 65 FR 62761.

Notice to Interested Persons: The applicant was unable to notify interested persons within the time period specified in the Notice. However, the applicant stated that interested persons, including the appropriate fiduciaries of the Plans, were notified in the manner and time agreed to by the Department, by November 18, 2000. Interested persons were informed that they had 30 days to submit any written comments regarding the Notice to the Department. No written comments were received by the Department.

FOR FURTHER INFORMATION CONTACT: Ms. Karin Weng of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

Care Services Employees' 401(k) Profit Sharing Plan and Trust (the Plan) Located in Beachwood, OH

[Prohibited Transaction Exemption 2001–02; Exemption Application No. D–10771]

Exemption

The restrictions of sections 406(a) and 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the (1) cash sale by the Plan, occurring on December 30, 1997, of certain assets (the Assets), to Mr. Warren L. Wolfson, a party in interest with respect to the Plan; and (2) the prospective cash resale of the Assets by the Plan to Mr. Wolfson.

This exemption is subject to the following conditions:

(a) Each sale of the Assets was or will be a one-time transaction for cash.

(b) The Plan received or will receive no less than the fair market value of the Assets at the time of each sale.

(c) The sales price for each Asset was determined or will be determined by a qualified, independent appraiser at the time of each sale transaction.

(d) The terms of the past and prospective sales transactions were or will be no less favorable to the Plan than those obtainable in similar transactions negotiated at arm's length with unrelated parties.

(e) The Plan did not incur any fees or commissions in connection with the past sale of the Assets nor will it incur any fees or commissions expenses with respect to the prospective sale of such Assets.

(f) Within 60 days of the publication, in the **Federal Register**, of the notice granting this proposed exemption, Mr. Wolfson will file a Form 5330 with the Internal Revenue Service and pay all appropriate excise taxes that may be due and owing with respect to prohibited transactions arising in connection with certain of the Assets.

EFFECTIVE DATE: This exemption is effective as of December 30, 1997 with respect to the initial sale of the Assets by the Plan to Mr. Wolfson. In addition, this exemption is effective as of the date of the grant with respect to the resale of the Assets by the Plan to Mr. Wolfson.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on October 31, 2000 at 65 FR 65011.

FOR FURTHER INFORMATION CONTACT: Ms. Jan D. Broady, Department of Labor, telephone (202) 219–8881. (This is not a toll-free number.)

IRAs for Eldon Nysether and Mark Nysether (the IRAs) Located in Seattle, Washington

[Prohibited Transaction Exemption 2001–03; Exemption Application Nos. D–10901 and D–10902]

Exemption

The sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed sale by the IRAs of their interests in certain improved real property (the Property) to Sea-Land Development Corporation, a disqualified person with respect to the IRAs,[1] provided that the following conditions are satisfied: (1) The sale is a one-time transaction for cash; (2) the IRAs pay no commissions nor other expenses relating to the sale; and (3) the sale price received by the IRAs equals the Property's fair market value, as of the date of the sale, as established by a qualified, independent appraiser.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on December 6, 2000 at 65 FR 76292.

FOR FURTHER INFORMATION CONTACT: Ms. Karin Weng of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemptions does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application accurately describes all material terms of the transaction which is the subject of the exemption.

[1] Pursuant to 29 CFR 2510.3–2(d), the IRAs are not within the jurisdiction of Title I of the Act. However, there is jurisdiction under Title II of the Act, pursuant to section 4975 of the Code.

Signed at Washington, D.C., this 10th day of January, 2001.

Ivan Strasfeld,

Director of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 01–1196 Filed 1–16–01; 8:45 am]

BILLING CODE 4510–29–P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Sunshine Act Meeting

January 10, 2001.

TIME AND DATE: 2:00 p.m., Wednesday, January 10, 2001.

PLACE: Room 6005, 6th Floor, 1730 K Street, NW., Washington, DC.

STATUS: Closed [Pursuant to 5 U.S.C. 552b(c)(10)].

MATTERS TO BE CONSIDERED: It was determined by a unanimous consent vote of the Commission that the Commission consider and act upon the following in closed session:

1. Disciplinary Matter, Docket No. D 2000–1.

2. Disciplinary Matter, Docket No. D 2001–1.

No earlier announcement of the meeting was possible.

CONTACT PERSON FOR FURTHER INFORMATION: Jean Ellen (202) 653–5629/(202) 708–9300 for TDD Relay/1–800–877–8339 for toll free.

Jean H. Ellen,

Chief Docket Clerk.

[FR Doc. 01–1482 Filed 1–12–01; 12:40 pm]

BILLING CODE 6735–01–M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 01–005]

Aerospace Safety Advisory Panel (ASAP); Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Pub. L. 92–463, as amended, the National Aeronautics and Space Administration announces a forthcoming meeting of the Aerospace Safety Advisory Panel.

DATES: Thursday, February 8, 2001, 1:00 p.m. to 2:30 p.m.

ADDRESSES: National Aeronautics and Space Administration, 300 E Street, SW., Room 9H40, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Mr. David M. Lengyel, Aerospace Safety Advisory Panel Executive Director, Code Q–1, National Aeronautics and Space Administration, Washington, DC 20546, 202/358–0391, if you plan to attend.

SUPPLEMENTARY INFORMATION: The Aerospace Safety Advisory Panel will present its annual report to the National Aeronautics and Space Administration Administrator. This is pursuant to carrying out its statutory duties for which the Panel reviews, identifies, evaluates, and advises on those program activities, systems, procedures, and management activities that can contribute to program risk. Priority is given to those programs that involve the safety of human flight. The major subjects covered will be the National Space Transportation System, International Space Station, Aeronautical Operations, and Workforce Issues. The Aerospace Safety Advisory Panel is chaired by Mr. Richard D. Blomberg and is composed of nine members and eight consultants. The meeting will be open to the public up to the capacity of the room (approximately 60 persons including members of the Panel).

Dated: January 11, 2001.

Beth M. McCormick,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 01–1307 Filed 1–16–01; 8:45 am]

BILLING CODE 7510–01–U

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 01–003]

5th Digital Earth Community Meeting

AGENCY: National Aeronautics and Space Administration (Lead Agency).

ACTION: Notice of meeting.

SUMMARY: The Federal Interagency Digital Earth Working Group will hold the 5th Digital Earth Community Meeting that will focus on accomplishments thus far, and the future of Digital Earth. The intent of this meeting is to continue the efforts of enabling and facilitating the evolution of Digital Earth, a digital representation of the planet that will allow people to access and apply geo-spatial data from multiple resources. Federal, state, and local government along with private industry, academia and others will participate in presentations, workshops and panel discussions. Together we will educate and empower each other to continue to develop the Digital Earth environment.

DATES: Wednesday, January 31, 2001 from 8:00 AM to 5:00 PM. Registration beginning at 7:30 AM.

ADDRESSES: Capitol Union Building, Penn State University at Harrisburg, 777 W. Harrisburg Pike, Middletown, PA 17057.

FOR FURTHER INFORMATION CONTACT: To register for the meeting, please contact PSU Continuing Education at 717–948–6505 or e-mail: pshceweb@psu.edu. If you would like to be present at this meeting, please contact Dr. Todd Bacastow at 814–863–0049 or e-mail bacastow@psu.edu. The deadline for registration is Wednesday, January 24, 2001. This is an outreach service of the College of Earth and Mineral Sciences.

SUPPLEMENTARY INFORMATION:

Format: The one day session will concentrate on presentations, workshops, and panel discussions. The status of The National Digital Earth Initiative, What is Digital Earth and Its Community, Using Digital Earth Guidelines, Developing Applications, Involving Students, and Data Accessibility will all be discussed. Upcoming conferences, organizational committees and collaborative efforts will be addressed as well. There will be space available for personal demonstrations—and discussions throughout the day. Although the meeting is open to all interested parties, time availability for presentations and demonstrations is limited and will be allocated on a first come basis. All interested parties must contact Dr. Todd Bacastow by January 17, 2001.

Web Information: Additional details on the Community Meeting will be posted to *www.digitalearth.gov* in the near future.

Dated: January 2, 2001.

Thomas S. Taylor,

NASA Digital Earth Program Manager.

[FR Doc. 01–786 Filed 1–16–01; 8:45 am]

BILLING CODE 7510–01–P

NATIONAL CREDIT UNION ADMINISTRATION

Notice of Meetings

TIME AND DATE: 10:00 a.m., Thursday, January 18, 2001

PLACE: Board Room, 7th Floor, Room 7047, 1775 Duke Street, Alexandria, VA 22314–3428

STATUS: Open.

MATTTERS TO BE CONSIDERED:

1. Request from a Federal Credit Union to Convert to a Community Charter.
2. Washington Member Business Loan Rule.
3. Request from a Corporate Credit Union for a Waiver under Part 704, NCUA's Rules and Regulations.
4. Final Rule: Amendments to Part 748, NCUA's Rules and Regulations, Guidelines for Safeguarding Member Information.

RECESS: 11:15 a.m.

TIME AND DATE: 11:30 a.m., Thursday, January 18, 2001

PLACE: Board Room, 7th Floor, Room 7047, 1775 Duke Street, Alexandria, VA 22314–3428

STATUS: Closed.

MATTER TO BE CONSIDERED:

1. One (1) Personnel Matter. Closed pursuant to exemptions (2) and (6).

FOR FURTHER INFORMATION CONTACT: Becky Baker, Secretary of the Board, Telephone 703–518–6304.

Becky Baker,

Secretary of the Board.

[FR Doc. 01–1414 Filed 1–11–01; 4:58 pm]

BILLING CODE 7535–01–M

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–277 and 50–278]

In the Matter of PECO Energy Company, PSEG Nuclear LLC, Delmarva Power and Light Company, Atlantic City Electric Company (Peach Bottom Atomic Power Station, Units 2 and 3); Order Approving Transfer of Licenses and Conforming Amendments

I

PECO Energy Company (PECO), PSEG Nuclear LLC, Delmarva Power and Light Company (DP&L), and Atlantic City Electric Company (ACE) are the joint owners of the Peach Bottom Atomic Power Station, Units 2 and 3 (Peach Bottom), located in York County, Pennsylvania. They hold Facility Operating Licenses Nos. DPR–44 and DPR–56 issued by the U.S. Nuclear Regulatory Commission (NRC or Commission) on October 25, 1973, and July 2, 1974, respectively, pursuant to Part 50 of Title 10 of the Code of Federal Regulations (10 CFR Part 50). Under these licenses, PECO (currently owner of 42.49 percent of each Peach Bottom unit) is authorized to possess, use, and operate the Peach Bottom units. The current nonoperating ownership interests of the other joint owners for

each Peach Bottom unit are as follows: PSEG Nuclear LLC, 42.49 percent; DP&L, 7.51 percent; and ACE, 7.51 percent.

II

By an Order dated April 21, 2000, the NRC approved the transfer of the subject Peach Bottom licenses from DP&L and ACE to PECO and PSEG Nuclear LLC. Conforming license amendments were also approved. The April 21, 2000, Order was in response to an application dated December 21, 1999, as supplemented February 11, March 2, and March 16, 2000, and was based in part on the DP&L and ACE interests in the licenses and in the facility being transferred simultaneously, as well as the accumulated decommissioning funds of DP&L and ACE being transferred collectively to the decommissioning trusts of PECO and PSEG Nuclear LLC. The April 21, 2000, Order, with respect to the DP&L and ACE license transfers that were proposed to PECO, was issued in the context of PECO then existing as a stand-alone electric utility, and did not expressly approve the DP&L and ACE license transfers to PECO as it now exists as a subsidiary of Exelon Corporation. Further, the Order did not approve DP&L and ACE license transfers to Exelon Generation Company LLC (EGC), which is to be formed as an indirect subsidiary of Exelon Corporation. The NRC did, however, issue Orders dated August 3, 2000, and October 5, 2000, that respectively approved the direct transfer of the Peach Bottom licenses, to the extent now held by PECO, to EGC, and the indirect transfer of the Peach Bottom licenses, again to the extent now held by PECO, to Exelon Corporation (which indirect transfer occurred on October 20, 2000, by reason of PECO becoming at that time a wholly-owned subsidiary of Exelon Corporation).

By application dated October 10, 2000, PECO, PSEG Nuclear LLC, DP&L, and ACE requested approvals as necessary to allow the Peach Bottom licenses, to the extent now held by DP&L and ACE, to be transferred to PECO (as a subsidiary of Exelon Corporation), to EGC (whether the transferor(s) are DP&L, ACE, or PECO), and to PSEG Nuclear LLC, at two different times, namely, the DP&L transfers first, and the ACE transfers second, if at all. The October 10, 2000, application also requested that the NRC extend the effectiveness of the April 21, 2000, Order to December 31, 2001. No physical changes or changes in the management or operations of the Peach Bottom units are proposed in the application. The application also requested the approval of conforming license amendments to reflect the license transfers that are the subject of the application. The proposed amendments would delete references in the licenses to DP&L and ACE as licensees, as each respective interest is transferred, and add EGC to the licenses at the appropriate time.

Approval of the transfers encompassed by the October 10, 2000, application and conforming license amendments was requested pursuant to 10 CFR 50.80 and 50.90. A notice of the license transfer application and the conforming amendment request, and an opportunity for a hearing was published in the **Federal Register** on November 27, 2000 (65 FR 70740). No hearing requests or written comments were filed.

Pursuant to 10 CFR 50.80, no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission gives its consent in writing. After reviewing the information submitted in the October 10, 2000, application, the Orders referenced above dated April 21, August 3, and October 5, 2000, and the underlying applications and safety evaluations regarding those Orders, and other information before the Commission, the NRC staff has determined that PSEG Nuclear LLC is qualified to hold, in addition to the interests in the licenses it presently holds, (1) one-half of the interest in the Peach Bottom licenses now held by DP&L, and (2) one-half of the interest in the Peach Bottom licenses now held by ACE; that PECO, as it presently exists as a subsidiary of Exelon Corporation, is qualified to hold, in addition to the interests in the licenses it presently holds, (1) one-half of the interest in the Peach Bottom licenses now held by DP&L, and (2) one-half of the interest in the Peach Bottom licenses now held by ACE; and that EGC is qualified to hold, in addition to the interests in the licenses that it may hold by virtue of transfers from PECO previously and separately approved by the August 3, 2000, Order, (1) one-half of the interest in the Peach Bottom licenses now held by DP&L, which one-half interest may be first transferred to PECO and then to EGC or may be directly transferred to EGC from DP&L, and (2) one-half of the interest in the Peach Bottom licenses now held by ACE, which one-half interest may be first transferred to PECO and then to EGC or may be directly transferred to EGC from ACE; and that each transfer of the licenses, as described, is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission, subject to the conditions described herein. The NRC staff has further found that the application for the proposed license amendments complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations set forth in 10 CFR Chapter I; the facility will operate in conformity with the application, the provisions of the Act, and the rules and regulations of the Commission; there is reasonable assurance that the activities authorized by the proposed license amendments can be conducted without endangering the health and safety of the public and that such activities will be conducted in compliance with the Commission's regulations; the issuance of the proposed license amendments will not be inimical to the common defense and security or to the health and safety of the public; and the issuance of the proposed license amendments will be in accordance with 10 CFR Part 51 of the Commission's regulations and all applicable requirements have been satisfied. These findings are supported by a safety evaluation dated December 27, 2000.

III

Accordingly, pursuant to Sections 161b, 161i, and 184 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2201(b), 2201(i), and 2234; and 10 CFR 50.80, *It Is Hereby Ordered* that each license transfer described in Section II of this Order is approved, subject to the following conditions:

1. DP&L shall transfer to the PECO or EGC decommissioning trusts for Peach Bottom, as appropriate to the transferee, and to the PSEG Nuclear LLC decommissioning trusts for Peach Bottom at the time DP&L's interests in the Peach Bottom licenses are transferred to PECO or EGC and to PSEG Nuclear LLC, all of DP&L's accumulated decommissioning trust funds for Peach Bottom Units 2 and 3, divided equally between the PECO or EGC trusts, as appropriate to the transferee, and the PSEG Nuclear LLC trusts. Immediately following such transfer, the amounts in the PECO or EGC and PSEG Nuclear LLC decommissioning trusts combined with the additional payments from ACE that would be owed to PECO or EGC and to PSEG Nuclear LLC under the respective contractual commitments referenced in the application, which contractual commitments shall be in force and effect at the time of the transfer, and that in turn would be contributed to the respective decommissioning trusts as represented

in the application must, with respect to the interests in Peach Bottom Units 2 and 3 transferred from DP&L that PECO or EGC and PSEG Nuclear LLC would then hold, be at a level no less than the formula amounts under 10 CFR Section 50.75.

2. ACE shall transfer to the PECO or EGC decommissioning trusts for Peach Bottom, as appropriate to the transferee, and to the PSEG Nuclear LLC decommissioning trusts for Peach Bottom at the time ACE's interests in the Peach Bottom licenses are transferred to PECO or EGC and to PSEG Nuclear LLC, all of ACE's accumulated decommissioning trust funds for Peach Bottom Units 2 and 3. Immediately following such transfer, the amounts in the PECO or EGC and PSEG Nuclear LLC decommissioning trusts must, with respect to the interests in Peach Bottom Units 2 and 3 transferred from DP&L and ACE that PECO or EGC and PSEG Nuclear LLC would then hold, be at a level no less than the formula amounts under 10 CFR Section 50.75.

3. The decommissioning trust agreements for Peach Bottom Units 2 and 3, with respect to decommissioning trust funds held by EGC and PSEG Nuclear LLC shall provide or continue to provide essentially that:

a. The agreement must be in a form acceptable to the NRC.

b. Investments in the securities or other obligations of the respective parent of the respective licensee, i.e., EGC or PSEG Nuclear LLC, affiliates thereof, or their successors or assigns, shall be prohibited. In addition, except for investments tied to market indexes or other non-nuclear sector mutual funds, investments in any entity owning one or more nuclear power plants shall be prohibited.

c. No disbursements or payments from the trust, other than for ordinary administrative expenses, shall be made by the trustee until the trustee has first given the NRC 30 days prior written notice of the payment. In addition, no disbursements or payments from the trust shall be made if the trustee receives prior written notice of objection from the Director, Office of Nuclear Reactor Regulation.

d. The trust agreement shall not be modified in any material respect without prior written notification to the Director, Office of Nuclear Reactor Regulation.

e. The trustee, investment advisor, or anyone else directing the investments made in the trust shall adhere to a ''prudent investor'' standard, as specified in 18 CFR 35.32(a)(3) of the Federal Energy Regulatory Commission's regulations.

4. With respect to each transfer approved by this Order, after receipt of all required regulatory approvals, the relevant transferor and transferee shall inform the Director, Office of Nuclear Reactor Regulation, in writing of such receipt and of the date of closing of the transfer no later than 1 business day before the date of closing. If any transfer approved by this Order is not completed by December 31, 2001, this Order shall become null and void with respect to such transfer; provided, however, on application and for good cause shown, such date may be extended.

It Is Further Ordered that, consistent with 10 CFR 2.1315(b), license amendments that make changes, as indicated in Enclosure 2 to the cover letter forwarding this Order, to conform the Peach Bottom licenses to reflect the subject transfers are approved. Such amendments as appropriate to the particular license transfer occurring shall be issued and made effective at the time the proposed corresponding license transfer is completed.

It Is Further Ordered that to the extent the previous Order, issued April 21, 2000, related to the license transfers approved by this Order, is inconsistent with this Order, the April 21, 2000, Order is hereby superseded. Also, condition 2 of the April 21, 2000, Order is modified to supplement the reference to PECO with a reference to EGC in the alternative, as appropriate to the actual transferee. In addition, for good cause shown in the application, namely, the delay in receiving other necessary regulatory approvals, the approval of any concurrent transfer of one-half of the DP&L interests and one-half of the ACE interests in the Peach Bottom licenses to PSEG Nuclear LLC shall remain effective until December 31, 2001, under the applicable terms and conditions set forth in the April 21, 2000, Order.

This Order is effective upon issuance.

For further details with respect to this Order, see the application dated October 10, 2000, and the related safety evaluation issued with this Order. Also see the application dated December 21, 1999, and supplements thereto dated February 11, March 2, and March 16, 2000, and the Orders and related safety evaluations dated August 3, and October 5, 2000, pertaining to related Peach Bottom license transfers involving EGC and PECO, which may be examined, and/or copied for a fee, at the NRC's Public Document Room, located at One WhiteFlint North, 11555 Rockville Pike (first floor), Rockville, MD, and are accessible electronically through the ADAMS Public Electronic Reading Room link at the NRC Web site *http://www.nrc.gov.*

Dated at Rockville, Maryland, this 27th day of December 2000.

For the Nuclear Regulatory Commission.

Jacqueline E. Silber,

Acting Director, Office of Nuclear Reactor Regulation.

[FR Doc. 01–1364 Filed 1–16–01; 8:45 am]

BILLING CODE 7590–01–P

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS

Sunshine Act Meeting

Board Votes to Close January 10, 2001, Meeting

In person and by telephone on January 10, 2001, a majority of the Board of Governors of the United States Postal Service voted to close to public observation its meeting held in Washington, DC, via teleconference. The Board determined that prior public notice was not possible.

ITEM CONSIDERED:

1. Business Initiative.

PERSONS EXPECTED TO ATTEND:

Governors Ballard, Daniels, del Junco, Dyhrkopp, Fineman, Kessler, McWherter, Rider and Walsh; Postmaster General Henderson, Deputy Postmaster General Nolan, Secretary to the Board Hunter, and General Counsel Gibbons.

GENERAL COUNSEL CERTIFICATION: The General Counsel of the United States Postal Service has certified that the meeting was properly closed under the government in the Sunshine Act.

CONTACT PERSON FOR MORE INFORMATION:

Requests for information about the meeting should be addressed to the Secretary of the Board, David G. Hunter, at (202) 268–4800.

David G. Hunter,

Secretary.

[FR Doc. 01–1411 Filed 1–11–01; 4:58 pm]

BILLING CODE 7710–12–M

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act; Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94–409, that the Securities and Exchange Commission will hold the following meetings during the week of January 15, 2001.

A closed meeting will be held on Thursday, January 18, 2001, at 11:00 a.m.

Commissioner Hunt, as duty officer, determined that no earlier notice thereof was possible.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(4), (8), (9)(A) and (10) and 17 CFR 200.402(a)(4), (8), (9)(A) and (10), permit consideration of the scheduled matters at the closed meeting.

The subject matters of the closed meeting will be:

- Institution and settlement of injunctive actions; and
- Institution and settlement of administrative proceedings of an enforcement nature.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: the Office of the Secretary at (202) 942–7070.

Dated: January 12, 2001.

Jonathan G. Katz,

Secretary.

[FR Doc. 01–1470 Filed 1–12–01; 11:38 am]

BILLING CODE 8010–01–M

SMALL BUSINESS ADMINISTRATION

Reporting and Recordkeeping Requirements Under OMB Review

AGENCY: Small Business Administration.

ACTION: Notice of reporting requirements submitted for OMB review.

SUMMARY: Under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35), agencies are required to submit proposed reporting and recordkeeping requirements to OMB for review and approval, and to publish a notice in the **Federal Register** notifying the public that the agency has made such a submission.

DATES: Submit comments on or before February 16, 2001. If you intend to comment but cannot prepare comments promptly, please advise the OMB Reviewer and the Agency Clearance Officer before the deadline.

ADDRESSES: Address all comments concerning this notice to: *Agency Clearance Officer*, Jacqueline White, Small Business Administration, 409 3rd Street, SW., 5th Floor, Washington, DC 20416; and *OMB Reviewer*, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Jacqueline White, Agency Clearance Officer, (202) 205–7044.

Copies: Request for clearance (OMB 83–1), supporting statement, and other documents submitted to OMB for review may be obtained from the Agency Clearance Officer.

SUPPLEMENTARY INFORMATION:

Title: 8(a) SDB Applications.
No's: 1010, 1010B's and 1010C.
Frequency: On Occasion.
Description of Respondents: 8(A) Companies.
Annual Responses: 6,103.
Annual Burden: 21,460.

Jacqueline White,

Chief, Administrative Information Branch.

[FR Doc. 01–1322 Filed 1–16–01; 8:45 am]

BILLING CODE 8025–01–U

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3315]

State of Arkansas; Amendment #1

In accordance with a notice received from the Federal Emergency Management Agency, dated January 8, 2001, the above-numbered Declaration is hereby amended to establish the incident period for this disaster as beginning on December 12, 2000 and continuing through January 8, 2001.

All other information remains the same, i.e., the deadline for filing applications for physical damage is February 27, 2001 and for economic injury the deadline is October 1, 2001.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008.)

Dated: January 10, 2001.

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. 01–1325 Filed 1–16–01; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3316]

State of Oklahoma

As a result of the President's major disaster declaration on January 5, 2001, I find that the following Counties in the State of Oklahoma constitute a disaster area due to damages caused by a severe winter ice storm beginning on December 25, 2000 and continuing: Adair, Atoka, Bryan, Carter, Cherokee, Choctaw, Cleveland, Coal, Cotton, Creek, Garvin, Grady, Haskell, Hughes, Jefferson, Johnston, Latimer, LeFlore, Lincoln, Love, Marshall, McClain, McCurtain, McIntosh, Murray, Muskogee, Okfuskee, Oklahoma, Okmulgee, Pittsburg, Pontotoc, Pottawatomie, Pushmataha, Seminole, Sequoyah, Stephens, Tulsa, Wagoner and Washington Counties. Applications for loans for physical damage as a result of this disaster may be filed until the close of business on March 6, 2001, and for loans for economic injury until the close of business on October 5, 2001 at the address listed below or other locally announced locations: U.S. Small Business Administration, Disaster Area 3 Office, 4400 Amon Carter Blvd., Suite 102, Fort Worth, TX 76155.

In addition, applications for economic injury loans from small businesses located in the following contiguous counties may be filed until the specified date at the above location: Caddo, Canadian, Comanche, Delaware, Kingfisher, Logan, Mayes, Nowata, Osage, Pawnee, Payne, Rogers, and Tillman in Oklahoma; Benton, Crawford, Little River, Polk, Scott, Sebastian, Sevier and Washington in Arkansas; Chautauqua and Montgomery in Kansas; Bowie, Clay, Cooke, Fannin, Grayson, Lamar, Montague, Red River and Wichita in Texas.

The interest rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	7.000
Homeowners Without Credit Available Elsewhere	3.500
Businesses With Credit Available Elsewhere	8.000
Businesses and Non-Profit Organizations Without Credit Available Elsewhere	4.000
Others (Including Non-Profit Organizations) With Credit Available Elsewhere	7.000
For Economic Injury:	
Businesses and Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 331611. For economic injury the numbers are 9K3300 for Oklahoma, 9K3400 for Arkansas, 9K3500 for Kansas, and 9K3600 for Texas.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008.)

Dated: January 9, 2001.

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. 01–1324 Filed 1–16–01; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3317]

State of Texas

As a result of the President's major disaster declaration on January 8, 2001, I find that the following Counties in the State of Texas constitute a disaster area due to damages caused by a severe winter ice storm beginning on December 12, 2000 and continuing: Bowie, Cass and Red River Counties. Applications for loans for physical damage as a result of this disaster may be filed until the close of business on March 9, 2001, and for loans for economic injury until the close of business on October 9, 2001 at the address listed below or other locally announced locations: U.S. Small Business Administration, Disaster Area 3 Office, 4400 Amon Carter Blvd., Suite 102, Fort Worth, TX 76155.

In addition, applications for economic injury loans from small businesses located in the following contiguous counties may be filed until the specified date at the above location: Delta, Franklin, Hopkins, Lamar, Marion, Morris and Titus Counties in Texas; Caddo County in Louisiana; Choctaw and McCurtain Counties in Oklahoma.

The interest rates are:

	Percent
For Physical Damage:	
Homeowners with credit available elsewhere	7.000
Homeowners without credit available elsewhere	3.500
Businesses with credit available elsewhere	8.000
Businesses and non-profit organizations without credit available elsewhere	4.000
Others (including non-profit organizations) with credit available elsewhere	7.000
For Economic Injury:	
Businesses and small agricultural cooperatives without credit available elsewhere	4.000

The number assigned to this disaster for physical damage is 331711. For economic injury the numbers are 9K3700 for Texas, 9K3800 for Louisiana, 9K3900 for Oklahoma.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008.)

Dated: January 10, 2001.

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. 01–1323 Filed 1–16–01; 8:45 am]

BILLING CODE 8025–01–U

DEPARTMENT OF STATE

[Public Notice 3540]

Bureau of Educational and Cultural Affairs Request for Grant Proposals: Benjamin A. Gilman International Scholarship Program—International Academic Opportunity Act of 2000

SUMMARY: The Office of Global Educational Programs of the Bureau of Educational and Cultural Affairs announces an open competition for the Benjamin A. Gilman International Scholarship Program. Public and private non-profit organizations meeting the provisions described in IRS regulation 26 CFR 1.501(c) may submit proposals for the purpose of carrying out a scholarship program for academic study outside of the United States.

Program Information

This program establishes grants for U.S. citizen or national undergraduate students of limited financial means from the United States to enable such students to pursue academic studies abroad. Such foreign study is intended to better prepare U.S. students to assume significant roles in an increasingly global economy.

Overview

This program provides an assistance award not to exceed $1,500,000 for the purpose of issuing grants of up to $5,000 to individuals who meet the eligibility requirements listed below, toward the cost of up to one academic year of undergraduate study abroad. Subject to the availability of funding and to satisfactory performance of the awardee, this assistance award may be renewable for two subsequent fiscal years.

The Presidential Memorandum on International Education of April 19, 2000 directs the Department of State to support the efforts of schools and colleges to improve access to high-quality international educational experiences by increasing the number of diversity of students who study and intern abroad. In support of this Memorandum and pursuant to the authorizing legislation for the Benjamin A. Gilman International Scholarship Program, this program is intended to broaden the student population that participates in study outside the U.S. by focusing on those students who might not otherwise study abroad due to financial constraints.

The Presidential Memorandum also directs the Department to encourage students and institutions to choose nontraditional study-abroad locations and to help underrepresented U.S. institutions offer and promote study-abroad opportunities for their students. These secondary objectives should also be addressed in grant proposals.

Guidelines

The administering organization should be prepared to solicit applications immediately upon receipt of grant notification and to award scholarships to allow study programs to begin in the 2001/2002 academic year.

Student Eligibility: To apply for a scholarship, an applicant must;

(1) Be a student in good standing at an institution of higher education in the United States (as defined in section 101(a) of the Higher Education Act of 1965);

(2) Have been accepted for up to one academic year of study on a program of study abroad approved for credit by the student's home institution;

(3) Be receiving any need-based student assistance under title IV of the Higher Education Act of 1965; and

(4) Be a citizen or national of the United States.

Application and Selection: (1) Scholarship application and selection shall be carried out through accredited institutions of higher education in the United States or a combination of such institutions.

(2) In considering applications for scholarships:

(A) consideration of financial need shall include the increased costs of study abroad; and

(B) priority consideration shall be given to applicants who are receiving Federal Pell Grants under title of the Higher Education Act of 1965.

(C) in ranking eligible applicants, consideration should also be given to academic excellence, and diversity of the applicant pool, fields of study, destinations, and type and location of home institutions of higher education.

Reporting: The grantee organization will submit quarterly reports on the number of applicants, the number of selectees, the names of the institutions of higher education in the United States that applicants and selectees attended at the time of application, name of institutions sponsoring the study program abroad, the names and locations of the institutions of higher education outside the United States which participants attended during

their study abroad, the fields of study of participants, and attrition rates. Additionally, the Bureau of Educational and Cultural Affairs may request other periodic and ad hoc reports.

Budget Guidelines

Grants awarded to eligible organizations with less than four years of experience in conducting international exchange programs are limited by Bureau policy to $60,000. The bureau intends to make one award not to exceed $1,500,000. Accordingly, institutions with less than five years experience are not encouraged to apply. The Bureau encourages applicants to provide maximum levels of cost-sharing and funding from private sources in support of its programs.

Applicants must submit a comprehensive budget for the entire program. Of the total grant, a maximum of 10% (up to $150,000) may be spent on administrative and overhead costs. There must be a summary budget as well as breakdowns reflecting both administrative and program budgets. Applicants may provide separate sub-budgets for each program component, phase, location, or activity to provide clarification.

Allowable costs for the program include the following:

(1) Administrative: Salaries and benefits and other direct administrative expenses such as postage, phone, printing and office supplies.

(2) Program: Participant expenses, which may include institutional fees, travel expenses, tuition; expenses related to review panels, including travel and perdiem.

Please refer to the Solicitation Package for complete budget guidelines and formatting instructions.

Announcement Title and Number

All correspondence with the Bureau concerning this RFGP should reference the above title and number *ECA/A/S/A–01–14*.

FOR FURTHER INFORMATION, CONTACT: The Office of Global Educational Programs, Educational Information and Resources Branch (ECA/A/S/A), Room 349, U.S. Department of State, 301 4th Street, SW., Washington, DC 20547; telephone 202–619–5434; fax 202–401–1433; e-mail advise@pd.state.gov to request a Solicitation Package. The Solicitation Package contains detailed award criteria, required application forms, specific budget instructions, and standard guidelines for proposal preparation. Please specify Bureau Program Officer Amy Forest on all other inquiries and correspondence.

Please read the complete **Federal Register** announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

To Download a Solicitation Package Via Internet

The entire Solicitation Package may be downloaded from the Bureau's website at http://exchanges.state.gov/education/RFGPs. Please read all information before downloading.

Deadline for Proposals

All proposal copies must be received at the Bureau of Educational and Cultural Affairs by 5 p.m. Washington, DC time on Friday, February 23, 2001. Faxed documents will not be accepted at any time. Documents postmarked on the due date but received on a later date will not be accepted. Each applicant must ensure that the proposals are received by the above deadline.

Applicants must follow all instructions in the Solicitation Package. The original and 15 copies of the application should be sent to: U.S. Department of State, SA–44, Bureau of Educational and Cultural Affairs, Ref.: *ECA/A/S/A–01–14*, Program Management, ECA/EX/PM, Room 534, 301 4th Street, SW., Washington, DC 20547.

Applicants must also submit the ''Executive Summary'' and ''Proposal Narrative'' sections of the proposal on 3.5″ diskette, formatted for DOS. These documents must be provided in ASCII text (DOS) format with a maximum line length of 65 characters.

Diversity, Freedom and Democracy Guidelines

Pursuant to the Bureau's authorizing legislation, programs must maintain a non-political character and should be balanced and representative of the diversity of American political, social, and cultural life. ''Diversity'' should be interpreted in the broadest sense and encompass differences including, but not limited to ethnicity, race, gender, religion, geographic location, socio-economic status, and physical challenges. Applicants are strongly encouraged to adhere to the advancement of this principle both in program administration and in program content. Please refer to the review criteria under the 'Support for Diversity' section for specific suggestions on incorporating diversity into the total proposal. Public Law 104–319 provides that ''in carrying out programs of educational and cultural exchange in countries whose people do not fully enjoy freedom and democracy,'' the Bureau ''Shall take appropriate steps to provide opportunities for participation in such programs to human rights and democracy leaders of such countries.'' Public Law 106–113 requires that the governments of the countries described above do not have inappropriate influence in the selection process. Proposals should reflect advancement of these goals in their program contents, to the full extent deemed feasible.

Review Process

The Bureau will acknowledge receipt of all proposals and will review them for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines stated herein and in the Solicitation Package. All eligible proposals will be reviewed by the program office, as well as the Public Diplomacy section overseas, where appropriate. Eligible proposals will be subject to compliance with Federal and Bureau regulations and guidelines and forwarded to Bureau grant panels for advisory review. Proposals may also be reviewed by the Office of the Legal Adviser or by other Department elements. Final funding decisions are at the discretion of the Department of State's Assistant Secretary for Educational and Cultural Affairs. Final technical authority for assistance awards (grants or cooperative agreements) resides with the Bureau's Grants Officer.

Review Criteria

Technically eligible applications will be competitively reviewed according to the criteria stated below. These criteria are not rank ordered and all carry equal weight in the proposal evaluation:

1. Quality of the Program Idea: Proposals should exhibit originality, substance, precision, and relevance to the Bureau's mission.

2. Program Planning: Detailed agenda and relevant work plan should demonstrate substantive undertakings and logistical capacity. Agenda and plan should adhere to the program overview and guidelines described above. The work plan should specify target dates for objectives such as application deadlines, notifications, and provision of funds to participants.

3. Ability to Achieve Program Objectives: Objectives should be reasonable, feasible, and flexible. Proposals should clearly demonstrate how the institution will meet the program's objectives and plan.

4. Multiplier Effect/Impact: Proposed programs should strengthen long-term mutual understanding, including

maximum sharing of information and establishment of long-term institutional and individual linkages.

5. Support of Diversity: Proposals should demonstrate substantive support of the Bureau's policy on diversity. Achievable and relevant features should be cited in both program administration and program content. Proposals should demonstrate the recipient's commitment to promoting the awareness and understanding of diversity, including but not limited to diversity in applicant pool, type and location of home institution, study destinations, and fields of study.

6. Institutional Capacity: Proposed personnel and institutional resources should be adequate and appropriate to achieve the program or project's goals. Applicants should demonstrate prior experience or the capacity to negotiate with academic institutions to achieve significant cost sharing. Electronic databases should be compatible with the Bureau's systems.

7. Institution's Record/Ability: Proposals should demonstrate an institutional record of successful exchange programs, including responsible fiscal management and full compliance with all reporting requirements for past Bureau grants as determined by Bureau Grant Staff. The Bureau will consider the past performance of prior recipients and the demonstrated potential of new applicants.

8. Follow-on Activities: Proposals should provide a plan for continued follow-on activity such as alumni tracking and programming.

9. Project Evaluation: Proposals should include a plan to evaluate the activity's success, both as the activities unfold and at the end of the program. A draft survey questionnaire or other technique plus description of a methodology to use to link outcomes to original project objectives is recommended. Successful applicants will be expected to submit intermediate reports after each project component is concluded or quarterly, whichever is less frequent.

10. Cost-effectiveness: The overhead and administrative components of the proposal, including salaries and honoraria, should be kept as low as possible. All other items should be necessary and appropriate.

11. Cost-Sharing: Proposals should maximize cost-sharing through other private sector support as well as institutional direct funding contributions.

Authority

Overall grant making authority for this program is contained in the Mutual Educational and Cultural Exchange Act of 1961, Public Law 87–256, as amended, also known as the Fulbright-Hays Act. The purpose of the Act is ''to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries . . . ; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations . . . and thus to assist in the development of friendly, sympathetic and peaceful relations between the United States and the other countries of the world.'' The funding authority for the program above is provided through the International Academic Opportunity Act of 2000.

Notice

The terms and conditions published in this RFGP are binding and may not be modified by any Bureau representative. Explanatory information provided by the Bureau that contradicts published language will not be binding. Issuance of the RFGP does not constitute an award commitment on the part of the Government. The Bureau reserves the right to reduce, revise, or increase proposal budgets in accordance with the needs of the program and the availability of funds. Awards made will be subject to periodic reporting and evaluation requirements.

Notification

Final awards cannot be made until funds have been appropriated by Congress, allocated and committed through internal Bureau procedures.

Dated: January 9, 2001.

William B. Bader,

Assistant Secretary for Educational and Cultural Affairs, U.S. Department of State.

[FR Doc. 01–1363 Filed 1–16–01; 8:45 am]

BILLING CODE 4710–05–U–M

DEPARTMENT OF STATE

[Public Notice 3539]

Imposition of Nonproliferation Measures Against a North Korean Entity, Including Ban on U.S. Government Procurement

AGENCY: Bureau of Nonproliferation, Department of State.

ACTION: Notice.

SUMMARY: A determination has been made that a North Korean entity has engaged in activities that require the imposition of measures pursuant to section 3 of the Iran Nonproliferation Act of 2000.

EFFECTIVE DATE: January 2, 2001.

FOR FURTHER INFORMATION CONTACT: On general issues: Vann H. Van Diepen, Office of Chemical, Biological and Missile Nonproliferation, Bureau of Nonproliferation, Department of State, (202–647–1142). On U.S. Government procurement ban issues: Gladys Gines, Office of the Procurement Executive, Department of State (703–516–1691).

SUPPLEMENTARY INFORMATION: Pursuant to sections 2 and 3 of the Iran Nonproliferation Act of 2000 (Pub. L. 106–178), the U.S. Government determined on January 2, 2001, that the measures authorized in section 3 of the Act shall apply to the following foreign entity identified in the report submitted pursuant to section 2(a) of the Act:

Changgwang Sinyong Corporation (North Korea) and any successor, sub-unit, or subsidiary thereof.

Accordingly, pursuant to the provisions of the Act, the following measures are imposed on this entity:

1. No department or agency of the United States Government may procure, or enter into any contract for the procurement of, any goods, technology, or services from the foreign person.

2. No department or agency of the United States Government may provide any assistance to the foreign person, and that person shall not be eligible to participate in any assistance program of the United States Government;

3. No United States Government sales to the foreign person of any item on the United States Munitions List (as in effect on August 8, 1995) are permitted, and all sales to that person of any defense articles, defense services, or design and construction services under the Arms Export Control Act are terminated; and,

4. No new individual licenses shall be granted for the transfer to the foreign person of items, the export of which is controlled under the Export Administration Act of 1979 or the Export Administration Regulations, and any existing such licenses are suspended.

These measures shall be implemented by the responsible departments and agencies of the United States Government and will remain in place until April 6, 2002, except to the extent that the Secretary of State may subsequently determine otherwise. The Secretary of State will make a new determination in the event that

circumstances change in such a manner as to warrant a change in the duration of sanctions.

Dated: January 10, 2001.

Robert J. Einhorn,

Assistant Secretary of State for Nonproliferation, U.S. Department of State.

[FR Doc. 01–1362 Filed 1–16–01; 8:45 am]

BILLING CODE 4710–25–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Advisory Circular 25.335–1A, Design Dive Speed

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of issuance of advisory circular.

SUMMARY: This notice announces the issuance of Advisory Circular (AC) 25.335–1A, Design Dive Speed. This AC sets forth an acceptable means, but not the only means, of demonstrating compliance with the airworthiness standards for transport category airplanes related to the minimum speed margin between design cruise speed and design dive speed for transport category airplanes. Like all ACs, it is not regulatory but is to provide guidance for applicants in demonstrating compliance with the objective safety standards set forth in the rule.

DATES: Advisory Circular 25.335–1A was issued by the Acting Manager, Transport Airplane Directorate, Aircraft Certification Service, ANM–100, on September 29, 2000.

How to Obtain Copies: A paper copy of AC 25.335–1A may be obtained by writing to the U.S. Department of Transportation, Subsequent Distribution Office, DOT Warehouse, SVC–121.23, Ardmore East Business Center, 3341Q 75th Ave., Landover, MD 20785, telephone 301–322–5377, or faxing your request to the warehouse at 301–386–5394. The AC also will be available on the Internet at *http://www.faa.gov/avr/air/airhome.htm*, at the link titled ''Advisory Circulars'' under the ''Available Information'' down-drop menu.

Issued in Renton, Washington, on January 8, 2001.

Donald L. Riggin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service, ANM–100.

[FR Doc. 01–1287 Filed 1–16–01; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Advisory Circular; Damage Tolerance for High Energy Turbine Engine Rotors

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of issuance of final advisory circular (AC) on damage tolerance for high energy turbine engine rotors.

SUMMARY: This notice announces the issuance of Advisory Circular (AC) No. 33.14–1, Damage Tolerance for High Energy Turbine Rotors.

DATES: Advisory Circular No. 33.14.1, was issued by the New England Aircraft Certification Service, Engine and Propeller Directorate on January 8, 2001.

FOR FURTHER INFORMATION CONTACT: Tim Mouzakis, Engine and Propeller Standards Staff, ANE–110, at the above address, telephone (781) 238–7114, fax (781) 238–7199. A copy of the subject AC may also be obtained electronically by writing to the following Internet address: ''tim.mouzakis@faa.gov''. Additionally, you may obtain a copy of the AC directly from the internet at the following address: ''http://www.faa.gov/avr/air/acs/achome.htm''.

SUPPLEMENTARY INFORMATION: This advisory circular (AC) provides guidance and information on acceptable methods, but not the only methods of compliance with § 33.14 of the Federal Aviation Regulations, Title 14 of the Code of Federal Regulations. Section 33.14 contains requirements of life management requirements applicable to the design and life management of titanium alloy high energy rotating parts of aircraft engines. Although this AC does refer to regulatory requirements that are mandatory, this ACT is not, in itself, mandatory. This AC neither changes any regulatory requirement nor authorizes changes in or deviations from the regulatory requirements.

This advisory circular would be published under the authority granted to the Administrator by 49 U.S.C. 106(g), 40113, 44701–44702, 44704, provides guidance for Damage tolerance for high energy turbine engine rotors.

Issued in Burlington, Massachusetts, on January 8, 2001.

David A. Downey,

Assistant Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 01–1285 Filed 1–16–01; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Advisory Circular 25.491–1, Taxi, Takeoff and Landing Roll Design Loads

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of issuance of advisory circular.

SUMMARY: This notice announces the issuance of Advisory Circular (AC) 25.491–1, Taxi, Takeoff and Landing Roll Design Loads. This AC sets forth acceptable methods of compliance with the provision of part 25 of the Federal Aviation Regulations (FAR) dealing with the certification requirements for taxi, takeoff and landing roll design loads. Guidance information is provided for showing compliance with § 25.491 of the FAR, relating to structural design for airplane operation on paved runways and taxiways normally used in commercial operations. Other methods of compliance with the requirements may be acceptable.

DATES: Advisory Circular 25.491–1 was issued by the Acting Manager, Transport Airplane Directorate, Aircraft Certification Service, ANM–100, on October 30, 2000.

How to Obtain Copies: A paper copy of AC 25.491–1 may be obtained by writing to the U.S. Department of Transportation, Subsequent Distribution Office, DOT Warehouse, SVC–121.23, Ardmore East Business Center, 3341Q 75th Ave., Landover, MD 20785, telephone 301–322–5377, or faxing your request to the warehouse at 301–386–5394. The AC also will be available on the Internet at *http://www.faa.gov/avr/air/airhome.htm*, at the link titled ''Advisory Circulars'' under the ''Available Information'' down-drop menu.

Issued in Renton, Washington, on January 8, 2001.

Donald L. Riggin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service, ANM–100.

[FR Doc. 01–1286 Filed 1–16–01; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Noise Exposure Map Notice; Gerald R. Ford International Airport, Grand Rapids, MI

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces its determination that the noise exposure maps submitted by Kent County Department of Aeronautics for Gerald R. Ford International Airport, Grand Rapids, Michigan 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 DATE: The effective date of the FAA's determination on the noise exposure maps is December 27, 2000.

FOR FURTHER INFORMATION CONTACT: Ernest P. Gubry, Willow Run Airport, East, 8820 Beck Road Belleville, MI, 48111, (734) 487–7280.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA finds that the noise exposure maps submitted for Gerald R. Ford International Airport, Grand Rapids, MI are in compliance with applicable requirements of Part 150, effective December 27, 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 non-compatible 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 Regulations (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 non-compatible uses and for the prevention of the introduction of additional non-compatible uses. The FAA has completed its review of the noise exposure maps and related descriptions submitted by Kent County Department of Aeronautics. The specific maps under consideration are Figure 6–1, ''2000 Noise Exposure Map'', and Figure 6–2 ''2005 Noise Exposure Map'' noise map in Volume 1 of 3 of the submission. The FAA has determined that these maps for Gerald R. Ford International Airport, Grand Rapids, Michigan are in compliance with applicable requirements. This determination is effective on December 27, 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. Questions may be directed to the individual named above under the heading **FOR FURTHER INFORMATION CONTACT**.

Issued in Belleville, Michigan, on December 27, 2000.

Irene Porter,

Manager, Detroit Airports District Office, Great Lakes Region.

[FR Doc. 01–1282 Filed 1–16–01; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2001–01]

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 February 5, 2001.

ADDRESSES: Send comments on any petition to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001. You must identify the docket number FAA–2000–XXXX at the beginning of your comments. If you wish to receive confirmation that FAA received your comments, include a self-addressed, stamped postcard.

You may also submit comments through the Internet to *http://dms.dot.gov.* You may review the public docket containing the petition, any comments received, and any final disposition in person in the Dockets Office between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. The Dockets Office (telephone 1–800–647–5527) is on the plaza level of the NASSIF Building at the Department of Transportation at the above address. Also, you may review public dockets on the Internet at *http://dms.dot.gov.*

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 14 CFR 11.85 and 11.91.

Issued in Washington, DC, on January 10, 2001.

Donald P. Byrne,

Assistant Chief Counsel for Regulations.

Dispositions of Petitions

Docket No.: FAA–2000–8157.

Petitioner: Petroleum Helicopters, Inc.
Section of 14 CFR Affected: 14 CFR § 135.152(a).
Description of Relief Sought/ Disposition: To permit PHI to operate three Bell 212 helicopters (Registration Nos. N1074C, N5009N, and N5736D; Serial Nos. 30989, 30915, and 31135, respectively), two Bell 214ST helicopters (Registration Nos. N59805 and N59806, Serial Nos. 28141 and 28140, respectively), three Bell 412 helicopters (Registration Nos. N2014K, N2258F, and N3893L; Serial Nos. 33020, 33073, and 33006, respectively), and one Bell 421SP helicopter (Registration No. N142PH, Serial No. 33150) under part 135 without an approved digital flight data recorder installed on each helicopter.
Grant, 12/15/2000, Exemption No. 6713E

Docket No.: FAA–2000–8430.
Petitioner: Rocky Mountain Holdings, L.L.C.
Section of 14 CFR Affected: 14 CFR § 135.143(c)(2).
Description of Relief Sought/ Disposition: To permit RMH to operate certain aircraft under part 135 without a TSO–C112 (Mode S) transponder installed in the aircraft.
Grant, 12/13/2000, Exemption No. 5774E

Docket No.: FAA–2000–8533.
Petitioner: Israel Aircraft Industries.
Section of 14 CFR Affected: 14 CFR § 61.77(a).
Description of Relief Sought/ Disposition: To permit IAI to obtain special purpose pilot authorizations for its pilot employees for the purpose of performing: (1) Ferry/delivery flights of U.S.-registered ASTRA Galaxy airplanes from Israel to the United States for its U.S. customers; (2) Ferry/delivery flights of U.S.-registered ASTRA Galaxy airplanes from Israel to other countries for its U.S. customers; and (3) For performing test and acceptance flights of U.S.-registered ASTRA Galaxy airplanes for its U.S. customers.
Grant, 01/13/1999, Exemption No. 7406

Docket No.: FAA–2000–8497.
Petitioner: America West Airlines.
Section of 14 CFR Affected: 14 CFR § 91.205(b)(12).
Description of Relief Sought/ Disposition: To permit AWX to operate it's aircraft over water without at least one pyrotechnic signaling device on board.
Denial, 12/18/2000, Exemption No. 7409

Docket No.: FAA–2000–8096.
Petitioner: Vinay M. Gidwani.
Section of 14 CFR Affected: 14 CFR § 61.83(a).
Description of Relief Sought/ Disposition: To permit Mr. Gidwani to obtain a student pilot certificate for operation of an aircraft other than a glider or balloon.
Denial, 12/18/2000, Exemption No. 7408

Docket No.: FAA–2000–8491.
Petitioner: Lifeport, Inc.
Section of 14 CFR Affected: 14 CFR §§ 25.562 and 25.785(b).
Description of Relief Sought/ Disposition: To permit certification of medical stretchers for transport of persons whose medical condition dictates such accommodation. The exemption is for an installation on a Learjet Model 45 airplane.
Grant, 12/07/2000, Exemption No. 7393

[FR Doc. 01–1288 Filed 1–16–01; 8:45 am]
BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2001–02]

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 February 5, 2001.

ADDRESSES: Send comments on any petition to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001. You must identify the docket number FAA–2000–XXXX at the beginning of your comments. If you wish to receive confirmation that FAA received your comments, include a self-addressed, stamped postcard.

You may also submit comments through the Internet to *http://dms.dot.gov.* You may review the public docket containing the petition, any comments received, and any final disposition in person in the Dockets Office between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. The Dockets Office (telephone 1–800–647–5527) is on the plaza level of the NASSIF Building at the Department of Transportation at the above address. Also, you may review public dockets on the Internet at *http://dms.dot.gov.*

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 14 CFR 11.85 and 11.91.

Issued in Washington, D.C., on January 10, 2001.

Donald P. Byrne,

Assistant Chief Counsel for Regulations.

Petitions for Exemption

Docket No.: FAA–2000–8165.
Petitioner: The Jet Center, Garret Aviation Services.
Section of 14 CFR Affected: 14 CFR 25.813(e).
Description of Relief Sought: To permit the Jet Center, Garret Aviation Services, to install doors in partitions between passenger compartments on Bombardier Model BD–700–1A10 airplanes used for corporate transportation.

[FR Doc. 01–1289 Filed 1–16–01; 8:45 am]
BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2001–03]

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 ommission 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 February 5, 2001.

ADDRESSES: Send comments on any petition in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rule Docket (AGC–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 915G, 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 Avaiation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to § 11.85 and § 11.91.

Issued in Washington, D.C., on January 10, 2001.

Donald P. Byrne,

Assistant Chief Counsel for Regulations.

Dispositions of Petitions

Docket No.: 30151.

Petitioner: Lufthansa Technik.

Section of the 14 CFR Affected: 14 CFR § 25.785(b)

Description of Relief Sought/ Disposition: To permit relief from the general occupant protection requirements for multiple place side-facing seats on a Boeing Model 777–2AN airplane, serial number 29953.

Grant, 12/11/00, Exemption No. 7392

Docket No.: 30081.

Petitioner: Kodiak Expediting, Inc.

Section of the 14 CFR Affected: 14 CFR § 61.133(b)(1)

Description of Relief Sought/ Disposition: To permit KEI to conduct passenger-carrying operations on cross-country flights in excess of 50 nautical miles without holding an instrument rating in the same category and class of aircraft listed on your commercial pilot certificate.

Denial, 12/18/00, Exemption No. 7407

Docket No.: 30052.

Petitioner: Airbus Industrie

Section of the 14 CFR Affected: 14 CFR § 25.807(f)(4)

Description of Relief Sought/ Disposition: To permit an interior arrangement on an Airbus Model A340–600 that does not provide 60 feet or less between passenger emergency exists in the side of the fuselage.

Denial, 12/11/00, Exemption No. 7404

[FR Doc. 01–1290 Filed 1–16–01; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Application To Use a Passenger Facility Charge (PFC) at Bradley International Airport, Windsor Locks, Connecticut

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent to rule on application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to use a PFC at Bradley International Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (title IX of the Omnibus Budget Reconciliation Act of 1990) (Public Law 101–508) and Part 158 of the Federal aviation regulations (14 CFR part 158).

DATES: Comments must be received on or before February 16, 2001.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Ms. Priscilla Scott, PFC Program Manager, Federal Aviation Administration, Airport Division, 12 New England Executive Park, Burlington, Massachusetts 01803.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Robert Juliano, A.A.E., Bureau Chief, State of Connecticut, Department of Transportation, Bureau of Aviation and Ports at the following address: 2800 Berlin Turnpike, P.O. Box 317546, Newington, CT. 06131–7546.

Air carriers and foreign air carriers may submit copies of written comments previously provided to the State of Connecticut under section 158.23 of Part 158 of the Federal Aviation Regulations.

FOR FURTHER INFORMATION CONTACT: Priscilla A. Scott, PFC Program Manager, Federal Aviation Administration, Airports Division, 12 New England Executive Park, Burlington, Massachusetts 01803, (781) 238–7614. The application may be reviewed in person at 16 New England Executive Park, Burlington, Massachusetts.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to use a PFC at Bradley International Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Public Law 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

On December 29, 2000, the FAA determined that the application to use a PFC submitted by the State of Connecticut was substantially complete within the requirements of section 158.25 of Part 158 of the Federal Aviation Regulations. The FAA will approve or disapprove the application, in whole or in part, no later than April 9, 2001.

The following is a brief overview of the use application.

PFC Project #: 01–13–U–00–BDL.

Level of the proposed PFC: $3.00.

Charge effective date: March 9, 2000.

Charge expiration date: April 11, 2000.

Estimated total PFC revenue: $4,400,000.

Brief description of project: Reconstruction of Taxiway ''S''.

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: On demand Air Taxi/Commercial Operators (ATCO).

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**.

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Connecticut Department of Transportation Building, 2800 Berlin Turnpike, Newington, Connecticut 06131–7546.

Issued in Burlington, Massachusetts on January 2, 2001.

Vincent A. Scarano,

Manager, Airports Division, New England Region.

[FR Doc. 01–1284 Filed 1–16–01; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Application To Impose and Use the Revenue From a Passenger Facility Charge (PFC) at Manchester Airport, Manchester, NH

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent to rule on application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Manchester Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Public Law 101–508) and part 158 of the Federal Aviation Regulations (14 CFR part 158).

DATES: Comments must be received on or before February 16, 2001.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address:

Priscilla Scott, PFC Program Manager, Federal Aviation Administration, Airports Division, 12 New England Executive Park, Burlington, Massachusetts 01803.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Kevin Dillon, Airport Director for Manchester Airport at the following address: Manchester Airport, One Airport Road, Suite 300, Manchester, New Hampshire 03103.

Air carriers and foreign air carriers may submit copies of written comments previously provided to the City of Manchester under section 158.23 of part 158 of the Federal Aviation Regulations.

FOR FURTHER INFORMATION CONTACT: Priscilla A. Scott, PFC Program Manager, Federal Aviation Administration, Airports Division, 12 New England Executive Park, Burlington, Massachusetts 01803 (781) 238–7614. The application may be reviewed in person at 16 New England Executive Park, Burlington, Massachusetts.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Manchester Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Public Law 101–508) and part 158 of the Federal Aviation Regulations (14 CFR part 158).

On December 28, 2000, the FAA determined that the application to impose and use the revenue from a PFC submitted by the City of Manchester was substantially complete within the requirements of section 158.25 of part 158 of the Federal Aviation Regulations. The FAA will approve or disapprove the application, in whole or in part, no later than April 6, 2001.

The following is a brief overview of the impose and use application.

PFC Project #: 01–09–C–00–MHT.

Level of the proposed PFC: $3.00.

Proposed charge effective date: April 1, 2017.

Estimated charge expiration date: June 1, 2017.

Estimated total net PFC revenue: $700,000.

Brief description of project: Acquire Airport Rescue and Fire Fighting Vehicle.

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: Air Taxi/Commercial Operators (ATCO).

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**.

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Manchester Airport, One Airport Road, Suite 300, Manchester, New Hampshire 03103.

Issued in Burlington, Massachusetts on January 2, 2001.

Vincent A. Scarano,

Manager, Airports Division, New England Region.

[FR Doc. 01–1283 Filed 1–16–01; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Policy Statement Number ACE–00–23.777–01]

Proposed Issuance of Policy Memorandum, Automatic Pilot (Control Wheel Steering) Applications for Part 23/CAR 3 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of policy statement; request for comments.

SUMMARY: This document proposes to adopt new policy for certification of normal, utility, acrobatic, and commuter category turbine powered airplanes with automatic pilot (autopilot) (control wheel steering) applications.

DATES: Comments sent must be received by February 16, 2001.

ADDRESSES: Send all comments on this proposed policy statement to the individual identified under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT:

Sending comments: Bill Marshall, Federal Aviation Administration (FAA), Small Airplane Directorate, Regulations and Policy Branch, ACE–111, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone (816) 329–4116; fax (816) 329–4090; email: <Bill.Marshall@faa.gov>.

Asking technical questions: Jon Hannan, FAA, Small Airplane Directorate, Regulations and Policy Branch, ACE–111, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone (816) 329–4127; fax (816) 329–4090; email: <Jon.Hannan@faa.gov>.

SUPPLEMENTARY INFORMATION:

Comments Invited

How do I comment on the proposed policy? We invite your comments on this proposed policy statement, ACE–00–23.777–01. You may send whatever written data, views, or arguments you choose. We will consider all comments received by the closing date. We may change the proposals contained in this notice because of the comments received.

Please send comments using the following Internet address: Bill.Marshall@faa.gov. Comments sent using the Internet must contain ''Comments to Policy Statement ACE–00–23.777–01'' in the subject line. Writers should format in Microsoft Word 97 or ASCII any file attachments that are sent using the Internet.

Send comments using the following format:

- Organize comments issue-by-issue. For example, discuss a comment about the automatic pilot control panel and a comment about primary flight controls as two separate issues.
- For each issue, state what specific change you are requesting to the proposed policy memorandum.
- Include justification (for example, reasons or data) for each request. If sending your comments using the Internet will cause you extreme hardship, you may send comments using the U.S. Mail, overnight delivery, or facsimile machine. You should mark your comments, ''Comments to Policy Statement ACE–00–23.777–01'' and send two copies to the above address in the section ''**FOR FURTHER INFORMATION CONTACT:** Sending comments.''

What would be the general effect of this proposed policy? The FAA is

presenting this information as a set of guidelines suitable for use. However, we do not intend for this proposed policy to become a binding norm; it does not form a new regulation, and the FAA would not apply or rely on it as a regulation.

The FAA Aircraft Certification Offices (ACO's) and Flight Standards District Offices (FSDO's) that certify changes in type design and approve alterations in normal, utility, and acrobatic category airplanes should try to follow this policy when appropriate. Also, as with all advisory material, this statement of policy identifies one means, but not the only means, of compliance.

Because this proposed general statement of policy only announces what the FAA seeks to establish as policy, the FAA considers it to be an issue for which public comment is appropriate. Therefore, the FAA requests comments on the following proposed general statement of policy relevant to compliance with § 23.777 of the Federal Aviation Regulations (14 CFR 23.777), and other related regulations.

Background

How does part 23 address the automatic pilot (autopilot) and control wheel steering? The guidance on autopilots used in part 23 airplanes does not specifically address Control Wheel Steering (CWS). Before 1996, CWS was a term used by industry to describe a momentary autopilot interrupt mode. Holding the CWS switch depressed temporarily disconnected the autopilot pitch and roll servos so the airplane could be maneuvered. When the CWS switch was released, the autopilot servos would reengage in the same mode as previously selected.

One minor exception was where an autopilot dropped the vertical axis from the reengagement. But in no case was there a change to a mode that had not been selected.

What recent developments have led to this proposed policy? More recently, there have been some autopilots certificated that could be engaged from a CWS mode switch on the primary flight controls. Additionally, some autopilots were certificated that changed modes from what had been previously selected by depressing the CWS switch.

In some cases, these two installations could lead to inadvertent autopilot engagement or mode changes during critical phases of flight such as liftoff, approach, and landing flare. Inadvertent operation could then lead to confusion and a misperception of a flight control problem or an unintended loss of approach coupling.

Although not specifically pertinent to autopilot controls, § 23.777 of the Federal Aviation Regulations (14 CFR 23.777) requires that each cockpit control ''be located . . . to provide convenient operation and to prevent confusion and inadvertent operation.''

The Proposed Policy

In order to comply with the intent of § 23.777 of the Federal Aviation Regulations (14 CFR 23.777) as applicable to automatic pilots (autopilots) installed in part 23 airplanes, autopilots should be evaluated in accordance with the following:

Note: These characteristics are not applicable to ''go around'' mode switches which are allowed on throttles.

- The automatic pilot (autopilot) should not be engaged from a switch on the primary flight controls, unless that switch is protected so inadvertent engagement is not possible. Guards covering the switch, which can be moved to provide access to the switch, may be acceptable in some cases.
- Mode changes should not be made by using a switch on the primary flight controls unless some reliable means is provided to prevent unsafe conditions caused by inadvertent mode changes. Refer to § 23.1329(h) of the Federal Aviation Regulations (14 CFR 23.1329(h)).
- The autopilot disengage button should be the color red and be of different design from nearby switches so it is distinguishable by touch.

Issued in Kansas City, Missouri on January 2, 2001.

Marvin R. Nuss,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 01–1276 Filed 1–16–01; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2001–8669]

Crowley Maritime Corporation; Notice of Application for Written Permission Under Section 805(a) of the Merchant Marine Act, 1936, as Amended

AGENCY: Maritime Administration, Transportation.

ACTION: Notice of Application.

SUMMARY: Crowley Maritime Corporation (Crowley), by letter dated January 4, 2001, requests written permission under section 805(a) of the Merchant Marine Act, 1936, as amended (Act), to allow Marine Transport Corporation's (MTC) vessels CHEMICAL EXPLORER and CHEMICAL TRADER to continue to receive operating-differential subsidy (ODS) after MTC becomes a subsidiary of Crowley. This section 805(a) permission is necessary for these vessels to continue to receive ODS because Crowley, through its subsidiaries, owns and operates vessels engaged in the domestic inter-coastal or coastwise service.

DATES: You should submit your comments early enough to ensure that Docket Management receives them not later than close of business (5 p.m. est) on January 31, 2001.

ADDRESSES: Your comments should refer to docket number MARAD–2001–8669. You may submit your comments in writing to: Docket Clerk, U.S. DOT Dockets, Room PL–401, 400 7th Street, SW, Washington, DC 20590. You may also submit them electronically via the internet at *http://dmses.dot.gov/submit/.* You may call Docket Management at (202) 366–9324 and visit the Docket Room from 10 a.m. to 5 p.m., EST., Monday through Friday, except Federal Holidays. An electronic version of this document is available on the World Wide Web at *http://dms.dot.gov*.

FOR FURTHER INFORMATION CONTACT: You may call Edmond J. Fitzgerald, Director, Office of Insurance and Shipping Analysis, (202) 366–2400. You may send mail to Edmond J. Fitzgerald, Director, Office of Insurance and Shipping Analysis, Room 8117, Maritime Administration, 400 Seventh St., SW., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

Comments

How Do I Prepare and Submit Comments?

Your comments must be written and in English. To ensure that your comments are correctly filed in the Docket, please include the docket number of this document in your comments. We encourage you to write your primary comments in a concise fashion. However, you may attach necessary additional documents to your comments. There is no limit on the length of the attachments. Please submit two copies of your comments, including the attachments, to Docket Management at the address given above under **ADDRESSES**.

If you wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelop containing your comments. Docket

Management will return the postcard by mail.

How do I submit confidential business information? If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, Maritime Administration, at the address given above under **FOR FURTHER INFORMATION CONTACT**. You should mark ''CONFIDENTIAL'' on each page of the original document that your would like to keep confidential. In addition, you should submit two copies, from which your have deleted the claimed confidential business information, to Docket Management at the address given under **ADDRESSES**. When you send comments containing information claimed to be confidential business information, you should include a cover letter setting forth with specificity the basis for any such claim.

Will the Agency Consider Late Comments?

We will consider all comments that Docket Management receives before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, we will also consider comments that Docket Management receives after that date.

How Can I Read Comments Submitted by Other People?

You may read the comments received by Docket Management at the address given above under **ADDRESSES**. The hours of the Docket Room are indicated above in the same location. You may also see the comments on the Internet. To read the comments on the Internet, take the following steps: Go to the Docket Management System (DMS) Web page of the Department of Transportation (http//dmses.dot.gov/), click on the box labeled ''Search''. The docket number for this document is MARAD–2001–8669. After typing in the last four-digits of the docket number, click on ''search.'' On the next page, which contains the docket summary information for the docket you selected, click on the desired comments. You may download the comments.

Application Request

Crowley and its wholly owned subsidiary, Shiloh Acquisition, Inc. (Shiloh), entered into an Agreement of Merger with MTC dated December 20, 2000. As part of the process, Shiloh will make a Tender Offer to purchase all the shares of MTC on January 5, 2001, which offer will expire on February 5, 2001, at which time Crowley expects to have control of MTC and subsequently thereafter effect a complete merger between Shiloh and MTC, with MTC being the surviving corporation as a direct subsidiary of Crowley.

MTC, through its subsidiaries, Frances ODS Corporation and Julius ODS Corporation, has two operating-differential subsidy agreements with the Maritime Administration dated as of September 30, 1998, Contract No. MA/MSB–442 and Contract No. MA/MSB–440, respectively. Pursuant to these agreements, Frances ODS Corporation receives ODS for the SMT CHEMICAL EXPLORER and Julius ODS Corporation receives ODS for SMT CHEMICAL TRADER. The agreement for SMT CHEMICAL EXPLORER will terminate by its terms on September 18, 2001 and the agreement for SMT CHEMICAL TRADER will terminate by its terms on March 25, 2001. Frances ODS Corporation receives approximately $8,500 per day pursuant to the agreement for the SMT CHEMICAL EXPLORER and Julius ODS Corporation receives approximately $8,100 per day pursuant to the agreement for SMT CHEMICAL TRADER.

Crowley, through its subsidiaries, owns and operates vessels engaged in the domestic inter-coastal or coastwise service, and has provided as an attachment to its application: Schedule A—the fleet of tugs and barges operating on the West Coast and Alaska and the Gulf; Schedule B—the fleet of tugs and barges operating in the U.S.-Puerto Rico trade; Schedule C—the fleet of tugs and barges operating on the East Coast and Gulf; and , Schedule D—the fleet of oil tankers operating throughout the Jones Act trading areas. These schedules show the horsepower of the tugs, capacity of the barges and tankers as well as the general itineraries. Interested parties may review these schedules by reading the application which is part of the docket and is accessible electronically via the internet, or personally at the DOT Docket Room, as described above under how to read comments submitted by other people.

In connection with these domestic services, Crowley requests written permission of the Secretary of Transportation, pursuant to section 805(a) of the Act to allow the MTC subsidiaries to continue to receive ODS pursuant to the subsidy contracts referred to above after MTC becomes a wholly owned subsidiary of Crowley.

In deciding whether to grant Crowley's application for a waiver pursuant to section 805(a) of the Act, Crowley requests the Maritime Administration to consider the following:

First, continued receipt by the two subsidiaries of MTC of ODS will not leak to Crowley. The subsidy dollars received by the two MTC subsidiaries will be used for the purposes set forth in the section 603 of the Act, as financial aid for the operation of the two vessels, the CHEMICAL EXPLORER and CHEMICAL TRADER. Thus, the ODS payments will remain with and be used by the ODS contractors, Frances ODS Corporation and Julius ODS Corporation.

Second, the continued receipt of ODS will be for (i) a relatively small amount of money and (ii) for a very short period of time. Crowley expects to have control of and complete the merger process by early February 2001. If this timetable holds firm, it would mean that Juluis ODS Corporation will receive subsidy for approximately one and a half months and Frances ODS Corporation will receive subsidy for approximately six and a half months. During this short period of time, the subsidy payments will be used by the ODS contractors and not leaked to Crowley.

Third, Crowley has been an operator in the Jones Act trades for over 100 years and, operates a wide range of vessels throughout the entire Jones Act trade area. Receipt of (i) a relatively small amount of ODS, (ii) for a short period of time; and (iii) earmarked for use by the Julius ODS Corporation and Frances ODS Corporation in the operation of the CHEMICAL TRADER and CHEMICAL EXPLORER will not leak to any of Crowley's wide range of Jones Act operations. In addition, it should be noted that by reason of the Title XI Reserve Fund and Financial Agreement between MARAD and the Julius ODS Corporation and the Frances ODS Corporation, those companies are prohibited from dividending any monies to their corporate parent and will continue to be so restricted through the date of the last ODS payment on September 18, 2001. Thus, there is no way for MTC to leak the ODS payments to Crowley.

For the reasons set forth above, Crowley believes that the grant of the requested section 805(a) waiver will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or inter-coastal service or that it would be prejudicial to the objects and policy of the Act and a hearing on the matter is not needed.

Any person, firm, or corporation having any interest (within the meaning of section 805(a)) in Crowley's request and desiring to submit comments

together with petition for leave to intervene should do so in accordance with the above instructions for submitting comments. The petition should state clearly and concisely the grounds of interest, and the alleged facts relied on for relief.

If no petition for leave to intervene is received with the specified time or if it is determined that petitions filed do not demonstrate sufficient interest to warrant a hearing, the Maritime Administration will take such action as may be deemed appropriate.

In the event petitions regarding the relevant section 805(a) issues are received from parties with standing to be heard, a hearing will be held, the purpose of which will be to receive evidence under section 805(a) relative to whether the proposed operations: (a) could result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or inter-coastal service, or (b) would be prejudicial to the objects and policy of the Act relative to domestic trade operations.

(Catalog of Federal Domestic Assistance Programs No. 20.805 Operating-Differential Subsidies)

By Order of the Maritime Administrator.
Dated: January 11, 2001.

Joel C. Richard,

Secretary.

[FR Doc. 01–1359 Filed 1–16–01; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2000–8666]

ALASKA ROSE, BERING ROSE, and SEA WOLF—Applicability of Preferred Mortgage, Ownership and Control Requirements to Obtain a Fishery Endorsement

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a petition requesting MARAD to issue a determination that the ownership and control requirements and the preferred mortgage requirements of the American Fisheries Act of 1998 and 46 CFR Part 356 are in conflict with an international investment agreement.

SUMMARY: The Maritime Administration (MARAD, we, our, or us) is soliciting public comments on a petition from the owners and mortgagees of the vessels ALASKA ROSE—Official Number 610984, BERING SEA—Official Number 609823, and SEA WOLF—Official Number 609823 (hereinafter the ''Vessels''). The petition requests that MARAD issue a decision that the American Fisheries Act of 1998 (''AFA''), Division C, Title II, Subtitle I, Pub. L. 105–277, and our regulations at 46 CFR Part 356 (65 Fed. Reg. 44860 (July 19, 2000)) are in conflict with the U.S.-Japan Treaty and Protocol Regarding Friendship, Commerce and Navigation, 206 UNTS 143, TIAS 2863, 4 UST 2063 (1953) (''U.S.-Japan FCN'' or ''Treaty''). The petition is submitted pursuant to 46 CFR 356.53 and 213(g) of AFA, which provide that the requirements of the AFA and the implementing regulations will not apply to the owners or mortgagees of a U.S.-flag vessel documented with a fishery endorsement to the extent that the provisions of the AFA conflict with an existing international agreement relating to foreign investment to which the United States is a party. This notice sets forth the provisions of the international agreement that the Petitioner alleges are in conflict with the AFA and 46 CFR Part 356 and the arguments submitted by the Petitioner in support of its request. If MARAD determines that the AFA and MARAD's implementing regulations conflict with the U.S.-Japan FCN, the requirements of 46 CFR Part 356 and the AFA will not apply to the extent of the inconsistency. Accordingly, interested parties are invited to submit their views on this petition and whether there is a conflict between the U.S.-Japan FCN and the requirements of both the AFA and 46 CFR Part 356. In addition to receiving the views of interested parties, MARAD will consult with other Departments and Agencies within the Federal Government that have responsibility or expertise related to the interpretation of or application of international investment agreements.

DATES: You should submit your comments early enough to ensure that Docket Management receives them not later than February 16, 2001.

ADDRESSES: Comments should refer to the docket number that appears at the top of this document. Written comments may be submitted by mail to the Docket Clerk, U.S. DOT Dockets, Room PL–401, Department of Transportation, 400 7th St., S.W., Washington, D.C. 20590–0001. You may also send comments electronically via the Internet at http://dms.dot.gov/submit/. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except Federal Holidays. An electronic version of this document and all documents entered into this docket are available on the World Wide Web at http://dms.dot.gov.

FOR FURTHER INFORMATION CONTACT: John T. Marquez, Jr. of the Office of Chief Counsel at (202) 366–5320. You may send mail to John T. Marquez, Jr., Maritime Administration, Office of Chief Counsel, Room 7228, MAR–222, 400 Seventh St., S.W., Washington, D.C., 20590–0001 or you may send e-mail to John.Marquez@marad.dot.gov.

SUPPLEMENTARY INFORMATION:

Background

The AFA was enacted in 1998 to give U.S. interests a priority in the harvest of U.S.-fishery resources by increasing the requirements for U.S. Citizen ownership, control and financing of U.S.-flag vessels documented with a fishery endorsement. MARAD was charged with promulgating implementing regulations for fishing vessels of 100 feet or greater in registered length while the Coast Guard retains responsibility for vessels under 100 feet.

Section 202 of the AFA, raises, with some exceptions, the U.S.-Citizen ownership and control standards for U.S.-flag vessels that are documented with a fishery endorsement and operating in U.S.-waters. The ownership and control standard was increased from the controlling interest standard (greater than 50%) of 2(b) of Shipping Act, 1916 (''1916 Act''), as amended, 46 App. U.S.C. 802(b), to the standard contained in 2(c) of the 1916 Act, 46 App. U.S.C. 802(c), which requires that 75 percent of the ownership and control in a vessel owning entity be vested in U.S. Citizens. In addition, section 204 of the AFA repeals the ownership grandfather ''savings provision'' in the Anti-Reflagging Act of 1987, Pub. L. 100–239, 7(b), 101 Stat 1778 (1988), which permits foreign control of companies owning certain fishing vessels.

Section 202 of the AFA also establishes new requirements to hold a preferred mortgage on a vessel with a fishery endorsement. State or federally chartered financial institutions must now comply with the controlling interest standard of 2(b) of the 1916 Act in order to hold a preferred mortgage on a vessel with a fishery endorsement. Entities other than state or federally chartered financial institutions must either meet the 75% ownership and control requirements of 2(c) of the 1916 Act or utilize an approved U.S.-Citizen Trustee that meets the 75% ownership and control requirements to hold the

preferred mortgage for the benefit of the non-citizen lender.

Section 213(g) of the AFA provides that if the new ownership and control provisions or the mortgagee provisions are determined to be inconsistent with an existing international agreement relating to foreign investment to which the United States is a party, such provisions of the AFA shall not apply to the owner or mortgagee on October 1, 2001, with respect to the particular vessel and to the extent of the inconsistency. MARAD's regulations at 46 CFR 356.53 set forth a process wherein owners or mortgagees may petition MARAD, with respect to a specific vessel, for a determination that the implementing regulations are in conflict with an international investment agreement. Petitions must be noticed in the **Federal Register** with a request for comments. The Chief Counsel of MARAD, in consultation with other Departments and Agencies within the Federal Government that have responsibility or expertise related to the interpretation of or application of international investment agreements, will review the petitions and, absent extenuating circumstances, render a decision within 120 days of the receipt of a fully completed petition.

The Petitioners

Alaska Rose L.P., Bering Rose, L.P. and Kendrick Bay, L.P. (each a ''Vessel Owner'' and collectively, the ''Vessel Owners''), are the owners, respectively, of the fishing vessels ALASKA ROSE, BERING ROSE and SEA WOLF (each a ''Vessel'' and collectively, the ''Vessels''). Wards Cove Packing Company (''Wards Cove''), Gravina Fisheries, Inc., Flag Point, L.P., Duke Point, L.P., Island Point Corporation, Maruha Corporation (''Maruha''), Western Alaska Fisheries, Inc. (''WAF'') and WAFBO, Inc., are owners of direct or indirect interests in the Vessel Owners and indirect interests in the Vessels. Alyeska Seafoods, Inc. (''Alyeska'') is the owner of direct and indirect interests in the Vessel Owners and indirect interests in the Vessels and is the mortgagee under preferred mortgages on the Vessels. The parties identified above, including the shareholders and the Japanese Bank Lenders identified below are hereinafter referred to as the ''Petitioner'' or ''Petitioners.''

Petitioner's Entry Into and Participation In U.S. Fisheries

The Petitioner provided the following background on its entry into and participation in the fisheries of the United States.

''In 1985, Wards Cove, Maruha and Marubeni Corporation (''Marubeni'') formed Alyeska to acquire, construct and operate a large seafood processing facility at Dutch Harbor, Alaska. Alyeska purchased an existing processing facility in 1985 and constructed a surimi processing plant and fish meal plant at the site in 1986 and 1987 to process pollock. Alyeska's total investment in its processing plant and equipment is approximately $70 million.

''The Alyeska processing facility is one of the largest fish processing facilities in the state of Alaska. Alyeska employs approximately 400 people at its Dutch Harbor processing facility and processes in excess of 125 million pounds of seafood annually. In order to secure a stable supply of raw material to this processing facility, Alyeska, Maruha and its subsidiaries, and Wards Cove, Alyeska's U.S. Citizen shareholder, have made investments in and provided financing for a number of fishing vessels, including the Vessels. By investing in the Vessel Owners, Alyeska, Maruha and Wards Cove also sought to realize the potential profits that could accrue to the Vessel Owners from sales to Alyeska. The Vessel Owners were organized and the Vessels were acquired by the Vessel Owners in 1996.

''Alyeska assisted in financing the acquisition of the Vessels by the Vessel Owners in return for the agreement of the Vessel Owners that fish harvested by the Vessels would be sold exclusively to Alyeska and in reliance on the assured revenue stream which sales to Alyeska would provide to the Vessel Owners. Such financing is a common and traditional means in the Alaska fishing industry by which fishing vessel owners secure financing for the acquisition, improvement or operation of their vessels and seafood processors secure supply commitments from fishing vessel owners. Each of the Vessels is 100 feet or greater in registered length. Each of the Vessels was designed and constructed or rebuilt for operation in the U.S. fisheries of the North Pacific Ocean and Bering Sea.

''As a result of the enactment of Section 208(a) of the American Fisheries Act, the fishing vessels eligible to catch and deliver pollock to Alyeska's Dutch Harbor facility are limited to vessels meeting specified criteria, including prior deliveries of certain quantities of pollock to Alaskan onshore processing plants. Accordingly, there is a fixed, limited number of vessels, including the Vessels, which are permitted by law to deliver to the Alyeska facility.''

Ownership and Mortgage Structure of the Vessels

The ownership and mortgage structure is substantially the same for each of the Vessels and is summarized as follows:

A. Ownership Structure

Alaska Rose, L.P., and Bering Rose, L.P., are Washington limited partnerships that were formed in 1996 for the purpose of acquiring and operating the vessels ALASKA ROSE and BERING ROSE, respectively. From the time of formation through the present date, Alaska Rose L.P. and Bering Rose, L.P. have been owned by Duke Point, L.P. (''Duke Point''), as sole general partner, and Alyeska Seafoods, Inc., as sole limited partner, in the following percentages: Duke Point—75%; Alyeska—25%.

Duke Point is a Washington limited partnership. At all times since the acquisition of the Vessels by Alaska Rose, L.P. and Bering Rose L.P., Duke Point has been owned by Flag Point, L.P. (''Flag Point''), as sole general partner, and Alyeska, as sole limited partner, in the following percentages: Flag Point—75%; Alyeska—25%.

Flag Point is a Washington limited partnership. Flag Point is owned by Gravina Fisheries, Inc., a Washington corporation, as sole general partner; and Island Point Corporation, a Washington corporation, and Alyeska, as limited partners, in the following percentages: Gravina Fisheries, Inc.—50%; Island Point Corp.—25%; Alyeska—25%.

Gravina Fisheries, Inc. is a wholly owned subsidiary of Wards Cove, an Alaska corporation. Petitioners state that all of the capital stock of Wards Cove is owned by United States Citizens, as defined in 46 C.F.R. Part 356. All of the capital stock of Island Point Corporation is owned by Alec W. Brindle, Winn F. Brindle and Harold A. Brindle, each an individual United States Citizen.

Wards Cove is a 100% U.S. Citizen-owned fish processing company which has been engaged in processing salmon and other fish and shellfish species in Alaska since 1912. In 1928, Wards Cove was acquired by two brothers, A. W. Brindle and Harold A. Brindle, and continues to be owned by the Brindle family or entities owned and controlled by them. All of the officers and directors of Wards Cove, Gravina Fisheries, Inc., and Island Point Corporation are U.S. Citizens.

Alyeska is an Alaska corporation, formed in 1985 to acquire, construct and operate a large seafood processing facility at Dutch Harbor, Alaska. All of the capital stock of Alyeska is owned by

Wards Cove, Maruha, WAF and Marubeni. Maruha and Marubeni are publicly traded Japanese corporations. WAF is a wholly-owned U.S. subsidiary of Maruha. Maruha, WAF and Marubeni collectively own more than 25% of the capital stock of Alyeska. Accordingly, Alyeska does not qualify as a U.S. Citizen under the standards of the AFA and MARAD's implementing rules and is therefore a ''Non-Citizen,'' as defined in 46 CFR 356.3(0).

The SEA WOLF is owned by Kendrick Bay, L.P. (''Kendrick Bay''), a Washington limited partnership formed in 1996 for the purpose of acquiring and operating the SEA WOLF. At the time of its formation through the present date, Kendrick Bay has been owned by Duke Point, as sole general partner, and WAFBO, Inc., as sole limited partner, in the following percentages: Duke Point—75%, WAFBO, Inc.—25%,

The ownership structure of Duke Point is described above in connection with the discussion of the ownership of Alaska Rose, L.P. and Bering Rose, L.P. WAFBO, Inc. is a Washington corporation wholly owned by WAF. WAF is an Alaska corporation wholly owned by Maruha. Prior to the acquisition of the SEA WOLF by Kendrick Bay, the SEA WOLF was owned by Sea Wolf Limited Partnership, a Washington limited partnership in which WAF held a 25% limited partnership interest. Sea Wolf Limited Partnership distributed undivided interests in the SEA WOLF to its partners in proportion to their interests in the partnership prior to the acquisition of the Vessel by Kendrick Bay. WAFBO, Inc. is an entity which satisfies the requirements of 46 U.S.C. 12102(a), commonly referred to as a ''Documentation Citizen,'' and was formed by WAF to hold WAF's undivided 25% interest in the SEA WOLF prior to transfer of the entire Vessel to Kendrick Bay. The former partners in Sea Wolf Limited Partnership with the exception of WAFBO, Inc. sold their undivided interests in the Vessel—totaling 75%—to Duke Point, which transferred this 75% interest in the SEA WOLF to Kendrick Bay as a capital contribution. WAFBO, Inc. transferred its undivided 25% interest in the SEA WOLF directly to Kendrick Bay as a capital contribution in return for a 25% limited partnership interest in Kendrick Bay.

The ownership structure of the Vessels was reviewed and approved by the U.S. Coast Guard under the standards applicable to fishing vessels and coastwise qualified vessels in a letter ruling dated December 11, 1996.

B. Mortgage Structure

Permanent financing for the acquisition of the Vessels was provided by three Japanese banks, Mitsubishi Trust and Banking Corporation, The Industrial Bank of Japan, Limited and The Dai-Ichi Kangyo Bank, Limited (collectively, the ''Japanese Bank Lenders''), pursuant to a Term Loan Agreement dated March 27, 1997 (the ''Alyeska Loan Agreement''). Pursuant to the Alyeska Loan Agreement, the Japanese Bank Lenders made loans to Alyeska (collectively, the ''Alyeska Loan'') for use by Alyeska for loans and capital contributions to the Vessel Owners and related entities to finance the acquisition by the Vessel Owners of the fishing vessels BERING ROSE, ALASKA ROSE and SEA WOLF.

Simultaneously with the Alyeska Loan transaction, Alyeska provided permanent financing to Alaska Rose, L.P. (the ''Alaska Rose Loan'') and Bering Rose, L.P. (the ''Bering Rose Loan'') for the purchase of the ALASKA ROSE and the BERING ROSE, respectively. In addition, permanent financing for the acquisition of the SEA WOLF was provided by the Japanese Bank Lenders through the Alyeska Loan transaction to Duke Point (the ''Duke Point Loan'') for Duke Point's purchase of an undivided 75% interest in the SEA WOLF. Alaska Rose, L.P., Bering Rose, L.P. and Duke Point executed Loan Agreements, Promissory Notes and Preferred Ship Mortgages in favor of Alyeska with respect to the loans. In consideration of the loans, Alaska Rose, L.P., Bering Rose, L.P., and Kendrick Bay also executed Nonrecourse Guaranties in favor of Mitsubishi Trust and Banking Corporation, as agent for the Japanese Bank Lenders (hereafter referred to as ''MTBC, as agent''), limited to the amount of the loans outstanding from time to time plus applicable interest, together with the following documents:

(a) Preferred Ship Mortgages on the Vessels in favor of MTBC, as agent, securing the Nonrecourse Guaranties; and

(b) Assignments of Insurance Proceeds in favor of MTBC, as agent, securing the Nonrecourse Guaranties.

C. Exclusive Marketing Agreement

The Petitioners state that Alyeska financed the purchase of the Vessels in order to ensure a stable supply of fish to Alyeska's Dutch Harbor facility and in reliance on the assured revenue stream which sales to Alyeska would generate for the Vessel Owner. Accordingly, Section 5(A) of the loan agreement for each Vessel provides:

So long as there remains any outstanding balance on the Loan, Borrower agrees that the Vessel's sole market shall be Alyeska Seafoods, Inc. for any and all products regularly processed by Alyeska Seafoods, Inc., and for any and all species of catch processed by Alyeska Seafoods, Inc. Exceptions to this requirement are specified (1) on a delivery-by-delivery basis, where Alyeska informs the partnership that it lacks capacity to process the delivery; and (2) where Alyeska and [Vessel Owner] agree that the vessel may sell into other markets. Section 5(B) of the [Vessel Loan Agreement] provides that, in return for this marketing commitment, Alyeska will pay [Vessel Owner] a substantial annual ''commitment fee.''

Requested Action

The Petitioners have requested a consolidated filing for the Vessels. MARAD's regulations require at 46 CFR 356.53(c) that a separate petition be filed for each vessel for which the owner or mortgagee is requesting an exemption unless the Chief Counsel authorizes a consolidated filing. The Chief Counsel hereby authorizes the consolidated filing by Petitioners relating to the three Vessels.

The Petitioners seek a determination from MARAD under 213(g) of the Act and 46 CFR 356.53 that they are exempt from the requirements of sections 202, 203 and 204 of the AFA and 46 CFR Part 356 on the ground that the requirements of the AFA and 46 CFR Part 356, as applied to Petitioners with respect to the Vessels, conflict with U.S. obligations under U.S.-Japan FCN. The Petitioners request a determination that the restrictions placed on foreign ownership, foreign financing and foreign control of U.S.-flag vessels documented with a fishery endorsement contained in 46 C.F.R. Part 356 and sections 202, 203 and 204 of the AFA do not apply to Petitioners with respect to:

(1) the existing ownership interests in the Vessels held, directly or indirectly, by the Vessel Owners and their Non-Citizen Investors; [1]

(2) the existing preferred mortgage interests in the Vessels held by Alyeska and the Japanese Bank Lenders identified below, including existing exclusive marketing agreements and other contract rights and interests ancillary to such financing arrangements; and

(3) future loan, financing and other transactions between the Non-Citizen Investors or the Japanese Bank Lenders,

[1] As used herein, the term ''Non-Citizen'' means a person or entity which is not a U.S. Citizen, as defined at 46 CFR § 356.3(e). The ''Non-Citizen Investors'' are Alyeska, Maruha, WAF, Marubeni Corporation, WAFBO, Inc., and Duke Point, L.P.

on the one hand, and the Vessel Owners, on the other, with respect to the Vessels.

Petitioner's Description of the Conflict Between the FCN Treaty and Both 46 CFR Part 356 and the AFA

MARAD's regulations at 46 CFR 356.53(b)(3) require Petitioners to submit a detailed description of how the provisions of the international investment agreement or treaty and the implementing regulations are in conflict. The entire text of the FCN Treaty is available on MARAD's internet site at *http://www.marad.dot.gov.* The description submitted by the Petitioner of the conflict between the FCN Treaty and both the AFA and MARAD's implementing regulations forms the basis on which the Petitioners request that the Chief Counsel issue a ruling that 46 CFR Part 356 does not apply to Petitioners with respect to the Vessels. The Petitioner's description of how the provisions of the U.S.-Japan FCN are in conflict with both the AFA and 46 CFR Part 356 is as follows:

A. The AFA's Limitations and Restrictions on Foreign Involvement in the U.S. Fishing Industry Are Inconsistent With U.S. Obligations Under the U.S.-Japan FCN.[3]

1. The AFA's Restrictions on Foreign Ownership Violates Article VII

(a) *The AFA's Restrictions on Foreign Investment Impair Petitioners' Existing Ownership Interests.* The AFA's new restrictions on foreign investment in fishing vessels will prohibit the Vessel Owners from employing their Vessels in the U.S. fisheries on and after October 1, 2001, because the extent of Japanese investment in the Vessel Owners exceeds the maximum permitted by the AFA.

Dept. verify hwer ref. & ft2**FOOTNOTES** [1]: [3]:

A vessel cannot lawfully be employed in the fisheries of the United States unless it is documented as a vessel of the United States with a fishery endorsement issued by the U.S. Coast Guard pursuant to 46 U.S.C. Chapter 121. 46 U.S.C. Chapter 121 sets out the requirements which must be met for a vessel to be eligible for documentation with a fishery endorsement, including requirements related to the citizenship of vessel owners.

The Vessels are fishing vessels, designed and constructed or rebuilt for use in the U.S. fisheries and operated in the U.S. fisheries of the North Pacific Ocean and Bering Sea. Each of the Vessel Owners is eligible to own a vessel with a fishery endorsement under the current standards of 46 U.S.C. Chapter 121 and each of the Vessels is documented as a vessel of the United States with a fishery endorsement.

However, the Vessel Owners will be prohibited from owning or operating the Vessels in the U.S. fisheries on and after October 1, 2001 under the new restrictions on foreign investment in fishing vessels imposed by the AFA and MARAD's implementing rules, codified at 46 CFR Part 356 (65 Fed. Reg. 44860 *et seq.*, July 19, 2000). The aggregate of the ownership interests held, directly or indirectly, in the Vessel Owners by Alyeska (in the case of the SEA WOLF, by Alyeska and WAFBO, Inc.) exceeds 25%—the maximum percentage interest permitted to be held by Non Citizens under Section 202(a) of the AFA, effective on and after October 1, 2001 (see 46 U.S.C. 12102(c)(1), as amended).[4] The AFA requires MARAD to revoke the fishery endorsement of any fishing vessel whose owner does not comply with this new requirement. AFA Section 203(e). Accordingly, unless exempted from the AFA's new requirements, the Vessel Owners will no longer be permitted to own and operate their Vessels in the U.S. fisheries as of October 1, 2001. As a result, the Vessel Owners will be deprived of income from their Vessels; will be driven into insolvency and will default under the terms of their Guaranties in favor of the Japanese Bank Lenders and their Loan Agreements with Alyeska, and Alyeska, in turn, will be forced into default under the terms of its loan agreement with the Japanese Bank Lenders. Alternatively, the Vessel Owners would be forced to sell the Vessels or their Non-Citizen Investors would be forced to sell their interests in the Vessel Owners, assuming a buyer could be found. In either case, if Alyeska loses access to the fish that would otherwise be harvested by the Vessels and delivered to its Dutch Harbor processing facility, the $70 million investment which Alyeska and its shareholders have made in that facility and the jobs of its employees would be jeopardized.

(b) *The Impairment of Petitioners' Existing Ownership Interests Violates Article VII.1 and the Grandfather Provision of Article VII.2* The impairment of Petitioners' existing ownership interests in the Vessels violates their right to ''national treatment'' under Article VII. 1 and the grandfather provision of Article VII.2 of the U.S.-Japan FCN.

The U.S.-Japan FCN was one of a series of similar Friendship, Commerce and Navigation (''FCN'') Treaties entered into by the United States with various countries after World War II, based on a standard State Department treaty text. All of these treaties reflect U.S. post-war policy to encourage and protect international trade and investment. Herman Walker, Jr., the principal author of the standard FCN treaty text and one of the principal State Department negotiators during this period, has described the FCN treaties as ''concerned with the protection of persons, natural and juridical, and of the property interests of such persons.'' Herman Walker, Jr., ''Modern Treaties of Friendship, Commerce and Navigation,'' 42 Minn. L. Rev. 805, 806 (1958) (hereinafter, ''Modern Treaties'').

Article VII.1 of the U.S.-Japan FCN guarantees broad ''national treatment'' for the nationals and enterprises of the U.S. and Japan when doing business within the jurisdiction of the other country. Article XXII.1 of the U. S.-Japan FCN defines ''national treatment'' as ''treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party.'' The principle of national treatment is the central principle of all of the post-war FCN treaties. National treatment requires that each State Party must treat nationals of the other in the same way that it treats its own nationals. The treaties focus on business and investment. ''The right of corporations to engage in business on a national-treatment basis may be said to constitute the heart of the treaty.'' Herman Walker, Jr., ''The Post-War Commercial Treaty Program of the United States,'' 73 Pol. Sci. Q. 57, 67 (1958). In a case involving interpretation of the U.S.-Japan FCN, the United States Supreme Court noted that the purpose

[3] The text of the relevant provisions of the U.S.-Japan FCN cited herein is found at Attachment 1 to the Annex I of Authorities (hereinafter ''Annex''), filed herewith.

[4] The AFA makes two primary changes to the existing limitation on foreign ownership of fishing vessels: (1) The required percentage of U.S. Citizen ownership is increased from ''a majority'' to 75%; (2) this new test is to be applied both ''at each tier of ownership and in the aggregate,'' whereas the existing standard is applied solely at each tier of ownership, allowing foreign interests ''in the aggregate'' to exceed 50%, so long as U.S. Citizen ownership is maintained ''at each tier.'' *See* 46 CFR 221.3(c) (a U.S. Citizen is a Person who ''at each tier of ownership'' satisfies the requisite ownership standard). *Compare,* 46 U.S.C. 12102(c), as now in effect, and 46 CFR 67.31(c), with 46 U.S.C. 12102(c)(1), as amended by Section 202(a) of the Act, and 46 CFR 356.9. The Vessels are owned by U.S. Citizens (as defined at 46 CFR 356.3(e)) at each ''tier'' of ownership but the ''aggregate'' U.S. citizen ownership is less than 75%. In addition, Section 204 of the AFA repeals a provision of prior law which permits 100% foreign owned corporations to own certain vessels.

of the FCN treaties was ''to assure [foreign corporations] the right to conduct business on an equal basis without suffering discrimination based on their alienage.'' *Sumitomo Shoii America* v *Avagliano*, 457 U.S. 176, 187–88 (1982). ''[N]ational treatment of corporations means equal treatment with domestic corporations.'' Id. at 188 n. 18.

The preamble of the U.S.-Japan FCN provides that guaranteeing nationals of each Party ''national * * * treatment unconditionally'' is one of the two general principles upon which the U.S.-Japan FCN was based. Use of the word ''unconditionally'' in this context clearly demonstrates the strength of the drafters' general intent. Accordingly, the exceptions to the principle of national treatment stated in the U.S.-Japan FCN must be narrowly construed.

The AFA's retroactive prohibition of ownership interests acquired by Alyeska and WAFBO, Inc. in compliance with existing law clearly denies national treatment to them and to the Vessel Owners. The AFA's new limitation on foreign ownership of fishing vessels is thus inconsistent with the most fundamental principle of the U.S.-Japan FCN.

The first sentence of Article VII.2 of the U.S.-Japan FCN provides a limited exception to the principle of national treatment for enterprises engaged in ''the exploitation of land or other natural resources.'' Even in that context, however, the second sentence of Article VII.2 (referred to as the ''grandfather'' provision of Article VII.2) prohibits application of new restrictions and limitations to Japanese nationals or enterprises which have previously ''acquired interests'' in enterprises owning U.S. fishing vessels or have previously engaged in the business activities now to be restricted. Article VII.2 provides in pertinent part:

> Each Party reserves the right to limit the extent to which aliens may within its territories establish, acquire interests in, or carry on * * * enterprises engaged in * * * the exploitation of land or other natural resources. *However, new limitations imposed by either Party upon the extent to which aliens are accorded national treatment, with respect to carrying on such activities within its territories. shall not be applied as against enterprises which are engaged in such activities therein at the time such new limitations are adopted and which are owned or controlled by nationals and companies of the other Party*

Emphasis added. The grandfather provision of Article VII.2 thus provides that any new limitations on national treatment placed on alien participation in the sectors covered by the first sentence of Article VII.2 shall not apply to existing enterprises engaged in business within those sectors at the time such new limitations are adopted.

A study commissioned by the State Department of its past interpretations of the FCN treaties notes that, under the grandfather provision of Article VII.2, ''protection is afforded to any privilege granted * * * prior to a change in national treatment; hence at a minimum these foreign enterprises are guaranteed the maintenance of their existing operations.'' Ronny E. Jones, ''State Department Practices Under U.S. Treaties of Friendship, Commerce, and Navigation'' (1981) (hereinafter ''Jones Study'') at 57.[5] ''[R]egulations that force divestiture of interests already acquired or established prior to promulgation of such regulation * * * raise Art. VII questions.'' *Id.* at 107. Herman Walker, Jr. stated the purpose of the Article VII.2 grandfather provision clearly: ''The aim is to * * * guarantee duly established investors against subsequent discrimination. The failure to find a welcome as to entry is of much less importance than would be a failure, once having entered and invested in good faith, to be protected against subsequent harsh treatment.'' Modern Treaties at 809. In describing the import of the phrase ''new limitations,'' another State Department study states,

> The net effect [of the second sentence of Article VII.2 is that, although not obligated to allow alien interests to become established in those fields of activity, *rights which have been extended in the past shall be respected and exempted from the application of new restrictions.*

Charles H. Sullivan, ''State Department Standard Draft Treaty of Friendship, Commerce and Navigation'' (undated) (hereinafter ''Sullivan Study'') at 149 (emphasis added). ''the second sentence of Article VII(2) is a grandfather clause intended in the interest of fairness to protect legitimately established alien enterprises against retroactive impairment.'' *Id.* at 148.

Both State Parties placed great importance on the grandfather provision of Article VII.2 because they recognized that it would not only protect existing property rights but would entitle foreign-owned enterprises to continue to operate in the same manner as before, notwithstanding later limitations placed on the rights of foreign-owned entities to engage in such business activities. It was a ''principal negotiating point'' of the U.S. side to ensure that the reservations in Article VII.2 would not permit retroactive application of any new limits to companies already engaged in relevant business activities.[6]

The U.S. negotiators therefore resisted efforts to modify the grandfather provision of Article VII.2, despite strong Japanese efforts to restrict its application. As an indication of the importance the Japanese negotiators attached to the provision, the Japanese Embassy at one point late in the negotiations indicated that the Ministry of Finance might be persuaded to withdraw ''all other objections'' to the draft treaty if the sentence granting grandfather rights to existing businesses were deleted.[7] Eventually, the Japanese negotiators accepted the language in Article VII.2 without any change after the U.S. agreed to the language appearing in the second sentence of Paragraph 4 of the Protocol. The U.S. State Department agreed to the Protocol language only on the understanding that it in no way undermined the prohibition against application of discriminatory laws to existing enterprises in the second sentence of Article VII.2.[8]

As adopted, the second sentence of Article VII.2 follows the standard treaty text developed by the State Department and used as the basis for more than a dozen FCN treaties. The Sullivan Study notes the breadth of the protection this sentence affords existing companies otherwise subject to VII.2. The Sullivan Study indicates that an enterprise protected by the Article VII.2 grandfather provision is not only protected as to existing property interests or contract rights, but ''is able to enjoy what may be considered normal business growth in terms of acquiring new customers and increasing the dollar volume of its business, but it cannot claim expanded privileges. * * *'' Sullivan Study at 150.

In short, the protections afforded existing investments and existing businesses by the second sentence of Article VII.2 were seen by the U.S. as a key part of the U.S.-Japan FCN and similar FCN treaties, providing substantial protections to foreign investors and businesses. The provision affords Alyeska and WAFBO, Inc. the right to continue to hold their direct and indirect investments in the Vessel Owners and, more generally, to continue to transact business with the

[5] Petitioners presume that MARAD has access to the Jones Study and the Sullivan Study referenced below. Petitioners will provide copies of these studies to MARAD on request.

[6] Annex, Attachment 2, Department of State Incoming Telegram dated March 20, 195, p. 1.

[7] Annex, Attachment 3, Memorandum from Frank A. Waring, Counselor of U.S. Embassy for Economic Affairs undated excerpt).

[8] Annex, Attachment 2 Department of State Incoming Telegram dated March 20, 1953, p. 1, and Attachment Office Memorandum dated March 23, 1953, pp. 1–2.

Vessel Owners on the same basis as permitted prior to passage of the AFA. Similarly, the Article VII.2 grandfather provision guarantees the Vessel Owners the right to own and operate the Vessels in the U.S. fisheries on equal terms with wholly domestic enterprises.

Maruha and Marubeni are clearly entitled to protection as Japanese enterprises which, at the time the AFA was adopted, were ''engaged in * * * activities'' within the United States which the AFA but for Section 213(g), would prohibit, limit or restrict. Alyeska, WAF, WAFBO, Inc. and the Vessel owners likewise come within the protection of the Article VII.2 grandfather provision by reason of the direct and indirect ownership interests in them held by Maruha and/or Marubeni. Thus, the Article VII.2 grandfather provision protects the ownership interests of Maruha, WAF and Marubeni in Alyeska, the ownership interests of Alyeska and WAFBO, Inc. in the Vessel Owners and the Vessel Owners' right to continue to own and operate the Vessels in the U.S. fisheries.

However, as noted above, the Article VII.2 grandfather provision not only protects preexisting rights and interests acquired, directly or indirectly, by Japanese nationals prior to a discriminatory change in the law, but protects *existing enterprises* from such changes. Accordingly, the Article VII.2 grandfather provision, together with Section 213(g) of the AFA, exempts the Vessel Owners and their Non-Citizen Investors from the new restrictions of Section 202, 203 and 204 of the AFA and 46 CFR Part 356 with respect to (a) the Non-Citizen Investors' existing direct and indirect ownership interests in the Vessel Owners and the Vessels, (b) the continued operations of the Vessels by the Vessel Owners in the U.S. fisheries, and (c) future transactions between the Non-Citizen Investors and the Vessel Owners to further or protect the existing rights and interests of the Non-Citizen Investors in the Vessels and the Vessel Owners, such as the refinancing of existing loans, the making of new loans, the modification of existing mortgages, the taking of new mortgages or other security and the conclusion of other contractual arrangements ancillary to such financing activities.

2. The AFA's Restrictions on Foreign Financing of Fishing Vessels Violate Article VII.

(a) *The AFA's Restrictions on Foreign Financing of Fishing Vessels Impair Petitioners' Rights and Interests With Respect to Vessel Financing.* The AFA will nullify the preferred mortgage interests in the Vessels currently held by Alyeska and the Japanese Bank Lenders, impair their rights and interests under existing financing documents and prevent them from protecting their established businesses and interests by entering into future financing and related business transactions with the Vessel Owners.

Current law permits wholly or partly Japanese-owned lenders, including the Japanese Bank Lenders, Alyeska and the other Non-Citizen Investors, to finance U.S. fishing vessels and to hold preferred mortgage interests in U.S. fishing vessels to secure their loans. *See* 46 USC 31322. A ''preferred mortgage'' is a creature of federal statute and gives the mortgagee a lien on the mortgaged vessel, enforceable in U.S. District Court under a priority scheme that protects the mortgagee from most maritime liens. *See, generally*, 46 USC Chapter 313. 46 USC 31326(b)(1) gives the preferred mortgage lien priority over all maritime liens arising after filing of the mortgage except a limited number of ''preferred'' maritime liens listed at 46 USC 31301(5) and provides that a sale of the vessel by order of the District Court terminates all liens or other claims against the vessel, thus ensuring the purchaser clear title and allowing the mortgagee to realize maximum value for its security. Since maritime liens arise in favor of suppliers, materialmen, repairmen and others in the course of the ordinary operations of the vessel, protection against such liens is essential to the mortgagee's security, as is the ability to terminate those liens on foreclosure and to sell the vessel ''free and clear'' of liens. Absent preferred mortgage status, a mortgage provides little or no security for the lender. Thus, the preferred mortgages which Alyeska and the Japanese Bank Lenders hold in the Vessels are valuable property interests in the Vessels.

The AFA will prohibit Alyeska and the Japanese Bank Lenders from continuing to hold their existing preferred mortgages on the Vessels unless, in the case of the Japanese Bank Lenders, their mortgages are transferred to a qualified Mortgage Trustee (*see* AFA Section 202(b), amending 46 USC 31322, and 46 CFR 356.19) *and* the terms of the financing documents are approved by a MARAD under the AFA's new ''control'' standards (see AFA Section 202(a), adding 46 USC 12102(c)(4)(A), and 46 CFR 356.15(d) and 356.21(d)). The AFA contains a new definition of impermissible Non-Citizen ''control'' (AFA Section 202(a), codified at 46 USC 12102(c)(2)) and requires transfers of ''control'' of fishing vessels to be ''rigorously scrutinized'' by MARAD under this new standard (AFA Section 203(c)(2)). MARAD has implemented the AFA's new ''control'' standard by adopting a host of new restrictions and limitations on contractual and other business arrangements between fishing vessel owners and Non-Citizens. *See, generally,* 46 CFR 356.11, 356.13–15, 356.21–25, 356.39–45. Unless MARAD reviews and approves the terms of the loan agreements, preferred mortgages and other financing documents previously executed by the Vessel Owners in favor of the Alyeska and the Japanese Bank Lenders prior to October 1, 2001 under these new standards, the Vessels will lose their fishery endorsements and the Vessel Owners will no longer be permitted to own or operate the Vessels in the U.S. fisheries. See 46 CFR 356.15(d), 356.21(d). This, in turn, will destroy the value of the Vessels as security under the mortgages held by Alyeska and the Japanese Bank Lenders and destroy the ability of the Vessel Owners to pay the debts which the mortgages secure. By prohibiting Alyeska and the Japanese Bank Lenders from continuing to hold their existing preferred mortgages on the Vessels, imposing new conditions and restrictions on the terms of their existing financing documents, including a new requirement of administrative review and approval of those financing documents under AFA's new ''control'' standards, the AFA and MARAD's implementing regulations will impair the contractual rights and mortgage interests of Alyeska and the Japanese Bank Lenders under their existing preferred mortgages and related financing documents.

In the case of Petitioner Alyeska's mortgages, *MARAD has made clear that there is no way that Alyeska can preserve its mortgage interests under the AFA.* MARAD has interpreted the AFA's requirements to prohibit Non-Citizen fish processors, such as Alyeska, from holding mortgages or other security interests in fishing vessels, even if the mortgage is held by a qualified Mortgage Trustee and the loan and mortgage terms are otherwise acceptable to MARAD. 65 Fed. Reg. at 44871 c.2 (July 19, 2000) (''[A]dvancements of funds from Non-Citizen processors will not be permitted where the security for the loan is a security interest in the vessel''). Thus, in the case of Alyeska, the AFA's requirements will nullify Alyeska's existing preferred mortgage interests in the Vessels. If Alyeska's mortgages are not released, the Vessels will lose their fishery endorsements, destroying the

value of the Vessels as collateral for Alyeska's loans and destroying the Vessel Owners' ability to pay their debts.

Further, even if Alyeska's *existing* financial interests in the Vessel Owners were found to be exempt from the requirements of the AFA and MARAD's implementing rules, the AFA's restrictions on *future* financing transactions between Alyeska or its Japanese shareholders and the Vessel Owners will substantially impair the rights and interests of Alyeska and its Japanese shareholders in violation of Article VII.1. The AFA's restrictions on foreign financing of fishing vessels will prevent Alyeska and its Japanese shareholders from protecting their investments in Alyeska's Dutch Harbor processing facility and their existing investments in and loans to the Vessel Owners by offering the Vessel Owners financing, secured by mortgages on the Vessels or otherwise, for vessel repairs or improvements which may become necessary to permit the Vessel Owners to operate profitably—or at all. If alternative financing from a financial institution is unavailable to the Vessel Owners, the ability of Alyeska to make loans to support the Vessels' continuing operations may be the only means available to protect the Vessel Owners from insolvency and default on their existing loans from Alyeska—triggering a default by Alyeska under its loan agreement with the Japanese Bank Lenders. Thus, the AFA's restrictions on the ability of Alyeska or its Japanese shareholders to make new loans to the Vessel Owners and to take security in the Vessels jeopardize the existing financial interests of Alyeska and its Japanese shareholders in the Vessel Owners and the Vessels, as well as Alyeska's own financial health.

Finally, the new restrictions imposed by the AFA and MARAD's regulations on the ability of Alyeska to make loans to fishing vessel owners will disrupt Alyeska's ability to secure a reliable supply of fish to its processing facility. Alyeska's ability to offer financing for the construction, acquisition or improvement of fishing vessels is a necessary means to secure a stable supply of fish to its processing plant. A processor's agreement to provide financing on favorable terms to qualified U.S. vessel owners in return for the vessel owner's agreement to sell the vessel's catch exclusively to the processor is a customary means by which vessel owners finance the acquisition, repair or improvement of their vessels and processors secure a reliable supply of fish to their plants. Such arrangements between vessel owners and processors, both wholly domestic and Non-Citizen processors, are common and traditional in the Alaska fishing industry. Non-Citizen processors, such as Alyeska, which have invested many millions of dollars in shore-based processing plants in remote locations in Alaska, must have the ability, like their wholly domestic competitors, to secure a reliable supply of fish to their plants by financing the acquisition or improvement of fishing vessels on normal commercial terms in return for the vessel owner's agreement to sell exclusively to that processor during the term of the loan. Just as their existing ownership and mortgage interests are protected by the Treaty; Alyeska, its Japanese shareholders and the Japanese Bank Lenders must also be able to modify and restructure their loans and related security arrangements with the Vessel owners and make new loans to the Vessel Owners with respect to the Vessels in order to further and protect their existing investments, mortgages and business interests, as circumstances may require.

(b) *The Restrictions on Foreign Financing of Fishing Vessels Imposed by the AFA and MARAD's Implementing Rules Violate Article VII.1.*

The new restrictions on foreign financing of fishing vessels imposed by the AFA and MARAD's implementing regulations violate Article VII.1's national treatment guaranty by (1) depriving Alyeska and the Japanese Bank Lenders of existing preferred mortgage interests securing existing loans; (2) subjecting the terms of their existing loan documents to a new requirement of administrative review and approval by MARAD under the new ''control'' standards of the AFA and MARAD's implementing rules; (3) depriving Alyeska and the Japanese Bank Lenders of the value of their collateral and the income stream from operations on which they relied in making their loans; and (4) preventing Alyeska, its shareholders or the Japanese Bank Lenders from refinancing existing loans, making new loans to the Vessel Owners, taking new mortgages on the Vessels or entering into other contractual arrangements with respect to the Vessels or the Vessel Owners necessary to further or protect their existing financial and business interests.

Article VII.1 extends full national treatment protection ''with respect to engaging in *all types* of commercial, industrial, *financial* and other business *activities*.'' The negotiating history of the U.S.-Japan FCN leaves no doubt that loans and lending by foreign-owned lenders are entitled to full national treatment under the first sentence of Article VII.1.

At the fourth informal meeting of the U.S. and Japanese negotiators, the Japanese negotiators argued that foreign-owned banks should be denied national treatment, as well as most-favored-nation protection. One reason given was that their loans could result in the foreign-owned bank lender controlling key industries.[9] For this and other reasons, Japan suggested rewriting Article VII.1, and among other changes deleting ''financial'' from the activities provided national treatment in the first sentence of the provision.

A cable from U.S. State Department headquarters in Washington noted that the Japanese proposal, and in particular its interest in denying national treatment to bank loans, reflected an attitude that creates a ''difficulty going to heart of treaty.[10] The State Department opposed any change that would delete the word *financial* from the first sentence of Article VII.1. Subsequently, the Japanese side suggested instead adding the word ''lending'' to the exception provided in the first sentence of Article VII.2, so the phrase would have read ''banking involving depository, lending or fiduciary functions.'' In response, the State Department reiterated its opposition to any change that would deny foreign lenders the right to full national treatment under Article VII.1.

A Department cable explained why the exception to national treatment provided by the first sentence of the U.S. draft of Article VII.2 was limited to only the depository and fiduciary functions of banks.[11] The cable states: ''Mr. Otabe is incorrect in supposing that the U.S. reservation for banking is based on the reason he alleges. The reservation has to do with receiving and keeping custody of deposits from the public at large; that is, the safekeeping of other people's money, a function of particular trust. It does not have to do with the lending activities of a bank; and the Department does not feel that a reservation is either appropriate or necessary as to a bank's lending its own money.'' Id. During the second round of informal meetings, the U.S. negotiators continued to oppose adding loans to the banking functions excluded from full national treatment by the first sentence of Article VII.2, and the Japanese

[9] Annex, Attachment 5, Memorandum of Conversation dated March 4, 1952, pp. 2–3.

[10] Annex, Attachment 6, Dept. of State Outgoing Telegram dated March 10, 1952, p. 1.

[11] Annex, Attachment 7, Dept. of State Outgoing Telegram dated May 21, 1952, p. 3.

government eventually agreed to withdraw its proposed change.[12]

The exception to national treatment for certain banking functions in the first sentence of Article VII.2 is the same as in the standard FCN treaty text. The Sullivan Study notes that ''this reservation is stated in terms intended to circumscribe it as much as possible, thereby maximizing the extent to which the banking business remains subject to the rule [of national treatment] set forth in Article VII(1).'' Sullivan Study at 144. The Sullivan Study notes that the two areas reserved, depositary and fiduciary functions, involve the custody and management of other people's money, and therefore are the most sensitive areas of banking.

It is clear, therefore, that the reference in the first sentence of Article VII.2 to ''banking involving depository or fiduciary functions'' does not include the lending activities of the Japanese Bank Lenders or Alyeska. Both the U.S. and Japanese negotiators were in full agreement as to the meaning of this phrase. Thus, the financing activities of banks and other lenders are entitled to the full national treatment under Article VII.1.[13]

The provisions of the AFA and MARAD's implementing rules which restrict the right of Japanese-owned entities to make loans secured by mortgages on U.S. vessels or to make such loans without prior MARAD approval of the loan terms are inconsistent with the guaranty of national treatment in Article VII.1. The rationale that such loan activities may be restricted on the grounds that they could result in a degree of control over sensitive industries was specifically considered by the U.S. negotiators and rejected as a valid reason for limiting the Treaty's protections for such lending activities. The control argument presented by Japan at that time is the same argument used to justify the restrictions of the AFA. Although the negotiating history deals largely with banking, the language of Article VII.1 extends the protections of national treatment broadly to ''all types of * * * financial * * * activities.'' Under Article VII.1, neither State Party may restrict loans by foreign-owned entities secured by vessels of their national flag.

The AFA and MARAD's implementing rules impose new restrictions on the ability of Alyeska and the Japanese Bank Lenders, going forward, to protect their existing financial interests in the Vessel Owners and the Vessels by, *e.g.*, re-financing existing loans, advancing new loans for repair or improvement of the Vessels or entering into other financing or contractual arrangements with the Vessel Owners. These restrictions are not permitted by Article VIII of the Treaty. Article VIII extends the Treaty's protection both to loans, mortgages and other financing arrangements that are now outstanding under the terms of existing financing documents and to future financing activities by Alyeska, its shareholders or the Japanese Bank Lenders involving the Vessels or the Vessel Owners.

Application of the AFA's new ''control'' standards to restrict the ability of Alyeska to do business with the Vessel Owners that supply fish to its processing plant, as it has done in the past and on the same terms as its U.S. Citizen competitors, would deny national treatment to Alyeska and its Japanese shareholders. The State Department has recognized that the exception to the requirement of national treatment that may apply with respect to the ownership of fishing vessels under the first sentence of Article VII.2 does not apply to fish processors.[14] Article VII.1 applies, and it extends the protection of full and unconditional national treatment to fish processors with Japanese ownership, such as Alyeska. The discriminatory restrictions imposed under the AFA on Alyeska's ability to enter into future financing and other contractual arrangements with the Vessel Owners to ensure a stable supply of fish to Alyeska's Dutch Harbor processing facility clearly violate Article VII.1.

For these reasons, Petitioners seek a determination by MARAD that Sections 202, 203 and 204 of the AFA and MARAD's implementing regulations do not apply to Petitioners with respect to (a) existing preferred mortgages and associated loan and security documents previously executed by the Vessel owners in favor of Alyeska or the Japanese Bank Lenders, including the exclusive marketing agreements contained in Alyeska's loan agreements with the Vessel Owners (or, in the case of the SEA WOLF, with the Vessel Owner's general partner); or (b) fixture financing and ancillary contractual arrangements between Alyeska or the Japanese Bank Lenders and the Vessel Owners, including exclusive marketing agreements.

3. Application of the AFA and MARAD's Implementing Rules to Petitioners Would Result in a ''Taking'' in Violation of Article VI.3

The first sentence of Article VI.3 of the Treaty states that ''[p]roperty of nationals and companies of either Party shall not be taken within the territories of the other Party except for a public purpose, nor shall it be taken without the prompt payment of just compensation.'' This ''takings'' provision precludes expropriations and other measures that substantially impair a Japanese national's direct and indirect property rights. Applying the AFA's new restrictions to prohibit the Non-Citizen Petitioners from holding their pre-existing ownership interests, mortgage interests and contract rights would deprive them of their property in violation of Article VI.3.

The term ''property'' in Article VI.3 includes not simply direct ownership but also a wide variety of property interests, such as those which the Non-Citizen Petitioners have in the Vessel Owners and in the Vessels. The Protocol to the U.S.-Japan FCN explicitly states that ''[t]he provisions of Article VI, paragraph 3 * * * shall extend to interests held directly *or indirectly* by nationals and companies of either Party in property which is taken within the territories of the other Party.'' Protocol, ¶ 2 (emphasis added). As the United States delegates made clear during the negotiation of the Treaty, the phrase ''interests held directly or indirectly'' is intended to extend to every type of right or interest in property which is capable of being enjoyed as such, and upon which it is practicable to place a monetary value. These direct and indirect interests in property include not only rights of ownership, but [also] * * * lease hold interest[s], easements, contracts, franchises, and other tangible and intangible property rights.[15] In short, ''all property interests are contemplated by the provision.'' [16] This necessarily includes the direct and indirect ownership interests which

[12] Annex, Attachment 8, Memorandum of Conversation dated October 15, 1952, p. 15.

[13] To the extent that it could be argued that the first sentence of Article VII.2 might permit restrictions on foreign financing of fishing vessels, the grandfather provision of Article VII.2 would clearly protect Alyeska, its shareholders and the Japanese Bank Lenders with respect to their existing rights and interests, as the holders of ownership and debt interests in the Vessel Owners and mortgage interests in the Vessels, and with respect to future financing activities undertaken to further or protect those interests. Alyeska, WAFBO, Inc., their Japanese shareholders and the Japanese Bank Lenders clearly ''acquired interests'' in the Vessel Owners prior to enactment of the AFA and are thus entitled to national treatment in future dealings with the Vessel Owners.

[14] Annex, Attachment 9, Letter to the Chairman of the House of Representatives Committee on Merchant Marine and Fisheries from Robert Lee, August 17, 1964.

[15] Annex, Attachment 10, Memorandum of Conversation dated April 15, 1952 at p. 3.

[16] *Id.*

Petitioners have in the Vessel Owners and in the Vessels and the preferred mortgage interests which Alyeska and the Japanese Bank Lenders have in the Vessels, together with ancillary contract rights granted in their loan documents.

The concept of a taking in this context is broad and ''is considered as covering, in addition to physical seizure, a wide variety of whole or partial sequestrations *and other impairments of interests in or uses of property.*'' Sullivan Study at 116 (emphasis added). Here, the AFA's new restrictions on foreign investment and foreign financing will prohibit the Vessel Owners from using their Vessels in the U.S. fisheries. In effect, the AFA will either deprive the Petitioners of the economic value of their interests in the Vessels by prohibiting their productive use or force divestiture. The impairment of the presently existing rights of the Vessel Owners to use their Vessels in the U.S. fisheries—and the rights of the other Petitioners to hold their existing direct and indirect ownership interests in the Vessel Owners and mortgage interests in the Vessels—is a sufficient impairment of those rights and interests as to constitute a violation of Article VI.3.

Further, a taking is permitted under the Treaty only for a ''public purpose,'' and it is clear that application of the AFA's ownership restrictions to the Vessel Owners so as to force a divestiture of the interests of Alyeska or WAFBO, Inc. to a private party which qualifies as a U.S. Citizen would not satisfy the ''public purpose'' requirement of the U.S.-Japan FCN. Even if such a forced sale to a private party could be characterized as having a ''public purpose,'' the AFA makes no provision for the ''prompt payment of just compensation,'' as required by Article VI.3. The fact that the AFA and 46 CFR Part 356 fail to provide any compensation scheme—let alone ''adequate provision * * * at or prior to the time of taking for the determination and payment thereof''—is another basis for concluding that the AFA's retroactive limitations on foreign ownership and foreign financing of fishing vessels are inconsistent with Article VI.3 of the U.S.-Japan FCN.

4. The AFA and MARAD's Implementing Rules Impair Petitioners' Legally Acquired Rights in Violation of Article V

The new restrictions imposed by the AFA and MARAD's implementing rules on foreign involvement in the U.S. fishing industry are ''unreasonable or discriminatory measures'' that impair the legally acquired rights and interests of Petitioners in violation of Article V of the Treaty.

Article V provides that ''[n]either Party shall take unreasonable or discriminatory measures that would impair the legally acquired rights or interests within its territories of nationals and companies of the other Party in the enterprises which they have established. * * *'' The provision follows the standard FCN treaty language, except that the language was moved from Article VI.3 in the standard text to a new Article V and certain additional language, not relevant here, was added. According to the Sullivan Study, the provision ''offers a basis in rather general terms for asserting protection against excessive governmental interference in business activities or particular activities not specifically covered by the treaty.'' Sullivan Study at 115. Herman Walker observed that this language is designed ''to account for the possibility of injurious governmental harassments short of expropriation or sequestration.'' Herman Walker, Jr., ''Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice,'' 5 Am. T. Comp. Law at 236 (1956). A State Department memorandum to Congress, discussing language very similar to Article V in another treaty, noted that the language ''affords one more ground, in addition to all the other grounds set forth in the treaty, for contesting foreign actions which appear to be injurious to American interests.'' [17]

The negotiating history confirms that Article V was intended as a general provision prohibiting discrimination against foreign-owned entities not subject to other provisions of the U.S.-Japan FCN. During the negotiations, Japan proposed-adding language prohibiting the denial ''of opportunities and facilities for the investment of capital.'' The proposal was not adopted after the U.S. opposed it on the grounds that Article VII fully addressed investment activities and that the additional language was not appropriate in Article V, which addresses issues not limited to investment.[18]

Thus, Article V was intended as a general prohibition of discriminatory restrictions not covered by other provisions of the U.S.-Japan FCN and of restrictions that do not rise to the level of a ''taking.'' Article V prohibits deprivations of both most-favored nation treatment and national treatment. Sullivan Study at 115. Thus, it would apply to the variety of discriminatory prohibitions and restrictions that the AFA and MARAD's implementing regulations impose on Petitioners' existing ownership and mortgage interests and other contract rights and on Petitioners' ongoing ability to protect those rights and interests by entering into future transactions with the Vessel Owners.

The intrusive and discriminatory restrictions imposed by the AFA and MARAD's implementing rules on transactions between Non-Citizen lenders, such as Alyeska and the Japanese Bank Lenders, and U.S. fishing vessel owners place the Non-Citizen lenders at a significant competitive disadvantage. U.S. Citizen processors and other lenders are free to make loans and to enter into contracts with fishing vessel owners without restriction. U.S. Citizen processors remain free to obtain a reliable supply of fish by financing fishing vessel acquisitions, conversions and improvements in return for exclusive marketing relationships while Non-Citizen processors are prohibited from making similar arrangements. As previously noted, MARAD has stated that Non-Citizen processors will be flatly prohibited from taking security in fishing vessels to secure loans to vessel owners. Under 46 CFR 356.45, a Non-Citizen lender is not even permitted to make an *unsecured* loan to a fishing vessel owner, if (a) the loan exceeds the annual value of the vessel's catch (where an exclusive marketing agreement is involved—see § 356.45(a)(2)(i)); or (b) the lender is ''affiliated with any party with whom the owner * * * has entered into a mortgage, long-term or exclusive sales or purchase agreement, or other similar contract * * * '' (see § 356.45(b)(1)). Under these standards, Alyeska's existing loans to the Vessel Owners would not have been permitted and Alyeska will not be permitted to make future loans to the Vessel Owners, secured or unsecured, to protect its existing interests. Further, the requirement of MARAD review and approval is itself an unreasonable and discriminatory burden, particularly in the absence of coherent standards. The AFA and MARAD's rules thus impose ''unreasonable or discriminatory measures'' on Non-Citizen fish processors and other lenders with Japanese ownership, such as Alyeska

[17] Annex, Attachment 11, Department of State Instruction dated February 15, 1954, p. 2, (discussing the applicability of Article V of the U.S.-Japan FCN to American lawyers doing business in Japan, and citing May, 1952 memorandum to U.S. Committee on Foreign Relations).

[18] Annex, Attachment 12; Department of State Division of Communications & Records Outgoing Airgram dated October 28, 1952, p. 2.

and the Japanese Bank Lenders, impairing their legally acquired rights and interests and their ongoing ability to protect those interests in violation of Article V of the U.S.-Japan FCN.

5. Article XIX 6 Does Not Authorize the Provisions of the AFA and MARAD's Implementing Rules Which Are Otherwise in Violation of the U.S.-Japan FCN

Article XIX.6 provides that notwithstanding any other provision of the Treaty, ''each Party may reserve exclusive rights and privileges to its own vessels with respect to the * * * national fisheries.* * *'' This provision does not authorize the discriminatory limitations on Japanese investment and financing contained in the AFA and MARAD's implementing rules.

Even if Article XIX. 6 is interpreted as applying to fishing vessels,[19] it would be irrelevant to the issues presented here with respect to the AFA. Consistent with the Treaty text authorizing a Party to reserve exclusive rights to ''its own vessels,'' the State Department has interpreted Article XIX.6 merely to permit the U.S. to reserve the right to catch or land fish in the U.S. national fisheries to ''U.S. flag vessels.'' [20] The text of Article XIX.6 says nothing about and certainly does not authorize restrictions on foreign ownership or financing of U.S. flag fishing vessels or the ability of foreign-owned enterprises to do business with the owners of U.S. flag fishing vessels—restrictions that otherwise clearly violate Article VII of the Treaty.

The historical record of the negotiations provides further evidence that Article XIX.6 was not intended to override Article VII's national treatment requirements with respect to foreign investment in or financing of U.S. flag fishing vessels or other dealings between foreign-owned enterprises and fishing vessel owners. At one point, the Japanese negotiators proposed rewriting Article XIX.6 to provide that the national treatment provisions of the Treaty would not extend to *''nationals companies and vessels* of the other Party any special privileges reserved to national fisheries.'' *See* Memorandum of Conversation dated April 3, 1952, at 5.[21] The State Department understood the Japanese suggestion as an attempt to obtain a blanket exception from the entire Treaty for national fisheries. *See* U.S. Dept. of State, Outgoing Airgram to U.S. Embassy in Tokyo (June 12, 1952), at 1–2 (noting that a clearer way to effect the Japanese intent would be by adopting a single comprehensive exception stating that ''[t]he provisions of the present Treaty shall not apply with respect to the national fisheries of either Party, or to the products of such fisheries'').[22] The U.S. rejected the Japanese proposal and the language of Article XIX.6 remained unchanged. The issue of Japanese investment in and other dealings with enterprises owning or operating U.S. flag fishing vessels was left to Article VII.

Subsequent practice of the State Department confirms this reading of Article XIX.6. In 1964, the State Department reaffirmed the narrow scope of Article XIX.6 in a letter to the House Committee on Merchant Marine and Fisheries. The letter makes clear that the provision merely permits the United States to reserve the right to catch or land fish to U.S. flag vessels? [23]

This reading of Article XIX.6 in the U.S.-Japan FCN also comports with the State Department's reading of this same language in other FCN treaties to which the U.S. is a party. The Sullivan Study explicitly states that ''[t]he crucial element in Article XIX is that it relates to the treatment of *vessels* and to the treatment of their cargoes. *It is not concerned with the treatment of the enterprises which own the vessels* and the cargoes.'' Sullivan Study at 284 (emphasis added).

Thus, the text, negotiating history and subsequent State Department practice and understanding all explicitly confirm that Article XIX.6 is irrelevant to laws restricting foreign ownership and control of fishing vessel *owners* and thus does not override the other provisions of the U.S.-Japan FCN dealing with foreign investment and business activity. Article XIX.6 does not exempt the AFA's foreign ownership, financing and control restrictions, from Articles V, VI.3, VII or IX.2, each of which bars application of those restrictions to Petitioners with respect to the Vessel Owners and the Vessels.

6. Broad Interpretation of the Treaty's Protections is in the U.S. Interest

The terms of the U.S.-Japan FCN and the other FCN treaties which share the same language are reciprocal—that is, the principle of ''national treatment'' applies not only to protect the investments of foreign nationals in the United States but also to protect the investments of U.S. nationals in Japan and other countries. Thus, any interpretation of the U.S.-Japan FCN adopted by MARAD in the present context will also define the rights of U.S. nationals doing business in Japan and other countries, now and in the future. A narrow interpretation of the U.S.-Japan FCN's protections for Japanese enterprises and their investments in the present context will effectively limit the rights of U.S. investors and U.S. businesses in Japan and other countries with which the United States has concluded similar FCN treaties.

For this reason, the State Department has interpreted the national treatment requirement of the FCN treaties broadly in the past. *See, generally,* Jones Study. The U.S. interest in protecting U.S. nationals doing business abroad, as well as the State Department's historical practice in interpreting the FCN treaties, requires an interpretation of the U.S.-Japan FCN which will protect the interests of foreign enterprises and the U.S. companies in which they have invested from the retroactive and discriminatory prohibitions and restrictions of the AFA and 46 C.F.R. Part 356.

B. AFA Section 213(g) Exempts Japanese Enterprises and U.S. Enterprises With Japanese Investment From The AFA's Limitations and Restrictions on Foreign Ownership, Foreign Financing and Foreign ''Control'' of U.S. Fishing Vessels

Sections 202, 203 and 204 of the AFA and the implementing regulations published by MARAD on July 19, 2000, codified at 46 C.F.R. Part 356, impose a host of new limitations and restrictions on foreign ownership of fishing vessels, foreign financing of fishing vessels and contractual arrangements between foreign enterprises or U.S. companies with substantial foreign ownership and U.S. fishing vessel owners. As demonstrated above, if applied to Petitioners, these new limitations and restrictions would deprive Petitioners and the Japanese Bank Lenders of valuable existing ownership, mortgage and contract rights and interests in violation of the U.S.-Japan FCN. Application of the new restrictions to bar Petitioner Alyeska or its Japanese shareholders from entering into future transactions with the Vessel Owners, particularly financing and ancillary contractual arrangements, such as exclusive marketing agreements, would also violate the U.S.-Japan-FCN by substantially impairing the ability of Alyeska and its shareholders to protect

[19] Article XIX.7 defines ''vessel'' to exclude ''fishing vessels'' for purposes of Article XIX.6.

[20] Annex, Attachment 9, Letter to the Chairman of the House of Representatives Committee on Merchant Marine and Fisheries from Robert Lee, August 17, 1964.

[21] Annex, Attachment 13, Memorandum of Conversation dated April 3, 1952.

[22] Annex, Attachment 14, Department of State Outgoing Airgram dated June 12, 1952.

[23] *See* fn. 21. *See also,* Jones Study at 80–81.

their existing rights and interests and to carry on their existing lawful business in the United States in conformity with past practice and on an equal footing with U.S. Citizens.

To avoid these results, Congress included a provision in the AFA to ensure that the Act would not contravene U.S. treaty obligations. Section 213(g) provides in pertinent part:

> In the event that any provision of section 12102(c) or section 31322(a) of title 46, United States Code, as amended by this Act, is determined to be inconsistent with an existing international agreement relating to foreign investment to which the United States is a party with respect to the owner or mortgagee on October 1, 2001 of a vessel with a fishery endorsement, such provision shall not apply to that owner or mortgagee with respect to such vessel to the extent of any such inconsistency * * *.

Section 213(g) makes clear that its reach is intended to extend to every ''owner'' or ''mortgagee'' holding an ownership or mortgage interest on October 1, 2001, when Sections 202, 203 and 204 of the AFA become effective. Section 213(g) provides explicitly that the exemption does not apply to ''subsequent owners and mortgagees'' who acquire their interests *after* October 1, 2001 or ''to the owner [of the vessel] on October 1, 2001 if any ownership interest in that owner is transferred to or otherwise acquired by a foreign individual or entity *after such date* (emphasis added).

Petitioners are ''owners'' and ''mortgagees'' who acquired their interests in the Vessels prior to October 1, 2001, and who intend to continue to hold those interests on and after October 1, 2001. The inconsistency between the provisions of the AFA and MARAD's implementing regulations and the requirements of the U.S.-Japan FCN is demonstrated above. Accordingly, under Section 213(g) of the Act, the provisions of Sections 202, 203 and 204 ''shall not apply'' to Petitioners ''to the extent of the inconsistency.''

The exemption provided by Section 213(g) is not limited to existing property rights, mortgage interests or investment interests in existence on October 1, 2001, but rather applies to an ''owner'' or ''mortgagee'' on October 1, 2001 ''to the extent of the inconsistency'' between the Act and the Treaty. Petitioners qualify as ''owners'' and ''mortgagees.'' Petitioners are, therefore, exempt from the requirements of the AFA ''to the extent of the inconsistency'' between the AFA and the Treaty. As demonstrated above, the ''inconsistency'' between the AFA and the Treaty is two-fold: (1) The Treaty protects the existing ownership and mortgage interests of Petitioners and the Japanese Bank Lenders in the Vessels and related contract rights, which the AFA would prohibit or restrict; and (2) the Treaty protects future transactions between Alyeska, its Japanese shareholders or the Japanese Bank Lenders and the Vessel Owners, which the AFA would prohibit or restrict, including future loans, preferred mortgages and other financing and contractual arrangements, which Petitioners may deem necessary or appropriate to protect their existing businesses and their existing interests in the Vessels and the Vessel Owners. Thus, Section 213(g) exempts Petitioners from the restrictions and limitations of Sections 202, 203 and 204 of the AFA and MARAD's implementing rules.

IV. Conclusion

For the reasons stated above, Sections 202, 203 and 204 of the AFA and 46 CFR Part 356 are inconsistent with the U.S.-Japan FCN and therefore may not be applied to Petitioners with: respect to the Vessels or the Vessel Owners.

This concludes the analysis submitted by Petitioner for consideration.

Dated: January 11, 2001.

By Order of the Maritime Administrator.

Joel Richard,

Secretary, Maritime Administration.

[FR Doc. 01–1357 Filed 1–16–01; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2001–8665]

ARICA—Applicability of Ownership and Control Requirements to Obtain a Fishery Endorsement to the Vessel's Documentation

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a petition requesting MARAD to issue a determination that the ownership and control requirements and the preferred mortgage requirements of the American Fisheries Act of 1998 and 46 CFR Part 356 are in conflict with an international investment agreement.

SUMMARY: The Maritime Administration (''MARAD'') is soliciting public comments on a petition from the owners and mortgagees of the vessel ARICA—Official Number 550139 (hereinafter the ''Vessel''). The petition requests that MARAD issue a decision that the American Fisheries Act of 1998 (''AFA'' or ''Act''), Division C, Title II, subtitle I, Pub. L. 105–277, and the implementing regulations at 46 CFR part 356 (65 FR 44860 (July 19, 2000)) are in conflict with the Agreement Between the United States of America and Denmark Regarding Friendship, Commerce and Navigation, 421 UNTS 105, TIAS: 4797,12 UST 908951 (1961) (''Denmark Treaty'' or ''FCN''). The petition is submitted pursuant to 46 CFR 356.53 and 213(g) of AFA, which provide that the requirements of the AFA and the implementing regulations will not apply to the owners or mortgagees of a U.S.-flag vessel documented with a fishery endorsement to the extent that the provisions of the AFA conflict with an existing international agreement relating to foreign investment to which the United States is a party. This notice sets forth the provisions of the international agreement that the Petitioner alleges are in conflict with the AFA and 46 CFR part 356 and the arguments submitted by the Petitioner in support of its request. If MARAD determines that the AFA and MARAD's implementing regulations conflict with the Denmark Treaty, the requirements of 46 CFR Part 356 and the AFA will not apply to the extent of the inconsistency. Accordingly, interested parties are invited to submit their views on this petition and whether there is a conflict between the Denmark Treaty and the requirements of both the AFA and 46 CFR Part 356. In addition to receiving the views of interested parties, MARAD will consult with other Departments and Agencies within the Federal Government that have responsibility or expertise related to the interpretation of or application of international investment agreements.

DATES: You should submit your comments early enough to ensure that Docket Management receives them not later than February 16, 2001.

ADDRESSES: Comments should refer to the docket number that appears at the top of this document. Written comments may be submitted by mail to the Docket Clerk, U.S. DOT Dockets, Room PL–401, Department of Transportation, 400 7th St., SW, Washington, DC 20590–0001. You may also send comments electronically via the Internet at http://dms.dot.gov/submit/. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except Federal Holidays. An electronic version of this document and all documents entered into this docket are available on the World Wide Web at http://dms.dot.gov.

FOR FURTHER INFORMATION CONTACT: John T. Marquez, Jr. of the Office of Chief Counsel at (202) 366–5320. You may send mail to John T. Marquez, Jr., Maritime Administration, Office of Chief Counsel, Room 7228, MAR–222, 400 Seventh St., SW, Washington, DC, 20590–0001 or you may send e-mail to John.Marquez@marad.dot.gov.

SUPPLEMENTARY INFORMATION:

Background

The AFA was enacted in 1998 to give U.S. interests a priority in the harvest of U.S.-fishery resources by increasing the requirements for U.S. Citizen ownership, control and financing of U.S.-flag vessels documented with a fishery endorsement. MARAD was charged with promulgating implementing regulations for fishing vessels of 100 feet or greater in registered length while the Coast Guard retains responsibility for vessels under 100 feet.

Section 202 of the AFA, raises, with some exceptions, the U.S.-Citizen ownership and control standards for U.S.-flag vessels that are documented with a fishery endorsement and operating in U.S.-waters. The ownership and control standard was increased from the controlling interest standard (greater than 50%) of § 2(b) of Shipping Act, 1916 (''1916 Act''), as amended, 46 App. U.S.C. 802(b), to the standard contained in § 2(c) of the 1916 Act, 46 App. U.S.C. 802(c), which requires that 75 percent of the ownership and control in a vessel owning entity be vested in U.S. Citizens. In addition, section 204 of the AFA repeals the ownership grandfather ''savings provision'' in the Anti-Reflagging Act of 1987, Pub. L. 100–239, § 7(b), 101 Stat 1778 (1988), which permits foreign control of companies owning certain fishing vessels.

Section 202 of the AFA also establishes new requirements to hold a preferred mortgage on a vessel with a fishery endorsement. State or federally chartered financial institutions must now comply with the controlling interest standard of § 2(b) of the 1916 Act in order to hold a preferred mortgage on a vessel with a fishery endorsement. Entities other than state or federally chartered financial institutions must either meet the 75% ownership and control requirements of § 2(c) of the 1916 Act or utilize an approved U.S.-Citizen Trustee that meets the 75% ownership and control requirements to hold the preferred mortgage for the benefit of the non-citizen lender.

Section 213(g) of the AFA provides that if the new ownership and control provisions or the mortgagee provisions are determined to be inconsistent with an existing international agreement relating to foreign investment to which the United States is a party, such provisions of the AFA shall not apply to the owner or mortgagee on October 1, 2001, with respect to the particular vessel and to the extent of the inconsistency. MARAD's regulations at 46 CFR 356.53 set forth a process wherein owners or mortgagees may petition MARAD, with respect to a specific vessel, for a determination that the implementing regulations are in conflict with an international investment agreement. Petitions must be noticed in the **Federal Register** with a request for comments. The Chief Counsel of MARAD, in consultation with other Departments and Agencies within the Federal Government that have responsibility or expertise related to the interpretation of or application of international investment agreements, will review the petitions and, absent extenuating circumstances, render a decision within 120 days of the receipt of a fully completed petition.

The Petitioners

Arica Fishing Company Limited Partnership (''Arica Fishing Co.'') is the owner of the Vessel. Arica Fishing Co. is owned by JOMM Enterprises, Inc, the General Partner, and limited partners Royal Greenland Inc.-USA, JZ, Ltd., Kenneth Morrison, and Robert F. Allen. Royal Greenland Inc.-USA directly owns 47% of Arica Fishing Co. and indirectly owns an additional percentage through its participation in both JOMM Enterprises, Inc. and JZ, Ltd.. Royal Greenland, Inc.-USA is a Washington State Corporation that holds an aggregate interest at all tiers of the partnership ownership structure of approximately 54%.

Royal Greenland, Inc.-USA is a subsidiary of Royal Greenland Trading ApS, a Danish company registered in Denmark. In 1994, Royal Greenland Trading ApS was approached to invest in U.S. fishing operations on the West coast of the United States. The following year Royal Greenland agreed to make these investments through a U.S. subsidiary, Royal Greenland Inc.-USA. Arica Fishing Co, Royal Greenland, Inc.-USA, Royal Greenland Trading ApS, JOMM Enterprises, Inc. and JZ, Ltd are hereafter collectively referred to as the ''Petitioner'' or ''Petitioners.''

Requested Action

The Petitioners seek a determination from MARAD under § 213(g) of the AFA and 46 CFR 356.53 that they are exempt from the U.S. citizen ownership and control requirements of the AFA and 46 CFR part 356 on the grounds that the requirements of the AFA and 46 CFR part 356, as applied to Petitioners with respect to the Vessel, conflict with U.S. obligations under the Denmark Treaty. Specifically, the Petitioners request that MARAD determine that the ownership and control restrictions do not apply to Royal Greenland Trading ApS, its wholly-owned subsidiary Royal Greenland, Inc.-USA, or its equity ownership in the Vessel, through its ownership interest in Arica Fishing Company Limited Partnership, JOMM Enterprises, Inc., and JZ, Ltd.

Petitioner's Description of the Conflict Between the FCN Treaty and Both 46 CFR Part 356 and the AFA

MARAD's regulations at 46 CFR 356.53(b)(3) require Petitioners to submit a detailed description of how the provisions of the international investment agreement or treaty and the implementing regulations are in conflict. The entire text of the Denmark Treaty is available on MARAD's internet site at *http://www.marad.dot.gov.* The description submitted by the Petitioner of the conflict between the Denmark Treaty and both the AFA and MARAD's implementing regulations forms the basis on which the Petitioner requests that the Chief Counsel issue a ruling that 46 CFR part 356 does not apply to Petitioner with respect to the Vessel. The Petitioner's description of how the provisions of the Denmark Treaty are in conflict with both the AFA and 46 CFR Part 356 is as follows:

Summary of Argument

The ownership and control provisions of the AFA are directly inconsistent with the U.S-Denmark Treaty of Friendship, Commerce and Navigation (the ''Denmark Treaty''), an existing international agreement relating to foreign investments to which the United States is a party. The issue is relevant because there is investment by Royal Greenland Trading, a Danish company, in the U.S. flag fishing vessel Arica that would be directly impaired by the AFA. Specifically, the AFA's unambiguous, retroactive discrimination against fishing companies with foreign ownership interests, for the benefit of super-majority U.S. owned fishing companies—as applied to Danish investment in such companies—is directly at odds with the Denmark Treaty.

The purpose of the Denmark Treaty is to encourage investment between the United States and Denmark. The Treaty prohibits the impairment of rights legally acquired by Danish investors in U.S. enterprises. The Denmark Treaty also explicitly accords Danish investors national treatment—treatment by the U.S. government as if such investors were U.S. nationals, with respect to their investments in the United States. Most plainly, the Denmark Treaty explicitly forbids interference with Danish investors'

rights to manage enterprises which they have established or acquired.

Therefore, under Section 213(g) of the Act, the irreconcilable conflict between the investment protection provisions of the Denmark Treaty and the AFA's retroactive impairment of Royal Greenland Trading's investment rights requires Marad to grant this petition to exempt from the U.S. citizen ownership and control requirements of the AFA Royal Greenland Trading's equity ownership in the Arica (through its ownership interest in Arica Fishing Company Limited Partnership, JOMM Enterprises, Inc., and JZ, Ltd.).

The U.S. Treaties of Friendship, Commerce and Navigation Are a Class of International Agreements Protecting Bilateral Investment

The Denmark Treaty was one of a group of post-World War II treaties designed to create open-door investment between the U.S. and nearly twenty other countries. Unlike previous agreements, these ''Friendship, Commerce and Navigation'' treaties dealt explicitly with corporate investment between countries.

The purpose of the FCN treaties in the post-war period was to provide a stable environment for private international investment.[14] The FCN treaties sought ''national treatment,''[15] and were intended to create an ''open door'' for foreign investment.[16] After the war, the United States ''took the lead in developing [a liberal] international investment regime, and began to negotiate a series of Friendship, Commerce and Navigation treaties, a major purpose of which was to protect U.S. investment abroad.''[17]

Federal courts recognized the FCN treaties as ''the medium through which the U.S. and other nations could provide for the rights of each country's citizens, their property and their interests, in the territories of the other.''[18] The treaties were the means by which nationals of each country could ''manage their investment in the host country.''[19]

These FCN treaties ''define the treatment each country owes the nationals of the other; their rights to engage in business and other activities within the boundaries of the former; and the respect due them, their property and their enterprises.''[20] Foreign investment issues were a centerpiece of the Treaties' purpose:

''[The FCN treaties] preoccupation with [national treatment issues] has been especially responsive to the contemporary need for a code of private foreign investment; and their adaptability for use as a vehicle in the forwarding of an investment aim follows from their historical concern with establishment matters.''[21]

The FCN Treaties reached after World War II, had:

''a new consideration * * * which lent special impetus to the program following World War II, [that consideration] was the need for encouraging and protecting foreign investment, responsively to the increasing investment interests of American business abroad and to the position the United States has now reached as principal reservoir of investment capital in a world which has become acutely ''economic development'' conscious.''[22]

It is also important to note that the FCN Treaties, including the Denmark Treaty, are self-executing treaties, that is, they are binding domestic law of their own accord, without the need for implementing legislation.[23] Such treaties are the supreme law of the land, and even federal statutes ''ought never to be construed to violate the law of nations if any other possible construction remains.''[24] Only when Congress clearly intends to depart from the obligations of a treaty will inconsistent federal legislation govern.[25]

The U.S.-Denmark Treaty of Friendship, Commerce and Navigation Protects Danish Investment in U.S. Companies and is Clearly Inconsistent with the American Fisheries Act

The Denmark Treaty contains 26 Articles, several of which contemplate, and expressly prohibit, retroactive limitations on foreign investment in U.S. companies, such as those imposed by the AFA.[26]

A. Proclamation: Encouraging International Investment

The first provision of the Denmark Treaty, entitled ''A Proclamation,'' contains broad language relevant to an understanding of the subsequent Treaty Articles relating to bilateral investment. The Proclamation states:

''The United States of America and the Kingdom of Denmark, desirous of strengthening the bonds of peace and friendship traditionally existing between them and of encouraging closer economic and cultural relations between their people, and *being cognizant of the contributions which may be made toward these ends by arrangements encouraging mutually beneficial investments,* promoting mutually advantageous commercial intercourse and otherwise establishing mutual rights and privileges, have resolved to conclude a Treaty of Friendship, Commerce and Navigation, based in general upon the principles of national and of most-favored-nation treatment unconditionally accorded * * *'' (emphasis added).

By emphasizing the importance of international investments, the Proclamation provides the Denmark Treaty's context for interpreting its investment protection provisions.[27] In entering into this Treaty, the United States recognized, and accepted as ''consideration,'' the advantages provided by

[14] Walker, Modern Treaties of Friendship, Commerce and Navigation, 42 Minn. L. Rev. 805 (1958). Herman Walker, Jr., the chief commentator on the purpose of the Friendship, Commerce and Navigation (''FCN'') treaties, served, at the time of the drafting of the Treaty as Adviser on Commercial Treaties at the State Department and was responsible for formulation of the postwar form of the FCN Treaty, negotiating several of the treaties for the Untied States. See *Sumitomo Shoji America Inc.* v. *Avagliano et al.,* 457 U.S. 176, 182 (1982).

[15] Walker, *Modern Treaties of Friendship, Commerce and Navigation,* 42 Minn. L. Rev. 817 (1958).

[16] ''National Treaties'' is defined by Article XXII of the Denmark Treaty as ''treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case maybe, of such parties.'' National treatment in to be accorded automatically and without condition of reciprocity (*Sullivan Report* at page 64; see, infra at p.5 fn. 19.)

Harold F. Lidner, Deputy Assistant Secretary of State for Economic Affairs, testified before the Senate during hearings on ratification of the Denmark Treaty (among others) and corrected U.S. Senator Sparkman at this hearing on his misapprehension that ''national treatment'' meant treatment of U.S. nationals in a foreign nation in the same way foreign nations were treated in the United States, clarifying that it meant, instead, treatment of foreign nationals in the U.S. exactly as U.S. citizens are treated. Hearing Subcommittee on Commercial Treaties and Consular Conventions, at p. 7, 82nd Cong. (May 9, 1952).

[17] Vandevelde, *Sustainable Liberalism and The International Investment Regime,* 19 Mich. J. Int'l L. 373 (1998).

[18] *Spiess* v. *C. Itoh and Co. (Am.) Inc.,* 643 F.2d 353, 361 (5th Cir. 1981), vacated on other grounds, 457 U.S. 1128 (1982), quoting Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present Untied States Practice 5 Am J. Comp. L. 229 (1956).*

[19] *Lemnitzer* v. *Philippine Airlines,* 783 F. Supp. 1238 (N.D. Cal. 1991), quoting *Spiess,* supra at 361.

[20] *Wickes* v. *Olympic Airways,* 745 F.2d 363 (6th Cir. 1984), quoting Walker, *Modern Treaties of Friendship Commerce and Navigation,* 42 Minn. L. Rev. 805, 806 (1958).

[21] Walker, *Modern Treaties of Friendship, Commerce and Navigation,* 42 Minn. L. Rev. 805, 806 1958).

[22] *Wickes* v. *Olympic Airways,* 745 F.2d 363 (6th Cir. 1984), quoting Walker, *The Post-War Commercial Treaty Program of the United States,* 73 Pol. Sci. Q. 57, 59 (1957); *See also,* Waldek, Note, Proposals for Limiting Foreign Investment Risk Under the Exon-Florio Amendment, 42 Hastings L.J. 1175, 1235 (1991).

[23] *See e.g., Zenith Radio Corp.* v. *Matsushita Electric Industrial Co. Ltd.,* 494 F. Supp. 1263, 1266 (E.D. Pa. 1980).

[24] *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10, 21 (1963).

[25] Id. *See also Sumitomo Shoii America, Inc.* v. *Avagliano et. al.,* 457 U.S. 176 (1982).

[26] The conflict between the AFA and certain international treaties has been recognized by one of the principal authors of the Act. Senator Slade Gorton (R–WA), one of the chief sponsors of the final legislation, was quoted in the press shortly after the Act passed questioning the validity of the new ownership provisions in relation to these investment treaties: 'Another provision [of the American Fisheries Act] requires vessels operating in this fishery to have at least 75 percent U.S. ownership three years after the law goes into effect, but [Senator Slade] Gorton said *this ''Americanization'' feature ''may very well be found invalid'' under U.S. trade agreements if challenged by foreign ownership interests. Marine Digest and Transportation News* at p. 29 November 1998) (emphasis added).

[27] The Sullivan Report is an Article-by-Article discussion of the standard draft treaty of Friendship, Commerce and Navigation, based on the record of negotiation, State Department messages providing instructions, and internal memoranda dealing with issues raised in the course of negotiations, that was completed in November, 1973. The Sullivan Report states that the standard FCN Treaty Preamble (designated ''Proclamation'' in the Denmark Treaty ''does have legal effect, for the courts rely on it at as a guide to interpretation concerning the applicability of the operative articles.'' *Sullivan Report* at 62.

foreign investment in this country and protection of U.S. investments abroad.[28] The national treatment benefits of the Danish Treaty are ''to be accorded automatically and without condition of reciprocity.'' [29]

B. Article VIII: Managing Commercial Enterprises

Paragraph 1 of Article VIII of the Denmark Treaty states that nationals of each signatory Nation shall be permitted to:

''constitute companies for engaging in commercial,[30] manufacturing, processing [and] financial * * * activities, and to *control and manage enterprises which they have been permitted to establish or acquire* [31] * * * *for the foregoing and other purposes.''* (emphasis added).

Royal Greenland Trading owns Royal Greenland Inc.-USA, a U.S. entity owning interests through a variety of entities in the fishing vessel Arica. There is no question that Royal Greenland Inc.-USA engages in commercial activities directly or through related entities: the sale of fish harvested by the fishing vessel Arica, and the fish processing undertaken aboard the vessel Arica.[32] Royal Greenland Inc.-USA is also directly engaged in financial activities: e.g., the investment of funds in the U.S. fishing industry.

The AFA would force Royal Greenland Trading to *divest itself of its current ownership and control of Royal Greenland, Inc.—USA,* requiring the sale of *75%* of that company's equity in order for it to be able to maintain its investment in Arica Fishing Company Limited Partnership.[33] Forced divestiture is facially inconsistent with the control and management protections required by Article VIII of the Denmark Treaty, above.

The clear conflict between Article VII.1 of the Denmark Treaty and the AFA can be seen from the stated purpose of the original bill that was eventually enacted as the AFA:

''*to prevent foreign ownership and control of United States flag vessels* employed in the fisheries in the navigable waters and exclusive economic zone of the United States * * *'' (emphasis added).[34]

One additional point regarding Paragraph 1 of Article VIII is worthy of note. Article VIII states that it protects the control only of enterprises which a Danish entity has ''been permitted to establish or acquire.'' That is, only retroactive limitations, such as the one here at issue, are forbidden.

2. Paragraph 2: National Treatment

Paragraph 2 of Article VIII states:

''Companies, *controlled by nationals and companies of either Party* and constituted under the applicable laws and regulations within the territories of the other Party for engaging in the activities listed in paragraph 1 of the present Article, *shall be accorded national treatment therein with respect to such activities.''* (emphasis added).

Under the definition of national treatment,[35] paragraph 2 of Article VIII requires that duly constituted companies controlled by Danish entities shall be treated precisely as if they were U.S. investors. Such an obligation can hardly be met by requiring the transfer of ownership and control of a company from Danish investors to U.S. investors.

The U.S. State Department has repeatedly recognized this interpretation of Article VIII. For example, in 1971, the State Department opposed legislation in Guam requiring that 50% of the voting stock of corporations doing business in Guam be owned by U.S. citizens. The State Department took the position that such legislation was inconsistent with Article VII of the Japan FCN Treaty, which, (as do Articles VII and VIII of the Denmark Treaty), establishes a right to national treatment of non-U.S. companies and nationals engaged in business activity.[36]

In sum, the provisions of the AFA requiring retroactive divestment of Danish ownership of a business entity in the United States are facially inconsistent with both paragraphs of Article VIII of the Denmark Treaty that explicitly protect foreign investors engaged in the control of U.S. companies.

C. Article VI, Paragraph 4: Impairment of Interest in Supplied Capital Is Prohibited

Paragraph 4 of Article VI of the Denmark Treaty prohibits:

''*unreasonable or discriminatory measures that would impair the legally acquired rights or interests* within its territories of nationals and companies of the other Party *in the enterprises which they have established, or in the capital,* skills, arts or technology *which they have supplied*.'' (emphasis added).

The explicit purpose and effect of the AFA is to discriminate against foreign nationals and companies. The Act's ownership provisions require divestment of substantial equity in U.S. fishing vessels and the loss of future profits from the enterprise. On their face, these provisions directly ''impair the legally acquired interests'' of Danish investors both ''in the enterprises which they have established,'' and ''in their capital * * * which they have supplied.''

It is clear from the expressed purposes of the FCN treaties, and from this provision in particular, that their central goal was to encourage capital investment between treaty signatories by protecting potential investors from the fear that government action would retroactively impair equity ownership rights in that investment. It was only in this context of mutually understood and guaranteed investment rights that open invitations to foreign capital to develop the U.S. fishing fleet could be, and was, successful.

Thus, the retroactive forced divestment of owned equity imposed on Danish investors by the AFA directly violates Article VI of the Denmark Treaty, and as such is inconsistent with the Treaty as contemplated under Section 213(g) of the Act.

D. Article VII: National Treatment Required

Paragraph 1 of Article VII of the Denmark Treaty states:

''Nationals and companies of either party shall be accorded * * * national treatment with respect to engaging in all types of commercial * * * [and] * * * financial activities.''

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[28] Harold F. Linder, Deputy Assistant Secretary of State for Economic Affairs, testified before the Senate during hearings on ratification of the Denmark Treaty (among others) as follows: ''. . . These treaties are not one-sided. They are drawn up in mutual terms, in keeping with their character as freely negotiated instruments between sovereign equals. Rights assured to Americans in foreign countries are assured in equivalent measure to foreigners in this country. Hearing, Subcommittee on Commercial Treaties and Consular Conventions, May 9, 1952 at p. 6

[29] *Sullivan Report* at 64. Although the Denmark Treaty requires investment protection without the requirement of reciprocity, it may be useful to note that a review of the *Jones Study, infra* p. 7 at fn. 23 shows no incidents of State Department conflicts with Denmark under the Denmark Treaty).

[30] The Minutes of interpretation appended to the Denmark Treaty state: ''The word ''commercial'' as used in Article VII, paragraph 1 and Article VIII paragraph 1, does not extend to the fields of navigation and aviation. The word ''commercial'' ''relates primarily but not exclusively to the buying and selling of goods and activities incidental thereto.'' Royal Greenland Inc. -USA is chiefly concerned with the sale of fishery products and activities incidental thereto. It is also important to note that the term ''navigation'' does not include commercial fishing. First, the Danish Treaty mentions ''national fisheries,'' and ''inland navigation'' as separate, independent activities under paragraph 3, Article XIX. ''Navigation'' is generally defined as ''the act of sailing a vessel on water.'' Black's Law Dictionary, 7th ed. West Publishing, 1999. Finally, it may be important to note that in the Denmark Treaty, the word navigation is represented by the Danish word ''sofort,'' which means transportation activity on sea and would not include fishing or fish processing. Had fishing or fish Processing been intended, the appropriate word would have been ''fiskrei.''

[31] This provision as well as others found in Article VII of the standard draft treaty examined by the Sullivan Report, is considered ''the heart of the treaty.'' *Sullivan Report* at 124.

[32] See, *e.g.* State Department opposition to H.R. 12275 (expanding the definition of fisheries to include processing activities) as contrary to U.S.-Japan FCN treaty; processing activities under the FCN are entitled even to prospective national treatment, Aug. 17, 1964. *Jones Study* at 80 (citation infra at p. 7 fn 29).

[33] Alternatively, Royal Greenland USA would be forced to sell its direct investment in the Arica Fishing Company, L.P., which would have the same impact on its parent company, Royal Greenland Trading.

[34] S. 1221, 105th Cong. (preamble) (1997).

[35] See supra at p. 3, fn. 9.

[36] The State Department's position on this and other FCN issues are reviewed in the ''Jones Study,'' prepared by Ronny E. Jones for the U.S. State Department, and is a compilation of post-World War II State Department positions on FCN Treaties through 1981. See e.g. State Department position re: Letter to A. Papa (U.S. Attorney General's office) from F.R. Brown (Legislative Counsel of 11th Legislature of Guam), Sept. 27, 1971, *Jones Study* at 76. See also, State Department position concluding under the French FCN Treaty that control and national treatment provisions ''bar new discriminatory limitations from being applied to established or authorized operations and rights of a protected foreign company'' (differentiating from permissible prospective limitations on ownership), *Jones Study* at 54; State Department position opposing Korean government's restricting foreign majority ownership of companies in certain industries, October, 1972, *Jones Study* at 86; State Department position opposing Thai government's restrictions on majority ownership of companies in some industries. 1972 *Jones Study* at 104–106.

As set forth above, the AFA directly affects Danish nationals and their companies that are ''engaging in * * * commercial and other business activities.'' Royal Greenland Trading engages in commercial and financial investment activities through a subsidiary, Royal Greenland Inc.-USA. The Denmark Treaty requires that Royal Greenland Trading's commercial and investment activities be accorded national treatment, and as demonstrated above, the AFA's explicit discrimination against non-U.S. citizens violates this national treatment provision when applied to Danish investment.

Paragraph 2 of Article VII *also* requires most-favored-nation treatment with respect to ''organizing, participating in and operating companies of [the United States].'' Most-favored-nation treatment is defined by Article XXII of the Denmark Treaty as ''treatment accorded * * * upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of any third country. Thus, it is important to note that *if nationals of any other country are afforded protection under section 213(g) of the Act failure to provide the same protection to Danish nationals would also be inconsistent with Article VII.*

E. Article IX: Protection of Movable Property

Article IX of the Denmark Treaty explicitly applies the protections afforded by the rest of the Treaty, and in particular those protections secured by Articles VII and VIII, to the purchase, ownership and disposition of property.

Paragraph 4 of Article IX sets out the only conditions under which nationals and companies of either party may be required to dispose of property they have acquired.[37] Subparagraph a, Paragraph 4 of Article IX permits such a requirement for movable property so *long as such a requirement conforms to Article VIII, paragraph 1 and all other provisions of the Denmark Treaty.* As set forth above and below, the retroactive equity divestment requirements of the AFA do not conform with Article VIII and the other provisions of the Denmark Treaty. Article IX of the Denmark Treaty, in effect, repeats that ownership of movable property may not be subject to forced retroactive divestiture.[38]

F. Article I: Equitable Treatment Required for Danish Interests

Article I of the Denmark Treaty states:

''Each Party shall at all times accord equitable treatment to the persons, property, enterprises and other interests of nationals and companies of the other Party.''

This Article was intended to provide a fail safe mechanism in the Treaty to ensure that fair and equitable treatment be afforded to nationals of both countries.[39] The forced divestiture of investments and/or sale of assets cannot be viewed as equitable treatment under any logical reading of Article I. Nevertheless, if this Article has any meaning whatsoever, at the very least, it cannot mean forcing a sale of valuable assets, such as the equity interest in a fishing company.

G. Article VI, Paragraph 3: Taking of Property Requires Just Compensation

Paragraph 3 of Article VI of the Denmark Treaty requires that the U.S. government cannot take property belonging to Danish nationals:

''without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof * * * ''

There is no practical difference between forcing a sale of property to the U.S. government and forcing such a sale to American nationals.[40] Thus, to the extent that a forced sale of property (1) diminishes the value of the asset for the company by virtue of the AFA's passage; or (2) results in a below-market sale of assets, the AFA violates Article VI,[41] as it makes no provision for compensation of Danish investors.[42] [43]

H. Article XIX: Vessels Flying the U.S. Flag are Deemed U.S. Vessels For Purposes of Access to U.S. Fisheries

Paragraph 4 of Article XIX of the Denmark Treaty states:

''each Party may reserve exclusive rights *and privileges to its own vessels* with respect to * * *. *national fisheries.*'' (emphasis added).

This provision allows the U.S. and Denmark to reserve exclusive rights and privileges to ''its own vessels'' operating in the fisheries of their respective countries. The national identity of a vessel is determined by the country in which the vessel is documented, *i.e.* by the flag that it flies. The national identity of a vessel is not determined by the nationality of the investor in the owning entity.[44]

The Arica is a U.S. vessel documented under the laws of the United States. The U.S. entity owning this U.S. flag vessel—like General Motors, Ford Motor Company and Coca-Cola—has foreign investors. The purpose of this provision in the Treaty was to allow the United States and Denmark the opportunity to restrict fisheries to vessels each country could control. That control, historically, has always been through the flag of the vessel, subjecting the vessel to our environmental, labor and tax laws—not to

[37] ''Nationals and companies of either Party shall be accorded national treatment within the territories of the other Party with respect to acquiring * * * and with respect to owning movable property of all kinds . . . subject to the right of such other Party to limit or prohibit, *in a manner that does not impair rights and privileges secured by Article VIII, paragraph 1,* [See discussion at pp. 58 supra] or by other provisions of the present treaty, alien ownership of particular materials that are dangerous from the standpoint of public safety and alien ownership of interests in enterprises carrying on particular types of activities.'' (emphasis added).

[38] ''The term ''discriminatory'' as used in this context would comprehend denials of either national or most-favored-nation treatment, or both . . . *the intent is to protect against retroactive impairment of vested rights if the acquisition of such rights was lawful* * * *'' (emphasis added). *Sullivan Report* at 115.

[39] This Article ''provides a basis for making representation against actions detrimental to [a signatory's] interests that may not be covered by any specific legal rule in the treaty, as, for example, a measure that is superficially nondiscriminatory but is so framed as to harm only some [signatory's] interest * * *. the construction leading to a just or equitable result is to be preferred.'' *Sullivan Report* at 67. See also, Webster's New Universal Unabridged Dictionary, Barnes and Noble Books, 1996, ''Equitable: Characterized by equity or fairness; just and right; fair; reasonable: *equitable treatment of all citizens*''; Black's Law Dictionary, 7th ed. West Publishing, 1999, ''Equitable: just; conformable to principles of justice and right.''

[40] The rule of just compensation covers partial takings. In such cases, the compensation should be a full approximation of the amount by which the taking impaired the value of the property.'' *Sullivan Report* at 117.

[41] At the very least, paragraph 3 of Article VI requires application of a standard similar to that under the 5th Amendment to the United States Constitution. Paragraph 5 of Article VI requires that Danish citizens ''shall in no case be accorded * * * less than national treatment * * * with respect to the matters set forth'' in paragraph 3. No federal court would permit the government to force a sale of assets by a U.S. citizen, thus denying that citizen any use of that property in the future, without requiring just compensation. Further, the Danish Protocol 2 appended to the Denmark Treaty requires that the provision of Article VI for payment of just compensation shall extend to interests held directly or indirectly by nationals and companies of either party.

[42] ''The intent of this requirement [that provision is made for the determination and payment of compensation] is to afford protection against *ex post facto* proceedings that could work to the disadvantage of the person whose property is taken.'' *Sullivan Report* at 119.

[43] Even with respect to the forced sale of ''materials dangerous from the standpoint of public safety,'' permitted under Article IX of the Treaty, the Danish Treaty requires that ''a term of at least five years shall be allowed in which to effect such disposition.'' Subparagraph b, Paragraph 4, Article IX.

[44] In order to be documented under the U.S. flag, for example, a vessel must be owned by a U.S. citizen corporation, partnership or other entity. There is no limitation on the citizenship of the investment for the basic documentation. 42 U.S.C. 12102(a). Should the vessel be used in specific trades, such as coastwise or fisheries, there may be limitation on the citizenship of the investors. 46 U.S.C. 12106; 12108. It is significant to note that *at the time the Denmark Treaty was signed there was no such limitation on fishing vessels.* It was not until 1988 that a *prospective* limitation was imposed on the citizenship of the investors in an entity owning a vessel with a fisheries endorsement. See, *The Commercial Fishing Industry Vessel Anti-Reflating Act of 1987*; Section 7(b) of Public Law 100–239.

allow the foreign investment capital to be taken.

This issue is further clarified by Paragraph 2 of Article XIX, which states explicitly:

''Vessels under the flag of either Party * * * shall be deemed to be vessels of that Party * * *''

Thus, the United States has the full authority to reserve exclusive rights and privileges to the U.S. flag vessel Arica, ever since Royal Greenland Trading made its first investment in the Vessel. What the United States has not had the right to do under the Denmark Treaty is to take away that investment once it was made. Article XIX does not permit the United States to reserve rights or privileges under the Denmark Treaty for some of ''its vessels'' (those with super-majority U.S. investment) as against others of ''its vessels'' (those that include some Danish investment). On the contrary, it guarantees U.S. fishing vessels with Danish investment equal access to U.S. fisheries.

I. Article XXI: Restrictions on the Rights of ''Third Country'' Nationals Are Not Applicable to the Danish Citizens of Greenland

Greenland is a legal territory of Denmark, not an independent country.[45] Residents of Greenland are Danish citizens. The Danish Constitution of 1953 covers all parts of Denmark, including Greenland. Subsequent to this constitution, Greenland was administered as a department directly under the central Danish government authority. In 1978, a parliamentary statute established Greenlandic ''home-rule'' effective May 1, 1979 for some internal legal areas. However, Greenland remains a legal part of the sovereign nation, Denmark, and is subject to Danish statutes, such as the ''Companies Act.''

As stated earlier,[46] Royal Greenland Trading, the Danish company with investment in Arica Fishing Company Limited Partnership, is owned by investors in the Territory of Greenland. Article XXI, Paragraph 1(d) of the Denmark Treaty denies:

''to any company in the ownership or direction of which nationals of any *third country or countries* have directly or indirectly a controlling interest, the advantages of the present Treaty, except with respect to recognition of juridical status and with respect to access to courts.'' (emphasis added).

This reservation is a provision to permit piercing the corporate veil when nationals of non-signatories seek to ''obtain rights under the treaty through the device of obtaining and exercising interests in companies of the treaty partner * * * *Absent such a provision, such corporate interests could take advantage of the definition of ''companies'' [in the Treaty], which establishes place of incorporation as the sole test of the nationality of a corporation.*[47] (emphasis added).

Greenland is not a ''third country'' within the meaning of this provision. Greenland is a territory of Denmark, dependent upon it for foreign policy determinations. It is also facially evident that no ''device'' to gain the benefits of the Treaty has taken place. The ownership arrangements for Royal Greenland Inc.-USA were completed long before enactment of the AFA. The duly constituted Danish company Royal Greenland Trading has the right to expect the protection afforded all incorporated Danish companies under the Denmark Treaty.

J. Article XXIII: Restriction on the Denmark Treaty's Application to Greenland Does Not Apply to Greenlandic Investment in a Duly Constituted Danish Company

Article XXIII of the Denmark Treaty states:

''The territories to which the present Treaty extends shall comprise all areas of land and water under the sovereignty or authority of each of the Parties, other than Greenland, the Panama Canal Zone and trust Territory of the Pacific. ''

As set forth above, Royal Greenland Trading is a duly incorporated Danish company, subject to Danish government authority and chartered by the Danish Crown. Royal Greenland Trading is located at Langerak 15, 9220 Aalborg, Denmark. Overall, Royal Greenland Trading's affiliated companies have several hundred employees in Denmark. Article XXII, Paragraph 3 states:

''* * * Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other 'party.' ''

Thus, the Denmark Treaty is absolutely explicit that:

''*the place of charter or incorporation [i]s the sole fact determining the nationality of the company.* This test is in contrast to the so-called 'seat' test favored in some European countries where the location of the real center of management of the company or the place or places where its principal activities are carried on are looked to as determining its nationality, even though its incorporation may be in another country. Under the test of place of incorporation, there is no specific requirement of a substantial de facto contact of the company with the chartering country other than the issuance of the charter * * * Adoption of the single test of place of incorporation was based in part on the practical consideration that it makes the nationality of a company simple and easy to determine.''[48] (emphasis added).

The only exception to this ''place of charter or incorporation'' rule, is that set forth in Article XXI of the Denmark Treaty discussed in Section I above. As discussed, Danish citizen investors residing in Greenland do not fall within the narrow exception for third country nationals seeking by device to take advantage of another nation's favorable trade relations. Therefore, Royal Greenland Trading must be afforded the protections for Danish companies under the Denmark Treaty.

In addition, it is important to recognize that Article XXIII was not intended to preclude protection for the Danish nationals of Greenland and their companies, to which Danish law applies. It appears clear that this exception was intended to protect areas having special territorial, commonwealth or merely military relationships with their home countries, such as the Panama Canal Zone and the U.S. Trust Territory of the Pacific Islands. Such policy rationales are not applicable to investments by the Danish citizens of Greenland in their host country.

V. Conclusion: Royal Greenland Trading is Entitled to an Exemption Under Section 213(g) of the American Fisheries Act Because the Act's Retroactive Ownership and Control Provisions are Inconsistent With the Denmark Treaty.

The Danish Treaty clearly contemplates the very category of investment restrictions here at issue. It is important to recognize that should the United States or Denmark have wished to exclude investment in the fishing industry vessels of one party on behalf of the nationals or companies of the other, they could easily have done so. For example, Article XIV of the Treaty relates to prohibitions and restrictions on imports. Paragraph 4 of Article XIV explicitly excludes from the protections of the Article ''advantages accorded * * * products of [each country's] national fisheries.'' Similarly, Paragraph 4 of Article XIX reserves exclusive rights and privileges to each signatory's own vessels with respect to national fisheries. The Treaty simply does not permit forced divestment of investment—or a prohibition on management of that investment—in U.S. companies operating in the national fisheries.

The overlapping, self-reinforcing investment protections provided by the several Articles analyzed in this petition were clearly intended to prohibit the category of coerced retroactive investment divestiture required by the AFA. The Treaty's explicit agreement as to a national's right to control interests in companies they have established in each Treaty partner's territory, its requirement for the highest possible degree of investment protection—national treatment, and its prohibition of the impairment of equity rights gained by supplied capital, are all, singly and in the aggregate, at odds with the AFA's ownership provisions.

If the investment of Royal Greenland Trading is not protected, the implications would be significant and the economic climate fostered by the Treaty damaged. Forcing the sale of Danish nationals' assets in the industry they helped to create would likely make more far reaching free trade agreements difficult. The United States has long been a champion worldwide of free market investment, often decrying other governments' actions in restricting their import markets, currencies and venture capital opportunities. To interpret the Treaty

[45] ''Greenland first came under Danish rule in 1380. In the revision of the Danish Constitution in 1953, Greenland became part of the Kingdom and acquired the representation of two members in the Danish Folketing * * * Greenland is part of the Kingdom of Denmark, and the Danish Government remains responsible for foreign affairs, defense and justice.'' *The Europa World Year Book* 1999, Europe Publications Ltd. (1999); Volume I at pp 1203–04.

[46] See *Exhibit A* and discussion accompanying supra at p.2 fn. 6.

[47] *Sullivan Report* at 308.

[48] *Sullivan Report* at 318–20.

so as to permit enforced, retroactive loss of assets, and the expulsion of Danish nationals overseeing their own investments from their corporate positions may seriously weaken the standing of the U.S. to continue in its leadership role.

Marad should therefore grant Royal Greenland Trading's petition pursuant to Section 213(g) of the AFA and 46 C.F.R. 356.53 promulgated thereunder, and rule that the citizen ownership and control restrictions in the Act and those portions of 46 C.F.R. Part 356 that implement those restrictions do not apply to Royal Greenland Trading ApS (or its wholly-owned subsidiary) with respect to its ownership equity in the vessel Arica (O.N. 550139), through its ownership interest in Arica Fishing Company Limited Partnership, JOMM Enterprises, Inc., and JZ, Ltd.

This concludes the analysis submitted by Petitioner for consideration.

Dated: January 11, 2001.

By Order of the Maritime Administrator.

Joel Richard,

Secretary, Maritime Administration.

[FR Doc. 01–1358 Filed 1–16–01; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

Marine Transportation System National Advisory Council

ACTION: National Advisory Council Public Meeting.

SUMMARY: The Notice of Marine Transportation System National Advisory Council Public Meeting which was published in the January 12, 2001 issue of the **Federal Register** contains an error. The meeting, scheduled for Friday, February 2, 2001, will begin at 8:30 a.m., not 9:00 a.m., as originally stated.

FOR FURTHER INFORMATION CONTACT: Raymond Barberesi, (202) 366–4357; Maritime Administration, MAR 830, Room 7201, 400 Seventh St., SW., Washington, DC 20590; Raymond.Barberesi@marad.dot.gov.

(Authority: 5 U.S.C. App 2, Sec. 9(a)(2); 41 CFR 101–6. 1005; DOT Order 1120.3B)

Dated: January 11, 2001.

Murray A. Bloom,

Acting Secretary, Maritime Administration.

[FR Doc. 01–1415 Filed 1–16–01; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 33990]

C & C Railroad, Inc.—Operation Exemption—Centerpoint Properties, L.L.C.

C & C Railroad, Inc. (C & C), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to acquire the operating authority on eight rail lines (lines) owned by Centerpoint Properties, L.L.C. (Centerpoint), and leased to The Custom Companies, Inc. (previously Custom Cartage, Inc.). The lines total about 1.71 miles and they connect with track located in the Union Pacific Global Two Intermodal Yard, near Union Pacific milepost 3.0. The lines are located in an office, warehouse, and dock facility at 317 West Lake Street in Northlake, IL.[1]

The transaction is expected to be consummated on the effective date of the exemption. The earliest the exemption can be consummated is January 9, 2001, the effective date of the exemption (7 days after the exemption was filed).[2]

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. 33990, 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 Michael A. Abramson, Esq., 120 S. Riverside Plaza, Suite 1200, Chicago, IL 60606.

Board decisions and notices are available on our website at ''WWW.STB.DOT.GOV.''

Decided: January 9, 2001.

Vernon A. Williams,

Secretary.

[FR Doc. 01–1331 Filed 1–16–01; 8:45 am]

BILLING CODE 4915–00–P

[1] Pursuant to an agreement with The Custom Company, Inc., C & C will acquire the right to operate the lines for the purpose of shuttling cars solely on Centerpoint's property.

[2] On January 8, 2001, a petition to stay the effective date of the exemption was filed by Joseph C. Szabo, on behalf of United Transportation Union-Illinois Legislative Board. The petition for stay was denied in *C & C Railroad, Inc.—Operation Exemption—Centerpoint Properties, L.L.C.,* STB Finance Docket No. 33990 (STB served Jan. 8, 2001).

Federal Register

Wednesday,

January 17, 2001

Part II

Department of Health and Human Services

Substance Abuse and Mental Health Services Administration

21 CFR Part 291

42 CFR Part 8

Opioid Drugs in Maintenance and Detoxification Treatment of Opiate Addiction; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Service Administration

21 CFR Part 291

42 CFR Part 8

[Docket No. 98N–0617]

RIN 0910–AA52

Opioid Drugs in Maintenance and Detoxification Treatment of Opiate Addiction;

AGENCY: Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Final rule.

SUMMARY: The Department of Health and Human Services and the Substance Abuse and Mental Health Services Administration (SAMHSA) are issuing final regulations for the use of narcotic drugs in maintenance and detoxification treatment of opioid addiction. This final rule repeals the existing narcotic treatment regulations enforced by the Food and Drug Administration (FDA), and creates a new regulatory system based on an accreditation model. In addition, this final rule shifts administrative responsibility and oversight from FDA to SAMHSA. This rulemaking initiative follows a study by the Institute of Medicine (IOM) and reflects recommendations by the IOM and several other entities to improve opioid addiction treatment by allowing for increased medical judgment in treatment.

DATES: This final rule will become effective on March 19, 2001.

FOR FURTHER INFORMATION CONTACT: Nicholas Reuter, Center for Substance Abuse Treatment (CSAT), SAMHSA, Rockwall II, 5600 Fishers Lane, Rm 12–05, Rockville, MD 20857, 301–443–0457, email: nreuter@samhsa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of July 22, 1999, (64 FR 39810, July 22, 1999, hereinafter referred to as the July 22, 1999, notice or July 22, 1999, proposal) SAMHSA, FDA, and the Secretary, Health and Human Services (HHS), jointly published a Notice of Proposed Rulemaking (NPRM) to revise the conditions for the use of narcotic drugs in maintenance and detoxification treatment of opioid addiction. The agencies also proposed the repeal of the existing narcotic treatment regulations enforced by the FDA, the creation of a new regulatory system based on an accreditation model under new 42 CFR part 8, and a shift in administrative responsibility and oversight from FDA to SAMHSA.

The July 22, 1999, notice traced the history of Federal regulatory oversight of Opioid Treatment Programs (''OTPs,'' also known as narcotic treatment programs, or, methadone programs), focusing on Federal regulations enforced by FDA since 1972. The July 22, 1999, notice summarized the periodic reviews, studies, and reports on the Federal oversight system, culminating with the 1995 Institute of Medicine (IOM) Report entitled, *Federal Regulation of Methadone Treatment* (Ref. 1). As noted in the July 22, 1999, proposal, the IOM report recommended that the existing FDA process-oriented regulations should be reduced in scope to allow more clinical judgment in treatment and greater reliance on guidelines. The IOM report also recommended designing a single inspection format, having multiple elements, that would (1) provide for consolidated, comprehensive inspections conducted by one agency (under a delegation of Federal authority, if necessary), which serves all agencies (Federal, State, local) and (2) improve the efficiency of the provision of methadone services by reducing the number of inspections and consolidating their purposes.

To address these recommendations, SAMHSA proposed a ''certification'' system, with certification based on accreditation. Under the system, as set forth in the July 22, 1999, proposal, a practitioner who intends to dispense opioid agonist medications in the treatment of opiate addiction must first obtain from SAMHSA, a certification that the practitioner is qualified under the Secretary's standards and will comply with such standards. Eligibility for certification will depend upon the practitioner obtaining accreditation from a private nonprofit entity, or from a State agency, that has been approved by SAMHSA to accredit OTPs. Accreditation bodies would base accreditation decisions on a review of an application for accreditation and on surveys (on site inspections) conducted every three years by addiction treatment experts. In addition, accreditation bodies will apply specific opioid treatment accreditation elements that reflect ''state-of-the-art'' opioid treatment guidelines. Moreover, accreditation standards will require that OTPs have quality assurance systems that consider patient outcomes.

As noted in the July 22, 1999, proposal, this new system would replace the existing FDA regulatory system. The existing system provides for FDA ''approval'' of programs, with direct government inspection in accordance with more detailed process-oriented regulations. These process-oriented regulations are less flexible and prescribe many aspects of treatment. The existing regulations do not require that programs have quality assurance systems. Finally, under the existing system, programs are not subject to periodic certification and there is no set schedule for inspections.

Proposed Subpart A addressed accreditation and included steps that accreditation bodies will follow to achieve approval to accredit OTPs under the new system. It also set forth the accreditation bodies' responsibilities, including the use of accreditation elements during accreditation surveys. Proposed Subpart B established the sequence and requirements for obtaining certification. This section addressed how and when programs must apply for initial certification and renewal of their certification. Finally, Subpart C of proposed part 8 established the procedures for review of the withdrawal of approval of the accreditation body or the suspension and proposed revocation of an OTP certification.

In addition to proposing an entirely new oversight system, the July 22, 1999, proposal included several other new provisions. For example, the Federal opioid treatment standards were significantly reduced in scope to allow more flexibility and greater medical judgment in treatment. Certain restrictions on dosage forms were eliminated so that OTPs may now use solid dosage forms. Under the previous rules, OTPs were limited to the use of liquid dosage forms. Several reporting requirements and reporting forms were eliminated, including the requirements for physician notifications (FDA Reporting Form 2633) and the requirement that programs obtain FDA approval prior to dosing a patient above 100 milligrams. The proposal included a more flexible schedule for medications dispensed to patients for unsupervised use, including provisions that permit up to a 31-day supply. Under the current regulations, patients are limited to a maximum 6-day supply of medication. Many of these regulatory requirements had been in place essentially unchanged for almost 30 years.

SAMHSA distributed the July 22, 1999, notice to each OTP listed in the current FDA inventory, each State Methadone Authority, and to other interested parties. Interested parties were given 120 days, until November 19, 1999, to comment on the July 22,

1999, proposal. In addition, on November 1, 1999, SAMHSA, FDA, the Office of National Drug Control Policy (ONDCP), the Drug Enforcement Administration (DEA), and other Federal agencies convened a Public Hearing on the proposal. The Public Hearing was announced in the **Federal Register** published October 19, 1999, (64 FR 59624, October 19, 1999), and was held in Rockville, MD. On January 31 and May 10, 2000, the SAMHSA/CSAT National Advisory Council Subcommittee on Accreditation met to assist SAMHSA/CSAT in its review of data and information from SAMHSA/CSAT's ongoing accreditation project. The SAMHSA/CSAT National Advisory Council convened to discuss the opioid accreditation project on May 12, 2000. The May 12, 2000, Council meeting provided an opportunity for comments from the public (65 FR 25352, May 1, 2000).

II. Comments and Agency Response

In response to the July 22, 1999, proposal, SAMHSA received almost 200 submissions, each containing one or more comments. The comments were from government, industry, industry trade associations, academia, health professionals, professional organizations, patient advocacy organizations, and individual patients.

A. General Comments

1. Many comments agreed in principle that the shift to an accreditation-based system will encourage OTPs to use individualized, clinically determined treatment plans that are guided by current, best-practice medical and clinical guidelines and to evaluate clinical outcomes. Other comments noted that the accreditation proposal recognizes that opiate addiction is a medical condition. Several comments affirmed that a major segment of the healthcare system in the United States is being reviewed through accreditation systems. As such, these comments stated that applying accreditation requirements to OTPs provides the potential for mainstream medicine to embrace opioid treatment.

While not opposing the proposal, some comments stated there should be no Federal regulations in this area. Other comments expressed concerns about additional costs to OTPs and, ultimately patients, for accreditation and duplicative assessments, noting that some States will continue to enforce process-oriented regulations, supported by considerable licensing fees. Based upon these ''uncertainties,'' these comments suggest that SAMHSA wait for the results of further study before implementing new regulations.

The Secretary agrees that the SAMHSA-administered accreditation-based regulatory system will encourage the use of best-practice clinical guidelines and require quality improvement standards with outcome assessments. As set forth below, the Secretary does not agree that comments on the uncertainty about accreditation costs or State regulatory activities warrant additional study before implementing these new rules.

2. Several comments addressed the costs associated with accreditation and challenged the estimates provided in the July 22, 1999, proposed rule. One comment included the results from a survey of OTPs with accreditation experience to indicate the indirect costs of accreditation will be considerable. According to the comment, these OTPs have had to spend considerable sums to hire consultants and additional staff, upgrade computers, develop infection control manuals, and make physical plant improvements. In some cases these costs were reported to approach $50,000. Some of these comments suggested that SAMHSA await the completion of the ''accreditation impact study'' to obtain additional information on costs, before proceeding. Other comments stated that accreditation can lead to increased treatment capacity, but only if additional funds are provided. One comment suggested that SAMHSA create a capital improvement fund, while another suggested that SAMHSA allow block grant funds to be used to pay for accreditation.

The Secretary believes that the estimated costs as set forth in the July 22, 1999, notice remain reasonably accurate. As discussed in greater detail below, information on accreditation developed under the accreditation impact study, together with other ongoing SAMHSA technical assistance programs, indicates that the accreditation system will not produce an excessive burden to programs to warrant delaying the implementation of this final rule.

There are many components to SAMHSA's accreditation project that have been proceeding concurrently with this rulemaking. In April 1999, SAMSHA's Center for Substance Abuse Treatment (CSAT) issued ''Guidelines for the Accreditation of Opioid Treatment Programs.'' These guidelines are up-to-date best-practice guidelines that are based upon the Federal opioid treatment standards set forth under proposed section 8.12 as well as SAMHSA/CSAT's Treatment Improvement Protocols (TIPs) that address opiate addiction treatment. Two accreditation bodies, the Commission for the Accreditation of Rehabilitation Facilities (CARF) and the Joint Commission for the Accreditation of Healthcare Organizations (JCAHO), under contract to SAMHSA/CSAT, used these guidelines to develop ''state-of-the-art'' accreditation elements. These two accreditation bodies have surveyed dozens of programs with these new accreditation standards.

The July 22, 1999, proposal described an ongoing accreditation impact study. Under the accreditation impact study, CARF and JCAHO trained over 170 participating OTPs. In addition, more than 50 OTPs have been accredited under this system with technical assistance provided through a contract funded by SAMHSA/CSAT. None of the accredited programs have had to incur the kind of ''physical plant'' and other costly expenses predicted by some of the comments previously discussed. This direct and up-to-date information indicates that the cost estimates in the July 22, 1999, notice are up-to-date and reasonable. On the other hand, the survey discussed above that was submitted with one comment reflected accreditation surveys performed over 10 years ago. And, in some cases, the accreditation experiences discussed in these comments reflect accreditation of psychiatric hospitals, not OTPs.

The accreditation-based system which is the subject of this rule includes safeguards to reduce the risk of unnecessary and overly burdensome accreditation activities relating to OTPs. For example, SAMHSA will approve each accreditation body after reviewing its accreditation elements, accreditation procedures, and other pertinent information. SAMHSA will convene periodically an accreditation subcommittee, as part of the SAMHSA/CSAT National Advisory Council. The subcommittee will review accreditation activities and accreditation outcomes and make recommendations to the full SAMHSA/CSAT Council, and ultimately to SAMHSA on accreditation activities and guidelines. Finally, SAMHSA/CSAT has been providing technical assistance to OTPs in the accreditation impact study that has helped programs in achieving accreditation. SAMHSA/CSAT intends to continue providing technical assistance on accreditation during the 3–5 year transition period and possibly longer.

The Secretary does not agree that it is necessary to establish a special fund to help programs pay for accreditation fees and indirect ''physical plant'' improvements in order for OTPs to be

able to achieve accreditation. As noted above, the Secretary believes that the estimates in the July 22, 1999, proposal for the cost of accreditation are reasonably accurate (approximately $4–5 million per year, $5400 per OTP per year, $39 per patient per year). Nonetheless, the Secretary has taken steps to minimize the potential effects of this burden to OTPs, especially to OTPs that are small businesses or that operate in under-served communities. First, the Secretary has determined that States could use funds provided by SAMHSA under their Substance Abuse Prevention and Treatment (SAPT) Block Grants to offset costs of accreditation for programs qualified to receive assistance under the State's SAPT block grant. Second, SAMSHA has included in its budget, a plan to continue funding accreditation. Finally, SAMHSA will continue to provide technical assistance which will aid those programs that need help in achieving accreditation.

3. One OTP that is participating in the accreditation impact study, while commending the accreditation experience and accreditation in general, commented that the proposed change is premature. Some comments suggested that SAMHSA postpone implementation for an indefinite period to allow for an unspecified number of CARF and JCAHO accreditation results. Another comment stated that the first series of surveys will determine the utility of the first generation of standards, noting that the process can be focused and modified in response to results from the impact study. A few comments questioned whether all providers can make the transition.

On the other hand, many comments stated that the field has been subject to regulatory neglect long enough, and that SAMHSA should minimize the delay in finalizing rules. One comment submitted the results of a survey that suggested that as many as 155 OTPs currently need technical assistance in order to provide treatment in accordance with standards and regulations.

The Secretary does not believe that these final regulations should be delayed until the completion of the accreditation impact study. As stated in the July 22, 1999, proposal, the Department of Health and Human Services (HHS) has determined that accreditation is a valid and reliable system for providing external monitoring of the quality of health care—including substance abuse and methadone treatment. The SAMHSA/CSAT study is designed to provide additional information on the processes, barriers, administrative outcomes, and costs associated with an accreditation-based system. In addition, the study is expected to provide important information to allow SAMHSA to keep its guidelines, and its accreditation program, as responsive and up-to-date as possible. Among other things, the study will allow HHS to continuously monitor the monetary costs of accreditation, to ensure that successful OTPs are not precluded from operating by the costs of accreditation, and that patients are not denied treatment based on costs. The full study, which compares a representative sample of OTPs 6 months following accreditation to their baseline status across several variables, will require a few years to complete. Regulations can be modified at any time. If SAMHSA believes that the results of the study merit changes in the regulations, then such changes will be the subject of a future rulemaking.

The Secretary has reviewed preliminary results from the accreditation study by two accreditation bodies, CARF and JCAHO, of almost 10 percent (approximately 80 OTPs) of the entire inventory of approved outpatient OTPs. Well over 90 percent of the OTPs surveyed achieved accreditation under the ''methadone specific'' accreditation standards. Only a very few programs required a follow-up survey to achieve accreditation. And, to date, only one OTP failed to achieve accreditation. These accreditation outcome results are comparable to the historical compliance rate under the previous FDA process-oriented regulatory system. In addition, these rates correspond to the assumed accreditation resurvey rate stated in the July 22, 1999, proposal for estimating the indirect costs of accreditation.

These accreditation outcome results have been analyzed and presented to SAMHSA/CSAT's National Advisory Council's Accreditation Subcommittee (NACAS). As discussed in the July 22, 1999, proposal, SAMHSA/CSAT augmented NACAS with consultants representing OTPs (both large and small programs), medical and other substance abuse professionals, patients, and State officials. The subcommittee has met twice, on January 31 and May 10, 2000, and the public was provided an opportunity to participate in this advisory process. On May 12, 2000, the SAMHSA/CSAT National Advisory Council urged SAMHSA/CSAT to move expeditiously to finalize the July 22, 1999, proposal.

The Secretary believes that the interim results from the accreditation impact study confirm that the accreditation guidelines, along with the accreditation process itself, are a valid and reliable method for monitoring the quality of care provided by OTPs. The results indicate that most OTPs can achieve accreditation and that treatment capacity has not declined as a result. While SAMHSA intends to continue the study to fulfill its objectives, the Secretary does not believe that it is appropriate or necessary to delay implementation of these new rules until the full study is complete.

4. Many comments, especially from current and past OTP patients, questioned the impact of revised Federal regulations in light of State regulations. These comments contend that State regulations are much more restrictive on medical and clinical practices than Federal regulations, and that State regulatory authorities have expressed little or no interest in changing their regulations or the way State regulations are enforced. Comments from OTP sponsors stated that accreditation costs would add to State licensing fees, which, in some States, exceed several thousand dollars annually.

The Secretary shares the concerns expressed in these comments about State regulations and licensing requirements. Indeed, the July 22, 1999, proposal discussed State licensure and regulatory issues. The proposal also noted that there was considerable variation in the nature and extent of oversight at the State level. Some States have regulations and enforcement programs that exceed Federal regulations. Others have relied exclusively upon FDA and DEA regulatory oversight. An increasing number of States rely on accreditation, by nationally recognized accreditation bodies, for all or part of their healthcare licensing functions.

The Secretary believes that SAMHSA's ongoing coordination activities with States will minimize the impact of Federal-State regulatory disparities upon OTPs. One objective of these activities is to increase State authorities' acceptance of the new accreditation-based system. First, SAMHSA/CSAT's OTP accreditation guidelines were developed by a consensus process that included representation from State Methadone Authorities. In addition, some State officials have accompanied CARF and JCAHO accreditation survey teams to observe site visits. Finally, SAMHSA/CSAT has distributed information on accreditation to each State. This information includes the SAMHSA/CSAT OTP accreditation guidelines, the CARF OTP accreditation standards and the JCAHO OTP accreditation standards. SAMHSA/CSAT convened three national meetings of State officials

between 1997 and 2000 and intends to continue coordinating activities with State authorities and national organizations such as the National Association of State Alcohol and Drug Abuse Directors (NASADAD).

This final rule includes provisions that would permit any State to apply for approval as an accreditation body and, if approved, accredit OTPs under the new Federal opioid treatment standards. Based on the above, the Secretary expects that many states will consider OTP accreditation and Federal certification requirements as sufficient to fulfill all or a substantial part of their licensing requirements. Taken together, the Secretary believes that these measures will minimize significantly the existing disparity between Federal and State regulation of OTPs.

5. Office-Based Treatment. The July 22, 1999, proposal discussed the concept of ''office-based opioid treatment'' and specifically solicited comments on how the Federal opioid treatment standards might be modified to accommodate office-based treatment and on whether a separate set of Federal opioid treatment standards should be included in this rule for office-based treatment.

The Secretary received many diverse comments on the office-based treatment issue. Several comments from patients and individual physicians believed that office-based treatment provided an excellent opportunity to expand opioid agonist treatment. These comments reference opioid treatment delivery systems in other countries and suggest that the U.S. should adopt similar systems. A few comments recommended that community pharmacies be encouraged to dispense methadone and LAAM as ''medication units'' as a way to make treatment more convenient for patients.

While many comments suggested separate standards for office-based treatment, others feared that different standards would result in a two-tiered system of treatment. Overall many comments stated that existing and proposed rules do not facilitate the development of the office-based practice model. As such, accreditation and certification would be prohibitively expensive for individual physicians.

On the other hand, many comments expressed concerns with the concept of ''office-based'' treatment and prescribing methadone and LAAM. Many of these comments reflected concern about the lack of trained and experienced practitioners. One comment referenced literature reports that described experiences in Australia and the United Kingdom with deaths from iatrogenic methadone toxicity associated with patients early in treatment. The experiences in these two countries were associated with an accelerated rate of patient admissions and the involvement of new, inexperienced practitioners. One comment cited research on methadone medical maintenance that indicated that approximately 15 percent of the patients treated in physicians offices were referred back to OTPs after ''relapsing'' to illicit opiate use.

Generally, most comments on this issue stated that there was not enough information on office-based practice. These comments suggest that based on the available information, office-based treatment warrants a gradual, step-wise approach, along with more use of medication units. This approach would serve to ''diffuse opioid agonist maintenance treatment into traditional settings.''

After carefully considering the diverse comments, as well as other legal and regulatory factors, the Secretary is not including in this rule specific standards that would permit physicians to prescribe methadone and LAAM in office-based settings without an affiliation with an OTP. Instead, until additional information is generated, the Secretary is announcing administrative measures to facilitate the treatment of patients under a ''medical maintenance'' model.

Current regulations enforced by DEA do not permit registrants to prescribe narcotic drugs, including opioid agonist medications such as methadone and LAAM for the treatment of narcotic addiction (see 21 CFR 1306.07(a)). In addition, the Secretary agrees that, at the present time, there should be some linkage between OTPs and physicians who treat stable patients with methadone and LAAM in their offices to address patients' psychosocial needs in the event of relapse. The Secretary agrees with the comments about the lack of trained and experienced practitioners to diagnose, admit, and treat opiate addicts who are not sufficiently stabilized, without the support of an OTP.

The Secretary has taken steps to facilitate ''medical maintenance,'' that will result in more patients receiving treatment with methadone and LAAM in an office-based setting. Medical maintenance refers to the treatment of stabilized patients with increased amounts of take-home medication for unsupervised use and fewer clinic visits for counseling or other services. First, the ''take home'' provisions in these rules have been revised from the previous regulations under 21 CFR § 291.505 to permit stabilized patients up to a one-month supply of treatment medication. In addition, SAMHSA/CSAT has developed treatment guidelines and training curricula for practitioners to increase the information and education for practitioners in this area. Finally, SAMHSA/CSAT has issued announcements to the field explaining how patients and treatment programs can obtain authorizations for medical maintenance. These authorizations were developed to address program-wide exemptions under 21 CFR 291.505; however, SAMHSA/CSAT envisions a similar approach will be used under the program-wide exemption provisions of 42 CFR 8.11(h).

Under the medical maintenance model, office-based physicians maintain formal arrangements with established OTPs. Typically, patients who have been determined by a physician to be stabilized in treatment may be referred to office-based physicians. It has been estimated that over 12,000 current patients would be eligible for medical maintenance treatment. The Secretary believes that this is a reasonable approach that will expand treatment capacity gradually while additional information and experience is developed to evaluate and refine office-based treatment models.

B. Comments on Subpart A—Definitions and Accreditation

Proposed subpart A sets forth definitions as well as procedures, criteria, responsibilities and requirements relating to accreditation.

1. A comment from a State authority suggested that the treatment plan definition under § 8.2 should be modified to require a reference to the services determined necessary to meet the goals identified in the plan. The Secretary agrees with this suggestion and has revised the treatment plan definition accordingly.

2. One comment suggested that the proposed definition of detoxification treatment specifies agonist and therefore precludes the use of mixed agonist or agonists in combination with other drugs. The Secretary has announced plans to develop new rules specifically for partial agonist medications for the treatment of opiate addiction (See 65 FR 25894, May 4, 2000). Therefore, use of the term ''agonist'' is appropriate in this context.

The use of ''other drugs'' (interpreted to mean non-narcotic substances) in combination with methadone and LAAM are not subject to the regulatory requirements of this rule.

3. Several comments were submitted on the proposed definition of opiate addiction. Some comments suggested that the definition should be revised to remove behavior-oriented concepts and rely on medical constructs only. One comment suggested substituting the definition of opiate addiction contained in the recent NIH consensus panel report. The Secretary concurs, and has revised the definition of opiate addiction to be more consistent with the recent NIH Consensus panel's recommendations.

4. A few comments were concerned that there would be only two accreditation bodies, CARF and JCAHO. In addition, these comments reflect concern that accreditation would be an additional requirement on top of existing FDA regulations.

As proposed in the July 22, 1999, notice (section 8.3(a)) any private nonprofit organization, State governmental entity, or political subdivision thereof, capable of meeting the requirements of subpart A is eligible to apply to become an accreditation body under the new rules. As discussed elsewhere in this final rule, some State authorities have contacted SAMHSA and expressed interest in becoming an accreditation body under subpart A. In addition, a number of non-governmental entities have expressed similar interest. Accordingly, the Secretary believes that there will be more than two accreditation bodies that seek and obtain approval to become an accreditation body under these rules.

The requirements for accreditation and SAMSHA certification under this final rule will replace the requirements for FDA approval of OTPs under previous regulations. The previous regulations in place under 21 CFR 291.505 will be rescinded on March 19, 2001.

5. The Secretary received a considerable number of diverse comments from State authorities, OTPs, and patients on the provision proposed under section 8.3(a) that would permit States to serve as accreditation bodies under the new rules. The preamble to the July 22, 1999, notice emphasized the need for States to consider serving as accreditation bodies. This emphasis was based upon the recommendation in the IOM Report that strongly suggested that the Federal Government design a consolidated inspection system that reduces the burden on OTPs from multiple (Federal, State, local) inspections.

State authorities provided a mixed response in their comments on this issue. As discussed below, several States expressed an interest in becoming accrediting bodies under the new rules but believed that they were ineligible because they could not accredit 50 OTPs a year under proposed section 8.3. On the other hand, many States indicated that they were not interested in becoming accreditation bodies, while several indicated that they were undecided and would await additional information.

Comments from OTPs, for the most part, reflect a longstanding cooperative relationship with State regulatory authorities. OTPs, in general, did not appear to oppose the concept of State authorities serving as accreditation bodies under the proposed new system. Indeed, some OTPs, located within States that assess extensive licensing fees, commented that it would be imperative that States take on the role of accreditation bodies under the new system in order to eliminate the financial impact of licensing and accreditation fees.

Comments from patients on this issue suggested caution. Many patients sensed that State regulators would retain strict, ''process-oriented'' regulations or philosophies. These comments urged that if SAMHSA permitted States to serve as accreditation bodies then the agency should carefully monitor accreditation standards and practices to assure that they conform with the Federal opioid treatment standards.

After considering the comments on this issue, the Secretary is retaining the provision that allows States to serve as accreditation bodies under the new rules. The Secretary acknowledges that many States will choose not to participate as accreditation bodies. Some of these States already accept accreditation by recognized accreditation bodies for licensing purposes. It is expected that more States, especially States with relatively few OTPs, will also choose to accept accreditation as meeting State licensure requirements in time. Indeed, legislation enacted recently in New Hampshire to allow methadone maintenance treatment incorporated a requirement for CARF accreditation (Ref. 2). Finally, some States will apply accreditation reviews and findings to complement their licensing activities. The Secretary recognizes that the States' role in adapting to the new system will change over time as additional information on accreditation is developed.

The Secretary believes that there are adequate safeguards to address patient concerns about overly restrictive State regulations and oversight. Under section 8.3(b)(3), SAMHSA will review each applicant accreditation body's proposed accreditation standards. As part of this review, SAMHSA will determine the extent to which the accreditation standards are consistent with the Federal opioid treatment standards. In addition, under section 8.5, SAMHSA will evaluate periodically the performance of accreditation bodies by inspecting a selected sample of the OTPs accredited by the accreditation body. As part of this effort SAMHSA may also consider follow-up inspections in cases where accreditation activities identify public health, public safety, and patient care issues.

The Secretary continues to believe, as outlined in the July 22 proposal, that there are benefits to States serving as accreditation bodies under this rule. This feature provides the potential to reduce the overall number of OTP inspections. It also permits the use and application of the vast expertise available within many State oversight agencies.

6. A number of State authorities and an accreditation body questioned the restriction under proposed section 8.3(b)(3) that would require accreditation bodies to be able to survey no less than 50 OTPs annually. Some comments contend that this would unfairly and inappropriately exclude smaller States or States with fewer OTPs from participating. These comments suggested that other requirements should be considered and applied or a waiver provision added. One accreditation body commented that accreditation bodies recognized by the Health Care Financing Administration are not subject to such arbitrary limitations. Other comments suggested that the 50 survey per year minimum was not necessary to achieve its stated purpose—to ensure the quality of accreditation services and minimize the variability of accreditation standards.

The Secretary concurs with these comments. The provisions of section 8.3(b)(3) (submission and review of proposed accreditation standards) and section 8.5 (periodic evaluation of accreditation bodies) are adequate to enable SAMHSA to ensure the quality of accreditation services and minimize the potential variability in accreditation standards. Accordingly, section 8.3(b) has been modified to remove this requirement.

7. A few comments suggested that State authorities and patient advocates should be permitted to participate in the approval of accreditation bodies under the new rules and in the accreditation process in general. These comments believe that they can make substantial contributions to the process.

The Secretary agrees that patients and State authorities can contribute

substantially to the successful operation of the new system. State authorities and patients have participated in the committees that have developed SAMHSA/CSAT's Accreditation Guidelines. In addition, representatives from both these groups have served on the Accreditation Subcommittee of the SAMHSA/CSAT National Advisory Council. Accreditation standards include several provisions designed to solicit and consider individual patient views regarding treatment planning and other areas. Some, though not all, accreditation bodies also have patient hotlines that allow patients to convey concerns directly to accreditation bodies. Finally, SAMHSA and State authorities will continue to consult and interact under the new rules. The Secretary believes that these measures are adequate to assure the appropriate level of State authority and patient input into the accreditation process.

8. Several comments addressed proposed section 8.3(b)(6), pertaining to the qualifications of accreditation body personnel and proposed section 8.4(h) on accreditation teams. One State authority objected that the requirement that there be a licensed physician on the accreditation body staff was an unnecessary expense to accreditation bodies. Another comment recommended that accreditation teams should include a physician certified for dispensing opioids. Some patients advocated that the accreditation team should include a current patient.

The Secretary believes the requirements for accreditation personnel and accreditation teams as set forth in the July 22, 1999, proposal are sufficient. It is not clear that every OTP would benefit from having a physician or opioid agonist patient on the accreditation team. The Secretary has reviewed the results of accreditation surveys under the SAMHSA/CSAT methadone accreditation project. Based on these reviews, the requirements set forth under section 8.4(h) are adequate to assure that accreditation bodies carefully consider the qualifications of accreditation surveyors and accreditation teams.

9. A considerable number of comments were submitted, mostly by State authorities, concerning the absence of a definition for State authority. These comments suggested that adding a definition for state authority could reduce confusion in States that serve as accreditation bodies. In addition, these comments reflect a belief that this change would help clarify the Federal-State consultation process set forth in the proposed rule. The Secretary agrees with these comments and has added a definition of State Authority. This definition tracks closely with the definition contained in the previous regulations under section 21 CFR 291.505.

C. Subpart B—Certification

Subpart B establishes the criteria and procedures for the certification of OTPs. This section also addresses the conditions for certification and the interaction between the Federal Government and State authorities under the new rules.

1. Many comments from State regulators noted that there was no reference to a requirement that OTPs obtain a license or permit from States before receiving certification from the Federal Government. These comments reflect a concern that SAMHSA may certify a program in a State where no methadone authority exists, or without the knowledge of the State authority. Other comments urged Federal certification to pre-empt State licensing, noting that ''initial State approval will remain a de facto requirement.''

The Secretary believes that the conditions for certification as set forth in the July 22, 1999, proposal, including the provisions relating to State licensure, are adequate and appropriate to fulfill the objectives of this rule. The Secretary's role in the oversight of narcotic treatment is to set standards for the appropriate use of narcotic drugs in the treatment of addiction, and then to ensure compliance with those standards. The States, on the other hand, have a broader set of responsibilities, including regional and local considerations such as the number and distribution of treatment facilities, the structural safety of each facility, and issues relating to the types of treatment services that should be available. Nothing in this part is intended to restrict State governments from regulating the use of opioid drugs in the treatment of opioid addiction. The Secretary notes that many States exercise this authority by choosing not to authorize methadone treatment at all.

The Secretary does not believe that OTPs will open and begin treating patients without State notification, review, and approval. The Secretary has been careful to state throughout this rule that OTPs (including medication units) must comply with all pertinent State and local laws as a condition of Federal certification. As such, OTPs will also be responsible for assuring that they have the necessary approvals and licensure at the State. Moreover, OTPs must obtain DEA registration prior to accepting opioid addiction treatment drugs for the treatment of opiate addiction. DEA registration is explicitly contingent upon State authority approval. Importantly, as noted below, there will be extensive consultation, coordination, and cooperation between SAMHSA and relevant State authorities.

2. One State regulator requested that the regulation be modified at section 8.11(c)(1) to add a requirement that SAMSHA notify the State upon receipt of applications for certification as well as approval and withdrawal. This comment was based upon a concern that provisionally certified programs could operate without a State's knowledge.

The Secretary agrees that it is imperative for States to be notified of significant certification activities, including new program applications, program suspensions and withdrawals. SAMHSA intends to notify States of all such developments under the provisions of section 8.11(c)(1). The Secretary believes that the rules are sufficiently clear on this point.

3. Some State authorities suggested revising proposed section 8.11(h), which states that SAMHSA ''may'' consult with State authorities prior to granting exemptions from a requirement under sections 8.11 or 8.12.

Section 8.11(h) permits OTPs to request exemptions from the requirements set forth under the regulation. This represents a continuation of a long-standing provision from the previous regulation under 21 CFR 291.505. The Secretary anticipates that most exemption requests under the new rule will be to permit variations from the treatment standards, including program-wide exemptions for medical maintenance. The Secretary agrees that it is appropriate and necessary to consult with State authorities on requests for variations from existing standards. Accordingly, section 8.11(h) is revised to require consultation with the State authority prior to granting an exemption.

4. Several comments from patients suggested that Federal regulations should prevent States from imposing additional regulatory requirements beyond the Federal regulations. Many of these comments contend that State regulations prevent treatment expansion, hinder accountability for quality treatment, limit patient access, and lead to patient abuses.

As noted above, the Secretary acknowledges the authority within State government to regulate the practice of medicine. This rule does not pre-empt States from enacting regulations necessary to carry out these important responsibilities.

Many State regulations closely resemble the previous Federal regulations under 21 CFR 291.505. In addition, many States are currently reevaluating their regulations to determine if modifications are necessary to reflect the changes in Federal rules. The Secretary encourages States to consider the new information on changes in the opioid addiction treatment field, including phases of treatment, measuring accountability for improving the quality of patient care, and modern medication dosing practices, as States proceed in revising their regulations.

The Secretary also invites States to continue to enhance their partnership with Federal authorities in this area. As noted above, the final rule includes a new feature—the opportunity for States to serve as accreditation bodies. This new activity adds to existing partnership opportunities, such as the participation in the SAPT Block Grant program and its related technical assistance program. The Secretary hopes that these actions collectively will continue the regulatory reform started with the July 22, 1999, proposal.

5. A few comments expressed concern about proposed section 8.11(e), which permits provisional certification for one year, while a program obtains accreditation. These comments believe that one year was ''too long for a program to go without accreditation.''

The Secretary believes that the maximum 1-year term (not including the 90-day extension allowed under section 8.11(e)(2)) for provisional certification is reasonable and customary with accreditation in other areas of healthcare. The purpose of this provision is to permit new OTPs to initiate operations and generate patient records to aid in the accreditation application, survey, and review process. It should be noted that OTPs will be subject to SAMHSA, DEA, and State oversight during the tenure of provisional accreditation. These OTPs must comply with Federal opioid treatment regulations and are subject to compliance actions at any time.

6. Section 8.11(i)(2) proposed that certification as an OTP would not be required for the maintenance or detoxification treatment of a patient who is admitted to a hospital or long-term care facility for the treatment of medical conditions other than addiction. One comment noted that, as written, patients admitted to hospitals for cocaine or alcohol addiction would not be eligible for treatment under this provision. The comment suggested that adding the word ''opioid'' before ''addiction'' would help to clarify this issue. The Secretary concurs and the section 8.11(i)(2) has been changed to reflect this change.

D. Subpart B—Treatment Standards

1. A number of comments were submitted on proposed section 8.12 in general. These comments stated that the Federal Opioid Treatment standards are vague and lack specificity. As such, these comments contend that the standards are unenforceable as regulations. One comment suggested that the SAMHSA/CSAT Accreditation Guidelines be incorporated as regulations.

The Secretary believes that the Federal Opioid Treatment Standards are enforceable, and do not need to be modified to accomplish their purpose under the new rules. The July 22, 1999, proposal noted that in the past, HHS has attempted to write all facets of treatment, including required services, into regulation. In addition, the proposal acknowledged that it is now accepted that (a) different patients, at different times, may need vastly different services, and (b) the state of the clinical art has changed, to reflect scientific developments and clinical experience, and is likely to continue to change and evolve as our understanding of more effective treatment methods increases. Accordingly, the Secretary proposed a more flexible approach with a greater emphasis on performance and outcome measurement. With guidance from SAMHSA, the accreditation bodies will develop the elements needed to determine whether a given OTP is meeting patient needs for required services. SAMHSA will review these elements as part of the accreditation body's initial and renewal applications to ensure that accreditation bodies have incorporated the Federal opioid treatment standards into their accreditation elements. SAMHSA will also review accreditation body elements to ensure that the elements do not exceed Federal expectations in terms of opioid agonist treatment. Incorporating accreditation guidelines into regulations would subvert this approach.

As noted in the July 22, 1999, proposal, the Secretary believes that the standards are ''enforceable regulatory requirements that treatment programs must follow as a condition of certification (64 FR 39810, July 22, 1999).'' While the new regulations increase the flexibility and clinical judgement in the way OTPs meet the regulatory requirements, they are set forth under section 8.12 as the services, assessments, procedures, etc., that OTPs ''must'' and ''shall'' provide. As such, the new standards are as enforceable as the previous regulations under 21 CFR 291.505. OTPs that do not substantially conform with the Federal Opioid Treatment standards set forth under section 8.12 will risk losing SAMHSA certification.

2. One comment recommended that proposed section 8.12(b) should be modified to require a standard that OTPs should have adequate facilities. The comment stated that this provision existed in the previous regulation. The Secretary agrees and has added a requirement that OTP's must maintain adequate facilities. The Secretary notes, however, that SAMHSA/CSAT accreditation guidelines and accreditation standards used in the SAMHSA accreditation impact study, address the adequacy of the OTP's facility. These accreditation standards, in conjunction with treatment outcomes, will help determine whether facilities are adequate under the new rules.

3. One comment addressed proposed section 8.12(b), stating that rules should expressly require compliance with civil rights laws, not just ''pertinent'' Federal laws. As such, the comment suggests that the standards should require detailed patient grievance procedures, including appeals to neutral parties. The Secretary believes that it is not necessary to modify the rule to reflect civil rights laws specifically. These laws are included under the requirement as written. In addition, SAMHSA/CSAT Accreditation Guidelines, as well as the accreditation standards developed from them include provisions for accepting and acting upon patient grievances.

4. A number of respondents commented on proposed section 8.12(d) which addresses OTP staff credentials. Under the July 22, 1999, proposal, the Secretary proposed that each person engaged in the treatment of opiate addiction must have sufficient education, training, or experience or any combination thereof, to enable that person to perform the assigned functions. Further, all licensed professional care providers must comply with the credentialing requirements of their professions. The proposal encouraged, but did not require, that treatment programs retain credentialed staff.

Some comments requested that this standard be clarified to require American Society of Addiction Medicine (ASAM)-certified medical professionals. Another comment questioned whether personnel had to be licensed in the State where the treatment program is located. Another comment from a State Authority, recommended that the regulations

specify the license, training, experience, as well as the number of licensed counselors in a program, including a minimum counselor-to-patient ratio. On the other hand, an OTP medical director commented that none of the cited credentials ''conferred competence in dealing with opioid dependent patients, per se.'' According to this comment, SAMHSA/CSAT should instead develop curricula for medical directors and other care givers.

Except for the requirements of section 8.12(h), which relate to the qualifications for practitioners who administer or order medications, the Secretary does not believe that it is appropriate to further prescribe the qualifications for health professionals in this regulation. Under sections 8.12(b), (d), (e), (f) services must be provided by professionals qualified by education and training. The Secretary does not believe that one credentialing organization should be specified as a requirement for qualifications. Instead, the Secretary intends to rely on guidelines and accreditation standards together with patient outcome assessments to determine the adequacy of training and education level of professionals in OTPs. SAMHSA/CSAT is actively developing model training curricula in this area.

5. A few comments suggested that the regulations specify the outcome measures for quality assessment plans under section 8.12(c)(1). Similarly, some comments suggested that diversion control plans, which OTPs are required to develop under section 8.12(c)(2), should also be spelled out in regulations.

The Secretary believes that the regulation as proposed provides sufficient detail on outcome measures and diversion control plans. In keeping with the intent of the regulation reform, these general requirements are elaborated in best-practice guidelines and in ''state-of-the-art'' accreditation standards. Indeed, following a review of the accreditation standards that are based upon SAMHSA/CSAT's opioid treatment accreditation guidelines, the Secretary has determined that they are adequate to ensure that OTPs will be able to develop meaningful outcome assessment and diversion control plans. In addition, these SAMHSA/CSAT accreditation guidelines and accreditation standards reflect the latest research findings in this area. Unlike the Federal regulations, these guidelines and standards will be updated periodically to reflect new research and clinical experience.

6. The Secretary received a considerable number of comments on the proposed definition and the standards for short-and long-term detoxification treatment. Most of these comments suggested that the word ''detoxification'' is a pejorative non-medical term and does not constitute treatment, because few, if any, patients can be stabilized in such a short period of time. These comments suggested that all references to detoxification should be deleted from the regulations, or at least renamed.

These comments fail to recognize the distinction between opiate dependence, for which detoxification treatment is appropriate, and opiate addiction, for which maintenance treatment is appropriate. The Narcotic Addiction Treatment Act of 1974 (NATA) and regulations have long recognized these distinctions. While a majority of the available treatment research, including recent studies, concludes that maintenance treatment is much more effective than detoxification regimens, the Secretary believes that it is still necessary to retain distinct standards for maintenance and detoxification treatment (Ref. 3).

7. Several comments were submitted in response to the Secretary's specific request for comments on proposed section 8.12(e)(4) which set forth minimum requirements for detoxification treatment. The July 22, 1999, proposal retained the requirement from the existing regulation that ''a patient is required to wait no less than 7 days between concluding one detoxification episode before beginning another.'' Essentially, while sympathetic to the need for limits on detoxification treatment, all the comments on this item opposed continuing any waiting period between detoxification episodes. These respondents believe that seven days is ''artificial * * * or more time than is needed.'' In addition, these comments indicate that OTPs often request and are granted exemptions from the waiting period requirement under the existing regulation, creating an unnecessary paperwork burden for OTPs, as well as State and Federal regulators. Instead, the comments suggested a limit on the number of unsuccessful detoxification episodes in one year before the patient is assessed for opioid agonist maintenance or other treatment. In addition, these comments recommended that an unsuccessful detoxification attempt be defined to include any relapse to abuse.

The Secretary agrees with the recommendations that the intent of the restrictions on detoxification can be accomplished without a mandated time interval between detoxification admissions. The standards for detoxification treatment set forth under section 8.12(e)(2) and (4) have been revised to state that patients with two or more unsuccessful detoxification episodes within a 12-month period must be assessed by the OTP physician for other forms of treatment. This change is consistent with SAMHSA/CSAT accreditation guidelines which also elaborate on unsuccessful detoxification treatment attempts.

8. A considerable number of diverse comments addressed proposed section 8.12(f) relating to required services. This section of the July 22, 1999, proposal requires that ''adequate medical, counseling, vocational, educational and assessment services are fully and reasonably available to patients enrolled in an OTP.''

Two comments strongly recommended that the regulation require integrated, simultaneous treatment by specially cross-trained staff, for co-occurring opioid treatment and mental illness. These respondents believe that integrated services for persons with an addiction(s) and a psychiatric disorder are crucial. These dually-diagnosed patients represent 50–80 percent of substance dependent populations.

The Secretary agrees with the importance of providing adequate integrated services for opiate-addicted patients who also suffer from psychiatric disorders. Indeed, the SAMHSA/CSAT Accreditation Guidelines, along with the accreditation standards developed by CARF and JCAHO all address the need to evaluate patients for co-occurring illnesses, including mental illness. CARF Opioid Treatment Program Accreditation Standards state that services for co-occurring illness should be provided on site or by referral. However, the same standards note that ''coexisting conditions, especially in persons from disenfranchised populations, are most effectively treated at a single site.'' The Secretary takes note that these provisions for co-occurring disorders under these new rules will be a vast improvement over the previous regulatory system, which did not address co-occurring opiate addiction and psychiatric disorders at all. As such, under the new rules, patients' access to effective treatment for co-occurring disorders will be enhanced substantially. However, the Secretary believes that it would be prohibitively expensive to require every OTP to hire and retain specialists in the treatment of co-occurring disorders.

Other comments on this section stated that the regulations should specify a schedule for services. Some comments

recommended that the regulations require OTPs to document that patients actually receive services when they are referred to off-site providers. Other comments suggested that accreditation bodies should monitor the extent to which services are provided as part of their periodic onsite surveys. Still other comments, mostly from patients, suggested the requirement for services be eliminated, maintaining that medication is all they needed.

The Secretary believes that the requirements for services as stated in the July 22, 1999, proposal, together with the accreditation process, provide adequate assurance that patients enrolled in OTPs receive the services that they have been assessed to need. The July 22, 1999, proposal emphasized the need for these services as an essential part of treatment. However, in shifting to an accreditation approach with an emphasis on performance outcomes, the Secretary was no longer attempting to ''write all facets of these required services into regulation.'' OTPs must initially and periodically assess each patient and ensure that adequate services are available to patients determined to need them. SAMHSA/CSAT Accreditation Guidelines and accreditation standards will elaborate on the standards for services. OTPs will be accountable through the accreditation process to assure that patients receive the appropriate services they need for successful treatment outcomes; for some patients, medication services may be sufficient to produce positive outcomes.

9. A number of respondents submitted comments on proposed section 8.12(f)(2), which requires a complete medical examination within the first 30 days following admission. Some of these comments noted that this provision, as proposed, permitted patients to enter treatment while tests, some of which required several days, are completed. Others commented that the 30 days was too long to wait for a medical exam to be completed, noting that information from the exam is crucial to the first few days of treatment. Finally, some comments suggested that regulations should specify the contents of the medical exam.

The intent of proposing 30 days for the completion of the physical exam was to allow patients into treatment while OTPs wait for the results of serology and other tests that require, in some cases, several days to complete. Section 8.12(f)(2) has been revised to clarify the requirement for a physical exam upon admission, with serology and other tests results completed w/in 14 days. The Secretary does not agree that regulations should specify the contents of the medical examination. Instead, the Secretary believes that accreditation guidelines should express the state-of-the-art content for a medical exam appropriate for the treatment of opiate addiction.

10. The July 22, 1999, notice proposed that OTPs conduct at least eight random drug abuse tests per year for each patient. Many comments suggested that the Federal standards specify more frequent drug abuse tests, including weekly testing, to balance the more flexible proposed take-home schedule. Other comments suggested that Federal regulations should specify measures to prevent adulteration. On the other hand, some comments suggested that quarterly drug abuse testing is appropriate. Moreover, one comment recommended substituting an ''honor system'' because patients can corrupt the testing process and falsify results.

After considering the comments on this issue, the Secretary is retaining the requirement for a minimum of eight random drug abuse tests per year for maintenance treatment. The Secretary believes that this is an adequate and balanced standard for drug abuse testing. There is extensive discussion on drug abuse testing issues in the SAMHSA/CSAT Treatment Improvement Protocols and the SAMHSA/CSAT Accreditation Guidelines. In addition, these guidelines elaborate on measures to address the corruption and falsification of results. Finally, as the Federal standard is a minimum, OTPs can require more frequent tests if desired.

11. The Secretary received many comments on proposed section 8.12(g)(2) which requires OTPs to determine and document that patients are not enrolled in other programs. Most respondents question how such determinations could be made without a patient registry. One comment stated that multiple enrollments are attributable to inadequate medication dosing practices.

The July 22, 1999, proposal retained the provisions relating to multiple enrollments from the previous regulations under 21 CFR 291.505. In proposing to retain the requirement, the Secretary noted that there have been cases of patients enrolling in more than one treatment program; however, the extent of this practice is undetermined but not considered to be widespread. The intent of this provision is for OTPs to make a good faith effort, using available resources and mechanisms to ascertain whether or not a prospective patient was currently enrolled in another OTP. Some individual States with OTPs concentrated within a community have established a patient registry and require OTPs to report new patients and patients who have discontinued in treatment. In other jurisdictions, patient registries are developed and maintained voluntarily by OTPs. OTPs also often contact other OTPs in the vicinity to determine if the patient is currently enrolled in an OTP, or they ask the patient. If used, these mechanisms must be used in accordance with the provisions at 42 CFR 2.34, regarding disclosures to prevent multiple enrollments. The Secretary acknowledges that none of these mechanisms can determine with complete certainty whether or not a patient is enrolled in more than one OTP. Accordingly, the Secretary expects that OTPs will document in each patient's record that the OTP made a good faith effort to review whether or not the patient is enrolled in any other OTP. Section 8.12(g)(2) has been revised accordingly.

12. The Secretary received many comments on proposed section 8.12(j), relating to interim methadone maintenance. Most of these comments were from patients who suggested interim maintenance as a model for long standing patients who have been stabilized in treatment. As such, these comments suggested that the term for interim methadone maintenance be extended beyond 120 days.

These comments reflect a misunderstanding of interim methadone maintenance. Interim methadone maintenance was mandated by the ADAMHA Reorganization Act of 1992 as a measure to address shortages in treatment capacity and documented waiting lists (Pub. L. 102–321, See also 58 FR 495, January 5, 1993). The legislation included several restrictions which were incorporated and retained into Federal regulations. Although very few programs have applied for authorization to provide interim methadone maintenance, the Secretary does not at this time believe it is necessary or appropriate to change the standards. Instead, as discussed elsewhere in this notice, the Secretary believes that medical maintenance provides a more reasonable approach for expanding treatment capacity.

13. The Secretary received comments on proposed section 8.11(h), which provides for exemptions from treatment standards or certification requirements. One comment suggested that the examples in the previous regulation for exemptions, be retained in the final new regulations. The comment suggests that this would encourage individual physicians, pharmacists, or both to

provide methadone treatment in rural areas where methadone treatment is scarce or unavailable. Another comment suggested that SAMHSA streamline the exemption process and do more to publicize the availability of such regulatory options. The Secretary accepts both of these suggestions, and section 8.11(h) has been revised accordingly. In addition, SAMHSA has already taken steps to streamline the exemption process and publicize the availability of certain exemptions (Ref. 4).

14. Most comments strongly supported the provisions in proposed section 8.12(h)(3)(i) which permits OTPs to use solid dosage forms. Some patients reported spoilage and decomposition problems with 14-day supplies of liquid dosage form. Other comments suggested that the use of solid medication will reduce treatment cost modestly by eliminating the need for dosage bottles for solutions. The Secretary agrees that permitting OTPs to use solid medication will reduce treatment costs and increase treatment convenience to patients.

15. The Secretary received many comments on proposed section 8.11(h)(3)(iii) that would have required the program physician to justify in the patient record all doses above 100 mg. Most comments viewed this requirement as an inappropriate ''value judgement'' that hampers clinical judgement. The Secretary agrees that the requirement to justify a dose above 100 mg, which is a modification of a requirement under the previous regulation, is not necessary to reduce the risk of medication diversion. Accordingly, this requirement has been eliminated from the final rule.

16. The Secretary specifically requested and received comments on proposed changes to the requirements under section 8.12(i) pertaining to medications dispensed for unsupervised use (hereinafter ''take-homes''). The July 22, 1999, proposal set forth four options for addressing take-homes. These options ranged from retaining the previous requirements to a scheme based on a maximum dose. Option number 2 was discussed as the option preferred by HHS and endorsed by DEA. This option resembles the requirement under the previous regulations and retains the 8-point take-home criteria. However, option number 2 permitted patients in stable treatment for one year to receive up to a 31-day supply of medication, while the previous regulation included a maximum take-home supply of 6 days.

Most comments supported proposed option 2, with modifications. In supporting option 2, current patients stated that less frequent clinic attendance will make treatment much more convenient. In addition, Option 2 will eliminate travel hardships and facilitate employment commitments, ultimately increasing retention in treatment and rehabilitation. Option 1, which encompassed the take-home schedule from the previous regulation, was viewed by many comments as too restrictive. Many comments opposed option 3, which proposed a set 2-week maximum milligram amount for take-homes, because it unfairly penalized patients receiving higher doses.

On the other hand, a form letter circulated and submitted by several treatment programs stated that no patients should be eligible for a 31-day take-home supply. According to these comments, all patients must report to clinics often so that their rehabilitation can be monitored appropriately. In addition, these comments stated that allowing any patient a 31-day take-home supply presents an unacceptable risk of diversion.

The Secretary does not agree with these comments. Indeed, there is considerable evidence that many patients can responsibly handle supplies of take-home medications beyond the 6-day maximum allowed under the previous regulations. In addition, FDA has permitted hundreds of patients to receive monthly take-home supplies of methadone through exemptions or Investigational New Drug Applications. These investigations have been analyzed and reported in scientific literature and indicate that patients successfully continue in rehabilitation (Ref. 5). Moreover, these cases indicate that rehabilitation is enhanced through these ''medical maintenance'' models. Accordingly, and in response to an increased interest in this issue, FDA and SAMHSA/CSAT issued a ''Dear Colleague'' letter on March 30, 2000, that advised the field on procedures for obtaining OTP exemptions for medical maintenance, which include a provision for up to a 31-day supply of take-home medication (Ref 4).

The Secretary notes that many comments provided suggestions on refining the basic schedule for take-home eligibility outlined in proposed option 2. For example, many comments suggested that one year of stable treatment was still too short a period of time to evaluate whether patients can responsibly handle a 31-day supply of take-home medication. These comments suggested an interim step that permits a 14-day take-home supply after one year of stable treatment before a patient is eligible for a 31-day supply.

The Secretary concurs with these comments. The 2-year time in treatment requirement is more consistent with the studies and exemptions for medical maintenance granted to date under the previous rules. In addition, this schedule is more consonant with the schedule set forth in the SAMHSA/CSAT Accreditation Guidelines and the accreditation body standards. Accordingly, section 8.12(i)(3) has been revised to reflect a 14-day take-home step after one year of stable treatment and to reflect that patients are eligible for a take-home supply up to 31 days after two years of stable treatment. The language in other parts of section 8.12(i)(3) has been modified slightly for clarity to lengthen the duration of the steps within the first year of treatment, and to remove some requirements for observed ingestion.

17. Comments overwhelmingly supported the proposal to permit take-home use of LAAM and suggest that the Secretary apply the same schedule as methadone, *e.g.* option 2. A comment from a practitioner who has treated over 500 patients, stated that patients dislike being switched from LAAM to methadone when necessary for travel purposes. Most comments suggested that diversion of LAAM is no more likely than the diversion of methadone which generally is not problematic. One comment submitted the results of a 149-patient study on LAAM take-home use. Patients were randomized into take-home and clinic only groups. As part of the study, 545 take-home doses of LAAM were distributed to patients, and patients were subject to random ''callbacks.'' There was no evidence of tampering, diversion, or interest in obtaining LAAM take-home supplies illicitly. In addition, there were no differences between the two groups in the measured outcome variables. The investigator concluded that methadone and LAAM should be subject to the same take-home requirements. The Secretary concludes that LAAM should be available for take-home use under this rule.

18. A comment submitted by a physician discussed his successful experience using LAAM for detoxification treatment, finding LAAM to be superior to methadone for detoxification with some patients. The comment suggested that the regulations should be modified to permit the use of LAAM for detoxification.

Although previous **Federal Register** notices may have suggested that LAAM was not available for use in detoxification treatment (58 FR 38704, July 20, 1993), the July 22, 1999, proposal does not prohibit the use of

methadone or LAAM for detoxification treatment. Indeed, the current FDA approved labeling for LAAM discusses and provides guidance on withdrawing patients from LAAM therapy:

> ORLAAM is indicated for the management of opiate dependence * * * There is a limited experience with detoxifying patients from ORLAAM in a systematic manner, and both gradual reduction (5 to 10% a week) and abrupt withdrawal schedules have been used successfully. The decision to discontinue ORLAAM therapy should be made as part of a comprehensive treatment plan.

The Secretary believes that the regulations are adequately clear on this point.

19. A few respondents commented upon the proposed implementation plan and whether OTPs could be expected to comply with the timetables for achieving accreditation. Under proposed section 8.11(d), treatment programs approved under the previous regulations are deemed certified under the new rules. This ''transitional certification'' would expire on June 18, 2001 unless the OTPs certify with a written statement signed by the program sponsor that they will apply for accreditation within 90 days of the date SAMHSA approves the first accreditation body. Transitional certification, in that case, will expire on March 19, 2003. SAMHSA may extend transitional certification on a case-by-case basis for up to one year under certain conditions. The comments questioned whether SAMHSA had empirical evidence that OTPs could meet this timetable.

The Secretary believes that the timetables proposed in the July 22, 1999, notice remain reasonable. A significant number of OTPs have already had experience with accreditation. This includes programs located in Department of Veterans Affairs Medical Centers, as well as OTPs located in the several States that require accreditation of OTPs (Maryland, Indiana, North Carolina, Georgia, South Carolina, and Michigan). Moreover, as discussed previously, as part of SAMHSA/CSAT's accreditation implementation plan, two accreditation bodies conducted accreditation surveys of OTPs and accredited over 50 OTPs in just a few months. SAMHSA/CSAT has planned additional training and technical assistance to enable OTPs to understand and comply with the new regulations. In addition, the regulations have been streamlined with fewer reporting and recordkeeping requirements. OTPs have had ample opportunity to prepare for this final rule, and the SAMHSA/CSAT Accreditation Guidelines as well as the CARF and JCAHO accreditation standards have been widely available for years. Taken together, these factors provide the Secretary with reasonable confidence that OTPs can apply for and achieve accreditation within two years from the effective date of this rule.

The Secretary is sensitive to concerns about OTPs contacting accreditation bodies and scheduling accreditation reviews in a convenient manner. Therefore, while not changing the timetables for achieving accreditation under the final rule, the Secretary has modified section 8.11(d) to state that programs will agree to apply for accreditation within 90 days from the date SAMSHA announces the approval of the second accreditation body. The Secretary believes that tying this certification for OTPs to apply from the date SAMHSA announces the approval of the first accreditation body to the date SAMHSA announces approval of the second accreditation body will facilitate OTPs contacting and achieving accreditation under the final rule.

20. A few comments requested that OTPs that have been previously accredited by JCAHO and CARF should be ''grandfathered'' somehow under the new final regulations.

There are no provisions in the final rule to accept accreditation by accreditation bodies that have not been approved by SAMHSA under section 8.3(d). These accreditation bodies did not develop and apply accreditation standards that were based upon the opioid agonist treatment standards set forth under section 8.12. SAMHSA, however, will consider on a case-by-case basis, whether OTPs that achieved accreditation under the SAMHSA/CSAT implementation initiative can be exempted from re-accreditation under this final rule, pursuant to section 8.11(h).

E. Subpart C—Procedures for Review of Suspension or Proposed Revocation of OTP Certification, and of Adverse Action Regarding Withdrawal of Approval of an Accreditation Body

1. One comment recommended that subpart C should be revised to add discovery provisions. This would enable OTPs to obtain crucial information on how ''accreditation bodies conducted their investigation.'' The Secretary believes that the provisions of subpart A that require that accreditation bodies have appeals procedures in their accreditation decision-making process is adequate to assure that OTPs can obtain the information they need on accreditation activities.

2. One comment suggested that subpart C should be revised to allow applicant OTPs to appeal decisions to deny approval of an initial application. The Secretary does not agree and points out that OTPs will be able to appeal denials of accreditation by accreditation bodies under § 8.3(b)(4)(vii).

3. Response times in § 8.26(a), (b) and (c) have been lengthened, as have the oral presentation timeframes in § 8.27(d), and expedited procedures in § 8.28(a) and (d).

F. Conclusion and Delegation of Authority

After considering the comments submitted in response to the July 22, 1999, proposal, along with the information presented during the November 1, 1999, Public Hearing, the Secretary has determined that the administrative record in this proceeding supports the finalization of new rules under 42 CFR part 8.

In a notice to be published in a future issue of the **Federal Register,** the Secretary will announce the delegation of authority to the Administrator of SAMHSA, with the authority to redelegate, responsibility for the administration of 42 CFR part 8.

III. Analysis of Economic Impacts

The Secretary has examined the impact of this rule under Executive Order 12866. Executive Order 12866 directs Federal agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages, distributive impacts, and equity). According to Executive Order 12866, a regulatory action is ''significant'' if it meets any one of a number of specified conditions, including having an annual effect on the economy of $100 million; adversely affecting in a material way a sector of the economy, competition, or jobs; or if it raises novel legal or policy issues. While this rule is not a significant economic regulation, the Secretary finds that this rule is a significant regulatory action as defined by Executive Order 12866. As such, this rule has been reviewed by the Office of Management and Budget (OMB) under the provisions of that Executive Order. In addition, it has been determined that this rule is not a major rule for the purpose of congressional review. For the purpose of congressional review, a major rule is one which is likely to cause an annual effect on the economy of $100 million; a major increase in costs or prices; significant effects on competition, employment, productivity, or

innovation; or significant effects on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

A. Introduction

As noted in the July 22, 1999, proposal, approximately 900 OTPs provide opioid agonist treatment to approximately 140,000 patients in the U.S. For almost 30 years, FDA has applied process-oriented regulations with periodic inspections to approve and monitor these OTPs. This final rule establishes an accreditation-based regulatory system, administered by SAMHSA, to carry out these responsibilities. In addition, this final rule includes changes that will make the regulations more flexible, and provide the opportunity to increase treatment capacity. OTPs will incur additional costs under the new accreditation-based system, but these additional costs are modest, and the Secretary believes are offset by benefits set forth under the new rules.

The additional costs under these new rules are attributable to the costs of accreditation. FDA did not assess fees for inspections under the previous regulations. Under the new rules, private not-for-profit accreditation bodies will assess accreditation survey fees, and if necessary, reinspection fees. The July 22, 1999, proposal estimated that the direct and indirect costs of accreditation at $4.9 million per year. These annual cost equal approximately $5,400 per facility and $39 per patient. The cost estimates were based on discussions with three accreditation bodies. Overall, the net costs of the new system over the existing FDA system, factoring in SAMHSA's estimated annual oversight costs of $3.4 million, was $4.4 million. The July 22, 1999, proposal noted that additional information on accreditation costs would be derived from SAMHSA/CSAT ongoing accreditation implementation project and requested specific comments on the estimates provided.

As discussed above, although a number of comments submitted in response to the July 22, 1999, proposal predicted that accreditation costs could be higher, these predictions were based upon accreditation experiences in the past, not associated with the specific accreditation standards set forth under the new system. The results from approximately 50 accreditation surveys under the SAMHSA accreditation impact study suggest that the costs, as estimated in the July 22, 1999, proposal, are reasonably accurate.

The July 22, 1999, proposal discussed the benefits of the proposed rule in terms of the advantages of accreditation and in terms of relapse rates as a function of retention in treatment. Although difficult to quantify, the Secretary believes that the accreditation-based system will provide more frequent quality surveys of OTPs and allow greater flexibility in the delivery of opioid treatment. In addition, patients have commented that the increased flexibility of the new regulations, particularly in the standards for medications dispensed for unsupervised use, will increase patient convenience, increase patient satisfaction, and increase patient retention in treatment. Importantly, changes in the regulations will facilitate and expand medical maintenance treatment freeing resources to expand treatment capacity. As noted in the July 22, 1999, proposal, increasing retention in treatment and increasing the number of patients in treatment will lead to decreases in mortality and morbidity associated with opiate addiction, decrease health expenditures, and decrease criminal activity. These benefits are likely to be significantly greater than the costs of these new regulations.

B. Small Entity Analysis

The Regulatory Flexibility Act (RFA) requires agencies to analyze regulatory options that would minimize any significant impact of a rule on a substantial number of small entities. SAMHSA included such an analysis in the July 22, 1999, proposal.

1. Description of Impact

The July 22, 1999, proposal provided an extensive description of the industry, and concluded that, although the regulations were streamlined under the proposal with fewer forms and reporting requirements, the proposed rule constituted a significant impact on a substantial number of small entities. This impact is attributable to the requirement that all OTPs, regardless of size, must be accredited and maintain accreditation in order to continue to treat patients. Overall, the July 22, 1999, proposal estimated that the cost per patient for a ''small'' OTP (defined as an OTP treating 50 or fewer patients) would increase slightly more than the industry average ($50 compared to $39).

2. Analysis of Alternatives

The July 22, 1999, notice included a brief discussion of alternatives to the proposed accreditation-based regulatory scheme. In the analysis set forth initially in the July 22, 1999 notice, the Department discussed but dismissed the alternative of continuing the existing direct, FDA monitored, regulatory system because of the findings and criticisms of that system identified in the Institute of Medicine Report and elsewhere. In addition, the alternative of allowing self-certification was discussed, but rejected due to concerns about diversion and insufficient enforceability.

The preamble to the proposed rule also included a brief discussion of alternatives that would minimize the economic impact of the new regulations on small businesses and other small entities. For example, the notice discussed the alternative of exempting small facilities from some requirements. It was also noted that small facilities could seek arrangements with larger facilities that could lower costs with economy-of-scale features.

The issues in this initial analysis were highlighted for specific comment, and the notice itself was sent to every OTP identified in the FDA inventory of approved programs. Except to say that small programs should not have to close under the new rules, or that small programs should be exempt from accreditation, very few comments addressed the issue specifically, or provided information on alternatives. Therefore, this initial analysis does not require changing and is adopted as the final regulatory flexibility analysis.

3. Response to Comments From Small Entities

These issues were highlighted for specific comment, and the notice itself was sent to every OTP identified in the FDA inventory of approved programs. Except to say that small programs should not have to close under the new rules, or that small programs should be exempt from accreditation, very few comments addressed the issue specifically, or provided information on alternatives.

As discussed above, SAMHSA has evaluated the results of accreditation surveys of OTPs conducted pursuant to the proposed Federal opioid treatment standards. As such, SAMHSA has a better understanding of how accreditation will work in both large and small OTPs. Moreover, SAMHSA has provided technical assistance to participating programs to help them achieve accreditation. SAMHSA expects to continue providing technical assistance to programs during and after the transition to the new system.

The accreditation-based system, the subject of these new rules, includes flexibility measures for small OTPs. The Secretary anticipates that there will be a number of approved accreditation bodies to choose from, including those

that will adjust accreditation fees on a sliding scale tied to the patient census. In addition, SAMHSA will retain the authority to certify programs without accreditation and could apply this provision, if necessary, to address burdens to OTPs with low patient censuses. SAMHSA prefers this case-by-case approach to a blanket exemption from accreditation requirements for programs below an arbitrary size. Such a blanket exemption would not be consistent with the intent of this regulatory initiative—to enhance the quality of opioid agonist treatment. The Secretary believes that, taken together, these considerations can mitigate the impact on small entities, while still meeting the objectives of this rulemaking.

C. Unfunded Mandates Reform Act of 1995

The Secretary has examined the impact of this rule under the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). This rule does not trigger the requirement for a written statement under section 202(a) of the UMRA because it does not impose a mandate that results in an expenditure of $100 million (adjusted annually for inflation) or more by State, local, and tribal governments in the aggregate, or by the private sector, in any one year.

IV. Environmental Impact

The Secretary has previously considered the environmental effects of this rule as announced in the proposed rule (64 FR 39810 at 39825). No new information or comments have been received that would affect the agency's previous determination that there is no significant impact on the human environment and that neither an environmental assessment nor an environmental impact statement is required.

V. Executive Order 13132: Federalism

The Secretary has analyzed this final rule in accordance with Executive Order 13132: Federalism. Executive Order 13132 requires Federal agencies to carefully examine actions to determine if they contain policies that have federalism implications or that preempt State law. As defined in the Order, ''policies that have federalism implications'' refer to regulations, legislative comments or proposed legislation, and other policy statements or actions 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.

The Secretary is publishing this final rule to set forth treatment regulations that provide for the use of approved opioid agonist treatment medications in the treatment of opiate addiction. The Narcotic Addict Treatment Act (the NATA, Pub. L. 93–281) modified the Controlled Substances Act (CSA) to establish the basis for the Federal control of narcotic addiction treatment by the Attorney General and the Secretary. Because enforcement of these sections of the CSA is a Federal responsibility, there should be little, if any, impact from this rule on the distribution of power and responsibilities among the various levels of government. In addition, this regulation does not preempt State law. Accordingly, the Secretary has determined that this final rule does not contain policies that have federalism implications or that preempt State law.

VI. Paperwork Reduction Act of 1995

This final rule contains information collection provisions which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (the PRA)(44 U.S.C. 3507(d)). The title, description and respondent description of the information collections are shown in the following paragraphs with an estimate of the annual reporting burden. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Title: Narcotic Drugs in Maintenance and Detoxification Treatment of Narcotic Dependence; Repeal of Current Regulations and Adoption of New Regulations.

Description: The Secretary is issuing regulations to establish an accreditation-based regulatory system to replace the current system that relies solely upon direct Federal inspection of treatment programs for compliance with process-oriented regulations.

These new rules are intended to enhance the quality of opioid treatment by allowing increased clinical judgment in treatment and by the accreditation process itself with its emphasis on continuous quality assessment. As set forth in this final rule, there will be fewer reporting requirements and fewer required forms under the new system. The total reporting requirements are estimated at 2,071 hours for treatment programs, and 341 hours for accrediting organizations as outlined in Tables 1 and 2.

The regulation requires a one-time reporting requirement for transitioning from the old system to the new system. The estimated reporting burden for ''transitional certification'' is approximately 475 hours. The proposal also requires ongoing certification on a 3-year cycle, with an estimated reporting burden of approximately 300 hours.

Description of Respondents: Business or other for-profit; Not-for-profit institutions; Federal Government; State, local or tribal government.

No comments were submitted in response to the Secretary's invitation in the July 22, 1999, proposal to comment on the information collection requirements.

TABLE 1.—ANNUAL REPORTING BURDEN FOR TREATMENT PROGRAMS

42 CFR citation	Purpose	Number of respondents	Responses/ respondent	Hours/ response	Total hours
8.11(b)	New programs approval (SMA–162)	75	1	1.50	112.50
8.11(b)	Renewal of approval (SMA–162) [1]	300	1	1.00	300.00
8.11(b)	Relocation of program (SMA–162)	35	1	1.17	40.83
8.11(d)	Application for transitional certification (SMA–162) [2]	300	1	1.58	475.00
8.11(e)(1)	Application for provisional certification	75	1	.50	37.50
8.11(e)(2)	Application for extension of provisional certification	30	1	.25	7.50
8.11(f)(5)	Notification of sponsor or medical director change	60	1	.33	20.00
8.11(g)(2)	Documentation to SAMHSA for interim maintenance.	1	1	2	2.00
8.11(h)	Request to SAMHSA for Exemption from 8.11 and 8.12.	800	3	.438	1050.00

TABLE 1.—ANNUAL REPORTING BURDEN FOR TREATMENT PROGRAMS—Continued

42 CFR citation	Purpose	Number of respondents	Responses/ respondent	Hours/ response	Total hours
8.11(i)(1)	Notification to SAMHSA Before Establishing Medication Units.	3	1	.25	.75
8.12(j)(2)	Notification to State Health Officer When Patient Begins Interim Maintenance.	1	1	.33	.33
8.24	Contents of Appellant Request for Review of Suspension.	2	1	.25	.50
8.25(a)	Informal Review Request	2	1	1.00	2.00
8.26(a)	Appellant's Review File and Written Statement	2	1	5.00	10.00
8.28(a)	Appellant's Request for Expedited Review	2	1	1.00	2.00
8.28(c)	Appellant's Review File and Written Statement	2	1	5.00	10.00
Total					2,070.91

[1] Applications for renewal of certification are required every 3 years.
[2] Transitional Certification is a one-time requirement and will be included in the total annualized burden but averaged over the 3-year period of the OMB collection activity approval.

The final rule does not increase the estimated annualized burden. Certain reporting requirements have been eliminated, such as submissions for authorizations to use LAAM, the requirement to submit a physician responsibility statement (FDA Form 2633), and elimination of the requirement to obtain Federal approval for take-home doses of methadone in excess of 100 mg that exceed a 6-day supply. The new rule adds a one-time requirement for existing programs to apply for transitional certification, and a requirement to apply for certification renewal every third year. The annualized burdens associated with these new reporting requirements offset the burdens eliminated, resulting in no estimated net change.

Accreditation bodies will also require treatment programs to submit information as part of the standard operating procedures for accreditation. As mentioned earlier in this notice, accreditation bodies, under contract to SAMHSA, have accredited existing OTPs as part of an initiative to gain more information on the accreditation of OTPs. SAMHSA prepared a separate OMB Paperwork Reduction notice and analysis for that information collection activity (63 FR 10030, February 27, 1998, OMB approval number 0930–0194).

TABLE 2.—ANNUAL REPORTING BURDEN FOR ACCREDITATION ORGANIZATIONS

42 CFR citation	Purpose	No. of respondents	Responses/ respondent	Hours/ response	Total hours
8.3 (b) (1–11)	Initial approval (SMA–163)	10	1	3.0	30.0
8.3 (c)	Renewal of approval (SMA-163)	3	1	1.0	3.0
8.3 (e)	Relinguishment notification	1	1	0.5	0.5
8.3 (f) (2)	Non-renewal notification to accredited OTP's	1	90	0.1	9.0
8.4 (b) (1) (ii)	Notification to SAMHSA for serious noncompliant programs.	2	2	1.0	4.0
8.4 (b) (1) (iii)	Notification to OTP for serious noncompliance	2	2	1.0	4.0
8.4 (d) (1)	General document and information to SAMHSA upon request.	10	2	0.5	10.0
8.4 (d) (2)	Accrediation survey to SAMHSA upon request	10	6	0.2	12.0
8.4 (d) (3)	List of surveys, surveyors to SAMHSA upon request.	10	6	0.2	12.0
8.4 (d) (4)	Less than full accrediation report to SAMHSA	10	7.5	0.5	37.5
8.4 (d) (5)	Summaries of Inspections	10	30	0.5	150.0
8.4 (e)	Notifications of Compliants	10	1	0.5	5.0
8.6 (a) (2) and (b) (3)	Revocation notification to Accredited OTP's	1	90	0.3	27.0
8.6 (b)	Submission of 90-day Corrective plan to SAMHSA	1	1	10	10.0
8.6 (b) (1)	Notification to accredited OTP's of Probationary Status.	1	90	0.3	27.0
Total		82			341

Note: Because some of the numbers underlying these estimates have been rounded, figures in this table are approximate. There are no maintenance and operation costs nor start up and capital costs.

Recordkeeping—The recordkeeping requirements for OTPs set forth in sec. 8.12 include maintenance of the following: A patient's medical evaluation and other assessments when admitted to treatment, and periodically throughout treatment Sec. 8.12(f)(4)); the provision of needed services, including any prenatal support provided the patient (Sec. 8.12(f)(3) and (f)(4)) justification of exceptional initial doses; changes in a patient's dose and dosage schedule; justification for variations from the approved product labeling for LAAM and future medications (Sec. 8.12(h)(4)); and the rationale for decreasing a patient's clinic attendance (Sec. 8.12(i)(3)).

In addition, sec. 8.4(c)(1) will require accreditation bodies to keep and retain for 5 years certain records pertaining to their respective accreditation activities.

These recordkeeping requirements for OTPs and accreditation bodies are customary and usual practices within the medical and rehabilitative communities, and thus impose no additional response burden hours or costs.

Disclosure—This final rule retains requirements that OTPs and accreditation organizations disclose information. For example, sec. 8.12(e)(1) requires that a physician explain the facts concerning the use of opioid drug treatment to each patient. This type of disclosure is considered to be consistent with the common medical practice and is not considered an additional burden. Further, the new rules require under sec. 8.4(i)(1) that each accreditation organization shall make public its fee structure. The Secretary notes that the preceding section of this notice contains publicly available information on the fee structure for each of three accreditation bodies. This type of disclosure is standard business practice and is not considered a burden in this analysis.

Individuals and organizations may submit comments on these burden estimates or any other aspect of these information collection provisions, including suggestions for reducing the burden, and should direct them to: SAMHSA Reports Clearance Officer, Room 16–105, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857.

The information collection provisions in this final rule have been approved under OMB control number 0930–0206. This approval expires 09/30/2002. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Nelba Chavez,

Administrator, Substance Abuse and Mental Health Services, Administration.

Dated: January 5, 2001.

Donna E. Shalala,

Secretary of Health and Human Services.

VII. References

The following references have been placed on display at SAMHSA/CSAT Reading Room (7–220), 5515 Security Lane, Rockville, MD 20852.

1. Institute of Medicine, Federal Regulation of Methadone Treatment, National Academy Press, 1995.

2. ''New Hampshire Legislature Allows Methadone Treatment,'' Copyright 2000, Alcoholism & Drug Abuse Weekly, Manisses Communications Group, Inc., Vol. 12, No. 23, Monday, June 5, 2000.

3. Sees, K.L., D.O., et al., ''Methadone Maintenance vs 180-Day Psychosocially Enriched Detoxification for Treatment of Opioid Dependence, A Randomized Controlled Trial,'' Journal of the American Medical Association, Vol 283, No. 10 p1303–1310, March 8, 2000.

4. Clark, H. Westly, M.D., Lepay, David, M.D., ''Dear Colleague Letter on Medical Maintenance'', March 30, 2000.

5. Schwartz, M.D., et al., ''A 12-Year Follow-Up of a Methadone Medical Maintenance Program, Am J Addiction, Vol. 8, pp 293–299, 1999.

List of Subjects

21 CFR Part 291

Health professions, Methadone, Reporting and recordkeeping requirements.

42 CFR Part 8

Health professions, Levo-Alpha-Acetyl-Methadol (LAAM), Methadone, Reporting and recordkeeping requirements.

Therefore, under the Comprehensive Drug Abuse Prevention and Control Act of 1970, the Controlled Substances Act as amended by the Narcotic Addict Treatment Act of 1974, the Public Health Service Act, and applicable delegations of authority thereunder, titles 21 and 42 of the Code of Federal Regulations are amended as follows:

21 CFR Chapter I

PART 291—[REMOVED]

1. Under authority of sections 301(d), 543, 1976 of the Public Health Service Act (42 U.S.C. 241(d), 290dd–2, 300y–11); 38 U.S.C. 7332, 42 U.S.C. 257a; and section 303(g) of the Controlled Substances Act (21 U.S.C. 823(g)), amend title 21 of the Code of Federal Regulations by removing part 291.

42 CFR Chapter I

2. Amend 42 CFR Chapter I by adding part 8 to subchapter A to read as follows:

PART 8—CERTIFICATION OF OPIOID TREATMENT PROGRAMS

Subpart A—Accreditation

Sec.
8.1 Scope.
8.2 Definitions.
8.3 Application for approval as an accreditation body.
8.4 Accreditation body responsibilities.
8.5 Periodic evaluation of accreditation bodies.
8.6 Withdrawal of approval of accreditation bodies.

Subpart B—Certification and Treatment Standards

8.11 Opioid treatment program certification.
8.12 Federal opioid treatment standards.
8.13 Revocation of accreditation and accreditation body approval.
8.14 Suspension or revocation of certification.
8.15 Forms.

Subpart C—Procedures for Review of Suspension or Proposed Revocation of OTP Certification, and of Adverse Action Regarding Withdrawal of Approval of an Accreditation Body

8.21 Applicability.
8.22 Definitions.
8.23 Limitation on issues subject to review.
8.24 Specifying who represents the parties.
8.25 Informal review and the reviewing official's response.
8.26 Preparation of the review file and written arguments.
8.27 Opportunity for oral presentation.
8.28 Expedited procedures for review of immediate suspension.
8.29 Ex parte communications.
8.30 Transmission of written communications by reviewing official and calculation of deadlines.
8.31 Authority and responsibilities of the reviewing official.
8.32 Administrative record.
8.33 Written decision.
8.34 Court review of final administrative action; exhaustion of administrative remedies.

Authority: 21 U.S.C. 823; 42 U.S.C. 257a, 290aa(d), 290dd–2, 300x–23, 300x–27(a), 300y–11.

Subpart A—Accreditation

§ 8.1 Scope.

The regulations in this part establish the procedures by which the Secretary of Health and Human Services (the Secretary) will determine whether a practitioner is qualified under section 303(g) of the Controlled Substances Act (21 U.S.C. 823(g)) to dispense opioid drugs in the treatment of opioid addiction. These regulations also establish the Secretary's standards regarding the appropriate quantities of opioid drugs that may be provided for unsupervised use by individuals undergoing such treatment (21 U.S.C. 823(g)(1)). Under these regulations, a practitioner who intends to dispense opioid drugs in the treatment of opioid addiction must first obtain from the Secretary or by delegation, from the Administrator, Substance Abuse and Mental Health Services Administration (SAMHSA), a certification that the practitioner is qualified under the Secretary's standards and will comply with such standards. Eligibility for certification will depend upon the practitioner obtaining accreditation from an accreditation body that has been approved by SAMHSA. These regulations establish the procedures whereby an entity can apply to become an approved accreditation body. This

part also establishes requirements and general standards for accreditation bodies to ensure that practitioners are consistently evaluated for compliance with the Secretary's standards for opiate addiction treatment with an opioid agonist treatment medication.

§ 8.2 Definitions.

The following definitions apply to this part:

Accreditation means the process of review and acceptance by an accreditation body.

Accreditation body means a body that has been approved by SAMHSA under § 8.3 to accredit opioid treatment programs using opioid agonist treatment medications.

Accreditation body application means the application filed with SAMHSA for purposes of obtaining approval as an accreditation body, as described in § 8.3(b).

Accreditation elements mean the elements or standards that are developed and adopted by an accreditation body and approved by SAMHSA.

Accreditation survey means an onsite review and evaluation of an opioid treatment program by an accreditation body for the purpose of determining compliance with the Federal opioid treatment standards described in § 8.12.

Accredited opioid treatment program means an opioid treatment program that is the subject of a current, valid accreditation from an accreditation body approved by SAMHSA under § 8.3(d).

Certification means the process by which SAMHSA determines that an opioid treatment program is qualified to provide opioid treatment under the Federal opioid treatment standards.

Certification application means the application filed by an opioid treatment program for purposes of obtaining certification from SAMHSA, as described in § 8.11(b).

Certified opioid treatment program means an opioid treatment program that is the subject of a current, valid certification under § 8.11.

Comprehensive maintenance treatment is maintenance treatment provided in conjunction with a comprehensive range of appropriate medical and rehabilitative services.

Detoxification treatment means the dispensing of an opioid agonist treatment medication in decreasing doses to an individual to alleviate adverse physical or psychological effects incident to withdrawal from the continuous or sustained use of an opioid drug and as a method of bringing the individual to a drug-free state within such period.

Federal opioid treatment standards means the standards established by the Secretary in § 8.12 that are used to determine whether an opioid treatment program is qualified to engage in opioid treatment. The Federal opioid treatment standards established in § 8.12 also include the standards established by the Secretary regarding the quantities of opioid drugs which may be provided for unsupervised use.

For-cause inspection means an inspection of an opioid treatment program by the Secretary, or by an accreditation body, that may be operating in violation of Federal opioid treatment standards, may be providing substandard treatment, or may be serving as a possible source of diverted medications.

Interim maintenance treatment means maintenance treatment provided in conjunction with appropriate medical services while a patient is awaiting transfer to a program that provides comprehensive maintenance treatment.

Long-term detoxification treatment means detoxification treatment for a period more than 30 days but not in excess of 180 days.

Maintenance treatment means the dispensing of an opioid agonist treatment medication at stable dosage levels for a period in excess of 21 days in the treatment of an individual for opioid addiction.

Medical director means a physician, licensed to practice medicine in the jurisdiction in which the opioid treatment program is located, who assumes responsibility for administering all medical services performed by the program, either by performing them directly or by delegating specific responsibility to authorized program physicians and healthcare professionals functioning under the medical director's direct supervision.

Medical and rehabilitative services means services such as medical evaluations, counseling, and rehabilitative and other social programs (e.g., vocational and educational guidance, employment placement), that are intended to help patients in opioid treatment programs become and/or remain productive members of society.

Medication unit means a facility established as part of, but geographically separate from, an opioid treatment program from which licensed private practitioners or community pharmacists dispense or administer an opioid agonist treatment medication or collect samples for drug testing or analysis.

Opiate addiction is defined as a cluster of cognitive, behavioral, and physiological symptoms in which the individual continues use of opiates despite significant opiate-induced problems. Opiate dependence is characterized by repeated self-administration that usually results in opiate tolerance, withdrawal symptoms, and compulsive drug-taking. Dependence may occur with or without the physiological symptoms of tolerance and withdrawal.

Opioid agonist treatment medication means any opioid agonist drug that is approved by the Food and Drug Administration under section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355) for use in the treatment of opiate addiction.

Opioid drug means any drug having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having such addiction-forming or addiction-sustaining liability.

Opioid treatment means the dispensing of an opioid agonist treatment medication, along with a comprehensive range of medical and rehabilitative services, when clinically necessary, to an individual to alleviate the adverse medical, psychological, or physical effects incident to opiate addiction. This term encompasses detoxification treatment, short-term detoxification treatment, long-term detoxification treatment, maintenance treatment, comprehensive maintenance treatment, and interim maintenance treatment.

Opioid treatment program or ''OTP'' means a program or practitioner engaged in opioid treatment of individuals with an opioid agonist treatment medication.

Patient means any individual who undergoes treatment in an opioid treatment program.

Program sponsor means the person named in the application for certification described in § 8.11(b) as responsible for the operation of the opioid treatment program and who assumes responsibility for all its employees, including any practitioners, agents, or other persons providing medical, rehabilitative, or counseling services at the program or any of its medication units. The program sponsor need not be a licensed physician but shall employ a licensed physician for the position of medical director.

Registered opioid treatment program means an opioid treatment program that is registered under 21 U.S.C. 823(g).

Short-term detoxification treatment means detoxification treatment for a period not in excess of 30 days.

State Authority is the agency designated by the Governor or other appropriate official designated by the

Governor to exercise the responsibility and authority within the State or Territory for governing the treatment of opiate addiction with an opioid drug.

Treatment plan means a plan that outlines for each patient attainable short-term treatment goals that are mutually acceptable to the patient and the opioid treatment program and which specifies the services to be provided and the frequency and schedule for their provision.

§ 8.3 Application for approval as an accreditation body.

(a) *Eligibility.* Private nonprofit organizations or State governmental entities, or political subdivisions thereof, capable of meeting the requirements of this part may apply for approval as an accreditation body.

(b) *Application for initial approval.* Three copies of an accreditation body application form [SMA–163] shall be submitted to SAMHSA at rm. 12–105, 5600 Fishers Lane, Rockville, MD 20857, and marked ATTENTION: OTP Certification Program. SAMHSA will consider and accept the electronic submission of these materials when electronic submission systems are developed and available. Accreditation body applications shall include the following information and supporting documentation:

(1) Name, address, and telephone number of the applicant and a responsible official for the accreditation body. The application shall be signed by the responsible official;

(2) Evidence of the nonprofit status of the applicant (*i.e.,* of fulfilling Internal Revenue Service requirements as a nonprofit organization) if the applicant is not a State governmental entity or political subdivision;

(3) A set of the accreditation elements or standards and a detailed discussion showing how the proposed accreditation elements or standards will ensure that each OTP surveyed by the applicant is qualified to meet or is meeting each of the Federal opioid treatment standards set forth in § 8.12;

(4) A detailed description of the applicant's decisionmaking process, including:

(i) Procedures for initiating and performing onsite accreditation surveys of OTPs;

(ii) Procedures for assessing OTP personnel qualifications;

(iii) Copies of an application for accreditation, guidelines, instructions, and other materials the applicant will send to OTPs during the accreditation process, including a request for a complete history of prior accreditation activities and a statement that all information and data submitted in the application for accreditation is true and accurate, and that no material fact has been omitted;

(iv) Policies and procedures for notifying OTPs and SAMHSA of deficiencies and for monitoring corrections of deficiencies by OTPs;

(v) Policies and procedures for suspending or revoking an OTP's accreditation;

(vi) Policies and procedures that will ensure processing of applications for accreditation and applications for renewal of accreditation within a timeframe approved by SAMHSA; and

(vii) A description of the applicant's appeals process to allow OTPs to contest adverse accreditation decisions.

(5) Policies and procedures established by the accreditation body to avoid conflicts of interest, or the appearance of conflicts of interest, by the applicant's board members, commissioners, professional personnel, consultants, administrative personnel, and other representatives;

(6) A description of the education, experience, and training requirements for the applicant's professional staff, accreditation survey team membership, and the identification of at least one licensed physician on the applicant's staff;

(7) A description of the applicant's training policies;

(8) Fee schedules, with supporting cost data;

(9) Satisfactory assurances that the body will comply with the requirements of § 8.4, including a contingency plan for investigating complaints under § 8.4(e);

(10) Policies and procedures established to protect confidential information the applicant will collect or receive in its role as an accreditation body; and

(11) Any other information SAMHSA may require.

(c) *Application for renewal of approval.* An accreditation body that intends to continue to serve as an accreditation body beyond its current term shall apply to SAMHSA for renewal, or notify SAMHSA of its intention not to apply for renewal, in accordance with the following procedures and schedule:

(1) At least 9 months before the date of expiration of an accreditation body's term of approval, the body shall inform SAMHSA in writing of its intent to seek renewal.

(2) SAMHSA will notify the applicant of the relevant information, materials, and supporting documentation required under paragraph (b) of this section that the applicant shall submit as part of the renewal procedure.

(3) At least 3 months before the date of expiration of the accreditation body's term of approval, the applicant shall furnish to SAMHSA three copies of a renewal application containing the information, materials, and supporting documentation requested by SAMHSA under paragraph (c)(2) of this section.

(4) An accreditation body that does not intend to renew its approval shall so notify SAMHSA at least 9 months before the expiration of the body's term of approval.

(d) *Rulings on applications for initial approval or renewal of approval.* (1) SAMHSA will grant an application for initial approval or an application for renewal of approval if it determines the applicant substantially meets the accreditation body requirements of this subpart.

(2) If SAMHSA determines that the applicant does not substantially meet the requirements set forth in this subpart. SAMHSA will notify the applicant of the deficiencies in the application and request that the applicant resolve such deficiencies within 90 days of receipt of the notice. If the deficiencies are resolved to the satisfaction of SAMHSA within the 90-day time period, the body will be approved as an accreditation body. If the deficiencies have not been resolved to the satisfaction of SAMHSA within the 90-day time period, the application for approval as an accreditation body will be denied.

(3) If SAMHSA does not reach a final decision on a renewal application before the expiration of an accreditation body's term of approval, the approval will be deemed extended until SAMHSA reaches a final decision, unless an accreditation body does not rectify deficiencies in the application within the specified time period, as required in paragraph (d)(2) of this section.

(e) *Relinquishment of approval.* An accreditation body that intends to relinquish its accreditation approval before expiration of the body's term of approval shall submit a letter of such intent to SAMHSA, at the address in paragraph (b) of this section, at least 9 months before relinquishing such approval.

(f) *Notification.* An accreditation body that does not apply for renewal of approval, or is denied such approval by SAMHSA, relinquishes its accreditation approval before expiration of its term of approval, or has its approval withdrawn, shall:

(1) Transfer copies of records and other related information as required by SAMHSA to a location, including

another accreditation body, and according to a schedule approved by SAMHSA; and

(2) Notify, in a manner and time period approved by SAMHSA, all OTPs accredited or seeking accreditation by the body that the body will no longer have approval to provide accreditation services.

(g) *Term of approval.* An accreditation body's term of approval is for a period not to exceed 5 years.

(h) *State accreditation bodies.* State governmental entities, including political subdivisions thereof, may establish organizational units that may act as accreditation bodies, provided such units meet the requirements of this section, are approved by SAMHSA under this section, and have taken appropriate measures to prevent actual or apparent conflicts of interest, including cases in which State or Federal funds are used to support opioid treatment services.

§ 8.4 Accreditation body responsibilities.

(a) *Accreditation surveys and for cause inspections.* (1) Accreditation bodies shall conduct routine accreditation surveys for initial, renewal, and continued accreditation of each OTP at least every 3 years.

(2) Accreditation bodies must agree to conduct for-cause inspections upon the request of SAMHSA.

(3) Accreditation decisions shall be fully consistent with the policies and procedures submitted as part of the approved accreditation body application.

(b) *Response to noncompliant programs.* (1) If an accreditation body receives or discovers information that suggests that an OTP is not meeting Federal opioid treatment standards, or if survey of the OTP by the accreditation body otherwise demonstrates one or more deficiencies in the OTP, the accreditation body shall as appropriate either require and monitor corrective action or shall suspend or revoke accreditation of the OTP, as appropriate based on the significance of the deficiencies.

(i) Accreditation bodies shall either not accredit or shall revoke the accreditation of any OTP that substantially fails to meet the Federal opioid treatment standards.

(ii) Accreditation bodies shall notify SAMHSA as soon as possible but in no case longer than 48 hours after becoming aware of any practice or condition in an OTP that may pose a serious risk to public health or safety or patient care.

(iii) If an accreditation body determines that an OTP is substantially meeting the Federal opioid treatment standards, but is not meeting one or more accreditation elements, the accreditation body shall determine the necessary corrective measures to be taken by the OTP, establish a schedule for implementation of such measures, and notify the OTP in writing that it must implement such measures within the specified schedule in order to ensure continued accreditation. The accreditation body shall verify that the necessary steps are taken by the OTP within the schedule specified and that all accreditation elements are being substantially met or will be substantially met.

(2) Nothing in this part shall prevent accreditation bodies from granting accreditation, contingent on promised programmatic or performance changes, to OTPs with less substantial violations. Such accreditation shall not exceed 12 months. OTPs that have been granted such accreditation must have their accreditation revoked if they fail to make changes to receive unconditional accreditation upon resurvey or reinspection.

(c) *Recordkeeping.* (1) Accreditation bodies shall maintain records of their accreditation activities for at least 5 years from the creation of the record. Such records must contain sufficient detail to support each accreditation decision made by the accreditation body.

(2) Accreditation bodies shall establish procedures to protect confidential information collected or received in their role as accreditation bodies that are consistent with, and that are designed to ensure compliance with, all Federal and State laws, including 42 CFR part 2.

(i) Information collected or received for the purpose of carrying out accreditation body responsibilities shall not be used for any other purpose or disclosed, other than to SAMHSA or its duly designated representatives, unless otherwise required by law or with the consent of the OTP.

(ii) Nonpublic information that SAMHSA shares with the accreditation body concerning an OTP shall not be further disclosed except with the written permission of SAMHSA.

(d) *Reporting.* (1) Accreditation bodies shall provide to SAMHSA any documents and information requested by SAMHSA within 5 days of receipt of the request.

(2) Accreditation bodies shall make a summary of the results of each accreditation survey available to SAMHSA upon request. Such summaries shall contain sufficient detail to justify the accreditation action taken.

(3) Accreditation bodies shall provide SAMHSA upon request a list of each OTP surveyed and the identity of all individuals involved in the conduct and reporting of survey results.

(4) Accreditation bodies shall submit to SAMHSA the name of each OTP for which the accreditation body accredits conditionally, denies, suspends, or revokes accreditation, and the basis for the action, within 48 hours of the action.

(5) Notwithstanding any reports made to SAMHSA under paragraphs (d)(1) through (d)(4) of this section, each accreditation body shall submit to SAMHSA semiannually, on January 15 and July 15 of each calendar year, a report consisting of a summary of the results of each accreditation survey conducted in the past year. The summary shall contain sufficient detail to justify each accreditation action taken.

(6) All reporting requirements listed in this section shall be provided to SAMHSA at the address specified in § 8.3(b).

(e) *Complaint response.* Accreditation bodies shall have policies and procedures to respond to complaints from SAMHSA, patients, facility staff, and others, within a reasonable period of time but not more than 5 days of the receipt of the complaint. Accreditation bodies shall also agree to notify SAMHSA within 48 hours of receipt of a complaint and keep SAMHSA informed of all aspects of the response to the complaint.

(f) *Modifications of accreditation elements.* Accreditation bodies shall obtain SAMHSA's authorization prior to making any substantive (*i.e.,* noneditorial) change in accreditation elements.

(g) *Conflicts of interest.* The accreditation body shall maintain and apply policies and procedures that SAMHSA has approved in accordance with § 8.3 to reduce the possibility of actual conflict of interest, or the appearance of a conflict of interest, on the part of individuals who act on behalf of the accreditation body. Individuals who participate in accreditation surveys or otherwise participate in the accreditation decision or an appeal of the accreditation decision, as well as their spouses and minor children, shall not have a financial interest in the OTP that is the subject of the accreditation survey or decision.

(h) *Accreditation teams.* (1) An accreditation body survey team shall consist of healthcare professionals with

expertise in drug abuse treatment and, in particular, opioid treatment. The accreditation body shall consider factors such as the size of the OTP, the anticipated number of problems, and the OTP's accreditation history, in determining the composition of the team. At a minimum, survey teams shall consist of at least two healthcare professionals whose combined expertise includes:

(i) The dispensing and administration of drugs subject to control under the Controlled Substances Act (21 U.S.C. 801 *et seq.*);

(ii) Medical issues relating to the dosing and administration of opioid agonist treatment medications for the treatment of opioid addiction;

(iii) Psychosocial counseling of individuals undergoing opioid treatment; and

(iv) Organizational and administrative issues associated with opioid treatment programs.

(2) Members of the accreditation team must be able to recuse themselves at any time from any survey in which either they or the OTP believes there is an actual conflict of interest or the appearance of a conflict of interest.

(i) *Accreditation fees.* Fees charged to OTPs for accreditation shall be reasonable. SAMHSA generally will find fees to be reasonable if the fees are limited to recovering costs to the accreditation body, including overhead incurred. Accreditation body activities that are not related to accreditation functions are not recoverable through fees established for accreditation.

(1) The accreditation body shall make public its fee structure, including those factors, if any, contributing to variations in fees for different OTPs.

(2) At SAMHSA's request, accreditation bodies shall provide to SAMHSA financial records or other materials, in a manner specified by SAMHSA, to assist in assessing the reasonableness of accreditation body fees.

§ 8.5 Periodic evaluation of accreditation bodies.

SAMHSA will evaluate periodically the performance of accreditation bodies primarily by inspecting a selected sample of the OTPs accredited by the accrediting body and by evaluating the accreditation body's reports of surveys conducted, to determine whether the OTPs surveyed and accredited by the accreditation body are in compliance with the Federal opioid treatment standards. The evaluation will include a determination of whether there are major deficiencies in the accreditation body's performance that, if not corrected, would warrant withdrawal of the approval of the accreditation body under § 8.6.

§ 8.6 Withdrawal of approval of accreditation bodies.

If SAMHSA determines that an accreditation body is not in substantial compliance with this subpart, SAMHSA shall take appropriate action as follows:

(a) *Major deficiencies.* If SAMHSA determines that the accreditation body has a major deficiency, such as commission of fraud, material false statement, failure to perform a major accreditation function satisfactorily, or significant noncompliance with the requirements of this subpart, SAMHSA shall withdraw approval of that accreditation body.

(1) In the event of a major deficiency, SAMHSA shall notify the accreditation body of the agency's action and the grounds on which the approval was withdrawn.

(2) An accreditation body that has lost its approval shall notify each OTP that has been accredited or is seeking accreditation that the accreditation body's approval has been withdrawn. Such notification shall be made within a time period and in a manner approved by SAMHSA.

(b) *Minor deficiencies.* If SAMHSA determines that the accreditation body has minor deficiencies in the performance of an accreditation function, that are less serious or more limited than the types of deficiencies described in paragraph (a) of this section, SAMHSA will notify the body that it has 90 days to submit to SAMHSA a plan of corrective action. The plan must include a summary of corrective actions and a schedule for their implementation. SAMHSA may place the body on probationary status for a period of time determined by SAMHSA, or may withdraw approval of the body if corrective action is not taken.

(1) If SAMHSA places an accreditation body on probationary status, the body shall notify all OTPs that have been accredited, or that are seeking accreditation, of the accreditation body's probationary status within a time period and in a manner approved by SAMHSA.

(2) Probationary status will remain in effect until such time as the body can demonstrate to the satisfaction of SAMHSA that it has successfully implemented or is implementing the corrective action plan within the established schedule, and the corrective actions taken have substantially eliminated all identified problems.

(3) If SAMHSA determines that an accreditation body that has been placed on probationary status is not implementing corrective actions satisfactorily or within the established schedule, SAMHSA may withdraw approval of the accreditation body. The accreditation body shall notify all OTPs that have been accredited, or are seeking accreditation, of the accreditation body's loss of SAMHSA approval within a time period and in a manner approved by SAMHSA.

(c) *Reapplication.* (1) An accreditation body that has had its approval withdrawn may submit a new application for approval if the body can provide information to SAMHSA to establish that the problems that were grounds for withdrawal of approval have been resolved.

(2) If SAMHSA determines that the new application demonstrates that the body satisfactorily has addressed the causes of its previous unacceptable performance, SAMHSA may reinstate approval of the accreditation body.

(3) SAMHSA may request additional information or establish additional conditions that must be met before SAMHSA approves the reapplication.

(4) SAMHSA may refuse to accept an application from a former accreditation body whose approval was withdrawn because of fraud, material false statement, or willful disregard of public health.

(d) *Hearings.* An opportunity to challenge an adverse action taken regarding withdrawal of approval of an accreditation body shall be addressed through the relevant procedures set forth in subpart C of this part, except that the procedures in § 8.28 for expedited review of an immediate suspension would not apply to an accreditation body that has been notified under paragraph (a) or (b) of this section of the withdrawal of its approval.

Subpart B—Certification and Treatment Standards

§ 8.11 Opioid treatment program certification.

(a) *General.* (1) An OTP must be the subject of a current, valid certification from SAMHSA to be considered qualified by the Secretary under section 303(g)(1) of the Controlled Substances Act (21 U.S.C. 823(g)(1)) to dispense opioid drugs in the treatment of opioid addiction. An OTP must be determined to be qualified under section 303(g)(1) of the Controlled Substances Act, and must be determined to be qualified by the Attorney General under section 303(g)(1), to be registered by the

Attorney General to dispense opioid agonist treatment medications to individuals for treatment of opioid addiction.

(2) To obtain certification from SAMHSA, an OTP must meet the Federal opioid treatment standards in § 8.12, must be the subject of a current, valid accreditation by an accreditation body or other entity designated by SAMHSA, and must comply with any other conditions for certification established by SAMHSA.

(3) Certification shall be granted for a term not to exceed 3 years, except that certification may be extended during the third year if an application for accreditation is pending.

(b) *Application for certification.* Three copies of an application for certification must be submitted by the OTP to the address identified in § 8.3(b). SAMHSA will consider and accept the electronic submission of these materials when electronic submission systems are developed and available. The application for certification shall include:

(1) A description of the current accreditation status of the OTP;

(2) A description of the organizational structure of the OTP;

(3) The names of the persons responsible for the OTP;

(4) The addresses of the OTP and of each medication unit or other facility under the control of the OTP;

(5) The sources of funding for the OTP and the name and address of each governmental entity that provides such funding; and

(6) A statement that the OTP will comply with the conditions of certification set forth in paragraph (f) of this section.

(7) The application shall be signed by the program sponsor who shall certify that the information submitted in the application is truthful and accurate.

(c) *Action on application.* (1) Following SAMHSA's receipt of an application for certification of an OTP, and after consultation with the appropriate State authority regarding the qualifications of the applicant, SAMHSA may grant the application for certification, or renew an existing certification, if SAMHSA determines that the OTP has satisfied the requirements for certification or renewal of certification.

(2) SAMHSA may deny the application if SAMHSA determines that:

(i) The application for certification is deficient in any respect;

(ii) The OTP will not be operated in accordance with the Federal opioid treatment standards established under § 8.12;

(iii) The OTP will not permit an inspection or a survey to proceed, or will not permit in a timely manner access to relevant records or information; or

(iv) The OTP has made misrepresentations in obtaining accreditation or in applying for certification.

(3) Within 5 days after it reaches a final determination that an OTP meets the requirements for certification, SAMHSA will notify the Drug Enforcement Administration (DEA) that the OTP has been determined to be qualified to provide opioid treatment under section 303(g)(1) of the Controlled Substances Act.

(d) *Transitional certification.* OTPs that before March 19, 2001 were the subject of a current, valid approval by FDA under 21 CFR, part 291 (contained in the 21 CFR Parts 200 to 299 edition, revised as of July 1, 2000), are deemed to be the subject of a current valid certification for purposes of paragraph (a)(11) of this section. Such 'transitional certification' will expire on June 18, 2001 unless the OTP submits the information required by paragraph (b) of this section to SAMHSA on or before June 18, 2001. In addition to this application, OTPs must certify with a written statement signed by the program sponsor, that they will apply for accreditation within 90 days of the date SAMHSA approves the second accreditation body. Transitional certification, in that case, will expire on March 19, 2003. SAMHSA may extend the transitional certification of an OTP for up to one additional year provided the OTP demonstrates that it has applied for accreditation, that an accreditation survey has taken place or is scheduled to take place, and that an accreditation decision is expected within a reasonable period of time (*e.g.,* within 90 days from the date of survey). Transitional certification under this section may be suspended or revoked in accordance with § 8.14.

(e) *Provisional certification.* (1) OTPs that have no current certification from SAMHSA, but have applied for accreditation with an accreditation body, are eligible to receive a provisional certification for up to 1 year. To receive a provisional certification, an OTP shall submit the information required by paragraph (b) of this section to SAMHSA along with a statement identifying the accreditation body to which the OTP has applied for accreditation, the date on which the OTP applied for accreditation, the dates of any accreditation surveys that have taken place or are expected to take place, and the expected schedule for completing the accreditation process. A provisional certification for up to 1 year will be granted, following receipt of the information described in this paragraph, unless SAMHSA determines that patient health would be adversely affected by the granting of provisional certification.

(2) An extension of provisional certification may be granted in extraordinary circumstances or otherwise to protect public health. To apply for a 90-day extension of provisional certification, an OTP shall submit to SAMHSA a statement explaining its efforts to obtain accreditation and a schedule for obtaining accreditation as expeditiously as possible.

(f) *Conditions for certification.* (1) OTPs shall comply with all pertinent State laws and regulations. Nothing in this part is intended to limit the authority of State and, as appropriate, local governmental entities to regulate the use of opioid drugs in the treatment of opioid addiction. The provisions of this section requiring compliance with requirements imposed by State law, or the submission of applications or reports required by the State authority, do not apply to OTPs operated directly by the Department of Veterans Affairs, the Indian Health Service, or any other department or agency of the United States. Federal agencies operating OTPs have agreed to cooperate voluntarily with State agencies by granting permission on an informal basis for designated State representatives to visit Federal OTPs and by furnishing a copy of Federal reports to the State authority, including the reports required under this section.

(2) OTPs shall allow, in accordance with Federal controlled substances laws and Federal confidentiality laws, inspections and surveys by duly authorized employees of SAMHSA, by accreditation bodies, by the DEA, and by authorized employees of any relevant State or Federal governmental authority.

(3) Disclosure of patient records maintained by an OTP is governed by the provisions of 42 CFR part 2, and every program must comply with that part. Records on the receipt, storage, and distribution of opioid agonist treatment medications are also subject to inspection under Federal controlled substances laws and under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321 et seq.). Federally-sponsored treatment programs are subject to applicable Federal confidentiality statutes.

(4) A treatment program or medication unit or any part thereof, including any facility or any individual, shall permit a duly authorized employee

of SAMHSA to have access to and to copy all records on the use of opioid drugs in accordance with the provisions of 42 CFR part 2.

(5) OTPs shall notify SAMHSA within 3 weeks of any replacement or other change in the status of the program sponsor or medical director.

(6) OTPs shall comply with all regulations enforced by the DEA under 21 CFR chapter II, and must be registered by the DEA before administering or dispensing opioid agonist treatment medications.

(7) OTPs must operate in accordance with Federal opioid treatment standards and approved accreditation elements.

(g) *Conditions for interim maintenance treatment program approval.* (1) Before a public or nonprofit private OTP may provide interim maintenance treatment, the program must receive the approval of both SAMHSA and the chief public health officer of the State in which the OTP operates.

(2) Before SAMHSA may grant such approval, the OTP must provide SAMHSA with documentation from the chief public health officer of the State in which the OTP operates demonstrating that:

(i) Such officer does not object to the providing of interim maintenance treatment in the State;

(ii) The OTP seeking to provide such treatment is unable to place patients in a public or nonprofit private comprehensive treatment program within a reasonable geographic area within 14 days of the time patients seek admission to such programs;

(iii) The authorization of the OTP to provide interim maintenance treatment will not otherwise reduce the capacity of comprehensive maintenance treatment programs in the State to admit individuals (relative to the date on which such officer so certifies); and

(iv) The State certifies that each individual enrolled in interim maintenance treatment will be transferred to a comprehensive maintenance treatment program no later than 120 days from the date on which each individual first requested treatment, as provided in section 1923 of the Public Health Service Act (21 U.S.C. 300x-23).

(3) SAMHSA will provide notice to the OTP denying or approving the request to provide interim maintenance treatment. The OTP shall not provide such treatment until it has received such notice from SAMHSA.

(h) *Exemptions.* An OTP may, at the time of application for certification or any time thereafter, request from SAMHSA exemption from the regulatory requirements set forth under this section and § 8.12. An example of a case in which an exemption might be granted would be for a private practitioner who wishes to treat a limited number of patients in a non-metropolitan area with few physicians and no rehabilitative services geographically accessible and requests exemption from some of the staffing and service standards. The OTP shall support the rationale for the exemption with thorough documentation, to be supplied in an appendix to the initial application for certification or in a separate submission. SAMHSA will approve or deny such exemptions at the time of application, or any time thereafter, if appropriate. SAMHSA shall consult with the appropriate State authority prior to taking action on an exemption request.

(i) *Medication units, long-term care facilities and hospitals.* (1) Certified OTPs may establish medication units that are authorized to dispense opioid agonist treatment medications for observed ingestion. Before establishing a medication unit, a certified OTP must notify SAMHSA by submitting form SMA–162. The OTP must also comply with the provisions of 21 CFR part 1300 before establishing a medication unit. Medication units shall comply with all pertinent state laws and regulations.

(2) Certification as an OTP under this part will not be required for the maintenance or detoxification treatment of a patient who is admitted to a hospital or long-term care facility for the treatment of medical conditions other than opiate addiction and who requires maintenance or detoxification treatment during the period of his or her stay in that hospital or long-term care facility. The terms ''hospital'' and ''long-term care facility'' as used in this section are to have the meaning that is assigned under the law of the State in which the treatment is being provided. Nothing in this section is intended to relieve hospitals and long-term care facilities from the obligation to obtain registration from the Attorney General, as appropriate, under section 303(g) of the Controlled Substances Act.

§ 8.12 Federal opioid treatment standards.

(a) *General.* OTPs must provide treatment in accordance with the standards in this section and must comply with these standards as a condition of certification.

(b) *Administrative and organizational structure.* An OTP's organizational structure and facilities shall be adequate to ensure quality patient care and to meet the requirements of all pertinent Federal, State, and local laws and regulations. At a minimum, each OTP shall formally designate a program sponsor and medical director. The program sponsor shall agree on behalf of the OTP to adhere to all requirements set forth in this part and any regulations regarding the use of opioid agonist treatment medications in the treatment of opioid addiction which may be promulgated in the future. The medical director shall assume responsibility for administering all medical services performed by the OTP. In addition, the medical director shall be responsible for ensuring that the OTP is in compliance with all applicable Federal, State, and local laws and regulations.

(c) *Continuous quality improvement.* (1) An OTP must maintain current quality assurance and quality control plans that include, among other things, annual reviews of program policies and procedures and ongoing assessment of patient outcomes.

(2) An OTP must maintain a current ''Diversion Control Plan'' or ''DCP'' as part of its quality assurance program that contains specific measures to reduce the possibility of diversion of controlled substances from legitimate treatment use and that assigns specific responsibility to the medical and administrative staff of the OTP for carrying out the diversion control measures and functions described in the DCP.

(d) *Staff credentials.* Each person engaged in the treatment of opioid addiction must have sufficient education, training, and experience, or any combination thereof, to enable that person to perform the assigned functions. All physicians, nurses, and other licensed professional care providers, including addiction counselors, must comply with the credentialing requirements of their respective professions.

(e) *Patient admission criteria.*—(1) Maintenance treatment. An OTP shall maintain current procedures designed to ensure that patients are admitted to maintenance treatment by qualified personnel who have determined, using accepted medical criteria such as those listed in the Diagnostic and Statistical Manual for Mental Disorders (DSM-IV), that the person is currently addicted to an opioid drug, and that the person became addicted at least 1 year before admission for treatment. In addition, a program physician shall ensure that each patient voluntarily chooses maintenance treatment and that all relevant facts concerning the use of the opioid drug are clearly and adequately explained to the patient, and that each patient provides informed written consent to treatment.

(2) Maintenance treatment for persons under age 18. A person under 18 years of age is required to have had two documented unsuccessful attempts at short-term detoxification or drug-free treatment within a 12-month period to be eligible for maintenance treatment. No person under 18 years of age may be admitted to maintenance treatment unless a parent, legal guardian, or responsible adult designated by the relevant State authority consents in writing to such treatment.

(3) Maintenance treatment admission exceptions. If clinically appropriate, the program physician may waive the requirement of a 1-year history of addiction under paragraph (e)(1) of this section, for patients released from penal institutions (within 6 months after release), for pregnant patients (program physician must certify pregnancy), and for previously treated patients (up to 2 years after discharge).

(4) Detoxification treatment. An OTP shall maintain current procedures that are designed to ensure that patients are admitted to short- or long-term detoxification treatment by qualified personnel, such as a program physician, who determines that such treatment is appropriate for the specific patient by applying established diagnostic criteria. Patients with two or more unsuccessful detoxification episodes within a 12-month period must be assessed by the OTP physician for other forms of treatment. A program shall not admit a patient for more than two detoxification treatment episodes in one year.

(f) *Required services.*—(1) General. OTPs shall provide adequate medical, counseling, vocational, educational, and other assessment and treatment services. These services must be available at the primary facility, except where the program sponsor has entered into a formal, documented agreement with a private or public agency, organization, practitioner, or institution to provide these services to patients enrolled in the OTP. The program sponsor, in any event, must be able to document that these services are fully and reasonably available to patients.

(2) Initial medical examination services. OTPs shall require each patient to undergo a complete, fully documented physical evaluation by a program physician or a primary care physician, or an authorized healthcare professional under the supervision of a program physician, before admission to the OTP. The full medical examination, including the results of serology and other tests, must be completed within 14 days following admission.

(3) Special services for pregnant patients. OTPs must maintain current policies and procedures that reflect the special needs of patients who are pregnant. Prenatal care and other gender specific services or pregnant patients must be provided either by the OTP or by referral to appropriate healthcare providers.

(4) Initial and periodic assessment services. Each patient accepted for treatment at an OTP shall be assessed initially and periodically by qualified personnel to determine the most appropriate combination of services and treatment. The initial assessment must include preparation of a treatment plan that includes the patient's short-term goals and the tasks the patient must perform to complete the short-term goals; the patient's requirements for education, vocational rehabilitation, and employment; and the medical, psychosocial, economic, legal, or other supportive services that a patient needs. The treatment plan also must identify the frequency with which these services are to be provided. The plan must be reviewed and updated to reflect that patient's personal history, his or her current needs for medical, social, and psychological services, and his or her current needs for education, vocational rehabilitation, and employment services.

(5) Counseling services. (i) OTPs must provide adequate substance abuse counseling to each patient as clinically necessary. This counseling shall be provided by a program counselor, qualified by education, training, or experience to assess the psychological and sociological background of patients, to contribute to the appropriate treatment plan for the patient and to monitor patient progress.

(ii) OTPs must provide counseling on preventing exposure to, and the transmission of, human immunodeficiency virus (HIV) disease for each patient admitted or readmitted to maintenance or detoxification treatment.

(iii) OTPs must provide directly, or through referral to adequate and reasonably accessible community resources, vocational rehabilitation, education, and employment services for patients who either request such services or who have been determined by the program staff to be in need of such services.

(6) Drug abuse testing services. OTPs must provide adequate testing or analysis for drugs of abuse, including at least eight random drug abuse tests per year, per patient in maintenance treatment, in accordance with generally accepted clinical practice. For patients in short-term detoxification treatment, the OTP shall perform at least one initial drug abuse test. For patients receiving long-term detoxification treatment, the program shall perform initial and monthly random tests on each patient.

(g) *Recordkeeping and patient confidentiality.* (1) OTPs shall establish and maintain a recordkeeping system that is adequate to document and monitor patient care. This system is required to comply with all Federal and State reporting requirements relevant to opioid drugs approved for use in treatment of opioid addiction. All records are required to be kept confidential in accordance with all applicable Federal and State requirements.

(2) OTPs shall include, as an essential part of the recordkeeping system, documentation in each patient's record that the OTP made a good faith effort to review whether or not the patient is enrolled any other OTP. A patient enrolled in an OTP shall not be permitted to obtain treatment in any other OTP except in exceptional circumstances. If the medical director or program physician of the OTP in which the patient is enrolled determines that such exceptional circumstances exist, the patient may be granted permission to seek treatment at another OTP, provided the justification for finding exceptional circumstances is noted in the patient's record both at the OTP in which the patient is enrolled and at the OTP that will provide the treatment.

(h) *Medication administration, dispensing, and use.* (1) OTPs must ensure that opioid agonist treatment medications are administered or dispensed only by a practitioner licensed under the appropriate State law and registered under the appropriate State and Federal laws to administer or dispense opioid drugs, or by an agent of such a practitioner, supervised by and under the order of the licensed practitioner. This agent is required to be a pharmacist, registered nurse, or licensed practical nurse, or any other healthcare professional authorized by Federal and State law to administer or dispense opioid drugs.

(2) OTPs shall use only those opioid agonist treatment medications that are approved by the Food and Drug Administration under section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355) for use in the treatment of opioid addiction. In addition, OTPs who are fully compliant with the protocol of an investigational use of a drug and other conditions set forth in the application may administer a drug that has been authorized by the Food and Drug Administration under an investigational new drug application

under section 505(i) of the Federal Food, Drug, and Cosmetic Act for investigational use in the treatment of opioid addiction. Currently the following opioid agonist treatment medications will be considered to be approved by the Food and Drug Administration for use in the treatment of opioid addiction:

(i) Methadone; and

(ii) Levomethadyl acetate (LAAM).

(3) OTPs shall maintain current procedures that are adequate to ensure that the following dosage form and initial dosing requirements are met:

(i) Methadone shall be administered or dispensed only in oral form and shall be formulated in such a way as to reduce its potential for parenteral abuse.

(ii) For each new patient enrolled in a program, the initial dose of methadone shall not exceed 30 milligrams and the total dose for the first day shall not exceed 40 milligrams, unless the program physician documents in the patient's record that 40 milligrams did not suppress opiate abstinence symptoms.

(4) OTPs shall maintain current procedures adequate to ensure that each opioid agonist treatment medication used by the program is administered and dispensed in accordance with its approved product labeling. Dosing and administration decisions shall be made by a program physician familiar with the most up-to-date product labeling. These procedures must ensure that any significant deviations from the approved labeling, including deviations with regard to dose, frequency, or the conditions of use described in the approved labeling, are specifically documented in the patient's record.

(i) Unsupervised or ''take-home'' use. To limit the potential for diversion of opioid agonist treatment medications to the illicit market, opioid agonist treatment medications dispensed to patients for unsupervised use shall be subject to the following requirements.

(1) Any patient in comprehensive maintenance treatment may receive a single take-home dose for a day that the clinic is closed for business, including Sundays and State and Federal holidays.

(2) Treatment program decisions on dispensing opioid treatment medications to patients for unsupervised use beyond that set forth in paragraph (i)(1) of this section, shall be determined by the medical director. In determining which patients may be permitted unsupervised use, the medical director shall consider the following take-home criteria in determining whether a patient is responsible in handling opioid drugs for unsupervised use.

(i) Absence of recent abuse of drugs (opioid or nonnarcotic), including alcohol;

(ii) Regularity of clinic attendance;

(iii) Absence of serious behavioral problems at the clinic;

(iv) Absence of known recent criminal activity, *e.g.,* drug dealing;

(v) Stability of the patient's home environment and social relationships;

(vi) Length of time in comprehensive maintenance treatment;

(vii) Assurance that take-home medication can be safely stored within the patient's home; and

(viii) Whether the rehabilitative benefit the patient derived from decreasing the frequency of clinic attendance outweighs the potential risks of diversion.

(3) Such determinations and the basis for such determinations consistent with the criteria outlined in paragraph (i)(2) of this section shall be documented in the patient's medical record. If it is determined that a patient is responsible in handling opioid drugs, the following restrictions apply:

(i) During the first 90 days of treatment, the take-home supply (beyond that of paragraph (i)(1) of this section) is limited to a single dose each week and the patient shall ingest all other doses under appropriate supervision as provided for under the regulations in this subpart.

(ii) In the second 90 days of treatment, the take-home supply (beyond that of paragraph (i)(1) of this section) is two doses per week.

(iii) In the third 90 days of treatment, the take-home supply (beyond that of paragraph (i)(1) of this section) is three doses per week.

(iv) In the remaining months of the first year, a patient may be given a maximum 6-day supply of take-home medication.

(v) After 1 year of continuous treatment, a patient may be given a maximum 2-week supply of take-home medication.

(vi) After 2 years of continuous treatment, a patient may be given a maximum one-month supply of take-home medication, but must make monthly visits.

(4) No medications shall be dispensed to patients in short-term detoxification treatment or interim maintenance treatment for unsupervised or take-home use.

(5) OTPs must maintain current procedures adequate to identify the theft or diversion of take-home medications, including labeling containers with the OTP's name, address, and telephone number. Programs also must ensure that take-home supplies are packaged in a manner that is designed to reduce the risk of accidental ingestion, including child-proof containers (see Poison Prevention Packaging Act, Public Law 91–601 (15 U.S.C. 1471 *et seq.*)).

(j) *Interim maintenance treatment.* (1) The program sponsor of a public or nonprofit private OTP may place an individual, who is eligible for admission to comprehensive maintenance treatment, in interim maintenance treatment if the individual cannot be placed in a public or nonprofit private comprehensive program within a reasonable geographic area and within 14 days of the individual's application for admission to comprehensive maintenance treatment. An initial and at least two other urine screens shall be taken from interim patients during the maximum of 120 days permitted for such treatment. A program shall establish and follow reasonable criteria for establishing priorities for transferring patients from interim maintenance to comprehensive maintenance treatment. These transfer criteria shall be in writing and shall include, at a minimum, a preference for pregnant women in admitting patients to interim maintenance and in transferring patients from interim maintenance to comprehensive maintenance treatment. Interim maintenance shall be provided in a manner consistent with all applicable Federal and State laws, including sections 1923, 1927(a), and 1976 of the Public Health Service Act (21 U.S.C. 300x–23, 300x–27(a), and 300y–11).

(2) The program shall notify the State health officer when a patient begins interim maintenance treatment, when a patient leaves interim maintenance treatment, and before the date of mandatory transfer to a comprehensive program, and shall document such notifications.

(3) SAMHSA may revoke the interim maintenance authorization for programs that fail to comply with the provisions of this paragraph (j). Likewise, SAMHSA will consider revoking the interim maintenance authorization of a program if the State in which the program operates is not in compliance with the provisions of § 8.11(g).

(4) All requirements for comprehensive maintenance treatment apply to interim maintenance treatment with the following exceptions:

(i) The opioid agonist treatment medication is required to be administered daily under observation;

(ii) Unsupervised or ''take-home'' use is not allowed;

(iii) An initial treatment plan and periodic treatment plan evaluations are not required;

(iv) A primary counselor is not required to be assigned to the patient;

(v) Interim maintenance cannot be provided for longer than 120 days in any 12-month period; and

(vi) Rehabilitative, education, and other counseling services described in paragraphs (f)(4), (f)(5)(i), and (f)(5)(iii) of this section are not required to be provided to the patient.

§ 8.13 Revocation of accreditation and accreditation body approval.

(a) *SAMHSA action following revocation of accreditation.* If an accreditation body revokes an OTP's accreditation, SAMHSA may conduct an investigation into the reasons for the revocation. Following such investigation, SAMHSA may determine that the OTP's certification should no longer be in effect, at which time SAMHSA will initiate procedures to revoke the facility's certification in accordance with § 8.14. Alternatively, SAMHSA may determine that another action or combination of actions would better serve the public health, including the establishment and implementation of a corrective plan of action that will permit the certification to continue in effect while the OTP seeks reaccreditation.

(b) *Accreditation body approval.* (1) If SAMHSA withdraws the approval of an accreditation body under § 8.6, the certifications of OTPs accredited by such body shall remain in effect for a period of 1 year after the date of withdrawal of approval of the accreditation body, unless SAMHSA determines that to protect public health or safety, or because the accreditation body fraudulently accredited treatment programs, the certifications of some or all of the programs should be revoked or suspended or that a shorter time period should be established for the certifications to remain in effect. SAMHSA may extend the time in which a certification remains in effect under this paragraph on a case-by-case basis.

(2) Within 1 year from the date of withdrawal of approval of an accreditation body, or within any shorter period of time established by SAMHSA, OTPs currently accredited by the accreditation body must obtain accreditation from another accreditation body. SAMHSA may extend the time period for obtaining reaccreditation on a case-by-case basis.

§ 8.14 Suspension or revocation of certification.

(a) *Revocation.* Except as provided in paragraph (b) of this section, SAMHSA may revoke the certification of an OTP if SAMHSA finds, after providing the program sponsor with notice and an opportunity for a hearing in accordance with subpart C of this part, that the program sponsor, or any employee of the OTP:

(1) Has been found guilty of misrepresentation in obtaining the certification;

(2) Has failed to comply with the Federal opioid treatment standards in any respect;

(3) Has failed to comply with reasonable requests from SAMHSA or from an accreditation body for records, information, reports, or materials that are necessary to determine the continued eligibility of the OTP for certification or continued compliance with the Federal opioid treatment standards; or

(4) Has refused a reasonable request of a duly designated SAMHSA inspector, Drug Enforcement Administration (DEA) Inspector, State Inspector, or accreditation body representative for permission to inspect the program or the program's operations or its records.

(b) *Suspension.* Whenever SAMHSA has reason to believe that revocation may be required and that immediate action is necessary to protect public health or safety, SAMHSA may immediately suspend the certification of an OTP before holding a hearing under subpart C of this part. SAMHSA may immediately suspend as well as propose revocation of the certification of an OTP before holding a hearing under subpart C of this part if SAMHSA makes a finding described in paragraph (a) of this section and also determines that:

(1) The failure to comply with the Federal opioid treatment standards presents an imminent danger to the public health or safety;

(2) The refusal to permit inspection makes immediate suspension necessary; or

(3) There is reason to believe that the failure to comply with the Federal opioid treatment standards was intentional or was associated with fraud.

(c) *Written notification.* In the event that SAMHSA suspends the certification of an OTP in accordance with paragraph (b) of this section or proposes to revoke the certification of an OTP in accordance with paragraph (a) of this section, SAMHSA shall promptly provide the sponsor of the OTP with written notice of the suspension or proposed revocation by facsimile transmission, personal service, commercial overnight delivery service, or certified mail, return receipt requested. Such notice shall state the reasons for the action and shall state that the OTP may seek review of the action in accordance with the procedures in subpart C of this part.

(d)(1) If SAMHSA suspends certification in accordance with paragraph (b) of this section:

(i) SAMHSA will immediately notify DEA that the OTP's registration should be suspended under 21 U.S.C. 824(d); and

(ii) SAMHSA will provide an opportunity for a hearing under subpart C of this part.

(2) Suspension of certification under paragraph (b) of this section shall remain in effect until the agency determines that:

(i) The basis for the suspension cannot be substantiated;

(ii) Violations of required standards have been corrected to the agency's satisfaction; or

(iii) The OTP's certification shall be revoked.

§ 8.15 Forms.

(a) SMA–162—Application for Certification to Use Opioid Agonist Treatment Medications for Opioid Treatment.

(b) SMA–163—Application for Becoming an Accreditation Body under § 8.3.

Subpart C—Procedures for Review of Suspension or Proposed Revocation of OTP Certification, and of Adverse Action Regarding Withdrawal of Approval of an Accreditation Body

§ 8.21 Applicability.

The procedures in this subpart apply when:

(a) SAMHSA has notified an OTP in writing that its certification under the regulations in subpart B of this part has been suspended or that SAMHSA proposes to revoke the certification; and

(b) The OTP has, within 30 days of the date of the notification or within 3 days of the date of the notification when seeking an expedited review of a suspension, requested in writing an opportunity for a review of the suspension or proposed revocation.

(c) SAMHSA has notified an accreditation body of an adverse action taken regarding withdrawal of approval of the accreditation body under the regulations in subpart A of this part; and

(d) The accreditation body has, within 30 days of the date of the notification, requested in writing an opportunity for a review of the adverse action.

§ 8.22 Definitions.

The following definitions apply to this subpart C.

(a) *Appellant* means:

(1) The treatment program which has been notified of its suspension or proposed revocation of its certification under the regulations of this part and has requested a review of the suspension or proposed revocation, or

(2) The accreditation body which has been notified of adverse action regarding withdrawal of approval under the regulations of this subpart and has requested a review of the adverse action.

(b) *Respondent* means SAMHSA.

(c) *Reviewing official* means the person or persons designated by the Secretary who will review the suspension or proposed revocation. The reviewing official may be assisted by one or more HHS officers or employees or consultants in assessing and weighing the scientific and technical evidence and other information submitted by the appellant and respondent on the reasons for the suspension and proposed revocation.

§ 8.23 Limitation on issues subject to review.

The scope of review shall be limited to the facts relevant to any suspension, or proposed revocation, or adverse action, the necessary interpretations of the facts the regulations, in the subpart, and other relevant law.

§ 8.24 Specifying who represents the parties.

The appellant's request for review shall specify the name, address, and phone number of the appellant's representative. In its first written submission to the reviewing official, the respondent shall specify the name, address, and phone number of the respondent's representative.

§ 8.25 Informal review and the reviewing official's response.

(a) *Request for review.* Within 30 days of the date of the notice of the suspension or proposed revocation, the appellant must submit a written request to the reviewing official seeking review, unless some other time period is agreed to by the parties. A copy must also be sent to the respondent. The request for review must include a copy of the notice of suspension, proposed revocation, or adverse action, a brief statement of why the decision to suspend, propose revocation, or take an adverse action is incorrect, and the appellant's request for an oral presentation, if desired.

(b) *Acknowledgment.* Within 5 days after receiving the request for review, the reviewing official will send an acknowledgment and advise the appellant of the next steps. The reviewing official will also send a copy of the acknowledgment to the respondent.

§ 8.26 Preparation of the review file and written arguments.

The appellant and the respondent each participate in developing the file for the reviewing official and in submitting written arguments. The procedures for development of the review file and submission of written argument are:

(a) *Appellant's documents and brief.* Within 30 days after receiving the acknowledgment of the request for review, the appellant shall submit to the reviewing official the following (with a copy to the respondent):

(1) A review file containing the documents supporting appellant's argument, tabbed and organized chronologically, and accompanied by an index identifying each document. Only essential documents should be submitted to the reviewing official.

(2) A written statement, not to exceed 20 double-spaced pages, explaining why respondent's decision to suspend or propose revocation of appellant's certification or to take adverse action regarding withdrawal of approval of the accreditation body is incorrect (appellant's brief).

(b) *Respondent's documents and brief.* Within 30 days after receiving a copy of the acknowledgment of the request for review, the respondent shall submit to the reviewing official the following (with a copy to the appellant):

(1) A review file containing documents supporting respondent's decision to suspend or revoke appellant's certification, or approval as an accreditation body, tabbed and organized chronologically, and accompanied by an index identifying each document. Only essential documents should be submitted to the reviewing official.

(2) A written statement, not exceeding 20 double-spaced pages in length, explaining the basis for suspension, proposed revocation, or adverse action (respondent's brief).

(c) *Reply briefs.* Within 10 days after receiving the opposing party's submission, or 20 days after receiving acknowledgment of the request for review, whichever is later, each party may submit a short reply not to exceed 10 double-spaced pages.

(d) *Cooperative efforts.* Whenever feasible, the parties should attempt to develop a joint review file.

(e) *Excessive documentation.* The reviewing official may take any appropriate steps to reduce excessive documentation, including the return of or refusal to consider documentation found to be irrelevant, redundant, or unnecessary.

(f) *Discovery.* The use of interrogatories, depositions, and other forms of discovery shall not be allowed.

§ 8.27 Opportunity for oral presentation.

(a) *Electing oral presentation.* If an opportunity for an oral presentation is desired, the appellant shall request it at the time it submits its written request for review to the reviewing official. The reviewing official will grant the request if the official determines that the decisionmaking process will be substantially aided by oral presentations and arguments. The reviewing official may also provide for an oral presentation at the official's own initiative or at the request of the respondent.

(b) *Presiding official.* The reviewing official or designee will be the presiding official responsible for conducting the oral presentation.

(c) *Preliminary conference.* The presiding official may hold a prehearing conference (usually a telephone conference call) to consider any of the following: Simplifying and clarifying issues; stipulations and admissions; limitations on evidence and witnesses that will be presented at the hearing; time allotted for each witness and the hearing altogether; scheduling the hearing; and any other matter that will assist in the review process. Normally, this conference will be conducted informally and off the record; however, the presiding official may, at the presiding official's discretion, produce a written document summarizing the conference or transcribe the conference, either of which will be made a part of the record.

(d) *Time and place of oral presentation.* The presiding official will attempt to schedule the oral presentation within 45 days of the date appellant's request for review is received or within 15 days of submission of the last reply brief, whichever is later. The oral presentation will be held at a time and place determined by the presiding official following consultation with the parties.

(e) *Conduct of the oral presentation.*—(1) General. The presiding official is responsible for conducting the oral presentation. The presiding official may be assisted by one or more HHS officers or employees or consultants in conducting the oral presentation and reviewing the evidence. While the oral

presentation will be kept as informal as possible, the presiding official may take all necessary steps to ensure an orderly proceeding.

(2) Burden of proof/standard of proof. In all cases, the respondent bears the burden of proving by a preponderance of the evidence that its decision to suspend, propose revocation, or take adverse action is appropriate. The appellant, however, has a responsibility to respond to the respondent's allegations with evidence and argument to show that the respondent is incorrect.

(3) Admission of evidence. The rules of evidence do not apply and the presiding official will generally admit all testimonial evidence unless it is clearly irrelevant, immaterial, or unduly repetitious. Each party may make an opening and closing statement, may present witnesses as agreed upon in the pre-hearing conference or otherwise, and may question the opposing party's witnesses. Since the parties have ample opportunity to prepare the review file, a party may introduce additional documentation during the oral presentation only with the permission of the presiding official. The presiding official may question witnesses directly and take such other steps necessary to ensure an effective and efficient consideration of the evidence, including setting time limitations on direct and cross-examinations.

(4) Motions. The presiding official may rule on motions including, for example, motions to exclude or strike redundant or immaterial evidence, motions to dismiss the case for insufficient evidence, or motions for summary judgment. Except for those made during the hearing, all motions and opposition to motions, including argument, must be in writing and be no more than 10 double-spaced pages in length. The presiding official will set a reasonable time for the party opposing the motion to reply.

(5) Transcripts. The presiding official shall have the oral presentation transcribed and the transcript shall be made a part of the record. Either party may request a copy of the transcript and the requesting party shall be responsible for paying for its copy of the transcript.

(f) *Obstruction of justice or making of false statements.* Obstruction of justice or the making of false statements by a witness or any other person may be the basis for a criminal prosecution under 18 U.S.C. 1001 or 1505.

(g) *Post-hearing procedures.* At the presiding official's discretion, the presiding official may require or permit the parties to submit post-hearing briefs or proposed findings and conclusions. Each party may submit comments on any major prejudicial errors in the transcript.

§ 8.28 Expedited procedures for review of immediate suspension.

(a) *Applicability.* When the Secretary notifies a treatment program in writing that its certification has been immediately suspended, the appellant may request an expedited review of the suspension and any proposed revocation. The appellant must submit this request in writing to the reviewing official within 10 days of the date the OTP received notice of the suspension. The request for review must include a copy of the suspension and any proposed revocation, a brief statement of why the decision to suspend and propose revocation is incorrect, and the appellant's request for an oral presentation, if desired. A copy of the request for review must also be sent to the respondent.

(b) *Reviewing official's response.* As soon as practicable after the request for review is received, the reviewing official will send an acknowledgment with a copy to the respondent.

(c) *Review file and briefs.* Within 10 days of the date the request for review is received, but no later than 2 days before an oral presentation, each party shall submit to the reviewing official the following:

(1) A review file containing essential documents relevant to the review, tabbed, indexed, and organized chronologically; and

(2) A written statement, not to exceed 20 double-spaced pages, explaining the party's position concerning the suspension and any proposed revocation. No reply brief is permitted.

(d) *Oral presentation.* If an oral presentation is requested by the appellant or otherwise granted by the reviewing official in accordance with § 8.27(a), the presiding official will attempt to schedule the oral presentation within 20 to 30 days of the date of appellant's request for review at a time and place determined by the presiding official following consultation with the parties. The presiding official may hold a pre-hearing conference in accordance with § 8.27(c) and will conduct the oral presentation in accordance with the procedures of §§ 8.27(e), (f), and (g).

(e) *Written decision.* The reviewing official shall issue a written decision upholding or denying the suspension or proposed revocation and will attempt to issue the decision within 7 to 10 days of the date of the oral presentation or within 3 days of the date on which the transcript is received or the date of the last submission by either party, whichever is later. All other provisions set forth in § 8.33 apply.

(f) *Transmission of written communications.* Because of the importance of timeliness for these expedited procedures, all written communications between the parties and between either party and the reviewing official shall be sent by facsimile transmission, personal service, or commercial overnight delivery service.

§ 8.29 Ex parte communications.

Except for routine administrative and procedural matters, a party shall not communicate with the reviewing or presiding official without notice to the other party.

§ 8.30 Transmission of written communications by reviewing official and calculation of deadlines.

(a) *Timely review.* Because of the importance of a timely review, the reviewing official should normally transmit written communications to either party by facsimile transmission, personal service, or commercial overnight delivery service, or certified mail, return receipt requested, in which case the date of transmission or day following mailing will be considered the date of receipt. In the case of communications sent by regular mail, the date of receipt will be considered 3 days after the date of mailing.

(b) *Due date.* In counting days, include Saturdays, Sundays, and holidays. However, if a due date falls on a Saturday, Sunday, or Federal holiday, then the due date is the next Federal working day.

§ 8.31 Authority and responsibilities of the reviewing official.

In addition to any other authority specified in this subpart C, the reviewing official and the presiding official, with respect to those authorities involving the oral presentation, shall have the authority to issue orders; examine witnesses; take all steps necessary for the conduct of an orderly hearing; rule on requests and motions; grant extensions of time for good reasons; dismiss for failure to meet deadlines or other requirements; order the parties to submit relevant information or witnesses; remand a case for further action by the respondent; waive or modify these procedures in a specific case, usually with notice to the parties; reconsider a decision of the reviewing official where a party promptly alleges a clear error of fact or law; and to take any other action necessary to resolve disputes in accordance with the objectives of the procedures in this subpart.

§ 8.32 Administrative record.

The administrative record of review consists of the review file; other submissions by the parties; transcripts or other records of any meetings, conference calls, or oral presentation; evidence submitted at the oral presentation; and orders and other documents issued by the reviewing and presiding officials.

§ 8.33 Written decision.

(a) *Issuance of decision.* The reviewing official shall issue a written decision upholding or denying the suspension, proposed revocation, or adverse action. The decision will set forth the reasons for the decision and describe the basis for that decision in the record. Furthermore, the reviewing official may remand the matter to the respondent for such further action as the reviewing official deems appropriate.

(b) *Date of decision.* The reviewing official will attempt to issue the decision within 15 days of the date of the oral presentation, the date on which the transcript is received, or the date of the last submission by either party, whichever is later. If there is no oral presentation, the decision will normally be issued within 15 days of the date of receipt of the last reply brief. Once issued, the reviewing official will immediately communicate the decision to each party.

(c) *Public notice and communications to the Drug Enforcement Administration (DEA).* (1) If the suspension and proposed revocation of OTP certification are upheld, the revocation of certification will become effective immediately and the public will be notified by publication of a notice in the **Federal Register**. SAMHSA will notify DEA within 5 days that the OTP's registration should be revoked.

(2) If the suspension and proposed revocation of OTP certification are denied, the revocation will not take effect and the suspension will be lifted immediately. Public notice will be given by publication in the **Federal Register**. SAMHSA will notify DEA within 5 days that the OTP's registration should be restored, if applicable.

§ 8.34 Court review of final administrative action; exhaustion of administrative remedies.

Before any legal action is filed in court challenging the suspension, proposed revocation, or adverse action, respondent shall exhaust administrative remedies provided under this subpart, unless otherwise provided by Federal law. The reviewing official's decision, under § 8.28(e) or § 8.33(a), constitutes final agency action as of the date of the decision.

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Part III

Department of Transportation

Federal Railroad Administration

49 CFR Parts 229, 231, and 232

Brake System Safety Standards for Freight and Other Non-Passenger Trains and Equipment; End-of-Train Devices; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Parts 229, 231, and 232

[FRA Docket No. PB–9; Notice No. 17]

RIN 2130–AB16

Brake System Safety Standards for Freight and Other Non-Passenger Trains and Equipment; End-of-Train Devices

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Final Rule.

SUMMARY: FRA is issuing revisions to the regulations governing the power braking systems and equipment used in freight and other non-passenger railroad train operations. The revisions are designed to achieve safety by better adapting the regulations to the needs of contemporary railroad operations and facilitating the use of advanced technologies. These revisions are being issued in order to comply with Federal legislation, to respond to petitions for rulemaking, and to address areas of concern derived from experience in the application of existing standards governing these operations.

EFFECTIVE DATE: April 1, 2001. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of April 1, 2001.

ADDRESSES: Any petition for reconsideration should reference FRA Docket No. PB–9, Notice 17, and be submitted in triplicate to FRA Docket Clerk, Office of Chief Counsel, RCC–10, 1120 Vermont Avenue, Mail Stop 10, Washington, DC 20590.

FOR FURTHER INFORMATION, CONTACT: Leon Smith, Deputy Regional Administrator—Region 3, FRA Office of Safety, RRS–14, 1120 Vermont Avenue, Stop 25, Washington, DC 20590 (telephone 404–562–3800), or Thomas Herrmann, Trial Attorney, Office of the Chief Counsel, RCC–10, 1120 Vermont Avenue, Stop 10, Washington, DC 20590 (telephone 202–493–6053).

SUPPLEMENTARY INFORMATION:

I. Background

In 1992, Congress amended the Federal rail safety laws by adding certain statutory mandates related to power brake safety. *See* 49 U.S.C. 20141. These amendments specifically address the revision of the power brake regulations by adding a new subsection which states:

> (r) POWER BRAKE SAFETY.—(1) The Secretary shall conduct a review of the Department of Transportation's rules with respect to railroad power brakes, and not later than December 31, 1993, shall revise such rules based on such safety data as may be presented during that review.
>
> (2) In carrying out paragraph (1), the Secretary shall, where applicable, prescribe standards regarding dynamic brake equipment. * * *
>
> Pub. L. 102–365, section 7; codified at 49 U.S.C. 20141, superseding 45 U.S.C. 431(r).

In response to the statutory mandate, the various recommendations and petitions for rulemaking, and due to its own determination that the power brake regulations were in need of revision, FRA published an Advance Notice of Proposed Rulemaking (ANPRM) on December 31, 1992 (57 FR 62546), and conducted a series of public workshops in early 1993. The ANPRM provided background information and presented questions on various subjects including the following: the use and design of end-of-train (EOT) telemetry devices; the air flow method of train brake testing; the additional testing of train air brakes during extremely cold weather; the training of employees to perform train brake tests and inspections; computer-assisted braking systems; the operation of dynamic brakes on locomotives; and other miscellaneous subjects relating to conventional brake systems as well as information regarding high speed passenger train brakes. The questions presented in the ANPRM on the various topics were intended as fact-finding tools and were meant to elicit the views of those persons outside FRA charged with ensuring compliance with the power brake regulations on a day-to-day basis.

Based on the comments and information received, FRA published a Notice of Proposed Rulemaking (1994 NPRM) regarding revisions to the power brake regulation. *See* 59 FR 47676 (September 16, 1994). In the 1994 NPRM, FRA proposed a comprehensive revision of the power brake regulations which attempted to preserve the useful elements of the current regulatory system in the framework of an entirely new document. FRA attempted to delineate the requirements for conventional freight braking systems from the more diverse systems for various categories of passenger service. In developing the NPRM, FRA engaged in a systems approach to the power brake regulations. FRA considered all aspects of a railroad operation and the effects that the entire operation had on the train and locomotive power braking systems. Therefore, the proposed requirements not only addressed specific brake equipment and inspection requirements, but also attempted to encompass other aspects of a railroad's operation which directly affect the quality and performance of the braking system, such as personnel qualifications; maintenance requirements; written procedures governing operation, maintenance, and inspection; record keeping requirements; and the development and integration of new technologies.

Following publication of the 1994 NPRM in the **Federal Register**, FRA held a series of public hearings in 1994 to allow interested parties the opportunity to comment on specific issues addressed in the NPRM. Public hearings were held in Chicago, Illinois on November 1–2; in Newark, New Jersey on November 4; in Sacramento, California on November 9; and in Washington, DC on December 13–14, 1994. These hearings were attended by numerous railroads, organizations representing railroads, labor organizations, rail shippers, and State governmental agencies. Due to the strong objections raised by a large number of commenters at these public hearings, FRA announced by notice published on January 17, 1995 that it would defer action on the NPRM and permit the submission of additional comments prior to making a determination as to how it would proceed in this matter. *See* 60 FR 3375. Although the comment period officially closed April 1, 1995, FRA continued to receive comments on the NPRM as well as other suggested alternatives well into October 1995.

Furthermore, beginning in mid-1995, FRA internally committed to the process of establishing the Railroad Safety Advisory Committee (RSAC). The determination to develop the RSAC was based on FRA's belief that the continued use of ad hoc collaborative procedures for appropriate rulemakings was not the most effective means of accomplishing its goal of a more consensual regulatory program. FRA believed that the establishment of an advisory committee to address railroad safety issues would provide the best opportunity for creating a consensual regulatory program to benefit the Administrator in the conduct of her statutory responsibilities. FRA envisioned that the RSAC would allow representatives from management, labor, FRA, and other interested parties to cooperatively address safety problems by identifying the best solutions based on agreed-upon facts, and, where regulation appears necessary, by identifying regulatory options to implement these solutions. The process of establishing the RSAC was not complete until March 1, 1996, and on March 11, 1996, FRA published a notice

in the **Federal Register** that the Committee had been established. *See* 61 FR 9740.

In the interim, based on these considerations and after review of all the comments submitted, FRA published a notice in the **Federal Register** on February 21, 1996, stating that, in order to limit the number of issues to be examined and developed in any one proceeding, FRA would proceed with the revision of the power brake regulations via three separate processes. *See* 61 FR 6611. In light of the testimony and comments received on the 1994 NPRM, emphasizing the differences between passenger and freight operations and the brake equipment utilized by the two, FRA decided to separate passenger equipment power brake standards from freight equipment power brake standards. As passenger equipment power brake standards are a logical subset of passenger equipment safety standards, it was determined that the passenger equipment safety standards working group would assist FRA in developing a second NPRM covering passenger equipment power brake standards. *See* 49 U.S.C. 20133(c). In addition, in the interest of public safety and due to statutory as well as internal commitments, FRA determined that it would separate the issues related to two-way EOTs from both the passenger and freight issues, address them in a public regulatory conference, and issue a final rule on the subject as soon as practicable. A final rule on two-way EOTs was issued on December 27, 1996. *See* 62 FR 278 (January 2, 1997). Furthermore, it was announced that a second NPRM covering freight equipment power brake standards would be developed with the assistance of RSAC. At the Committee's inaugural meeting on April 1–2, 1996, the RSAC officially accepted the task of assisting FRA in development of revisions to the regulations governing power brake systems for freight equipment. *See* 61 FR 29164.

Members of RSAC nominated individuals to be members of the Freight Power Brake Working Group (Working Group) tasked with making recommendations regarding revision of the power regulations applicable to freight operations. The Working Group was comprised of thirty-one voting members as well as a number of alternates and technical support personnel. The following organizations were represented by a voting member and/or an alternate on the Working Group:

Association of American Railroads (AAR)
The American Short Line Railroad Association (ASLRA)
Brotherhood of Locomotive Engineers (BLE)
The Burlington Northern and Santa Fe Railway Company (BNSF)
Canadian National Railroads (CN)
Canadian Pacific Rail Systems (CP)
Consolidated Rail Corporation (CR)
CSX Transportation, Incorporated (CSX)
Illinois Central Railroad Company (IC)
International Association of Machinists & Aerospace Workers (IAMAW)
National Transportation Safety Board (NTSB)(Advisor)
National Association of Regulatory Commissioners (NARUC)
California Public Utilities Commission (CAPUC)
Norfolk Southern Corporation (NS)
Railway Progress Institute (RPI)
Sheet Metal Workers International Association (SMWIA)
Southern Pacific Lines (SP)
Transportation Communications International Union/Brotherhood of Railway Carmen (TCU/BRC)
Transport Workers Union of America (TWU)
Union Pacific Railroad Company (UP)
United Transportation Union (UTU)

The Working Group held seven multi-day sessions in which all members of the working group were invited. These sessions were held on the following dates:

May 15–17, 1996 in Washington D.C.;
June 11–13, 1996 in Chicago, Illinois;
July 31, 1996 in Chicago, Illinois;
August 21–23, 1996 in Annapolis, Maryland;
September 26–27, 1996 in Washington D.C.;
October 29–30, 1996 in Washington D.C.; and
December 4, 1996 in St. Louis, Missouri.

General minutes of each of these meetings are contained in FRA Docket PB–9 and are available for public inspection during the times and at the location noted previously. In addition to these meetings, there were numerous meetings conducted by smaller task force groups designated by the Working Group to further develop various issues. All of these smaller task forces were made up of various members of the Working Group or their representatives, with each task force being represented by management, labor, FRA, and other interested parties. The Working Group designated smaller task forces to address the following issues: Dry air; dynamic brakes; periodic maintenance and testing; electronically controlled locomotive brakes; and inspection and testing requirements. These task forces were assigned the job of developing the issues related to the broad topics, presenting reports to the larger Working Group, and if possible making recommendations to the Working Group for addressing the issues.

Although the Working Group discussed, debated, and attempted to reach consensus on various issues related to freight power brakes, consensus could not be reached. However, the working group in conjunction with the various task forces developed a wealth of information on various issues and further clarified the parties' positions regarding how the issues could or should be addressed in any regulation. The major cluster of issues, upon which resolution of many of the other issues rested, were the requirements related to the inspection and testing of brake equipment. The inspection and testing task force met on numerous occasions and gathered and reviewed data, and the labor and rail management representatives to the task force drafted various proposals and options related to the inspection and testing of freight brake equipment. The Working Group discussed the proposals and investigated many of the costs and benefits related to the various proposals as well as the safety implications; however, the Working Group could not reach any type of consensus position. Consequently, FRA declared that an impasse had been reached and announced, at the December 4, 1996 meeting of the Working Group, that FRA would proceed unilaterally with the drafting of the NPRM.

Subsequent to December 4, 1996, several members of the Working Group, including representatives from both rail management and labor, continued informal discussions of some of the issues related to the inspection and testing of freight equipment. These representatives informed FRA that a consensus proposal might be possible, provided that the Working Group were permitted to continue deliberations. Consequently, FRA agreed to reconvene the Working Group, and in April 1997 three additional meetings were conducted on the following dates:

April 2–3 in Kansas City, Missouri;
April 10–11 in Phoenix, Arizona; and
April 23 in Jacksonville, Florida.

Representatives of both rail management and rail labor presented the Working Group with inspection and testing proposals for consideration and review both before and during this period. Although the proposals were discussed and deliberated, the Working Group was once again unsuccessful in

reaching consensus on any of the freight power brake inspection and testing issues. Consequently, by letter dated May 29, 1997, FRA informed the members of the Working Group that FRA would be withdrawing the freight power brake task from the Working Group at the next full RSAC meeting on June 24, 1997. FRA provided this notice to avoid any misunderstanding regarding the process by which the proposed rule would be drafted. FRA also informed the members of the Working Group that it would not invest further time in attempting to reach consensus unless all other members of the Working Group jointly indicated that they have reached consensus on a proposal and wanted to discuss it with FRA. FRA noted that if that were to occur prior to June 24, 1997, it would reconsider withdrawing the task from RSAC. As no consensus proposal was presented to FRA prior to June 24, 1997, FRA withdrew the task from the Working Group and informed the members of RSAC that FRA would proceed independently in the drafting of a freight power brake NPRM.

FRA carefully considered the information, data, and proposals developed by the Freight Power Brake Working Group as well as all the oral and written comments offered by various parties regarding the 1994 NPRM on power brakes when developing a revised power brake NPRM. On September 9, 1998, an NPRM (1998 NPRM) was published in the **Federal Register** proposing brake system safety standards for freight trains and equipment. *See* 63 FR 48294 (September 9, 1998).

As evidenced by the preceding discussion, FRA spent years developing the 1998 proposed power brake regulations. During that time, FRA instituted rulemakings to address passenger and commuter operations and equipment and two-way end-of-train devices, and developed a channel of communication to address tourist and excursion operational concerns. Consequently, the 1998 proposal focused solely on freight and other non-passenger operations. FRA did not, for the most part, attempt to include provisions related to the inspection and maintenance of locomotive braking systems or to the performance of other mechanical inspections that are currently addressed by other parts of the regulations. FRA believed that although those requirements are interrelated to the inspection, testing, and maintenance of freight power brakes, they are adequately addressed in other regulations and would only add to the complexity of the proposal, causing confusion and misunderstanding by members of the regulated community.

When developing the 1998 NPRM, FRA determined that the proposal would closely track the existing requirements related to the inspection, testing, and maintenance of the braking systems used in freight operations. Although FRA recognized that the current regulatory scheme tended to create incentives to ''overlook'' defects or fail to conduct vigorous inspections, FRA also believed that the current regulatory scheme is an effective and proven method of ensuring safety and that many of the ''negative incentives'' could be greatly reduced by strict and aggressive enforcement coupled with moderate revisions to address specific concerns raised by interested parties. Furthermore, representatives of both rail labor and rail management indicated that if a consensus proposal could not be developed then FRA should proceed on its own with developing a proposal which tracks the current requirements, and that FRA should strictly enforce those requirements.

The 1998 NPRM proposed a moderate, although comprehensive, revision of the existing requirements related to the inspection, testing, and maintenance of brake equipment used in freight operations. The proposal attempted to balance the concerns of rail labor and management and increase the effectiveness of the regulation. In the 1998 NPRM, FRA attempted to reorganize, update, and clarify the existing regulations related to freight power brakes and eliminate potential loopholes created by the existing regulatory language. Furthermore, completely new requirements were proposed to address the qualifications of those individuals conducting brake inspections and tests. FRA also proposed requirements related to the movement of freight equipment with defective or inoperative brakes which were consistent with existing statutory requirements and other federal regulations addressing the movement of defective freight equipment. The 1998 NPRM also attempted to codify existing maintenance requirements related to the brake system and its components and prevent unilateral changes to those provisions by the very party to which they apply. Moreover, the proposal also contained specific requirements related to dynamic brakes and requirements aimed at increasing the quality of air introduced into brake systems by yard air sources.

In addition to the above, the 1998 proposal also contained various incentives to the railroads to encourage the performance of quality brake inspections, particularly at locations where trains originate. These included incentives to use qualified mechanical forces to conduct brake system tests at major terminals where long-distance trains originate in order to move these trains greater distances between brake inspections than existing regulations permitted. Consequently, the 1998 proposal retained the basic inspection intervals and requirements contained in the existing regulations and preserved the useful elements of the existing system, but also proposed additions, clarifications, and modifications that FRA believed would increase the safety, effectiveness, and enforceability of the regulations.

Following publication of the 1998 NPRM, FRA held two public hearings and a public technical conference to allow interested parties the opportunity to comment on specific issues addressed in the NPRM. The public hearings were held in Kansas City, Missouri on October 26 and in Washington, DC on November 13, 1998. The public technical conference was conducted in Walnut Creek, California on November 23 and 24, 1998. The hearings and technical conference were attended by numerous railroads, organizations representing railroads, labor organizations, rail shippers, and State governmental agencies. During the hearings and technical conference a vast amount of oral information was presented, and a considerable number of issues were raised and discussed in detail.

Subsequent to conducting these public hearings and technical conference, FRA issued a notice extending the comment period on the NPRM from January 15, 1999 to March 1, 1999. *See* 64 FR 3273. This extension was provided based on the requests of several interested parties for more time in which to develop their responses. At the public hearings and technical conference conducted in relation to the NPRM and in written comments submitted subsequent to the public hearings and technical conference, concerns were raised regarding the data discussed by FRA in the NPRM. The comments raised concerns regarding FRA's collection of data related to FRA's inspection activity and the number of conditions not in compliance with Federal regulations found during that inspection activity. The comments and correspondence received alleged that there were substantial problems with FRA's database, that there had been substantial overreporting of the number of units inspected, and that there had been a systematic deflation of power brake defect ratios.

As the allegations and concerns raised were general in nature, FRA believed it prudent and necessary to allow interested parties to fully explain and discuss their concerns. Therefore, FRA conducted a public meeting on May 27, 1999 to permit the exchange of information and concerns regarding FRA's database and the information developed from that database. *See* 64 FR 23816 (May 4, 1999). The purpose of the meeting was to allow FRA to provide information regarding its internal review of the data and address some of the concerns raised as well as to allow interested parties to further develop and articulate the issues and concerns they had with regard to the data gathered and presented by FRA in the NPRM.

FRA has carefully considered all the information, data, and proposals submitted in relation to FRA Docket PB–9 when developing this final rule. This includes: the information, data and proposals developed by the RSAC Freight Power Brake Working Group; all oral and written comments submitted in relation to the 1994 NPRM on power brakes; and all oral and written comments submitted regarding the 1998 NPRM on freight power brakes. In addition to the preceding information, FRA's knowledge and experience with enforcing the existing power brake regulations were also relied upon when developing this final rule.

II. Overview of Comments and General FRA Conclusions

The following discussions are grouped by major themes and issues addressed in the 1998 NPRM and the oral and written comments submitted in relation to that document. In each of the major issue areas, FRA has attempted to outline the significant portions of the proposal, discuss the comments received on the proposal and any alternative approach recommended, and provide a general idea of how FRA has decided to address the issues or approaches.

A. Accident/Incident History and Defective Equipment

The 1998 NPRM contained a detailed discussion regarding the accident/incident data which FRA considered when developing the proposal. In that discussion, FRA noted that it considers a variety of factors in attempting to determine the relative condition of the industry as it relates to the safety of train power brake systems. Two of the factors considered when making this assessment are the number of recent brake-related incidents and the amount of defective brake equipment recently discovered operating over the railroad system, both of which provide some indication as to the potential or likelihood of future brake-related incidents. Due to concerns raised in both written comments and at the public meeting conducted on May 27, 1999, regarding the accident/incident data and power brake defect ratio data discussed above, FRA believes it is necessary to further explain how these data were used in developing this final rule.

1. Accident/Incident Data

In order to determine the potential quantifiable safety benefits to be derived from the provisions proposed in the NPRM and either retained or modified in this final rule, FRA conducted a review of all accidents/incidents reported to FRA to determine which incidents/accidents could potentially have been prevented had the provisions of the rule been in place. For purposes of the NPRM, FRA identified a brake-related incident as being an incident reported to FRA as being caused by one of the following: brake rigging down or dragging; air hose uncoupled or burst; broken brake pipe or connections; other brake components damaged, worn, broken or disconnected; brake valve malfunction (undesired emergency); brake valve malfunction (stuck brake); hand brake broken or defective; hand brake linkage and/or connections broken or defective. For purposes of the NPRM, FRA did not consider brake pipe obstruction-related incidents because FRA believed they had been fully considered at the time that FRA promulgated the final rule relating to the use of two-way end-of-train devices.

In written comments and at the public meeting held in conjunction with the NPRM, several labor representatives raised concerns regarding FRA's reliance on accident/incident information which is essentially reported to FRA by the railroads. These representatives contend that railroads have an economic incentive to report accidents/incidents as being due to human factors rather than to mechanical problems or deficiencies. Thus, they contend that the potential safety benefits identified by FRA in the NPRM are inaccurate and underestimated because the data used to determine those benefits are developed by the railroads. FRA tends to agree with the concerns raised by these commenters and raised this concern in its discussion of the accident/incident data in the NPRM.

In the NPRM, FRA acknowledged that the presented brake-related incidents most likely did not accurately reflect the total number of incidents that were potentially linked, in some part, to brake-related causes and did not provide a complete picture of the costs associated with the identified incidents. *See* 63 FR 48297. FRA recognized that the information on most incidents is provided by the railroads which generally identify the direct cause of an incident but may not sufficiently identify all of the contributory causes in a manner to permit FRA to conclude that the brake system played a part in the incident. Thus, FRA acknowledged that there may be numerous incidents which occurred in the industry which were at least partially due to brake-related problems, but which were ultimately more closely linked to human error or other mechanical problems and thus, were reported to FRA under different cause codes. However, as it is extremely difficult to identify those accidents/incidents that may have been in some part related to a brake problem, FRA elected to include only those accidents specifically identified as brake-related in its quantified safety benefits and included other potential incidents as qualitative safety benefits in the NPRM. FRA also recognized that the damage costs provided to FRA by the railroads for the incidents identified in the NPRM failed to consider all of the costs associated with an accident such as: loss of lading; wreck clearance; track delay; environmental clean-up; removal of damaged equipment; evacuations; or the impact on local traffic patterns. *See* 63 FR 48297. Thus, for purposes of the NPRM, the property damages reported by the railroads were multiplied by a factor of 1.5625 in an effort to capture these non-reported damages. *See* 63 FR 48297.

In calculating the potential quantifiable safety benefits to be derived from this final rule, FRA has slightly expanded the criteria for determining the accidents/incidents which are addressed by this final rule. Thus, for purposes of this final rule the quantified safety benefits include a percentage of certain types of accidents reported as being due to human error or other than a brake-related mechanical problem. The quantified safety benefits for this final rule also include a percentage of those incidents which are considered brake pipe obstruction-related. Although these accidents were considered in relation to the two-way EOT final rule, FRA believes that this final rule will prevent an additional percentage of those incidents that were not captured by the two-way EOT final rule.

Table 1 below contains a compilation of the relevant incidents that FRA

considers to be preventable that have been reported to FRA from 1994 through 1998. The incidents included in this table contain incidents reported to FRA as being caused by one of the following: Brake rigging down or dragging; air hose uncoupled or burst; broken brake pipe or connections; other brake components damaged, worn, broken or disconnected; brake valve malfunction (undesired emergency); brake valve malfunction (stuck brake); hand brake broken or defective; hand brake linkage and/or connections broken or defective. Table 1 also contains incidents reported as being related to brake pipe obstructions and certain brake-related human factor incidents which include: runaway cuts of cars; train handling; and improper use of brakes. FRA believes that various provisions of this final rule have the potential of preventing a certain percentage of the incidents reported as being due to these causes. However, in developing the cost/benefit analysis for this final rule, FRA used a very conservative effectiveness rate of .2 for incidents with these reported causes. The Regulatory Impact Analysis prepared in connection with this final rule provides a detailed discussion of how certain human factor and brake pipe obstruction incidents were utilized when evaluating this rule.

It should be noted that the damage costs noted in Table 1 for the identified incidents are based on the damage to railroad property or equipment. Thus, the damages presented fail to consider the costs associated with the injuries and fatalities involved. These costs are calculated in detail in the Regulatory Impact Analysis prepared in connection with this final rule. The costs presented in Table 1 also do not consider such things as: loss of lading; wreck clearance; track delay; environmental clean-up; removal of damaged equipment; evacuations; or the impact on local traffic patterns. Consequently, the railroad property damages have been multiplied by a factor of 1.5625 in an effort to capture some of these non-reported damages.[1]

TABLE 1.—BRAKE-RELATED INCIDENTS

Year	Number of accidents	Injuries	Fatalities	Damages *
1994	99	24	1	$11,414,346
1995	121	65	0	9,431,582
1996	112	44	3	20,637,986
1997	98	8	0	9,651,569
1998	121	3	0	10,791,626
Total	551	140	4	61,927,107

* Increased by 56.25% to reflect unreported damages.

2. Use of Power Brake Defect Data

A second factor that is considered by FRA, to some extent, in determining the relative condition of the industry in regard to the safety of power brake equipment is the percentage of equipment found with defective brakes during FRA inspections and special projects. As noted in the preceding discussions, the method for calculating and determining the percentage of equipment with defective brakes was a contentious subject within the RSAC Power Brake Working Group prior to the issuance of the NPRM and at the public hearings and meetings conducted subsequent to the issuance of the NPRM. In the NPRM, FRA provided a lengthy discussion regarding the data it had available regarding power brake defect ratios and the limitations regarding the use of such data. *See* 63 FR 48298. In that discussion, FRA explained that data on brake defects is collected by FRA inspectors as they do rail equipment inspections and during special projects conducted under the Safety Assurance and Compliance Program (SACP). The NPRM made clear that the data collected during these activities is not suitable for use in any statistical analysis of brake defects.

In order to perform a statistically valid analysis, either all cars and locomotives must be inspected (prohibitively expensive), or a statistically valid sample must be collected. For the sample to be valid for the purpose of statistical analysis, the sample must be randomly selected so that it will represent the same characteristics as the universe of data. Random samples have several unique characteristics. They are unbiased, meaning that each unit has the same chance of being selected. Random samples are independent, or the selection of one unit has no influence on the selection of other units. Most statistical methods depend on independence and lack of bias. Without a randomized sample design there can be no dependable statistical analysis, and no way to measure sampling error, no matter how the data is modified. Random sampling ''statistically guarantees'' the accuracy of the results.

The sampling method used for regular FRA inspections is not random. It is more of a combination between a *judgement* sample and an opportunity sample. The opportunity sample basically just takes the first sample population that comes along, while the judgement sample is based on ''expert'' opinion. The sampling method used for SACP inspections is also a judgement sample, where FRA is focusing its inspections on a specific safety concern. This method is extremely prone to bias, as FRA is typically investigating known problem areas. Furthermore, some SACP inspections are joint inspections with labor. Consequently, it is unknown whether the final reports reflect only FRA defects, as many of the joint inspections had both AAR and FRA defects recorded.

Neither the regular FRA inspections nor the SACP inspections were designed for random data collection. Although both are very useful to FRA, they were not designed for this purpose and the data should be used carefully. FRA believes that data collected during routine inspections are the most likely data to accurately reflect the condition of the fleet. However, both FRA inspection data and SACP data lack any measuring device, a defect is a defect and no distinction is made between a critical defect versus a minor defect. Furthermore, the estimated correlation coefficients between defects and

[1] AAR surveyed its members and reported that, on average, these other costs constitute an additional 56.25 percent of the reported damages.

accidents were not found to be statistically significant. This does not mean that defects cannot lead to collisions or derailments as the lack of correlation could easily be a result of non-random sampling. Therefore, the data collected both during routine FRA inspections and under SACP cannot be used as a proxy for data collected by means of a random sample for the purpose of statistical analysis. The sample is not random, so no dependable statistical analysis may be performed. Consequently, FRA did not and will not use the data regarding power brake defects for the purpose of conducting any type of statistical analysis.

In the NPRM, FRA provided brake defect ratio's for the years 1993 through 1997 based upon the data contained in its database. *See* 63 FR 48298, Table 2. The average brake defect ratio for this five year period was 3.84 percent. The NPRM also noted that the available SACP data (which focuses on known problem areas) indicated brake defect ratios as high as 35 percent at some locations. FRA stated that the SACP data in all likelihood indicates that there are localized areas of concern and that some railroads have particular yards or operations with persistent problems. The NPRM attempted to make clear that FRA believes that brake defects are in all likelihood higher than that indicated by FRA's database and that the reality of power brake defects lies somewhere between the 3.84 percent represented in FRA's database and the 35 percent found at certain locations. FRA noted that actual power brake defect ratios are probably closer to the percentage reflected in FRA's database because FRA examines almost ½ million freight cars and locomotives annually. Thus, contrary to the assertions of certain commenters, FRA did not assert or contend that the power brake defect ratios represented by its database were an accurate or precise reflection as to the relative condition of the industry. In fact, as evidenced by the preceding discussion, FRA attempted to point out the limited usefulness of the data contained in its database. Furthermore, review of the defect data submitted by the BRC at the technical conference in Walnut Creek, California, as discussed below, appears to support FRA's conclusions regarding power brake defect ratios.

The NPRM made clear that the power brake defect ratios indicated in FRA's database were specifically relied on only to calculate the cost of the requirement to conduct retests on cars found with brakes that are not applied during the performance of the various required brake tests. Power brake defect ratios were not specifically relied on when developing any provision contained in the NPRM or in this final rule. Although power brake defect ratios were considered, they were not used as the basis for any of the provisions proposed in the NPRM or contained in this final rule. They were generally used to aid FRA in identifying problem areas, which in turn helped FRA identify brake issues and practices that needed to be addressed. For example, the existence of high power brake defect ratios at a particular location or on a particular railroad likely indicate the existence of certain practices or procedures that create or contribute to the high defect levels. As is evident from the discussions of the various requirements contained in both the NPRM and in this final rule, FRA considered a massive amount of information when developing this rule. These included accident/incident data; information and data provided in relation to the 1994 NPRM, the RSAC Power Brake Working Group, and the 1998 NPRM as well as FRA's experience in the enforcement of existing regulations and the expertise and knowledge of FRA's field inspectors.

Although the data regarding defect ratios contained in FRA's database has limited usefulness in the context of developing a regulation, the data is very useful to FRA in other ways. The data is useful in measuring a railroad's general compliance level and aids in identifying problem areas or locations. This information aids FRA in allocating its inspections forces and permits FRA to focus its enforcement on locations or issues which are in the greatest need of such scrutiny. By focusing its enforcement in this manner FRA is able to make the best use of its limited resources.

3. Discussion of Concerns Regarding FRA's Collection of Power Brake Defect Data

Although the NPRM and the preceding discussion detail the limitations of using the data collected by FRA regarding power brake defects when developing a regulation, FRA believes that a more detailed discussion of FRA's collection of power brake defect data is needed in order to address the issues raised by various commenters subsequent to the issuance of the NPRM. As noted above, FRA conducted a public meeting on May 27, 1999 in order to address general concerns raised by various parties regarding the accuracy of the brake defect data presented in the NPRM and to provide interested parties the opportunity to develop the issues they generally raised in oral and written comments regarding that data. At this public meeting, representatives of several labor organizations raised issues regarding the accuracy and use of the power brake defect data complied by FRA. These commenters generally allege that the method by which FRA collects defect data results in the underreporting of defects which in turn results in a systematic deflation of power brake defect ratios.

Specific issues raised at this public meeting and in subsequent written comments include: the overreporting of units inspected during FRA inspections; the calculation and deflation of the power brake defect ratio; the inspection procedures used by FRA that tend to exclude certain categories of power brake defects; potential discrepancies in the input data relative to the activity codes from FRA field inspection reports to FRA's database; the performance of power brake inspections by FRA inspectors on cars that are not properly charged or connected to a source of compressed air; FRA's reliance on the railroads for the total number of cars inspected; and the wide variance between FRA inspectors and FRA regions in the number of units inspected, the number of defects reported, and the resulting defect ratios.

In order to understand some of the issues raised, it is necessary to understand how inspection data developed by an FRA inspector are entered into FRA's database. FRA Motive Power & Equipment (MP&E) inspectors conduct inspections of railroad freight equipment pursuant to various parts of the Federal regulations contained in chapter 49 of the Code of Federal Regulations. Principally, these include inspections under the following: Part 215—Freight Car Safety Standards; part 229—Locomotive Safety Standards; part 231—Safety Appliance Standards; and part 232—Power Brakes and Drawbars. When performing an inspection under each of these parts, an FRA inspector will fill out the appropriate inspection form which indicates the number of units inspected under each part as well as the number of defective conditions found on those units. In the context of performing power brake inspections under part 232, an inspection of a car means a unit count of one. When this type of inspection is conducted, inspectors inspect various brake-related car components such as: Foundation brake rigging, air hoses, angle cocks, brake shoes, and, where possible, piston travel. When an inspector performs an inspection of a brake test required under part 232, the unit count for such a test

is the train consist, block of cars, or car being tested. For example, when an inspector observes the performance of an initial terminal brake test, the entire train would constitute one unit count.

Certain labor representatives raised various issues regarding FRA's calculation of power brake defect ratios. Several of these concerns involve the potential overreporting of the number of units inspected which then results in the deflation of power brake defect ratios. One concern addressed the practice of counting a single car or locomotive as a unit count under each of the MP&E regulations that it is inspected under. For example, a freight car could be considered a unit count under part 215, part 231, and part 232 if an FRA inspector were to inspect that freight car under each of those provisions. Thus, one freight car could be represented as three unit counts. It is claimed that this practice inflates the number of units inspected and thus, deflates defect ratios. This concern would be valid if FRA were to attempt to express a defect ratio for combined parts of the CFR. For example, if FRA were to attempt to express an MP&E defect ratio (a combination of parts 215, 229, 231, and 232) then the method by which FRA collects data would result in an inflation of the number of units inspected and the resulting defect ratio would be skewed. For purposes of analysis, FRA's database is constructed so that defect ratios are expressed only in terms of each separate part of the CFR. Therefore, the power brake defect ratios discussed in the NPRM were calculated based solely on the units inspected by FRA under the provisions contained in part 232.

A second concern involves the potential of duplicate inspection reports being submitted by different FRA inspectors when engaged in team inspections. Certain labor representatives allege that FRA inspectors are significantly inflating the number of power brake units being inspected by submitting duplicate reports for the same inspection activity when groups of FRA inspectors perform inspections at the same location. In an effort to investigate this concern, FRA designed a computer program to search for potentially duplicate inspection reports submitted during the years of 1995 through 1998. Table 2 displays the figures regarding power brake inspections conducted by FRA for the years of 1995 through 1998 that is contained in FRA's database.

TABLE 2.—POWER BRAKE INSPECTIONS AND DEFECT RATIOS: 1995 THROUGH 1998*

Calendar year	Power brake units	Power brake defective units	All railroads power brake defect ratios	Class I RRs power brake defect ratios
1995	611,824	24,387	.03986	.0369
1996	646,140	28,795	.04456	.0419
1997	582,685	26,004	.04463	.045
1998	585,663	26,286	.04488	N/A

*__Note__: Class I Railroads Power Brake Defect Ratios column information comes from the Regulatory Impact Analysis (RIA) for the 1998 NPRM on freight power brakes. No defect ratio was used in the report for calendar year 1998 because the RIA was finalized in August of 1998.

In order to identify potential duplicate reports the computer program identified inspection reports in which two or more FRA inspectors were in the same county, on the same day, on the same railroad, and in which at least one unit-count code matched. Table 3 displays the results of this search, showing the number of potential duplicate reports that were submitted from 1995 through 1998 and showing the potential number of over reported units.

TABLE 3.—POTENTIAL DUPLICATE POWER BRAKE INSPECTIONS 1995 THROUGH 1998

Calendar year	Inspection reports with more than one matching unit	Units	Potential duplicate units (half of units)
1995	39	1,965	983
1996	154	12,646	6,323
1997	342	19,482	9,741
1998	182	8,692	4,346

Table 4 and Table 5 display the impact of the potential duplicate reports on the calculation of power brake defect ratios. FRA believes that the data contained in Tables 4 and Table 5 establish that the impact of potential duplicate reports on the defect ratios presented in the NPRM is insignificant when considered in the context of nationwide data.

TABLE 4.—REVISED POWER BRAKE DATA CONSIDERING POTENTIAL DUPLICATE REPORTS 1995 THROUGH 1998

Calendar year	Power brake units	Potential duplicate units	Units minus potential duplicate units	Defective units	Defect ratios after adjusting for potential duplicate units
1995	611,824	983	610,841	24,387	.03992
1996	646,140	6,323	639,817	28,795	.04501
1997	582,685	9,741	572,944	26,004	.04539
1998	585,663	4,346	581,317	26,286	.04522

TABLE 5.—AFFECT OF POTENTIAL DUPLICATE REPORTS ON POWER BRAKE DEFECT RATIOS 1995 THROUGH 1998

Calendar year	Defect ratios before adjustment	Defect ratios after adjustment	Difference
1995	.03986	.03992	.00006
1996	.04456	.04501	.00045
1997	.04463	.04539	.00076
1998	.04488	.04522	.00034

It should be noted that the numbers presented in Tables 3 through Table 5 overstate the actual impact of potential duplicate inspection reports. For the year 1998, FRA conducted an in-depth analysis of the potential duplicate reports found by the computer program. The computer program identified 393 potential duplicate inspection reports for the year 1998. However, included in this grouping were unique inbound inspection reports, outbound inspection reports and split inspection reports. In addition, there were inspection reports from inspectors who worked in the same county, but at different locations. Each of these reports was removed from the 393 potentially duplicate inspection reports identified by the computer program based on a report-by-report analysis of each of the reports by FRA MP&E specialists. This analysis left 182 potential duplicate reports for 1998, which were used to calculate the figures presented in Tables 3 through 5 for 1998. Although these tables note 182 potential duplicate inspection reports involving 8,692 units (4,346 duplicates), a further analysis of the reports by FRA found that only 54 of the inspection reports were actually found to be duplicative. These 54 duplicate inspection reports involved the over-reporting of just 3,073 units rather than the 4,346 units identified in Table 4. As an in-depth analysis was not performed on the potential duplicate inspection reports identified by the computer program for the years of 1995 through 1997, the figures provided for those years in all likelihood greatly overstate the actual number of duplicate claims submitted in each of those years. Thus, the actual impact of duplicate inspection reports is even less than the small percentages indicated in Table 5 above.

Although the impact of duplicate inspection reports is insignificant, FRA believes that a brief discussion of how these duplicate inspection reports happened is necessary in order to assure interested parties that such occurrences are rare and that FRA has taken steps to avoid these inaccuracies. In 1994, FRA had four inspection forms for the Agency's five inspection disciplines. The Operating Practices and Hazardous Materials disciplines shared the same form. FRA also had a Quality Improvement Plan (QIP) daily activity report form to help the Agency track resource allocations, including the amount of time required to perform certain inspections. When ''team inspections'' occurred, one inspector completed the inspection report for the entire team. However, each inspector on the team was also required to complete a separate QIP report to receive credit for the inspection. On January 1, 1995, a newly developed single inspection form (FRA 6180.96) for all disciplines became operational. Furthermore, in May of 1995, FRA discontinued the collection of QIP-time data based on FRA's conclusion that it had adequate information from previous QIP reports regarding the time it takes to conduct various inspections. In addition, the new inspection form incorporated many of the previous QIP codes. In August 1995, FRA converted to a data collection system using personal computers.

After conducting the analysis discussed above, it was determined that 26 FRA MP&E inspectors inadvertently prepared all of the involved duplicate inspection reports. Furthermore, FRA was not aware that the new computer system did not filter out duplicate inspection reports. After becoming aware of these problems based on reports from its field personnel, FRA specifically addressed the issue of inspection reporting at FRA's multi-regional conference conducted in 1998. At this conference, FRA's Office of Safety management provided specific guidance on preparing reports that would eliminate potential duplicate reporting. During this same period, FRA also changed its computer software to give inspectors credit for inspections while at the same time preventing potential duplicate reporting. Furthermore, on March 5, 1999, FRA re-issued reporting procedures designed to prevent duplicate inspection reports when team inspections are conducted. These procedures were issued to all Federal and State inspection personnel and to all FRA Regional Administrators and Deputy Regional Administrators.

Subsequent to the public meeting conducted in May of 1999, FRA made two modifications to the summary data produced by its database in order to clarify the meaning of the data and to avoid misunderstanding by outside parties. The first modification relates to safety appliance inspections conducted under 49 CFR part 231. The summary data previously contained the heading ''SA & PB (cars and locomotives).'' This heading may have caused some confusion because the heading suggests that it applies to both safety appliance and power brake inspections when in reality the data captured under this heading only concerns safety appliance inspections under part 231. This heading has been modified to read ''SA (cars and locomotives)'' to more accurately reflect the information contained under this heading. FRA has also modified the summary data by eliminating the calculation of an MP&E defect ratio. As discussed above, FRA believes that the calculation of a composite MP&E defect ratio is inappropriate based on the way FRA collects the information contained in its database and would result in a deflation of MP&E defect ratios. Therefore, defect ratios will only be presented for each separate MP&E CFR part.

In response to the issue raised regarding FRA's practice of conducting brake inspections under part 232 while cars are not connected to a source of compressed air or not completely charged with air, FRA has developed a separate reporting code for brake inspections conducted in this manner. This reporting code will become effective in mid-2000 and will indicate when brake inspections are conducted on cars or trains that are not charged with compressed air. Although FRA agrees that the most thorough brake inspection is performed when a car or train is charged, a large majority of the brake components on a car can be inspected for abnormalities without the actual application of the air brakes. For example, cut-out air brakes, brake connection pins missing, brake rigging down or dragging, brake shoes worn to the extent that the backing plate comes in contact with the tread of the wheel,

angle cocks missing or broken, retainer valves broken or missing, and air brake piping bent or broken can all be discovered regardless of whether a car or train is charged with air. When FRA inspectors conduct train air brake tests, they inspect all of the components noted above as well as the operation of the train air brakes while under the required air pressures. FRA has conducted inspections of brake equipment in this manner for decades and will continue to conduct brake inspections under part 232 on equipment that is both on and off a source of compressed air. FRA believes that the addition of a code to identify those inspections conducted while equipment is not connected to a source of compressed air will provide a more accurate assessment of defective brake system components.

Two other issues raised by various individuals at the May 27, 1999, public meeting concerned FRA's reliance on railroads to determine the number of cars inspected and the wide disparity between FRA inspectors and regions with regard to the number of units inspected and defects reported. FRA acknowledges that FRA inspectors frequently rely on information provided by the railroad regarding car counts when initially conducting an inspection, which is sometimes higher than the actual number of cars being inspected. However, in most instances FRA inspectors request a copy of the consist prior to finalizing their inspection reports to ensure a proper unit count. FRA has issued guidance to its inspectors to ensure that the unit counts on all inspections are accurate.

Although FRA acknowledges that the number of brake inspections conducted varies somewhat from inspector to inspector and from region to region, FRA contends that these variances are the result of competing priorities and varying workloads within each region. FRA makes every effort to standardize its inspection activities by providing substantial training to each of its inspectors. This training is comprised of both classroom and on-the-job training. Classroom training conducted at least once a year at the Regional or Multi-Regional conferences, and through training provided by General Electric, General Motors-EMD, and Westinghouse Air Brake Company. Many regions also conduct discipline specific conferences with training on new regulations and issues provided by various subject matter experts. On-the-job training is provided through Regional Specialists and journeyman inspectors. These individuals will work one-on-one with the inspectors on the various types of inspections that the inspector is required to conduct. FRA also frequently issues enforcement guidance to its inspectors in the form of technical bulletins in order to ensure consistent enforcement of the regulations.

4. Review of Defect Data Submitted by the Brotherhood of Railway Carmen (BRC)

After issuance of the 1998 NPRM, FRA conducted a technical conference in Walnut Creek, California, on November 23 and 24, 1998. At this technical conference individuals representing the BRC submitted a vast amount of data collected either by its members at various locations or through joint labor and FRA inspection activities conducted at various locations. The data provided by BRC representatives addressed defective equipment found in various trains at seven different locations across the country during various time periods from October of 1997 to November of 1998. The BRC submitted this data in order to establish that the power brake defect ratios developed based on the information contained in FRA's database were inaccurate.

FRA conducted an in-depth review of the data submitted by BRC representatives. Although the BRC attempted to summarize the data for many of the locations addressed, FRA's review of the data discovered that the BRC's summaries counted defects that were not power brake defects, failed to summarize all the data for all the trains covered by the supporting documentation, and double counted some brake defects when calculating the number of defective cars. It should also be noted that approximately 80–90 percent of the defective conditions noted on the supporting documentation merely listed the defective condition as being ''brake shoes.'' This notation does not make clear whether the defective brake shoe was defective under the federal regulations or defective under AAR industry standards. However, in order to assess the data in a manner that is most favorable to the party submitting the data, FRA assumed that all defects noted as ''brake shoes'' were defective under Federal requirements. In conducting its analysis of the data submitted, FRA only considered power brake defects, whereas, BRC's summary data appear to consider other mechanical and safety appliance defects which are not the subject of this proceeding.

Table 6 contains a summary of FRA's in-depth analysis of the data submitted. FRA's analysis determined that the data submitted by the BRC establish a power brake defect ratio of approximately 4.96 percent, which is less than 1 percent higher than the power brake defect ratios developed based on the information contained in FRA's database for the years of 1996 and 1997, discussed in the 1998 NPRM. *See* 63 FR 48298. The analysis of the data submitted by the BRC indicates that some locations and some trains have power brake defect ratios in excess of 11 and 12 percent, which is consistent with the findings made and reported by FRA during various SACP inspections as noted in the preceding discussion and in the 1998 NPRM.

TABLE 6.—ANALYSIS OF DEFECT DATA SUBMITTED BY THE BRC

Location	Total trains inspected	Total cars inspected	Cars with power brake defect	Power brake defect ratio (percent)
North Platte, Nebraska	1,625	150,926	8,136	5.39
Hinkle Yard, Oregon	151	13,455	425	3.15
Oak Island-Newark, New Jersey	13	618	72	11.65
Kansas City, Missouri	180	11,917	159	1.33
Clovis, Alliance, Temple Yards—Texas	16	1,419	41	2.88
Sparks Yard—Sacramento, California	8	781	30	3.84
Various Locations, Mississippi	4	296	37	12.5
Totals	1,997	179,412	8,900	4.96

B. Inspection and Testing Requirements

As noted in the preceding discussions and in the 1998 NPRM, the issues related to the inspection and testing of the brake equipment on freight trains are some of the most complex and sensitive issues with which FRA deals on a daily basis. Consequently, the requirements related to the inspection and testing of freight power brakes must be viewed as the foundation on which the rest of the requirement contained in this final rule are based.

1. Brake Inspections—General

In the 1998 NPRM, FRA fully discussed the information and proposals submitted in response to the 1994 NPRM, as well as the proposals developed as part of the RSAC process. *See* 63 FR 48298–304 (September 9, 1998). Based on its review of that information and those proposals and based upon its experience in the enforcement of the current power brake regulations, FRA provided a detailed discussion as to why those alternatives were not viable models upon which a revision of the freight power brake requirements could be based. *See* 63 FR 48301–304. Rather than reiterate those discussions, FRA refers interested parties to the discussions contained in the 1998 NPRM noted above. In developing the inspection requirements contained in the NPRM, FRA determined that the proposed requirements should closely track the existing inspection requirements and intervals as they have proven themselves effective in ensuring the safety of railroad operations. FRA believed that moderate modifications to the existing requirements were necessary to ensure clarity, eliminate potential loopholes, incorporate current best practices of the industry, and enhance enforcement while providing some flexibility to the railroads to utilize new technologies and recognize contemporary railroad operations.

The current regulations are primarily designed around the following four different types of brake system inspections: Initial terminal; 1,000-mile; intermediate terminal; and brake pipe continuity check. *See* 49 CFR 232.12 and 232.13. These brake system inspections differ in complexity and detail based on the location of the train or on some event that affects the composition of the train. Each of the inspection provisions details specific actions that are to be performed and identifies the items that are to be observed by the person performing the inspection.

The initial terminal inspection described in § 232.12(c)–(j) is intended to be a comprehensive inspection of the brake equipment and is primarily required to be performed at the location where a train is originally assembled. This inspection requires the performance of a leakage test and an in-depth inspection of the brake equipment to ensure that it is properly secure and does not bind or foul. Piston travel must be checked during these inspections and must be adjusted to a specified length if found not to be within a certain range of movement. The brakes must also be inspected to ensure that they apply and release in response to a specified brake pipe reduction and increase. FRA recently issued enforcement guidance to its field inspectors clarifying that both sides of a car must be observed sometime during the inspection process in order to verify the condition of the brake equipment as required when performing an initial terminal inspection.

The current regulations require an intermediate brake inspection at points not more than 1,000 miles apart. These inspections are far more limited than the currently required initial terminal inspections in that the railroad is required only to determine that brake pipe leakage is not excessive, the brakes apply on each car, and the brake rigging is secure and does not bind or foul. *See* 49 CFR 232.12(b). In the 1982 revisions to the power brake rules, FRA extended the distance between these inspections from 500 miles to 1,000 miles.

The existing regulations also mandate the performance of an intermediate terminal brake inspection on all cars added to a train after it leaves its initial terminal, en route to its destination, unless they have been previously given an initial terminal inspection. This inspection requires the performance of a leakage test and verification that the brakes on each car added to the train and the rear car of the train apply and release. *See* 49 CFR 232.13(d). Railroads are permitted to use a gauge or device at the rear of the train to verify changes in brake pipe pressure in lieu of performing an application and release on the rear car. The current regulations also require that if cars that are given an intermediate terminal brake inspection and have not previously been provided an initial terminal inspection and are then added to a train, then the added cars must be given an initial terminal inspection at the next location where facilities are available for performing such an inspection.

The current regulations also require the performance of a brake pipe continuity test whenever minor changes to a train consist occur. This inspection requires that a brake pipe reduction be made and verification that the brakes on the rear car apply and release. Railroads are permitted to use a gauge or device at the rear of the train to verify changes in brake pipe pressure in lieu of visually verifying the rear car application and release. This inspection is to be performed when a locomotive or caboose is changed, when one or more consecutive cars are removed from the train, and when previously tested cars are added to a train.

In the 1998 NPRM, FRA noted that in its opinion railroads have not conducted the excellent initial terminal inspections that were contemplated in 1982, when FRA extended the 500-mile inspection interval to 1,000 miles. FRA also contended that many initial terminal brake inspections are being performed by individuals who are not sufficiently qualified or trained to perform the task. FRA recognized that since 1982 new technology and improved equipment have been developed that allow trains to operate for longer distances with fewer defects. However, the key to achieving this improved capability is to ensure the proper operation and condition of the equipment at the location where the train is initially assembled.

Although FRA agreed that many of the initial terminal inspections conducted by train crews are not of the quality anticipated in 1982 when the inspection interval was increased from 500 miles to 1,000 miles, FRA also conceded that properly trained and qualified train crew personnel can perform certain brake inspections and have been performing such inspections for many years. FRA stated that it did not believe that a reversion to a 500-mile inspection interval restriction on trains inspected by train crews, as sought by some commenters, would adequately address the concerns regarding the safety of those trains and would impose an economic burden on the railroads that could not be justified. In FRA's view, two of the major factors in ensuring the quality of brake inspections are the proper training of the persons performing the inspections and adequate enforcement of the requirements. Therefore, FRA proposed that the current 1,000-mile inspection interval be retained but that general training requirements for persons conducting brake inspections be established. The proposed training requirements included general provisions requiring both classroom and ''hands-on'' training, general testing requirements, and annual refresher training provisions. FRA also proposed that various training records be

maintained by the railroads in order for FRA to determine the basis for a railroad's determination that a particular person is qualified to perform a brake inspection, test, or repair. FRA believed that the proposed general training and recordkeeping requirements would provide some assurances that qualified people were conducting brake system inspections and tests. (See discussion below titled ''Training and Qualification of Personnel.'')

In addition to proposing general training requirements, FRA also noted its intent to enhance and increase its enforcement activities with regard to the performance of the brake inspections and tests eventually finalized in this rule, particularly those performed by train crews. FRA made clear that it would make a concerted effort to focus on the qualifications of train crew members and would strictly scrutinize the method and length of time spent by these individuals in the performance of the required inspections. FRA also committed to focus its inspection activities to ensure that train crews are provided the proper equipment necessary to perform many of the required inspections.

In addition to focusing its enforcement and to aid in that initiative, FRA proposed various clarifications, modernizations, and modifications of the current inspection requirements in order to close what are perceived to be existing loopholes and to incorporate what FRA believed to be the best practices existing in the industry while updating the requirements to recognize existing technology. FRA believed, and many representatives of rail labor and management agreed, that the current inspection requirements are very good for the most part and are sufficient to ensure a high level of safety, but that they need to be strictly enforced, clarified, and updated to recognize existing and new technology. Therefore, as noted above, FRA did not propose an extensive revision of the basic brake inspection intervals or requirements. Rather, FRA proposed a moderate revision of the requirements, with the intent of tightening, expanding, or clarifying those inspection or testing requirements that have created enforcement problems or inconsistencies in the past. FRA recognized some of the technological improvements made in the industry such as the use of two-way EOTs during the brake tests and use of the air flow method of qualifying train air brake systems. FRA also recognized that some trains are capable of moving extended distances between inspections provided that comprehensive inspections are performed at the locations where the trains are originated. (See discussion below titled ''Extended Haul Trains.'')

In order to clarify the requirements regarding where and when various brake inspections and tests were to be performed, FRA proposed modification of the terminology related to the power brake inspection and testing requirements contained in the current regulations, which is generally based on the locations where the inspections and tests must be performed (*e.g.,* ''initial terminal'' and ''intermediate terminal''). Instead, FRA proposed various ''classes'' of inspections based on the duties and type of inspection required, such as: Class I; Class IA; and Class II. This is similar to the approach taken by FRA in the 1994 NPRM and in the final rule on passenger equipment safety standards. *See* 64 FR 25682–83. FRA believed that this type of classification system would avoid some of the confusion that currently arises regarding when and where a certain brake inspection must be performed.

Currently, the brake system inspection and testing requirements are interspersed within §§ 232.12 and 232.13 and are not clearly delineated. Therefore, FRA proposed a reorganization of the major types of brake inspections into separate and distinct sections in order to provide the regulated community with a better understanding as to when and where each inspection or test would be required. Although FRA proposed a change in the terminology used to describe the various power brake inspections and tests, the requirements of these inspections and tests mirrored the current requirements and were not intended to change or modify any of the voluminous case law that had been developed over the years regarding the inspections. Consequently, FRA proposed four different types of brake inspections that were to be performed by freight railroads some time during the operation of the equipment. FRA proposed the terms ''Class I,'' ''Class IA,'' ''Class II,'' and ''Class III'' to identify the four major types of brake inspections required by this proposal.

The proposed Class I brake test, currently known as the ''initial terminal'' test, generally contained the requirements currently contained in § 232.12(a) and (c)–(j). *See* 63 FR 48362–63. The requirements were reorganized to clearly delineate when and how the inspection was to be performed based on current interpretations and comments received since the 1994 NPRM. The requirements were also modified to require written notification that the test was performed and that the notification was to be retained in the train until it reached its destination. The proposed revisions also acknowledged the use of the air flow method for qualifying train brake systems and permitted the use of end-of-train devices in the performance of the test. The proposal also provided some latitude to trains received in interchange that had a pre-tested car or solid block of cars added at the interchange point or that were to be moved less than 20 miles after being received in interchange by permitting these types of trains to continue without the performance of a comprehensive Class I brake test.

The proposed Class IA brake test clarified the requirements for performing 1,000-mile brake inspections currently contained in § 232.12(b). *See* 63 FR 48363. The proposal made clear that the most restrictive car or block of cars in the train would determine when the inspection was to be performed on the entire train. FRA also proposed that railroads designate the locations where these inspections would be conducted and did not permit a change in those designations without 30-day notice to FRA or the occurrence of an emergency situation. The proposed Class II and Class III brake tests essentially clarified the intermediate terminal inspection requirements currently contained in § 232.13(c) and (d) regarding the performance of brake system inspections when cars were added to the train en route or when the train consist was slightly altered en route. *See* 63 FR 48364.

In addition to the modifications and clarifications proposed with regard to the four major types of brake system inspections, FRA's proposal also retained, with clarification and elaboration, the basic inspection requirements related to transfer trains currently contained at § 232.13(e) as well as the requirements for performing brake system inspections using yard air sources currently contained at § 232.12(i). *See* 63 FR 48365. The proposal also retained the requirements related to the inspection and testing of locomotives when used in double heading and helper service currently contained at § 232.15 and proposed additional inspection requirements of locomotives when used in helper service or in distributed power operations to ensure the proper functioning of the brakes on these locomotives as these types of inspections are not adequately addressed in the existing regulation. *See* 63 FR 48365. Furthermore, the proposal recognized that trains, if properly inspected, could safely travel greater

than 1,000 miles between brake inspections. (See discussion below titled ''Extended Haul Trains.'')

FRA received numerous comments in response to the 1998 NPRM from representatives of rail labor and rail management, various private car owners, the NTSB, manufacturers of rail equipment, and one state public utility commission relating to these proposed provisions. These individuals and representatives submitted comments addressing the qualifications of individuals conducting the proposed inspections, the methods by which the proposed inspections are to be conducted, the frequency with which the proposed inspections should be required, and various other specific aspects of the language used in the proposed inspection requirements.

Several labor representatives objected to the proposed change in the names of the specific required inspections. These commenters believe that the proposed new terminology of Class I, Class IA, Class II, and Class III would result in a number of problems including confusion among those individuals responsible for performing the inspections as the existing terminology has been used for decades, imposition of additional training costs on the railroads as workers will need to be reeducated, and the risk of upsetting years of case law dealing with the various inspections.

Certain labor representatives also objected to the language used in connection to the proposed inspections that would permit a qualified person to perform many of the required inspections. Various labor organizations and their representatives reiterated their concerns that such an approach would continue to allow untrained and unqualified train crew personnel to perform the required inspections. These commenters continued to assert that FRA should mandate that carmen, or persons similarly trained and experienced, perform all of the required brake inspections except for the cursory train line continuity inspections covered by the proposed Class III brake test. It is their belief that only carmen possess the necessary training, skill, and experience to properly perform the other brake inspections contained in the proposal. These commenters contend that FRA is ignoring the commitment made by rail management in 1982, when the regulations were revised to permit trains to travel up to 1,000 miles between brake inspections, to conduct high quality inspections at a train's initial terminal. They contend that the 1982 revisions were intended to require that these brake inspections be performed only by carmen. Several labor representatives also contend that since the railroads have failed to live up to the commitment made in 1982, to conduct high quality initial terminal inspections, that FRA should reconsider its proposals to permit trains to travel 1,000 miles or more between brake inspections. These commenters recommended that FRA reduce the inspection interval to 500 miles.

Conversely, representatives of rail management and private car owners suggest that FRA failed to adequately consider the industry's safety record in proposing the inspection requirements. Several of these commenters recommended that FRA reconsider performance standards similar to those provided by the AAR in response to the 1994 NPRM. *See* 63 FR 48300. These individuals assert that based upon the industry's excellent safety record there is no need for the command and control type of regulations proposed in the 1998 NPRM. Several railroad representatives also commented that the proposed training requirements for designating an individual as a qualified person are onerous and not justified in light of the industry's safety record. They contend that the industry's safety record is evidence of the sufficiency of the training currently provided to its inspection forces. (See discussion below regarding the ''Training and Qualification of Personnel.'')

Many railroad and private car owner representatives also contend that there is no justification for continuance of the 1,000-mile inspection requirement. They contend that if a car is properly inspected at its point of origin it can be safely moved to destination and that very few cars are found defective at 1000-mile inspections. As support for these contentions, they cite to various studies, which included: a 1994 study conducted by the Illinois Institute of Technology Research Institute, which concluded that brake shoes could last up to 4,000 miles; a 1993 study conducted by BNSF at Havre, Montana, which found that less than ⅓ of 1 percent of the cars inspected at 1,000 miles had any kind of brake defect; and data submitted in 1985 by the AAR related to cars operating 3,000 miles between brake inspections. These commenters also rely on the fact that Canada eliminated its intermediate brake inspection requirement in 1994. Consequently, these commenters contend that the 1,000-mile inspection serves no useful purpose from a safety standpoint, creates unnecessary delays, and should be eliminated.

Commenters representing certain labor organizations also recommended that FRA establish step-by-step procedures for conducting the proposed inspections which specifically include a requirement that both sides of a train be given a walking inspection during both the set and the release of the brakes. These commenters contend that the language proposed in the 1998 NPRM regarding the inspection of both sides of a train is unclear and creates uncertainty as to how a proper inspection is to be conducted. They further recommend that roll-by inspections of the brake release not be permitted and that a walking inspection of the release be required. They also object to the proposed requirement permitting the use of an end-of-train device in lieu of a visual inspection of the pressure at the rear car in the train or in lieu of a set and release on such car as such a practice does not ensure actual application and release of that rear car.

Representatives of railroads and private car owners also believe that FRA should clarify the method by which certain inspections are to be performed. However, these commenters seek to clarify that both sides of the equipment do not have to be inspected during either the application or release of the brakes when conducting a Class I brake test and that both sides of the equipment do not have to be inspected when conducting Class IA brake tests. They contend that there is no reason to observe both sides of the equipment during either the set or release as long as the brake rigging and equipment is inspected to ensure it is in proper condition prior to or at the same time that the application or release of the brakes is conducted. If the brakes are applied or released on one side of the equipment then, due to the design of the equipment, the brakes on the other side of the equipment will be similarly applied or released in virtually every instance. Therefore, it is contended that there is no justification to require observation of the set and release from each side of the equipment. These commenters also contend that FRA needs to clarify that both sides of the equipment do not need to be observed during the performance of a Class IA inspection. They assert that such a requirement would be contrary to the current 1,000-mile inspection requirements and would increase the burden on railroads when conducting this inspection.

The CAPUC submitted comments on the proposed inspection requirements recommending that each side of the car be inspected during both the application and release of the brakes. This commenter also recommend that FRA

require the proposed Class I brake tests to be performed by individuals designated as ''qualified mechanical inspectors'' pursuant to the proposal. The CAPUC believes that only these individuals possess sufficient knowledge and ability to adequately perform the inspection. The NTSB also submitted comments on the proposed inspection requirements suggesting that FRA modify the requirements regarding the pressure at which trains are tested to require that trains be tested at the pressure at which they will be operated. The NTSB believes that such a requirement would preclude attempts to qualify trains that have excessive leakage by testing them at a pressure that is lower than the train's operating pressure and thus, lower the amount of leakage that exists on the train.

Some labor commenters again objected to FRA's inclusion of the air flow method as an alternative to the leakage test when qualifying a train's brake system. They contend that the air flow method disguises serious leaks and allows greater leakage in a train's brake system than the currently required leakage test. The AAR and other railroad representatives endorsed the allowance of the air flow method as an alternative to the leakage test for qualifying a train's brake system. They believe that the air flow method is superior to the leakage test and is an appropriate alternative for all trains, regardless of length, provided the 15 psi brake pipe gradient is maintained.

Certain labor representatives expressed concern over the proposed provision permitting yard air tests to be conducted at a pressure that is lower than the operating pressure of the train. These commenters suggested that such a practice could permit trains to depart with excess leakage since the required leakage test would be performed at the lower pressure and thus, mask the potential leakage of the train. The AAR and some of its member railroads also expressed concern regarding the proposed requirements related to the performance of brake tests using yard air. These commenters objected to the requirement that brake tests performed with yard air be performed at 80 psi. They recommended that such test be permitted to be performed at 60 psi as currently required because the proposal permits yard and transfer trains to operate at such pressure and that to test at higher pressure creates the potential for overcharge conditions. They also argue the practical difficulties of an 80 psi requirement in that many older yard plants and rental compressors are not capable of supplying 80 psi of air pressure. These commenters further contend that FRA should permit yard air to be connected to other than the front of the consist provided that procedures are taken to prevent overcharge conditions. The commenters also provided recommended language to clarify the calibration requirements for devices and gauges used to conduct yard air brake tests.

Several labor representatives also commented on the proposed written notification requirement related to the performance of Class I brake tests. These commenters supported the written notification requirement and recommended that the information remain with the train if the motive power is changed. One labor organization also recommended that the proposed requirements related to the designation of 1,000-mile inspections are insufficient. This commenter recommended that the designation be filed with FRA and that the designations specifically identify the trains that will be inspected at each location. Representatives of rail management objected to the proposed requirement that locomotive engineers be notified in writing by a person performing the test as to the successful completion of a Class I brake test. These commenters did not object to notifying the locomotive engineer of the results of the test but believe that the notification could be provided orally or electronically by a person with knowledge of the test as long as the locomotive engineer made a record of the notification and necessary information. These commenters also sought clarification of the proposed requirements regarding the designation of locations where 1,000-mile inspections would be conducted. These commenters did not object to the designation requirement provided that it is not required on a train by train basis. They contend that to require that specific trains have 1,000-mile inspections performed at specific locations would create substantial burdens and would eliminate flexibility needed to operate trains in a timely and efficient manner.

The AAR and other railroad commenters also raised concern over the requirement that trains in captive service be required to receive a Class I brake test every 3,000 miles. They recommended that a train of this type that travels in excess of 3,000 miles between cycles be permitted to complete its cycle prior to receiving a Class I brake test. They contend that to require a Class I brake test on these types of cycle trains on a 3,000 mile basis will require the reallocation of manpower and equipment to locations not currently equipped to perform such inspections.

Several railroad representatives also objected to the definition of ''solid block of cars'' contained in the proposal. This definition is important because FRA proposed that if more than a solid block of cars is removed from or added or a train, the entire train would have to receive a Class I brake test. As the proposed definition limits a ''solid block of cars'' to a group of cars that are removed from only one other train and that remain coupled together, these commenters contend that the definition is much more restrictive than the current interpretation of the language and would significantly increase the need to perform Class I brake tests. These commenters contend that the current interpretation of the language permits a ''solid block of cars'' to be made up of cars from several different trains provided the block of cars is added to a train as one unit without triggering the requirement to perform a new initial terminal brake test on the entire train. These commenters also noted that a literal reading of the proposed provisions for when a Class I brake test would be required does not allow a railroad to remove defective equipment without triggering a Class I brake test on the entire train. They contend that this authority needs to be recognized and is currently permitted.

FRA Conclusions. After consideration of the comments submitted and based upon its experience in the enforcement of the current power brake regulations, FRA continues to believe that the general approach to brake inspections contained in the 1998 NPRM represents the most effective method of ensuring the continued safety and proper operation of brake systems currently used in the railroad industry without creating an unnecessary burden to the railroads. Therefore, the final rule is a moderate revision of the current inspection requirements, similar to that proposed, with certain minor changes made to address the comments and recommendations submitted on the NPRM.

The final rule adopts the proposed classifications identifying the various types of brake inspections based on the duties and tasks that are required to be performed. These include: Class I; Class IA; Class II; and Class III brake tests. Contrary to the contentions of some commenters, FRA does not believe that this classification of the brake inspections in any way impacts previous case law regarding the various inspections. Although the final rule changes the terminology used to describe the various brake inspections,

the underlying inspection requirements have remained generally consistent with the existing requirements, and the final rule is not intended to change or modify any of the voluminous case law that has developed over the years regarding the inspections. Furthermore, the final rule retains the monikers that have traditionally been attached to the various inspections so as to limit any confusion that may exist. For example, the section containing the requirements for conducting Class I brake tests is entitled, ''Class I brake test-initial terminal inspection.'' FRA believes that the classifications proposed in the NPRM and retained in this final rule clearly delineate what is required at each inspection, better clarify when each inspection is to be performed, and avoid the potential confusion caused by the terminology used in the present regulations.

As discussed in detail in the 1998 NPRM, FRA continues to believe that the performance standard recommended by the AAR in response to the 1994 NPRM and suggested again by some commenters does not provide a viable method for establishing the frequency of brake inspections. *See* 63 FR 48301–02. The performance standard proposed by the AAR is based upon the number of mechanically-caused accidents per million train miles. Therefore, the standard is based upon the rate of occurrence of accidents—accident history—rather than on a factor that could measure a railroad's performance prior to an accident occurring. The suggested performance standard would also be very difficult to calculate on a railroad-by-railroad basis, and the standard itself is a very subjective factor as many accidents are due to a variety of causes only a part of which may be a mechanical or brake-related cause. Thus, the determination of what constitutes a mechanically-caused accident would be difficult if not impossible to make in some circumstances and would be a determination made by the railroad; thus, opening the potential for data manipulation. FRA also notes that the AAR's performance standard contains certain provisions that are contrary to existing statutory requirements regarding the movement of defective equipment.

The final rule retains the requirement to perform 1,000-mile brake inspections as proposed with a few minor revisions discussed below and in the section-by-section analysis of that section. Although FRA agrees that many of the initial terminal brake inspections currently conducted by train crews and other personnel are not of the quality anticipated in 1982, when the inspection interval was increased from 500 miles to 1,000 miles, FRA continues to believe that properly trained and qualified train crew personnel can perform most of the inspections required by this final rule and have been performing such inspections for many years. Furthermore, FRA continues to believe that a reversion to a 500-mile inspection interval on trains inspected by train crews, as suggested by some commenters, does not address the concerns regarding the safety of these trains and would impose an economic burden on the railroads that cannot be justified. Rather than simply increasing the frequency at which inspections are performed, FRA believes that the proper approach is to enhance the quality of the inspections being performed in order to further improve safety. FRA believes that the training and designation requirements contained in this final rule will increase the quality of the brake inspections being performed by ensuring that those individuals responsible for conducting the inspections are provided adequate and continuing training to properly perform the task. The final rule contains general training provisions which include: classroom and experiential ''hands-on'' training; general testing requirements; and periodic refresher training. The final rule also mandates that training records be maintained by the railroads in order for FRA to ascertain the basis for a railroad's determination that a particular person is considered qualified to perform the inspection or test he or she is assigned. FRA believes these training requirements will provide the necessary assurances that the people conducting the required inspections and tests are qualified.

FRA recognizes that since 1982 new technologies and improved equipment have been developed that allow trains to operate longer distances with fewer defects. The data submitted by AAR, noted above, appears to support this assertion, and FRA does not dispute the potential capability of certain equipment to travel distances in excess of 1,000 miles without becoming defective. However, the capability of the equipment to travel extended distances is contingent on the condition of the equipment when it begins operation and on the nature of the operation in which it is to be engaged. FRA believes that in order for brake equipment to travel extended distances between brake inspections, the condition and planned operation of the equipment must be thoroughly assessed at the beginning of a train's journey through high quality inspections. As noted above, FRA believes that railroads are not conducting high quality initial terminal inspections at many locations because the railroads are utilizing employees who are not sufficiently qualified or trained to perform the inspections. Therefore, FRA believes that the 1,000-mile brake inspection interval continues to be necessary and important to ensure the safe operation of trains inspected by qualified personnel pursuant to this final rule. Furthermore, no trains operated in the United States are currently permitted to travel greater than 1,000 miles between brake inspections. Consequently, FRA is not willing to permit trains to travel in excess of 1,000 miles between brake inspections, except in the limited, controlled situations where data on the equipment can be gathered. (See discussion below titled ''Extended Haul Trains.'') FRA notes that Canada eliminated intermediate inspections in 1994. However, Canada has different inspection requirements than those contained in this final rule and vastly different operating conditions and environments than those prevalent on most American railroads, operating conditions and environments that are more conducive to the inspection regimen imposed by that country.

The final rule also generally retains the proposed provisions detailing the items that must be inspected during the various inspections and the minimum procedures for performing the inspections. Contrary to the assertions of some commenters, FRA believes that the proposed methods of inspection sufficiently detailed how the various inspections were to be performed while providing flexibility for railroads to conduct the inspections in a manner most conducive to their operations. The methods of inspection proposed in the 1998 NPRM incorporated current practices and technical guidance previously issued by FRA. To require that all inspections be performed by walking the train would impose a huge financial and operational burden on the railroads and would ignore the various different methods by which inspections are currently performed and have been performed for years. FRA does not intend to mandate specific methods for how the various inspections are to be performed. FRA believes that each railroad is in the best position to determine the method of inspection that best suits its operations at different locations. FRA has never mandated specific step-by-step procedures for conducting brake inspections but

merely requires that, whichever method is used, it must ensure that all of the components required to be inspected will be so inspected.

The proposed rule made clear that when performing a Class I brake test of a train the inspector must take positions on each side of each car in the train sometime during the inspection process. This provision is retained in the final rule. This is intended to mean that at a minimum both sides of the equipment must be inspected. The provision does not require that both sides be observed during the application or during the release of the brakes. However, at a minimum at least one side of the car must be inspected while the brakes on the car are applied or if the brakes do not apply, while an effort is made to apply the brakes on the car. FRA continues to believe that if the various brake components are inspected to ensure they are properly secure and in proper condition then, due to the design of the equipment, if an application or release is observed from one side it can be assumed that in virtually every case there is an application or release of the brake occurring on the other side of the equipment. The final rule also retains the proposed requirement that the piston travel on each piece of the equipment must be inspected while the brakes are applied. Furthermore, the final rule retains the provision that permits a roll-by inspection of the release of the brake but prohibits the roll-by inspection from being considered an inspection of that side of the equipment.

FRA also finds the comments of AAR and other railroad representatives contending that both sides of the equipment should not be required to be inspected at Class IA brake tests to be lacking. The Class IA brake test basically incorporates the current 1,000-mile brake inspection, which FRA believes requires an inspection of both sides of the equipment during the inspection process. The current 1,000-mile inspection requires that brake rigging be inspected to ensure it is properly secure and does not bind or foul and that the brakes apply on each car in the train. *See* 49 CFR 232.12(b). In order to make these inspections properly, FRA believes that both sides of the equipment must be observed sometime during the inspection process and, to FRA's knowledge, railroads currently conduct these inspections in this manner. Thus, the NPRM and the final rule merely clarify what is required to be performed under the current regulations to properly perform a 1,000-mile inspection. Therefore, contrary to the contentions of certain commenters, retention of this current requirement does not impose any additional burden on the railroads.

The final rule retains the provisions granting railroads the ability to utilize the air flow method (AFM) to qualify a train's brake system in lieu of the traditional leakage test. FRA believes that if a train contains a locomotive equipped with 26L freight locomotive brake equipment and the train is equipped with an EOT device, that train should be allowed to be qualified using the AFM. The AFM of qualifying train air brake systems has been allowed in Canada as an alternative to the leakage test since 1984. In addition, several railroads in the United States have been using the AFM since 1989 when FRA granted the AAR's petition for a waiver of compliance to permit the AFM as an alternative to the leakage test. FRA recognizes the concerns of several labor organization commenters opposing the adoption of the AFM; however, FRA believes these commenters' apprehension is based on their unfamiliarity with the method. As FRA pointed out in the ANPRM, the 1994 NPRM, and the 1998 NPRM, the AFM is a much more comprehensive test than the leakage test. *See* 57 FR 62551, 59 FR 47682–47683, 63 FR 48305–06. The AFM tests the entire brake system just as it is used, with the pressure-maintaining feature cut in. FRA believes the AFM is an effective and reliable alternative method of qualifying train brakes. In the 1998 NPRM, FRA expressed some concern regarding the use of the AFM on short trains. However, based on consideration of the comments received and FRA's experiences in observing the use of the AFM, FRA agrees that the AFM should be permitted as an alternative on any train provided the 15 psi gradient is maintained on the train.

The final rule changes some of the provisions related to the conduct of brake tests utilizing yard air sources that were proposed in the NPRM. Rather than requiring yard air tests to be performed at 80 psi as was proposed, the final rule reduces the required pressure to 60 psi at the end of the consist as is currently required. FRA recognizes that many yard air sources and rental compressors are not capable of producing 80 psi of air pressure. However, to address the concerns raised regarding the inadequacy of conducting a leakage or air flow test at this lower pressure, the final rule includes provisions to require those tests to be conducted at the operating pressure of the train. Thus, if the yard air is not capable of producing the pressure that the final rule requires, then the leakage or air flow test is to be conducted when the locomotives are attached. The final rule also permits the yard air test device to be connected at other than the end of the consist nearest the controlling locomotive, provided that the railroad adopts and complies with written procedures to ensure that overcharge conditions do not occur. Many yards across the country currently conduct the test in this manner, and FRA believes it is necessary to acknowledge the viability of these operations.

The final rule also modifies the notification requirement related to Class I brake tests from that proposed in the NPRM. In the NPRM, FRA proposed that the engineer be informed in writing of the successful completion of the Class I brake test. The intent of this requirement was to ensure that the locomotive engineer was adequately informed of the results of the inspection; however, FRA recognizes that a requirement to provide the information in writing ignores technological advances and operational efficiencies. Consequently, the final rule will permit the notification in whatever format the railroad deems appropriate; provided that the notification contains the proper information and a record of the notification and the requisite information is maintained in the cab of the controlling locomotive. FRA believes these changes are consistent with the intent and purpose of the proposed requirement for written notification and ensure necessary information is relayed to the operator of the train.

FRA also realizes that the proposed requirement for designating locations where Class IA inspections will be performed was somewhat unclear and may have caused confusion. The intent of the requirement was to ensure that FRA was informed of those locations where a railroad intends to perform Class IA brake inspections and that FRA had the information with which to hold the railroad responsible for conducting the inspections at those locations. FRA was not intending to require that a railroad separately identify a specific Class IA inspection location for each train it operates. Consequently, the final rule makes clear that the designation required is for locations where such inspections will be performed and permits deviance from those locations only in emergency situations.

The final rule retains the proposed requirement that unit or cycle trains receive a Class I brake test every 3,000 miles. FRA has added a definition of ''unit train'' and ''cycle train'' to the final rule in order to clarify the applicability of the requirement.

Historically, these trains operate for extended periods of time with only a series of brake inspections similar to Class IA brake inspections. FRA believes that the proposed 3,000-mile limitation is appropriate as it represents the approximate distance that a train would cover when traveling from coast to coast. In addition the 3,000 mile requirement is consistent with the interval for performing Class IA brake tests and would equate to every third inspection being a Class I brake test rather than a Class IA brake test. Furthermore, AAR does not seek a moderate extension of a couple hundred miles so a few trains could complete their cycle, but seeks to extend the distance to more than 4,500 miles in many instances. FRA is not willing to modify the proposed requirement to that extent and believes that the 3,000-mile interval for these types of trains provides sufficient flexibility to the railroads to perform periodic Class I brake tests on these trains in a cost-efficient manner.

The definition of ''solid block of cars'' has been modified from that proposed in the NPRM. Although FRA believes the definition it proposed is consistent with current interpretations and enforcement of the requirement, FRA agrees with some of the commenters that the definition may have been too narrow and does not directly address FRA's primary concern, the block of cars itself. FRA's primary concern is the condition of the block of cars being added to the train especially when the block of cars is made up of cars from more than one train. Thus, the final rule will permit a solid block of cars to be added to a train without triggering a requirement to perform a Class I brake test on the entire train. However, depending on the make-up of that block of cars, certain inspections will have to be performed on that block of cars at the location where it is added to the train.

FRA believes that limits have to be placed on the addition of blocks of cars being added to a train in order to ensure that cars are being inspected in a timely manner and in accordance with the intent of the regulations. Some commenters suggest that a block of cars should be permitted to be added to a train with no inspection other than a continuity test regardless of the number of different trains the cars making up the block came from provided all the cars received a Class I brake test at their point of origin. Other commenters suggest that any number of blocks of cars should be permitted to be added to a train at a single location. FRA believes that to accept either of these positions would be tantamount to eliminating initial terminal and intermediate inspections and would drastically reduce the safety of freight trains being operated across the country. In FRA's view, both of the positions noted above are merely means to circumvent inspections and are akin to a practice known as ''block swapping'' in the mechanical inspection context, a practice that FRA does not permit. In FRA's opinion, the ability to add multiple blocks of cars to a train at one location or add a single block of cars to a train that is composed of cars from numerous different trains without inspecting the cars in those blocks, would essentially allow railroads to assemble new trains without performing any direct inspection of any of the cars in the train. Furthermore, if cars are permitted to be moved in and out of trains at will, the ability to track when and where Class IA brake tests are to be performed on trains will be impossible.

Based on a review of the comments submitted, two other minor modifications to the proposed inspection requirements have been made in this final rule. The final rule contains an additional caveat that will permit the removal of defective equipment at locations where other cars are added or removed without triggering the requirement to perform a Class I brake test on the entire train. FRA currently permits this practice, and it is consistent with the requirements aimed at having defective equipment repaired as quickly as possible. The final rule also modifies the language used in the proposed provisions related to the air pressure at which the brake tests are to be conducted based on a comment submitted by the NTSB. The NTSB noted that the language used by FRA in the NPRM to describe the air pressure settings for conducting the required brake tests would permit some road trains to be tested at a lower pressure than that at which the train would be operated. The NTSB contends that although most road freight trains operate at 90 psi, some road freight trains are operated at 100 psi and the proposal would permit them to be tested at 90 psi. FRA agrees with NTSB's suggestion that a trains brake system should be tested at the pressure at which the train will operate and has modified the language of the final rule accordingly.

2. Extended Haul Trains

In developing the provisions regarding extended haul trains proposed in the 1998 NPRM, FRA relied on several basic beliefs developed from the information and comments submitted and upon its experience in enforcing the current regulations. FRA believed that if a train was properly and thoroughly inspected, with as many defective conditions being eliminated as possible, then the train would be capable of traveling much more than 1,000 miles between brake inspections. By this, FRA contended that not only must the brake system be in quality condition but that the mechanical components of the equipment must be in equally prime condition. FRA believed that as the distance a train is allowed to travel increases, the mechanical condition of the equipment is a key factor in ensuring the proper and safe operation of the train brake system throughout the entire trip. FRA also stated that the best place to ensure the proper conduct of these inspections and to ensure that the train's brake system and mechanical components are in the best condition possible is at a train's point of origin (initial terminal).

In the 1994 NPRM, FRA proposed a set of requirements that had to be met by a railroad in order to move a train up to 1,500 miles without performing additional brake inspections. The requirements included such features as low defect ratios, maintenance programs, and the performance of quality brake and mechanical inspections at a train's point of origin. *See* 59 FR 47735. In the 1998 NPRM, FRA agreed with several commenters that some of the 1994 proposed requirements were overly burdensome and were partially predicated on potentially subjective standards. However, FRA continued to believe that many of the inspection requirements and movement restrictions proposed in 1994 were valid conditions that should be met in order to operate trains for extended distances between brake inspections. These included: the performance of a quality, in-depth brake inspection by a highly qualified inspector; the performance of a quality mechanical inspection by a person qualified under 49 CFR 215.11; and a restriction on the number of set-outs and pick-ups occurring en route. FRA also believed that these extended haul trains had to be closely monitored to ensure that both the brake system and mechanical components remain safely intact throughout the train's journey.

In the 1998 NPRM, FRA proposed that certain designated trains be permitted to move up to 1,500 miles between brake and mechanical inspections provided the railroad met various inspection and monitoring requirements. *See* 63 FR 48343, 48364–65. As no trains were currently permitted to travel in excess of 1,000 miles between inspections, FRA was not willing to propose more than

1,500 miles between such inspections until appropriate data is developed that establish that equipment moved under the proposed criteria remains in proper condition throughout the train's trip. FRA believed that the proposed provision requiring the performance of an inbound inspection at destination or at 1,500 miles and the requirement that carriers maintain records of all defective conditions discovered on these trains would create the bases for developing such data.

In order to ensure the accuracy of the data as well as ensure the proper and safe operation of these extended haul trains, FRA also proposed that the trains have 100 percent operative brakes and contain no cars with mechanical defects at their initial terminal point and at the time of departure from the 1,500-mile point, if moving an additional 1,500 miles from that location between brake inspections. FRA further proposed that these trains not conduct any pick-ups or set-outs en route, except for the removal of defective equipment, in order to minimize the disruptions made to the integrity of the train's brake system and reduce mechanical damage that might occur during switching operations. In addition, as there was no reliable tracking system currently available to FRA to ensure that cars added to the train en route have been inspected in accordance with the proposed requirements, FRA believed that the number of cars added to these trains had to be limited.

As noted earlier in the discussion, FRA believed that in order for a train to be permitted to travel 1,500 miles between inspections, the train must receive inspections that ensure the optimum condition of both the brake system and the mechanical components at the location where the train originates. In order to ensure that quality inspections were performed, FRA proposed that they be performed by highly qualified and experienced inspectors. As FRA intended that the proposed Class I brake test performed on these trains at their initial terminal be as in-depth and comprehensive as possible, FRA believed that the inspections should be performed by individuals possessing the knowledge not only to identify and detect a defective condition in all of the brake equipment required to be inspected, but also to possess the basic knowledge to recognize the interrelational workings of the equipment and the ability to trouble-shoot and repair the equipment. Therefore, FRA proposed the term ''qualified mechanical inspector'' to identify and describe those individuals it believed would possess the necessary knowledge and experience to perform the proposed Class I brake tests on these extended haul trains.

In the 1998 NPRM, a ''qualified mechanical inspector'' was defined as a person with training or instruction in the troubleshooting, inspection, testing, maintenance, or repair of the specific train brake systems the person is assigned responsibility and whose primary responsibilities include work generally consistent with those functions. (See § 232.5 of the section-by-section analysis for a more detailed discussion of ''qualified mechanical inspector.'') FRA also proposed that these same highly qualified inspectors be the type of individuals performing the proposed inbound inspection on these extended haul trains in order to ensure that all defective conditions are identified at the train's destination or 1,500-mile location. Similarly, FRA proposed that all of the mechanical inspections required to be performed on these trains be conducted by inspectors designated pursuant to 49 CFR 215.11 in order to ensure that all mechanical components are in proper condition prior to the train's departure.

The AAR and various private car owners submitted a number of comments objecting to the proposed requirements regarding extended haul trains contained in the 1998 NPRM. These commenters believe that the 1,500-mile limitation on the movement of these trains between brake inspections is insufficient considering the restrictions placed on the trains. They recommend that these trains be permitted to operate to its destination or at a minimum be permitted 2,000 miles between brake inspections. They contend that the 1,500-mile limitation results in little or no benefit to the railroads because in order to take advantage of the flexibility provided, railroads would have to establish new facilities and add more manpower at 1,500-mile points to conduct the more stringent inspections required at those locations. They contend that a limitation at the 2,000-mile point would be logically consistent with existing inspection requirements, based on 1,000-mile increments, and would allow a greater number of trains to utilize the provisions because railroads could use existing facilities and manpower. They recommend that FRA reconsider the estimates provided regarding the benefits derived from the extended haul train provisions, claiming that the benefits estimated in the NPRM's Regulatory Impact Analysis are overstated. Several private car owners also suggested that even if FRA were not to extend the proposed distance for the entire industry, it should allow certain private car owners greater distances due to their superior safety record and maintenance practices.

Many of these same commenters also object to the proposed requirement that extended haul trains not be permitted to make any pick-ups or set-outs en route. These commenters contend that this restriction severely limits the actual flexibility of the proposal. They assert that the prohibition on pick-ups and set-outs would eliminate nearly one-half of the trains that could potentially be operated under the proposed provisions. Several commenters also objected to the proposed notification requirements for extended haul trains. These commenters state that the proposed provision requiring advance notification to FRA of the trains to be operated under the extended haul provision would seriously limit the number of trains utilizing the provisions as many trains are unscheduled with unknown train symbols and would be excluded. They recommend that the notification requirements be reduced in some manner to allow unscheduled trains to be identified as extended haul trains. One commenter also objects to the proposed requirement that extended haul trains not depart their initial terminals with any part 215 defects entrained. This commenter asserts that there was no rationale for this restriction and that it merely creates an additional burden for railroads.

Several rail labor representatives also object to the proposed provisions permitting trains to be operated as extended haul trains; however, these commenters oppose allowing any train to operate more than 1,000 miles between brake inspections. These commenters contend that when the distance between intermediate brake inspections was increased in 1982, the railroads made a commitment to conduct quality initial terminal brake inspections in exchange for the increased mileage, but that has not occurred and FRA should not provide the railroads with an increase in mileage when the previous agreement has not been honored. They contend that the proposed extension would merely allow defective equipment to be moved further distances without repair. They further contend that the proposed increase in distance between brake tests is not justified from a safety standpoint and, thus, violates 49 U.S.C. 20302(d)(2), which permits a change in the existing power brake regulations ''only for the purpose of achieving safety.'' These commenters oppose any extension in the distance between brake inspections unless stringent

requirements are placed on the trains, one such requirement being that carmen or similarly trained individuals perform all the inspections and tests required to be performed on the trains. They also contend that the proposed standard for revoking a railroad's ability to designate extended haul trains is too high.

FRA Conclusions. FRA continues to believe that if a train is properly and thoroughly inspected, with as many defective conditions being eliminated as possible, then the train is capable of traveling much greater than 1,000 miles between brake inspections. Therefore, the final rule retains the provisions permitting railroads to designate trains as extended haul trains and allowing such trains to be operated up to 1,500 miles between brake inspections. Although FRA recognizes that retention of the 1,500-mile limitation may limit the utility of the provision on some railroads, FRA is not willing to increase the proposed mileage restriction at this time. Currently, no train is permitted to travel more than 1,000 miles without receiving an intermediate brake inspection. Therefore, FRA does not believe it would be prudent to immediately double or triple the currently allowed distance without evaluating the safety and operational effects of an incremental increase in the distance. Consequently, until sufficient information and data are collected on trains operating under the provisions proposed in the NPRM and retained in this final rule, FRA is not willing to permit trains to travel the distances suggested by some commenters without additional brake inspections. FRA continues to believe that the requirement for performing inbound inspections and the requirement to maintain records of all defective conditions discovered on these trains provides the basis for developing the information and data necessary to determine the viability of allowing greater distances between brake inspections.

After consideration of the comments submitted, FRA agrees that the benefits estimated in the NPRM in association with the extended haul provisions may have been overstated. FRA realizes that the retention of the 1,500-mile limitation may eliminate certain trains from being operated pursuant to the extended haul provisions and reduce the benefits estimated at the NPRM stage of the proceeding. (See detailed discussion in the Regulatory Impact Analysis portion of the preamble below.) However, in order to increase the viability of the extended haul provisions, the final rule provides some flexibility for designating extended haul trains and allows for the limited pick-up and set-out of equipment.

Several commenters noted that the proposed provisions regarding the advance designation of extended haul trains would prohibit certain unscheduled trains from being operated as extended haul trains. In an effort to provide some flexibility in this area, the final rule has been modified to allow railroads to designate certain locations as locations where extended haul trains will be initiated and requires railroads to describe those trains that will be so operated rather than requiring specific identification of every train. FRA believes this modification will allow railroads to capture some of their unscheduled trains by identifying the trains by the locations where they are initiated.

The final rule will also permit extended haul trains to set out cars at one location or to pick up cars, or both, at the same or another location. This modification will provide railroads the flexibility to set-out a block of cars at one location and pick up a block of cars at another location. FRA believes that this limited ability provides the railroads with some flexibility to move equipment efficiently while minimizing the disruptions made to the train's brake system and ensuring that cars added to such trains can be adequately tracked and inspected. The final rule makes clear that any cars added to extended haul trains must be inspected in the same manner as the cars at the train's initial terminal. The final rule also makes clear that any car removed from the train must be inspected in the same manner as a car at the train's point of destination or 1,500-mile location.

Certain commenters have portrayed the provisions related to extended haul trains as merely being an extension of the current intermediate inspection distances. FRA objects to such a characterization. In FRA's view, the extended haul provisions contained in the NPRM and retained in this final rule constitute a completely new inspection regimen. The provisions related to the operation of extended haul trains contain stringent inspection requirements, both brake and mechanical, by highly qualified inspectors and establish stringent requirements whenever cars are added to or removed from such trains. The extended haul train requirements also contain a means to assess the safety of such operations by requiring that records be maintained of the defective conditions that develop on these trains while en route. Consequently, FRA believes that the requirements related to extended haul trains not only ensure the safe operation of the trains operated under them, but actually increase the safety of such operations over that which is provided in the current regulations.

3. Charging of Air Brake System

Present regulations for air brake testing basically require that cars that have previously been tested in accordance with the regulations either ''be kept charged until road motive power is attached'' or be retested. *See* 49 CFR 232.12(i). The current regulations also require the performance of an initial terminal brake test ''where the train consist is changed other than by adding or removing a solid block of cars, and the train brake system remains charged. * * *'' *See* 49 CFR 232.12(a)(ii). Based on longstanding administrative interpretation and practice, FRA currently presumes that a brake system is no longer adequately charged if disconnected from the charging device (supply of pressurized air) for more than two hours before coupling or recoupling of locomotives; otherwise, retesting is required.

In the 1994 NPRM, FRA proposed to permit trains to be removed from a continuous source of compressed air for up to four hours without requiring the re-performance of a comprehensive brake inspection. FRA received very few comments that directly addressed the safety implications of this proposal; thus, FRA proposed the four-hour time limitation in the 1998 NPRM. In the 1998 NPRM, FRA agreed that its longstanding administrative interpretation, that requires the retesting of cars disconnected from a charging device for longer than two hours, was established prior to the development of new equipment that has greatly reduced leakage problems, such as welded brake piping and fittings and ferrule-clamped air hoses. However, contrary to several railroads' assertions, FRA did not believe that cars should be allowed to be off air for extended periods of time without being retested. FRA believed that the longer cars sit without air attached, the greater the chances were that the integrity of the brake system would be compromised. Consequently, based on today's equipment, operating practices, and overriding safety concerns, FRA proposed that cars should not be disconnected from a continuous supply of pressurized air for longer than four hours without being retested. FRA also proposed that the source of compressed air must be sufficient to maintain the integrity of the brake system. Consequently, FRA proposed that the source of compressed

air be maintained at a minimum level of 60 psi.

The AAR and several other parties commented that there is no reason to assume that once a train is charged and tested and then left standing without being provided with a source of compressed air that the brake system would become defective. These commenters assert that leaving equipment connected to a source of compressed air does nothing to ensure proper performance of the brake system, does not prevent vandalism, and does not prevent leakage due to adverse weather conditions. These parties suggest that leakage on standing trains has been greatly reduced through the use of welded brake piping and fittings and ferrule-clamped air hoses. These commenters believe that FRA's current interpretation of allowing trains to sit without air for only two hours is from an era when this new equipment was not used. They also contend that FRA's current interpretation and the proposed four-hour limitation costs the industry money, fuel, and time and creates pollution because trains must either be reinspected or left with a locomotive attached and idling in order to avoid performing a full Class I brake test. They further contend that the proposed four-hour rule exposes employees to various safety hazards due to the employees being required to perform inspections at locations that are not designed or equipped for such activity.

The AAR recommends that the proposed four-hour limitation be eliminated for the reasons noted above. They also noted that the Canadian rules do not contain an off-air requirement and that in Canada if cars are off air for any length of time, only a set-and-release continuity test is required. As an alternative to eliminating the off-air requirement completely, the AAR suggests that FRA adopt requirements which would allow cars to be removed from a source of compressed air for up to 48 hours without a car-by-car reinspection. They recommend that cars only be required to receive a continuity test when they have been off a source of compressed air for more than fours hours but less than 48 hours and that no retesting occur if equipment is off air for less than four hours.

Representatives of rail labor objected to the proposed increase in the amount of time that equipment could be removed from a source of compressed air. These commenters believe that the existing two-hour limitation is reasonable. Most of these commenters expressed concern for the integrity of the brake system if a consist were left standing for longer than two hours. These concerns were aimed at the effect that climate might have on the equipment and the increased possibility of vandalism to the equipment if consists or equipment were left off air for longer periods.

FRA Conclusions. The final rule retains the proposed requirement that equipment removed from a source of compressed air for longer than four hours be reinspected. FRA believes that this requirement is necessary to ensure not only the integrity of the brake system on equipment but to ensure that inspections are performed on equipment in a timely and predictable manner. FRA tends to agree that the amount of time equipment is left off a source of compressed air is not directly related to the operation of the brake system on that equipment. However, FRA does believe that in certain circumstances the length of time that equipment is removed from a source of compressed air can impact the integrity and operation of the brake system on a vehicle or train. Particularly in cold weather situations where freeze-ups in train brake systems can occur or in areas where the potential for vandalism is high due to the location where equipment is left standing. Moreover, FRA believes that the four-hour limitation is consistent with the intent of the existing regulations and is intended to ensure that equipment is regularly inspected.

The commenters objecting to the four-hour limitation proposed in the NPRM and retained in this final rule have ignored the intent and purpose of the existing two-hour allowance permitted by longstanding administrative interpretation. As discussed above, the existing power brake regulations, adopted by Congress in 1958, are based on the premise that if a train or equipment does not remain charged the equipment is to be retested. There is no provision in the existing regulations for allowing equipment to be removed from a source of compressed air for any length of time, such allowance was granted only through administrative interpretation. The original intent of the currently existing two-hour interpretation, which permits equipment to remain off-air for up to two-hours without being retested, was to allow trains to pick up or remove cars from their consists while en route without requiring a retest of the entire train. The two-hour limit was based on the amount of time it would take a train to make a switching move while en route. Thus, the current application of the two-hour rule to any and all equipment left off a source of compressed air is somewhat counter to the original intent of the interpretation when it was provided.

Although FRA recognizes that it has acquiesced and endorsed the expansion of the two-hour rule to all equipment, FRA believes that the underlying intent of the existing regulations must be recognized and maintained. The doubling of the existing two-hour interpretation to four hours is based on the fact that the average time needed for many trains to perform the switching they conduct while en route has increased. Thus, FRA's intent when proposing an expansion of the two-hour rule was not to alter the basic tenet that equipment should be retested when it is removed from a source of compressed air for any lengthy period of time. FRA believes that the four-hour allowance provided by this final rule gives the railroads flexibility to perform switching operations while trains are en route and provides flexibility to efficiently move cars from one train to another when necessary, yet retains the concept that equipment be retested when left disconnected from a source of compressed air for longer periods of time.

FRA further believes that a limitation on the amount of time that equipment may be off air is necessary for ensuring that equipment is inspected in a timely and predictable manner. If no time limit were imposed or if 48 hours were permitted, as suggested by some commenters, equipment could lawfully sit for days at various locations while en route to its destination and be switched in and out of numerous trains without ever being reinspected. Such an approach would drastically reduce the number of times that the brake systems on such equipment would ever be given a visual inspection from what is currently required and, in FRA's view, would seriously degrade the safety of the trains operating with such equipment in its consist. Furthermore, if equipment were allowed to be off-air for an excessive amount of time, it would be virtually impossible for FRA to ensure that equipment is being properly retested as it would be extremely difficult for FRA to determine how long a particular piece of equipment was disconnected from a source of compressed air. In order to make such a determination, FRA would have to maintain observation of the equipment for days at a time. Consequently, the final rule retains the proposed four-hour limit on the amount of time equipment can be disconnected from a source of compressed air as it maintains current levels of safety and provides an enforceable and verifiable time limit that FRA believes provides the railroads

some additional benefit over what is currently required both in terms of operational efficiency and cost savings.

4. Retesting of Brakes

In the 1998 NPRM, FRA attempted to clarify language contained in the current regulation which requires that the brakes ''apply.'' *See* 49 CFR 232.12(b), 232.12(d), 232.13(d), and 232.13(e). The current language has been misinterpreted by some to mean that if the piston applies in response to a command from a controlling locomotive or yard test device, and releases before the release signal is given, the brake system on that car is in compliance with the regulation because the brake simply applied. The intent of the regulation has always been that the brakes apply and remain applied until the release signal is initiated from the controlling locomotive or yard test device. Therefore, clarifying language was added to the proposed inspection requirements to eliminate all doubt as to what is required. In the 1998 NPRM, FRA made clear that the brakes on a car must remain applied until the appropriate release signal is given. The proposal required that cars with brakes that fail to remain applied either be removed from the train or repaired in the train and retested, and the proposal provided specific requirements for performing a retest on such equipment.

FRA recognized that some defective train air brake conditions found when performing a train air brake test, which may cause insufficient application of the brakes on a piece of equipment, are of such a nature that they can be quickly repaired in the train. For example, a brake connection pin might be missing, a slack adjuster might be disconnected, or some other minor part of the brake system might be defective. FRA realized that to mandate that equipment with these types of obvious defective conditions be removed from the train would potentially impose a tremendous burden on the railroads. Therefore, FRA sought to provide some relief to railroads by permitting cars with obvious brake defects to be repaired and retested while remaining in the train. However, FRA also believed that some consistency and guidance had to be provided regarding the performance of a retest on a car's brake system. Consequently, FRA proposed that the retesting of a car had to be conducted from the controlling locomotive or head end of the consist if a car is repaired in a train. Furthermore, FRA proposed that if a retest is conducted the brakes on the retested car must remain applied for a minimum of five (5) minutes. The proposed five-minute requirement was based on the leakage parameters established for locomotives contained at § 229.59(c).

The AAR and several other commenters object to the parameters contained in the proposed retesting provisions. Specifically, these commenters object to three of the requirements contained in the proposed retest provision, these include: the requirement that only cars with an obvious defect be retested, the requirement that the brakes remain applied for five minutes, and the requirement that the retest be conducted from the controlling locomotive or the head of the consist. These commenters contend that there is no reason to limit the retest provision to cars with readily identifiable defects. They claim that there are a number of conditions which might cause a car's brakes not to apply that are not readily identifiable thus, the retest may identify the problem and allow it to be repaired, or the reason for a no-set is unknown but the brakes operate properly upon being retested.

These commenters also believe that the proposed requirement to have the brakes remain applied for five minutes is impractical and unnecessary. They assert that it is only necessary to have the brakes remain applied for the period of time it takes an inspector to perform an inspection of the brakes and that it is impractical to require an employee to watch each retested car for five minutes. They also contend that FRA's reliance on the five-minute requirement related to the testing of locomotive brake cylinder leakage contained in § 229.59 is misplaced. They assert that there is no parallel between determining the brake cylinder leakage on a locomotive and the testing of the brakes on a freight car. One commenter suggests that a one-minute application is a sufficient period to ensure the proper operation of a car's brakes.

These commenters also object to the proposed requirement that the retest be conducted from the controlling locomotive or the head end of the consist. They contend that there is no safety hazard in performing the test with a test device positioned at one end of the car being retested. They assert that such a procedure would replicate the natural gradient of the train and, thus, avoid the possibility of overcharging the brake system, and would better facilitate retesting.

Representatives of rail labor generally supported the proposed retest provisions. These commenters did assert that any retest should be conducted from the head end of the consist or from the controlling locomotive. They claim that to perform the test from other than that location would provide no assurance that the brakes would apply in response to a brake pipe reduction from the controlling locomotive.

FRA Conclusions. FRA agrees that the proposed provisions regarding the retesting of cars may have been overly restrictive and is modifying the final rule based on FRA's review of the comments and recommendations submitted. The final rule has been modified to permit the retesting of any car the brakes of which were found not to be applied during a required inspection. FRA agrees that there are several circumstances that could occur where the reason for the failure of the brakes to apply is not readily apparent. FRA believes that permitting a retest on any car found not applying will not adversely affect safety since the car will be required to pass the retest in order to remain in the train or be handled for necessary repair.

The final rule also modifies the proposed provision that requires a retested car's brakes to remain applied for five minutes. FRA agrees that its reliance on the five-minute requirement applicable to the testing of locomotive brake cylinder leakage is not appropriate. However, rather than insert a subjective requirement for how long the brakes should remain applied, as suggested by some commenters, FRA believes that a definite time period should be established to ensure consistency in the performance of these retests. Thus, the final rule requires that the brakes on a retested car remain applied for at least three minutes. FRA believes that three minutes is consistent with the amount of time that it would take an individual to conduct a complete inspection of the retested car's brakes. The three minutes is based on the generally accepted period of one and one-half minutes it would take to perform a walking inspection on each side of an average size freight car. Requiring the brakes to remain applied for a period of at least three minutes also provides FRA with sufficient assurances that the brakes are operating properly and will remain applied for the duration of any brake application required during the train's journey.

The final rule also modifies the proposed requirement that the retest be conducted from the controlling locomotive or the head of the consist by permitting the retest to be conducted with a suitable test device positioned at one end of the car or cars being retested. FRA agrees that there is little or no safety rationale for requiring the retest to be performed from the controlling locomotive or head of the consist. Some

commenters argue that if the retest is not conducted from the controlling locomotive, then there are no assurances that the brakes will apply in response to a brake reduction from the controlling locomotive. FRA finds that this argument ignores the various methods by which cars may be tested and assembled when air brake tests are conducted using yard air sources. FRA currently allows and this final rule continues to allow cars to be tested with yard test plants and allows such cars to be added to trains without requiring that each car be inspected to ensure it operates in response to the controlling locomotive.

One potential safety hazard with allowing cars to be retested with a device at the car is the potential for injury to the employees responsible for separating the train line between the charged cars. The train line between the car being retested and the car it is coupled to would have to be separated to perform the retest with a device. In many cases this train line will be under pressure at the time of the separation and could cause injury to the person separating the train line if caution is not used. The final rule recognizes this potential safety concern and requires that the compressed air in a car to be retested must be depleted prior to separating the air hoses and conducting the retest.

C. Movement of Equipment With Defective Brakes

The current regulations do not contain requirements pertaining to the movement of equipment with defective power brakes. The movement of equipment with these types of defects is currently controlled by a specific statutory provision originally enacted in 1910, and later amended which states:

> (a) GENERAL.—A vehicle that is equipped in compliance with this chapter whose equipment becomes defective or insecure nevertheless may be moved when necessary to make repairs, without a penalty being imposed under section 21302 of this title, from the place at which the defect or insecurity was first discovered to the *nearest available place at which the repairs can be made*—
>
> (1) On the railroad line on which the defect or insecurity was discovered; or
>
> (2) At the option of a connecting railroad carrier, on the railroad line of the connecting carrier, if not farther than the place of repair described in clause (1) of this subsection.
>
> 49 U.S.C. 20303(a) (emphasis added).

Although there is no limit contained in 49 U.S.C. 20303 as to the number of cars with defective equipment that may be hauled in a train, FRA has a longstanding interpretation which requires that, at a minimum, 85 percent of the cars in a train have operative brakes. FRA bases this interpretation on another statutory requirement which permits a railroad to use a train only if ''at least 50 percent of the vehicles in the train are equipped with power or train brakes and the engineer is using the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in a train.'' 49 U.S.C. 20302(a)(5)(B). As originally enacted in 1903, section 20302 also granted the Interstate Commerce Commission (ICC) the authority to increase this percentage, and in 1910 the ICC issued an order increasing the minimum percentage to 85 percent. *See* 49 CFR 232.1, which codified the ICC order.

As virtually all freight cars are presently equipped with power brakes and are operated on an associated train line, the statutory requirement is in essence a requirement that 100 percent of the cars in a train have operative power brakes, unless being hauled for repairs pursuant to 49 U.S.C. 20303. Consequently, FRA currently requires that equipment with defective or inoperative air brakes makeup no more than 15 percent of the train and that if it is necessary to move the equipment from where the railroad first discovered it to be defective, the defective equipment be moved no farther than the nearest place on the railroad's line where the necessary repairs can be made or, at the option of the receiving carrier, to a location that is no farther than the location where the repairs could have been performed on the delivering line.

In addition to the general requirements relating to the movement of equipment with defective safety appliances, FRA currently requires 100-percent operative brakes on a train departing its initial terminal. The requirement for 100 percent at the initial terminal has been a standard by which the railroad industry has operated for decades and one which FRA and its predecessor agency, the Interstate Commerce Commission, have endorsed since the adoption of the power brake regulations. The requirement is founded on Congress' mandate that the ICC incorporate into the federal rail safety regulations the AAR's rules, standards, and instructions as of April 11, 1958, regarding the installation, inspection, maintenance, and repair of train brakes. In 1958, Congress amended a provision of the Safety Appliance Acts, then codified at 45 U.S.C. 9, by incorporating the inspection requirements of the AAR into the statute and permitting their change only for the purpose of achieving safety.[3] Based on a review of the legislative history surrounding that amendment, FRA believes it is clear that Congress interpreted the AAR standards as requiring 100 percent operative brakes on all trains prior to departure from an initial terminal. As the current regulations regarding the performance of an initial terminal inspection contained at 49 CFR 232.12(c)-(j) were basically an adoption of the AAR inspection and testing standards as they existed in 1958, FRA believes that the current regulations are intended and do require 100 percent operative brakes at initial terminals.

In developing the 1998 NPRM, FRA considered the various proposals discussed in the RSAC Working Group and the numerous comments provided subsequent to the issuance of the 1994 NPRM. A discussion of those comments and proposals was provided in the 1998 NPRM and will not be reiterated here. *See* 63 FR 48308–310. It is clear from that discussion that many of the proposals received by FRA since the issuance of the 1994 NPRM were in direct conflict with various statutory requirements related to the movement of equipment with defective brakes. As the RSAC Working Group was unable to reach a consensus on the inspection, testing, and maintenance requirements for freight train brake systems, FRA was not willing or able to propose provisions regarding the movement of equipment with defective brakes that would be contrary to existing statutory mandates. The 1998 NPRM contained proposals regarding the tagging of defective equipment, the placement of defective equipment in a train, and a method for consistently calculating the percentage of operative brakes on a train. Therefore, in addition to being consistent with the statutory requirements, the proposed requirements ensured the safe and proper movement of defective equipment and clarified the duties imposed on a railroad when moving such equipment.

FRA proposed that all cars or locomotives found with defective or inoperative brake equipment be tagged as bad ordered with a designation of the location where the necessary repairs

[3] In 1994, Congress revised, recodified, and enacted without substantive change, the federal railroad safety laws. Simultaneously, the then existing general and permanent federal railroad safety laws were repealed. 45 U.S.C. 9 of the Safety Appliance Acts is currently codified at 49 U.S.C. 20301 and 20302. The reference to the AAR rules, standards, and instructions was removed during the recodification as executed. *See* Pub. L. 103–272 (July 5, 1994) and H.R. Rep. No. 103–180, at 94 (1993).

would be effectuated. FRA attempted to expressly clarify the requirement that equipment with defective brakes not depart from, or be moved beyond, a location where the necessary repairs to the equipment could be performed. The 1998 proposal made clear that if a car or locomotive is found with defective brakes during any of the proposed brake inspections or while the piece of equipment is en route and the location where the defective equipment is discovered is a place where repairs of the type needed can be performed, then that car or locomotive may not be moved from that location until the necessary repairs are effectuated. However, if repairs to the defective condition cannot be performed at the location where the defect is discovered, or should have been discovered, the proposal made clear that the railroad is permitted to move the equipment with the defective condition only to the nearest location where the necessary repairs can be performed.

The preamble to the 1998 NPRM contained a lengthy discussion regarding FRA's views as to what constitutes the nearest location where the necessary repairs can be performed. *See* 63 FR 48309. In that discussion, FRA noted that its previous proposals regarding the use of mobile repair trucks and when locations serviced by those trucks would be considered locations where necessary repairs could be effectuated did not sufficiently address the issue and might lead to undesired consequences. Rather than attempt to develop a standard applicable to all situations, which FRA did not believe could be accomplished at the time, FRA intended to approach the issue of what constitutes the nearest location where necessary repairs could be made based on a case-by-case analysis of each situation. FRA noted that in making these determinations both the railroad as well as FRA's inspectors must conduct a multi-factor analysis based on the facts of each case. In the preamble, FRA provided a broad discussion, based on existing case law, setting out general guidelines and factors that should be considered when determining whether a particular location is a location where necessary repairs can be made or whether a location is the nearest location where the necessary repairs can be effectuated. *See* 63 FR 48309.

FRA also proposed continuation of the requirement to have 100 percent operative brakes on a train at its point of origin (initial terminal). FRA noted that this has been a requirement in the railroad industry for decades and that it was not only wise from a safety standpoint, as it ensures the proper operation of a train's brake system at least once during its life, but it also sets the proper tone for what FRA expects to be accomplished at these locations. Furthermore, requiring 100 percent operative brakes on a trains at its inception provides the railroads with a margin for failure of some brakes while the train is in transit (up to 15 percent) and tends to ensure that defective equipment is being repaired in a timely fashion. In addition, FRA stated that the 100-percent requirement is consistent not only with Congress' understanding of the AAR inspection standards that were adopted in 1958, but also with the intent of FRA, rail management, and rail labor as to what was to occur at initial terminals when the inspection interval was increased from 500 miles to 1,000 miles in 1982. At that time, carrier representatives committed to the performance of quality initial terminal inspections in exchange for an extension in the inspection interval, for which FRA intended to hold them accountable. Moreover, FRA believed that retention of the 100-percent requirement is consistent with the statutory requirements regarding the movement of defective equipment because a majority of the locations where trains are initiated have the capability of conducting virtually any brake system repair, and thus, under 49 U.S.C. 20303(a) the defective equipment may not be moved from those locations anyway.

In the preamble to the 1998 NPRM, FRA recognized that the 100-percent requirement at points of origin tends to be somewhat burdensome for some railroads at certain locations. *See* 63 FR 48309–10. However, FRA noted that the number of locations where the requirement is quite burdensome appears to be fairly low as FRA had made clear that railroads are free to petition for a waiver of this requirement, but as of the issuance of the NPRM no railroad had filed such a petition. Although FRA recognized that the requirement creates somewhat illogical scenarios at some locations, FRA was not willing to propose provisions permitting trains to depart locations with less than 100 percent operative brakes without fully considering the safety hazards or potential abuses which may accompany such an approach. Therefore, FRA sought comment from interested parties regarding the potential for permitting very limited flexibility in moving defective equipment from outlying initial terminals which lack the capability of effectuating brake system repairs. FRA also discussed various alternative approaches, with attendant restrictions, which might provide some flexibility at these outlying locations and sought comment on those approaches as well. *See* 63 FR 48310.

The AAR and several other railroad representative submitted a number of comments on the proposed requirements regarding the movement of defective equipment. The majority of the comments received from these parties addressed the proposed requirements regarding 100 percent operative brakes at a train's initial terminal, the identification of locations where brake repairs should be required, and the tagging of defective equipment.

These commenters recommend that FRA permit trains to operate from any location with a minimum percentage of its brakes inoperative. At a minimum, they recommend that this flexibility be provided at locations where repairs can not be performed. They suggest adoption of a 95-percent minimum operative brake requirement from such locations. They contend that the 100-percent requirement at initial terminals is outdated and does not take into consideration the numerous technological improvements made to brake systems over the last several decades. They also contend that it makes no sense to require 100-percent operative brakes on trains originating at a location yet allow a train originating at another location to pick-up defective equipment at the same location and haul it to the same place that it could have been hauled by the originating train. They further contend that the 100-percent requirement results in the unnecessary switching of cars and exposes employees to greater safety risks than if the equipment were permitted to depart in originating trains. Several commenters note that Canada has permitted trains to operate to destination with 95 percent operative brakes since June of 1994 and has experienced no compromise in safety. The AAR commented that railroads could live with a 95-percent operative brake requirement out of initial terminals provided that there were no mileage restrictions placed on the movement of such defective equipment as discussed in the NPRM. *See* 63 FR 48310. The ASLRA sought clarification as to the applicability of the 100-percent requirement to transfer trains. They contend that the language used in the NPRM suggests that all transfer trains must have 100-percent operative brakes from their initial terminal which is not what is required under the current regulations and would have a huge impact on small railroads.

A number of railroad representatives also provided comments and

recommendations on how FRA addressed the issue of what constitutes a location where brake repairs are required to be performed. These commenters recommend that FRA clarify what constitutes the nearest location where repairs can be made. These parties do not believe that this determination should be left to the discretion of individual FRA inspectors. They claim that such an approach creates inconsistent enforcement from one region to another and makes it very difficult for railroads to comply as FRA is continually second guessing their good faith determinations.

The AAR and other commenters contend that Congress intended that only fixed repair facilities be considered locations where brake system repairs must be conducted and that such facilities provide safer working conditions than those encountered when using a mobile repair truck. They further contend that it is not in the public interest to require repair trucks to make repairs at every location where they can be moved. The AAR and several railroads recommend that FRA permit railroads to designate repair locations to FRA and permit modification of those designations each quarter.

The AAR and its member railroads also objected to some to the proposed tagging requirements associated with the movement of equipment with defective brakes. They objected to the requirement that any automated tracking system be approved by FRA prior to its implementation. These commenters suggested that such review and approval process would be very time consuming and that FRA would not easily grant the use of such systems. They also objected to the proposed requirement that the tag or card be retained for 90 days, contending that the requirement was merely to aid in FRA's enforcement and served no other purpose.

The AAR also recommended that FRA modify the proposed requirement regarding the placement of equipment with defective brakes. The AAR contends that FRA should permit the use of multi-unit articulated equipment provided that it has no more than two consecutive control valves cut out or inoperative rather than the proposed limitation prohibiting the use of such equipment with consecutive inoperative or cut-out control valves. They contend this is the current practice of many railroads in the United States and is currently allowed on trains operated in Canada.

A number of rail labor representatives also provided comments on the proposed provisions regarding the movement of equipment with defective brakes. These commenters as well as the CAPUC support the requirement that trains have 100-percent operative brakes at their initial terminals. They believe that any flexibility granted to railroads in this regard would reduce the incentive to conduct quality inspections and would result in railroads eliminating even more personnel at other outlying locations. These commenters also suggest that any inability of railroads to conduct repairs at outlying locations is due to their own actions in eliminating repair equipment and personnel from these locations. They also contend that properly equipped mobile repair trucks have the capability of conducting any repair that would be required at virtually any of the outlying locations operated by a railroad.

Several labor representatives also object to granting the railroads the ability to designate locations where brake system repairs will be conducted. They contend that this is merely an attempt by the railroads to eliminate existing locations where repairs can be conducted. They further object to the AAR's contention that only fixed repair facilities should be considered in determining where brake system repairs must be conducted. They claim that such an approach would lead to the closure of even more fixed repair shops so that railroads could further circumvent the requirement to make timely repairs at the nearest location. They assert that allowing railroads to designate locations where repairs will be made would violate 49 U.S.C. 20303(a) which requires repairs to be conducted at the nearest location where the necessary repairs can be made.

Parties representing rail labor generally support the proposed tagging requirements for moving defective equipment but noted their objection to the use of an automated tracking system. These commenters believe that an automated tracking system reduces the awareness of ground inspection forces as to the presence of defective equipment and would not ensure proper handling of such equipment. The required tag provides carmen and yard crews with the ability to visually identify defective equipment and take appropriate action. Furthermore, it is contended that automated tracking systems lack ready accessibility and do not provide sufficient accountability or security to prevent potential abuse by the railroads. Many of these commenters also recommend that the tags be retained for a period of at least one year rather than the proposed 90 days and that they be made available to FRA immediately rather than within the proposed 15 days. Allowing railroads 15 days to produce the document would merely frustrate FRA enforcement activity due to information delay.

Several labor commenters as well as the CAPUC also recommend that FRA modify the proposed requirements regarding the person responsible for making the determinations regarding the movement of defective brake equipment. They suggest that the rule require the person to be a carman or at a minimum a person meeting the proposed definition of a qualified mechanical inspector. They contend that only these individuals have the experience and knowledge to adequately assess the impact that a defective piece of equipment might have on a train's operation.

Several labor representatives also raised concerns regarding the proposed method for calculating the percentage of operative brakes. These commenters along with the NTSB recommend that the proposed method for calculating the percentage of operative brakes, based on the number of cut-out control valves, be modified because a control valve can be cut in but the brakes which it controls can be inoperative. Thus, the proposed method does not provide an accurate count of the number of defective brakes. Some labor representatives suggest that the computation be based on car count as it provides a much more simple, reliable, and enforceable method than the proposed control-valve method. Certain labor representatives also object to the proposed list of conditions that would not be considered an inoperative brake for purposes of calculating the percentage of operative brakes. They contend that cars containing any of the listed conditions should be considered to have inoperative brakes.

FRA Conclusions. The final rule generally retains the requirements regarding the movement of defective equipment proposed in the 1998 NPRM with minor modification in response to the comments submitted. The final rule modifies the language used in the proposed general provisions to accurately reflect the language contained in the existing statutory provisions pertaining to the movement of equipment with defective brakes. The final rule replaces the term ''repair location'' with the phrase ''location where necessary repairs can be performed.'' FRA agrees that the proposed language could have been interpreted as being somewhat contrary to the language used in the existing statute, which was not FRA's intent.

The final rule also clarifies that the person required to make the determinations regarding the safe movement of defective equipment is to be a ''qualified person'' as defined in the final rule. The intent of FRA when issuing the NPRM was to require the determinations to be made by these individuals. FRA believes that the training requirements contained in the final rule for designating a person qualified to perform a specific task will ensure that the individual possesses the appropriate knowledge and skills to perform the assigned task. The determinations that are required to be made in the final rule are currently made by individuals which FRA believes will be trained and designated under the final rule as qualified persons.

The final rule also modifies the proposed method for calculating the percentage of operative brakes. The final rule retains the general method of calculating the percentage based on a control-valve basis. FRA believes that basing the calculation on control valves provides a much more accurate measurement than using a car basis because many types of freight equipment in use today can have the brakes cut out on a per-truck basis, and FRA expects this trend to continue as the technology is applied to new equipment. Thus, the method retained in this final rule more accurately reflects the true braking ability of a train as a whole and recognizes existing technology. However, FRA agrees with the comments of the NTSB and certain labor representatives that the method proposed in the NPRM did not take into consideration the possibility of a control valve being cut in when the brakes it controls are inoperative. Consequently, the final rule clarifies that a control valve will not be considered cut in if the brakes controlled by that valve are inoperative.

The final rule also retains the proposed list of conditions that are not to be considered inoperative power brakes for purposes of calculating the percentage of operative brakes. Contrary to the assertions of some commenters, the conditions listed do not render the brakes inoperative nor are the listed conditions ones that are outside the scope of the movement-for-repair provisions. Furthermore, many of the listed conditions are of such a nature that if found, they would constitute a violation under other provisions contained in the final rule and separate penalties are provided.

The final rule also modifies the proposed requirement regarding the placement of multi-unit articulated equipment with inoperative brakes. The final rule requires that such equipment shall not be placed in a train if it has more than two consecutive individual control valves cut out or if the brakes controlled by the valve are inoperative. FRA recognizes that the proposed requirement prohibiting the placement of such equipment with consecutive control valves cut out is more restrictive than current practice on many railroads. When proposing the requirement in the NPRM, FRA believed that the current practice on most railroads was to prohibit the placement of such equipment if it had consecutive control valves cut-out. Based on the comments received, it appears that the standard practice on most railroads prohibits placement of this equipment only if more than two consecutive control valves are cut-out. As it was FRA's intent to incorporate the current practices of railroads with regard to the placement of this equipment, the final rule has been modified accordingly.

The final rule retains FRA's position on the use of automated tracking systems in lieu of the required tagging of defective equipment. As an adequate automated system for tracking defective equipment does not currently exist on most railroads, FRA is not willing to permit the implementation of such a system without its approval. Furthermore, FRA does not believe it is prudent, from a safety perspective, to allow implementation of a tracking system for which FRA would not have a prior opportunity to assess to ensure the system's accessibility, security, and accuracy. Moreover, FRA agrees that the physical tagging of defective equipment provides a railroad's ground and operational forces the ability to visually locate and identify defective equipment at the time they see it rather than referring to an electronic database for such information. It should be noted that FRA is not intending to discourage the development of a viable automated tracking system, but believes that FRA must be provided the ability to review and approve any such system prior to its implementation. In fact, the final rule contains some new language regarding FRA's oversight of any automated tracking system that is approved by FRA to ensure the agency's ability to monitor such systems and potentially prohibit the use of the system if it is found deficient.

The final rule also retains the proposed requirement that a record or copy of each tag removed from a defective piece of equipment be retained for 90 days and made available to FRA within 15 days of request. FRA does not believe that the proposed time frames need to be expanded as suggested by some commenters. The provisions are identical to those contained in part 215 regarding freight car defects, and they have proven to be sufficient to meet the needs of FRA. FRA admits that the record keeping requirements are intended to aid FRA in its enforcement of the regulations. However, as the agency is able to inspect and oversee only a small portion of the railroad operations taking place across the country at any one time, the need for railroads to maintain records is essential for FRA carry out its mission of ensuring that all railroads are operating in the safest possible manner and comply with those regulatory provisions designed to ensure that safety.

After consideration of the comments provided, FRA believes it is essential to further clarify to the regulated community its position for determining whether a location is a place where brake repairs can be made. FRA does not agree that railroads should be permitted to unilaterally determine the locations FRA will consider capable of making brake system repairs. History shows that many railroads and FRA have widely different views on what should be considered a location where brake repairs can and should be effectuated. Furthermore, it is apparent to FRA that some railroads attempt to minimize or circumvent the requirements for conducting repairs for convenience or efficiency. However, FRA also recognizes that the emergence of mobile repair trucks creates an ability to perform repairs that did not exist when Congress enacted the statutory requirements related to the movement of defective equipment. FRA acknowledges that every location where a mobile repair truck is capable of making repairs should not be considered a location where repairs must be conducted. However, FRA also disagrees with the contentions of some commenters that Congress intended for only fixed repair facilities to be considered when determining locations where brake repairs are to be performed and that mobile repair trucks should not be considered. FRA is aware of numerous locations where mobile repair trucks are being used in lieu of a fixed facility or where a fixed facility was eliminated and the same repairs, that were being performed by the fixed facility, are now being performed at the same location by a fully equipped repair truck. Thus, FRA believes that locations where repair trucks are used in the same manner as a fixed facility should be considered when determining where the necessary repairs can be made.

As noted in the NPRM, the determination as to what constitutes the

nearest location where necessary repairs can be performed is an issue that FRA has grappled with for decades. FRA continues to believe that the determination must be made on a case-by-case basis after conducting a multi-factor analysis. However, in an effort to better detail the items that will be considered by FRA in making a determination, the final rule contains general guidelines that FRA will consider when determining whether a location is one where at least some brake system repairs must be made. FRA would expect railroads to consider the guidance contained in the final rule when making their decisions on where equipment containing brake defects will be repaired. The guidance contained in the final rule is based upon the voluminous case law that establishes the guiding principles for determining whether a location constitutes the nearest location where the necessary repairs can be made, previous enforcement actions taken, and guidance provided by FRA regarding identification of repair locations. The final rule guidance incorporates the principles contained in the following discussion previously set out in the NPRM.

In determining whether a particular location is a location where necessary repairs can be made or whether a location is the nearest repair location, the accessibility of the location and the ability to safely make the repairs at that location are the two overriding factors that must be considered in any analysis. These two factors have a multitude of sub-factors which must be considered, such as: the type of repair required; the safety of employees responsible for conducting the repairs; the safety of employees responsible for getting the equipment to or from a particular location; the switching operations necessary to effectuate the move; the railroad's recent history and current practice of making repairs (brake and non-brake) at a particular location; and relevant weather conditions. Although the distance to a repair location is a key factor, distance alone is not the determining factor concerning whether a particular location is the nearest location for purposes of effectuating repairs and must be considered in conjunction with the factors noted above. Existing case law states that neither the congestion of work at a particular location or convenience to the railroad are to be considered when conducting this analysis.

Although FRA does not believe that railroads should be permitted to unilaterally designate locations where brake system repair will be conducted, FRA does believe that safety could be served and disputes avoided if a railroad in cooperation with its employees could develop a plan, subject to FRA's approval, which designates locations where brake system repairs will be effectuated. FRA believes such a plan would have to be consistent with the guidelines discussed above and contained in this final rule and that such plans would have to be approved by FRA prior to being implemented. Such a plan could serve safety well by making clear to all where repairs are to be made and by assuring in advance that the criteria set forth in the final rule are appropriately applied. Consequently, the final rule permits railroads and representatives of their employees to submit a joint proposal containing a plan which designates locations where brake system repairs will be conducted. The final rule makes clear that such proposals would have to be approved by FRA prior to being implemented.

The final rule also retains the proposed and current requirement that a train have 100-percent operative brakes when departing from a location where an initial terminal brake test is required to be performed on the train. This has been a requirement in the railroad industry for decades, and FRA is not willing to provide an exception on an industry-wide basis at this time. Contrary to the assertions made by some commenters, FRA believes there is adequate justification for retaining the 100-percent requirement. In the NPRM and in the preceding discussion, FRA provided a number of reasons why it believes there is a need for the 100-percent requirement and will not reiterate them here. *See* 63 FR 48309. Some commenters suggested that FRA should permit any and all trains that have 95-percent operative brakes to operate from their points of origin to destination and that Canada currently allows such operation. FRA believes that such an approach would be completely contrary to, and would violate, the existing statutory mandate regarding the movement of equipment with defective brakes. The existing statutory provisions regarding the movement of equipment require that such equipment be repaired at the nearest location where the necessary repairs can be performed. *See* 49 U.S.C. 20303(a). Consequently, trains that originate at or that operate through locations where the necessary brake repairs can be effectuated clearly are required by the statute to have 100-percent operative brakes prior to departing those locations and may not haul a car with inoperative brakes under the statutory hauling-for-repair provision.

Although FRA recognizes that the 100-percent requirement may be somewhat burdensome for some railroads at certain locations, FRA believes that the number of locations involved is relatively low and should be handled on a case-by-case basis through the existing waiver process. FRA agrees that many railroads have created their own problems by eliminating repair facilities and personnel at many of the outlying locations where the railroads now claim they lack the ability to make appropriate repairs. Furthermore, FRA believes that the best method of assessing the safety implications of permitting a location to operate trains with less than 100-percent operative brakes is for the railroad to provide information on how the railroad will handle the defective equipment based on the specific needs and operating characteristics of the railroad involved.

In the NPRM, FRA provided various approaches under which it would potentially consider allowing a railroad to operate a train from their initial terminal with less than 100-percent operative brakes. *See* 63 FR 48310. The methods suggested by FRA were rejected as being overly burdensome by several commenters noted in the preceding discussion. Therefore, FRA believes the burden falls on each railroad seeking relief from the 100-percent requirement at certain outlying locations to provide FRA with an operating plan that will ensure the safe operation of such trains and provide for the timely and certain repair of any defective equipment moved from those locations. Consequently, FRA believes that there are a few existing locations that may be candidates for receiving a waiver from the 100-percent requirement, and FRA is willing to consider waivers for such locations, however; the railroads applying for such waivers must be able to establish a true need for the exemption and must be willing to provide alternative operating procedures that ensure the safety of the trains being operated from those locations.

The final rule also clarifies that the 100-percent operative brake requirement is not intended to apply to transfer trains that originate at location where the necessary brake repairs cannot be effectuated. FRA agrees that the 100-percent requirement does not currently apply to such trains, and it was not FRA's intention when issuing the NPRM to extend its application to such trains. However, it should be noted that if a transfer train originates at a location where repairs to the equipment

containing defective brakes can be effectuated, then the train would be required to have 100-percent operative brakes prior to departing that location.

D. Dynamic Brakes

The issue of dynamic brakes, and the extent to which FRA should impose regulatory requirements governing their use, if at all, is one which has prompted lengthy and animated debate among all affected parties since the issuance of the ANPRM in December 1992. Coincident with the drafting of the ANPRM, the Rail Safety Enforcement and Review Act amended section 202 of the Federal Railroad Safety Act of 1970 (recodified at 49 U.S.C. 20141), and mandated, in part, that FRA, ''where applicable, prescribe regulations that establish standards on dynamic braking equipment.'' This specific mandate is derived largely from two NTSB recommendations to FRA concerning dynamic brakes following the Southern Pacific Transportation Company (SP) accident at San Bernardino, California on May 25, 1989.

In this accident, excessive tonnage and excessive speed cresting a 2.2-percent grade, complicated by the fact that the train crew had been provided erroneous information regarding available and operative dynamic brakes, led to a train that was out of control and was ultimately unable to stop before derailing. While the NTSB determined the primary cause of the accident to be the excessive weight of the train as compared to that reported to the train crew, a secondary cause was determined to be the fact that the engineer had far less operable dynamic braking available for use than expected. The combination of these two conditions likely led to flawed decision making by the train crew in developing train handling strategies for negotiating the grade safely. In its final report, the Safety Board issued the following recommendations to the FRA regarding dynamic brakes:

1. Study, in conjunction with the AAR, the feasibility of developing a positive method to indicate to the operating engineer in the cab of the controlling locomotive unit the condition of the dynamic brakes on all units in the train.

2. Revise regulations to require that if a locomotive unit is equipped with dynamic brakes that the dynamic brakes function. NTSB Recommendation R–90–24 (1990).

To reiterate the general explanation of the principles of dynamic braking, as provided in the ANPRM (57 FR 62546), the 1994 NPRM (59 FR 47676), and the 1998 NPRM (63 FR 48311), dynamic brakes were developed as a ''free'' by-product of the diesel-electric drive train. By engaging the dynamic brake, the normally powered traction motors on each axle are changed to generators, and the power generated is dissipated through resistance grids. The effect is similar to that of shifting an automobile to a lower gear when descending a steep grade. The additional hardware needed to outfit a locomotive with dynamic brakes includes the grids and the controls and switches.

The primary selling point of dynamic brakes has been the ability to reduce freight car brake shoe wear. The dynamic brake is also useful in controlling train slack in lieu of using the locomotive independent brake. Furthermore, use of the dynamic brake in controlling train speed in lieu of power braking, where the train brake is applied with the locomotive under power, is a major factor in fuel savings. Due to these benefits, railroads currently emphasize and encourage the use of dynamic brakes as evidenced through examination of numerous carriers' operating rules which dictate the use of dynamic braking as the preferred method of slowing or controlling a train, or both, especially in heavy-grade territory. Historically, dynamic brakes have been applied to locomotives at the individual railroad's option, primarily based on economic considerations. It is important to note that, at present, the vast majority of new locomotives procured by the railroads are equipped with dynamic brakes.

A wealth of information was gathered regarding the operation, testing, and maintenance of dynamic brakes prior to the issuance of the 1998 NPRM. In the 1998 NPRM, FRA provided an in-depth discussion of the various proposals and comments related to the operation and maintenance of dynamic brakes as well as potential technologies for providing information to the locomotive engineer regarding the operational status of the dynamic brakes in a train consist. *See* 63 FR 48310–313. After consideration of all the information submitted and developed, FRA proposed a set of standards for dynamic brakes that it believed were consistent with the statutory mandate, took into consideration NTSB recommendations, promoted progressive improvements in dynamic brake information systems through the phased introduction of technology, while avoiding excessive regulation that might discourage the use of dynamic brakes.

In the 1998 NPRM, FRA noted that RSAC Working Group and task force deliberations provided no rationale to warrant a reconsideration of FRA's stated position that dynamic brakes do not offer the technical capability to serve as a primary train braking system since: (i) They provide braking force only on powered locomotive axles and are incapable of controlling in-train forces in the same manner as the automatic braking system; (ii) they are effective only within a narrow speed range and have no capability to actually stop a train; (iii) they can fail without prior warning; and (iv) their failure mode is characterized by loss of braking force (as opposed to the automatic brake, which, properly employed, initiates an emergency brake application upon loss of system integrity and therefore is failsafe). Similarly, however, FRA asserted that the RSAC Working Group and task force deliberations reinforced FRA's belief that dynamic brakes have become, *de facto,* a second-order safety system where employed. Although from the point of view of logical priorities, dynamic brakes ''back up'' the automatic train brake system, in sequence of operational procedures the priority is reversed. Stated differently, either the proper functioning of these systems, or the provision of reliable information concerning degraded functioning of these systems, should prevent locomotive engineers from operating trains in a manner that might make recovery through use of the automatic brake impossible.

In considering all of the information available, FRA concluded that it was imperative for the locomotive engineer to be informed in writing as to the operational status of the dynamic brakes on all locomotives in the consist at the initial terminal or point of origin for a train or at other locations where a locomotive engineer first takes charge of a train. Therefore, FRA proposed that locomotive engineers be provided this information at these locations. This proposed provision directly addressed the foremost concern articulated by the NTSB following the San Bernardino accident. FRA also proposed provisions requiring visible identification of locomotive units with inoperative dynamic brakes. FRA also agreed that when locomotives are equipped with dynamic brakes, they should be in proper operating condition and be maintained on a regular basis. Therefore, FRA proposed that defective dynamic brakes be repaired within 30 days of being found defective or at the locomotive's next periodic inspection. FRA recognized that these maintenance requirements might be overly burdensome in some instances for railroads (primarily short lines) that do not utilize dynamic brakes in their

respective operations, but yet own and operate locomotives equipped with dynamic brakes. Consequently, FRA proposed provisions for deactivating a locomotive's dynamic brakes without physically removing the components.

In addition to the information and maintenance requirements, FRA also proposed the development of operating rules and training programs to ensure the proper and safe use of dynamic brakes. For example, FRA proposed that railroads operating trains with brake systems that include dynamic brakes, develop and implement written operating rules governing safe train handling procedures for using these dynamic brakes under all operating conditions that are tailored to the specific equipment and territory of the railroad. The NPRM also proposed that the railroads provide training to their locomotive engineers on the prescribed operating rules, that at a minimum includes classroom, hands-on, and annual refresher training. More importantly, FRA also proposed a requirement that a railroad's operating rules be *based on the ability of friction brakes alone to safely stop the train under all operating conditions.* FRA believed that the establishment of these comprehensive operating rules and training plans was the most effective means by which to minimize the possibility of future incidents caused by excessive reliance on dynamic brakes by a train crew.

In the ANPRM (57 FR 62555), the 1994 NPRM (59 FR 47687), and the 1998 NPRM (63 FR 48314), FRA requested comments from the industry on possible methods of providing information regarding the status of dynamic brakes to the engineer in the cab of the controlling locomotive. The 1998 NPRM also contained a detailed discussion of various technologies available for providing information on the status of the dynamic brakes to the locomotive engineer. *See* 63 FR 48312–13. Although FRA recognized that the technology for dynamic brake displays with the ability to provide the type of information sought by FRA in the 1994 NPRM was not readily available at the time the 1998 NPRM was issued, several commenters suggested that the technology was under development. Consequently, FRA was not ready or willing to require the use of such indicators at that time. However, FRA noted that the benefit of such an indicator would be to alert engineers that they have diminished or excessive dynamic braking capabilities, thus permitting the engineers to control the braking of their trains in the safest possible manner. FRA indicated that it would continue to monitor the development of the technology and consider its application to locomotives used in the industry.

The AAR and its members, the NTSB, the CAPUC, and several representatives of rail labor provided numerous comments on the provisions related to dynamic brakes proposed in the 1998 NPRM. The AAR contends that the proposed requirement to provide written notification of the operational status of the dynamic brakes is overly burdensome. They recommend that the information be permitted to be transmitted in any manner, provided a record of the notification is maintained in the cab of the controlling locomotive. They also suggest that the notification only be required on an exception basis, when the dynamic brakes are inoperative. Conversely, representatives of rail labor contend that no locomotive with inoperative dynamic brakes should be permitted to be dispatched from a location with mechanical facilities capable of making the repairs. They further contend that if the locomotive's dynamic brakes cannot be repaired at the train's point of origin it should be allowed to be operated only as a trailing unit. These commenters support the requirement that the locomotive engineer be informed in writing as to the operational status of the dynamic brakes on all units in the consist and recommend that the lead locomotive of the consist be tagged to notify the engineer of the presence of a defective unit.

The AAR also objects to the proposed requirement that defective dynamic brakes be repaired within 30 days of being found defective. It claims that due to the reliability of dynamic brake systems they should be permitted to operate until the next periodic inspection. AAR asserts that a shorter repair cycle will reduce motive power availability and may result in shortages of motive power on some railroads. AAR also requests clarification of the term ''ineffective'' dynamic brake. The organization recommends that the term be eliminated, that the term ''inoperative'' dynamic brake be retained, and that a dynamic brake be considered ''inoperative'' when it is no longer capable of providing its designed retarding force on the train, similar to the proposed definition of ''effective'' brake.

Representatives of rail labor contend that locomotives with defective dynamic brakes should be required to be repaired within 15 days of being discovered. They contend that this is a more than sufficient time period for railroads to arrange for alternative power and get the locomotive to a location where it can be repaired. These commenters also recommend that a record of the repairs made to a locomotives dynamic brakes be retained for a period of one year rather than the 92 days proposed in the NPRM. These commenters also recommend that provisions be added to ensure that all dynamic brakes operate as intended and that the equipment not be altered or cut back in any manner.

The AAR also seeks clarification of the proposed training requirements contending that they should not be included in this rule unless FRA is willing to specify the knowledge, skills, and ability criteria needed pursuant to part 240. They also contend that the proposed requirement regarding the development of operating rules is unclear and should be eliminated if not clarified. The BLE asserted that the problem is not in the training of engineers on the use of dynamic brakes but in the prohibition on the use of the automatic brake in normal train operation, not just when the dynamic brakes fail. They assert that locomotive engineers should be permitted to use the automatic brake to control the train on a periodic basis to become familiar with its operation.

The AAR also objects to the requirement to stencil locomotives operating with deactivated dynamic brakes. The AAR asserts that defacing such locomotives is unnecessary and that a less intrusive means of identification should be used. The organization recommends that a locomotive with a deactivated dynamic brake should be treated no differently than a locomotive with an inoperative dynamic brake, in that the locomotive engineer should be notified of its presence. The AAR also recommends that railroads be permitted to use existing tags to identify locomotives with inoperative dynamic brakes.

The AAR and several locomotive manufacturers provided comments on the availability and use of dynamic brake indicators. These commenters make clear that there is currently no easy method of providing the available dynamic brake retarding force to the locomotive engineer. They also contend that the technology does not exist to show dynamic brake performance on distributed power units and that they should, therefore, be excluded from any indicator requirements. These commenters indicated that technology is not available to have most existing locomotives retrofitted with an indicator of some sort. They also assert that it is impossible to develop a device that will tell an engineer whether the dynamic

brakes will operate prior to the engineer actually applying the brakes due to the unknown risk of failure. The AAR also recommends that if FRA adopts an indicator requirement then the proposed requirements related to the notification of the locomotive engineer of dynamic brake status and for repairing inoperative dynamic brakes should not be adopted since real-time information will be available to the locomotive engineer.

Numerous labor representatives, the NTSB, and the CAPUC contend that the technology does exist, at least for new locomotives, to provide locomotive engineers with real-time indicators of the operating status of the dynamic brakes on trailing units. These commenters believe that the information these indicators provide to an engineer is extremely important and would allow engineers to control and operate their trains in the safest manner possible. All of these commenters appear to support a requirement to require these indicators in new locomotives, and some recommend some sort of retrofit requirement for existing equipment.

Several parties responded to FRA's request regarding technical reasons for prohibiting a locomotive with inoperative dynamic brakes from functioning as the lead or controlling locomotive in a locomotive consist. The AAR responded that it found no technical reason to prohibit such use, provided the locomotive has the ability to control the dynamic brakes on trailing locomotives. The AAR contends that railroads currently operate in this manner and will use a non-equipped locomotive when the other locomotives in the consist are cabless. Several labor representatives asserted that a locomotive with inoperative dynamic brakes should not be permitted to operate as the controlling locomotive regardless of whether it can operate the dynamic brakes on trailing units. These commenters contend that the engineer is better able to feel the dynamic brakes operate if the controlling unit has operative dynamic brakes and that the engineer will at least know whether that unit has operable dynamic brakes. The CAPUC cites similar human factor reasons for contending that a locomotive with inoperative dynamic brakes should not be used as a controlling unit. Several labor representatives also contended that if a defective locomotive were in the controlling position, then the speed of the train should be limited to 30 mph and the train should not be permitted to operate over grades of one percent or greater until a locomotive with operative dynamic brakes is placed in the lead position.

The NTSB and the CAPUC recommend that FRA include a ''mile-per-hour-overspeed-stop'' rule into the final rule to ensure that the speed of a train does not exceed its braking capacity. Such a rule would require a train that exceeds an established speed limit by a specified amount to be placed in emergency. The NTSB recommends that the overspeed limit be 5 mph or less over the designated speed limit. The CAPUC claims that California uses a 5 mph rule but that the limit may vary for different operations and should be established through validated simulations that include brake fade and field tests and must be related to a safe base speed. Both commenters contend that although the overspeed rule is simple, it accomplishes a critical safety function and reduces the chances of a runaway occurring as it removes any discretion from the operator. The CAPUC also recommends that railroads be required to validate their operating rules to ensure that friction brakes alone are sufficient to stop a train on all grades operated by the railroad. The CAPUC recommends that this be accomplished through validated simulations and field test that take into account brake heat-fade.

FRA Conclusions. The intent of the proposed requirement to notify the locomotive engineer in writing as to the operational status of the dynamic brakes on the locomotives in a train's consist was to ensure that the engineer had timely information on the condition of the locomotives so he could operate the train in the safest possible manner based upon that information. Thus, the manner in which the information is provided to the engineer is not a major concern to FRA, provided the information is accurate and up-to-date. Therefore, the final rule will allow railroads to provide locomotive engineers with the required information by any means they deem appropriate. However, the final rule will require that a written or electronic record of the information provided be maintained in the cab of the controlling locomotive. This will ensure that on-coming engineers will have the information provided to the previous operator of the train. The final rule also clarifies that the information is to be provided to the locomotive engineer at the train's initial terminal and at other locations where an engineer ''first begins operation'' of the train rather than where the engineer ''takes charge of the train.'' This clarification is in response to certain labor commenters to prevent possible misinterpretation or abuse of the requirement.

The final rule retains the proposed requirement to repair locomotives with inoperative dynamic brakes within 30 days of being found inoperative or at the locomotive's next periodic inspection, whichever occurs first. Due to the industry's reliance on these braking systems, as noted in the discussion above, FRA continues to believe they should be repaired as soon as possible after being found inoperative. FRA believes that a period of 30 days provides the railroads with sufficient time to get a locomotive to a location where the dynamic brakes can be repaired and allows for the reallocation of motive power when necessary so as to cause minimal disruption to a railroad's operation. FRA is not willing decrease the time period allowed to make repairs, as recommended by some commenters, because such a reduction could jeopardize a railroad's access to available motive power and could cause delay in the movement of freight which may create safety hazards themselves.

The final rule also eliminates the use of the term ''ineffective'' dynamic brakes and uses the term ''inoperative'' dynamic brake to include any dynamic brake that no longer provides its designed retarding force on the train, for whatever reason. FRA agrees that the use of only this term clarifies the applicability of the requirements related to dynamic brakes and prevents potential misunderstandings. The final rule also retains the proposed requirements related to the tagging of a locomotive found with inoperative dynamic brakes. Contrary to the comments of some parties, FRA does not believe that the tagging provisions require the development of new tags. The rule would allow the use of any type of tag, provided it is placed in a conspicuous location and contains the required information. The final rule also eliminates the requirement to stencil the outside of a locomotive declared to have deactivated dynamic brakes. FRA agrees that defacing the exterior of the locomotive is unnecessary and would do little to inform the locomotive engineer of the presence of the locomotive. FRA believes that the requirements to notify the locomotive engineer of the operational status of the locomotives and to have the cab of the locomotive clearly marked that the locomotive's dynamic brakes are deactivated provide sufficient notice to the locomotive engineer as to the status of that locomotive.

The final rule contains a requirement that an electronic or written record of repairs made to a locomotive's dynamic brakes be maintained and retained for a period of 92 days. Although this

requirement was not proposed in the NPRM, FRA believes these records fall within the scope of the notice and are necessary to ensure that necessary repairs are conducted on a locomotive's dynamic brakes in a timely fashion. FRA also believes that such a record will provide a railroad with information regarding the operation of the dynamic brakes and will potentially permit railroads to identify a repeated problem with a locomotive's dynamic brakes to prevent future reoccurrences and, thus, increase the utilization of a locomotive's dynamic brakes.

The final rule also contains specific requirements related to the use of a locomotive with inoperative or deactivated dynamic brakes as a controlling locomotive. These requirements are based on FRA's review of the comments submitted in response to FRA's request regarding the positioning of such a locomotive made in the NPRM. *See* 63 FR 48314. FRA tends to agree that there are no technical reasons why a locomotive with inoperative dynamic brakes cannot function as the controlling locomotive provided it can control the dynamic brakes on trailing units in the locomotive consist. However, FRA also agrees that a locomotive engineer loses the physical sensation of the operation of the dynamic brakes when the unit where the engineer is riding loses dynamic brake capability, which, if present, provides the engineer with at least some assurance that the dynamic brakes on some of the units in the consist are operating. Thus, in addition to requiring that locomotives with inoperative or deactivated dynamic brakes have the capability of controlling the dynamic brakes on trailing units when operating as the controlling locomotive, the final rule also requires that such locomotives also have the capability of displaying to the locomotive engineer the deceleration rate of the train or the total train dynamic brake retarding force. This requirement will ensure that locomotive engineers have at least some information as to the operation of the dynamic brakes in the locomotive consist they are controlling. FRA intends that the information required by this provision be provided either by a device known as an ''accelerometer'' or a similar device or by a dynamic brake indicator capable of providing total train dynamic brake retarding force to the locomotive engineer.

The final rule also contains provisions requiring new and rebuilt locomotives to be equipped with some sort of dynamic brake indicator. Although FRA agrees that the technology does not currently exist to equip existing locomotives with dynamic brake indicators economically, FRA does believe that the technology exists or is sufficiently developed to provide new locomotives with the ability to test the electrical integrity of the dynamic brakes at rest and to display the total train dynamic brake retarding force at various speed increments in the cab of the controlling locomotive. FRA recognizes that the industry will require a little time to incorporate the existing technology into new locomotives. Therefore, the requirements related to dynamic brake indicators will only apply to locomotives ordered one and one-half years after the issuance of this final rule and to locomotives placed in service for the first time three years after the effective date of the final rule. FRA also recognizes that not all locomotives being rebuilt are designed, or have the capability of being redesigned, to have the capability to display the total train dynamic brake retarding force in the cab of the controlling locomotive. Thus, the final rule allows rebuilt locomotives to be designed to display the train deceleration rate (i.e., equipped with an accelerometer or similar device as discussed above) in lieu of being equipped with the dynamic brake indicator required on new locomotives. FRA believes that the information provided by these indicators is extremely useful to an engineer and will provide locomotive engineers with ready access to real-time information on the operation of the dynamic brakes in a locomotive consist and permit engineers to control and operate trains in the safest manner possible.

FRA also acknowledges that the information provided by dynamic brake indicators would eliminate the need to provide the locomotive engineers with information regarding the operational status of the dynamic brakes when the engineer first begins operation of a train. As the indicators would provide real-time information to the engineer on the operation of the dynamic brakes brake in the train consist, the information received by the engine when beginning operation would be unnecessary. Therefore, the final rule alleviates the need to inform locomotive engineers of the status of the dynamic brakes when all of the locomotives in the lead consist are equipped with dynamic brake indicators required for new locomotives. FRA believes that this allowance makes sense from a practical perspective but also provides some incentive for railroads to equip existing equipment with such indicators when the technology for doing so becomes economically feasible. It should be noted that there is no requirement that the dynamic brake status of distributed power units be provided in order to eliminate the need to provide dynamic brake information to the engineer. FRA agrees that the technology for transmitting that information to the engineer is not currently available in a cost effective and reliable manner.

The final rule retains the proposed provisions requiring railroads to develop and implement written operating rules governing the use of dynamic brakes and to incorporate training on those operating rules into the locomotive engineer certification program pursuant to 49 CFR part 240. Contrary to the assertions of some commenters, FRA does not believe these requirements are unclear. FRA intends for each railroad to develop appropriate operating rules regarding train handling procedures when utilizing dynamic brakes that cover the equipment and territory operated by the railroad. Many railroads already have these procedures in place and already provide training to their employees that adequately cover the requirements. FRA continues to believe that training on proper train handling procedures is essential to ensuring that locomotive engineers can properly handle their trains with or without dynamic brakes and in the event that these brake systems fail while the train is being operated. FRA also disagrees that the agency should specify the knowledge, skill, and ability criteria that a railroad must incorporate in its training program. FRA believes that each railroad is in the best position to determine what these criteria should be, given the railroad's equipment, physical characteristics and operating rules, and what training is necessary to provide that knowledge, skill, and ability to its employees.

The final rule also requires that the operating rules developed by railroads include a ''miles-per-hour-overspeed-stop'' requirement that requires a train to be immediately stopped if it exceeds the maximum authorized speed by more than 5 mph when descending a grade of one percent or greater. FRA agrees with both the NTSB and the CAPUC that this requirement accomplishes a critical safety function and reduces the potential for a runaway train as it establishes a clear rule for stopping a train and removes any discretion from the operator to continue operation of a train. FRA believes that the five-mph limitation is a good base limitation that should be reduced if so indicated by validated research and should be increased only with FRA approval. Moreover, the operating rules of most

Class I railroads already include a five-mph-overspeed-stop provision; thus, FRA's inclusion of the requirement in this final rule should impose little or no burden on the operations of most railroads.

E. Training and Qualifications of Personnel

Currently, the regulations contain no specific training requirements or standards for personnel who conduct brake system inspections. The regulations merely require that a ''qualified person'' perform certain inspections or tasks. *See* 49 CFR 232.12(a). Furthermore, the current regulations do not require that a railroad maintain any type of records or information regarding the training or instruction it provides to its employees to ensure that they are capable of performing the brake inspections or tests for which they are assigned responsibility. In several cases, FRA has found that a railroad's list of ''qualified persons'' is merely a roster of all of its operating and mechanical forces.

In the 1994 NPRM, FRA proposed a series of broad qualification standards addressing various types of personnel engaged in the inspection, testing, and maintenance of brake equipment. *See* 59 FR 47731–47732. These broad qualifications were separated into distinct subgroups that identified various types of personnel based on the type of work those individuals would be required to perform under the proposal. These included supervisors, train crew members, mechanical inspectors, and electronic inspectors. Although not proposed in the rule text of the 1994 NPRM, the preamble contained various guidelines regarding specific hours of classroom and ''hands-on'' training as well as guidelines regard the level of experience each of these types of employees would be required to possess or be provided. *See* 59 FR 47702–47703. The proposal also contained various requirements regarding the development and retention of records and information used by a railroad in determining the qualifications of such employees. See 59 FR 47732.

In the 1998 NPRM, FRA acknowledged that many railroads continue to improve the training they provide to individuals charged with performing brake system inspections, tests, and maintenance; however, FRA also acknowledged that it continued to believe that this training could be greatly improved and enhanced. The agency noted that although there had been a decline in the number of train incidents, derailments, fatalities, and injuries over the previous ten years, FRA believed that the number of these incidents could be further reduced if maintenance, inspections, and tests of the brake system were performed by individuals who have received proper training specifically targeting the activities for which the individual is assigned responsibility. FRA believed that one of the major factors in ensuring the quality of brake inspections and the proper operation of that equipment is the adequate training of those persons responsible for inspecting and maintaining that equipment.

In the 1998 NPRM, FRA proposed broad performance-based training and qualification requirements that would permit a railroad to develop programs specifically tailored to the type of equipment it operates and the employees designated by the railroad to perform the inspection, testing, and maintenance duties required in this proposal. FRA agreed that there is no reason for an individual who solely performs pre-departure air brake tests and inspections to be as highly trained as a carman since a carman performs many other duties which involve the maintenance and repair of equipment in addition to brake inspections. Therefore, FRA proposed training and qualification requirements which permit a railroad to tailor its training programs to ensure the capability of its employees to perform the tasks to which they are assigned. FRA also made clear that the proposed training and qualification requirements applied not only to railroad personnel but also to the personnel of railroad contractors and personnel in plants that build cars and locomotives that are responsible for brake system inspections, maintenance, or tests covered by this part.

Contrary to the 1994 NPRM, FRA did not issue specific guidelines on experience, classroom training, or ''hands-on'' training. FRA agreed that many of the guidelines contained in the preamble to that proposal were overly restrictive and might have impeded the implementation of certain training protocols capable of achieving similar results with less emphasis on solely the time spent in the training process. Furthermore, the 1994 proposed guidelines failed to consider the potentially narrow scope of training that might be required for some employees, particularly some train crew personnel, that perform very limited inspection functions on very limited types of equipment. Consequently, although the training and qualification requirements proposed in the 1998 NPRM continued to require that any training provided include classroom and ''hands-on'' training as well as verbal or written examinations and ''hands-on'' proficiency, they did not mandate a specific number of hours that the training must encompass as FRA realized that the time period should vary depending on the employee or employees involved. The 1998 proposal also contained provisions for conducting periodic refresher training and supervisor oversight of an employee's performance once training is provided.

FRA believed that the recordkeeping and notification requirements contained in the 1998 proposal were the cornerstone of the training and qualification provisions. As FRA was not proposing specific training curricula or specific experience thresholds, FRA believed that the recordkeeping provisions were vital to ensuring that proper training was being provided to railroad personnel. FRA intended the record keeping requirements to provide the means by which FRA would judge the effectiveness and appropriateness of a railroad's training and qualification program. The proposed recordkeeping provisions also provided FRA with the ability to independently assess whether the training provided to a specific individual adequately addresses the tasks that the individual is deemed capable of performing. Finally the proposed training mandates seemed most likely to prevent railroads from using insufficiently trained individuals to perform the necessary inspections, tests, and maintenance required by the proposal.

In the 1998 NPRM, FRA proposed to require that railroads maintain specific personnel qualification records for all personnel (including their contractors' personnel) responsible for the inspection, testing, and maintenance of train brake systems. FRA proposed that the records contain detailed information regarding the training provided as well as detailed information on the types of equipment the individual is qualified to inspect, test, or maintain and the duties the individual is qualified to perform. As an additional means of ensuring that only properly qualified individuals are performing only those tasks for which they are qualified, FRA proposed that railroads be required to promptly notify personnel of changes in their qualification status and specifically identify the date that the employee's qualification ends unless refresher training is provided.

FRA recognized that some railroads would be forced to place a greater emphasis on training and qualifications than they had in the past, and as a result would incur additional costs. However, FRA believed that the proposed rule

allowed railroads the flexibility to provide only the training that an employee needs in order to perform a specific job. The 1998 proposed rule did not require an employee who performs only brake inspections while the train is en route (*i.e.,* Class II brake tests) to receive the intensive training needed for an employee who performs Class I brake tests or one who is charged with the maintenance or repair of the equipment. The training might be tailored to the specific needs of the railroad. Across the industry as a whole, the 1998 proposal would not have required extensive changes in the way most railroads currently operate, but it would have required some railroads to invest more time in the training of their personnel.

FRA recognized that the costs of the proposed training requirements were fairly substantial; however, FRA believed that most Class I railroads had already invested in training, routinely scheduled training for their employees, and offered training to other interested parties. On the other hand, FRA noted that most railroads did not engage in the ''hands-on'' training and testing contained in the proposal nor did most railroads maintain the records required in the proposal. FRA noted that many Class I railroads have participated in initiatives under the Safety Assurance and Compliance Program (SACP) with FRA and labor and that many of the proposed training requirements would already be met by those railroads that have completed the training required under the SACP.

In the 1998 NPRM, FRA recognized that the proposed training requirements would likely cause some impact to smaller railroads but believed that the impact of the requirements on these smaller operations would be somewhat reduced due to the training already provided by the railroads and due to the nature of the operations themselves. FRA noted that many smaller railroads, particularly Class II railroads, send their employees to other railroads for training, participate in ASLRA and FRA training, and have some form of on-the job training. Furthermore, Class III railroad employees are not likely to require extensive training on different types of brake equipment since most of the equipment used by Class III railroads have only one type of brake valve. Furthermore, the employees of these small railroads would likely not be required to receive any training in the areas of EPIC brakes, dynamic brakes, two-way EOT devices, or on some of the brake tests and maintenance mandated in the proposal due to the limited distances traveled by these trains, the low tonnages hauled, and because many of the maintenance functions are contracted out to larger railroads.

The AAR and its members, the ASLRA, and various private car owners submitted numerous comments regarding the proposed training requirements. Generally, these commenters believe that the significant costs being imposed by the proposed training requirements are not justified based on the industry's safety record over the last two decades. They contend that the industry's safety record is evidence that the current training provided by the railroads is sufficient. At a minimum, these commenters recommend that railroads be provided three years to implement any training requirements imposed. Such an approach would be consistent with the proposed three-year refresher training requirements and would prevent manpower shortages and ease the financial impact.

Several railroad representatives recommend that railroads not be responsible for the training of the contract personnel they employ as was proposed. They contend that railroads do not maintain records of the training or experience of these individuals and that the contractor should bear the burden of training its own employees. These commenters admit that railroads would work with contractors to help them train their employees but that the contractor should be held responsible for providing the necessary training. They assert that the contractor is in the best position to determine the training needs of its employees and that the proposed approach potentially intrudes and alters the employment relationship of contractors and railroads.

Representatives of various railroads also object to some of the administrative burdens imposed by the proposed training requirements. They contend that the requirement to identify all tasks related to the inspection, testing, and maintenance of brake systems and develop procedures for performing each task, is overly burdensome and unnecessary. They also object to the proposed requirement that the railroad's Chief Mechanical or Chief Operating Officer sign a statement for each employee attesting that the employee meets the minimum requirements. They contend that the requirement would inhibit the use of electronic records and that there is no benefit obtained by requiring such a signature. These commenters further object to the requirement that railroads implement formal internal audit programs, contending that these programs would waste scarce resources and that the effectiveness of a training program can be assessed through efficiency tests, supervisory spot checks, and other less burdensome methods.

The AAR also objects to the potential requirement that all existing employees be completely retrained. The AAR recommends that existing employees not be required to receive any new training because it is unnecessary and there has been no showing that current training is inadequate. They also suggest that there is no need for refresher training of these employees unless a new brake system is introduced. At a minimum, they recommend that the ''hands-on'' refresher training be eliminated as virtually every railroad conducts periodic efficiency testing or audits of its employees to ensure ''hands-on'' proficiency of personnel. They also contend that refresher training should only be required for those employees that repeatedly demonstrate a failure to properly perform their required duties.

Several railroad representatives also object to the proposed requirement that employees receive training and testing on each task they will be required to perform and that they be trained and tested on each type of equipment operated by the railroad. These commenters contend that these proposed requirements would be cost-prohibitive and time-consuming. They claim that it is impossible for a railroad to have every type of vehicle it operates available to train all of its employees. They recommend that the training be limited to the different brake systems operated by the railroad and that the training be required to impart the necessary skills and abilities to perform the required tasks.

The AAR and the ASLRA also object to the proposed record keeping provisions, claiming they are overly detailed and unnecessary. These commenters recommend that the record keeping burdens be reduced and that FRA should only require a list of qualified employees, the training courses completed by an employee, and the date that training was completed. They contend that each railroad is in the best position to determine the level of detail that their records should contain and that the level of detail proposed by FRA will have a significant cost burden on railroads.

Representatives of rail labor reiterate that the need for any training provisions could be greatly reduced if FRA would simply require many of the proposed inspections and tests to be conducted by qualified carmen. At a minimum, these commenters contend that any training provisions must include a requirement

for FRA approval. They assert that any training program developed by a railroad should be approved by FRA. Several labor representatives also contend that the proposed training requirements fail to adequately address supervisors charged with oversight and training instructors. They believe that specific qualifications of both supervisors and instructors should be included in any final rule developed. They further contend that the proposed requirements do not include a dispute resolution procedure which they believe is necessary to avoid potential abuses by railroads when designating qualified employees. Certain labor representatives recommend that the proposed language regarding the training on new equipment needs to be clarified to ensure that the training is provided before the new equipment is placed in service.

FRA Conclusions. FRA recognizes that there has been a significant decline in the number of brake-related derailments and other train accidents and incidents, and resulting property damage, fatalities, and injuries over the last ten years; however, FRA continues to believe these numbers can be even further reduced if the inspections and tests of brake systems are performed by individuals who have received training that specifically targets the activities which the individual is assigned responsibility to perform. FRA's experience in enforcing the existing power brake regulations supports the conclusion that the better trained a person is on how to perform a brake inspection the better that person can perform the inspection when required to do so. Many FRA field inspectors have discovered equipment with brake conditions having the potential of causing a derailment or accident that are not identified by railroad personnel because those persons responsible for finding the conditions are not sufficiently trained or equipped to conduct the inspections they are required to perform. FRA's field forces consistently find that the most comprehensive brake inspections are performed by those individuals who have received detailed training specifically related to the inspection being performed and who conduct such inspections on a consistent basis. Based on this experience, FRA believes that the training required in this final rule will enhance the quality of brake inspections, which will increase the discovery of brake conditions that have the potential of causing a derailment or other accident. Because an increased number of brake conditions having the potential of causing a derailment or other accident will be discovered prior to being used in a train, FRA expects that the training required by this rule will reduce the number of incidents caused by brake-related problems.

Furthermore, as discussed in the 1998 NPRM, railroads continue to consolidate mechanical work to fewer and fewer locations on their systems. This trend places an increasing premium on the ability of mechanical and operating forces to conduct meaningful inspections and tests of the power brake system. Increases in train speeds and increased pressure on operating personnel due to growing traffic density will continue to make it critical for operating and mechanical forces to discharge their duties with respect to the power brake system both diligently and effectively even under the most optimistic of scenarios. Technological change presents an additional reason for placing a strong emphasis on the training and qualifications of inspection personnel. Both operating and mechanical personnel are confronted with an increasing variety of power brake arrangements and features. Consequently, these trends and changes make the training required in this final rule a necessity in order to ensure and enhance the quality of brake inspections.

In addition to the safety benefits, both quantified and non-quantified, there are certain operational benefits derived from the training required by this final rule. This final rule allows an increase in the distance some trains may travel between brake inspections. These increases are premised on the condition that all of the inspection functions performed on these trains are conducted by highly trained and qualified personnel. The latitude provided to these trains will result in fewer inspections per miles traveled and will reduce the number of opportunities that exist for a serious defect to be found before it could result in a train incident. It is imperative, therefore, that each inspection performed on these trains be of uniformly high quality. FRA believes that the training required by this final rule is a key factor for ensuring such high quality inspections. FRA also believes that certain non-quantifiable operational benefits will be derived from the training required by this final rule, particularly in the areas of equipment utilization, reduced train delays, and repair costs.

FRA agrees that railroads have made significant improvements in the quality of training provided to their employees but believes that this training can be further improved. Furthermore, FRA believes that a number of railroads participating in the SACP process have already developed, or are in the process of developing, comprehensive training programs that meet many of the requirements proposed in the NPRM. Therefore, the final rule retains the basic structure and concepts that were proposed in the NPRM regarding the training of individuals responsible for conducting the inspections and tests required by the final rule. The proposed training requirements have been slightly revised in this final rule in order to clarify FRA's intent, to recognize existing training, and to reduce any unnecessary burden that may have been inadvertently created by the proposed requirements.

The final rule modifies the proposed provision that required a railroad to provide training to the personnel of a contractor to the railroad whom the railroad uses to perform the various tasks required by the rule. The final rule makes clear that the contractor is responsible for providing appropriate training to its employees. FRA agrees that railroads should not bear the burden of training the employees of a contractor. However, FRA notes that this change does not relieve the railroad from potential civil penalties for, *e.g.,* failure to perform a proper Class I brake test, if the employees of a contractor were found not to be qualified to perform the task for which they are assigned responsibility. As a contractor's employees are acting as an agent for the railroad when performing a task required by this regulation, both the railroad and the contractor would remain liable for potential civil penalties if the employees used to perform a particular task were not trained and qualified in accordance with the training requirements contained in this final rule.

The final rule retains the proposed requirement that railroads and contractors identify the tasks related to the inspection, testing, and maintenance of the brake system required to be performed by the railroad or contractor and identify the skills and knowledge necessary to perform each task. FRA believes that it is essential to developing a comprehensive training program for a railroad or contractor to go through the process of identifying the tasks they will be required to perform and determining the skills and knowledge that must be provided to perform those tasks. FRA believes that most railroads have already engaged in this activity and would merely need to revise existing data with changes made to existing requirements by this final rule. The final rule eliminates the requirement to

develop written procedures for performing each task identified. Although FRA believes that each railroad or contractor should and will develop such procedures, FRA does not believe it is necessary to require their development as FRA believes they will either be developed in the required training curricula or are sufficiently detailed in the regulation itself.

The final rule also clarifies that the required training is intended to provide employees with the skills and knowledge necessary to perform the tasks required by this final rule. FRA does not believe it is necessary to train an employee on every different type of equipment that a railroad operates or on each and every task an employee will be required to perform. FRA's intent when issuing the NPRM was to ensure that the training received by an employee provided that individual with the knowledge and skills needed to perform the tasks he or she was assigned on the various types of equipment the railroad operated. Therefore, the final rule clarifies this intent by specifically stating that the training curriculum, the examinations, and the ''hands-on'' capability should address the skills and knowledge needed to perform the various required tasks rather than focusing strictly on the tasks themselves or on the specific types of equipment operated by the railroad. The final rule also clarifies that the training that an employee is required to receive need only address the specific skills and knowledge related to the tasks that the person will be required to perform under this part. Thus, a railroad or contractor may tailor its training programs to the needs of each of its employees based on the tasks that each of its employee will be required to perform. FRA tends to agree with several commenters that there is no reason for an individual who performs strictly brake inspections and tests to be as highly trained as a carman since carmen perform many other duties related to the maintenance and repair of equipment in addition to brake inspections.

The final rule also clarifies that previous training and testing received by an employee may be considered by the railroad. FRA did not intend to require the complete retraining of every employee performing a task required in this final rule. When proposing the training requirements, FRA intended for railroads to incorporate existing training regimens and curricula into the proposed training programs. Therefore, in order to clarify this intent, the final rule contains a specific provision which permits railroads to consider previous training and testing received by an employee when determining whether an employee is qualified to perform a particular task. However, the final rule also makes clear that any previous training or testing considered by a railroad or contractor must be documented as required in the final rule. Thus, previous training or testing which has not been properly documented cannot be considered. The final rule also makes clear that employees must be trained on the specific regulatory requirements contained in this final rule related to the tasks that the employee will be required to perform. Therefore, all employees performing tasks covered by this part will require at least some training which covers the specific requirements detailed in this final rule.

The final rule retains the proposed requirement regarding the performance of periodic refresher training and testing. The final rule retains the requirement that refresher training be provided at least once every three years and that it include both classroom and experiential ''hands-on'' training and testing. FRA continues to believe that periodic refresher training is essential to ensuring the continued ability of an employee to perform a particular task. FRA does not intend for such training to be as lengthy or as formal as the initial training originally provided, but believes that the training should reemphasize key elements of various tasks and focus on items or tasks that have been identified as being problematic or of poor quality by the railroad, contractor, or its employees through the periodic assessment of the training program. The final rule also makes clear that a railroad or contractor may use efficiency testing to meet the hands-on portion of the required refresher training provided such testing is properly documented. FRA agrees that such testing provides the necessary assurances that the individual continues to have the knowledge and skills necessary to perform the task for which the employee is being tested.

The final rule also modifies the proposed requirement that railroads develop an internal audit process to evaluate the effectiveness of their training. Although FRA agrees that a formal audit process may not be necessary, FRA continues to believe that railroads and contractors should periodically assess the effectiveness of their training programs. However, rather than require a formal internal audit, FRA believes that periodic assessments may be conducted through a number of different means and each railroad or contractor may have a need to conduct the assessment in a different manner. The final rule requires that a railroad or contractor develop a plan to periodically assess its training program and, as suggested by some commenters, permits the use of efficiency tests or periodic review of employee performance as methods for conducting such review. FRA agrees that many railroads, due to their small size, are capable of assessing the quality of the training their employees receive by conducting periodic supervisory spot checks or efficiency tests of their employees' performance.

The final rule also retains the record keeping requirements proposed in the NPRM with slight modification for consistency with the changes noted above regarding the application of the skills and knowledge necessary to perform a particular task. FRA continues to believe that the record keeping and designation requirements contained in this final rule are the cornerstone of the training requirements. Contrary to the views of some commenters, FRA believes that something more than mere lists of qualified employees is needed. Because the rule allows each railroad and contractor the flexibility to develop a training program that best fits its operation and does not impose specific curriculum or experience requirements, FRA continues to believe it is vital for railroads and contractors to maintain detailed records on the training they do provide. Such documentation will allow FRA to judge the effectiveness of the training provided and will provide FRA with the ability to independently assess whether the training provided to a specific individual adequately addresses the skills and knowledge required to perform the tasks that the person is deemed qualified to perform. Moreover, requiring these records will prevent railroads and contractors from circumventing the training requirements and prevent them from attempting to utilize insufficiently trained personnel to perform the inspections and tests required by this rule.

The final rule makes clear that the required records may be maintained either electronically or in writing. Many railroads currently maintain their training records in an electronic format, and FRA sees no reason not to permit such a practice if as the information can be provided to FRA in a timely manner upon request. The proposed provision requiring the railroad's chief mechanical or chief operating officer to sign a statement regarding each employee's qualifications has been modified in the final rule to merely require identification of the person or persons

making the determination that the employee has completed the necessary training. This modification will permit the information to be maintained electronically and will still provide the accountability which FRA intended by the provision in the NPRM. FRA believes it is absolutely essential that those individuals making the determinations regarding an employee's qualification be identified in order to ensure the integrity of the training programs developed and prevent potential abuses by a railroad or contractor.

FRA also objects to the portrayal by some commenters that the records required to be maintained are overly burdensome. Virtually all of the items required to be recorded are currently maintained by most railroads in some fashion or another. Contrary to the concerns raised by some commenters, the rule does not require that the contents of each training program be maintained in each employee's file. Railroads are free to develop whatever type of cross-referencing system they desire, provided the contents of the training program are maintained in some fashion and can be readily retrieved. Furthermore, railroads currently maintain lists of individuals they deem to be qualified persons and inform those individuals as to their status to perform particular tasks. FRA believes this is a good practice and is necessary to ensure that individual employees do not attempt to perform, or are not asked to perform, tasks for which they have not been trained.

The final rule contains two provisions that were not specifically included in the NPRM but which were intended by FRA to be covered by the established training programs. The final rule requires that new brake systems be added to training programs prior to their introduction into revenue service. FRA believes this requirement is only logical and makes sense. FRA believes that prior to the introduction of any new brake system the employees responsible for inspecting and maintaining the equipment need to be specifically trained on the systems in order to adequately perform their required tasks. The final rule also requires railroads that operate trains under conditions that require their employees to set retaining valves to develop training programs which specifically address the use of retainers and provide such training to those employees responsible for using or setting retainers. This provision has been added in response to an NTSB recommendation which FRA supports. *See* NTSB Recommendation R–98–7.

FRA has not included provisions requiring FRA approval of the training programs developed by railroads or contractors as suggested by some commenters. FRA does not have the resources to implement such an approval process and does not believe such approval is necessary, given the records that will be required to be maintained. Furthermore, FRA believes that such a process would slow the implementation of training programs and, thus, slow the implementation of this final rule. An approval process would also seriously impede the ability of a railroad or contractor to make necessary and timely changes to its training program, which is necessary to ensure its currency. The final rule also does not contain a dispute-resolution provision regarding such programs. FRA believes that such matters are within the province of employee-employer relationships and are better addressed by established processes. The final rule also does not specifically address the training that must be provided to supervisors. Although some commenters recommended specific requirements, FRA believes that supervisors are sufficiently covered by the final rule requirements. FRA believes that in order for a supervisor to properly exercise oversight of an employee's work, the supervisor must be qualified to perform the tasks for which they have oversight responsibilities.

FRA realizes that many railroads will need time to bring their existing training programs up to the level required by this final rule. FRA also recognizes that the cost of the proposed training requirements is somewhat substantial and may prevent railroads from completing the necessary training in a short period of time. Moreover, FRA recognizes that railroads need time to provide the necessary training to their employees without causing manpower shortages in their operations. Therefore, the final rule allows railroads three years in which to develop and complete the required training. This period is consistent with the time requested by the AAR and other railroad commenters. It is also consistent with the requirement to provide refresher training at least every three years and will allow a railroad to have one-third of its inspection forces receive the necessary refresher training each year after the initial training is complete.

F. Air Source Requirements

In the 1998 NPRM, FRA again proposed a ban on the use of anti-freeze chemicals in train air brake systems, reiterating the position stated in the 1994 NPRM, in order to prevent untimely damage and wear to brake system components. *See* 59 FR 47728. At that time, FRA had not received any adverse comments on this issue in response to the 1994 NPRM, in which a similar requirement was proposed. Furthermore, statements and discussions provided at various RSAC Working Group meetings appeared to establish that both rail labor and rail management representatives believed that such a provision would be acceptable.

Based on information gathered throughout the RSAC process, previous comments by industry parties, and agency experience, FRA firmly believes that the presence of moisture in the train air brake system poses potential safety, operational, and maintenance issues that require attention in this rulemaking. After completion of detailed, instrumented testing on both locomotives and yard test plants performed as part of the task force activities, FRA determined that locomotives rarely contribute to moisture in the trainline. Consequently, FRA did not propose that air dryers be installed on new locomotives, as was proposed in the 1994 NPRM (59 FR 47729). A detailed discussion of the testing conducted by the RSAC Working Group members and recommendations regarding air dryers appears in the preamble of the 1998 NPRM. *See* 63 FR 48317–19.

In contrast, the results of the same testing clearly indicated to FRA that yard air plants often provide unacceptably high levels of moisture while charging the train air brake system due to the age of the system, improper design, inadequate maintenance, or a combination thereof. Working Group task force efforts also estimated that upwards of 80 percent of train air brake systems are charged using yard/ground air plants. However, FRA did not believe that simply requiring yard air sources to be equipped with air dryers would solve or address the problem. In order for air dryers to be effective on yard air sources, the air dryers must be properly placed to sufficiently condition the air source. FRA determined that many yard air sources are configured such that a single air compressor services several branch lines used to charge train air brake systems; therefore, multiple air dryers would be required to eliminate the introduction of moisture into the brake system. Consequently, FRA determined that requiring yard air sources to be equipped with air dryers would impose a significant and unnecessary cost burden on the railroads.

Based on its determination that air dryers would not provide a cost effective or suitable solution, FRA considered other viable alternatives. In the 1998 NPRM, FRA proposed that each railroad develop and implement a system by which it would monitor all yard air sources to ensure that the air sources operate as intended and do not introduce contaminates into the brake system. FRA believed that the proposed monitoring program provided a method by which the industry might maximize the benefits to be realized through air dryer technology, which all parties acknowledge has been proven to reduce the level of moisture introduced into the trainline, at a cost that was commensurate with the potential benefits. The proposed monitoring program required railroads to take remedial action with respect to any yard air sources that were found not operating as intended, and established a retention requirement for records of the deficient units to facilitate the tracking and resolution of continuing problem areas. FRA also proposed that yard air reservoirs either be equipped with an operative automatic drain system or be manually drained at least once each day that the devices were used or when moisture was detected in the system. FRA believed that these proposed provisions, in concert with assurances that condensation is blown from the pipe or hose from which compressed air is taken prior to connecting the yard air line or motive power to the train, as currently prescribed in § 232.11(d), would significantly minimize the possibility of moisture being introduced into the train air brake system.

In the 1998 NPRM, FRA noted the recent issuance of a final rule mandating the incorporation of two-way end-of-train telemetry devices (two-way EOTs) on a variety of freight trains, specifically those operating at speeds of 30 mph or greater or in heavy grade territories. *See* 62 FR 278. Two-way EOTs provide locomotive engineers with the capability of initiating an emergency brake application that commences at the rear of the train in the event of a blockage or separation in the train's brake pipe that would prevent the pneumatic transmission of the emergency brake application throughout the entire train. FRA noted that the issuance of a final rule mandating the use of these devices was significant particularly in the context of air source requirements and air dryers. In the unlikely event that the proposed requirements regarding air sources fail to sufficiently eliminate moisture from the trainline, and a restriction or obstruction in the form of ice forms as the result of the freezing of this moisture during cold weather operations, the two-way EOT device becomes a first order safety device and will initiate an emergency application of the brakes from the rear of train. Therefore, many of the concerns associated with moisture in the trainline freezing in cold weather operations have been alleviated through the incorporation of this technology in most freight operations, thus reducing the need or desire to specifically require air dryers on air sources.

The AAR and its member railroads submitted various comments related to the proposed air source requirements. Although various railroads had previously indicated support for a requirement banning the use of alcohol in train brake system and stated that their railroad no longer used alcohol in its operation, they now object to the proposed requirement prohibiting the use of the such chemicals. These commenters now assert that there are instances in the industry where alcohol is used to unfreeze frozen trainlines. They contend that railroads should be permitted to continue this practice in order to move trains in certain circumstances and that the need to use alcohol would be rare but necessary. The AAR contends that the use of the term ''chemical'' is inappropriate, and, unless there is an alternative, the requirement should be deleted. They contend that frozen trainlines are a reality and railroads must be provided some method to deal with such occurrences other than waiting for warm weather which could take months.

These commenters also discussed the proposed requirements related the development and implementation of monitoring plans for yard air sources. The AAR contends that the railroads would need at least five years to comply with the proposed requirements and would incur costs of $41 million. These commenters object to the requirement for remedial action when a yard air source is found to have the ''potential'' of introducing contaminants into the equipment it services. They contend that such remedial action should be required only if the yard air source actually introduces such contaminants. These commenters also object to the requirement for a detailed assessment of the remedial actions taken as unnecessary and believe that the recordkeeping requirements merely increase a railroad's administrative burden and are merely included as enforcement traps.

Several representatives of rail labor and the NTSB support the proposed prohibition on the use of alcohol and object to any allowance of its use. Some labor representatives suggested that, if FRA were to allow the use of alcohol, then it needed to reinstate the requirements to perform periodic clean, oil, test, and stencilling (COT&S). These commenters recommend that the prohibition be extended to any device providing air to a train's brake system. The BRC again asserts that FRA should require that locomotives and air sources be equipped with air dryers, contending that they are the only way to ensure that moisture is not introduced into a train's brake system. Labor representatives also object to the proposed yard air monitoring plan requirements, contending that the proposed requirements fail to specify the frequency with which yard air sources are to be inspected. They recommend that such inspections should be more frequent at locations in cold climates. They also suggest that the monitoring plans should be subject to FRA approval prior to implementation.

FRA Conclusions. The final rule retains the basic requirements regarding yard air sources and cold weather operations that were proposed in the 1998 NPRM. The final rule generally retains the proposed requirement prohibiting the use of chemicals in a train air brake system. However, FRA agrees that the proposed prohibition of all chemicals may have been somewhat overbroad and contrary to FRA's actual intent. In proposing the prohibition, FRA intended to eliminate the use of chemicals, such as alcohol, which are known to degrade the rubber of a train's brake system. FRA agrees that there are chemicals that are currently available or that are in the process of being developed that do not cause the problems associated with the use of alcohol. In fact, FRA believes there are products currently available that do not degrade a brake system's rubber components like alcohol does. FRA believes that several railroads are currently testing or using these chemical alternatives. Consequently, the final rule slightly modifies the prohibition on the use of chemicals by imposing the prohibition on chemicals that are known to degrade or harm brake system components, such as alcohol.

The final rule also modifies some of the requirements related to the proposed yard air source monitoring plans. FRA agrees that the proposed requirements did not establish a frequency with which inspections of yard air sources should be conducted. In proposing the requirement, FRA hoped that various commenters would recommend frequencies for conducting these

inspections. This did not occur. FRA agrees that a set frequency needs to be established that will ensure that yard air sources are inspected in a timely manner during various climatic conditions. Therefore, the final rule requires the that yard air sources be inspected at least twice each calendar year and that two of the inspections be no less than five months apart. FRA intends for this requirement to result in yard air sources being inspected each year during two different seasonal periods.

The final rule also clarifies that remedial action under the monitoring plans is required only on those yard air sources that are not operating as intended or that are found introducing contaminants into brake systems. Thus, the final rule removes the word ''potential'' as FRA agrees that the proposed language was unclear and may have been over-inclusive. The final rule also eliminates the requirement for railroads to conduct a detailed assessment of the remedial actions taken. FRA agrees that this requirement is unnecessary because railroads will be conducting regular inspections of the yard air sources on which they have conducted repairs or taken other remedial action and will be able to determine if the repairs were effective through those inspections. The final rule retains the other proposed record keeping requirements related to yard air monitoring plans but clarifies that the records may be maintained either electronically or in writing. FRA continues to believe that these records are necessary to ensure that railroads are properly conducting the required inspections and are taking timely and appropriate remedial action when a problem air source is detected.

The final rule does not contain provisions requiring FRA approval of the yard air source monitoring plans prior to their implementation as suggested by some commenters. FRA does not have the manpower or resources to review and approve the plan of each railroad and does not believe such approval is necessary given the specific requirements contained in the final rule and the records that are required to be maintained. The final rule also does not contain requirements regarding the use of air dryers on either locomotives or yard air sources. For the reasons noted in the discussion above and in the NPRM, FRA believes that requiring the use of air dryers on either locomotives or yard air sources would impose a significant cost burden on railroads and would not necessarily address the problem sought to be resolved. *See* 63 FR 48317–19. It should be noted that FRA advocates the use of air dryers when possible and agrees that they have proven effective in reducing the level of moisture introduced into the brake system; however, FRA believes that the railroad is in the best position to determine where these devices will provide the greatest benefit based on the railroad's operation.

FRA is somewhat skeptical of the AAR's contentions regarding both the time and the cost necessary to implement the required yard air source monitoring plans. FRA sees no reason why a railroad would need five years to implement a plan to inspect each of its yard air sources twice a year. These devices are used on a fairly regular, if not daily, basis and should not be that difficult to inspect. Therefore, FRA believes that railroads should easily be able to implement these monitoring plans within the three years allowed under the applicable date provided in this final rule.

G. Maintenance Requirements

Based on comments received in response to the 1994 NPRM, deliberations of the RSAC Working Group and task force, and field experience, FRA proposed a comprehensive set of maintenance requirements which were intended to be a codification of current best practices occurring within the industry. The preamble to the 1998 NPRM contains a detailed discussion of the issues raised, discussed, and considered prior to the issuance of the NPRM. *See* 63 FR 48320–22.

After consideration of all the information and comments submitted prior to the issuance of the 1998 NPRM, FRA remained confident that the ''new'' repair track test and single car test, which have been used industry-wide since January of 1992, are a much better and more comprehensive method of detecting and eliminating defective brake equipment and components than the old, time-based COT&S requirements. FRA continued to believe that performance of the repair track and single car test significantly reduces the number of defective components and dramatically increases the reliability of brake equipment. Accordingly, FRA proposed the incorporation of AAR Interchange Rule 3 and Chart A into the 1998 NPRM, thus codifying the repair track air test requirements per Chart A, such that a railroad would be required to perform a repair track brake test on freight cars in any of the following six circumstances: (i) When a freight car is removed from a train due to an air brake related defect; (ii) when a freight car has its brakes cut out when removed from a train or when placed on a shop or repair track; (iii) when a freight car is on a repair or shop track for any reason and has not received a repair track brake test within the previous 12 month period; (iv) when a freight car is found with missing or incomplete repair track brake test information; (v) when the brake reservoir(s), the control valve mounting gasket, and the pipe bracket stud are removed, repaired, or replaced; or (vi) when a freight car is found with a wheel with a built-up tread, a slid flat, or a thermal crack. FRA also proposed that each freight car receive a repair track air test no less frequently than every 5 years, and not less than 8 years from the date the car was built or rebuilt. Similarly, it was proposed that the single car test requirements of Chart A be codified, such that a railroad would perform a single car test on a freight car when the service portion, the emergency portion, or the pipe bracket or a combination of such components is removed, repaired, or replaced.

In the 1998 NPRM, FRA recognized that circumstances arise where the proposed repair track brake tests or single car tests could not always be performed at the point where repairs can be made that necessitate performance of the test. To address these circumstances, FRA proposed that a car would be allowed to be moved to the next forward location where the test could be performed after the necessary repairs were conducted. FRA attempted to make clear that the inability to perform a repair track brake test or a single car test did not constitute an inability to effectuate the necessary repairs. At the same time, however, FRA recognized rail labor's contention that some carriers often attempt to circumvent the requirements for single car and repair track testing through the elimination of repair tracks, by moving cars to ''expediter'' tracks for repair, or simply by making the repairs in the field. As a means to curtail these practices, FRA decided to impose extensive tagging requirements on freight cars that, due to the nature of the defective condition(s) detected, require a repair track brake test or single car test but that are moved from the location where repairs are performed prior to receiving the required test. As an alternative to the tagging requirements, FRA proposed that railroads be permitted to utilize an automated tracking system to monitor these cars and ensure they receive the requisite tests provided the automated system has been approved by FRA. FRA also proposed to require stencilling of cars with the location and date of the last

repair track or single car test. Alternatively, FRA proposed that railroads could utilize an electronic record keeping system to accomplish this stencilling requirement, provided the system has been approved by FRA. FRA believed that the proposed tagging and stencilling requirements were necessary to ensure the timely performance of the tests. Without such information, there would be virtually no way for FRA to verify a railroad's compliance with the proposed repair track and single car test requirements.

FRA also proposed various requirements related to the testing of the devices used to perform the single car tests. Similar to the 1994 NPRM, the 1998 NPRM again proposed that single car testing devices be tested at least once a day and receive routine maintenance at least every 92 days. FRA also proposed that the mechanical and electronic test devices be regularly calibrated.

In the 1998 NPRM, FRA determined that any changes to the AAR standards incorporated into regulation should be reviewed and approved by all affected parties, including FRA and rail labor. Consequently, FRA proposed a special approval process, whereby the AAR would be required to submit any proposed changes to the FRA. FRA would review the proposed change to determine whether the change is ''safety-critical.'' Such proposed changes include, but are not limited to the following: (i) Any changes to Chart A, (ii) changes to established maintenance intervals, and (iii) changes to UMLER reporting requirements. If the proposed change was deemed by FRA to be ''non safety-critical,'' FRA would permit the change to be implemented immediately. If the proposed change was deemed ''safety-critical,'' FRA would be required to publish a **Federal Register** notice, conduct a public hearing if necessary, and act based on the information developed and submitted in regard to these proceedings.

FRA proposed the special approval process in response to comments from several railroads and manufacturers that FRA needed to devise some sort of quick approval process in order to permit the industry to make modifications to existing standards or equipment based on the development of new technology. Thus, FRA attempted to propose an approval process it believed would speed the process for taking advantage of new technologies over that which is currently available under the waiver process. However, in order to provide an opportunity for all interested parties to provide input for use by FRA in its decision-making process as required by the Administrative Procedure Act, FRA determined that any special approval provision must, at a minimum, provide proper notice to the public of any significant change or action being considered by the agency with regard to existing regulations.

The AAR, its members, and various private car owners and brake manufacturers submitted numerous comments regarding the maintenance requirements proposed in the NPRM. The commenters object to the proposed incorporation of AAR's Rule 3, Chart A, and the incorporation of specific AAR standards for performing single car and repair track air brake tests. They contend that such incorporation would inhibit the ability of the industry to develop and implement new rules and procedures that would improve safety and hinder the ability of the industry to implement changes that improve brake performance. They contend that the current reference to AAR rules is sufficient and that oversight by FRA is not necessary. The AAR notes that there have been over 25 changes to the AAR maintenance requirements and test procedures over the last ten years and that many of these may not have been accomplished under the provisions proposed in the NPRM. The AAR also notes that the single car and repair track standards cited in the NPRM were changed in July of 1998 and were being revised again in 1999. These commenters recommend that any provisions requiring FRA approval of AAR standards should be eliminated. Alternatively, they recommend that AAR be permitted to implement changes subject to FRA revocation based on a finding that the change does not promote safety.

In addition to their general objections to any incorporation of AAR maintenance standards, these commenters provide several recommendations in the event that FRA should decide to retain the proposed requirements. They recommend that FRA eliminate the requirement to stencil equipment with the date of the last single car or repair track air brake test and allow the industry to use the UMLER tracking system to record and monitor such information. They believe that the industry should be permitted to implement an automated or electronic tracking system without prior FRA approval. They contend that the industry has been using the UMLER system to track this information for years and it has proven effective. They contend that the automated system currently used is no less secure or capable of manipulation than a manual stenciling requirement. They contend that there has been no evidence of falsification on the part of railroads using the UMLER system and that it should be permitted without FRA approval.

Several railroad representatives also object to the proposed requirement for performing a repair track air brake test whenever a car is removed from a train for a brake-related defect. They contend that the way the provision is proposed it would require repair track air brake tests whenever minor brake defects occur that have no relation to the actual operation of the brakes. They recommend that the requirement be tied to cars removed from trains for inoperative brakes as this is the intent of AAR's Rule 3, Chart A. These commenters also object to the proposed requirement to perform a set and release of the brakes and to check piston travel when a car is on a shop or repair track. They contend that AAR no longer requires this to be performed and assert that the brake tests required in the proposal are sufficient to determine piston travel and proper operation of the brakes. These commenters also contend that there is no need to retain the bad order tags required for moving equipment for testing because a record of the repair is maintained for a year pursuant to AAR rules. They also recommend that FRA should not require brake repairs at locations where single car or repair track tests cannot be performed. They contend that the test is necessary to determine the sufficiency of the repair. They believe that the inability to conduct these test should be considered an inability to conduct brake repairs.

The AAR and certain manufacturers of brake equipment also raise concerns over the proposed requirements related to the testing and calibration of devices used to perform single car and repair track air tests. These commenters generally object to the inclusion of these requirements in the proposal as they have always been part of AAR standard S–486 and feel they do not belong in federal regulations. These parties also contend that the proposed requirements regarding the testing and calibration of single car test devices are more restrictive than are currently required. The current existing industry requirements for testing single car test devices are based on the date on which the device is placed in service. Thus, the time for conducting the 92-day test does not begin to run until the device is placed in service. They contend that the ''in service'' date allows railroads flexibility in having spare devices when

a primary device is being serviced as such a device is generally sent to a special location for calibration and cleaning. At a minimum, they recommend that the rule permit testing and calibration of single car test devices based on the in-service date of the device rather than a strict 92-day requirement.

Representatives of rail labor support the incorporation of AAR standards and contend that AAR should not be allowed unilateral discretion to change the incorporated standards. These commenters assert that railroads do not currently follow existing AAR standards and will not do so unless they are made part of a federal regulation. These commenters recommend that FRA develop specific, detailed maintenance requirements rather than reference AAR standards. They further contend that all maintenance should be required to be performed by a carman or at least by a QMI as defined in the NPRM. These commenters object to any type of automated tracking system as it is susceptible to abuse and manipulation by railroads.

Certain labor representatives provided specific comments on the proposed requirements related to conducting single car and repair track air brake tests. They recommend that FRA identify locations where single car and repair track air brake tests can be performed to prevent manipulation and circumvention of the requirements by railroads. These commenters contend that only a carman or a QMI should be permitted to perform a single car or repair track air brake test. They also contend that, since periodic COT&S has been eliminated, the need to conduct frequent repair track and single car tests is much greater in order to ensure the proper operation of the brake equipment. They assert that the intervals for conducting these tests need to be increased over those proposed and recommend that each car receive a repair track air brake every year and a single car test every four years.

FRA Conclusions. Although the final rule retains many of the proposed maintenance requirements, several modifications have been made in this final rule in response to comments received and based upon the current best practices occurring within the industry. FRA agrees that the proposed incorporation of AAR Rule 3, Chart A, is unnecessary as it would remove the determination of when certain maintenance is performed from the discretion of the railroads, and would make it difficult for railroads to change the requirements related to the performance of that maintenance. FRA believes that a railroad is in the best position to determine when and where it will perform various maintenance on its equipment and should not have its hands tied in this area by overly prescriptive federal requirements. Furthermore, FRA's primary intent when proposing incorporation of AAR Rule 3, Chart A, was to codify the existing requirements for performing single car and repair track air brake tests and eliminate the right of the industry to unilaterally change the frequency and method of performing these tests. As the final rule retains the requirements for when and how these tests are to be completed and retains certain inspections that are to be performed when equipment is on a shop or repair track, FRA believes that it is unnecessary to incorporate every maintenance procedure covered in AAR's Rule 3, Chart A. Consequently, the final rule does not incorporate AAR's Rule 3, Chart A, and continues to allow railroads some flexibility in determining appropriate maintenance practices.

Contrary to the assertions of some commenters, FRA continues to believe that certain maintenance procedures are critical to ensuring the safe and proper operation of the brake equipment on the nation's fleet of freight cars. FRA does not believe that the determination of what maintenance should be performed should be left solely to the discretion of the railroads operating the equipment in all circumstances. As periodic COT&S maintenance has been eliminated and replaced with the performance of single car and repair track tests, which FRA agrees is a better and more comprehensive method of detecting defective brake equipment and components, FRA believes that specific and determinable limits must be placed on the manner and frequency in which these tests are performed. Therefore, the final rule retains the proposed requirements regarding the performance of single car and repair track tests.

FRA recognizes that the procedures for performing single car and repair track tests proposed in the NPRM have been modified by the AAR since the issuance of the proposal. As it is FRA's intent to incorporate the most recent version of the single car and repair track air brake test procedures, the final rule incorporates the test procedures that were issued by the AAR in April of 1999. FRA recognizes that the industry may find it necessary to modify the test procedures from time to time in order to address new equipment or utilize new technology. Thus, the final rule permits railroads to seek approval of alternative procedures through the special approval process contained in the final rule. The special approval process is intended to speed FRA's consideration of a party's request to utilize an alternative procedure from the one identified in the rule itself. FRA believes that it is essential for FRA to approve any change made in the procedures for conducting these safety-critical tests in order to prevent unilateral changes and to ensure consistency in the method in which the tests are performed.

It should be noted that the incorporated procedures for performing single car and repair track air brake tests are the minimum requirements for performing such tests. The special approval process is required to be used only if the incorporated procedures are to be changed in some manner. For instance, if the industry were to elect to add a new test protocol to the incorporated procedures, there would be no need to seek approval of such an addition as long as the procedures contained in the incorporated standard are still maintained. This final rule is not intended to prevent railroads from voluntarily adopting additional or more stringent maintenance standards provided they are consistent with the standards incorporated.

The final rule also modifies one of the proposed conditions for when a repair track air brake test would be required to be performed. FRA agrees that the proposed requirement to perform a repair track air brake test on any car removed from a train for a brake-related defect is overly restrictive and inconsistent with the requirements of AAR's Rule 3, Chart A. FRA agrees that the proposed requirement would require the performance of the test when minor brake system repairs are conducted, which is not the intent of the AAR's rule. Therefore, the final rule modifies the proposed condition to require the performance of a repair track test on cars that have inoperative or cut-out air brakes when removed from a train.

The final rule also modifies the proposed requirements regarding the use of an automated tracking system in lieu of stenciling equipment with the date and location of the last single car or repair track test received. Since 1992, the industry has utilized the AAR's UMLER reporting system to electronically track the performance of single car and repair track air brake test as well as other repair information. Based on the performance and use of this system over the last seven years, FRA believes that the AAR's UMLER system has proven itself effective for tracking the information required in this final rule and ensuring the timely performance of single car and repair

track air brake tests. Furthermore, FRA continues to believe that the information required to be tracked with regard to these tests is easily maintained through an electronic medium. Moreover, FRA has found no substantiated instances of railroads falsifying or altering the information monitored and tracked by AAR's UMLER system. Thus, the final rule permits railroad to utilize an electronic record keeping system to track single car and repair track air brake tests without obtaining prior FRA approval of the system. The final rule makes clear that FRA will monitor the performance of such systems and retains the right to revoke a railroad's authority to utilize the system if FRA finds that it is not properly secure, inaccessible to FRA or a railroad's employees, or fails to properly or adequately track and monitor the equipment.

The final rule does not increase the proposed frequency at which the single car or repair track air brake tests are to be performed as recommended by some commenters. As noted above, the primary intent of the proposed provisions was to codify the existing requirements regarding the performance of single car and repair track air brake tests and prevent any unilateral changes to those requirements. FRA believes that the frequency at which these tests are currently required to be performed under industry standards has proven to be sufficient and a substantial economic burden would be imposed if the frequency were increased. The final rule also retains the requirement that these tests be conducted by a qualified person. FRA believes that the person performing these tests must be specifically trained and tested on how the test is to be performed and be able to determine the appropriate actions that must be taken based on the results of the test. FRA does not believe that the mere fact that a person is a carman or a QMI is sufficient to consider that person qualified to perform single car or repair track air brake tests. FRA believes that the training requirements contained in this final rule ensure that a person deemed qualified to perform these tests has been specifically trained and tested on the performance of the tests prior to being considered qualified.

The final rule also retains the proposed provisions permitting cars to be moved from a location where necessary repairs are made to a location where a single car or repair track air brake test can be performed if it cannot be performed at the same location where the repairs are conducted. FRA disagrees with the assertion that air brake repairs should not be required at locations that lack the ability to perform single car or repair track air brake tests. FRA believes that position is not only contrary to the statutory mandates regarding the movement of equipment with defective brakes but would open the door to potential abuse by railroads. Furthermore, the operation of a car's brake system can generally be tested after a repair without performing a complete repair track air brake test. For the most part, single car and repair track air brake tests are intended to be maintenance requirements that attach based on a condition in which a car is found or on a repair that is required to be performed. If the condition of a car is such that a repair track air brake test is necessary to determine the defect, then the final rule would permit movement of the car to the nearest location where a repair track air brake test can be performed. However, FRA believes that most defective conditions can be easily determined without performing a repair track air brake test. Moreover, for years FRA has required the performance of repairs where they can be performed and has allowed such equipment to be moved to the next forward location for performance of a single car or repair track air brake test and has not found that such a practice has created any potential safety hazard.

The final rule retains the proposed requirements for tagging equipment which is being hauled for the performance of a single car or repair track air brake test after the appropriate repairs have been conducted. FRA believes that the tags are necessary not only to provide notice to a railroad's ground forces as to the presence of the car but to ensure that railroads are properly performing the tests at appropriate locations. Furthermore, many railroads currently move equipment in this fashion, and there has been no indication that safety has been compromised. The final rule also retains the requirement that a copy or record of the tag be retained for 90 days and made available to FRA upon request. Contrary to the objections of some commenters, FRA continues to believe that the record keeping requirements are necessary so that there is accountability on the part of the railroads to conduct these tests at the proper locations and that equipment is not moved for extended periods without receiving its required maintenance. It should be noted that the final rule clarifies that the record or copy of the tag may be maintained either electronically or in writing provided all the required information is recorded. The final rule does not define or require identification of locations that can or will perform single car or repair track air brake tests as suggested by some commenters. FRA does not believe that such a requirement is necessary as the rule specifically establishes when the tests are to be performed and it is in the railroad's best interests to perform the tests in a timely manner.

The final rule retains the proposed provisions requiring certain tests and inspections to be performed whenever a car is on a shop or repair track. Although the AAR asserts that it did away with the requirements to perform a set and release of the brakes and adjust piston travel on all cars on repair or shop tracks, the requirements are currently contained in power brake regulations separate and apart from any AAR requirements. *See* 49 CFR 232.17(a)(2)(ii), (iv). FRA believes that repair and shop tracks provide an ideal setting for railroads to conduct an individualized inspection on a car's brake system to ensure its proper operation and that such an inspection is necessary to reduce the potential of cars with excessive piston travel being overlooked when employees are performing the ordinary brake inspections required by this final rule. If any problems are detected at that location, the personnel needed to make any necessary corrections are already present. Furthermore, performing these inspections at this time ensures proper operation of the cars' brakes and eliminates the potential of having to cut cars out of an assembled train and, thus, should reduce inspection times and make for more efficient operations.

The final rule adds two items to the inspections that are to be conducted when a car is on a shop or repair track. They are an inspection of a car's hand brake and an inspection of the accuracy and operation of any brake indicators on cars so equipped. The final rule does not provide for the specific inspection of these items during any of the other required brake tests. Consequently, FRA believes this is an ideal time for the railroad to inspect these items while imposing the least burden on the railroad's inspection and repair forces.

As the final rule requires that certain inspections and tests be performed when a car is on a shop or repair track and because a repair track air brake test is required to be performed when a car is on a repair track and such a test has not been performed within the last twelve months, FRA believes it is necessary to clarify what constitutes a shop or repair track. This issue has become more prevalent over the last few years due to the growing use of mobile repair trucks and due to the requirements for conducting repair track

air brake tests. For years, many railroads have conducted minor repairs on tracks called ''expedite tracks.'' Generally, the types of repairs that were performed on these tracks were minor repairs that could be made quickly with a limited amount of equipment, and neither the railroads or FRA considered the tracks to be repair tracks. However, recently railroads have started performing virtually every type of repair on these expedite tracks. These tracks are no longer limited to minor repairs but are being used to perform heavy, complex repairs that require the jacking of entire cars or the disassembly and replacement of major portions of a car's truck or brake system. At many locations these expedite tracks are positioned next to operative repair shops. Furthermore, several railroads have closed previously existing repair shop facilities and are now using fully equipped mobile repair trucks to perform the same type of repairs that were previously performed in the shop or on established repair tracks and are attempting to call the tracks serviced by these mobile repair trucks ''expedite tracks.'' Thus, the line between what constitutes a repair or shop track and what constitutes an ''expedite track'' has become unclear, if not, nonexistent.

FRA believes that the operational changes, noted above, are partly an attempt by the railroads to circumvent the requirements that currently apply when a car is on a shop or repair track. Currently, if a car is on a shop or repair track, it must have its brakes inspected, under 49 CFR 232.17(a)(2)(ii), (iv), and the car is to receive a repair track air brake test if it has not received one in the last twelve months under AAR Rule 3, Chart A. Some railroads contend that an expedite track is not a repair or shop track; therefore, the requirements of § 232.17(a)(2)(ii), (iv) do not apply. FRA finds this interpretation to be unacceptable and believes that railroads are abusing the concept of expedite tracks to avoid performing required maintenance. Therefore, the industry's own actions have caused the need for FRA to clarify what constitutes a shop or repair track. Consequently, the final rule includes a definition of what FRA will consider to be repair or shop tracks requiring the performance of certain tests and inspections.

The final rule makes clear that FRA will consider certain tracks to be repair or shop tracks based on the types of repairs that are made on the tracks, not necessarily the designation given by a railroad. The definition in the final rule also makes clear that it is the nature of the repairs being conducted on a certain track that is the determining factor not whether a mobile repair truck is being used to make the repairs. Due to the ability of mobile repair trucks to make virtually any type of repair necessary and due to their growing use, FRA does not believe that tracks regularly and continually serviced by these types of vehicles should be excepted from the definition of a repair track. FRA believes that if a track is designated by the railroad as an ''expedite'' track (*i.e.,* one where minor repairs will be conducted) then the railroad should ensure that only cars needing minor repairs be directed to that track for repair. The final rule does not eliminate the concept of expedite tracks but limits the use of such tracks to those types of repairs that are truly minor in nature and that require a limited amount of equipment to perform. At locations where a railroad conducts repairs of all types, either with fixed facilities or with mobile repair trucks, FRA would expect the railroad to designate certain trackage at the location as repair tracks and certain trackage as ''expedite tracks'' where only minor repairs would be conducted. In such circumstances, FRA would expect railroads to direct cars in need of heavier repairs, the kind that have been traditionally performed on a shop or repair track, to be directed to trackage designated at the location as a repair track.

The final rule places the burden on the railroad to designate those tracks it will consider repair tracks at locations where it performs both minor and heavy repairs, and makes the railroad responsible for directing the equipment in need of repair to the appropriate trackage. If the railroad determines that repairs of a heavy nature will be performed on certain trackage, then the track should be treated as a repair track, and any car repaired on that trackage should be provided the attention required by this final rule for cars on a shop or repair track. Further, if a railroad determines that minor repairs will be performed on certain trackage, then the railroad bears the burden of ensuring that only cars needing minor repairs are directed to that trackage. If the railroad fails to adequately distinguish the tracks performing minor repairs from those tracks performing heavy repairs or improperly performs heavy repairs on a track designated as an ''expedite track,'' then the railroad will be required to treat all cars on the trackage at the time that the heavy repairs are being conducted as though they are on a repair or shop track.

It should be noted that the issue of what constitutes a repair or shop track for the purposes of 49 CFR 232.17(a)(2)(ii) and (iv) is completely separate and distinct from the issue of whether a location is a location where necessary repairs can be performed for purposes of 49 U.S.C. 20303. Although an outlying location might be considered a location where certain brake repairs can be conducted, that does not mean the track where those repairs are performed should be considered a repair track. FRA does not intend for trackage located at outlying locations or sidings which are occasionally or even regularly serviced by mobile repair trucks to be considered repair tracks. FRA believes that repair or shop tracks should exist at locations that have fixed repair facilities and at locations where repairs of all types are performed on a regular and consistent basis regardless of whether the repairs are performed in fixed facilities or by mobile repair vehicles.

The final rule also modifies some of the proposed provisions regarding the testing and calibration of single car test devices and other mechanical devices used to perform single car and repair track air brake tests. FRA's intent when proposing the requirements was to codify the current best practices of the industry. Thus, FRA did not intend to propose testing and calibration requirements that were more stringent that those currently imposed by AAR standards. Therefore, FRA agrees that the testing and calibration requirements for single car test devices should not be imposed until the devices are actually placed in service, which is consistent with current AAR requirements. FRA recognizes that the proposed calibration and testing requirements may have resulted the unnecessary acquisition of single car testing devices. Consequently, the final rule makes clear that the 92-day and the 365-day requirements related to single car test devices are to be calculated from the day on which the device is first placed in service.

III. Section-by-Section Analysis

Amendments to 49 CFR Part 229

The amendments to part 229 contained in this final rule concern the testing of electronic gauges commonly used in electronically controlled locomotive brake systems. Currently, there are two electronically controlled locomotive brake systems in use on the nation's railroads, the Electro-Pneumatic Integrated Control (EPIC) system supplied by Westinghouse Air Brake Company and the Computer Controlled Brake (CCB) system developed by New York Air Brake Company. At this time, there are thousands of locomotives in service that

are equipped with either the CCB system or the EPIC system.

The final rule retains the proposed requirements extending the testing cycles for the electronic gauges used in these types of locomotive brake systems. The final rule retains the proposed increase of the testing interval for these electronic gauges from 92 days to one year. Although certain labor representatives objected to the proposed increase in the testing interval, contending that the interval should be reduced due to problems encountered by numerous locomotive engineers, FRA continues to believe that technology incorporated into the electronic gauges used in these locomotive brake systems has significantly increased their reliability over standard mechanical gauges. Furthermore, the objections raised were not based on the proper operation or performance of the electronic gauges.

The lengthening of the testing interval for these gauges is based on recommendations made by a committee formed to address issues related to the operation of electronically controlled locomotive brake systems as well as the training of those individuals using this new technology. In May of 1996, the RSAC Working Group decided to form a task force to consider issues related to electronically controlled locomotive brake systems. Rather than create an entirely new task force, the Working Group assigned the task to a group of individuals who were members of the previously established ''New Technology Joint Information Committee.'' This task force, comprised of representatives from the railroad industry, rail labor, air brake manufacturers, and locomotive manufacturers, addressed several issues related to these braking systems including: design; training; inspection and testing; and maintenance. The task force concluded that additional regulation of these types of locomotive braking systems was unnecessary since the current regulations or waivers sufficiently address the training, inspection, and maintenance of these systems and any additional design requirement would most likely not enhance safety and would probably restrict the advancement of new technology. The task force recommended that part 229 be revised to increase the testing interval for these electronic gauges from 92 days to an annual cycle. The task force based this recommendation on its finding that the electronic gauges used in these brake system are much more reliable than standard mechanical gauges due to the following: the electronic components have longer life cycles than those in mechanical gauges; the accuracy and durability of the transducer have been extended; and internal computer diagnostics detect inaccuracies before gauges becoming defective under federal regulations. FRA continues to agree with these findings and has retained the proposed extension in this final rule.

The final rule does not include the proposed requirement that locomotive compressors be tested for capacity by orifice test during the annual test required by § 229.27. FRA agrees that the requirement for orifice testing of locomotive air compressors was eliminated from part 229 in 1980. See 45 FR 21097. At that time, FRA found that such a test was not useful in detecting a bad compressor and, thus, found no reason to retain the requirement. Although the requirement to perform orifice testing remained in § 232.10(c), FRA's elimination of the requirement from part 229 rendered the provision in part 232 meaningless. As no railroad has performed orifice testing since 1980 and because FRA is not aware of any safety hazard being created due to the elimination of such testing, FRA agrees that there is no justification for reinstating the requirement to perform such testing.

Amendments to 49 CFR Part 231

The final rule retains the proposed clarifying changes in the applicability section of this part. FRA received no comments objecting to the proposed modifications. The changes are intended to make the regulatory exceptions consistent with the exceptions contained in the statute. The added exceptions are taken directly from 49 U.S.C. 20301 (previously codified at 45 U.S.C. 6). It is noted that the words ''freight and other non-passenger'' have been added to the exceptions in order to remain consistent with Congress' intent when the statutory exceptions were created. At the time that Congress provided an exception from the requirements of the Safety Appliance Acts, Congress did not and could not envision that the equipment used in these operations would be modified for the purposes of hauling passengers, which FRA has discovered with regard to four-wheel coal cars. Consequently, the final rule makes clear that FRA will except only freight operations or other non-passenger operations that employ the types of equipment contained in these amendments.

The final rule also retains the proposed movement of the provisions related to drawbars from part 232, where they are currently contained, to this part. FRA believes that part 231 is a more logical place for the drawbar provisions to be located as they are not a brake system component but a generic safety appliance. Although the final rule adopts the drawbar provisions as proposed, the changes made to the language of those provisions when proposed in the NPRM were for clarity and readability and were not intended to change any of the basic drawbar requirements contained in part 232.

49 CFR Part 232

Subpart A—General

Section 232.1 Purpose and Scope

Paragraph (a) contains a formal statement of the final rule's purpose and scope. FRA intends the final rule to cover all brake systems and brake components used in all freight train operations and all other non-passenger train operations.

Paragraph (b) contains the dates upon which railroads covered by this part will be required to comply with the requirements contained in this final rule. FRA recognizes the interrelationship between the proper training of railroad personnel and implementation of many of the inspection, testing, and maintenance requirements contained in the final rule. FRA realizes that in order for railroads to comply with many of the requirements related to the inspection, testing, and maintenance of equipment and the requirements regarding the movement of defective equipment, the railroad and its contractors must first be provided sufficient time to assess its current training program and develop and implement a training program consistent with the requirements of this part. The railroad or contractor then needs time to provide the necessary training to its employees without causing manpower shortages in its operations. FRA also recognizes that the costs of the training requirements are somewhat substantial and may prevent a railroad or contractor from completing the necessary training in a short period of time. Therefore, this final rule provides railroads and contractors with three years to develop and implement the required training. This period is consistent with the time requested by the AAR and other railroads. It is also consistent with the requirement to provide refresher training at least every three years and will allow a railroad or contractor to have one-third of its inspection forces receive the necessary refresher training each year after the initial training period is complete. Consequently, FRA will require compliance with all the requirements contained in § 232.15, subpart B,

subpart C, and subpart F of this final rule at the conclusion of the three-year period provided for conducting the required training.

This paragraph makes clear that the maintenance requirements contained in subpart D will become applicable to all railroads to which this part applies approximately six months after the issuance of this final rule. Virtually all of the requirements contained in this subpart are existing regulatory requirements or prevailing industry practice, and FRA sees no reason to significantly delay their implementation. FRA notes that this subpart requires certain tasks to be performed by a ''qualified person'; however, FRA will not subject railroads to the qualification and training requirements contained in this final rule for individuals performing these tasks until the conclusion of the three-year period provided for conducting the required training.

This paragraph also clarifies that the general provisions contained in subpart A of this final rule regarding applicability, definitions, waivers, responsibility for compliance, penalties, preemptive effect, special approval procedures, availability of records, and information collection will become applicable approximately sixty days after the issuance of this final rule. Due to the enforcement implications connected with these provisions, it is both necessary and desirable to have the provisions become applicable as quickly as possible.

This paragraph also makes clear that the requirements related to end-of-train devices contained in subpart E become applicable to all trains operating on track which is part of the general system of transportation approximately sixty days after issuance of the final rule. As the requirements related to these devices have existed for a number of years and because this final rule modifies those requirement to a very limited extent, FRA believes that railroads should have no problem complying with the requirements in this subpart in the period of time provided. Furthermore, the requirements contained in this subpart apply to both freight and passenger trains that operate on the general system of transportation and are not contingent on the performance of additional training.

FRA also recognizes that there are certain aspects of this final rule that provide operational flexibility to the railroads. Due to this flexibility, FRA believes that some railroads will desire the authority to comply with the final rule as soon as their employees have been properly trained. Therefore, paragraph (c) contains a provision which allows a railroad to notify FRA in writing that it is willing to begin compliance with the requirements of the final rule sometime earlier than the three years provided. However, FRA wishes to make clear that it does not intend for railroads to take advantage of the flexibility provided under some of the provisions of the final rule unless the railroad is willing to comply with all the requirements contained in the final rule.

Paragraph (d) of this section clarifies that any railroad that operates on the general railroad system of transportation that is not operating pursuant to the requirements contained in this final rule or the requirements contained in the Passenger Equipment Safety Standards at 49 CFR part 238, shall continue to comply with the requirements contained in part 232 as it existed prior to the issuance of this final rule, which have been moved to Appendix B of the new part 232. Thus, a railroad will continue to be subject to the existing inspection, testing, and maintenance provisions contained in part 232 until the railroad is required to operate under the provisions of this final rule (*i.e.* three years for most requirements) or until the railroad voluntarily commits to operate under the provisions of this final rule, whichever comes first. FRA also intends for operations and trains which currently operate under the existing part 232 to continue to operate pursuant to those provisions if the operation is not addressed by either this final rule or part 238. It should be noted that FRA does not intend to extend the coverage of part 232 beyond the types of operations that are currently subject to the requirements of part 232. Thus, FRA has explicitly excluded railroads that operate only on track inside an installation that is not part of the general railroad system of transportation, rapid transit operations that are not connected with the general system, and operations specifically excluded by statute.

Section 232.3 Applicability

As a general matter, paragraph (a) of this section establishes that this final rule applies to all railroads that operate freight or other non-passenger train service on standard gage track which is part of the general railroad system of transportation. In paragraph (b) of this section, FRA makes clear that subpart E of this final rule applies to all trains that operate on the general system regardless of whether the train is a freight or passenger train, unless it is specifically excepted by the provisions contained in subpart E. Subpart E contains the requirements regarding the use of two-way end-of-train devices which were issued on January 2, 1997 and became effective on July 1, 1997. Although the final rule contains some minor changes to these requirements, principally for clarification, the provisions contained in Subpart E are very similar to the existing requirements.

Paragraph (c) of this section contains a listing of those operations and equipment to which FRA does not intend this final rule to apply. These include: rapid transit operations not connected to the general system; commuter, intercity, and other short-haul passenger operations; and tourist, scenic, historic, or excursion operations. In 1994, FRA issued a power brake NPRM in which FRA attempted to draft a proposal covering all railroad operations. FRA received a multitude of comments suggesting that similar treatment of passenger and freight operations was not a viable approach due to the significant differences in the operating environment and equipment used in these operations. Based on these comments, FRA decided to separate passenger and freight operations and FRA recently addressed the power brake issues related to passenger and commuter operations in a separate final rule specifically tailored to those types of operations. *See* 64 FR 25540. Similarly, the Federal Railroad Safety Authorization Act of 1994 directs FRA to examine the unique circumstances of tourist and historic railroads when establishing safety regulations. The Act, which amended 49 U.S.C. 20103, states that:

> In prescribing regulations that pertain to railroad safety that affect tourist, historic, scenic, or excursion railroad carriers, the Secretary of Transportation shall take into consideration any financial, operational, or other factors that may be unique to such railroad carriers. The Secretary shall submit a report to Congress not later than September 30, 1995, on actions taken under this subsection.

Pub. L. 103–440, § 217, 108 Stat. 4619, 4624, November 2, 1994.

In response to this mandate, FRA submitted a report to Congress on June 11, 1996, outlining FRA's efforts to tailor its rail safety requirements to tourist, historic, scenic, and excursion railroads. Notably, FRA has established a Tourist and Historic Railroads Working Group formed under RSAC to specifically address the applicability of FRA's regulations to these unique types of operations. Consequently, any requirements issued by FRA for these types of operations will be part of a separate rulemaking proceeding. However, this final rule makes clear that

the provisions of part 232 as they existed prior to this issuance of this rule will continue to apply to such operations that are currently required to comply with the requirements in order to avoid regulatory gaps while power brake provisions for such service are finalized. Part 232 as it existed prior to the issuance of this final rule is contained as appendix B to this new part 232.

Similar to the amendments made to part 231, paragraphs (c)(6)–(c)(8) of this section also contain the express exceptions currently contained in the statute for certain coal cars and logging cars. These provisions are intended to make the regulatory exceptions consistent with the exceptions contained in the statute. The exceptions are taken directly from 49 U.S.C. 20301 (previously codified at 45 U.S.C. 6). As was done in these amendments to part 231, the words ''freight and other non-passenger trains'' have been added to the exceptions in order to remain consistent with Congress' intent when the statutory exceptions were created. At the time that Congress created an exception from the requirements of the Safety Appliance Acts, Congress did not and could not envision that the equipment used in these operations would be modified for the purposes of hauling passengers, which FRA has discovered with regard to four-wheel coal cars. Consequently, FRA will only except freight and other non-passenger operations which employ the types of equipment contained in these amendments.

Paragraph (d) of this section revokes the Interstate Commerce Commission Order 13528, of May 30, 1945, as amended (codified in existing § 232.3 and appendix B to part 232), and codifies some of the relevant provisions of that Order. Thus, paragraph (d) of this section contains a list of pieces of equipment that were excepted from the Order's specifications and requirements for operating power-brake systems for freight service. FRA believes that the Order is no longer completely relevant or necessary and believes that the relevant provisions should be incorporated into this section. In addition, FRA references current industry standards containing performance specifications for freight power brakes in other portions of this final rule which mirror the provisions contained in the Order. FRA notes that locomotives were removed from the listing as this final rule contains various requirements which address locomotives.

It should be noted that paragraph (a) of this section contains a specific reference to private cars and circus trains. As private cars are designed to carry passengers and are generally hauled in both freight and passenger trains, FRA intends that these types of cars be covered by both the recently issued Passenger Equipment Safety Standards and this final rule. For example, these types of cars will be subject to the maintenance and equipment standards applicable to passenger equipment but will be covered by the inspection requirements contained in this final rule when hauled in a freight train. With regard to circus trains, FRA intends for these operations to be covered by this final rule due to the unique nature of this equipment and operations. Although a circus train carries some employees, the majority of the train is composed of freight-type equipment and is operated in a manner similar to a freight train. Thus, for consistency purposes, FRA intends that this final rule apply to circus train operations.

Section 232.5 Definitions

This section contains an extensive set of definitions. FRA intends these definitions to clarify the meaning of important terms as they are used in the text of the final rule. The definitions are carefully worded in an attempt to minimize the potential for misinterpretation of the rule. The final rule retains most of the definitions proposed in the NPRM; however, based on the comments received a few new definitions have been added and other definitions previously included in the NPRM have been slightly modified for clarity. Several of the definitions introduce new concepts or new terminologies which require further discussion. The following discussion is arranged in the order in which the definitions appear in the rule text.

''Brake indicator'' means a device, actuated by brake cylinder pressure, which indicates whether brakes are applied or released on a car. The use of brake indicators in the performance of brake tests is a controversial subject. Rail labor organizations correctly maintain that brake indicators are not fully reliable indicators of brake application and release on each car in the train. Further, railroads correctly maintain that reliance on brake indicators is necessary because inspectors cannot always safely observe brake application and release. FRA believes that brake indicators can serve an important role in the performance of brake tests, particularly in those instances where the design of the equipment requires inspectors to place themselves in potentially dangerous position in order to observe the brake actuation or release.

The definition of ''effective brake'' has been slightly modified from the definition proposed in the NPRM. The modification clarifies that a car's air brake will not be considered effective if its piston travel exceeds the specified limits or if it is not capable of producing its designed retarding force. FRA believes this clarifying language is necessary to address the concerns raised by certain commenters regarding the definitions of ''bind'' and ''foul'' contained in this final rule. The definitions of ''bind'' and ''foul'' have been retained as proposed in the NPRM. Contrary to the assertions made by some commenters, FRA believes that the definitions are sufficiently clear. Certain commenters contend that the definitions of these terms fail to address every possible condition that could affect the proper operation of a brake system. FRA believes that the conditions noted by several commenters as not being covered by these definitions are sufficiently covered by the clarified definition of ''effective brake'' contained in this final rule. Thus, even though a condition may not cause a brake to ''bind'' or ''foul'' the condition would cause the brake not to be an ''effective brake'' as defined in the final rule. Furthermore, FRA does not believe that the definitions of ''bind'' or ''foul'' are overly broad, as suggested by some commenters, since the restrictions addressed are ones which affect the intended movement of a component. Therefore, if the restriction is one that does not restrict the component's intended movement, then it should not be considered to ''bind'' or ''foul.''

The final rule also includes a definition of ''inoperative dynamic brake'' which was not specifically contained in the NPRM. This definition has been added in response to comments that the term ''ineffective dynamic brake'' contained in the NPRM was unclear and could lead to potential misunderstandings. These commenters contended that the rule should use the term ''inoperative dynamic brake'' and that its definition should be consistent with the definition of ''inoperative brake.'' FRA agrees with these comments and thus, the final rule replaces the term ''ineffective dynamic brakes'' with the term ''inoperative dynamic brake.'' The term ''inoperative dynamic brake'' means any dynamic brake that no longer provides its designed retarding force on the train, for whatever reason. FRA agrees that the use of only this term clarifies the applicability of the requirements related

to dynamic brakes and prevents potential misunderstandings.

The final rule also defines the term ''initial terminal'' to mean the location where a train is originally assembled. This definition is consistent with the definition contained in the existing power brake regulations. Furthermore, the final rule eliminates the term ''point of origin'' proposed in the NPRM. FRA agrees that the proposed definition of this term was duplicative of the term ''initial terminal'' and merely created potential misunderstandings. Moreover, FRA agrees that the problems attempted to be addressed by the use of this term are sufficiently addressed by the various inspections required in this final rule when adding cars to a train.

The concept of ''ordered date'' or ''date ordered'' is vital to the correct application of this final rule. The terms mean the date on which notice to proceed is given by a procuring railroad to a contractor or supplier for new equipment. Some of the provisions of the final rule apply only to newly constructed equipment. When FRA applies a requirement only to equipment ordered on or after a specified date or placed in service for the first time on or after a specified date, FRA intends to exempt from the requirement, or ''grandfather'' any piece of equipment that is both ordered and placed in service for the first time before that date. FRA believes this approach will allow railroads to minimize, or avoid altogether, any costs associated with changing existing purchase orders and yet limit the delay in realizing the safety benefits of the requirements contained in this final rule.

The definitions of ''qualified person'' and ''qualified mechanical inspector'' are vital to understanding the inspection, testing, and maintenance provisions contained in this final rule. In order to ensure a proper understanding of these terms, the final rule clarifies FRA's intent regarding the necessary training these individuals are to receive and further clarifies the designation of such individuals. Although FRA disagrees with the assertions of some commenters that a ''qualified person'' should only be able to perform a limited number of tasks required by this final rule, FRA does agree that the definition of ''qualified person'' contained in the NPRM was overly vague and was susceptible to abuse and misunderstanding. Therefore, this final rule modifies the definition of a ''qualified person'' in order to more fully develop what is required by a railroad when designating a person as qualified to perform a particular task.

The definition of ''qualified person'' contained in this final rule makes clear that the person is to receive training pursuant to the training, qualification, and designation program required under § 232.203. The definition also makes clear that although a person may be deemed a ''qualified person'' for the performance of one task, that same person may or may not be considered a ''qualified person'' for the performance of another task. The rule requires that various tasks be performed by a ''qualified person.'' For example, these tasks include the performance of brake inspections, the handling of defective equipment, and the performance of single car tests. FRA would expect employees performing these various tasks to have different levels of training. For example, a person receiving appropriate training to be deemed a ''qualified person'' for the purpose of performing Class II brake tests should not be deemed a ''qualified person'' for the purpose of moving defective equipment or performing single car or repair track air brake tests, unless specific training is provided that individual which specifically covers those tasks. The final rule stresses that the individual must have received appropriate training to perform the task for which the railroad is assigning the person responsibility.

Contrary to the assertions of certain commenters, FRA does not intend for term ''qualified person'' to be synonymous with the term train crew member. Although the NPRM discussed the fact that a train crew member could be considered a ''qualified person'' for performing many of the brake inspections required by the rule, FRA does not intend for a train crew member to be deemed a ''qualified person'' for performing every task covered by this final rule which is to be performed by a ''qualified person.'' There are various tasks covered by this final rule (*i.e.,* single car and repair track air brake test) that must be performed by a ''qualified person'' which would require an individual to receive more specialized and in-depth training than that received by a person strictly performing brake inspections. For some tasks a ''qualified person'' may have to be an individual in the railroad's repair or mechanical department. The final rule makes clear that the railroad is responsible for determining that the person has the knowledge and skills necessary to perform the required function for which the person is assigned responsibility and for maintaining sufficient records documenting this knowledge and skill.

The final rule also retains the proposed definition of ''qualified mechanical inspector'' (QMI) with slight modification to ensure clarity and avoid potential misunderstanding. The final rule defines a QMI as a ''qualified person'' who as a part of the training, qualification, and designation program required under § 232.203 has received instruction and training that includes ''hands-on'' experience (under appropriate supervision or apprenticeship) in one or more of the following functions: trouble-shooting, inspection, testing, maintenance, or repair of the specific train brake components and systems for which the inspector is assigned responsibility. This person shall also possess a current understanding of what is required to properly repair and maintain the safety-critical brake components for which the person is assigned responsibility. Further, a QMI shall be a person whose primary responsibility includes work generally consistent with the above-referenced functions.

The definition contained in this final rule clarifies the intent of the NPRM by specifically stating that a QMI must be properly trained and have a primary responsibility in the function of trouble-shooting, inspection, testing, maintenance, or repair of the specific train brake systems for which the inspector is assigned responsibility. The definition also clarifies that a QMI must possess a current understanding of what is required to properly repair and maintain the safety-critical brake or mechanical components for which the person is assigned responsibility. The concept of QMI is premised on the idea that railroads will be permitted to move trains extended distances between brake inspections if the trains are inspected by highly qualified individuals. As no trains are currently permitted to move the distances between brake inspections permitted by this rule, FRA believes that the inspections these trains receive must be of very high quality and must be performed by individuals who can not only identify a particular defective condition but who have the knowledge and experience to know how the particular defective condition affects other parts of the brake system or mechanical components and who have an understanding of what might have caused a particular defective condition. FRA also believes that in order for a person to become highly proficient in the performance of a particular task that person must perform the task on a repeated and consistent basis. As it is almost impossible to develop and impose specific experience requirements, FRA believes that a requirement that the person's primary

responsibility be in one or more of the specifically identified work areas and that the person have a basic understanding of what is required to properly repair and maintain safety-critical brake components is necessary to ensure the high quality inspections envisioned by the rule.

In order to clarify the meaning of ''primary responsibility'' as used in the definition of QMI, the final rule contains a definition of the term. As a rule of thumb FRA will consider a person's ''primary responsibility'' to be the task that the person performs at least 50 percent of the time. Therefore, a person who spends at least 50 percent of the time engaged in the duty of either inspecting, testing, maintaining, troubleshooting, or repairing train brakes systems may be designated as a QMI; provided, the person is properly trained to perform the tasks assigned and possesses a current understanding of what is required to properly repair and maintain the safety-critical brake components for which he or she is assigned responsibility. However, FRA will consider the totality of the circumstances surrounding an employee's duties in determining a person's ''primary responsibility.'' For example, a person may not spend 50 percent of their day engaged in any one readily identifiable type of activity; in those situations FRA will have to look at the circumstances involved on a case-by-case basis.

The definition of QMI largely rules out the possibility of train crew members being designated as these highly qualified inspectors since the primary responsibility, as defined above, of virtually all current train crew personnel is the operation of trains and for the most part train crew personnel do not possess a current understanding of what is required to properly repair and maintain the safety-critical brake components that are inspected during the various required brake tests. FRA provides a clear definition of qualified mechanical inspector so that a differentiation can be made between the comprehensive knowledge and training possessed by a professional mechanical employee, and the more specialized training and general knowledge possessed by train crews. FRA intends the definition to allow the members of the trades associated with the testing and maintenance of equipment such as carmen, machinists, and electricians to become qualified mechanical inspectors. However, membership in labor organizations or completion of apprenticeship programs associated with these crafts is not required to be a qualified mechanical inspector. The two primary qualifications are possession of the knowledge required to do the job and a primary work assignment inspecting, testing, maintaining, troubleshooting, or repairing the equipment.

The definition of ''solid block of cars'' has been modified from that proposed in the NPRM. Although FRA believes the definition it proposed is consistent with current interpretations and enforcement of the existing requirement, FRA agrees with some of the commenters that the definition may have been too narrow and did not directly address FRA's primary concern, the block of cars itself. Rather than attempt to limit the addition of certain blocks of cars to a train by requiring that the entire train be reinspected if the block of cars is not composed of cars from only one other train, the final rule specifically addresses the inspection of a ''solid block of cars'' in the various inspection provisions based on the composition of the block. Thus, the final rule defines a ''solid block of cars'' as two or more freight cars consecutively coupled together and added to a train as a single unit. As FRA's primary concern is the condition of the block of cars being added to the train especially when the block of cars is made up of cars from more than one train, the final rule will permit a solid block of cars to be added to a train without triggering a requirement to perform a Class I brake test on the entire train. However, depending on the make-up of that block of cars, certain inspections will have to be performed on that block of cars at the location where it is added to the train. Therefore, the final rule places the emphasis on the inspection of the cars being added to the train rather than requiring a complete reinspection of the entire train.

The final rule also adds a definition of ''unit train'' and ''cycle train'' in order to clarify the requirement regarding the performance of a Class I brake test on such a train every 3,000 miles. Although the preamble to the NPRM made clear that this requirement was intended to apply to trains that are operated in captive service, the proposed rule text failed to specifically identify which trains were required to receive such attention. Thus, in order to remain consistent with FRA's intent, the final rule text has been modified to include the term ''unit or cycle train.'' ''Unit train'' or ''cycle train'' means a train that, except for the changing of locomotive power and the removal or replacement of defective equipment, remains coupled as a consist and continuously operates from location A to location B and back to location A. These trains are also referred to as captive service trains as they basically operate in one continuous loop. Currently, trains which operate in this fashion can operate almost indefinitely on one initial terminal inspection and then a continuing series of 1,000-mile inspections. FRA believes that it is necessary for these trains to receive comprehensive brake inspections on a periodic basis in order to ensure their safe and proper operation.

The definitions of ''transfer train'' and ''switching service'' are somewhat interrelated since the determination as to whether, at a minimum, a transfer train brake test is required is based on whether the movement is a switching movement or a train movement. It is noted that the definition of ''yard train'' contained in the NPRM has been eliminated from this final rule. As the term was not used in the NPRM and has not been used in this final rule, FRA finds no need to retain the definition. Furthermore, the determination as to whether or not a yard train is required to be inspected and tested as a transfer train is based on whether the train is engaged in a train movement.

The final rule slightly modifies the proposed definition of ''transfer train'' to clarify that such a train may pick up and deliver freight equipment while en route to its destination. Such activity is currently conducted by these trains, and it was not FRA's intent when issuing the NPRM to prohibit these trains from being used in this fashion. The final rule also retains the definition of ''switching service,'' which is defined as the classification of cars according to commodity or destination; assembling of cars for train movements; changing the position of cars for purposes of loading, unloading, or weighing; placing of locomotives or cars for repair or storage; or moving of rail equipment in connection with work service that does not constitute a train movement. Thus, a train engaged in switching service carries the potential of becoming a transfer train, subject to a transfer train's testing requirements, if the movement it will be engaged in is considered a ''train movement'' rather than a ''switching movement.'' FRA's determination of whether the movement of cars is a ''train movement,'' subject to the requirements of this section, or a ''switching movement'' is and will be based on the voluminous case law developed by various courts of the United States.

FRA's general rule of thumb as to whether a trip constitutes a ''train movement'' requires five or more cars coupled together that are hauled a distance of at least one mile without a

stop to set off or pick up a car and not moving for the purpose of assembling or disassembling a train. However, FRA may consider movements of less than one mile ''train movements'' if various circumstances exist. In determining whether a particular movement constitutes a ''train movement,'' FRA conducts a multi-factor analysis based upon the discussions contained in various court decisions on the subject. *See e.g. United States* v. *Seaboard Air Line R. R. Co.,* 361 U.S. 78 (1959); *Louisville & Jeffersonville Bridge Co.* v. *United States,* 249 U.S. 543 (1919). The following factors are taken into consideration by FRA: The purpose of the movement; the distance traveled without a stop to set out or pick up cars; the number of cars hauled; and the hazards associated with the particular route traveled (*e.g.,* the existence of public or private crossings with or without crossing protection, the steepness of the grade, the existence of curves, any other conditions that minimize the locomotive engineer's sight distance, and any other conditions that may create a greater need for power brakes during the movement). The existence of any of these hazards would tend to weigh towards the finding of a ''train movement,'' since these are the types of hazards against which the power brake provisions of the Federal rail safety laws were designed to give protection.

Section 232.7 Waivers

This section sets forth the procedures for seeking waivers of compliance with the requirements of this rule. Requests for such waivers may be filed by any interested party. In reviewing such requests, FRA conducts investigations to determine if a deviation from the general criteria can be made without compromising or diminishing rail safety.

Section 232.9 Responsibility for Compliance

General compliance requirements are contained in this section. In accordance with the ''use'' or ''haul'' language previously contained in the Safety Appliance Acts (49 U.S.C. chapter 203), and with FRA's general rulemaking authority under the Federal railroad safety laws, the final rule retains the proposed requirement that any train, railroad car, or locomotive covered by this part will be considered ''in use'' prior to departure but after it receives or should have received the necessary tests and inspections required for movement. FRA will no longer necessarily wait for a piece of equipment with a power brake defect to be hauled before issuing a violation report and recommending a civil penalty, a practice frequently criticized by the railroads. FRA believes that this approach will increase FRA's ability to prevent the movement of defective equipment that creates a potential safety hazard to both the public and railroad employees. FRA does not feel that this approach increases the railroads' burden since equipment should not be operated if it is found in defective condition in the pre-departure tests and inspections, unless permitted by the regulations. In fact, this modification of FRA's perspectives as to when a piece of equipment will be considered ''in use'' was fully discussed by members of the Working Group and representatives of both rail labor and rail management supported this approach, agreeing that the current practice of waiting for a defective piece of equipment to depart from a location does very little to promote or ensure the safety of trains. FRA received no comments objecting to this approach in response to the NPRM.

FRA currently interprets the ''use'' or ''haul'' language previously contained in the Safety Appliance Acts narrowly to require that a train or car not in compliance with the power brake regulations actually engage in a train movement before a violation under the power brake regulations could be assessed against a railroad. Although this interpretation is in accordance with existing case law, FRA believes that a broader interpretation is possible based upon the case law interpreting the ''use'' language contained in the Safety Appliance Acts and based upon FRA's general rulemaking authority under the Federal railroad safety laws. Based upon both these authorities, FRA finds that it is not necessary to require that a train or car engaged in a train movement prior to FRA assessing a violation under the power brake regulations. The fact that the train or car is being used by a railroad, has been or should have been inspected by the railroad, and will be engaged in a train movement while in non-compliance with the requirements contained in this part is sufficient to allow a violation to be assessed.

This section also clarifies FRA's position that the requirements contained in these rules are applicable to any ''person,'' as broadly defined in § 232.11, that performs any function required by the proposed rules. Although various sections of the final rule address the duties of a railroad, FRA intends that any person who performs any action on behalf of a railroad or any person who performs any action covered by the final rule is required to perform that action in the same manner as required of a railroad or be subject to FRA enforcement action. For example, private car owners and contract shippers that perform duties covered by these regulations would be required to perform those duties in the same manner as required of a railroad.

Paragraph (c) states that any ''person'' as broadly defined in § 232.11, that performs any function or task required by this part will be deemed to have consented to FRA inspection of the person's operation to the extent necessary to ensure that the function or task is being performed in accordance with the requirements of this part. This provision was contained in the NPRM, and FRA received no comments opposing the position. This provision is intended to put railroads, contractors, and manufacturers that elect to perform tasks required by this part on notice that they are consenting to FRA's inspection for rail safety purposes of that portion of their operation that is performing the function or task required by this part. In most cases, this function or task involves a contractor's performance of certain required brake inspections or the performance of specified maintenance on cars, such as conducting single car or repair track tests on behalf of a railroad. FRA believes that if a person is going to perform a task required by this part, FRA must have the ability to view the performance of such a task to ensure that it is conducted in compliance with federal regulations. Without such oversight, FRA believes that the requirements contained in this the regulation would become illusory and could be easily circumvented by some railroads. FRA believes that it has the statutory authority pursuant to 49 U.S.C. 20107 to inspect any facility or operation that performs functions or tasks required under this part, and this provision is merely intended to make that authority clear to all persons performing such tasks or functions.

Section 232.11 Penalties

This section identifies the penalties that may be imposed upon a person, including a railroad or an independent contractor providing goods or services to a railroad, that violates any requirement of this part. These penalties are authorized by 49 U.S.C. 21301, 21302, and 21304. The penalty provision parallels penalty provisions included in numerous other safety regulations issued by FRA. Essentially, any person who violates any requirement of this part or causes the violation of any such requirement will be subject to a civil penalty of at least $500 and not more than $11,000 per violation. Civil penalties may be

assessed against individuals only for willful violations, and where a grossly negligent violation or a pattern of repeated violations creates an imminent hazard of death or injury to persons, or causes death or injury, a penalty not to exceed $22,000 per violation may be assessed. In addition, each day a violation continues will constitute a separate offense. It should be noted that, the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101–410 Stat. 890, 28 U.S.C. 2461 note, as amended by the Debt Collection Improvement Act of 1996 Pub. L. 104–134, April 26, 1996 required agencies to adjust for inflation the maximum civil monetary penalties within the agencies jurisdiction. See 63 FR 11623. The resulting $11,000 and $22,000 maximum penalties noted in this section were determined by applying the criteria set forth in sections 4 and 5 of the statute to the maximum penalties otherwise provided for in the Federal railroad safety laws. Finally, paragraph (b) makes clear that a person may be subject to criminal penalties under 49 U.S.C. 21311 for knowingly and willfully falsifying reports required by these regulations. FRA believes that the inclusion of penalty provisions for failure to comply with the regulations is important in ensuring that compliance is achieved.

The final rule includes a schedule of civil penalties in appendix A to this part. Because such penalty schedules are statements of policy, notice and comment were not required prior to its issuance. See 5 U.S.C. 553(b)(3)(A).

Section 232.13 Preemptive Effect

This section informs the public as to FRA's intention regarding the preemptive effect of the final rule. While the presence or absence of such a section does not conclusively establish the preemptive effect of a final rule, it informs the public concerning the statutory provisions which govern the preemptive effect of the rule and FRA's intentions concerning preemption. Paragraph (a) points out the preemptive provision contained in 49 U.S.C. 20106, which provides that all regulations prescribed by the Secretary relating to railroad safety preempt any State law, regulation, or order covering the same subject matter, except a provision necessary to eliminate or reduce an essentially local safety hazard that is not incompatible with a Federal law, regulation, or order and that does not unreasonably burden interstate commerce. With the exception of a provision directed at an essentially local safety hazard that is not inconsistent with Federal law, regulation, or order and that does not unreasonably burden interstate commerce, 49 U.S.C. 20106 will preempt any State regulatory agency rule covering the same subject matter as the regulations contained in this final rule.

Paragraph (b) of this section also informs the public of the potential for preemption under various other statutory and constitutional provisions. These include: the Locomotive Inspection Act (now codified at 49 U.S.C. 20701–20703), the Safety Appliance Acts (now codified at 49 U.S.C. 20301–20304), and the Commerce Clause. FRA is not expressing positions as to whether or to what extent preemption exists with regard to any of the provisions noted above because doing so requires a lengthy analysis for each component which, in the aggregate, would be so long as to impair the usefulness of this document for most readers. As FRA lacks the authority to make binding preemption determinations, FRA's purpose in identifying these provisions is merely to inform the public of the existence of these provisions and that voluminous case law exists regarding preemption under each of the provisions.

Paragraph (c) further informs the public that FRA does not intend to preempt provisions of State criminal law that impose sanctions for reckless conduct that leads to actual loss of life, injury, or damage to property, whether such provisions apply specifically to railroad employees or generally to the public at large.

Section 232.15 Movement of Defective Equipment

This section contains the provisions regarding the movement of equipment with defective brakes without civil penalty liability. Except as noted in the discussion below, the provisions contained in this section are almost identical to the provisions proposed in the 1998 NPRM and incorporate the stringent conditions currently contained in 49 U.S.C. 20302, 20303, 21302, and 21304 (previously codified at 45 U.S.C. 13). The language used in some of the provisions has been slightly modified to ensure consistency with existing statutory requirements. As pointed out in the previous discussion, most of the alternative proposals received by FRA in response to the 1994 NPRM, the subsequent RSAC Working Group meetings, and the 1998 NPRM all contained provisions regarding the movement of equipment with defective brakes which are in direct conflict with the statutory requirements. *See* ''Overview of Comments and General FRA Conclusions'' portion of the preamble under the heading ''Movement of Equipment with Defective Brakes.'' FRA continues to believe that the requirements related to the movement of equipment with defective brakes retained in this final rule are not only consistent with the statutory requirements, but also ensure the safe and proper movement of defective equipment and clarify the duties imposed on a railroad when moving such equipment.

Paragraph (a) of this section contains various parameters which must exist in order for a railroad to be deemed to be hauling a piece of equipment with defective brakes for repairs without civil penalty liability. The final rule modifies the language used in some of the proposed general provisions contained in this paragraph to accurately reflect the language contained in the existing statutory provisions pertaining to the movement of equipment with defective brakes. The final rule replaces the term ''repair location'' with the phrase ''location where necessary repairs can be performed.'' FRA agrees with the comments of certain labor representatives that the proposed language could have been interpreted as being somewhat contrary to the language used in the existing statute, which was not FRA's intent.

The vast majority of the requirements contained in this paragraph should pose absolutely no additional burden to railroads as they are merely a codification of existing statutory requirements. The only requirement being retained from the 1998 NPRM in this paragraph that is not currently mandated is the requirement that all cars or locomotives found with defective or inoperative braking equipment be tagged as bad ordered with a designation of the location where the necessary repairs can and will be effectuated and that a qualified person determine the safety parameters for moving a piece of defective equipment. Although these are new requirements, most railroads already tag defective brake equipment upon discovery of the defect. It should be noted that the final rule clarifies that the person required to make the determinations regarding the safe movement of defective equipment is to be a ''qualified person'' as defined in the final rule. The intent of FRA when issuing the NPRM was to require the determinations to be made by these individuals. FRA believes that the training requirements contained in the final rule for designating a person qualified to perform a specific task will ensure that the individual possesses the appropriate knowledge and skills to

perform the assigned task. Furthermore, the determinations that are required to be made in the final rule are currently made by individuals who FRA believes will be trained and designated under the final rule as qualified persons.

In paragraph (a), FRA retains the existing and proposed requirement that equipment with defective brakes shall not depart from or be moved beyond a location where the necessary repairs to the equipment can be performed. Therefore, if a car or locomotive is found with defective brakes during any of the proposed brake inspections or while the piece of equipment is en route and the location where the defective equipment is discovered is a place where repairs of the type needed can be performed, that car or locomotive shall not be moved from that location until the necessary repairs are effectuated. However, if repairs to the defective condition cannot be performed at the location where the defect is discovered, or should have been discovered, the final rule makes clear that the railroad is permitted to move the equipment with the defective condition only to the nearest location where the necessary repairs can be performed.

Paragraph (a) also retains the proposed codification and clarification of the statutory restrictions on the movement of equipment with defective brakes onto the line of a connecting railroad. Hence, the delivery of defective equipment in interchange is covered by these restrictions. In addition to fulfilling the other requirements set out in this section, a railroad seeking relief from civil penalty liability must show that the connecting railroad has elected to accept the non-complying equipment and that the point of repair on the connecting railroad's line, where the equipment will be repaired, is no further than the point where the repairs could have been made on the line where the equipment was first found to be defective.

Paragraph (b) of this section contains the specific requirements regarding the tagging of equipment found with defective brake components. The requirements contained in this paragraph are very similar to the tagging requirements proposed in the NPRM and those currently contained in part 215, regarding the movement of equipment not in compliance with the Freight Car Safety Standards, and are generally consistent with how most railroads currently tag equipment found with defective brakes. The final rule retains the proposed requirement that a record or copy of each tag removed from a defective piece of equipment be retained for 90 days and made available to FRA within 15 days of request. FRA does not believe that the proposed time frames need to be expanded as suggested by some commenters. The provisions are identical to those contained in part 215, regarding freight car defects and they have proven to be sufficient to meet the needs of FRA. The record keeping requirements are intended to aid FRA in its enforcement of the regulations. As the agency is able to inspect and oversee only a small portion of the railroad operations taking place across the country at any one time, the need for railroads to maintain records of such operations is essential for FRA to carry out its mission of ensuring that all railroads are operating in the safest possible manner and that they comply with those minimum Federal standards designed to ensure that safety.

Paragraph (b) also recognizes that the industry may attempt to develop some type of automated tracking system capable of retaining the information required by this section and tracking defective equipment electronically. Thus, this paragraph permits the use of an automated tracking system in lieu of directly tagging the equipment if the automated system is approved for use by FRA. Contrary to the recommendations of some commenters, FRA is not willing to permit the implementation of an automated tracking system without its approval. As an adequate automated system for tracking defective equipment does not currently exist on most railroads, FRA does not believe it is prudent, from a safety perspective, to allow implementation of a tracking system for which FRA would not have a prior opportunity to assess to ensure the system's accessibility, security, and accuracy. Furthermore, FRA tends to agree with the assertion of various labor representatives that the physical tagging of defective equipment provides a railroad's ground and operational forces the ability to visually locate and identify defective equipment at the time they see it rather than referring to an electronic database for such information.

This paragraph also contains language not previously included in the NPRM regarding FRA's oversight of an automated tracking system that is approved by FRA. FRA believes these provisions as necessary to ensure the agency's ability to monitor such systems and potentially prohibit the use of the system if it is found deficient. The provisions make clear that an automated tracking system approved for use by FRA be capable of being reviewed and monitored by FRA at any time. This paragraph also notifies the railroads that FRA reserves the right to prohibit the use of a previously approved automated tracking system if FRA subsequently finds it to be insecure, inaccessible, or inadequate. Such a determination would have to be in writing and include the basis for taking such action.

Paragraph (c) retains the proposed provision restricting the movement of a vehicle with defective brakes for the purpose of unloading or purging only if it is necessary for the safe repair of the car. This restriction is fully consistent with the statutory provisions regarding the movement of equipment with defective safety appliances.

Paragraph (d) retains with slight modification the method of calculating the percentage of operative power brakes (operative primary brakes) in a train that was proposed in the NPRM. This paragraph retains the general method of calculating the percentage on a control valve basis. However, FRA agrees with the comments of the NTSB and certain labor representatives that the method proposed in the NPRM did not take into consideration the possibility of a control valve being cut in when the brakes it controls are inoperative. Therefore, this final rule clarifies that a control valve will not be considered cut-in if the brakes controlled by that valve are inoperative. Although the statute discusses the percentage of operative brakes in terms of a percentage of vehicles, the statute was written nearly a century ago, and at that time the only way to cut out the brakes on a car or locomotive was to cut out the entire unit. *See* 49 U.S.C. 20302(a)(5)(B). Today, many types of freight equipment can have their brakes cut out on a per-truck basis, and FRA expects this trend to increase as the technology is applied to newly acquired equipment. This final rule merely adopts a method of calculating the percentage of operative brakes in a train based on the design of equipment used today and, thus, a means to more accurately reflect the true braking ability of the train as a whole. FRA believes that this method of calculation is consistent with the intent of Congress when it drafted the statutory requirement and simply recognizes the technological advancements made in braking systems over the last century.

Paragraph (d) also retains the proposed list of conditions that are not to be considered inoperative power brakes for purposes of calculating the percentage of operative brakes. Certain commenters recommended that FRA eliminate the proposed listing of conditions that would not be considered as rendering the brakes inoperative, contending that the listed conditions

should not be excluded from consideration. FRA disagrees with these commenters. The purpose of the calculation is to determine the percentage of operative brakes, and the conditions listed in the proposal and retained in this final rule do not render the power brakes inoperative. Many of the listed conditions constitute a violation under other provisions contained in the final rule or another regulatory provision for which separate penalties are provided.

A cut-out or ineffective power brake is an inoperative power brake, but the failure or cutting out of a secondary brake system does not result in inoperative power brakes; for example, failure of the dynamic brake does not render the power brake inoperative. Furthermore, inoperative handbrakes or power brakes overdue for maintenance or stenciling do not render the power brakes inoperative on the car and should not be deemed inoperative power brakes for purposes of the calculation. The final rule and other regulations contain separate penalties for operating a car that has an inoperative handbrake, is overdue for maintenance, or lacks the proper stenciling or marking if not being properly hauled for repairs. In addition, although a car may be found with piston travel that exceeds the Class I brake test limits, such excess travel does not render the brakes inoperative until the piston travel exceeds the outside limits established for that particular type of piston design. However, piston travel that exceeds the applicable Class I brake test limits would be considered a defective condition if the piston travel were not adjusted at the time that a Class I brake test were performed, and the final rule contains an appropriate penalty for such a condition.

Paragraph (e) contains the requirements regarding the placement of cars in a train that have inoperative brakes. The requirements contained in this final rule are virtually identical to the requirements proposed in the NPRM. The restrictions contained in this paragraph are consistent with current industry practice and are part of almost every major railroad's operating rules. This paragraph prohibits the placing of a vehicle with inoperative brakes at the rear of the train. In addition, this paragraph retains the prohibition on the consecutive placing of more than two vehicles with inoperative brakes, as test track demonstrations have indicated that when three consecutive cars have their brakes cut-out it is not always possible to obtain an emergency brake application on trailing cars. However, as it was FRA's intent to incorporate current industry practice when proposing the requirements, the final rule slightly modifies the requirement regarding the placement of multi-unit articulated equipment. When proposing the restrictions regarding multi-unit articulated equipment, FRA extrapolated the restriction based on the requirements regarding the consecutive placing of defective cars. Based on its consideration of the comments, FRA has determined that the proposed requirement prohibiting the placement of such equipment with consecutive control valves cut out is more restrictive than current practice on many railroads, which was not FRA's intent when drafting the proposal. Consequently, in order to remain consistent with existing industry practice, the final rule requires that such equipment shall not be placed in a train if it has more than two consecutive individual control valves cut out or if the brakes controlled by the valve are inoperative.

Paragraph (f) contains guidelines that FRA will consider when determining whether a location is one where necessary brake repairs can be performed and whether a location is the nearest location where such repairs can be effectuated. The preamble to the NPRM contained an extensive discussion regarding what factors should be considered when determining whether a particular location is one where brake system repairs should be performed and discussed the difficulties and pitfalls associated developing a standard applicable to all situations. *See* 63 FR 48309. In the NPRM, FRA stated that the determinations as to what constitutes a location where necessary repairs can be performed had to be conducted on a case-by-case basis utilizing the criteria established in existing case law. A number of railroad representatives commented on this issue and recommended that FRA further clarify what constitutes a location where brake repairs must be conducted. These commenters claimed that leaving the determination solely to individual FRA inspectors creates inconsistent enforcement and makes it virtually impossible for railroads to comply. AAR and its members recommended that FRA allow railroads to designate locations where brake system repairs would be conducted. Conversely, representatives of rail labor objected to any approach that would permit railroads to designate repair locations, claiming that such an allowance would violate the statutory conditions regarding the movement of defective equipment.

After consideration of these comments, FRA believes it is essential to further clarify to the regulated community what the agency's position will be for determining whether a location is a place where brake repairs are to be conducted. FRA does not agree that a railroad should be permitted to independently determine the locations it will consider capable of making brake system repairs. History shows that many railroads and FRA have widely different views on what should be considered a location where brake repairs can and should be effectuated. Furthermore, it is apparent to FRA that some railroads attempt to minimize or circumvent the requirements for conducting repairs in the name of convenience or efficiency. However, FRA also recognizes that the emergence of mobile repair trucks creates an ability to perform repairs that did not exist when Congress originally enacted the statutory requirements related to the movement of defective equipment. FRA acknowledges that every location where a mobile repair truck is capable of making repairs should not be considered a location where repairs must be conducted. However, FRA also disagrees with the contentions of some commenters that Congress only intended for fixed repair facilities to be considered when determining locations where brake repairs are to be performed and that mobile repair trucks should not be considered. FRA is aware of numerous locations where mobile repair trucks are being used in lieu of a fixed facility or where a fixed facility was eliminated and the repairs that were being performed by the fixed facility are now being performed at the same location with a fully equipped repair truck. Thus, FRA believes that locations where repair trucks are used in virtually the same manner as a fixed facility should be considered when determining whether the location is capable of making the necessary repairs.

As noted in the NPRM, the determination as to what constitutes a location where necessary repairs can be performed is an issue that FRA has grappled with for decades. FRA continues to believe that the determination must be made on a case-by-case basis after conducting a multi-factor analysis. However, in an effort to better detail the items that will be considered by FRA in making a determination, paragraph (f) contains general guidelines that FRA will consider when determining whether a location is one which should be considered a location where at least some brake system repairs must be

made. FRA would expect a railroad to consider the guidance contained in this paragraph when making its decisions on where equipment containing brake defects will be repaired. The guidance contained in this paragraph is based upon, and consistent with, the voluminous case law which exists that establishes the guiding principles for determining whether a location constitutes a location where the necessary repairs can be made as well as previous enforcement actions taken and guidance provided by FRA regarding such locations. The final rule guidance incorporates the principles discussed in the ''Overview of Comments and General FRA Conclusions'' portion of the preamble under the heading ''Movement of Equipment with Defective Brakes.''

Paragraph (g) provides a method by which a railroad may designate locations where various brake system repairs will be conducted. Although FRA does not believe that railroads should be permitted to unilaterally designate locations where brake system repair will be conducted, FRA does believe that a railroad in cooperation with its employees could potentially develop a plan that designates locations where brake system repairs will be effectuated. This paragraph makes clear that such a plan would have to be consistent with the guidelines contained in paragraph (f) and that such plans would have to be approved by FRA prior to being implemented. This paragraph also makes clear that for FRA to entertain a proposal containing a plan which designates locations where brake system repairs will be conducted a railroad and representatives of its employees must submit the proposal jointly . FRA does not intend to consider proposals nominally submitted pursuant to this provision that are not supported by a railroad's employees and their representatives.

Section 223.17 Special Approval Process

This section contains the procedures to be followed when seeking to obtain FRA approval of a pre-revenue service acceptance plan under § 232.505 for completely new brake system technologies or major upgrades to existing systems or when seeking approval of an alternative to the test standard incorporated in §§ 232.305 or 232.307. Several railroads and manufacturers contended, both in response to the 1994 NPRM and at the RSAC Working Group meetings, that FRA needed to devise some sort of quick approval process in order to permit the industry to make modifications to incorporated standards or existing equipment based on the emergence of new technology. Thus, FRA proposed an approval process it believed should speed the process for taking advantage of new technologies over that which is currently available under the waiver process. However, in order to provide an opportunity for all interested parties to provide input for use by FRA in its decision making process, as required by the Administrative Procedure Act, FRA believes that any special approval provision must, at a minimum, provide proper notice to the public of any significant change or action being considered by the agency with regard to existing regulations.

This section essentially retains the proposed special approval process. One private car owner commented that the procedures should require FRA to publish any petition received within 30 days of receipt and to rule on the petition within 30 days of receipt of the last comment. Certain representatives of rail labor asserted that the special approval procedures should be tightened to be consistent with the requirements for granting a waiver and that the comment period should be extended and expanded to provide adequate time for parties to prepare. As the special approval process only applies to pre-revenue testing plans and the procedures for conducting single car and repair track air brake tests and because the purpose of the process is to speed the decision making process, FRA does not believe it is necessary to further lengthen the comment periods proposed in the NPRM, and FRA thinks that the procedures provide an adequate opportunity for interested parties to comment. Furthermore, if the procedures for these special approvals are made overly burdensome then the speed intended to be gained through the process would be lost. However, FRA also does not believe that the proposed time frames provided for FRA's consideration of a petition should be reduced. FRA believes that the time frames included in the proposal for FRA consideration are necessary for FRA to fully consider all comments and information received.

Section 232.19 Availability of Records

This section makes clear that unless otherwise provided by this part, the records and plans required to be developed and maintained by this part shall be made available to representatives of FRA and States participating under part 212 of this chapter for inspection and copying upon request. FRA has added this section to the final rule in order to specifically clarify the availability of such records while increasing the readability of the rule and reducing the unnecessary repetition of the requirement throughout the text of the rule.

Section 232.21 Information Collection

This section indicates the provisions of this part that have been approved by the Office of Management and Budget for compliance with the Paperwork Reduction Act of 1995. *See* 44 U.S.C. 3501 *et seq*. A more detailed discussion of the information collection requirements contained in this part is provided in the ''Regulatory Impact'' portion of this preamble.

Subpart B—General Requirements

Section 232.101 Scope

This section contains a formal statement of the scope of this specific subpart of the final rule. This subpart is intended to establish general operating, performance, and design standards for railroads that operate freight or other non-passenger trains and further contains specific requirements for equipment used in these types of operations.

Section 232.103 General Requirements for All Train Brake Systems

This section contains general requirements that are applicable to all freight and non-passenger train brake systems. This section specifically includes certain basic train brake system practices and procedures that form the foundation for the safe operation of all types of trains. Some of these basic principles are so obvious that they have not been specifically included in past rules. For example, paragraphs (a)-(c) state the most basic safety requirements for all train brake systems, which include having the ability to stop a train within the existing signal spacing, maintaining and monitoring the integrity of the train brake communication line, and having the train brake system respond as intended to signals from the brake communication line. These basic requirements were proposed in the NPRM and have been retained in this final rule without change.

Paragraph (d) contains the provision requiring trains to have 100 percent operative and effective power brakes prior to use at, or departure, from certain locations and prohibiting the hauling of a car with inoperative or ineffective power brakes from certain under 49 U.S.C. 20303. Paragraph (d) has been slightly modified from that

proposed in the NPRM in order to clarify that the requirement applies only to trains that are required to receive a Class I brake test at the location. This modification was made in order to specifically clarify that the 100 percent operative brake requirement is not intended to apply to transfer trains that originate at a location where the necessary brake repairs cannot be effectuated. FRA agrees with the concerns raised by various commenters that the proposed language could have been interpreted as applying to transfer trains. FRA agrees that the 100 percent requirement does not currently apply to such trains, and it was not FRA's intention when issuing the NPRM to extend its application to such trains. However, it should be noted that if a transfer train originates at a location where repairs to the equipment containing defective brakes can be effectuated, then the train would be required to have 100 percent operative brakes prior to being used or departing that location.

Contrary to the contentions of certain commenters, FRA continues to believe that there is adequate justification for retaining the 100 percent requirement. The requirement to have 100 percent operative brakes prior to departing a location where an initial terminal brake test is required to be performed has existed in the railroad industry for decades. FRA believes it is not only wise from a safety standpoint, as it ensures the proper operation of a train's brake system at least once during its existence, but the requirement sets the proper tone for what FRA expects to be accomplished at these locations. FRA believes that requiring 100 percent operative brakes on trains at their origin provides the railroads with a margin for failure of some brakes while the train is in transit (up to 15 percent) and tends to ensure that defective equipment is being repaired in a timely fashion. In addition, FRA believes that the 100 percent requirement is consistent not only with Congress' understanding of the AAR inspection standards that were adopted in 1958, but also with the intent of FRA, rail management, and rail labor as to what was to occur at initial terminals when the inspection interval was increased from 500 miles to 1,000 miles in 1982. At that time, carrier representatives committed to the performance of quality initial terminal inspections in exchange for an extension in the inspection interval, for which FRA intends to hold them accountable.

Some commenters recommended that FRA permit any and all trains that have 95 percent operative brakes to operate from their point of origin to destination and noted that Canada currently allows such operation. FRA believes that such an approach would be completely contrary to the existing statutory mandate regarding the movement of equipment with defective brakes. The existing statutory provision regarding the movement of equipment with defective brakes requires that such equipment be repaired at the nearest location where the necessary repairs can be performed. *See* 49 U.S.C. 20303. Consequently, trains that originate at or that operate through locations where the necessary brake repairs can be effectuated are clearly required by the statute to have 100 percent operative brakes prior to departing those locations.

FRA realizes that the 100 percent requirement creates a somewhat illogical situation at some locations by requiring certain trains to have 100 percent operative brakes prior to departing the location and yet allowing other trains to pick up defective equipment at the same location. However, FRA believes that various safety benefits are created by retaining the 100 percent requirement. The public is assured that a train's brake system is in near perfect condition at the beginning of its journey, train crews are more cognizant of the presence of defective cars in the train when they are picked up en route, railroads are more likely to perform repairs at a location where trains are initiated in order to avoid breaking up trains to set out defective cars once the trains are assembled, and FRA retains a clear and consistent enforcement standard that can be easily understood by its inspectors and railroad industry employees.

Although FRA recognizes that the 100 percent requirement may be somewhat burdensome for some railroads at certain locations, FRA believes that the number of locations involved is relatively low and should be handled on a case-by-case basis through the existing waiver process. FRA believes that many railroads have created their own problems by eliminating repair facilities and personnel at many of the outlying locations that the railroads now claim they lack the ability to make appropriate repairs. Furthermore, FRA believes that the best method of assessing the safety implications of permitting a location to operate trains with less than 100 percent operative brakes is for the railroad to provide information on how the railroad will handle the defective equipment based on the specific needs and operating characteristics of the railroad involved.

In the NPRM, FRA provided various approaches under which it would potentially consider allowing a railroad to operate trains from their initial terminals with less than 100 percent operative brakes. *See* 63 FR 48310. The methods suggested by FRA were rejected as being overly burdensome by several commenters. Therefore, FRA believes the burden falls on each railroad seeking relief from the 100 percent requirement at certain outlying locations to provide FRA with an operating plan that will ensure the safe operation of such trains and provide for the timely and certain repair of any defective equipment moved from those locations. Consequently, FRA believes that there are a few existing locations that may be candidates for receiving a waiver from the 100 percent requirement, and FRA is willing to consider waivers for such locations; however the railroads applying for such waivers must be able to establish a true need for the exception and must be willing to provide alternative operating procedures that ensure the safety of the trains being operated from those locations.

Paragraph (e) contains a clear and absolute prohibition on train movement if more than 15 percent of the cars in a train have their brakes cut out or have otherwise inoperative brakes. Although there is no explicit limit contained in the statute regarding the number of cars with inoperative brake equipment that may be hauled in a train, the 15-percent limitation is a longstanding industry and agency interpretation of the hauling-for-repair provision currently codified at 49 U.S.C. 20303, and has withstood the test of time. This interpretation is extrapolated from another statutory requirement which permits a railroad to use a train only if ''at least 50 percent of the vehicles in the train are equipped with power or train brakes and the engineer is using the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in a train.'' 49 U.S.C. 20302(a)(5)(B). As originally enacted in 1903, section 20302 also granted the Interstate Commerce Commission (ICC) the authority to increase this percentage, and in 1910 the ICC issued an order increasing the minimum percentage to 85 percent. *See* 49 CFR 232.1, which codified the ICC order. One labor representative recommended that this requirement be eliminated as it creates confusion regarding the movement of defective equipment. FRA believes that if the rule is read in its entirety there should be no

confusion as to the movement of defective equipment, and that this provision merely sets an outside limit on the percentage of cars that may be hauled in any train with inoperative brakes. Consequently, FRA believes the express prohibition is necessary and will continue to require that equipment with inoperative air brakes make up no more than 15 percent of any train.

As virtually all freight cars are presently equipped with power brakes and are operated on an associated trainline, the statutory requirement cited above is in essence a requirement that 100 percent of the cars in a train have operative power brakes, unless being hauled for repairs pursuant to 49 U.S.C. 20303. Therefore, paragraph (f) makes clear that a train's air brakes shall be in effective and operable condition unless a car is being hauled for repairs pursuant to the conditions contained in § 232.15. This section retains the proposed standard for determining when a freight car's air brakes are not in effective operating condition based on piston travel. The piston travel limits for standard 12-inch stroke brake cylinders are the same as currently required under § 232.11(c). Certain labor representatives asserted that the permissible piston travel for these brake cylinders should be reduced to 10 inches rather than the currently allowed 10½ inches. These commenters provided no technical data to support such a change, and FRA is not aware of any problems or unsafe conditions resulting from the current 10½ inch piston travel allowance on such brake cylinders. Consequently, the final rule retains the existing piston travel limits for standard 12-inch stroke brake cylinders.

Due to the proliferation of equipment with other than standard 12-inch stroke brake cylinders, FRA has found that mechanical forces and train crew members performing brake system inspections often do not know the acceptable range of brake piston travel for this non-standard equipment. In an attempt to improve this situation and to ensure the proper operation of a car's brakes after being inspected, FRA proposed that vehicles equipped with other than standard 12-inch stroke brake cylinders have either the badge plate for the vehicle or a stencil, sticker, or marker indicate the acceptable range of piston travel for the brake equipment on that vehicle. FRA also proposed that the information on the badge plate, sticker, stencil, or marker include both the permissible brake cylinder piston travel range for the vehicle at Class I brake tests and the lengths at which the piston travel renders the brake ineffective. Paragraph (g) generally retains these proposed requirements. FRA continues to believe that this information is essential in order for a person to properly perform the brake inspections contained in this final due to the growing number of cars with other than standard brake designs. The requirement has been slightly modified from that proposed to require that the outside piston travel limit need only be provided if it is different from the Class I brake test limit. FRA agrees with the contentions of certain commenters that such information would be unnecessarily redundant if the limits are the same. Thus, if there is no outside limit indicated on the badge plate, stencil, sticker, or marker the piston travel limits indicated for the Class I/ initial terminal brake test for the vehicle will be considered the outside piston travel limits for that vehicle.

The AAR recommends that, in addition to vehicles equipped with standard 12-inch stroke brake cylinders, FRA should also except vehicles equipped with WABCOPAC or NYCOPAC truck-mounted brake cylinders from the marking requirements contained in paragraph (g). The AAR contends that the stenciling or marking of the piston travel limits on these vehicles is unnecessary because the piston travel limits for these brake systems are well-known and nearly 30 percent of the fleet is equipped with them. FRA disagrees with this contention. Based on FRA's experience in monitoring the performance of various brake tests, FRA believes that many employees are not aware of the piston travel limits for the brake systems noted above. Furthermore, there are numerous truck-mounted brake cylinders currently in use that have piston travel limits which are different from those of the WABCOPAC and NYCOPAC truck-mounted systems. Thus, FRA believes all vehicles equipped with these brake systems need to be marked in order to avoid confusion by individuals inspecting the equipment and thus ensure the proper operation of the brakes on such cars. Moreover, FRA is aware that many vehicles equipped with the type of truck-mounted brake systems sought to be excepted by AAR, particularly privately owned vehicles, already have decals, stickers, or stencils containing the information required by this paragraph.

The AAR also recommends that railroads be provided eight years in which to implement the marking requirements contained in this paragraph in order to perform the work during the required periodic single car or repair track air brake tests. FRA believes such an allowance of time is unnecessary and excessive. The reason FRA is permitting the information to be marked on the car with either a decal, stencil, or sticker is to provide the railroads with relatively simple and easy methods for bring cars into compliance without requiring them to be placed in a maintenance facility or on a repair track to have the information affixed. FRA believes that the three-year applicability period provided by this final rule provides railroads with sufficient time to mark cars as required. Furthermore, many cars are already properly marked with the necessary information as noted in the previous discussion.

Paragraph (h) requires that all equipment ordered or placed in service for the first time on or after the specified dates, be designed not to require an inspector to place himself or herself on, under, or between components of the equipment to observe brake actuation or release. This paragraph allows railroads the flexibility of using a reliable indicator in place of requiring direct observation of the brake application or piston travel because the designs of some freight car brake systems make direct observation extremely difficult unless the inspector places himself or herself underneath the equipment. Indicators of brake system piston travel or piston cylinder pressure have been used with satisfactory results for many years. Although indicators do not provide 100 percent certainty that the brakes are effective, FRA believes that they have proven themselves effective enough to be preferable to requiring an inspector to assume a dangerous position. Some commenters recommended that the indicator alternative be eliminated and that railroads should not be allowed to rely on indicators. FRA believes that these commenters fail to recognize the need to provide some alternative to direct observation of the piston travel on certain equipment and fail to acknowledge the existence of new technologies available to the industry. Further, although the rule permits the use of an indicator for purposes of determining piston travel, the individual inspecting such equipment would be required to inspect all components of the brake system for proper operation.

This requirement stems primarily from the brake system design of double-stack equipment currently used by several larger freight operations. Several commenters have indicated that the functioning of the brakes on this type of equipment cannot be observed without

inspectors placing themselves in potentially dangerous positions. In addition, a complete inspection of the brake equipment and systems used on double-stack equipment is time consuming. Consequently, inspectors are reluctant to conduct a complete brake inspection test on departing trains that contain this type of equipment. FRA thinks that double-stack equipment is becoming a mainstay of the freight railroad industry and that this design deficiency must be corrected. Thus, FRA has attempted to make this a performance requirement by simply specifying how the equipment must function and allowing the industry to determine the method of compliance.

Paragraph (i) retains the proposed requirement that an emergency brake application feature be available at any time and that it produce an irretrievable stop. This section merely codifies current industry practice and ensures that all equipment will continue to be designed with an emergency brake application feature. In the 1994 NPRM on power brakes, FRA proposed a requirement that all trains be equipped with an emergency application feature capable of increasing the train's deceleration rate a minimum of 15 percent. *See* 59 FR 47729. This proposed requirement merely restated the emergency specification currently contained in Appendix B to part 232. Comments received in response to that proposal indicated that some brake equipment currently in use or being developed could provide a deceleration rate with a full service application that is close to the emergency brake rate and that the proposed requirement would require the lowering of full service brake rates, thereby compromising safety and lowering train speeds. Consequently, the requirement proposed in the 1998 and retained in this final rule removes the 15-percent differential.

Paragraphs (j) and (k), which were proposed as paragraphs (k) and (l), impose on the railroads the responsibility for determining maximum air brake system working pressure and maximum brake pipe pressure. These provisions were contained in both the 1994 and 1998 NPRM, and FRA received no comments objecting to their inclusion. *See* 59 FR 47743. Thus, FRA intends to continue to allow individual railroads the wide latitude currently permitted in determining these pressures.

Paragraph (l), previously proposed as paragraph (m), provides that except as provided by other provisions of this part, all equipment used in freight or other non-passenger trains shall, at a minimum, meet the performance specification for freight brakes in AAR standard S–469–47. The AAR standard incorporated by reference in this paragraph contains all the provisions currently referenced in § 232.3 and contained in existing Appendix B to part 232. In the NPRM, FRA sought comments from interested parties as to the necessity of referencing these standards as well as any information on any updated standards related to the performance of freight equipment that is currently being used throughout the industry. Although one commenter generally asserted that the standards should merely be included as a reference and that their inclusion would require retroactive validation of proven designs, FRA finds little merit in this contention since any existing equipment should already be designed to the specifications as they are currently part of the existing regulations. Except as noted below, FRA received no comments seeking specific changes to the referenced specifications or other objections to their inclusion.

It should be noted that the provision previously proposed in paragraph (j) of this section requiring that the air brake components that control brake application and release be adequately sealed to prevent contamination by foreign material (63 FR 48359) has been removed due to its incorporation in another provision contained in this final rule. As the proposed requirement is contained in AAR standard S–469–47 as one of the general specification requirements, there is no reason to retain the specific requirement in this final rule. Thus, although the requirement has been specifically removed from the rule text, it is retained by its inclusion in the referenced AAR standard. Furthermore, FRA finds AAR's objection to this requirement somewhat hard to understand. FRA is not imposing a new requirement but merely sets forth an existing requirement contained in an AAR standard. Contrary to the concerns raised by AAR, FRA does not intend to change the existing standard of compliance for this requirement.

Paragraph (m), previously proposed as paragraph (n), retains the proposed requirement that if an en route train qualified by the Air Flow Method experiences a brake pipe air flow of greater than 60 CFM or brake pipe gradient of greater than 15 psi and the movable pointer does not return to those limits within a reasonable time the train must be stopped at the next available location and inspected for leaks in the brake system. This requirement one of the conditions of the general waiver granted to the AAR allowing the use of the air flow method to qualify train air brakes. FRA believes that this requirement is necessary to prevent trains with excessive leakage from continuing to operate. If a train has excessive leakage, the engineer may lack the ability to stop the train using the air brake system. Other than the general contention raised by certain labor representatives that the Air Flow Method not be allowed, FRA received no specific comments on the requirements contained in this paragraph.

Paragraph (n), previously proposed as paragraph (o), contains requirements regarding the setting and releasing of hand brakes on equipment that is left unattended. The requirements contained in this paragraph differ from those previously proposed in the NPRM. In the NPRM, FRA proposed various requirements for securing standing equipment. The requirements proposed in the NPRM were basically a reiteration of the guidance issued by FRA in Safety Advisory 97–2 on September 15, 1997. *See* 62 FR 49046. The securement guidance contained in Safety Advisory 97–2 was based upon FRA's review of an incident that occurred on August 20, 1997 near Fort Worth, Texas, and its awareness of other incidents involving the improper securement of rolling equipment. The Safety Advisory was issued in order to provide the industry with some assistance and guidance regarding securement procedures and to provide information on current practices of the industry related to the securement of rolling stock. Id.

The requirements proposed in the NPRM where also intended to address the practice known as ''bottling the air'' in a standing cut of cars, an issue related to improperly secured rail equipment. The practice of ''bottling the air'' occurs when a train crew sets out cars from a train with the air brakes applied and the angle cocks on both ends of the train closed, thus trapping the existing compressed air and conserving the brake pipe pressure in the cut of cars they intend to leave behind. This practice has the potential of causing, first, an unintentional release of the brakes on these cars and, ultimately, a runaway. Many railroad operating rules require that a 20-pound reduction in brake pipe pressure be made when stopping a train to remove a cut of cars from the train. Thus, if the trainman closes the angle cock where the cut is to be made before pressure equalizes in the trainline, an air wave action may form that can be of sufficient amplitude to initiate an unintentional release of the brakes.

Brake pipe gradient is another factor that makes bottling the air dangerous. ''Normal gradient'' is a term used to express the difference between the higher pressure on the front end of the train and the lower pressure on the rear end of the train, which is dependent upon brake pipe leakage and train length. Each train establishes its own normal gradient value. ''Inverse gradients'' and ''False gradients'' are temporary gradients that are a result of brake operations. Inverse gradients occur when a brake pipe reduction is made, temporarily making the brake pipe pressure higher on the rear of the train. The false gradient is created anytime the train brakes are set and released, thus temporarily resulting in a higher than normal pressure differential between the front and rear end of the train as the brake pipe charges. Therefore, if the engineer sets and releases a train's brakes a sufficient number of times prior to stopping to remove a cut of cars, a false gradient could be established. Even if the engineer made a 20-pound brake pipe reduction and listened for the air to stop exhausting at the automatic brake valve before giving the signal to the trainman to cut off the cars, the potential exists for an unintentional release of air brakes if the air on the cars is bottled. The false gradient could be of such magnitude that, as the trainline attempts to equalize, the higher pressure on the front end flowing to the rear will exceed the 1½ pound differential across the service piston and cause a release of air brakes. An inverse gradient can also create an unintentional release of brakes. As brake pipe pressure is reduced at the front of the train, the rear end temporarily has a higher pressure. As the trainline attempts to equalize, the pressure on the front end will rise. In some circumstances, this rise could be enough to initiate a release of air brakes.

On June 5, 1998, the NTSB issued the following recommendation to FRA:

> Issue a regulation that requires the brake pipe pressure to be depleted to zero and an angle cock to remain open on standing railroad equipment that is detached from a locomotive controlling the brake pipe pressure.

(R–98–17). This recommendation was the result of NTSB's investigation of an incident that occurred on January 27, 1997, on the Apache Railway near Holbrook, Arizona. The incident involved the runaway of 77 cars down a 1.7 percent grade for 14 miles resulting in the eventual derailment of 46 cars and the release of hazardous materials. Although there were no fatalities, 150 people were evacuated from nearby residential areas. The NTSB determined that the 77 cars rolled away unattended because the conductor of the train had trapped the air in the brake system, i.e., ''bottled the air,'' which resulted in an undesired release of the brakes on the standing cars. In its recommendation the NTSB correctly noted that FRA statistics show that ten accidents occurred between 1994 and 1995 which were attributable to the practice of ''bottling the air.''

FRA received numerous comments from the AAR and various other representatives of the railroads objecting to the proposed provisions regarding the securement of standing equipment. Although these commenters generally agreed with the intended purpose of the proposed requirements, they believed that the proposed provisions were overbroad, increased certain safety hazards, and exposed railroad employees to higher risk of injury. These commenters contend that the goals of FRA could be accomplished in a less burdensome fashion while increasing safety and reducing the potential for employee injuries. After reviewing the comments submitted by these parties, FRA agrees with most of the recommendations provided. Consequently, the provisions contained in this paragraph have been modified to reflect those recommendations.

FRA agrees with the recommendation that the requirements contained in this paragraph should be applied only to unattended equipment rather than to standing equipment generally. FRA agrees that, if the train is attended, the setting of handbrakes serves no useful purpose and would result in an enormous cost to the industry. Therefore, paragraph (n) contains a definition of ''unattended equipment'' to clarify the applicability of the requirements contained in this paragraph. The term covers equipment left standing and unmanned in such a manner that the brake system of the equipment cannot be readily controlled by a qualified person.

FRA also agrees that the proposed requirement that railroads develop a matrix to determine the number of hand brakes that are to be applied may not be the best approach to ensure that a sufficient number of hand brakes have been applied to a specific cut of unattended equipment. FRA agrees that the number of hand brakes required to be applied depends on a wide variety of factors not easily captured in a matrix format and that a matrix approach might result in either too few or too many hand brakes being applied. Thus, paragraph (n)(1) eliminates the requirement for developing a matrix and is modified to include a performance-based requirement that a sufficient number of hand brakes be applied to hold the equipment and a requirement that railroads develop and implement a process or procedure to verify that the applied hand brakes will sufficiently hold the equipment when the air brakes are released. This requirement will permit a railroad to develop appropriate operating rules to verify the sufficiency of the handbrakes applied which can be tailored to the specific territory and equipment operated by the railroad. On some railroads and at some locations, these operating rules may include the use of a matrix or some other type of set calculation.

Paragraph (n)(2) addresses the issue of ''bottling air'' on unattended equipment. This paragraph requires that an emergency brake application be initiated on all equipment prior to its being left unattended. This paragraph no longer requires that the locomotive be detached to effectuate the emergency application as was proposed. FRA agrees with the concerns raised by certain parties that the proposed requirement to detach locomotives to allow an emergency application of the brakes is not appropriate or desirable in many circumstances. FRA agrees that it is not necessary to detach locomotives to initiate an emergency application, that it is safer to leave the locomotives attached due to redundant securement features on a locomotive, that an emergency application should not be made until it is known that the number of hand brakes set is sufficient, and that it would be very burdensome to detach locomotives every time a train is left unattended.

Paragraphs (n)(3) and (n)(4) contain the requirements for securing unattended locomotives. FRA agrees with the recommendations made by various commenters that the proposed requirements regarding locomotive securement were over broad by failing to distinguish among (i) locomotives in the lead consist of a train, (ii) distributed power locomotives, and (iii) locomotives within yard limits. FRA agrees that these securement requirements contained in this final rule should not apply to distributed power locomotives. Consequently, these paragraphs establish specific securement requirements that apply only to locomotives in the lead consist of a train and are based on the location of the locomotive or locomotive consist when it is being left unattended.

Paragraph (n)(5) retains the proposed and existing requirement that any hand brakes applied to secure unattended equipment not be released until it is

known that the air brake system is properly charged.

It should be noted that paragraph (n) reflects FRA's agreement with the various concerns raised regarding the proposed requirements to use derails to secure unattended equipment and to chock and chain locomotives when left unattended on certain grades. FRA agrees that the use of derails, as proposed in the NPRM, could potentially create safety hazards if not properly removed and might expose employees to a greater potential for injury by increasing the handling and movement of derails. FRA also agrees that if handbrakes are properly applied on unattended locomotives there is little need to chock and chain locomotive wheels in most instances and such a requirement merely creates the potential of exposing railroad employees to unnecessary risks. Furthermore, FRA believes that the alternative approach submitted by the CAPUC regarding when and where derails should be applied is too complicated, requires further research, and might require unnecessary securement in many instances. Thus, the approach taken in this final rule is to provide requirements for the setting of hand brakes and require railroads to ensure the capability of those hand brakes to hold the equipment. If the applied hand brakes do not adequately hold the equipment, FRA would expect the railroad to utilize other methods of securement such as derails, skates, chains, and chocks.

Paragraph (o), previously proposed as paragraph (p), requires that air pressure regulating devices be adjusted in accordance with the air pressures contained in the chart contained in this paragraph. The chart is very similar to that proposed in the NPRM, but has been slightly modified in response to the comments received. The references to equipment used in passenger operations has been eliminated, and the pressure of the self-lapping portion for independent air brake has been modified to read ''30 psi or less'' rather than the proposed ''30–72 psi.''

Paragraph (p) contains the proposed provision regarding the joint responsibility of supervisors and inspectors to ensure the proper condition and functioning of train brake systems. The provision contained in this paragraph has been slightly modified in order to remain consistent with the existing requirement regarding such joint responsibility contained at § 232.11(a). These modifications clarify that joint responsibility exists to the extent that it is possible to detect defective equipment by the inspections and tests required by this part.

Section 232.105 General Requirements for Locomotives

For the most part, this section contains general provisions related to locomotives that are either currently contained in § 232.10 or that were previously proposed in the NPRM. As discussed in detail in the NPRM, FRA does not intend to include provisions in this final rule related to the inspection and maintenance of locomotive braking systems. FRA believes that these requirements are adequately addressed in part 229 and would only add to the complexity of this rule and potentially cause confusion or misunderstanding by members of the regulated community. Therefore, while many of the requirements currently contained in § 232.10 are no longer necessary as they are adequately addressed in part 229, paragraphs (a) and (c) are provisions currently contained in § 232.10 which FRA believes need to be retained. See 49 CFR 232.10(b) and (f)(2).

Paragraph (c) retains the proposed requirement that the hand or parking brake on a locomotive be inspected and repaired, if necessary, at least every 368 days. It should be noted that paragraph (c) has been slightly modified from that proposed in order to allow the date of the last inspection of the hand brake to be entered on Form FRA F 6180–49A in lieu of stenciling such information on the car. As the current regulation permits either the stenciling or tagging of a locomotive with this information and because many railroads currently record the information on the form noted above, FRA believes it is appropriate to continue to allow such a practice. FRA continues to believe that this inspection requirement will have little or no impact on railroads as this inspection is intended to coincide with the annual locomotive inspection required under § 229.27 and many railroads currently inspect these devices at this annual inspection. FRA also continues to believe that a thorough inspection of these devices on an annual basis is sufficient to ensure the proper and safe functioning of the devices.

Paragraph (b) retains the proposed requirement that locomotives ordered or placed in service for the first time after the specified dates be equipped with a hand or parking brake. Although the final rule retains the requirements that the hand or parking brake be capable of being set and released manually, the final rule modifies the requirement regarding the holding capability of such brakes. Rather than requiring that the brake be capable of holding the equipment on the maximum grade anticipated by the operating railroad, the final rule requires that the brake be capable of holding the equipment on a three-percent grade. Based on information provided by several locomotive manufacturers, FRA agrees that current locomotive hand and parking brakes are designed to achieve a three-percent holding capacity and that current operating practices are based on this capacity. Several manufacturers assert that if the holding capacity of these brakes had to be increased, then the cost of a locomotive would increase significantly as such an increase would require redesign of the foundation brake rigging. As the current designs have provided adequate safety and the enhanced design would be very expensive relative to the improvement in safety, this paragraph has been amended to require that the hand or parking brake be capable of holding the unit on a three percent grade.

A hand or parking brake is an important safety feature that prevents the rolling or runaway of parked locomotives. The requirements contained in this paragraph represent current industry practice. In the 1994 NPRM on power brakes, FRA proposed requiring that a hand brake be equipped on locomotives. See 59 FR 47729. FRA received several comments to that proposal suggesting that the term ''parking brake'' be added to the requirement since that is what is used on many newly built locomotives. A parking brake generally can be applied other than by hand, such as by spring pressure, by air pressure when the brake pipe air is depleted, or by an electrical motor. Parking brakes usually incorporate some type of manual application or release feature, although these features are generally more difficult to operate. FRA believes that parking brakes are the functional equivalent of a traditional hand brake and are capable of providing a similar level of security to stationary equipment. Consequently, FRA added the term ''parking brake'' to the 1998 NPRM and has retained the term in this final rule.

In paragraph (d), FRA requires that the leakage of air from equalizing reservoirs on locomotives and related piping be zero. The equalizing reservoir contains the controlling volume of air pressure, which is set to a desired pressure by the locomotive engineer by setting the regulating valve (also known as the ''feed valve'') on the automatic air brake system. When the automatic brake valve handle is moved to the release position, air supplied from the locomotive air compressor and the main air reservoirs is supplied to the equalizing reservoir through the

regulating valve. The brake pipe pressure will then be charged to the level of the air pressure contained in the equalizing reservoir. When an application of the train brakes is desired, the engineer moves the automatic brake valve handle into the application zone. The movement of the brake valve handle into the application zone shuts off the supply of air from the regulating valve to the equalizing reservoir, leaving the volume of air contained in the equalizing reservoir trapped in the equalizing reservoir. The pressure of the trapped air can then be reduced to a desired amount by movement of the automatic brake valve handle. This will result in the brake pipe pressure responding and being reduced to a pressure equal to the pressure contained in the equalizing reservoir. Furthermore, the air pressure in the brake pipe on most freight equipment will be maintained at the pressure in the equalizing reservoir due to the maintaining features of the brake system. Consequently, any leakage from the equalizing reservoir will affect the maintaining feature of the automatic air brake, causing the engineer to lose the ability to effectively maintain control of the brake pipe pressure and, thus, affecting the ability of the engineer to safely control the train in some circumstances.

One manufacturer of locomotives commented on the requirement contained in this paragraph, contending that the requirement should not be applied to locomotives utilizing electronic braking systems because such leakage is not detectable by the locomotive engineer. This commenter contends that on these types of braking systems a continuous demand is made on the compressor to offset any leakage and if the compressor cannot offset the leakage the engineer is notified and the train is automatically stopped if necessary. Thus, the systems are designed to be fail-safe in the event of excessive leakage. This commenter believes that FRA should recognize these types of designs and except them from the requirement contained in this paragraph.

FRA agrees that the electronic brake systems currently in use on some locomotives are designed to maintain equalizing reservoir pressure at a set limit. Because these systems are designed to offset equalizing reservoir leakage, the locomotive engineer would not experience any problem with the operation of the train's brakes if a minor leak occurs. However, if the leakage exceeds the ability of the system to maintain the pressure, a fault message would be displayed to the locomotive engineer and the train's brakes would be automatically applied, if necessary. Therefore, this section has been slightly modified from that proposed in the NPRM to allow locomotives that are equipped with these types of maintaining features to continue to operate with some leakage in the equalizing reservoir. However, this section makes clear that when such systems identify an equalizing reservoir leak, the railroad is to perform the repairs necessary to eliminate the leakage at the nearest forward location where such repairs can be made. Generally a leakage on these electronic braking systems will be discovered when maintenance personnel review the fault screen during routine inspections and tests. Therefore, if a locomotive is equipped with a braking system that has the ability to maintain equalizing reservoir pressure, with the automatic brake valve set in the freight position or direct release, an equalizing reservoir leak will generally not be required to be repaired until it is either identified by the inspection forces or until the locomotive engineer identifies the condition during the normal operation of the train.

In paragraph (e), FRA retains the proposed prohibition on the use of ''feed or regulating valve braking,'' in which reductions and increases in the brake pipe pressure are effected by manually adjusting the feed valve. ''Feed valve braking'' has been recognized by both the railroad industry and FRA as an unsafe practice. Most railroads already have some type of operating rule prohibiting this type of braking. No comments were received objecting to the inclusion of this prohibition in response to the NPRM.

In paragraph (f), FRA also retains the proposed prohibition on the use of the ''passenger'' position on the locomotive brake control stand on conventional freight trains when the trailing equipment is not designed for graduated brake release. The ''passenger'' position was intended only for use with equipment designed for graduated brake release. Therefore, use of the ''passenger'' position with other equipment can lead to potentially dangerous situations where undesired release of the brakes can easily occur due to the slightest movement of the automatic brake valve. In FRA's view, the only situation when the use of the passenger position might become necessary to safely control a train is when equalizing reservoir leakage occurs en route. If such a situation arises, this paragraph makes clear that the train may move only to the nearest forward location where the equalizing reservoir leakage can be corrected. No objections were received by FRA in response to the NPRM with regard to these requirements.

Paragraph (g) contains an existing requirement which was inadvertently excluded from the NPRM. This paragraph makes clear that engineers must know that the brakes on locomotives of which they are taking charge are in operative condition. This requirement is currently contained at § 232.10(l). Thus, FRA is not imposing a new burden by incorporating this requirement into the final rule. Furthermore, FRA does not intend to create a new inspection requirement by including this provision, but intends for it to be applied and enforced in the same manner as the existing requirement. If a locomotive engineer relieves another engineer, the condition of the brakes could be determined, based on a conversation or report from the engineer being relieved. The railroad may also elect to have mechanical forces inspect the locomotive for proper operation of the brakes and have the locomotive engineer accept the locomotives based on the mechanical department's inspection. However, a locomotive engineer may have to conduct a cursory inspection and perform a running test of the brake system to satisfy this requirement, if a prior inspection has not been performed.

Section 232.107 Air Source Requirements

This section contains requirements directed at ensuring that freight brake systems are devoid, to the maximum extent practical, of water and other contaminates which could conceivably deteriorate components of the brake system and, thus, negatively impact the ability of the brake system to function as intended. The general preamble section of this rule provides a detailed discussion as to why FRA proposed many of the items contained in this paragraph. *See* discussion contained in ''Overview of Comments and General FRA Conclusions'' portion of the preamble under the heading ''Air Source Requirements.'' Based on the work performed by and information gathered by the RSAC Working Group and based on FRA field experience, FRA continues to believe that requiring locomotives to be equipped with air dryers would provide minimal safety benefits and would impose an enormous and unwarranted cost burden on the railroads. Further, FRA continues to believe that simply requiring that yard air sources be equipped with air dryers may not necessarily effectuate the

desired results unless the air dryers are appropriately placed to sufficiently condition the air source. Many yard air sources are configured such that a single air compressor services several branch lines used to charge train air brake systems and, therefore, multiple air dryers may be required to eliminate the introduction of wet air into the brake system. FRA believes that, as with locomotives, requiring yard air sources to be equipped with air dryers would likely impose a significant and unnecessary cost burden on the railroads.

This section retains the basic requirements regarding yard air sources and cold weather operations that were proposed in the NPRM with minor modification based on the comments submitted in response to the proposal. Paragraph (a) retains the provisions requiring railroads to adopt and comply with a plan to monitor all yard air sources to ensure that the yard air sources operate as intended, are in proper condition, and do not introduce contaminants into the brake system of freight equipment. FRA intends to make clear that the inspections required under this paragraph are to be thorough inspections of the entire yard air source. This inspection would include all compressors, piping, hoses, valves, and any other component or part of the yard air source to ensure it is in proper condition and operates as intended.

Paragraph (a) modifies some of the proposed requirements related to the yard air source monitoring plans. FRA agrees with the comments provided by several labor representatives that the proposed requirements did not establish a frequency with which inspections of yard air sources should be conducted. In proposing the requirement, FRA hoped that various commenters would recommend frequencies for conducting these inspections. This did not occur. FRA agrees that a set frequency needs to be established which will ensure that yard air sources are inspected in a timely manner during various climatic conditions. Therefore, paragraph (a)(2)(i) requires that the monitoring plan developed by a railroad ensure that each yard air source be inspected at least twice each calendar year and that two of the inspections be no less than five months apart. FRA intends for this requirement to result in yard air sources being inspected each year during two different seasonal periods.

Paragraph (a)(2)(ii) clarifies that remedial action under the monitoring plans is required only on those yard air sources that are not operating as intended or that are found introducing contaminants into brake systems. Thus, the final rule removes the word ''potential'' from the proposed language as FRA agrees that the proposed language was unclear and may have been over-inclusive. The final rule also eliminates the proposed requirement for railroads to conduct a detailed assessment of the remedial actions taken. FRA agrees with the assertions of AAR that this proposed requirement is unnecessary because railroads will be conducting regular inspections of the yard air sources on which they have conducted repairs or taken other remedial action and will be able to determine if the repair were effective through those inspections. Paragraph (a)(3) retains the other proposed record keeping requirements related to yard air monitoring plans but clarifies that the records can be maintained either electronically or in writing. FRA continues to believe that these records are necessary to ensure that railroads are properly conducting the required inspections and are taking timely and appropriate remedial action when a problem air source is detected.

The final rule does not contain provisions requiring FRA approval of the yard air source monitoring plans prior to their implementation as suggested by some commenters. FRA does not have the personnel or resources to review and approve the plan of each railroad and does not believe such approval is necessary given the specific requirements contained in the final rule and the records that are required to be maintained. Although the final rule does not contain requirements regarding the use of air dryers on either locomotives or yard air sources, FRA advocates the use of air dryers when possible and agrees that they have proven effective in reducing the level of moisture introduced into the brake system. However, FRA believes that a railroad is in the best position to determine where these devices will provide the greatest benefit based on the railroad's operation. FRA notes its disagreement with AAR's contentions regarding both the time and the cost necessary to implement the required yard air source monitoring plans. FRA sees no reason why a railroad would need five years to implement a plan to inspect each of its yard air sources twice a year. These devices are used on a fairly regular, if not daily, basis and should not be that difficult to inspect. Consequently, FRA believes that railroads should easily be able to implement these monitoring plans by the three-year effective date provided in this final rule.

Paragraphs (b) and (d) contain additional measures to minimize the possibility of moisture being introduced into the trainline. Paragraph (b) of this section reiterates the proposed and current requirement contained at § 232.11(d), which requires that condensation be blown from the pipe or hose from which compressed air is taken prior to connecting the yard air line or motive power to the train. As an additional precaution, paragraph (d) of this section retains the proposed requirement that yard air reservoirs be equipped with an operable automatic drain system, or be manually drained at least once each day that the devices are used or more often when moisture is detected in the system.

Paragraph (c) generally retains the proposed ban on the use of chemicals in a train air brake system. However, FRA agrees with the position asserted by several commenters that the proposed prohibition of all chemicals may have been somewhat overbroad and contrary to FRA's actual intent. In proposing the prohibition FRA intended to eliminate the use of chemicals, such as alcohol, which are known to degrade the rubber of a train's brake system. FRA agrees that there may be chemicals which are currently available or which are in the process of being developed which do not cause the problems associated with the use of alcohol. In fact, FRA believes there are products currently available which do not degrade a brake system's rubber components. FRA believes that several railroads are currently testing or using these chemical alternatives. Therefore, FRA believes that there are alternatives to using alcohol which currently exist or can be developed which would provide railroads the ability to address the rare instances where trainlines become frozen. Consequently, this paragraph slightly modifies the prohibition on the use of chemicals by imposing the prohibition on chemicals that are known to degrade or harm brake system components, such as alcohol.

It should be noted that FRA recently published a final rule mandating the incorporation of two-way EOTs on a variety of freight trains, specifically those operating at speeds of 30 mph or greater or in heavy grade territories. *See* 62 FR 278. Two-way EOTs provide locomotive engineers with the capability of initiating an emergency brake application that commences at the rear of the train in the event of a blockage or separation in the train's brake pipe that would prevent the pneumatic transmission of the emergency brake application from the front of the train through the rest of the train. These devices consist of a front unit, located in the cab of the

controlling locomotive, and a rear unit, located in the rear of the train and attached to the brake pipe. Radio communication between the front and rear units is continually monitored and confirmed at regular intervals, and the rear unit is only activated when continuity of these radio transmissions is not maintained over a specified time interval. This discussion of two-way EOTs is particularly appropriate within the context of the air source requirements. In the unlikely event that compliance with the requirements contained in this section regarding dry air fails to sufficiently eliminate moisture from the trainline, and a restriction or obstruction in the form of ice develops as the result of freezing of this moisture during cold weather operations, the two-way EOT device becomes a first-order safety device and will initiate an emergency application of the brakes from the rear of train. As such, the vast majority of concerns associated with moisture in the trainline freezing during cold weather operations have been alleviated through the incorporation of this technology in most freight operations.

Paragraph (e) retains the proposed requirement that a railroad adopt and comply with detailed written operating procedures tailored to the equipment and territory of the railroad to promote safe train operations during cold weather situations. In 1990, the NTSB, in response to an accident which occurred in Helena, Montana, recommended that FRA amend the power brake regulations to require additional testing of air brake systems when operating in extreme cold, especially when operated in mountain grade territory. *See* NTSB Recommendation R–89–081 (February 12, 1990). In response to this recommendation and to various petitions for rulemaking requesting similar action, FRA in the 1994 NPRM proposed various requirements regarding cold weather operations, which included: use of two-way EOTs; prohibition on the use of alcohol in trainlines; air dryers on locomotives; and requirements for railroads to develop procedures for operating during cold weather and in mountain grade territories. As noted previously, a final rule regarding the use of two-way EOTs has been issued and is in effect. This final rule also prohibits the use of certain anti-freeze chemicals, contains other requirements to ensure that dry air is being added to brake systems, and retains the previously proposed requirement that railroads adopt and comply with operating requirements for cold weather and heavy-grade operations.

FRA recognizes that in the past there has been little support for mandating additional brake system testing during cold weather. FRA agrees that the development and use of welded pipe fittings, wide-lip hose couplings, and ferrule clamps have greatly reduced the effects of cold weather on the air brake system. However, FRA continues to believe that cold weather situations do involve added safety risks and need to be further addressed. FRA believes that requiring the development of written operating procedures will require railroads to go through the thought process necessary to analyze their operations during cold weather conditions in order to determine the inherent safety hazards involved and develop procedures to minimize those hazards. Due to the unique nature of each railroad and the difficulty in developing specific requirements that are applicable to all operations, FRA does not intend to mandate specific operating requirements at this time. However, FRA might consider mandating specific operating requirements that should be included in a railroad's cold weather operating practices if it is found that railroads do not develop sufficient requirements to address safe cold weather operations.

FRA recognizes that some railroads have already developed certain cold weather operating procedures which might be useful as models on other similarly situated railroads. For example, BNSF has unilaterally instituted a cold weather operating plan for certain trains at specific locations in Montana. This plan requires trains with greater than 100 tons per operative brake to be inspected or operated in a certain manner when temperatures fall below zero degrees. Part of the plan requires that after the performance of a 1,000-mile or initial terminal brake test on such trains, the brakes be reset and held for 30 minutes after which time the train is to be reinspected to ensure that 100 percent of the brakes remained applied. Brakes found not to have remained applied must be set out of the train or repaired. FRA believes that procedures such as these could greatly enhance the safety of the trains operated in cold weather conditions. FRA recognizes that there may be other types of operating or inspection criteria that could be implemented in extreme cold weather instead of, or in addition to, that noted above; such as, limits on the length or tonnage of such trains, limits on the use of yard air sources, or other enhanced inspection criteria. At this time, FRA continues to believe that railroads are in the best position to determine what procedures are best suited to their operations.

Section 232.109 Dynamic Brake Requirements

This section contains the operating requirements for trains equipped with dynamic brakes. Most, if not all, of the railroads participating in and commenting on this rulemaking have asserted that they do not consider dynamic brakes to be a safety device. However, these same commenters admit that they promote and encourage the use of dynamic brakes for purposes of fuel efficiency and to avoid wear to brake components. Due to this encouragement, dynamic brakes are relied on to control train speed and to provide assistance in controlling trains on heavy grades. Contrary to continued comments of several labor representatives, FRA does not feel that locomotives should be required to be equipped with dynamic brakes. FRA believes that the decision to equip a locomotive with dynamic brakes is mainly an economic one, best determined by each individual railroad. However, in order to prevent accidents and injuries that may result from an over-reliance on the dynamic brake, which may fail at any time, FRA believes that if the devices are available, engineers should be informed on their safe and proper use and be provided with information regarding the amount of dynamic braking power actually available on their respective trains. FRA continues to believe that by providing an engineer with as much information as possible on the status of the dynamic brakes on a train, a railroad better enables that engineer to operate the train in the safest and most efficient manner.

Paragraph (a) generally retains the proposed requirement that a locomotive engineer be informed of the operational status of the dynamic brakes on the locomotives the engineer will be required to operate. This paragraph makes clear that the information is to be provided to the locomotive engineer at a train's initial terminal and at other locations where a locomotive engineer first begins operation of a train. This paragraph slightly modifies the proposed method for providing this information to the locomotive engineer. The NPRM proposed that the locomotive engineer be provided the required information in writing. The intent of the proposed requirement to notify the locomotive engineer in writing as to the operational status of the dynamic brakes was to ensure that the engineer had timely information on

the condition of the locomotives so he or she could operate the train in the safest possible manner based upon that information. Thus, FRA tends to agree with the comments of several railroads and their representatives that the manner in which the information is provided to the engineer should not be a major concern provided the information is accurate and up-to-date. Therefore, this paragraph allows railroads to provide a locomotive engineer with the required information by any means they deem appropriate. However, this paragraph also makes clear that a written or electronic record of the information provided shall be maintained in the cab of the controlling locomotive. This will ensure that relief or other oncoming engineer will have the information provided to the previous operator of the train.

This paragraph also clarifies that the information is to be provided to the locomotive engineer at the train's initial terminal and at other locations where an engineer ''first begins operation'' of the train rather than where the engineer ''takes charge of the train.'' This clarification is in response to comments provided by certain labor representatives to prevent possible misinterpretation or abuse of the requirement since most railroads consider the conductor to be in charge of a train.

Paragraph (b) retains the proposed requirement to repair a locomotive with inoperative dynamic brakes within 30 days of its being found inoperative or at the locomotive's next periodic inspection, whichever occurs first. There are currently no requirements governing the maintenance and repair of dynamic brakes. Experience has shown that, since railroads do not consider dynamic brakes to be a critical safety item, repairs are typically effectuated when it is convenient and economical for the railroad, with little regard for timeliness. FRA believes that, as railroads have become increasingly dependent on the use of dynamic brakes as an integral part of their published safe train handling procedures, it is a reasonable expectation on behalf of locomotive engineers to have operable dynamic brakes on those locomotive units which are so equipped. Due to the industry's reliance on these braking systems, as noted in the discussion above, FRA continues to believe they should be repaired as soon as possible after being found inoperative. FRA agrees that there must be an appropriate balance between the operational considerations important to the locomotive engineer and the logistical and repair considerations that will be imposed on the railroads. FRA continues to believe that 30 days provides a railroad with sufficient time to get a locomotive to a location where the dynamic brakes can be repaired and allows for the reallocation of motive power when necessary so as to cause minimal disruption to a railroad's operation. Although certain commenters requested that the period allowed for repair be reduced to 15 days or less, FRA believes such a reduction is unwise as it might jeopardize a railroad's access to available motive power and could cause delay in the movement of freight, consequences that may create safety hazards themselves.

This paragraph also eliminates the use of the term ''ineffective dynamic brake'' and replaces it with the term ''inoperative dynamic brake.'' The term ''inoperative dynamic brake'' is defined in § 232.5 of the final rule to mean any dynamic brake which no longer provides its designed retarding force on the train, for whatever reason. FRA agrees with the comment of the AAR that the use and meaning of the term ''ineffective dynamic brake'' in the proposal was unclear and had the potential of creating misunderstandings. Consequently, for clarity this section uses only the term ''inoperative dynamic brake'' to describe a defective dynamic brake.

Paragraph (c) retains the proposed requirements related to the tagging of a locomotive found with inoperative dynamic brakes. FRA believes that the tags required by this paragraph are necessary to ensure the prompt and timely repair of locomotives found with defective dynamic brakes and also provide locomotive engineers and a railroad's ground forces with specific knowledge of the presence of such a locomotive. Contrary to the comments of some parties, FRA does not believe that the tagging provisions contained in this paragraph would require the development of new tags. This paragraph would allow the use of any type of tag provided it is placed in a conspicuous location on the cab of the locomotive and contains the required information.

Paragraph (d) contains a requirement that an electronic or written record of repairs made to a locomotive's dynamic brakes be maintained and retained for a period of 92 days. Although this requirement was not proposed in the NPRM, FRA believes these records fall within the scope of the notice and are necessary to ensure that repairs are conducted on a locomotive's dynamic brakes in a timely fashion. FRA also believes that such a record will provide a railroad with information regarding the operation of the dynamic brakes and will potentially permit railroads to identify a repeated problem with a locomotive's dynamic brakes to prevent recurrences of the problem and thus, increase the utilization of a locomotive's dynamic brakes.

The final rule continues to acknowledge that some railroads, primarily short lines, may own locomotives that are equipped with dynamic brakes but due to the physical terrain over which the railroad operates or the operating assignments of the particular locomotive, the railroad rarely, if ever, has the need to employ the dynamic braking capabilities of the individual locomotive. In these instances, the maintenance requirements discussed above become unnecessarily burdensome. Therefore, FRA continues to believe that relief is warranted in these situations provided a specified set of parameters is developed and adhered to that prevents direct and intentional circumvention of the proposed repair requirements. Therefore, paragraph (e) retains the proposed provision permitting a railroad to declare a locomotive's dynamic brakes ''deactivated'' if the following requirements are met: (i) The locomotive is clearly marked with the words ''dynamic brake deactivated'' in a conspicuous location in the cab of the locomotive; and (ii) the railroad has taken appropriate action to ensure that the deactivated locomotive is incapable of utilizing dynamic braking effort to retard or control train speed. It should be noted that the final rule eliminates the requirement to stencil the outside of a locomotive declared to have deactivated dynamic brakes. FRA agrees with the comments submitted by the AAR and other railroad representatives that defacing the exterior of the locomotive is unnecessary and would do little to inform the locomotive engineer of the deactivation of the dynamic brake. FRA believes that the requirements to notify the locomotive engineer of the operational status of the locomotives and to have the cab of the locomotive clearly marked that the locomotive's dynamic brakes are deactivated provide sufficient notice to the locomotive engineer as to the status of that locomotive.

This paragraph does not prescribe the specific manner in which a locomotive is to be deactivated, so long as the unit is not physically capable of employing its dynamic brakes to aid in train handling. Although FRA does not envision a significant number of instances where a locomotive which has been declared ''deactivated'' would need to be ''reactivated,'' FRA does

recognize that some railroads may need to reactivate the dynamic brakes in some circumstances, such as changes in a locomotive's operating environment or situations where a locomotive with previously ''deactivated'' dynamic brakes is purchased by another railroad. However, FRA intends to interpret the provision for ''*deactivating*'' a locomotive's dynamic brakes rather literally to minimize contentions that railroads are merely playing a cat and mouse game with the required maintenance interval to avoid repairing the units. Furthermore, FRA would expect the dynamic brakes on a locomotive to be fully functional at the time the locomotive is considered reactivated.

Paragraph (f) contains specific requirements related to the use of a locomotive with inoperative, deactivated, or no dynamic brakes as a controlling locomotive. These requirements are based on FRA's review of the comments submitted in response to FRA's request regarding the positioning of such locomotives contained in the NPRM. *See* 63 FR 48314. FRA tends to agree that there are no technical reasons why a locomotive with inoperative dynamic brakes cannot function as the controlling locomotive provided it can control the dynamic brakes on trailing units in the locomotive consist. However, FRA also agrees that a locomotive engineer loses the physical sensation of the operation of the dynamic brakes when the unit the engineer is riding loses dynamic brake capability because the physical sensation of operating dynamic brakes provides the engineer with at least some assurance that the dynamic brakes on some of the units in the consist are operating. Thus, this paragraph makes clear that locomotives with inoperative, deactivated, or no dynamic brakes have the capability of controlling the dynamic brakes on trailing units when operating as the controlling locomotive, and that such locomotives also have the capability of displaying to the locomotive engineer the deceleration rate of the train or the total train dynamic brake retarding force. FRA believes this requirement will ensure that locomotive engineers have at least some information as to the operation of the dynamic brakes in the locomotive consist they are controlling. FRA intends that the information required by this provision be provided by a device known as an ''accelerometer'', ''predictor'', or a similar type of device; or by a dynamic brake indicator capable of providing total train dynamic brake retarding force to the locomotive engineer. An ''accelerometer'' or ''predictor'' is a device currently used in the industry that indicates the predicted speed in miles per hour of the locomotive 60 seconds from the present, based on the computed acceleration or deceleration rate. This would provide the engineer with an indication of the retarding performance of the dynamic brakes and the train.

Paragraph (g) contains provisions requiring new locomotives to be equipped with some sort of dynamic brake indicator. In the NPRM, FRA sought information and comments regarding the feasibility of dynamic brake indicators which continually monitor the operation of dynamic brakes in a train consist. *See* 63 FR 48334. The NTSB noted that the NPRM failed to address its recommendation resulting from its investigation of the January 12, 1997, freight train derailment near Kelso, California, that all locomotives equipped with dynamic brakes be equipped with a device in the cab of the controlling locomotive to indicate real-time condition of the dynamic brakes on each trailing unit. *See* NTSB Recommendation R–98–6. Based on a review of the comments and information provided, FRA continues to believe that the technology does not currently exist to economically equip existing locomotives with dynamic brake indicators. However, FRA does believe that the technology exists or is sufficiently developed to provide new locomotives with the ability to test the electrical integrity of the dynamic brakes at rest and to display the total train dynamic brake retarding force at various speed increments in the cab of the controlling locomotive. Consequently, this paragraph requires new locomotives to be equipped with such indicators. FRA recognizes that the industry will require a little time to incorporate the existing and developing technology into new locomotives. Therefore, the requirements contained in this paragraph will apply only to locomotives ordered one and one-half years after the issuance of this final rule and to locomotives placed in service for the first time three years after the effective date of the final rule.

Paragraph (h) contains requirements for equipping rebuilt locomotives with devices to provide locomotive engineers with additional information on the operation of dynamic brakes on other locomotives in the train consist. This paragraph recognizes that not all locomotives being rebuilt are designed, or have the capability of being redesigned to have the capability to display the total train dynamic brake retarding force in the cab of the controlling locomotive. Thus, this paragraph allows rebuilt locomotives to be designed to display the train deceleration rate (i.e., to be equipped with an accelerometer, predictor, or similar device as described above) in lieu of being equipped with the dynamic brake indicator required on new locomotives. FRA believes that the information provided by these indicators is extremely useful to an engineer, will provide the engineer with ready access to real-time information on the operation of the dynamic brakes in a locomotive consist, and will permit the engineer to control and operate trains in the safest manner possible.

Paragraph (i) acknowledges that the information provided to a locomotive engineer by a dynamic brake indicator would satisfy the need to provide the locomotive engineer with information regarding the operational status of the dynamic brakes when the engineer first begins operation of a train. As the indicators would provide real-time information to the engineer on the operation of the dynamic brakes in the train consist, a separate set of information received by the engineer when beginning operation would be unnecessary. Therefore, this paragraph carves out an exception to the requirement to inform locomotive engineers of the status of the dynamic brakes for situations when all of the locomotives in the lead consist are equipped with dynamic brake indicators of the type required for new locomotives. FRA believes that this exception makes sense from a practical perspective and also provides some incentive for railroads to equip existing equipment with such indicators where possible when the technology for doing so becomes economically feasible. It should be noted that there is no requirement that the dynamic brake status of distributed power units be provided in order to eliminate the need to provide dynamic brake information to the engineer. FRA agrees that the technology for transmitting that information to the engineer is not currently available in a cost effective and reliable manner.

Paragraphs (j) and (k) retain the proposed provisions requiring railroads to adopt and comply with written operating rules governing the use of dynamic brakes and to incorporate training on those operating rules into the locomotive engineer certification program pursuant to 49 CFR part 240. Contrary to the assertions of some commenters FRA does not believe these requirements are unclear. FRA intends for each railroad to develop appropriate operating rules regarding train handling

procedures when utilizing dynamic brakes that cover the equipment and territory operated by the railroad. Many railroads already have these procedures in place and already provide training to their employees which adequately cover the requirements. FRA continues to believe that training on proper train handling procedures is essential to ensuring that locomotive engineers can properly handle their trains with or without dynamic brakes and in the event that these brake systems fail while the train is being operated. FRA also disagrees that it must specify the knowledge, skill, and ability criteria that a railroad must adopt into its training program. FRA believes that each railroad is in the best position to determine what these criteria should be and what training is necessary to provide that knowledge, skill, and ability to its employees.

FRA continues to believe that the establishment of these comprehensive operating rules and their incorporation into a railroad's training plans is the most effective means by which to minimize the possibility of future accidents caused by excessive reliance on dynamic brakes by a train crew as a method of controlling the speed of a train in its descent through a difficult grade, as was the case in the San Bernardino incident. FRA views as unfortunate the number of existing train handling and power brake instructions issued by freight railroads that emphasize the use of dynamic brakes but do not include prominent warnings that such systems may not be relied upon to provide the margin of safety necessary to stop short of obstructions and control points or to avoid overspeed conditions. FRA believes that such instructions, while not misleading to seasoned locomotive engineers, could lead to an excessive reliance on these systems. Given the ever-increasing weight and length of freight trains, and the severe grades that they are often required to negotiate en route, the need for locomotive engineers who are thoroughly trained and knowledgeable in all aspects of train handling is paramount for continued safety in the rail industry.

Paragraph (j)(2) requires that the operating rules developed by railroads under this section include a ''miles-per-hour-overspeed'' requirement that requires trains to be immediately stopped if they exceed the maximum authorized speed by more than 5 mph when descending grades of one percent or greater. The NTSB recommended that FRA adopt such a requirement as a result of its investigation of the freight train derailment near Kelso, California noted above. *See* NTSB Recommendation R–98–4. FRA agrees with NTSB's recommendation and also agrees with the comments provided by both the NTSB and the CAPUC that this requirement accomplishes a critical safety function and reduces the potential for runaways because it establishes a clear rule for stopping a train and removes any discretion from the operator to continue operation of a train. This paragraph makes clear that the five-mph limitation is a good base limitation which should be reduced by a railroad if it so desires or if a reduction is indicated by validated research. The five-mph limitation may only be increased with FRA approval. FRA notes that the operating rules of virtually every Class I railroad already include a five-mph-overspeed provision similar to that contained in this paragraph. Consequently, FRA's inclusion of the requirement in this final rule should impose little or no burden on the operations of most railroads.

Section 232.111 Train Information Handling

This section retains the proposed requirements regarding the handling of train information, with slight modification in response to the comments submitted by interested parties. The purpose of the train-information handling requirements contained in this section is to ensure that a train crew is provided accurate information on the condition of a train's brake system and other factors that affect the performance of a train's brake system when the crew assumes responsibility for a train. This section contains a list of the specific information railroads are to furnish train crew members about the train and the train's brake system at the time they take charge of the train. FRA continues to believe that train crews need this information in order to avoid potentially dangerous train handling situations and to be able to comply with various Federal safety standards. Many railroads already provide their train crews with most of the information required in this section or have a process set up that can transmit such information; thus, the impact of these requirements should be relatively minor.

Paragraph (a) has been slightly modified to clarify that the information required to be provided in this section may be provided by any means determined appropriate by the railroad, provided, that a record of the information is maintained in the cab of the controlling locomotive. This requirement does not constitute a change from what was proposed in the NPRM but is merely a clarification to resolve an apparent misunderstanding of some parties. In the NPRM, FRA noted that it intended to leave the method in which the required information would be conveyed to train crews to the discretion of each railroad. FRA believed that each individual railroad is in the best position to determine the method in which to dispense the required information based on the individual characteristics of its operations. However, FRA noted that the means for conveying the required information would have to be part of the written operating requirements, and railroads would be required to follow their own requirements.

Paragraphs (b)(1) and (b)(2) have also been slightly modified, for purpose of clarity, from what was proposed in the NPRM. Paragraph (b)(1) clarifies that train crews are to be provided the required information when ''taking charge of a train'' rather than when ''coming on duty'' as was proposed. FRA agrees with the comments of the AAR that the modified language better clarifies when the required information is to be provided. Paragraph (b)(2) has been modified to clarify that the weight and length information to be provided should be based on the best information available to the railroad. FRA agrees with the comments of the AAR and several railroads that it is impossible to provide the exact weight of each car in a train because the facilities to weigh each car do not exist. FRA also agrees that it would be cost prohibitive and unrealistic to require that each car be weighed prior to being moved in a train. Consequently, the final rule makes clear that the weight of the train can be estimated based on the best information available to the railroad. It should be noted that FRA has eliminated the proposed requirement that train crews be provided a record of train configuration changes since performance of the last Class I brake test. FRA agrees that such information is not necessary based on the other information that is required to be provided and has the potential of creating information overload for the train crews.

Subpart C—Inspection and Testing Requirements

Section 232.201 Scope

This section contains the general statement regarding the scope of this subpart, indicating that it contains the inspection and testing requirements for brake systems used in freight and other non-passenger trains. This section also

indicates that this subpart contains the general training requirements for railroad and contract personnel who perform the inspections and tests required by this part.

Section 232.203 Training Requirements

This section contains the general training requirements for railroad employees and contractor employees that are used to perform the inspections required by this part. (See ''Overview of Comments and General FRA Conclusions'' portion of the preamble under the heading ''V. Training and Qualifications of Personnel'' for a detailed discussion pertaining to the provisions contained in this section.) This section retains the basic structure and concepts regarding the training and qualification of individuals performing inspections and tests required by this part that were proposed in the NPRM. The training requirements contained in this final rule have been slightly revised from those proposed in the NPRM in order to clarify FRA's intent, to recognize existing training, and to reduce some of the burden that may have been inadvertently created by the proposed requirements.

Paragraph (a) requires that each railroad and each contractor adopt and comply with a training, qualification, and designation program for railroad employees and contractor employees who perform air brake system tests, inspections and maintenance. This paragraph modifies the proposed provision that would have required a railroad to provide training to the personnel of a contractor whom the railroad uses to perform the various tasks required by the rule. This paragraph makes clear that the contractor is responsible for providing appropriate training to its employees and maintaining the required records and information. FRA agrees with the comments submitted on behalf of numerous railroads that asserted that railroads should not bear the burden of training the employees of a contractor. However, FRA notes that this change does not relieve the railroad from potential civil penalties for, e.g., failure to perform a proper Class I brake test, if the employees of a contractor are found not to be qualified to perform the task for which they are assigned responsibility. Both the railroad and the contractor would remain liable for potential civil penalties if the employees used to perform a particular task were not trained and qualified in accordance with the training requirements contained in this final rule.

For purposes of this section, a ''contractor'' is defined as a person under contract with a railroad or a car owner or an employee of a person under contract with a railroad or a car owner. FRA intends for the training and qualification requirements to apply not only to railroad personnel but also to contract personnel that are responsible for performing brake system inspections, maintenance, or tests required by this part. FRA believes that railroads and contractors are in the best position to determine the precise method of training that is required for the personnel they use to conduct required brake system inspections, tests, and maintenance. Although FRA provides railroads and contractors with broad discretion to develop training programs specifically tailored to their operations and personnel, FRA will expect railroads and contractors to fully comply with the training and qualification plans they adopt. A critical component of this training will be making employees aware of specific Federal requirements that govern their work. Currently, many railroad training programs fail to distinguish Federal requirements from company policy.

Paragraph (b) contains general requirements or elements which must be part of any training and qualification plan adopted by a railroad or contractor. FRA believes that the elements contained in this section are specific enough to ensure high quality training and broad enough to permit a railroad or contractor to adopt a training plan that is best suited to its particular operation. This paragraph retains the proposed requirement that the plan identify the tasks related to the inspection, testing, and maintenance of the brake system required to be performed by the railroad or contractor and identify the skills and knowledge necessary to perform each task. FRA believes that most railroads already have a training plan and would merely need to revise it to reflect changes made to existing requirements by this final rule. The final rule eliminates the proposed requirement to develop written procedures for performing each task identified. Although FRA believes that each railroad or contractor should and will develop such procedures, FRA does not believe it is necessary to require their development as FRA believes they will either be developed in the required training curricula or are sufficiently detailed in the regulation itself.

This paragraph also clarifies that the required training is intended to provide employees with the skills and knowledge necessary to perform the tasks required by this final rule. FRA does not believe it is necessary to train an employee on every different type of equipment that a railroad operates or on each and every task an employees will be required to perform. FRA's intent when issuing the NPRM was to ensure that the training received by an employee provides that individual with the knowledge and skills needed to perform the tasks he or she is assigned on the various types of brake systems on the equipment the railroad operates. Therefore, this paragraph clarifies this intent by specifically stating that the training curriculum, the examinations, and the ''hands-on'' capability should address the skills and knowledge needed to perform the various required tasks rather than focusing strictly on the tasks themselves or on the specific types of equipment operated by the railroad. However, FRA does intend for the training developed by the railroad or contractor to address the various types of brake systems the employee will be required to inspect, test, or maintain. For example, if an employee were trained on how to perform a Class I brake test and demonstrated hands-on capability to perform that task, FRA would not expect the employee to demonstrate hands-on capability to perform a Class IA or Class II brake test since the components of a Class I brake test cover these other inspections. However, FRA would expect the employee to receive classroom training on when these other inspections are required and the tasks that are involved in each.

This paragraph also clarifies that the training that an employee is required to receive need only address the specific skills and knowledge related to the tasks that the person will be required to perform under this part. Thus, a railroad or contractor may tailor its training programs to the needs of each of its employees based on the tasks that each of its employees will be required to perform. FRA tends to agree with several commenters that there is no reason for an individual who performs strictly brake inspections and tests to be as highly trained as a carman since carmen perform many other duties related to the maintenance and repair of equipment in addition to brake inspections.

This paragraph also clarifies that previous training and testing received by an employee may be considered by the railroad. FRA did not intend to require the complete retraining of every employee performing a task required in this final rule. When proposing the training requirements, FRA intended for railroads to incorporate existing training

regimens and curricula into the proposed training programs. In order to clarify this intent, this paragraph permits railroads and contractors to incorporate an already existing training program, such as an apprenticeship program, and contains a specific provision which permits railroads and contractors to consider previous training and testing received by an employee when determining whether an employee is qualified to perform a particular task. Thus, railroads and contractors would most likely not need to provide much additional training, except training specifically addressing the new requirements contained in this part and possibly refresher training, to its carmen forces that have completed an apprentice program for their craft. However, the final rule also makes clear that any previous training or testing considered by a railroad or contractor must be documented as required in the final rule. Thus, previous training or testing which has not been properly documented cannot be considered. The final rule also makes clear that employees must be trained on the specific regulatory requirements contained in this final rule related to the tasks that the employee will be required to perform. Therefore, all employees will require at least some training which covers the specific requirements detailed in this final rule.

This paragraph retains the proposed requirements that any program developed must include experiential or ''hands-on'' training as well as classroom instruction. FRA believes that classroom training by itself is not sufficient to ensure that an individual has retained or grasped the concepts and duties explained in a classroom setting. In order to adequately ensure that an individual actually understands the training provided in the classroom, some sort of ''hands-on'' capability must be demonstrated. FRA believes that the ''hands-on'' portion of the training program would be an ideal place for a railroad to fully involve its labor force in the training process. Appropriately trained and skilled employees would be perfectly suited to provide much of the ''hands-on'' training envisioned by FRA. Consequently, FRA strongly suggests that railroads work in partnership with their employees to develop a training program which utilizes the knowledge, skills, and experience of the employees to the greatest extent possible.

This paragraph also retains, with modification for clarity, the proposed requirement that employees pass either a written or oral examination and demonstrate ''hands-on'' capability. This paragraph clarifies that the tests and demonstration of ''hands-on'' capability cover the skills and knowledge the employee will need to possess in order to perform the tasks required by this part that the employee will be responsible for performing rather than focusing strictly on the tasks themselves or on the specific types of equipment operated by the railroad. However, FRA does intend for the testing and ''hands-on'' demonstration to cover the various types of brake systems the employee will be required to inspect, test, or maintain. FRA continues to believe that in order for a person to be adequately trained to perform a task, the individual must not only possess the knowledge of what is required to be performed but also must possess the capability of applying that knowledge.

This paragraph also retains the proposed requirement regarding the performance of periodic refresher training and testing. The final rule retains the requirement that refresher training be provided at least once every three years and that it include both classroom and experiential ''hands-on'' training and testing. FRA continues to believe that periodic refresher training is essential to ensuring the continued ability of an employee to perform a particular task. FRA does not intend for such training to be as lengthy or as formal as the initial training originally provided, but believes that the training should reemphasize key elements of various tasks and focus on items or tasks that have been identified as being problematic or of poor quality by the railroad, contractor, or its employees through the periodic assessment of the training program. This paragraph makes clear that a railroad or contractor may use efficiency testing to meet the hands-on portion of the required refresher training provided such testing is properly documented and covers the necessary tasks to ensure retention of the knowledge and skill required to perform the employee's duties required by this part. FRA agrees that such testing provides the necessary assurances that the individual continues to have the knowledge and skills necessary to perform the task for which the employee is being tested.

This paragraph contains a provision that was not specifically included in the NPRM but which was intended by FRA to be covered by the established training programs. This paragraph requires that new brake systems be added to training programs prior to their introduction into revenue service. Several labor representatives recommended that this provision be explicitly added to the training provisions, and FRA believes this requirement is only logical and makes sense. FRA believes that, prior to the introduction of any new brake system, the employees responsible for inspecting and maintaining the equipment need to be specifically trained on the systems in order to adequately perform their required tasks.

This paragraph also retains the proposed requirement that supervisors exercise oversight to ensure that all identified tasks are performed in accordance with the railroad's procedures and the specific Federal regulatory requirements contained in this part. Although the final rule also does not specifically address the training that must be provided to supervisors as suggested by some commenters, FRA believes that supervisors are sufficiently covered by the requirements contained in this section. FRA believes that in order for a supervisor to properly exercise oversight of an employee's work, the supervisor must be trained and qualified to perform the tasks for which they have oversight responsibilities.

Paragraph (c) requires each railroad that operates trains required to be equipped with two-way EOTs and each contractor that maintains such devices adopt and comply with a training program which specifically addresses the testing, operation, and maintenance of the devices. The final rule requiring the use of two-way EOTs became effective on July 1, 1997. Since that time, FRA has discovered numerous operating and mechanical employees who do not fully understand when the devices are required or how the inspection and testing of the devices are to be accomplished. Furthermore, FRA believes that it is vital for those employees responsible for the use of the devices (e.g. engineers and conductors) to be intimately familiar with the use and operation of the devices to ensure that the full safety potential of the devices is utilized and available. Consequently, FRA believes that adequate training must be provided to those employees responsible for the inspection, testing, operation and use of two-way EOTs.

Paragraph (d) requires railroads that operate trains under conditions that require their employees to set retaining valves to develop training programs which specifically address the use of retainers and provide such training to those employees responsible for using or setting retainers. This provision has been added in response to an NTSB recommendation which FRA supports. *See* NTSB Recommendation R–98–7. The NTSB specifically suggested that an explicit requirement to provide this

training be contained in the final rule. The NTSB had previously recommended such a requirement in early 1998 based on its investigation of the 1997 derailment of a freight train near Kelso, California. Many railroads are currently providing such training based on that recommendation and FRA believes that a specific requirement to provide such training will ensure that all railroads that require their employees to set retainers adequately train their employees responsible for performing the task on the use of retainers.

Paragraph (e) retains the record keeping requirements proposed in the NPRM with slight modification for consistency with the changes noted above regarding the application of the skills and knowledge necessary to perform a particular task. FRA continues to believe that the record keeping and designation requirements contained in this final rule are the cornerstone of the training requirements. Contrary to the views of some commenters, FRA believes that something more than mere lists of qualified employees is needed. Because the rule allows each railroad and contractor the flexibility to develop a training program that best fits its operation and does not impose specific curriculum or experience requirements, FRA continues to believe it is vital for railroads and contractors to maintain detailed records on the training they do provide. Such documentation will allow FRA to judge the effectiveness of the training provided and will provide FRA with the ability to independently assess whether the training provided to a specific individual adequately addresses the skills and knowledge required to perform the tasks that the person is deemed qualified to perform. Moreover, requiring these records will deter railroads and contractors from circumventing the training requirements and discourage them from attempting to utilize insufficiently trained personnel to perform the inspections and tests required by this rule.

This paragraph makes clear that the required records may be maintained either electronically or on paper. Many railroads currently maintain their training records in an electronic format, and FRA sees no reason not to permit such a practice if the information can be provided to FRA in a timely manner upon request. The proposed provision requiring the railroad's chief mechanical or chief operating officer to sign a statement regarding each employee's qualifications has been modified in the final rule to merely require identification of the person or persons making the determination that the employee has completed the necessary training. This modification will permit the information to be maintained electronically and will still provide the accountability which FRA intended by the provision in the NPRM. FRA believes it is absolutely essential that those individuals making the determinations regarding an employee's qualification be identified in order to ensure the integrity of the training programs developed and to prevent potential abuses by a railroad or contractor.

FRA also objects to the portrayal by some commenters that the requirement to maintain training records is overly burdensome. Virtually all of the items required to be recorded are currently maintained by most railroads in some fashion or another. Contrary to the concerns raised by some commenters, the rule does not require that the contents of each training program be maintained in each employee's file. Railroads are free to develop whatever type of cross-referencing system they desire, provided the contents of the training program are maintained in some fashion and can be readily retrieved. Furthermore, railroads currently maintain lists of individuals they deem to be qualified persons, and the companies inform those individuals as to their status to perform particular tasks. FRA believes this is a good practice and is necessary to ensure that individual employees do not attempt to perform, or are not asked to perform, tasks for which they have not been trained.

Paragraph (e) requires that each railroad or contractor adopt and comply with a plan to periodically assess the effectiveness of its training program. This paragraph modifies the proposed requirement that railroads develop an internal audit process to evaluate the effectiveness of their training. Although FRA agrees that a formal audit process may not be necessary, FRA continues to believe that railroads and contractors should periodically assess the effectiveness of their training programs. However, rather than require a formal internal audit, FRA believes that periodic assessments may be conducted through a number of different means and each railroad or contractor may have a need to conduct the assessment in a different manner. This paragraph requires that a railroad or contractor institute a plan to periodically assess its training program and, as suggested by some commenters, the paragraph permits the use of efficiency tests or periodic review of employee performance as methods for conducting such review. FRA agrees that many railroads, due to their small size, are capable of assessing the quality of the training their employees receive by conducting periodic supervisory spot checks or efficiency tests of their employees' performance. However, FRA continues to believe that on larger railroads the periodic assessment of a training program should involve all segments of the workforce involved in the training. FRA believes it is vital that labor be intrinsically involved in the assessment process, from beginning to end. For example, evaluation of training techniques might best be approached through a ''team'' method, where several observers, including labor representatives, periodically evaluate course or ''hands-on'' training content and presentation.

Section 232.205 Class I Brake Test-Initial Terminal Inspection

This section describes the circumstances that would mandate the performance of a Class I brake test and outlines the tasks that must be performed when performing this inspection. Most of the provisions contained in this section are currently contained in § 232.12(a) and (c)–(h) or were proposed in the 1998 NPRM in order to clarify existing requirements, to eliminate potential abuses, and to standardize certain provisions. Basically a Class I brake test is intended to be the functional equivalent to what is currently referred to as an ''initial terminal brake inspection.''

Paragraph (a) identifies those trains that are required to receive a Class I brake test prior to movement from a location. The provisions contained in this paragraph are virtually identical to those proposed in the NPRM, with slight modification for clarity. Paragraph (a)(1) requires that a train receive a Class I brake test at the location where it is originally assembled. It should be noted that the final rule eliminates the term ''point of origin'' proposed in the NPRM. FRA agrees that the proposed definition of this term was duplicative of the term ''initial terminal'' and merely created potential misunderstandings. Moreover, FRA agrees that the problems attempted to be addressed by the use of this term are sufficiently addressed by the various inspections required in this final rule when cars are added to a train.

Paragraph (a)(2) requires the performance of a Class I brake test when the train consist is changed other than by adding or removing a solid block of cars. Currently, there appears to be some confusion over what constitutes a ''solid block of cars.'' In order to clarify the

issue, FRA proposed a definition of ''solid block of cars'' in the NPRM. In response to numerous comments regarding the proposed definition and to further clarify the issue, FRA has modified the definition in this final rule and referenced that definition in this paragraph. Although FRA believes that the definition it proposed is consistent with current interpretations and enforcement of the requirement, FRA agrees with some of the commenters that the proposed definition may have been too narrow and did not directly address FRA's primary concern, the block of cars itself. FRA's primary concern is the condition of the block of cars being added to the train, especially when the block of cars is made up of cars from more than one train. Thus, the final rule will permit a solid block of cars to be added to a train without triggering a requirement to perform a Class I brake test on the entire train. However, depending on the make-up of that block of cars, certain inspections will have to be performed on that block of cars at the location where it is added to the train.

FRA believes that limits have to be placed on the number of blocks of cars being added to a train in order to ensure that cars are being inspected in a timely manner and in accordance with the intent of the regulations. Some commenters suggest that a block of cars should be permitted to be added to a train with no inspection other than a continuity test regardless of the number of different trains the cars making up the block came from provided all the cars received a Class I brake test at their point of origin. Other commenters suggest that any number of blocks of cars should be permitted to be added to a train at a single location. FRA believes that to accept either of these positions would be tantamount to eliminating initial terminal and intermediate inspections and would drastically reduce the safety of freight trains being operated across the country. In FRA's view, both of the positions noted above are merely means to circumvent inspections and are akin to a practice known as ''block swapping'' in the mechanical inspection context, a practice that FRA does not permit. In FRA's opinion, the authority to add multiple blocks of cars to a train at one location or add a single block of cars to a train that is composed of cars from numerous different trains without inspecting the cars in those blocks, would essentially allow railroads to assemble new trains without performing any direct inspection of any of the cars in the train. Furthermore, if cars are permitted to be moved in and out of a train at will, determining when and where a Class IA brake test must be performed on the train will be impossible.

This paragraph requires the performance of a Class I brake test at locations where more than one ''solid block of cars'' is added to or removed from a train. It should be noted that the final rule permits both the addition and the removal of a ''solid block of cars'' at a location without requiring the performance of a Class I brake test on the entire train. Although this practice is not permitted under the existing regulations, FRA believes that the inspection requirements contained in this final rule ensure the safety of cars being added and removed in this fashion. This paragraph also contains an additional caveat that will permit the removal of defective equipment at locations where other cars are added or removed without triggering the requirement to perform a Class I brake test on the entire train. FRA currently permits this practice, and it is consistent with the requirements aimed at having defective equipment repaired as quickly as possible.

Paragraph (a)(3) incorporates FRA's longstanding administrative interpretation which permits trains to remain disconnected from a source of compressed air (''off air'') for a short length of time without having to be retested. Currently, FRA permits trains to remain ''off air'' only for a period of approximately two hours before an initial terminal brake inspection must be performed. This paragraph retains the proposed extension of the permissible time ''off air'' to four hours. A detailed discussion regarding FRA's retention of the proposed extension of the permissible time cars may be left ''off-air'' is contained in the preceding ''Overview of Comments and General FRA Conclusions'' portion of the preamble under the heading ''II. C. Charging of Air Brake System.''

Paragraph (a)(4) retains the proposed requirement that unit or cycle trains receive a Class I brake test every 3,000 miles. The final rule has been slightly modified from the provision contained in the NPRM to clarify that this requirement applies to unit or cycle trains. FRA has also added a definition of ''unit train'' and ''cycle train'' to the final rule in order to clarify the applicability of the requirement. Historically, these trains operate for extended periods of time with only a series of brake inspections similar to Class IA brake inspections. FRA believes that the proposed 3,000-mile limitation is appropriate as it represents the approximate distance that a train would cover when traveling from coast to coast. In addition, the 3,000-mile requirement is consistent with the interval for performing Class IA brake tests and would equate to every third inspection on these trains being a Class I brake test rather than a Class IA brake test. Furthermore, AAR does not seek a moderate extension of a couple hundred miles so a few trains could complete their cycle, but seeks to extend the distance to more than 4,500 miles in many instances. FRA is not willing to modify the proposed requirement to that extent and believes that a 3,000-mile interval for these types of trains provides sufficient flexibility to the railroads to perform periodic Class I brake tests on these train in a cost-effective manner.

Paragraph (a)(5) retains the proposed provisions for when trains received in interchange must receive a Class I brake test. These are similar to what is currently contained in § 232.12(a)(1)(iii); however, this paragraph retains two proposed provisions that are not contained in the existing regulations. The final rule will permit trains received in interchange to have a previously tested solid block of cars added to the train without requiring the performance of a Class I brake test. Currently, the addition of these types of cars to a train received in interchange would require the performance of an initial terminal inspection. As long as the added block of cars has been previously tested, FRA sees no safety hazard in permitting the cars to be added to a train at an interchange location. Furthermore, the final rule will permit a train that is received in interchange, and that will travel no more than 20 miles from the interchange location, to have its consist changed other than as provided in paragraph (a)(5) without being required to receive a Class I brake test; provided that, any cars added to the consist at the interchange location receive at least a Class II brake test pursuant to § 232.209. Historically, FRA has not had a problem with these shorter distance trains and believes that a Class II brake test on those cars added to the train is sufficient to ensure the safety of these operations.

Paragraph (b) details the required tasks comprising a Class I brake test. A proper Class I brake test ensures that a train is in proper working condition and is capable of traveling to its destination with minimal problems en route. The final rule retains virtually all of the provisions proposed in the NPRM regarding the specific tasks that are to be part of the Class I brake test, which include most of the tasks currently

required by § 232.12(c)-(h) for an initial terminal brake test, with some modification in the interest of standardization and clarity.

The final rule retains a standardized brake-pipe reduction of 20 psi for virtually all brake inspections and tests as was proposed in the 1994 and 1998 NPRMs. FRA agrees with both labor and management commenters that a standard brake-pipe reduction will simplify train brake tests and will make it easier to train workers. The 20-psi standardized reduction was suggested by both labor and management representatives.

The brake-pipe leakage test will continue to be a valid method of qualifying brake systems. However, the final rule retains the air flow method of testing the condition of the brake pipe as an acceptable alternate to the brake-pipe leakage test. The air flow method (AFM) would be an alternative only for trains having a lead locomotive equipped with a 26-L brake valve or equivalent and outfitted with an EOT device. The maximum allowable flow would be 60 CFM. The AFM of qualifying train air brake systems has been allowed in Canada as an alternative to the leakage test since 1984. In addition, several railroads in the United States have been using the AFM since 1989 when FRA granted the AAR's petition for a waiver of compliance to permit the AFM as an alternative to the leakage test. FRA recognizes the concerns of several labor organization commenters opposing the adoption of the AFM; however, FRA believes these commenters' apprehension is based on their unfamiliarity with the method. As FRA pointed out in the ANPRM, the 1994 NPRM, and the 1998 NPRM, the AFM is a much more comprehensive test than the leakage test. *See* 57 FR 62551, 59 FR 47682–47683, 63 FR 48305–06. The AFM tests the entire brake system just as it is used, with the pressure-maintaining feature cut in. FRA believes the AFM is an effective and reliable alternative method of qualifying train brakes. In the 1998 NPRM, FRA expressed some concern regarding the use of the AFM on short trains. However, based on consideration of the comments received and FRA's experiences in observing the use of the AFM, FRA agrees that the AFM should be permitted as an alternative on any train provided the 15 psi gradient is maintained on the train.

The brake-pipe gradient of 15 psi has been retained for both the leakage and air flow method of train brake testing; however, the minimum rear-car pressure has been increased to at least 75 psi, which will require a locomotive brake-pipe pressure of at least 90 psi. FRA feels that the added margin of braking power justifies the increase in pressure. The final rule modifies the language used in the proposed provisions related to the air pressure at which the brake tests are to be conducted based on comments submitted by the NTSB. The NTSB noted that the language used by FRA in the NPRM to describe the air pressure settings for conducting the required brake tests would permit some road trains to be tested at a lower pressure than that at which the train would be operated. The NTSB contends that although most road freight trains operate at 90 psi, some road freight trains are operated at 100 psi and the proposal would permit them to be tested at 90 psi. FRA agrees with NTSB's suggestion that a train's brake system should be tested at the pressure at which the train will operate and has modified the language of the final rule accordingly. Consequently, the final rule requires that the brake system be charged to the pressure at which the train will be operated and that the rear car pressure be within 15 psi of that pressure and not less than 75 psi when conducting the required brake tests and inspections.

Based on FRA's experience over the last several years and based on numerous comments received by FRA verifying the high reliability of the rear-car pressure transducers used in reporting brake-pipe pressure by an end-of-train (EOT) device, FRA now feels comfortable and justified in allowing the use of EOT devices in establishing the rear car pressure for Class I brake tests. FRA currently has requirements in place for the inspection and testing of EOT devices at the time of installation, which have been incorporated into subpart E of this proposal. However, in using an EOT to verify rear car pressure during a Class I brake test, the reading of the rear car air pressure is only permitted from the controlling or hauling locomotive of the train. Under no circumstances may train air brake pressure be read from a remote highway vehicle, another locomotive not attached to the train, or at any other location such as a remote unit installed in an office or shop.

Paragraph (b)(2) retains the proposed language regarding the duties of individuals performing brake inspections contained in this final rule. The language in this paragraph is reiterated in the final rule provisions on both the Class IA and Class II brake tests in order to ensure the proper performance of brake inspections. Contrary to the assertions of some commenters, FRA believes that the proposed provisions sufficiently detailed how the various inspections were to be performed while providing flexibility for railroads to conduct the inspections in a manner most conducive to their operations. The methods of inspection proposed in the 1998 NPRM incorporated current practices and technical guidance previously issued by FRA.

Over the last few years there has been extensive debate concerning what constitutes a proper train air brake test under the current provisions contained in part 232, particularly relating to the positioning of the person performing the brake inspection. In early 1997, FRA issued a technical bulletin to its field inspectors in an attempt to clarify what must be done in order to properly perform a brake test. This technical bulletin stated that inspectors must position themselves in such a manner so as to be able to observe all of the movable parts of the brake system on each car. At a minimum, this requires that the inspector observe both sides of the equipment sometime during the inspection process. FRA continues to believe that both sides of the equipment must be observed sometime after the occurrence of activities that have the likelihood of compromising the integrity of the brake components of the equipment, such as: hump switching; multiple switching; loading; or unloading. FRA also agrees with the comments submitted by several railroad representatives that if one side of the equipment is inspected to ensure the proper attachment and condition of brake components and the proper condition of brake shoes on that side and the application of the brakes is observed from the other side of the equipment, then based on the design of brake systems today it can be safely assumed that in virtually every case an application of the brakes is occurring on the other side of the equipment. Consequently, FRA would like to again make clear that both sides of the equipment do not necessarily have to be inspected while the brakes are applied if an adequate inspection of the brake components was conducted on both sides of the equipment sometime during the inspection process. However, FRA also intends to make clear that the piston travel on each car must be inspected while the brakes are applied; thus, an inspector must take appropriate steps to make this observation.

As indicated in the NPRM, FRA does not intend to mandate specific methods for how the various inspections are to be performed. FRA believes that each

railroad is in the best position to determine the method of inspection that best suits its operations at different locations. To require that all inspections be performed by walking the train, as suggested by several labor representatives, would impose a huge financial and operational burden on the railroads and would ignore the various different methods by which inspections are currently performed and have been performed for years. FRA has never mandated specific step-by-step procedures for conducting brake inspections but merely requires that, whichever method is used, it must ensure that all of the components required to be inspected will be so inspected.

Paragraph (b)(4) contains the requirements for ensuring that a proper application of a car's brakes is made during the performance of brake inspections and provides the procedures for retesting a car found not to be properly applied during the initial performance of a brake inspection. In proposing the requirements contained in this paragraph, FRA attempted to clarify language contained in the current regulation which requires that the brakes ''apply.'' The existing language has been misinterpreted by some to mean that if the piston applies in response to a command from a controlling locomotive or yard test device, and releases before the release signal is given, the brake system on that car is in compliance with the regulation because the brake simply applied. The intent of the regulation has always been that the brakes apply and remain applied until the release signal is initiated from the controlling locomotive or yard test device. In order to eliminate any confusion, this paragraph requires that the brakes on a car must remain applied until the appropriate release signal is given. If the brakes on a car fail to do so, the car must either be removed from the train or repaired in the train and retested as discussed below.

This paragraph retains the general concepts for retesting cars with brakes that are found not to apply or not to remain applied that were proposed in the NPRM. However, some of the specific requirements for performing a retest have been modified from those proposed in the NPRM based on FRA's consideration of the comments submitted and its determination that the proposed retesting provisions may have been overly restrictive. This paragraph modifies the proposed retest requirements by permitting any car found with brakes not applied during a required inspections to be retested rather than just cars with obvious defective conditions. FRA agrees with the assertions of several commenters that there are a number of circumstances where the reason for the failure of the brakes to apply is not readily apparent. This paragraph reduces the amount of time that the brakes on a retested car must remain applied to three minutes from the proposed five minutes. The final rule makes clear that the brakes on a retested car remain applied until the release is initiated and that the release be initiated no less than three minutes after the application of the brakes. FRA believes three minutes is consistent with the amount of time it would take a person to conduct a complete inspection of the retested car's brakes. This paragraph also permits a car to be retested with the use of a suitable device positioned at the car being retested rather than from the head of the consist or from the controlling locomotive. When a retest is performed in this fashion, the final rule requires that the compressed air be depleted from the car being retested prior to separating the train line to perform the retest in order to prevent potential injury to employees conducting the retest. This paragraph also makes clear that any retest performed must be conducted at the air pressure at which the train will be operated. The modifications made to the retesting requirements in this paragraph are reiterated or referenced in the other types of brake inspections required in this subpart. A detailed discussion regarding the modifications made to the retesting provision is contained in the preceding ''Overview of Comments and General FRA Conclusions'' portion of the preamble under the heading ''II. D. Retesting of Brakes.''

Paragraph (b)(5) retains the proposed and current requirement that piston travel be adjusted during the performance of a Class I brake test if it is found outside the nominal limits established for standard 8½ inch and 10-inch diameter brake cylinder or outside the limits established for other types, which will be contained on a stencil, sticker, or badge plate. This provision is identical to that proposed in the NPRM and is similar to the provision currently contained at § 232.12(f). The major difference is that FRA has modified the existing provision to require that piston travel found to be less than 7 inches or more than 9 inches must be adjusted nominally to 7½ inches. This change is based on a request by AAR to change the adjustment to 7½ inches from 7 inches as its member railroads were finding it extremely difficult to adjust the piston travel to precisely 7 inches and that in some cases the adjustment would be marginally less than 7 inches, thus requiring a readjustment. Thus, AAR sought the extra ½ inch in order to provide a small measure for error when the piston travel is adjusted. As FRA believes that AAR's concerns are validly placed and would have no impact on safety, FRA has accommodated the request.

Paragraph (b)(7) retains the proposed provision which clarified that brake connection bottom rod supports will no longer be required on bottom connection rods secured with locking cotter keys. FRA recognizes that there is no need for bottom rod safety supports in these circumstances and intends to relieve railroads of this unnecessary expense, which will provide the industry a cost savings without compromising safety.

Paragraph (b)(8) retains the proposed provisions relating to the performance of ''roll-by'' inspections of the release of the brakes on the cars of the train. This method of inspection has been used for years even though there is nothing in the current regulation which specifically addresses the method. The authority to use this method of inspection of the brake release permits railroads to expedite the movement of trains and has not proven to create a safety hazard. Therefore, this paragraph is intended to clarify the authority of railroads to use such a method and to ensure that the inspection is performed properly. This paragraph makes clear that when a railroad is performing a ''roll-by'' inspection of the brake release the train's speed shall not exceed 10 mph, that the qualified person performing the ''roll-by'' inspection shall notify the engineer when and if the ''roll-by'' has been successfully completed, and that the operator of the train shall note successful completion of the release portion of the inspection on the written or electronic notification required by this final rule. FRA intends to make clear that the notification to the engineer may be made through a hand held radio, a cellular telephone, or communication with a train dispatcher but that such information must be provided to the engineer prior to the train's departure. Based on the rationale provided for permitting only one side of a train to be inspected during the application of the brakes, FRA intends to make clear that only one side of the train must be inspected during the release portion of a brake test. However, paragraph (b)(2) makes clear that a ''roll-by'' inspection of the brake release shall not constitute an inspection of that side

for purposes of inspecting both sides during the inspection.

Paragraph (c) generally retains the provision as it was proposed in the NPRM and as currently contained in § 232.12(a), with slight modification for clarity, stating that a carman alone will be considered a qualified person if a railroad's collective bargaining agreement (CBA) provides that carmen are to perform the inspections and tests required by this section. FRA received a number of comments from various labor representatives objecting to FRA's proposed modification of the provision that currently exists in § 232.12(a). These commenters contended that the proposed language would alter the meaning of the existing provision and effectively eliminate its enforceability. Particularly, they objected to the proposed addition of the word ''only'' in the first sentence of the provision and the proposed elimination of the phrase ''existing or future collective bargaining agreement.'' They contend that no CBA provides that only a carman may perform the inspections and that it is unclear whether the provision will apply to future CBAs due to the elimination of the specific language to that effect. They also asserted that it is unnecessary to require that carmen be trained as a qualified person or a QMI since carmen were recognized as the craft qualified to perform the inspection in 1982.

FRA's intent in proposing this provision was to clarify the meaning of the provision and explain FRA's ability to enforce the existing provision. FRA's intent was neither to expand nor reduce the applicability of the provision. FRA recognizes that its proposed addition of the word ''only'' could have the effect of altering the provision in a way that was not intended as FRA agrees that many existing CBAs do not require that only a carman perform the inspections. Thus, the language of the provision in this final rule eliminates the word ''only'' from the proposed clause, ''Where a railroad's collective bargaining agreement provides that only a carman is to perform the inspections and tests required by this section. * * *'' However, FRA does not agree that it is necessary to include the phrase ''existing or future collective bargaining agreement,'' as suggested by some commenters. FRA intends for the reference to a collective bargaining agreement to include any existing or future CBA. FRA believes that the inclusion of the suggested phrase is unnecessary because the plain meaning of the text is the CBA that applies at the time the issue arises. FRA sees no way to read the provision contained in this final rule as not to include both existing and future CBAs.

FRA also believes that it is essential for railroads to ensure that the individuals required to perform the inspections covered by this provision are properly trained and qualified to perform the inspections. As the requirements contained in this final rule for performing these inspections differ somewhat from the existing regulation, FRA believes it is necessary for employees performing the inspections to be trained on these new requirements. This paragraph merely makes clear that, in circumstances where a collective bargaining agreement requires that a carman is to perform the inspections and tests required by this section, the railroad shall bear the responsibility of ensuring that the carman responsible for performing this task is properly trained and designated as qualified to perform the task. In these circumstances, FRA believes that the railroad must ensure that the employees with whom they have collectively bargained to perform the inspections and tests required by this section are properly trained and designated to perform the task. Furthermore, FRA believes that on virtually all railroads carmen will be sufficiently trained and experienced to be considered ''qualified persons'' and ''qualified mechanical inspectors'' as defined in this proposal, provided they receive some additional training on the specific requirements contained in this final rule.

The original provision was added to the regulations in 1982 when the distance between brake inspections was increased from 500 miles to 1,000 miles. The provision was included as part of an agreement between the railroads and rail labor for permitting the maximum distance between brake tests to be increased and was presented to FRA at the time. The language contained in that agreement was included in the 1982 regulatory revisions without change by FRA. Consequently, due to the circumstances under which this provision was added to the regulations and because it has existed for over 16 years, FRA feels compelled to retain the language in this final rule. FRA will continue to interpret the provision as it has always interpreted the provision. In circumstances where a railroad's collective bargaining agreement requires that a carman perform the inspections and tests required by this section, a carman alone will be considered a qualified person. This has been FRA's approach to the provision since its inception.

As FRA lacks the authority to issue binding interpretations of collective bargaining agreements, FRA lacks the authority to settle a dispute between a railroad and its employees as to which group of its employees is to perform what work. FRA intends to make clear, that in order for FRA to proceed with an enforcement action under the provision contained in this paragraph, one of the parties to the collective bargaining agreement would first have to obtain a decision from a duly authorized body interpreting the relevant agreement, specifically identifying the involved location, and adequately resolving all of the interpretative issues necessary for FRA to conclude that the work belongs to a particular group of employees.

Paragraph (d) contains the requirement regarding the notification to the locomotive engineer and train crew of the successful completion of a Class I brake test by a qualified person. This paragraph slightly modifies the notification requirement from that proposed in the NPRM. In the NPRM, FRA proposed that the engineer be informed in writing of the successful completion of the Class I brake test. The intent of this proposed requirement was to ensure that the locomotive engineer was adequately informed of the results of the inspection; however, FRA recognizes that a requirement to provide the information in writing ignores technological advances and operational efficiencies. Consequently, this paragraph permits the notification to be made in whatever format the railroad deems appropriate; provided that the notification contains the proper information and a record of the notification and the requisite information is maintained in the cab of the controlling locomotive. FRA believes these changes are consistent with the intent and purpose of the proposed requirement for written notification and ensure necessary information is relayed to the operator of the train.

Paragraph (f) retains the proposed and existing requirements relating to the adding of cars or blocks of cars while a train is en route. This paragraph informs railroads that cars picked up en route that have not been previously tested and kept connected to a source of compressed air are to receive a Class I brake test when added to the train. Alternatively, a railroad may elect to perform only a Class II brake test at the time that a car is added to the train en route, but FRA intends to make clear that if this option is elected then the cars added in this fashion must be given a Class I brake test at the next forward location where facilities are available for providing such attention.

Section 232.207 Class IA Brake Tests—1,000-Mile Inspection

This section retains the proposed requirements related to the performance of a Class IA brake test. Many of the provisions contained in this section are currently contained at § 232.12(b) regarding the performance of 1,000-mile inspections. FRA has modified some of the existing requirements for purposes of clarity and has added a few additional requirements in order to make the inspection requirement more enforceable and to prevent some of the current abuses which FRA field inspectors have observed in their enforcement activities.

FRA recognizes that since 1982 new technologies and improved equipment have been developed that allow trains to operate longer distances with fewer defects. The data submitted by AAR appear to support this assertion, and FRA does not dispute the potential capability of certain equipment to travel distances in excess of 1,000 miles without becoming defective. However, the capability of the equipment to travel extended distances safely is contingent on the condition of the equipment when it begins operation and on the nature of the operation in which it is to be engaged. FRA believes that in order for brake equipment to travel extended distances between brake inspections, the condition and planned operation of the equipment must be thoroughly assessed at the beginning of a train's journey through high quality inspections. As noted in the general preamble discussion above, FRA believes that railroads are not conducting high quality initial terminal inspections at many locations because the railroads are utilizing employees who are not sufficiently qualified or trained to perform the inspections. Therefore, FRA believes that the 1,000-mile brake inspection interval continues to be necessary and important to ensure the safe operation of trains inspected by qualified personnel pursuant to this final rule. Furthermore, no trains operated in the United States are currently permitted to travel greater than 1,000 miles between brake inspections. Consequently, FRA is not willing to permit trains to travel in excess of 1,000 miles between brake inspections, except in the limited, controlled situations where data on the equipment can be gathered. (See discussion and provisions related to ''Extended Haul Trains.'') FRA notes that Canada eliminated intermediate inspections in 1994. However, Canada has different inspection requirements than those contained in this final rule and vastly different operating conditions and environments than those prevalent on most American railroads, operating conditions and environments that are more conducive to the inspection regimen imposed by that country.

Paragraph (a) provides that each train shall receive a Class IA brake test at a location that is not more than 1,000 miles from the point where any car in the train last received a Class I or Class IA brake test. FRA intends to make clear that the most restrictive car or block of cars in the train will determine the location where this test must be performed. For example, if a train departs point A and travels 500 miles to point B where it picks up a previously tested block of cars en route which has travelled 800 miles since its last Class I brake test and the crew does not perform a Class I brake test when entraining the cars, then the entire train must receive a Class IA brake test within 200 miles from point B even though that location is only 700 miles from point A.

Paragraph (b) contains the tasks which must be performed when conducting a Class IA brake test. These task are virtually identical to some of the tasks required to be performed during a Class I brake test. A leakage or air flow test must be performed. Thus, when locomotives are equipped with a 26–L brake valve or equivalent, FRA will permit the use of the air flow method as an alternative to the brake pipe leakage test. This paragraph makes clear that the brakes shall apply on each car in the train in response to a 20-psi brake pipe reduction and shall remain applied until a release is initiated. In addition, the paragraph reiterates the parameters for performing a retest of the brakes on those cars found not to have sufficiently applied, which are contained in the Class I brake test requirements. It should be noted that, defective equipment may be moved from or past a location where a Class IA brake test is performed only if all of the requirements contained in § 232.15 have been satisfied. The only change to the tasks contained in this paragraph from those proposed in the NPRM is the clarification that the brake system be charged to the pressure at which the train will be operated and that the rear car pressure be within 15 psi of that pressure and not less than 75 psi when conducting the required brake tests and inspections. This change is identical to the change made in the Class I brake test and is discussed in detail in that section.

This paragraph also makes clear that in order to properly perform a Class IA brake test under this section both sides of the equipment must be observed sometime during the inspection process. FRA finds the comments of AAR and other railroad representatives contending that both sides of the equipment should not be required to be inspected at Class IA brake tests to lack merit. The Class IA brake test basically incorporates the current 1,000-mile brake inspection, which FRA believes requires an inspection of both sides of the equipment during the inspection process. The current 1,000-mile inspection requires that brake rigging be inspected to ensure it is properly secure and does not bind or foul and that the brakes apply on each car in the train. *See* 49 CFR 232.12(b). In order to make these inspections properly, FRA believes that both sides of the equipment must be observed sometime during the inspection process and, to FRA's knowledge, railroads currently conduct these inspections in this manner. Thus, the NPRM and the final rule merely clarify what is required to be performed under the current regulations to properly perform a 1,000-mile inspection. Therefore, contrary to the contentions of certain commenters, retention of this current requirement does not impose any additional burden on the railroads.

Paragraph (c) retains the proposed provision which would require railroads to maintain a list of locations where Class IA inspections will be performed and that FRA be notified at least 30 days in advance of any change to that list of locations. Based on a review of the comments submitted, FRA recognizes that the proposed requirement for designating locations where Class IA inspections will be performed was somewhat unclear and may have caused confusion. The intent of the proposed requirement was to ensure that FRA was informed of those locations where a railroad intends to perform Class IA brake inspections and that FRA had the information with which to hold the railroad responsible for conducting the inspections at those locations. FRA was not intending to require that railroad separately identify a specific Class IA inspection location for each train it operates. Consequently, this paragraph has been slightly modified from that proposed in order to make clear that the designation required is for locations where such inspections will be performed and permits deviance from those locations only in emergency situations.

The current regulations merely require that railroads designate locations where intermediate 1,000-mile brake inspections will be performed but place no limitation on changing the locations. Therefore, FRA has found

some railroads changing the locations where these intermediate inspections are to occur on a daily basis which prevents FRA from observing these inspections being performed or avoids full performance of the required inspection by mechanical forces. In order to ensure that these types of inspections are being properly performed, FRA must be able to determine where the railroad plans to conduct these types of inspections. This paragraph recognizes that there may be occurrences or emergencies, such as derailments, that make it impossible or unsafe for a train to reach a location that the railroad has designated as a Class IA inspection site. Consequently, this paragraph permits railroads to bypass the 30-day written notification requirement in these instances provided FRA is notified within 24 hours after a designation has been changed. This paragraph also makes clear that failure to perform a Class IA brake test at a designated location will constitute a failure to properly perform the inspection.

Section 232.209 Class II Brake Tests—Intermediate Inspection

This section contains the requirements related to the performance of Class II brake tests. The requirements contained in this section are similar to the proposed requirements and the requirements currently contained in § 232.13(d) but have been slightly modified for clarity and to address situations where solid blocks of cars are added to an en route train. Paragraph (a) identifies those cars that are required to receive a Class II brake test when added to a train. This paragraph has been modified to address situations when certain ''solid blocks of cars'' are added to a train. As discussed previously, the final rule modifies the definition of ''solid block of cars'' from that proposed in the NPRM. (See section-by-section analysis of § 232.5.) Although FRA believes the definition it proposed was consistent with current interpretations and enforcement of the requirement, FRA agrees with some of the commenters that the definition may have been too narrow and did not directly address FRA's primary concern, the block of cars itself. FRA's primary concern is the condition of the block of cars being added to the train especially when the block of cars is made up of cars from more than one train. Thus, the final rule permits a ''solid block of cars'' to be added to a train without triggering a requirement to perform a Class I brake test on the entire train. However, this paragraph identifies the situations when ''solid blocks of cars'' must be inspected when added to a train.

This paragraph makes clear that a car or a solid block of cars that has not previously received a Class I brake test or that has been off a source of compressed air for longer than four hours must, at a minimum, receive a Class II brake test when added to an en route train. This paragraph also makes clear that a Class II brake test is required to be performed on each ''solid block of cars'' added to a train which is composed of cars from more than one other train or that is composed of cars from only one other train but that have not remained continuously and consecutively coupled together. It should be noted that this paragraph specifically acknowledges that the removal of defective equipment from a solid block of cars will not result in the solid block of cars being considered not to be continuously and consecutively coupled together. FRA believes this approach is consistent with the intent of both FRA and Congress to have defective equipment repaired as quickly as possible.

Paragraph (b) retains the proposed tasks which must be performed when conducting a Class II brake test. The only changes to the tasks contained in this paragraph from those proposed in the NPRM is the clarification that the brake system be charged to the pressure at which the train will be operated and that the rear car pressure be within 15 psi of that pressure and not less than 75 psi when conducting the required brake tests and inspections and the procedures for performing retests on cars. These changes are identical to the changes made in the Class I and Class IA brake tests and are discussed in detail in those sections.

A Class II brake test is intended to ensure that the brakes on those cars added apply and release and that the added cars do not compromise the integrity of the train's brake system. Therefore, a leakage or air flow test must be performed when the cars are added to the train to ensure the integrity of the train's brake system. This paragraph makes clear that in order to properly perform an inspection under this section both sides of the equipment must be observed sometime during the inspection process. This paragraph also makes clear that the brakes shall apply on each car added to the train and remain applied until a release is initiated and reiterates the parameters that are contained in the Class I brake test requirements for performing a retest on those cars whose brakes were found not to have sufficiently applied. It should be noted that, defective equipment may be moved from or past a location where a Class II brake test is performed only if all of the requirements contained in § 232.15 have been satisfied. Paragraph (b) also requires that the release of the brakes on those cars added to the train and on the rear car of the train be verified and allows railroads to conduct ''roll-by'' inspections for this purpose.

Paragraph (c) continues to permit the proposed and existing alternative to the rear car application and release portion of this test. This alternative permits the locomotive engineer to rely on a rear car gauge or end-of-train device to determine that the train's brake pipe pressure is being reduced by at least 5 psi and then restored by at least 5 psi in lieu of direct observation of the rear car application and release. Although certain labor representatives contended that this practice should not be allowed and that it is in violation of the existing regulations, this alternative has been permitted for years under the current regulations (§ 232.13(c)(1), (d)(1)) without any degradation of safety, and thus, FRA intends to permit the practice to continue.

Paragraph (d) retains the proposed and existing requirements relating to the inspection of cars or blocks of cars added to a train while a train is en route. This paragraph makes clear that if cars are given a Class II brake test when added to a train then the cars added must receive a Class I brake test at the next forward location where the facilities are available for performing such an inspection.

Section 232.211 Class III Brake Tests—Trainline Continuity Inspection

This section contains the requirements related to the performance of Class III brake tests. The requirements contained in this section are generally the same as those proposed, which incorporated the requirements currently contained in § 232.13(c), but have been slightly modified for clarity and standardization with the changes made in other inspection requirements contained in this final rule. Some of the changes made in this section from that proposed clarify the need to perform a Class III brake test when a solid block of cars is added to a train which does not require the performance of either a Class I or Class II brake test. Paragraph (b) of this section has been modified to incorporate the clarification that the brake system be charged to the pressure at which the train will be operated and that the rear car pressure be within 15 psi of that pressure and not less than 75 psi when conducting the required inspection.

The purpose of a Class III brake test is to ensure the integrity of the trainline when minor changes in the train consist occur. Basically, a Class III brake test ensures that the train brake pipe is properly delivering air to the rear of the train. FRA intends to make clear that this inspection is designed to be performed whenever the continuity of the brake system is broken or interrupted. For example, if a railroad disconnects a locomotive from a train consist to perform switching duties for a short period and then reattaches the locomotive to the consist, without any other change being made in the consist, the railroad would be required to perform a Class III brake test prior to the train's departure. Similarly, a Class III brake test would be required if a railroad disconnects a locomotive from the train and adds a different locomotive to the train, only to discover that the added locomotive is not operating properly, and thus, adds the original locomotive back into the consist. Because the continuity of the trainline was interrupted when the locomotive was removed and then placed back in the train, even though the same cars and locomotives remained in the consist, a Class III brake test must be performed.

Paragraphs (b) and (c) contain the tasks related to the performance of a Class III brake test. These paragraphs require that the brakes on the rear car of the train apply in response to a 20-psi brake pipe reduction and that the brakes subsequently release on the rear car of the train when the release is initiated. Similar to a Class II brake test, paragraph (c) permits an alternative to direct observation of the application and release of the rear car's brakes by permitting the operator to rely on a rear car gauge or end-of-train device to determine that the brake pipe pressure is being reduced and restored in response to the controlling locomotive.

Section 232.213 Extended Haul Trains

This section generally retains the proposed provisions, which permit an extension of the allowable maximum distance a train may travel between train brake system tests. After consideration of all the comments submitted on this matter, FRA continues to believe that if a train is properly and thoroughly inspected, with as many defective conditions being eliminated as possible, then the train is capable of traveling much greater than 1,000 miles between brake inspections. (A detailed discussion of the comments submitted on this issue is contained in the preceding ''Overview of Comments and General FRA Conclusions'' portion of the preamble under the heading ''II. B. Extended Haul Trains.'') Therefore, the final rule retains the provisions permitting railroads to designate trains as extended haul trains and allowing such trains to be operated up to 1,500 miles between brake inspections. Although FRA recognizes that retention of the 1,500-mile limitation may limit the utility of the provision on some railroads, FRA is not willing to increase the proposed mileage restriction at this time. Currently, no train is permitted to travel more than 1,000 miles without receiving an intermediate brake inspection. Therefore, FRA does not believe it would be prudent to immediately double or triple the currently allowed distance without evaluating the safety and operational effects of an incremental increase in the distance. Consequently, until sufficient information and data are collected on trains operating under the provisions contained in this final rule, FRA is not willing to permit trains to travel the distances suggested by some commenters without additional brake inspections. FRA continues to believe that the requirement for performing inbound inspections and the requirement to maintain records of all defective conditions discovered on these trains provides the basis for developing the information and data necessary to determine the viability of allowing greater distances between brake inspections.

After consideration of the comments submitted, FRA agrees that the benefits estimated in the NPRM in association with the extended haul provisions may have been overstated. FRA realizes that the retention of the 1,500-mile limitation may eliminate certain trains from being operated pursuant to the extended haul provisions and reduce the benefits estimated at the NPRM stage of the proceeding. (See detailed discussion in the Regulatory Impact Analysis portion of the preamble below.) In order to increase the viability of the extended haul provisions, the final rule provides some flexibility for designating extended haul trains and allows for the limited pick-up and set-out of equipment as discussed below.

Certain commenters have portrayed the provisions related to extended haul trains as merely being an extension of the current intermediate inspection distances. FRA objects to such a characterization. In FRA's view, the extended haul provisions contained in this section constitute a completely new inspection regimen. This section contains stringent inspection requirements, both brake and mechanical, by highly qualified inspectors and establishes stringent requirements whenever cars are added to or removed from such trains. This section also contains a means to assess the safety of such operations by requiring that records be maintained of the defective conditions that develop on these trains while en route. Consequently, FRA believes that the requirements related to extended haul trains not only ensure the safe operation of the trains operated under them, but actually increase the safety of such operations over that which is provided in the current regulations.

In paragraph (a), FRA generally retains the proposed provisions permitting railroads to designate specific trains that will move up to 1,500 miles between brake and mechanical inspections provided the railroad meets various stringent inspection and monitoring requirements, which FRA believes will ensure the safe and proper operation of these trains. FRA intends to make clear that a railroad must meet all of the requirements contained in this paragraph in order to designate a train as an extended haul train. Paragraph (a)(1) contains the requirements for designating trains a railroad intends to move in accordance with this section. Several commenters contended that the proposed provisions regarding the advance designation of extended haul trains would prohibit certain unscheduled trains from being operated as extended haul trains. In an effort to provided some flexibility in this area, this paragraph has been modified to allow railroads to designate certain locations as locations where extended haul trains will be initiated and requires railroads to describe those trains that will be so operated rather than requiring specific identification of every train. FRA believes this modification will allow railroads to capture some of their unscheduled trains by identifying the trains by the locations where they originate. This paragraph sets forth the information that must be provided to FRA in writing when designating a train or a location for such operation. The information required to be submitted is necessary to facilitate FRA's ability to independently monitor a railroad's operation of these extended haul trains.

FRA continues to believe that in order for a train to be permitted to travel 1,500 miles between inspections, the train must receive inspections that ensure the optimum condition of both the brake system and the mechanical components. In paragraphs (a)(2), (a)(3), and (a)(8), FRA retains the proposed requirement that these inspections be performed by highly qualified and experienced

inspectors in order to ensure that quality inspections are being performed. As FRA intends the Class I brake tests that are required to be performed on these trains to be as in-depth and comprehensive as possible, FRA continues to believe that these inspections must be performed by individuals possessing not only the knowledge to identify and detect a defective condition in all of the brake equipment required to be inspected but also the knowledge to recognize the interrelational workings of the equipment as well as a general knowledge of what is required to repair the equipment. Therefore, paragraphs (a)(2) and (a)(8) retain the use of the term ''qualified mechanical inspector'' to identify and describe those individuals it believes possess the necessary knowledge and experience to perform the required Class I brake tests on these trains. A ''qualified mechanical inspector'' is a person with training or instruction in the troubleshooting, inspection, testing, maintenance, or repair of the specific train brake systems for which the person is assigned responsibility and whose primary responsibilities include work generally consistent with those functions. (See § 232.5 of this section-by-section analysis for a more detailed discussion of ''qualified mechanical inspector.'') FRA also continues to believe these same highly qualified inspectors must be the individuals performing the required inbound inspection, contained in paragraph (a)(6) of this section, on these extended haul trains in order to ensure that all defective conditions are identified at the train's destination or 1,500 mile location. Similarly, in paragraph (a)(3), FRA requires that all of the mechanical inspections required to be performed on these trains be conducted by inspectors designated pursuant to 49 CFR 215.11, rather than train crew members, in order to ensure that all mechanical components are in proper condition prior to the trains departure.

As discussed in detail above, FRA is not willing to allow more than 1,500 miles between brake inspections until appropriate data are developed which establish that equipment moved under the criteria contained in this final rule remains in proper condition throughout the train's journey. FRA believes that the provisions contained in paragraphs (a)(6) and (a)(7), requiring the performance of an inbound inspection at destination or at 1,500 miles and requiring carriers to maintain records of all defective conditions discovered on these trains for a period of one year, create the basis for developing such data. FRA believes the information generated from these inbound inspections will be extremely useful in assessing the quality of a railroad's inspection practices and will help FRA identify any systematic brake or mechanical problems that may result in these types of operations. It should be noted that paragraph (a)(7) has been slightly modified from what was proposed in order to clarify that the required records may be maintained either electronically or on paper.

Paragraphs (a)(4) and (a)(8) retain the proposed requirements that these trains have 100 percent operative brakes and contain no cars with mechanical defects under part 215 at either the train's initial terminal or at the time of departure from a 1,500-mile point, if moving in excess of 1,000 miles from that location. FRA has modified the provision proposed in paragraph (a)(5) that restricted extended haul trains from conducting any pick-ups or set-outs en route, except for the removal of defective equipment. Paragraph (a)(5) is modified to permit extended haul trains the limited ability make one pick-up and one set-out while en route. This modification will provide railroads the flexibility to set out a block of cars at one location and pick up a block of cars at the same or another location. FRA believes that this limited ability provides the railroads with some flexibility to move equipment efficiently while minimizing the disruptions made to the train's brake system and ensuring that cars added to such trains can be adequately tracked and inspected. Paragraph (a)(5) makes clear that any cars added to extended haul trains must be inspected in the same manner as the cars at the train's initial terminal. This paragraph also makes clear that any car removed from the train must be inspected in the same manner as a car at the train's point of destination or 1,500-mile location.

Paragraph (b) is retained as proposed and makes clear that failure to comply with any of the restrictions contained in this section will be considered an improper movement of a designated extended haul train for which appropriate civil penalties may be assessed. FRA has included specific civil penalties in appendix A to this final rule pertaining to the improper movement of these types of trains. In addition to the imposition of civil penalties, this paragraph makes clear that FRA reserves the right to revoke a railroad's authority to designate any or all trains for repeated or willful noncompliance with any of the provisions contained in this section.

Section 232.215 Transfer Train Brake Tests

This section generally retains the proposed requirements related to the performance of transfer train brake tests. The final rule requirements have been slightly modified for consistency with other inspection requirements and to clarify when a transfer train brake test is to be performed. The requirements contained in this section generally incorporate the requirements currently contained in § 232.13(e). ''Transfer train'' is defined in § 232.5 of this final rule as a train that travels between a point of origin and a point of destination, located not more than 20 miles apart. The definition makes clear a transfer train may pick up or deliver freight equipment while en route to its destination. This final rule makes clear that the decision as to whether a particular consist is subject to the transfer train inspection requirements is primarily based on a determination that the movement the train is engaged in is considered a ''train movement'' rather than a ''switching movement.'' FRA's determination of whether the movement of cars is a ''train movement,'' subject to the requirements of this section, or a ''switching movement'' is and will be based on the voluminous case law developed by various courts of the United States. (See section-by-section analysis for § 232.5 for a detailed discussion of the terms ''train movement'' and ''switching movement.'')

FRA intends to make clear that a train will be considered a transfer train only if the train moves no more than 20 miles between its point of origin and its point of final destination. If the train will move greater than 20 miles between the point of origin and point of final destination, it cannot be considered a transfer train, and a Class I brake test must be performed on the train prior to departure from its point of origin. Although cars may be added to a transfer train while the train is en route, as discussed below, with a transfer train brake test being performed on the cars added, the train is limited to a total of 20 miles from its point of origin, not from the location where new cars are added. The distance the entire train will move between its point of origin and point of final destination is the determinative factor in determining whether the train is a transfer train, cars dropped-off or picked-up en route do not affect this distance.

Paragraph (a) retains the proposed tasks that are required to be performed when conducting a transfer train brake test. Due to the short distance these

types of trains will travel, FRA will continue to permit the brake system to be charged to only 60 psi but will make clear that this must be verified by an accurate gauge or end-of-train device. Although the current regulations do not require the use of a gauge or device, FRA is at a loss to understand how an inspector can know the pressure in the brake system without getting a reading from the rear of the train. This paragraph also retains the requirement that the brakes apply in response to a 15-psi brake pipe reduction. FRA continues to believe that the reduced pressure at which this test is performed (i.e., 60 psi rather than 75 psi) requires that an application be obtained with a smaller pressure reduction than that required for other brake tests. This paragraph also makes clear that the brakes shall apply on each car added to the train and remain applied until a release is initiated and reiterates the parameters for performing a retest on those cars found not to have sufficiently applied that are contained in the Class I brake test requirements.

Paragraph (b) clarifies that cars may be added to a transfer train while it is en route to its destination. This activity is currently conducted by these trains, and it was not FRA's intent when issuing the NPRM to propose prohibiting these trains from being used in this fashion. This paragraph makes clear that when cars are added to a transfer train the added cars are to be inspected pursuant to the requirements contained in paragraph (a) of this section. This is generally consistent with what FRA currently requires when cars are added to a transfer train, and this paragraph has been added to clarify FRA's retention of the existing practice.

Section 232.217 Train Brake System Tests Conducted Using Yard Air

This section contains the requirements for performing train brake system tests when using yard air. The requirements contained in this section have been modified from those proposed in the NPRM in response to the comments and recommendations received. Paragraph (a) retains the proposed requirements regarding the use of an engineer's brake valve or a suitable test device capable of making any increase or decrease of brake pipe air pressure at the same, or slower, rate as an engineer's brake valve when conducting brake tests utilizing yard air. The requirement to use such a device also applies when retesting cars during Class I, Class IA, Class II, and transfer train brake tests.

Paragraph (b) generally retains the requirement to connect the air test device to the end of the cut of cars that will be nearest to the controlling locomotive. However, this paragraph permits the test device to be connected to other than the end nearest the controlling locomotive if a railroad has appropriate procedures in place to ensure the safety of such a practice. FRA recognizes that some currently existing yards are designed in such a manner so that performance of a test from the front of the consist is extremely difficult or impossible. FRA also recognizes that the safety concerns that arise when cars are charged from other than the head-end of the consist can be eliminated if proper procedures are in place to ensure that overcharge conditions do not occur. An ''overcharge condition'' describes a situation in which the brake equipment of cars, or locomotives, or both is charged to a higher pressure than the maximum brake pipe pressure that can normally be achieved in that part of the train; this may result in the locomotive engineer's lacking the ability to control the application or release of the brakes at the rear of the train. This paragraph recognizes that there are a number of operating or testing procedures which may be used to eliminate the existence of potential overcharge conditions. Rather than specify a procedure, this paragraph permits a railroad to adopt and comply with whatever procedure it determines is best suited to its operation. However, this paragraph makes clear that the procedure must be in writing and that the procedure must be followed by the railroad. Consequently, FRA will hold a railroad responsible for complying with whatever procedure it adopts.

Paragraph (c) modifies some of the provisions related to conducting brake tests utilizing yard air sources that were proposed in the NPRM. Rather than requiring yard air tests to be performed at 80 psi as was proposed, this paragraph reduces the required pressure to 60 psi at the end of the consist as is currently required. FRA recognizes that many yard air sources and rental compressors are not capable of producing 80 psi of air pressure. In order to address the concerns raised regarding the inadequacy of conducting a leakage or air flow test at this lower pressure, this paragraph includes a requirement that leakage and air flow tests be conducted at the operating pressure of the train. Thus, if the yard air is not capable of producing the air pressure at which the train will be operated, then the leakage or air flow test must be conducted when the locomotives are attached. This paragraph also retains the proposed requirement that a Class III brake test as proposed in § 232.211 must be performed on cars tested with yard air at the time that the road locomotive is attached. This paragraph also retains the proposed requirement for retesting cars that remain disconnected from a source of compressed air for more than four hours.

Paragraph (c) and (d) retain the proposed requirements regarding the calibration and accuracy of yard test devices and gauges with slight modification for clarity. Paragraph (c) requires that mechanical yard test devices and gauges be calibrated every 92 days and that electronic yard test devices and gauges be calibrated annually. Based on observations made by FRA's field inspectors, FRA has some concerns regarding the condition of many yard test devices and gauges. FRA has found numerous mechanical gauges the condition of which creates serious doubt as to the accuracy of the gauge. Mechanical gauges have been found with broken or missing glass which would allow moisture and other contaminates to be present in the gauge. As many of the yard test plants being used today are portable, they are exposed to a wide array of handling and environmental hazards while being transported from location to location. Therefore, this paragraph requires that mechanical devices and gauges be tested and calibrated every 92 days. On the other hand, electronic gauges and devices appear to have much less exposure to many of the hazards encountered by mechanical devices and gauges and tend to be much more reliable and accurate for a longer period of time. Consequently, this paragraph requires electronic yard test devices and gauges to be tested or calibrated, or both, on an annual basis. Paragraph (d) retains the proposed requirement that any yard air test device and any yard air test equipment used to test a train be accurate and function as intended. FRA will consider a device or gauge to be accurate if it is within the calibration parameters contained in paragraph (c) of this section.

Section 232.219 Double Heading and Helper Service

This section contains the requirements related to double heading and helper service. This section has been modified from that proposed in order to clarify that the requirements contained in this section do not apply to distributed power units and to remove unnecessary provisions. Thus, the second sentence of proposed paragraph (a) has been removed as the brake valve on distributed power units

are left cut in to accelerate response time. In addition, proposed paragraph (b) has been eliminated as it was originally intended to apply to passenger equipment and is not applicable to freight operations. Paragraph (a) retains the proposed clarification regarding the inspection that is to be performed when a controlling locomotive is changed. Paragraph (a) clearly identifies that a Class III brake test pursuant to § 232.211 must be performed when a new locomotive is placed in control of the train. FRA believes that the provisions retained in paragraph (a) are necessary and have been in place for years in order to ensure that locomotives taking control of a train have the ability to actually control the brakes on the train.

Paragraph (b), previously proposed as paragraph (c), retains the proposed requirement aimed at ensuring that the brake systems on helper locomotives respond as intended to brake commands from the controlling locomotive at the time it is placed in the train. Although the brake system on locomotives are required to be inspected on a daily basis, FRA continues to believe that a visual confirmation of the proper operation of a helper locomotive's brakes should be made at the time the locomotive is added to a train. Failure of a helper locomotive to respond to the command of the controlling locomotive could result in a very serious safety hazard in that a helper locomotive may continue to push the rear of the train while the brakes are applied, potentially resulting in a derailment or other incident. FRA intends to make clear in this paragraph that a helper locomotive found with inoperative or ineffective brakes is to be repaired prior to use or else removed from the train.

Paragraph (c) contains basic design and testing requirements for helper locomotives utilizing a Helper Link device or similar technology. The Helper Link device is an electronic device, mounted on the front end of the lead helper locomotive and is used to control the automatic air brakes on helper locomotive consists. When this device is used, the train's brake pipe is not connected between the rear car of the train being pushed and the helper locomotives. The end-of-train device, attached to the rear car of the train, sends a radio signal which is received by the Helper link device. The Helper Link device is connected to the brake pipe of the helper locomotives, and electronic commands from the EOT device cause the air pressure in the helper locomotive brake pipe to be reduced or increased, thus applying or releasing the brakes on the helper locomotives. A signal is transmitted from the EOT device to the Helper Link device at 10-second intervals to ensure communication. The Helper Link is also used to operate the uncoupling lever to detach the helper locomotives from the rear of the train without stopping the train.

Based on information currently available to FRA, it appears that when there is a loss of communication between the EOT device and the Helper Link device, the engineer of the helper locomotive consist is not immediately aware of the failure. If the communication between the EOT device and the Helper Link is not reestablished within the next 40-second communication cycle, the Helper Link device will automatically disable itself. Consequently, if the train experiences an emergency application of the air brakes while the Helper Link device is disabled, the brakes on the helper locomotives would not apply and would result in the helper locomotives continuing to push under power. Furthermore, in order for communications to be reestablished between the EOT and Helper Link, the engineer must leave the locomotive controls, exit the locomotive cab, and proceed to the front of the locomotive to manually press the reset buttons located on the Helper Link device itself. In addition, there are currently no regulations which address the use, testing, or calibration of these Helper Link devices.

On August 22, 1996, the UTU submitted a petition for rulemaking with FRA regarding Helper Link devices raising many of the concerns noted above. *See* Petition for Proposed Rulemaking, Docket 96–1. In order to address the UTU petition in this rulemaking and to address the concerns of FRA noted above, FRA sought information and comment from persons interested in the NPRM. *See* 63 FR 48345. A presentation and discussion regarding the use, operation, and design of Helper Link devices was engaged in at the technical conference conducted in Walnut Creek, California, on November 23 and 24, 1998. Written comments regarding the device were also submitted by the manufacturer of the device. Based on consideration of this information, FRA has determined that certain minimum design and testing requirements should be included in this final rule to ensure the safety of those trains utilizing Helper Link technology.

Paragraph (c) contains the design and testing requirements that FRA believes are appropriate when railroads utilize Helper Link devices or similar technology. This paragraph ensures that a locomotive engineer is notified by a distinctive alarm of any loss of communication for more than 25 seconds between the device and the two-way EOT. This paragraph also requires that the engineer be provided a method of resetting the device in the cab of the helper locomotive and that the device be tested and calibrated on an annual basis. Due to the limited number of Helper Link devices currently being used, FRA believes that the manufacturer of these devices can easily provide railroads utilizing the devices with the information and hardware to meet the requirements contained in this paragraph at a minimal cost to the railroad.

Subpart D—Periodic Maintenance and Testing Requirements

This subpart provides the periodic brake system maintenance and testing requirements for equipment used in freight and other non-passenger trains. As stated in the 1994 NPRM and 1998 NPRM, FRA firmly believes that the new repair track test and single car test, which have been used industry-wide since January of 1992, are a much better and more comprehensive method of detecting and eliminating defective brake equipment and components than the old, time-based COT&S requirements. FRA believes that performance of these tests has significantly reduced the number of defective components found and has dramatically increased the reliability of brake equipment. Through the implementation of the repair track and single car tests, the safety of both railroad employees and the public has greatly improved due to brake equipment being in better and safer condition. At the same time, however, FRA is cognizant that contentions by rail labor regarding the carrier's direct and intentional circumvention of these revised requirements through the elimination of repair tracks, by moving cars to expediter tracks for repair, or simply by making repairs in the field raise a legitimate concern that needs to be addressed to ensure that the industry fully benefits from the advantages of the improved tests.

Although this subpart retains many of the proposed maintenance requirements, several modifications have been made in this final rule in response to comments received and based upon the current best practices occurring within the industry. FRA agrees that the proposed incorporation of AAR Rule 3, Chart A, is unnecessary as it would remove the determination of when certain maintenance is performed from the discretion of the railroads, and

would make it difficult for railroads to change the requirements related to the performance of that maintenance. FRA believes that a railroad is in the best position to determine when and where it will perform various maintenance on its equipment and should not have its hands tied in this area by overly prescriptive federal requirements. Furthermore, FRA's primary intent when proposing incorporation of AAR Rule 3, Chart A, was to codify the existing requirements for performing single car and repair track air brake tests and eliminate the ability of the industry to unilaterally change the frequency and method of performing these tests. As this subpart retains the requirements for when and how these tests are to be completed and retains certain inspections that are to be performed when equipment is on a shop or repair track, FRA believes that it is unnecessary to incorporate every maintenance procedure covered in AAR's Rule 3, Chart A. Consequently, the final rule does not incorporate AAR's Rule 3, Chart A, and continues to allow railroads some flexibility in determining appropriate maintenance practices. (A detailed discussion of the comments and recommendations submitted on the maintenance requirements contained in this subpart is contained in the preceding ''Overview of Comments and General FRA Conclusions'' portion of the preamble under the heading ''VII. Maintenance Requirements.'')

Section 232.303 General Requirements

This section contains the general requirements regarding the maintenance, repair, and testing of freight cars. Paragraph (a) contains various definitions for determining whether a particular track or facility constitutes a shop or repair track. The definitions contained in this paragraph were not previously proposed in the NPRM but are consistent with current FRA enforcement policies and are necessary to clarify when various tests and inspections required in this section are to be performed.

As the current regulations and this subpart require that certain inspections and tests are to be performed when a car is on a shop or repair track and because a repair track air brake test is required to be performed when a car is on a repair track and such a test has not been performed within the last twelve months, FRA believes it is necessary to clarify what constitutes a shop or repair track. This issue has become more prevalent over the last few years due to the growing use of mobile repair trucks and due to the requirements for conducting repair track air brake tests. For years, many railroads have conducted minor repairs on tracks called ''expedite tracks.'' Generally, the types of repairs that were performed on these tracks were minor repairs that could be made quickly with a limited amount of equipment, and neither the railroads or FRA considered the tracks to be repair tracks. However, recently railroads have started performing virtually every type of repair on these expedite tracks. These tracks are no longer limited to minor repairs but are being used to perform heavy, complex repairs that require the jacking of entire cars or the disassembly and replacement of major portions of a car's truck or brake system. At many locations these expedite tracks are positioned next to operative repair shops. Furthermore, several railroads have closed previously existing repair shop facilities and are now using fully equipped mobile repair trucks to perform the same type of repairs that were previously performed in the shop or on established repair tracks and are attempting to call the tracks serviced by these mobile repair trucks ''expedite'' or ''light repair'' tracks. Thus, the line between what constitutes a repair or shop track and what constitutes an ''expedite'' or ''light repair'' track has become unclear or nonexistent.

Appendix A of AAR's Field Manual of Interchange Rules provides a definition of both ''shop or repair track'' and ''expedite track.'' Although FRA does not consider these definitions to be controlling with regard to what constitutes a repair track under the current regulations, FRA does believe that AAR's definitions of the above terms have created confusion within the industry regarding what constitutes a repair track. If the AAR's definitions are read together they appear to exclude repairs made by mobile repair trucks, regardless of where they are made or the nature of the repairs conducted, from ever being considered as being performed on a repair track. FRA believes it is both illogical and inconsistent with the intent and meaning of the existing regulations and with the provisions proposed in the NPRM to exclude from the definition of ''shop or repair track'' tracks at locations where repairs of all types are regularly and consistently performed from merely because they are serviced by a mobile repair vehicle. Furthermore, it would be inconsistent with previous technical bulletins and enforcement guidance issued by FRA to allow major repair work to be performed on ''expedite'' or ''light repair'' tracks merely because the repairs are performed by a mobile repair vehicle.

FRA believes that the operational changes, noted above, are partly an attempt by the railroads to circumvent the requirements that currently apply when a car is on a shop or repair track. Currently, if a car is on a shop or repair track, it must have its brakes inspected, under 49 CFR 232.17(a)(2)(ii), (iv), and the car is to receive a repair track air brake test if it has not received one in the last twelve months under AAR Rule 3, Chart A. Some railroads contend that an expedite track is not a repair or shop track; therefore, the requirements of § 232.17(a)(2)(ii), (iv) and AAR Rule 3, Chart A, do not apply. FRA finds this practice and interpretation to be unacceptable and believes that railroads are abusing the concept of expedite tracks to avoid performing required maintenance. Therefore, the industry's own actions have caused the need for FRA to clarify what constitutes a shop or repair track. Consequently, paragraph (a) includes a definition of what FRA will consider to be repair or shop tracks requiring the performance of certain tests and inspections.

Paragraph (a) makes clear that FRA will consider certain tracks to be repair or shop tracks based on the frequency and types of repairs that are made on the tracks, not necessarily the designation given by a railroad. The definitions in this paragraph also make clear that it is the nature of the repairs being conducted on a certain track that is the determining factor not whether a mobile repair truck is being used to make the repairs. Due to the ability of mobile repair trucks to make virtually any type of repair necessary and due to their growing use, FRA does not believe that tracks regularly and continually serviced by these types of vehicles should be excepted from the definition of ''repair track.'' FRA believes that if a track is designated by the railroad as an ''expedite'' track (i.e., one where minor repairs will be conducted) then the railroad should ensure that only cars needing minor repairs are directed to that track for repair. FRA does not intend to eliminate the concept of expedite tracks but limits the use of such tracks to those types of repairs that are truly minor in nature and that require a limited amount of equipment to perform. At locations where a railroad conducts repairs of all types on a regular and consistent basis, either with fixed facilities or with mobile repair trucks, FRA would expect the railroad to designate certain trackage at the location as repair tracks and certain trackage as ''expedite tracks'' where only minor repairs would be conducted.

In such circumstances, FRA would expect railroads to direct cars in need of heavier repairs, the kind that have been traditionally performed on a shop or repair track, to be directed to trackage designated at the location as a repair track.

Paragraph (a) places the burden on the railroad to designate those tracks it will consider repair tracks at locations where it performs both minor and heavy repairs on a regular and consistent basis, and makes the railroad responsible for directing the equipment in need of repair to the appropriate trackage. If the railroad determines that repairs of a heavy nature will be performed on certain trackage, then the track should be treated as a repair track, and any car repaired on that trackage should be provided the attention required by this final rule for cars on a shop or repair track. Further, if a railroad determines that minor repairs will be performed on certain trackage, then the railroad bears the burden of ensuring that only cars needing minor repairs are directed to that trackage. If the railroad fails to adequately distinguish the tracks performing minor repairs from those tracks performing heavy repairs or improperly performs heavy repairs on a track designated as an ''expedite track,'' then the railroad will be required to treat all cars on the trackage at the time that the heavy repairs are being conducted as though they are on a repair or shop track.

It should be noted that the issue of what constitutes a repair or shop track for the purposes of this subpart is completely separate and distinct from the issue of whether a location is a location where necessary repairs can be performed for purposes of 49 U.S.C. 20303 and § 232.15 of this final rule. Although an outlying location might be considered a location where certain brake repairs can be conducted, that does not mean the track where those repairs are performed should be considered a repair track. FRA does not intend for trackage located at outlying locations or sidings which are occasionally or even regularly serviced by mobile repair trucks to be considered repair tracks. FRA believes that repair or shop tracks should exist at locations that have fixed repair facilities and at locations where repairs of all types are performed on a regular and consistent basis regardless of whether the repairs are performed in fixed facilities or by mobile repair vehicles.

Paragraphs (b)–(d) retain the proposed provisions requiring certain tests and inspections to be performed whenever a car is on a shop or repair track. Although the AAR asserts that it did away with the requirements to perform a set and release of the brakes and adjust piston travel on all cars on repair or shop tracks, the requirements are currently contained in power brake regulations separate and apart from any AAR requirements. *See* 49 CFR 232.17(a)(2)(ii), (iv). FRA believes that repair and shop tracks provide an ideal setting for railroads to conduct an individualized inspection on a car's brake system to ensure its proper operation and that such an inspection is necessary to reduce the potential of cars with excessive piston travel being overlooked when employees are performing the ordinary brake inspections required by this final rule. If any problems are detected at that location, the personnel needed to make any necessary corrections are already present. Furthermore, performing these inspections at this time ensures proper operation of the cars' brakes and eliminates the potential of having to cut cars out of an assembled train and, thus, should reduce inspection times and make for more efficient operations.

Paragraph (b) retains the proposed requirement that a car on a shop or repair track be tested to determine that its air brakes apply and remain applied until a release is initiated. This paragraph requires that the air brakes remain applied until the release signal is initiated and is intended to maintain consistency with the requirement contained in § 232.205(b)(4). Paragraph (b)(4) is an attempt to clarify language contained in the current regulation which require that the brakes ''apply.'' This language has been misinterpreted by some to mean that if the piston applies in response to a command from a controlling locomotive or yard test device, and releases before the release signal is given, the brake system on that car is in compliance with the regulation because the brake simply applied. The intent of the regulation has always been that the brakes apply and remain applied until the release signal is initiated from the controlling locomotive or yard test device. Therefore, clarifying language was proposed in this paragraph to eliminate all doubt as to what is required. Consequently, this paragraph makes clear that the brakes on a car must remain applied until the appropriate release signal is given. If it fails to do so, the car must be repaired and retested.

Paragraph (c) retains the proposed requirement that if piston travel is found to be less than 7 inches or more than 9 inches, it must be adjusted to nominally 7½ inches, which is a change from the 7 inches as currently required, in order to maintain consistency with the requirement proposed at § 232.205(b)(5). This change was proposed in the NPRM and is based on a request by AAR to change the adjustment to 7½ inches from 7 inches as its member railroads were finding it extremely difficult to adjust the piston travel to precisely 7 inches and that in some cases the adjustment would be marginally less than 7 inches, thus requiring a readjustment. Therefore, AAR sought the extra ½ inch in order to provide a small margin for error when the piston travel is adjusted. As FRA believes that AAR's concerns are validly placed and would have no impact on safety, FRA has accommodated the request.

Paragraph (d) retains the proposed listing of brake system components that are to be inspected prior to a car being released from a shop or repair track. Many of the items contained in this paragraph are currently required to be inspected pursuant to § 232.17(a)(2)(iv). It should be noted that the proposed requirement, retained in this final rule, regarding the proper functioning of angle cocks was modified in the NPRM from the existing requirement by clarifying that angle cocks must be inspected to ensure that they are properly positioned to allow maximum air flow. This is a clarification regarding the normal functioning of the angle cock, and should pose little, if any, additional inspection burden on the railroads. This paragraph adds two items to the inspections that are to be conducted when a car is on a shop or repair track. They are an inspection of a car's hand brake and an inspection of the accuracy and operation of any brake indicators on cars so equipped. As the final rule does not provide for the specific inspection of these items during any of the other required brake tests, FRA believes this is an ideal time for the railroad to inspect these items while imposing the least burden on the railroad's inspection and repair forces.

Paragraph (e) retains the proposed provisions permitting cars to be moved from a location where necessary repairs are made to a location where a single car or repair track air brake test can be performed if it cannot be performed at the same location where the repairs are conducted. FRA disagrees with the assertions of some commenters that air brake repairs should not be required at locations that lack the ability to perform single car or repair track air brake tests. FRA believes that position is not only contrary to the statutory mandates regarding the movement of equipment with defective brakes but would open the door to potential abuse by railroads.

Furthermore, the operation of a car's brake system can generally be tested after a repair without performing a complete repair track air brake test. For the most part, single car and repair track air brake tests are intended to be maintenance requirements that attach based on a condition in which a car is found or on a repair that is required to be performed. If the condition of a car is such that a repair track air brake test is necessary to determine the defect, then the final rule would permit movement of the car to the nearest location where a repair track air brake test can be performed. However, FRA believes that most defective conditions can be easily determined without performing a repair track air brake test. Moreover, for years FRA has required the performance of repairs where they can be performed and has allowed such equipment to be moved to the next forward location for performance of a single car or repair track air brake test and has not found that such a practice has created any potential safety hazard.

Paragraph (e) also retains the proposed requirements for tagging equipment which is being hauled for the performance of a single car or repair track air brake test after the appropriate repairs have been conducted. FRA believes that the tagging requirements are necessary not only to provide notice to a railroad's ground forces as to the presence of the car but also to ensure that railroads are properly performing the tests at appropriate locations. Furthermore, many railroads currently move equipment in this fashion, and there has been no indication that safety has been compromised. The final rule also retains the requirement that a copy or record of the tag be retained for 90 days and made available to FRA upon request. Contrary to the objections of some commenters, FRA continues to believe that the record keeping requirements are necessary so that there is accountability on the part of the railroads to conduct these tests at the proper locations and that equipment is not moved for extended periods without receiving its required maintenance. It should be noted that the final rule clarifies that the record or copy of the tag may be maintained either electronically or in writing provided all the required information is recorded. This paragraph retains the proposed alternative to the tagging requirements, which permits a railroad to utilize an automated tracking system to monitor these cars and ensure they receive the requisite tests as prescribed in this section provided the automated system is approved by FRA. It should be noted that the final rule does not define or require identification of locations that can or will perform single car or repair track air brake tests as suggested by some commenters. FRA does not believe that such a requirement is necessary because the rule specifically establishes when the tests are to be performed and it is in the railroad's best interests to perform the tests in a timely manner.

Paragraph (f) contains the requirements for railroads to adequately track when single car or repair track air brake tests were last performed on a piece of equipment. This paragraph modifies the proposed requirements regarding the use of an automated tracking system in lieu of stenciling equipment with the date and location of the last single car or repair track test received. Since 1992, the industry has utilized the AAR's UMLER reporting system to electronically track the performance of single car and repair track air brake test as well as other repair information. Based on the performance and use of this system over the last seven years, FRA believes that the AAR's UMLER system has proven itself effective for tracking the information required in this paragraph and ensuring the timely performance of single car and repair track air brake tests. Furthermore, FRA continues to believe that the information required to be tracked in this paragraph with regard to these tests is easily maintained through an electronic medium. Moreover, FRA has found no substantiated instances of railroads falsifying or altering the information monitored and tracked by AAR's UMLER system. Thus, this paragraph permits railroads to utilize an electronic record keeping system to track single car and repair track air brake tests without obtaining prior FRA approval of the system. The final rule makes clear that FRA will monitor the performance of such systems and retains the right to revoke a railroad's authority to utilize the system if FRA finds that it is not properly secure, inaccessible to FRA or a railroad's employees, or fails to properly or adequately track and monitor the equipment.

Section 232.305 Repair Track Air Brake Tests and Section 232.307 Single Car Tests

These sections generally retain the proposed requirements related to the performance of single car and repair track air brake tests. Contrary to the assertions of some commenters, FRA continues to believe that certain maintenance procedures are critical to ensuring the safe and proper operation of the brake equipment on the nation's fleet of freight cars. FRA does not believe that the determination of what maintenance should be performed should be left solely to the discretion of the railroads operating the equipment in all circumstances. As periodic COT&S maintenance has been eliminated and replaced with the performance of single car and repair track tests, which FRA agrees is a better and more comprehensive method of detecting defective brake equipment and components, FRA believes that specific and determinable limits must be placed on the manner and frequency of performing these tests. Therefore, these sections generally retain the proposed requirements regarding the performance of single car and repair track brake tests.

FRA recognizes that the procedures for performing single car and repair track tests proposed in the NPRM have been modified by the AAR since the issuance of the proposal. As it is FRA's intent to incorporate the most recent version of the single car and repair track air brake test procedures, paragraph (a) of each section incorporates by reference the test procedures that were issued by the AAR in April of 1999. These test procedures are contained in AAR standard S–486–99, Sections 3.0 and 4.0, which are located in the AAR's ''Manual of Standards and Recommended Practices, Section E'' (April 1999). Both these sections recognize that the industry may find it necessary to modify the test procedures from time to time in order to address new equipment or utilize new technology. Thus, paragraph (a) of each section permits railroads to seek approval of alternative procedures through the special approval process contained in § 232.17 of this final rule. The special approval process is intended to speed FRA's consideration of a party's request to utilize an alternative procedure from the ones identified in the rule itself. FRA believes that it is essential for FRA to approve any change made in the procedures for conducting these safety-critical tests in order to prevent unilateral changes and to ensure consistency in the method in which the tests are performed.

It should be noted that the incorporated procedures for performing single car and repair track air brake tests are the minimum requirements for performing such tests. The special approval process is required to be used only if the incorporated procedures are to be changed in some manner. For instance, if the industry were to elect to add a new test protocol to the incorporated procedures, there would be no need to seek approval of such an

addition as long as the procedures contained in the incorporated standard are still maintained. This final rule is not intended to prevent railroads from voluntarily adopting additional or more stringent maintenance standards provided they are consistent with the standards incorporated.

Both sections retain the proposed frequency at which single car and repair track air brake tests are to be performed. As noted in the preceding discussion, the primary intent of the proposed provisions was to codify the existing requirements regarding the performance of single car and repair track air brake tests and prevent any unilateral changes to those requirements. FRA believes that the frequency at which these tests are currently required to be performed under industry standards has proven to be sufficient and a substantial economic burden would be imposed if the frequency were increased. Both sections also retain the requirement that these tests be conducted by a qualified person. FRA continues to believe that the person performing these tests must be specifically trained and tested on how the test is to be performed and be able to determine the appropriate actions that must be taken based on the results of the test. FRA does not believe that the mere fact that a person is a carman or a QMI is sufficient to make that person qualified to perform single car or repair track air brake tests. FRA believes that the training and testing requirements required by this final rule ensures that a person is qualified to perform these tests.

Section 232.305(b) generally retains the proposed list of conditions that would require the performance of a repair track air brake test. However, two of the proposed conditions for when a repair track air brake test would be required to be performed have been slightly modified in order to make them consistent with the currently existing AAR requirements for performing these tests. FRA agrees that the proposed requirement to perform a repair track air brake test on any car removed from a train for a brake-related defect is overly restrictive and inconsistent with the requirements of AAR's Rule 3, Chart A. FRA agrees that the proposed requirement would require the performance of the test when minor brake system repairs are conducted, which is not the intent of the AAR's rule. Therefore, this paragraph modifies the proposed condition to require the performance of a repair track test on cars that have inoperative or cut-out air brakes when removed from a train. Furthermore, the proposed provisions requiring the performance of a repair track air brake test whenever a car is found with a wheel with built-up tread or slid flat have been slightly modified. Under the final rule, the test will not be required if the built-up tread or slid flat wheel is known to have been caused by a hand brake that was left applied. These modifications are consistent with what is currently required under AAR Rule 3, Chart A.

Paragraphs (c) and (d) of § 232.305 retain the proposed requirements that each freight car receive a repair track air test within eight years from the date the car was built or rebuilt, and within every five years thereafter. FRA strongly believes that these minimum attention periods are sufficient to ensure the safety of the freight car fleet when considered in conjunction with the increased attention that freight cars receive when these types of tests are performed.

Paragraph (c) of § 232.307 retains the proposed requirement that a single car test be conducted by a qualified person prior to a new or rebuilt car being placed in or returned to revenue service. FRA believes that it is essential for new and rebuilt cars to receive this test prior to being placed in revenue service in order to ensure the proper operation of the brake system on the vehicle. Most railroads already require this attention to be given to new and rebuilt cars; thus, the cost of this requirement is minimal and merely incorporates the best practices currently in place in the industry.

Section 232.309 Repair Track Test and Single Car Test Equipment and Devices

This section generally retains the proposed requirements for maintaining the equipment and devices used in performing repair track and single car air brake tests. This section modifies some of the proposed provisions regarding the testing and calibration of single car test devices and other mechanical devices used to perform single car and repair track air brake tests. FRA's intent when proposing the requirements contained in this section was to codify the current best practices of the industry. Thus, FRA did not intend to propose testing and calibration requirements that were more stringent that those currently imposed by AAR standards. Therefore, FRA agrees with the comments submitted by AAR that the testing and calibration requirements for single car test devices should not be imposed until the devices are actually placed in service, which is consistent with current AAR requirements. FRA recognizes that the proposed calibration and testing requirements may have resulted in the unnecessary acquisition of single car testing devices. Consequently, this section has been modified to clarify that the 92-day and the 365-day calibration and testing requirements related to single car test devices are to be calculated from the day on which the device is first placed in service. FRA continues to believes that the devices and equipment used to perform these single car and repair track air brake tests are safety-critical items. Consequently, FRA believes that these devices must be kept accurate and functioning properly in order to ensure that repair track and single car tests are properly performed.

Subpart E—End-of-Train Devices

This subpart incorporates the design, performance, and testing requirements relating to end-of-train devices (EOTs) that were issued on January 2, 1997, which became effective for all railroads on July 1, 1997, except for those for which the effective date was extended to December 1, 1997 by notice issued on June 4, 1997. *See* 62 FR 278 and 62 FR 30461. This subpart also incorporates the recent modifications made to the two-way EOT requirements to clarify the applicability of the requirements to certain passenger train operations where multiple units of freight-type equipment, material handling cars, or express cars are part of a passenger train's consist. *See* 63 FR 24130.

As noted in the discussion of the applicability provisions contained in § 232.3 of this final rule, this subpart applies to all trains unless specifically excepted by the provisions contained in this subpart. As the provisions contained in this subpart were just recently issued, there is little need to discuss these requirements in detail as they were fully discussed in the publications noted above. However, after their issuance, FRA discovered that a few of the provisions were in need of minor modification for clarification purposes and to address some valid concerns that have been raised both internally by FRA inspectors and by outside parties. Consequently, in the NPRM FRA proposed various changes to the provisions related to end-of-train devices and discussed other issues which might require modification of the existing provisions. *See* 63 FR 48347–49. This discussion is intended to focus on the proposed changes and address those issues discussed in the preamble to the NPRM as well as address the issues raised at the public hearings and in written comments.

Section 232.405 Design and Performance Standards for Two-Way End-of-Train Devices

Paragraph (d) retains the proposed modification of the requirement relating to the diameter of the valve opening and hose on two-way EOTs, which is currently contained in § 232.21(d). The current regulation requires that the valve opening and hose have a minimum diameter of ¾ inch to effect an emergency application. FRA has discovered that sometime prior to the issuance of the final rule on two-way EOTs, Pulse Electronics began manufacturing its two-way EOT with the internal diameter of the hose being ⅝ inch. Testing of the devices manufactured with these smaller diameter hoses showed that they met all criteria for emergency application capability based on standards and guidelines set forth by the AAR. Furthermore, testing of the devices at the Westinghouse facility in Wilmerding, Pennsylvania, demonstrated that the ⅝ inch diameter hose permitted 14 consecutive 50-foot cars with cut-out control valves or 750 feet of brake pipe to be jumped. This is more than double the AAR standard for control valve requirements. Moreover, FRA's intent when issuing the two-way EOT design requirements was to incorporate designs that existed at the time the rule became effective. Consequently, paragraph (d) of this section is modified to permit the use of a ⅝ inch internal diameter hose in the design of the devices.

Paragraph (e) has been slightly modified, from what is currently required in § 232.21(e), to permit the manually operated switch capable of initiating an emergency brake command to the rear unit to be located either on the front unit itself or on the engineer control stand. Several railroads and a manufacturer of locomotives recommended that the provision regarding the placement of the manually operated switch be modified to recognize existing designs of the devices and the locomotives on which they are placed. These commenters stated that many front units do not have the switch located directly on the front unit itself but that the switch is located on the engineer's control stand. FRA agrees with this recommendation and currently does not take exception to locomotives designed in the manner described above. Consequently, this paragraph permits the manually operated switch to be located either on the front unit itself or on the engineer's control stand.

A new paragraph (f) has been added to this section which incorporates a recommendation from AAR and its member railroads that new locomotives be equipped with a means to automatically activate an emergency brake application from the rear unit whenever the locomotive engineer places the train air brakes in emergency. On June 1, 1998, FRA issued Safety Advisory 98–2, which recommended that railroads adopt a procedure to require activation of the rear unit to effectuate an emergency brake application either by using the manual toggle switch or through automatic activation, whenever it becomes necessary for a locomotive engineer to place the train air brakes in emergency using either the automatic brake valve or the conductor's emergency brake valve or whenever an undesired emergency application of the train air brakes occurs. *See* 63 FR 30808. FRA applauds the industry for taking the initiative to incorporate available technology on new locomotives and agrees with the representatives of the railroads that it is not economically feasible to require existing equipment to be retrofitted with this capability at this time. Furthermore, existing equipment is addressed in § 232.407(f)(3), which retains the proposed requirement for the engineer to manually activate an emergency application from the rear unit when the engineer initiates an emergency application in the controlling locomotive if the locomotive is not equipped to do so automatically.

FRA issued Safety Advisory 98–2 in response to several recent freight train incidents potentially involving the improper use of a train's air brakes, events that caused FRA to focus on railroad air brake and train handling procedures related to the initiation of an emergency air brake application, particularly as they pertain to the activation of the two-way EOT from the locomotive. The NPRM discussed four accidents in which a train was placed into emergency braking by use of the normal emergency brake valve handles on the locomotive, and although the train in each instance was equipped with an armed and operable two-way EOT, the device was not activated by the locomotive engineer. *See* 63 FR 48348. Preliminary findings indicate that in all of the incidents noted above, there was evidence of an obstruction somewhere in the train line, caused by either a closed or partially closed angle cock or a kinked air hose. This obstruction prevented an emergency brake application from being propagated throughout the entire train, front to rear, after such an application was initiated from the locomotive using either the engineer's automatic brake valve handle or the conductor's emergency brake valve. Furthermore, the locomotive engineers in each of the incidents stated that they did not think to use the two-way EOT, when asked why they failed to activate the device.

Section 232.407 Operations Requiring Use of Two-Way End-of-Train Devices; Prohibition on Purchase of Nonconforming Devices

Paragraph (e) generally retains the proposed modification of the provision, currently contained in § 232.23(e)(1), which excepts from the two-way EOT requirements trains operating with a locomotive capable of effectuating an emergency application located in the rear third of the train. In the NPRM, FRA proposed to modify this exception so that it would be applicable only to trains operating with a locomotive on the rear of the train. Data supplied by VOLPE demonstrates that stopping distances are greatly increased, and could potentially result in a runaway train or derailment depending on the length of the train, if an obstruction of the brake pipe were to occur directly behind a locomotive located in the rear third of the train. Therefore, FRA proposed that a train with a locomotive located in the rear third of the consist no longer be excepted from the two-way EOT requirements, unless the train qualifies for relief under one of the other specific exceptions contained in § 232.407(e). Although FRA received no objections to this specific change, several commenters did recommend that the exception contained in paragraph (e)(1) be modified to include locomotive consists at the rear of a train. These commenters asserted that the existing rule needed to recognize that some locomotives have fuel tenders attached. FRA finds this requested modification to be sensible and logical. Consequently, paragraph (e)(1) has been retained as proposed, with a slight modification to clarify that the exception extends to trains with either a locomotive or a locomotive consist located at the rear of the train.

A new exception to the two-way EOT requirements has been added at paragraph (e)(9) to address the practice of ''doubling a hill.'' The practice of ''doubling a hill'' occurs in situations where a train must be divided in two in order to traverse a particularly heavy grade due to the lack of sufficient motive power to haul the entire train up the grade. This issue was discussed in the NPRM and at the public technical conference conducted subsequent to the issuance of the NPRM. Initially, FRA believed that the two-way EOT should

be connected to that portion of the train traversing the grade. However, such an approach creates a multitude of operational as well as safety concerns. Such an approach would require train crews to repeatedly switch the rear unit from one portion of the train to another, which would require these individuals to repeatedly walk sections of the train at locations where it may not be safe to do so. Alternatively, such an approach might require some trains to carry extra devices while in transit. At the public technical conference, there was universal agreement between all representatives at the conference that the device should remain on the rear unit of the train in these circumstances. Consequently, paragraph (e)(9) has been added to except trains from the two-way EOT requirements that must be divided into two sections in order to traverse a grade. This paragraph makes clear that the exception only applies to the extent necessary to traverse the grade and only while the train is divided into two to conduct that movement.

Paragraph (f)(1) has been slightly modified from what is currently contained § 232.23(f)(1) in order to clarify and address an issue related to the ability of a railroad to dispatch a train with an inoperative two-way EOT from a location where the device is installed. Section 232.23(f)(1) of the current regulations, § 232.407(f)(1) of the NPRM, requires that ''the device shall be armed and operable from the time the train departs from the point where the device is installed until the train reaches its destination.'' Therefore, the existing regulations clearly require a train to be equipped with an armed and operable two-way EOT when dispatched from a location where the device is installed. When issuing this requirement, FRA intended railroads to install repeater stations at locations where communication problems are prevalent.

Several commenters, both at the public hearings and in written comments, assert that this requirement is impossible to meet at some locations regardless of whether repeater stations are installed. These commenters contend that certain locations have dead spots where it is impossible to establish communication between the front and rear unit. These parties recommend that some allowance be provided to permit trains at these locations to be moved a short distance to restore communication. FRA agrees that there are a few locations where dead spots exist which make it difficult if not impossible to establish communication between the two units when they are installed. Therefore, paragraph (f)(1) has been modified to allow a train that experiences a loss of communication or that fails to establish communication between the two units at the location where the device is installed to move up to one mile from that location in order to establish communication. FRA believes that this allowance should be sufficient at most locations to establish the required communication. Furthermore, if communication cannot be established within these limits, then FRA believes the railroad needs to install additional repeater stations. If additional repeater stations still fail to address the issue, then FRA believes that a railroad should be required to apply for a waiver of the requirement at a particular location, pursuant to the requirements of 49 CFR part 211. This approach will allow FRA to address the unique circumstances of each location on a case-by-case basis and ensure that the railroad implements other operational safeguards to ensure the safety of those trains dispatched without armed and operable devices.

Paragraph (f)(3) generally retains the proposed provision requiring the two-way EOT to be activated to effectuate an emergency brake application either by using the manual toggle switch or through automatic activation, whenever it becomes necessary for the locomotive engineer to initiate an emergency application of the train's air brakes using either the automatic brake valve or the conductor's emergency brake valve. As discussed previously in regard to the addition of § 232.405(f), the proposed requirement incorporates the recommendations contained in FRA's Safety Advisory 98–2, issued on June 1, 1998. *See* 63 FR 30808. FRA believes that the operational requirement contained in this paragraph must be stressed by the railroads when conducting the two-way EOT training required in § 232.203 of this final rule. FRA continues to believe that the likelihood of future incidents, such as the ones described in the NPRM, will be greatly reduced if the train handling procedure contained in this paragraph is made part of a train crew's training and followed by members of the crew in emergency situations. FRA believes that this additional procedure, together with the required training, will not only ensure that an emergency brake application is commenced from both the front and rear of the train in emergency situations, but will familiarize the engineer with the activation and operation of the devices and will educate the engineer to react in the safest possible manner whenever circumstances require the initiation of an emergency brake application.

FRA recognizes that a number of railroads have already adopted procedures similar to those required in this paragraph and commends such actions. Although this paragraph allows the device to be activated either manually or automatically, FRA intends to make clear that the front unit of the device or the engineer's control stand must be equipped with a manually operated switch. *See* § 232.405(e). Although some railroads have developed, and this final rule requires, new locomotives to be equipped with a means by which the rear unit is automatically activated when an engineer makes an emergency application with the brake handle, FRA believes that an engineer must also be provided a separate, manually operated switch which is independent of any automatic system in order to ensure the activation of the rear unit in the event that the automatic system fails.

It should be noted that the provision contained in paragraph (f)(3) has been slightly modified from that proposed in the NPRM. This final rule has eliminated the requirement to activate the rear unit when an undesired emergency brake application occurs to a train. FRA agrees with the assertions of various commenters that such a requirement might distract a locomotive engineer from performing other critical duties required to bring a train to a stop when an undesired emergency brake application occurs. As an undesired emergency brake application is not initiated by the locomotive engineer, such an event will usually take the engineer by surprise, and FRA agrees that the engineer's attention would be best focused on the activity of bringing the train to a stop in such circumstances. Furthermore, all of the instances where an engineer failed to activate the rear device that were discussed in the NPRM occurred in conjunction with an emergency brake application knowingly initiated by the engineer.

Based on the above discussion regarding paragraph (e)(1) of this section, paragraph (g)(1) retains the proposed modification of the requirements for operating a train that experiences an en route failure of the two-way EOT over a section of track with an average grade of two percent or greater over a distance of two continuous miles. In the NPRM, FRA proposed modification of the alternative measure, currently contained at § 232.23(g)(1)(iii), which permits the operation over such a grade if a radio-controlled locomotive is placed in the

rear third of the train consist and under the continuous control of the engineer in the head end of the train. FRA proposed modification of this alternative measure to permit such operation only if the radio-controlled locomotive is placed at the rear of the train consist. This modification is retained in this final rule in order that the alternative methods of operation over a heavy grade remain consistent with the exception from the two-way EOT requirements contained in § 232.407(e)(1) as discussed in the preceding paragraph. Although some commenters suggested elimination of all of the requirements related to operating a train experiencing an en route failure of its two-way EOT over heavy grades, FRA believes that the alternative methods are necessary to ensure the safety of such a train when descending a heavy grade and ensure that railroads properly maintain the required devices.

Paragraphs (g)(1)(i)(A) and (B) have also been slightly modified to clarify the requirements that a train be stopped in certain situations where communication is lost between a helper locomotive and the controlling locomotive. The final rule makes clear that the stopping of trains in such circumstances should be in accordance with the railroad's operating rules. When issuing the two-way EOT requirements, FRA did not intend for engineers to place themselves in unsafe situations when they encounter an en route failure of the device when traversing a heavy grade. Although the existing rule prohibits the operation of a train over certain heavy grades when a failure of the device occurs en route, FRA did not intend that the train be immediately stopped when a failure of the device occurs while operating on a heavy grade. Rather, FRA intended for the locomotive engineer to conduct the movement in accordance with the railroad's operating rules for bringing the train safely to a stop at the first available location. Therefore, safety may require that the train continue down the grade or to a specific siding rather than come to an immediate halt. Consequently, the modifications contained in these paragraphs are intended to reflect FRA's expectations when issuing the two-way EOT regulations.

Paragraph (g) has also been slightly modified in order to clarify what constitutes a loss of communication between the front and the rear units on two-way EOTs. The 16 minutes 30 seconds time period for determining when a loss of communication between the front and the rear unit was adopted based on the design of the devices, which automatically checks communication between the front and rear units every ten minutes. If no response is received, the front unit automatically requests communication from the rear unit 15 seconds later; if no response is received to that request, another request is made six minutes later; and if there is still no response, the front unit makes another request 15 seconds later. If there is still no response, a message is displayed to the locomotive engineer that there is a communication failure. This has caused some confusion in the industry, in that many people believe the 16 minutes and 30 seconds time frame should start when the message is first displayed on the front unit. This is incorrect. Based on the design of the currently operating devices, the 16 minutes and 30 seconds has elapsed when the failure message is broadcast. This paragraph has been modified to explain this design feature. Thus, appropriate action should be taken immediately upon receiving the failure message on the front unit. FRA also realizes that there may be some time lapse when the requests are made and the message is displayed, therefore the manufacturers of the devices should take care to factor any time lag into the 16 minute and 30 second time frame designed into the devices.

Section 232.409 Inspection and Testing of End-of-Train Devices

Paragraph (c) of this section regarding the notification of the locomotive engineer when the device is tested by someone other than a train crew member has been slightly modified from that proposed in the NPRM. In the NPRM, FRA proposed that the locomotive engineer be notified in writing in such circumstances. FRA agrees that this proposed requirement may have been overly burdensome and believes that the intent of the proposed requirement can be met without specifically requiring written notification. FRA's intent in proposing the written requirement was to ensure that locomotive engineers are provided sufficient information to confirm that the devices are properly inspected and tested and to provide locomotive engineers with a measure of confidence that the devices will work as intended. FRA believes these goals can be accomplished by permitting the required information to be provided by any means a railroad deems appropriate. FRA believes that the information required to be provided to an engineer (the date and time of the test, the location where the test was performed, and the name of the person performing the test) will ensure that the proper tests and inspections are performed. The modifications made in this paragraph make clear that a written or electronic record of the required information must be maintained in the cab of the controlling locomotive.

Paragraph (d) retains the proposed changes to the language related to the annual calibration and testing of EOT devices currently contained at § 232.25(d). The regulation currently states that the devices shall be ''calibrated'' annually. FRA intends to make clear that it intended for railroads to perform whatever tests or checks are necessary to ensure that the devices are operating within the parameters established by the manufacturers of the devices. Several railroads have attempted to ''sharp shoot,'' or narrowly interpret, the language currently contained in the regulation, claiming that the manufacturer states that front units do not need to be calibrated on an annual basis, in order to avoid doing any testing of the devices. Although FRA agrees that the front units may not have to be calibrated every year, the devices must be tested in some fashion to verify that they are operating within the manufacturer's specification with regard to radio frequency, signal strength, and modulation and do not require recalibration. FRA has been provided written instructions from the manufacturers of the devices which contain procedures for testing both the front and rear units. Furthermore, railroads using the devices in Canada acknowledge that the radio functions of the front and rear units are tested periodically. Consequently, this paragraph retains the proposed clarifying language in order to avoid any misconceptions as to what actions are required to be performed on these devices on an annual basis.

Paragraph (d) has also been slightly modified to require the ready accessibility of the information regarding the calibration and testing of a front unit, which the current regulation requires to be placed on a sticker or other marking device affixed to the exterior of the front unit. Recently, FRA has discovered that some railroads have locked the cabinets that house the front units and that there is no way for either FRA or railroad operating crews to inspect the marking devices and verify the information required to be maintained. In order for the marking device to serve its intended purpose, it must be readily capable of being inspected by both FRA and railroad operating crews. FRA intends to make clear that the required information regarding the date and location that the unit was last calibrated is to be easily accessible to both FRA and train crews

for inspection either on the marking device attached to the outside of the front unit or, if the front unit is inaccessible, in a readily accessible location in the cab of the locomotive.

In the NPRM, FRA discussed the potential need to amend paragraph (c) of this section by including specific provisions in this final rule to address the performance of bench testing on the front and rear units of two-way EOTs. *See* 63 FR 48322. After consideration of the comments received, FRA believes that specific regulatory requirements for performing these tests are unnecessary. FRA believes that its existing guidance, FRA Technical Bulletin MP&E 97–8, regarding the performance of bench tests on two-way EOTs is sufficient at this time. Since the issuance of this guidance on July 28, 1997, FRA has discovered very few instances where the issued guidance was not being followed and has found no evidence indicating that bench tests have compromised the proper operation of the devices. Consequently, FRA will not issue specific regulations regarding the performance of bench test at this time. However, FRA will continue to monitor the performance of these tests and will continue to expect railroads to perform the tests in accordance with the guidance previously issued by FRA.

FRA issued Technical Bulletin MP&E 97–8 to its inspectors to clarify what is required when a railroad performs a bench test. In this guidance, FRA made clear that a bench test may be performed on both the front and rear units, independent of each other, if the test is performed within the yard limits or location where the unit will be installed on the train. In FRA's view, bench testing the rear unit requires applying air pressure to the device and then transmitting an emergency brake application from a front unit using the front unit manual switch; the individual performing the test would determine that the emergency valve functions properly either by observing the emergency indicator pop out or by observing brake pipe pressure at the rear device go to zero while hearing the exhaust of air from the device. On the other hand, bench testing the front unit would entail transmitting an emergency brake application from the front unit, using the front unit manual switch, and observing that a rear unit successfully receives the signal and activates the emergency air valve.

The guidance also indicated that both tests must be performed within a reasonable time period prior to the device being armed and placed on the train. To determine a reasonable time period, the environment where the device is stored and the conditions the device is subjected to after completing a successful bench test have to be considered. If the device is tested and stored in a controlled environment that is free from weather elements, excessive dust, grease, and dirt prior to the immediate installation on a train, then four to eight hours would be acceptable. If the device is tested and haphazardly thrown into a corner of a shop or are placed in the rear of a truck to be bounced around a yard, one hour would likely be considered reasonable before installation. The guidance also made clear that bench tests must be performed at the location or yard where the device will be installed on a train.

Subpart F—Introduction of New Brake System Technology

This subpart retains, without change, the proposed tests and procedures required to introduce new train brake system technology into revenue service. The technology necessary for the introduction of advanced braking systems is quickly developing. The new technology includes various forms of electronic braking systems, a variety of braking sensors, and computer-controlled braking systems. In order to allow and encourage the development of new technology, this subpart establishes tests and procedures for introducing new brake system technology. These provisions require the submission to FRA of a pre-revenue service acceptance testing plan.

FRA intends to make clear that this subpart applies only to new train brake system technology that complies with the statutory mandates contained in 49 U.S.C. 20102, 20301–20304, 20701–20703, 21302, and 21304, but that is not specifically covered by this final rule. Any type of new train brake system that requires an exemption from the Federal railroad safety laws in order to be operated in revenue service may not be introduced into service pursuant to this section. In order to grant a waiver of the Federal railroad safety laws, FRA is limited by the specific statutory provisions contained in 49 U.S.C. 20306 as well as any FRA procedural requirements contained in this chapter.

Section 232.503 Process to Introduce New Brake System Technology

This section retains the proposed procedural requirements which must be met when a railroad intends to introduce new brake system technology into its system. This section makes clear that the approval of FRA's Associate Administrator for Safety must be obtained by a railroad prior to the railroad's implementation of a pre-revenue service acceptance test plan and before introduction of new brake system technology into revenue service. This section requires that such approval be obtained pursuant to the special approval process contained in § 232.17 of this final rule. FRA believes the special approval process should speed the process for taking advantage of new technologies over that which is currently available under the waiver process. However, in order to provide an opportunity for all interested parties to provide comment for use by FRA in its decision making process, as required by the Administrative Procedure Act, FRA believes that any special approval provision must, at a minimum, provide proper notice to the public of any significant change or action being considered by the agency with regard to existing regulations.

Section 232.505 Pre-Revenue Service Acceptance Testing Plan

This section retains the proposed requirements for pre-revenue service testing of new brake system technology. These tests are extremely important in that they are intended to prove that the new brake system can be operated safely in its intended environment. For equipment that has not previously been used in revenue service in the United States, paragraph (a) requires the operating railroad to develop a pre-revenue service acceptance testing plan and obtain FRA approval of the plan under the procedures stated in § 238.17 before beginning testing. Previous testing of the equipment at the Transportation Test Center, on another railroad, or elsewhere will be considered by FRA in approving the test plan. Paragraph (b) requires the railroad to fully execute the tests required by the plan, to correct any safety deficiencies identified by FRA, and to obtain FRA's approval to place the equipment in revenue service prior to introducing the equipment in revenue service. Paragraph (c) requires the railroad to comply with any operational limitations imposed by FRA. Paragraph (d) requires the railroad to make the plan available to FRA for inspection and copying. Paragraph (e) enumerates the elements that must be included in the plan. FRA believes this set of steps and the documentation required by this section are necessary to ensure that all safety risks have been reduced to a level that permits the new brake system technology to be used in revenue service. In lieu of the requirements of paragraphs (a) through (e), paragraph (f) provides for an abbreviated testing procedure for new brake system technology that has previously been

used in revenue service in the United States. The railroad need not submit a test plan to FRA; however, a description of the testing shall be maintained by the railroad and made available to FRA for inspection and copying.

IV. Regulatory Evaluation

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule has been evaluated in accordance with existing policies and procedures and is considered to be significant under both Executive Order 12866 and DOT policies and procedures (44 FR 11034; Feb. 26, 1979). FRA has prepared and placed in the docket a regulatory evaluation of this final rule. This evaluation estimates the costs and consequences of this final rule as well as its anticipated economic and safety benefits. It may be inspected and photocopied during normal business hours by visiting the FRA Docket Clerk at the Office of Chief Counsel, FRA, Seventh Floor, 1120 Vermont Avenue, NW., in Washington, DC. Photocopies may also be obtained by submitting a written request by mail to the FRA Docket Clerk at the Office of Chief Counsel, Federal Railroad Administration, 1120 Vermont Avenue, NW., Mail Stop 10, Washington, DC 20590.

FRA believes that this rule will produce net benefits to society. The estimated Net Present Value (NPV) of the total 20-year costs associated with this final rule is approximately $109 million. The total 20-year benefits (safety and economic) consist of quantified benefits estimated at between approximately $112 and $130 million and various non-quantified benefits discussed in detail below. The following tables contain the estimated 20-year quantified costs and quantified benefits associated with this final rule.

TABLE 3.—ESTIMATED COSTS

Category	NPV costs
Training	$61,221,156
Retest	8,276,574
Piston Travel Stickers	3,385,681
Air Quality	1,819,214
Dynamic Brake	11,657,846
Cycle Trains	16,012,217
Class I Brake Test Notification	4,414,173
Helper Locomotive Inspection	1,929,071
Helper Link	164,933
Total	108,880,865

TABLE 4.—ESTIMATED BENEFITS

Category	NPV benefits
Extended Haul	$29,590,556—$46,735,494
Safety Improvements	57,460,452
EOT Use at Class I Brake Test	22,070,863
Bottom Rod Safety Supports	3,239,650
Total	112,361,521—129,506,459

Although the quantified benefits of this final rule exceed the quantified costs of the rule, FRA believes that the quantified benefits significantly underestimate the total benefits of this rule for several reasons. The information available to FRA on the value of property damage significantly understates the true value of the damage in railroad accidents. The property damage estimate provided by the railroad(s) in the aftermath of an accident are only for ''railroad property damage'' (equipment, track, and structures). Although the numbers provided by the railroads regarding railroad property damage have been enhanced to account for chronic underestimation of these damages, the figures used by FRA do not include the costs of evacuations, individual (non-railroad employee) or community health expenses, environmental cleanup, the closure of adjacent roads, or any of the other potential costs which are borne by society after a railroad accident.

A review of recent incidents that involve a train that loses its ability to stop or decrease speed show that there is a significant risk that such an occurrence could result in the release of large amounts of hazardous materials which, if the incident occurred in a densely populated or environmentally sensitive area, could produce truly catastrophic results. The costs of evacuation and medical treatment for those near the accident site could be substantial, and associated road closures could also produce significant economic impact to travelers and the communities nearby. Should a hazardous material release impact a river or stream, the consequences to wildlife in the area could also be severe and lasting. Furthermore, because derailments or collisions of trains which lose the ability to stop or decrease speed often occur due to overturning on curves or entering congested areas, third party casualties and property damage can also be substantial. As the inspection, testing, and maintenance provisions of this final rule are intended to ensure that the brakes on a train are effective and operable and because this final rule will ensure that a locomotive engineer is provided information regarding the condition of the brakes on the train they are operating, FRA believes that this final rule will reduce the number of instances where a train loses its ability to stop or decrease speed that create the potential for catastrophic consequences.

An example of the catastrophic consequences that could result when a freight train loses the ability to stop or decrease speed occurred on February 1, 1996, in Cajon Pass in California. This accident resulted in two fatalities, 32 injuries (32 emergency responders required medical treatment due to inhalation of toxic chemicals), the release of hazardous materials, and the subsequent evacuation of the surrounding area. In addition, a 20 mile segment of Interstate 15, the main route between Los Angeles and Las Vegas, was closed for 5 days as a result of the hazardous materials release. The road closure forced 89,000 vehicles a day to use detours. This added approximately 2 hours to the travel time between Las Vegas and Los Angeles. The losses to the surface transportation sector due to road and track closure, revenue losses to businesses and tourism, and the costs of emergency response related to this incident were not included in the estimated $15 million damage figure used by FRA when including this incident in the regulatory impact analysis of the two-way end-of-train device final rule. *See* 62 FR 291. FRA recognizes that an exact figure cannot be placed on these costs, but believes that the figure would be in the tens, if not hundreds, of millions of dollars. As devastating and costly as this incident was, it is probable that the results of this particular incident could have been much more disastrous. An Amtrak passenger train passed 17 minutes ahead of the train involved in the incident. Had the Amtrak train been stopped on the tracks or otherwise delayed, the consequences of the incident would have been much more severe, with the potential for scores of fatalities. (As illustration of potential consequences, a freight-to-passenger train collision at Hinton, Alberta, on February 8, 1986, resulted in 29 fatalities.)

Other power-brake related accidents illustrate the potential for high severity when a heavy-tonnage freight train loses braking control. On May 12, 1989, a Southern Pacific Transportation Company train accelerated out of control descending a 2.2 percent grade into San Bernardino, California. Two employees were killed and three injured. The entire train was effectively

destroyed. The incident destroyed seven residences adjacent to the right-of-way, killing two residents and injuring a third. A 14-inch gasoline pipeline which may have been damaged in either the incident or the ensuing clean-up, ruptured 13 days later, resulting in the death of two additional residents, serious injuries to two residents, and minor injuries to 16 others. Eleven additional homes were destroyed, along with 21 motor vehicles.

On February 2, 1989, near Helena, Montana, freight cars from a Montana Rail Link train rolled eastward down a mountain grade and struck a helper locomotive consist, slightly injuring two crewmembers. Hazardous materials in the consist which included hydrogen peroxide, isopropyl alcohol, and acetone were later released. The release of these hazardous materials resulted in a fire and explosions necessitating the evacuation of approximately 3,500 residents of Helena for over two days. According to the National Transportation Safety Board, railroad and other property damage alone exceeded $6 million, and all of the buildings of Carroll College sustained damage. Furthermore, the City of Helena received 154 reports of property damage from residents within a three-mile radius of the incident. Consequently, FRA believes that the potential unquantified benefits derived from the prevention of just one accident similar to the Cajon Pass incident or the other incidents noted above would most likely outweigh the potential costs of this final rule.

In addition to the potential underestimation of the quantified safety benefits, there may also be significant non-quantified business benefits that may be available as a consequence of this rule. The quantified benefits from the extended haul provisions may be significantly understated. FRA's estimates for the number of trains eligible for this benefit, and the cost saving that it produces, were much higher in the NPRM than those supplied by AAR in response to the NPRM. While we have used the figures provided by AAR to develop a range for the benefits related to the extended haul provisions, FRA continues to believe that more potential benefits are available to the industry than have been quantified in the Regulatory Impact Analysis.

Another business benefit for which FRA has insufficient information to form a credible estimate relates to the provision permitting previously tested cars to be added to trains received in interchange and the allowance to conduct a Class II brakes test on only those cars added to trains received in interchange that will move less than 20 miles from the interchange location. Under the existing regulations the addition of cars to such trains would require the performance of either an initial terminal brake test or a transfer train brake test on the entire train. The industry may realize substantial cost savings by being permitted to add cars to such trains without inspection of the entire train. By permitting the addition of cars to trains received in interchange, FRA allows the railroads to save significant time (labor and train delay costs) by not having to inspect the entire train consist when such cars are added to these trains. Because FRA does not have information on the number of interchanged trains engaging in such activity (and none were provided in response to the NPRM), we have not estimated the extent of this potential benefit. Actual business benefits to be realized due to this rule, therefore, may be significantly understated.

Moreover, Congress mandated that FRA review and revise the existing power brake regulations where necessary and specifically required that FRA prescribe standards regarding dynamic brakes, where applicable. Consequently, FRA believes that this final rule produces a net benefit to society. The costs that have been quantified represent the maximum that this rule is expected to cost, and the quantified projected benefits are the minimum which should be realized.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires an assessment of the impacts of proposed and final rules on small entities. FRA has conducted a regulatory flexibility analysis of this rule's impact on small entities, and the assessment has been placed in the public docket for this rulemaking.

1. Why Action By the Agency Is Being Considered

In 1992, Congress amended the Federal rail safety laws by adding certain statutory mandates related to power brake safety. *See* 49 U.S.C. 20141. These amendments specifically address the revision of the power brake regulations by adding a new subsection which states:

> (r) POWER BRAKE SAFETY.—(1) The Secretary shall conduct a review of the Department of Transportation's rules with respect to railroad power brakes, and not later than December 31, 1993, shall revise such rules based on such safety data as may be presented during that review.
>
> (2) In carrying out paragraph (1), the Secretary shall, where applicable, prescribe standards regarding dynamic brake equipment. * * * Pub. L. No. 102–365, section 7; codified at 49 U.S.C. 20141, superseding 45 U.S.C. 431(r).

In addition to this statutory mandate, FRA received various recommendations and petitions for rulemaking, and determined on its own that the power brake regulations were in need of revision. FRA has been in the process of revising the power brake regulations since 1992. An ANPRM and two NPRMs revising the power brake regulations were previously issued on December 31, 1992, September 16, 1994, and September 9, 1998, respectively. *See* 57 FR 62546, 59 FR 47676, and 63 FR 48294. A detailed discussion of the history leading up to this final rule is contained in the preamble. The reasons for the actual provisions of the action considered by the agency are explained in the body of the preamble and the section-by-section analysis.

2. The Objectives and Legal Basis for the Rule

The objective of the rule is to enhance the safety of rail transportation, protecting both those people traveling and working on the system, and those people off the system who might be affected by a rail incident by revising the regulations related to the braking systems used and operated in freight and other non-passenger trains to address potential deficiencies in the existing regulations, better address the needs of contemporary railroad operations, and facilitate the use of advanced technologies. The legal basis for this action is reflected in the response to 1. above and in the preamble.

3. A Description of and an Estimate of the Number of Small Entities to Which the Final Rule Would Apply

The Small Business Administration (SBA) uses an industry wide definition of ''small entity'' based on employment. Railroads are considered small by SBA definition if they employ fewer than 1,500 people for line haul railroads, and 500 for switching and terminal railroads. An agency may establish one or more other definitions of this term, in consultation with the SBA and after an opportunity for public comment, that are appropriate to the agency's activities.

The classification system used in this analysis is that of the FRA. Prior to the SBA regulations establishing size categories, the Interstate Commerce Commission (ICC) developed a classification system for freight railroads as Class I, II, or III, based on annual operating revenue. A Class I railroad has

operating revenue of $250 million or more, a Class II railroad has operating revenue greater than $20 million dollars but less than $250 million and a Class III railroad has operating revenue of $20 million or less. The Department of Transportation's Surface Transportation Board, which succeeded the ICC, has not changed these classifications. The ICC/STB classification system has been used pervasively by FRA and the railroad industry to identify entities by size. In the NPRM, FRA discussed these revenue thresholds in terms of the revenue levels actually achieved by these different classes of railroads rather than by the specific limits established in the Surface Transportation Board's regulations. See 49 CFR part 1201 1–1.

After consultation with the Office of Advocacy of the SBA and as explained in detail in the ''Interim Policy Statement Concerning Small Entities Subject to the Railroad Safety Laws,'' published August 11, 1997 at 62 FR 43024, FRA has decided to define ''small entity,'' on an interim basis, to include only those entities whose revenues would bring them within the Class III definition. In response to FRA's request for comments on its alternate definition, the American Short Line and Regional Railroad Association (ASLRRA) suggested that the definition include all Class II and Class III railroads. However, the ASLRRA offered no support for this request nor provided any rationale for why such a large number of railroads should be considered ''small entities.'' Consequently, this final rule retains the alternate definition of ''small entity'' which includes only Class III railroads.

All of the small entities directly affected by this rule are Class III railroads. FRA certifies that this final rule is expected to have a significant impact on a substantial number of Class III railroads. Although FRA did not quantify the estimated annual cost or benefit to the average Class III railroad (of which there are approximately 600–650 at any given time), the Regulatory Impact Analysis contains discussions and cost estimates for certain specific provisions where the impact could be estimated for non-Class I and Class III railroads.

The only significant costs to Class III railroads imposed by this final rule are related to the training of employees. In the NPRM, FRA estimated that Class III railroads would absorb approximately 15 percent of the training costs being imposed on non-Class I railroads. This estimate was based on the fact that Class III railroads employ approximately 15 percent of the employees on non-Class I railroads and because virtually all of the training costs are related to the number and types of employees employed by a railroad. FRA received no specific comment from any interested party objecting to this estimate. The final rule has been modified to reduce the potential impact of the training requirements on these small railroads based on comments received, by eliminating the need to develop internal audit programs and by allowing efficiency tests to be utilized to assess the effectiveness of a railroad's training program. Moreover, as discussed above and below, the training that employees of Class III railroads will be required to receive is significantly less than the required training of many employees on Class I and Class II railroads. Thus, although FRA believes that the actual cost to Class III railroads will be much less than the 15 percent originally assigned, FRA will retain the very conservative cost estimate related to training for Class III railroads of 15 percent of the training costs for non-Class I railroads which results in an estimated impact of approximately $740,579, or less than $1,200 for the average Class III railroad. These cost will be apportioned among the 600 to 650 Class III railroads, and will vary according to the number of employees each railroad must train. This is a rough estimate based on the number of Class III employees as a percentage of total employees. Actual impact should be less, as discussed below.

4. A Description of the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Final Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirements and the Type of Professional Skills Necessary for Preparation of the Report or Record

Other than the training requirements discussed above, this rule will have a *de minimus* impact on small entities. Most of the final rule provisions will not effect small railroad costs because of the nature and limits to their operations, or the small railroad costs are inseparable from the industry-wide costs. For example, small railroads do not generally operate helper locomotives, so they will not be subject to the costs associated with that new rule provision. In the case of provisions such as those requiring piston travel stickers, FRA has no basis for assigning to any particular segment of the industry the costs for equipping the entire fleet of non-standard piston travel cars with piston travel stickers. But in reality, it is unlikely that these costs will fall on the smaller railroads.

In various places in the Regulatory Impact Analysis, FRA has attempted to assign burdens to the smaller members of the industry based on some measure of their size relative to the rest of the industry. In those cases, FRA has probably overestimated the burden for the smaller carriers. A good example is the requirement regarding the repair and documentation of dynamic brake failures. While FRA has assigned these costs based on the total number of locomotives operated by each segment of the industry, the reality is that few small railroads operate locomotives equipped with operative dynamic brakes and they will not actually be subject to these costs. The costs shown in the Regulatory Impact Analysis should be viewed as a maximum. Similarly, smaller railroads perform a limited number of Class I brake tests, do not generally own and operate yard air sources, and do not usually perform the type of maintenance that will trigger the new record keeping requirements, thus the reporting and record keeping requirements related to those activities will be minimal or non-existent for these smaller carriers.

5. Federal Rules Which May Duplicate, Overlap, or Conflict With the Rule

None.

Significant Alternatives:

1. Differing compliance or reporting requirements or timetables which take into account the resources available to small entities:

2. Clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities:

3. Exemption from coverage of the rule, or any part thereof, for such small entities:

FRA considered the role that non-Class I railroads (Class II and III railroads) have in today's freight industry. FRA believes that the current marketplace requires Class I railroads and these smaller railroads to operate as an integrated system. Many of today's smaller railroads rely on Class I railroads for the training of their employees and the maintenance of their equipment. In addition, many non-Class I railroads and Class I railroads interchange and operate each other's equipment. Therefore, except in limited circumstances, it is impossible, from a regulatory standpoint, to separate these smaller railroads from the larger Class I railroads. Therefore, in order to ensure the safety and quality of train and locomotive power braking systems throughout the entire freight industry, this final rule generally imposes a consistent set of requirements on Class

I, II, and III railroads as a group. Although FRA recognizes that many of the operational benefits created by this final rule are not available to many of the smaller operations, FRA feels that the integrated nature of the freight industry requires that universally consistent requirements be imposed on both Class I and non-Class I railroads.

Where possible, efforts were taken in this final rule to minimize the impact on non-Class I railroads. The dynamic brake provisions of this final rule provide railroads with the option of declaring the dynamic brake portion of a locomotive deactivated. Thus, smaller railroads which do not choose to utilize dynamic brakes are not required to incur the cost of maintaining the equipment. The final rule also eliminates the proposed requirement to stencil a locomotive with deactivated dynamic brakes which further reduces the cost to smaller railroads. The final rule permits railroads to perform Class II brake tests on cars added to a train received in interchange, if the train will travel a distance not to exceed 20 miles from the point at which it was received in interchange. The current regulations require the performance of at least a transfer train brake test on the entire train, rather than testing only those cars added. FRA believes this will provide a cost savings to smaller railroads as they generally move short distances from interchange points to destination.

Furthermore, virtually all of the inspection and testing requirements imposed by this final rule on Class III railroads reflect current practices on those operations.

The final rule also modifies some of the proposed training requirements in order to reduce the costs to smaller railroads based on comments received by the ASLRRA. The final rule eliminates the requirement that railroads develop an internal audit program to assess the effectiveness of their training programs and allows efficiency tests to be utilized to assess the effectiveness of such programs. This was a change requested by the ASLRRA and will reduce the impact of the training requirements by permitting smaller railroads to utilize existing supervisory oversight to assess the effectiveness of training. The final rule also clarifies that each employee need only be trained on the knowledge and skills necessary to perform the tasks they are required to perform. Because employees of Class III railroads generally are not required to perform many of the tasks covered by this final rule, these employees would not be required to be trained on those tasks. For example, Class III railroads generally do not operate a large variety of brake systems on their lines thus, their employees would only have to be trained on a limited number of different brake systems. In addition, the employees of Class III railroads generally will not be required to receive any training in the areas of EPIC brakes, dynamic brakes, two-way EOT devices, or on some of the brake tests and maintenance mandated in this final rule due to the limited distances traveled by trains on these operations, the low tonnages hauled, and because many of the maintenance functions on these smaller railroads are contracted out to larger railroads. Thus, the final rule has attempted to narrow the training requirements for employees of smaller railroads to only those tasks they are required to perform and thus, reduce the economic impact of the requirements.

4. Use of performance, rather than design standards:

Where possible, especially with regard to advanced technologies and certain brake system components, an attempt was made to tie the proposed requirements to performance.

C. Paperwork Reduction Act

The information collection requirements in this final rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq*. The sections that contain the new information collection requirements and the estimated time to fulfill each requirement are as follows:

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual burden cost (dollars)
229.27—Annual tests	20,000 locomotives	18,000 tests	15 minutes	4,500 hours	157,500
231.31—Drawbars for freight cars—approval to operate on track with non-standard gage.	545 railroads	0 letters	N/A	N/A	N/A
232.1—Purpose and Scope—Requests for Earlier Application to comply with Subparts D through F.	545 railroads	4 requests/letters	60 minutes	4 hours	180
232.3—Applicability— Export, industrial, & other cars not owned by railroads-identification.	545 railroads	8 cards	10 minutes	1 hour	45
232.7—Waivers	545 railroads	10 petitions	40 hours	400 hours	18,000
232.11—Penalties—Knowing falsifying a record/report.	545 railroads	1 falsified recd/rpt	10 minutes	.20 hour	9
232.15—Movement of Defective Equipment:					
—Tags	1,620,000 cars	128,400 tags	2.5 minutes	5,350 hours	187,250
— Written Notification	1,620,000 cars	21,200 notices	3 minutes	1,060 hours	37,100
232.17—Special Approval Procedure:					
—Petitions for special approval of safety-critical revision.	545 railroads	4 petition	100 hours	400 hours	18,000
—Petitions for special approval of pre-revenue service acceptance plan.	545 railroads	2 petitions	100 hours	200 hours	9,000
—Service of petitions	545 railroads	6 petitions	40 hours	240 hours	10,800
—Statement of interest.	Public/railroads	20 statements	8 hours	160 hours	7,200
—Comments	Public/railroads	15 comments	4 hours	60 hours	2,700

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual burden cost (dollars)
232.103—Gen'l requirements—all train brake systems:	1,600,000 cars	246,866 stickers	10 minutes	41,144 hours	835,156
—Locomotives—1st Year—Procedures.	545 railroads	50 procedures	4 hours	200 hours	9,000
—Locomotives—Subsequent Years—Procedures.	25 new railroads	1 procedure	4 hours	4 hours	180
232.105—Gen'l requirements for locomotives-Inspection.	545 railroads	20,000 insp. forms	5 minutes	1,667 hours	58,345
232.107—Air source requirements:.					
—1st Year	545 railroads	50 plans	40 hours	2,000 hours	90,000
—Subsequent Years	25 new railroads	1 plan	40 plans	40 hours	1,800
—Amendments to Plan.	50 existing plans	10 amendments	20 hours	200 hours	9,000
—Recordkeeping	50 existing plans	1,150 records	20 hours	23,000 hours	1,035,000
—Cold weather situations.	545 railroads	37 plans	20 hours	740 hours	33,300
232.109—Dynamic brake requirements:.					
—status	545 railroads	1,656,000 records	4 minutes	110,400 hours	3,864,000
—Inoperative dynamic brakes.	20,000 locomotives	6,358 repair recds	4 minutes	424 hours	14,840
—Tag bearing words ''inoperative dynamic brakes''.	20,000 locomotives	6,358 tags	30 seconds	53 hours	1,855
—Deactivated dynamic brakes—1st Year.	8,000 locomotives	2,800 stencilings	5 minutes	233 hours	8,155
—Subsequent Years	8,000 locomotives	20 stencilings	5 minutes	2 hours	70
—Displays to Locomotive Engineer-Deceleration rate.	8,000 locomotives	2,800,000 Disp.	.50 second	400 hours	0
—Operating rules—1st Year.	545 railroads	300 oper. rules	4 hours	1,200 hours	54,000
—Subsequent Years	5 new railroads	5 operating rules	4 hours	20 hours	900
—Amendments	545 railroads	15 amendments	1 hour	15 hours	675
—Miles-per-hour-overspeed-top rule in operating proc..	545 railroads	545 rules	60 minutes	545 hours	24,525
—Requests to increase 5 mph overspeed restriction.	545 railroads	5 requests/lttrs.	30 min. + 20 hrs.	103 hours	4,635
—Knowledge criteria—locomotive engineers—1st Year.	545 railroads	300 amendments	16 hours	4,800 hours	216,000
—Subsequent Years	5 new railroads	5 amendments	16 hours	80 hours	3,600
232.111—Train information handling:					
—1st Year	545 railroads	545 procedures	50 hours	27,250 hours	1,226,250
—Subsequent Years	10 new railroads	10 procedures	40 hours	400 hours	18,000
—Amendments	100 railroads	100 amendments	20 hours	2,000 hours	90,000
—Report requirements to train crew.	545 railroads	2,112,000 reports	10 minutes	352,000 hours	12,320,000
232.203—Training requirements—Tr. Prog.:					
—1st Year	545 railroads	300 programs	100 hours	30,000 hours	1,350,000
—Subsequent years	15 railroads	1 program	100 hours	100 hours	4,500
—Amendments to written program.	545 railroads	545 amendments	8 hours	4,360 hours	196,200
—Training records	545 railroads	67,000 records	8 minutes	8,933 hours	312,655
—Training notifications.	545 railroads	67,000 notific.	3 minutes	3,350 hours	117,250
—Audit program	545 railroads	545 plans	40 hours	21,800 hours	981,000
—Amendment to audit program.	545 railroads	50 amendments	20 hours	1,000 hours	45,000
232.205—Class 1 brake test—Notifications.	545 railroads	1,656,000 notific.	45 seconds	20,700 hours	724,500
232.207—Class 1A brake tests:	545 railroads	25 lists	30 minutes	13 hours	585
—1st Year	545 railroads	1 list	1 hour	1 hour	45
—subsequent years					
—Notification	545 railroads	5 amendments	1 hour	5 hours	225
232.209—Class II brake tests-intermediate inspection.	545 railroads	1,600,000 comnnt	3 seconds	1,333 hours	46,655
—Operator of train	545 railroads	1,600,000 comm.	2 seconds	889 hours	31,115
—Electronic communication link.	545 railroads	32,000 messages	2 seconds	18 hours	630

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual burden cost (dollars)
232.211—Class II brake test-trainline continuity insp..	545 railroads	500,000 commun.	5 seconds	694 hours	24,290
—Electronic communication link.	545 railroads	5,000 messages	5 seconds	7 hours	245
232.213—Extended haul trains.	84,000 long dist. mvmts.	70 letters	15 minutes	18 hours	810
—Record of all defective/inoperative brakes.	84,000 long dist. mvmts.	25,200 records	20 minutes	8,400 hours	294,000
232.303—Gen'l requirements—single car test.	1,600,000 frgt. cars	5,600 tags	5 minutes	467 hours	16,345
—Last repair track brake test/single car test.	1,600,000 frgt. cars	320,000 stncl.	5 minutes	26,667 hours	993,345
232.307—Single Car	545 railroads	Inc. under 232.17	Inc. under 232.17	Inc. under 232.17	Inc. under 232.17
232.309—Repair track brake test.	640 shops	5,000 tests	30 minutes	2,500 hours	87,500
232.403—Design stds—1 way end-of-train (EOTs) dev..	545 railroads	4 billion mess.	1/186,000 sec.	6 hours	0
—Unique Code	545 railroads	12 requests	5 minutes	1 hour	35
232.405—Design + Performance stds.—2 way EOTs.	545 railroads	8 billion mess.	1/186,000 sec.	12 hours	0
232.407—Operations 2-way EOTs.	545 railroads	50,000 comm.	30 seconds	417 hours	14,595
232.409—Insp. and Testing of EOTs.	245 railroads	450,000 comm.	30 seconds	3,750 hours	168,750
—Telemetry Equipment—Testing and Calibration.	245 railroads	32,708 units	1 minute	545 hours	24,525
232.503—Process to introduce new brake technology.	545 railroads	1 letter	1 hour	1 hour	45
—Special approval	545 railroads	1 request	3 hours	3 hours	135
232.505—Pre-revenue service accept. test plan:					
—1st Yr.	545 railroads	1 main. procedure	160 hours	160 hours	7,200
—Subsequent years	545 railroads	1 main. procedure	160 hours	160 hours	7,200
—Amendments	545 railroads	1 main. procedure	40 hours	40 hours	1,800
—Design description	545 railroads	1 petition	67 hours	67 hours	3,015
—Report to FRA Assoc. Admin.. for Safety.	545 railroads	1 report	13 hours	13 Hours	585
—Brake system technology testing.	545 railroads	5 descriptions	40 hours	200 hours	9,000

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. For information or a copy of the paperwork package submitted to OMB contact Robert Brogan at 202–493–6292.

OMB is required to make a decision concerning the collection of information requirements contained in this final rule between 30 and 60 days after publication of this document in the **Federal Register**.

FRA cannot impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. This final rule has been assigned OMB control number 2130–0008.

D. Environmental Impact

FRA has evaluated this final rule in accordance with its ''Procedures for Considering Environmental Impacts'' (FRA Procedures)(64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this final rule is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c) of FRA's Procedures. Section 4(c) of FRA's Procedures identifies twenty classes of FRA actions that are categorically excluded from the requirements for conducting a detailed environmental review. FRA further considered this final rule in accordance with section 4(c) and (e) of FRA's Procedures to determine if extraordinary circumstances exist with respect to this final rule that might trigger the need for a more detailed environmental review. After conducting this review, FRA has determined that extraordinary circumstances do not exist because this final rule: Is not judged to be environmentally controversial; is not inconsistent with Federal, State, or local laws, regulations, ordinances, or judicial or administrative determinations relating to environmental protection; will not have any significant adverse impact on any natural, cultural, recreational, or scenic environments; will not use protected properties, involve new construction in wetlands, or affect a base floodplain; and will not cause a significant short- or long-term increase in traffic congestion or other adverse environmental impact on any mode of transportation. As a result, FRA finds that this regulation is not a major Federal action significantly effecting the quality of the human environment.

E. Federalism Implications

FRA believes it is in compliance with Executive Order 13132. This final rule will not have a substantial effect 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 will not have federalism implications that impose substantial direct compliance costs on State and local governments. FRA notes that States involved in the State Participation Program, pursuant to 49 CFR part 212, may incur minimal costs associated with the training of their inspectors involved in the enforcement of this final rule. Meanwhile, State officials were consulted to a practicable extent through their participation in the RSAC, a federal advisory committee discussed earlier in the preamble. Although this rule was removed from the RSAC process prior to the issuance of the 1998 NPRM, representatives of state officials were represented in the RSAC Power Brake Working Group and the concerns and comments raised by these representatives during that process were fully considered during the development of both the 1998 NPRM and this final rule. Specifically, the National Association of Regulatory Commissioners, the American Association of State Highway and Transportation Officials, and the California Public Utilities Commission (CAPUC) were all represented when this rule was being considered by the RSAC Power Brake Working Group. The CAPUC submitted extensive comments in response to the 1998 NPRM which are detailed and addressed in the preamble to this final rule.

In any event, Federal preemption of a State or local law occurs automatically as a result of the statutory provision contained at 49 U.S.C. 20106 when FRA issues a regulation covering the same subject matter as a State or local law unless the State or local law is designed to reduce an essentially local safety hazard, is not incompatible with Federal law, and does not place an unreasonable burden on interstate commerce (see discussion in the section-by-section analysis of § 232.13). It should be noted that the potential for preemption also exists under various other statutory and constitutional provisions. These include: the Locomotive Inspection Act (now codified at 49 U.S.C. 20701–20703), the Safety Appliance Acts (now codified at 49 U.S.C. 20301–20304), and the Commerce Clause of the United States Constitution.

List of Subjects

49 CFR Part 229

Railroad locomotive safety, Railroad safety.

49 CFR Part 231

Railroad safety, Railroad safety appliances.

49 CFR Part 232

Incorporation by reference, Railroad power brakes, Railroad safety, Two-way end-of-train devices.

The Rule

In consideration of the following, FRA amends chapter II, subtitle B of title 49, Code of Federal Regulations as follows:

Part 229—[AMENDED]

1. The authority citation for part 229 is revised to read as follows:

Authority: 49 U.S.C. 20102–20103, 20107, 20133, 20137–20138, 20143, 20701–20703, 21301–21302, 21304; 49 CFR 1.49(c), (m).

2. Section 229.5 is amended by adding a new paragraph (p) to read as follows:

§ 229.5 Definitions.

* * * * *

(p) *Electronic air brake* means a brake system controlled by a computer which provides the means for control of the locomotive brakes or train brakes or both.

3. Section 229.25 is amended by revising paragraph (a) to read as follows:

§ 229.25 Tests: Every periodic inspection.

* * * * *

(a) All mechanical gauges used by the engineer to aid in the control or braking of the train or locomotive, except load meters used in conjunction with an auxiliary brake system, shall be tested by comparison with a dead-weight tester or a test gauge designed for this purpose.

* * * * *

4. Section 229.27 is amended by revising paragraph (b) to read as follows:

§ 229.27 Annual tests.

* * * * *

(b) The load meter shall be tested. Each device used by the engineer to aid in the control or braking of the train or locomotive that provides an indication of air pressure electronically shall be tested by comparison with a test gauge or self-test designed for this purpose. An error of greater than five percent or three pounds per square inch shall be corrected. The date and place of the test shall be recorded on Form FRA F 6180–49A, and the person conducting the test and that person's supervisor shall sign the form.

* * * * *

5. Section 229.53 is revised to read as follows:

§ 229.53 Brake gauges.

All mechanical gauges and all devices providing indication of air pressure electronically that are used by the engineer to aid in the control or braking of the train or locomotive shall be located so that they may be conveniently read from the engineer's usual position during operation of the locomotive. A gauge or device shall not be more than five percent or three pounds per square inch in error, whichever is less.

Part 231—[AMENDED]

6. The authority citation for part 231 is revised to read as follows:

Authority: 49 U.S.C. 20102–20103, 20107, 20131, 20301–20303, 21301–21302, 21304; 49 CFR 1.49(c), (m).

7. Section 231.0 is amended by adding paragraphs (b)(3) through (5) and paragraph (g) to read as follows:

§ 231.0 Applicability and penalties.

* * * * *

(b) * * *

(3) Freight and other non-passenger trains of four-wheel coal cars.

(4) Freight and other non-passenger trains of eight-wheel standard logging cars if the height of each car from the top of the rail to the center of the coupling is not more than 25 inches.

(5) A locomotive used in hauling a train referred to in paragraph (b)(4) of this section when the locomotive and cars of the train are used only to transport logs.

* * * * *

(g) Except as provided in paragraph (b) of this section, § 231.31 also applies to an operation on a 24-inch, 36-inch, or other narrow gage railroad.

8. Part 231 is further amended by adding § 231.31 to read as follows:

§ 231.31 Drawbars for freight cars; standard height.

(a) Except on cars specified in paragraph (b) of this section—

(1) On standard gage (56½-inch gage) railroads, the maximum height of drawbars for freight cars (measured perpendicularly from the level of the tops of the rails to the centers of the drawbars) shall be 34½ inches, and the minimum height of drawbars for freight cars on such standard gage railroads (measured in the same manner) shall be 31½ inches.

(2) On 36-inch gage railroads, the maximum height of drawbars for freight cars (measured perpendicularly from the level of the tops of the rails to the centers of the drawbars) shall be 26 inches, and the minimum height of drawbars for freight cars on such 36-inch gage railroads (measured in the same manner) shall be 23 inches.

(3) On 24-inch gage railroads, the maximum height of drawbars for freight cars (measured perpendicularly from the level of the tops of the rails to the centers of the drawbars) shall be 17½ inches, and the minimum height of drawbars for freight cars on 24-inch gage railroads (measured in the same manner) shall be 14½ inches.

(4) On railroads operating on track with a gage other than those contained in paragraphs (a)(1) through (a)(3) of this section, the maximum and minimum height of drawbars for freight cars operating on those railroads shall be established upon written approval of FRA.

(b) This section shall not apply to a railroad all of whose track is less than 24 inches in gage.

9. Appendix A of Part 231 is amended by adding an entry for § 231.31 to the end of the Schedule of Civil Penalties to read as follows:

Appendix A to Part 231—Schedule of Civil Penalties

FRA safety appliance defect code section	Violation	Willful violation
* * *	*	*
231.31 Drawbars, standard height	2,500	5,000
* * *	*	*

10. Part 232 is revised to read as follows:

PART 232—BRAKE SYSTEM SAFETY STANDARDS for FREIGHT and OTHER NON-PASSENGER TRAINS and EQUIPMENT; END-of-TRAIN DEVICES

Subpart A—General

Sec.
232.1 Scope.
232.3 Applicability.
232.5 Definitions.
232.7 Waivers.
232.9 Responsibility for compliance.
232.11 Penalties.
232.13 Preemptive effect.
232.15 Movement of defective equipment.
232.17 Special approval procedure.
232.19 Availability of records.
232.21 Information collection.

Subpart B—General Requirements

232.101 Scope.
232.103 General requirements for all train brake systems.
232.105 General requirements for locomotives.
232.107 Air source requirements and cold weather operations.
232.109 Dynamic brake requirements.
232.111 Train handling information.

Subpart C—Inspection and Testing Requirements

232.201 Scope.
232.203 Training requirements.
232.205 Class I brake tests—initial terminal inspection.
232.207 Class IA brake tests—1,000-mile inspection.
232.209 Class II brake tests—intermediate inspection.
232.211 Class III brake tests—trainline continuity inspection.
232.213 Extended haul trains.
232.215 Transfer train brake tests.
232.217 Train brake tests conducted using yard air.
232.219 Double heading and helper service.

Subpart D—Periodic Maintenance and Testing Requirements

232.301 Scope.
232.303 General requirements.
232.305 Repair track air brake tests.
232.307 Single car tests.
232.309 Repair track air brake test and single car test equipment and devices.

Subpart E—End-of-Train Devices

232.401 Scope.
232.403 Design standards for one-way end-of-train devices.
232.405 Design and performance standards for two-way end-of-train devices.
232.407 Operations requiring use of two-way end-of-train devices; prohibition on purchase of nonconforming devices.
232.409 Inspection and testing of end-of-train devices.

Subpart F—Introduction of New Brake System Technology

232.501 Scope.
232.503 Process to introduce new brake system technology.
232.505 Pre-revenue service acceptance testing plan.

Appendix A—Schedule of Civil Penalties

Appendix B—49 CFR part 232 prior to April 1, 2001

Authority: 49 U.S.C. 20102–20103, 20107, 20133, 20141, 20301–20303, 20306, 21301–21302, 21304; 49 CFR 1.49(c), (m).

Subpart A—General

§ 232.1 Scope.

(a) This part prescribes Federal safety standards for freight and other non-passenger train brake systems and equipment. Subpart E of this part prescribes Federal safety standards not only for freight and other non-passenger train brake systems and equipment, but also for passenger train brake systems. This part does not restrict a railroad from adopting or enforcing additional or more stringent requirements not inconsistent with this part.

(b) Except as otherwise specifically provided in this paragraph or in this part, railroads to which this part applies shall comply with all the requirements contained in subparts A through C and subpart F of this part beginning on April 1, 2004. Sections 232.1 through 232.13 and 232.17 through 232.21 of this part will become applicable to all railroads to which this part applies beginning on April 1, 2001. Subpart D of this part will become applicable to all railroads to which this part applies beginning on August 1, 2001. Subpart E of this part will become applicable to all trains operating on track which is part of the general railroad system of transportation beginning on April 1, 2001.

(c) A railroad may request earlier application of the requirements contained in subparts A through C and subpart F of this part upon written notification to FRA's Associate Administrator for Safety. Such a request shall indicate the railroad's readiness and ability to comply with all of the requirements contained in those subparts.

(d) Except for operations identified in § 232.3(c)(1), (c)(4), and (c)(6) through (c)(8), all railroads which are part of the general railroad system of transportation shall operate pursuant to the requirements contained in this part 232 as it existed on April 1, 2001 and included as Appendix B to this part until they are either required to operate pursuant to the requirements contained in this part or the requirements contained in part 238 of this chapter or they elect to comply earlier than otherwise required with the requirements contained in this part or the requirements contained in part 238 of this chapter.

§ 232.3 Applicability.

(a) Except as provided in paragraphs (b) and (c) of this section, this part applies to all railroads that operate freight or other non-passenger train service on standard gage track which is part of the general railroad system of transportation. This includes the operation of circus trains and private cars when hauled on such railroads.

(b) Subpart E of this part, ''End-of-Train Devices,'' applies to all trains operating on track which is part of the general railroad system of transportation unless specifically excepted in that subpart.

(c) Except as provided in § 232.1(d) and paragraph (b) of this section, this part does *not* apply to:

(1) A railroad that operates only on track inside an installation that is not part of the general railroad system of transportation.

(2) Intercity or commuter passenger train operations on standard gage track which is part of the general railroad system of transportation;

(3) Commuter or other short-haul rail passenger train operations in a metropolitan or suburban area (as described by 49 U.S.C. 20102(1)), including public authorities operating passenger train service;

(4) Rapid transit operations in an urban area that are not connected with the general railroad system of transportation;

(5) Tourist, scenic, historic, or excursion operations, whether on or off the general railroad system;

(6) Freight and other non-passenger trains of four-wheel coal cars;

(7) Freight and other non-passenger trains of eight-wheel standard logging cars if the height of each car from the top of the rail to the center of the coupling is not more than 25 inches; or

(8) A locomotive used in hauling a train referred to in paragraph (c)(7) of this subsection when the locomotive and cars of the train are used only to transport logs.

(d) The provisions formerly contained in Interstate Commerce Commission Order 13528, of May 30, 1945, as amended, now revoked, are codified in this paragraph. This part is not applicable to the following equipment:

(1) Scale test weight cars.

(2) Locomotive cranes, steam shovels, pile drivers, and machines of similar construction, and maintenance machines built prior to September 21, 1945.

(3) Export, industrial, and other cars not owned by a railroad which are not to be used in service, except for movement as shipments on their own wheels to given destinations. Such cars shall be properly identified by a card attached to each side of the car, signed by the shipper, stating that such movement is being made under the authority of this paragraph.

(4) Industrial and other than railroad-owned cars which are not to be used in service except for movement within the limits of a single switching district (i.e., within the limits of an industrial facility).

(5) Narrow-gage cars.

(6) Cars used exclusively in switching operations and not used in train movements within the meaning of the Federal safety appliance laws (49 U.S.C. 20301–20306).

§ 232.5 Definitions.

For purposes of this part—

AAR means the Association of American Railroads.

Air brake means a combination of devices operated by compressed air, arranged in a system, and controlled manually, electrically, electronically, or pneumatically, by means of which the motion of a railroad car or locomotive is retarded or arrested.

Air Flow Indicator, AFM means a specific air flow indicator required by the air flow method of qualifying train air brakes (AFM). The AFM Air Flow Indicator is a calibrated air flow measuring device which is clearly visible and legible in daylight and darkness from the engineer's normal operating position. The indicator face displays:

(1) Markings from 10 cubic feet per minute (CFM) to 80 CFM, in increments of 10 CFM or less; and

(2) Numerals indicating 20, 40, 60, and 80 CFM for continuous monitoring of air flow.

Bind means restrict the intended movement of one or more brake system components by reduced clearance, by obstruction, or by increased friction.

Brake, dynamic means a train braking system whereby the kinetic energy of a moving train is used to generate electric current at the locomotive traction motors, which is then dissipated through resistor grids or into the catenary or third rail system.

Brake, effective means a brake that is capable of producing its required designed retarding force on the train. A car's air brake is not considered effective if it is not capable of producing its designed retarding force or if its piston travel exceeds:

(1) 10½ inches for cars equipped with nominal 12-inch stroke brake cylinders; or

(2) the piston travel limits indicated on the stencil, sticker, or badge plate for that brake cylinder.

Brake, hand means a brake that can be applied and released by hand to prevent or retard the movement of a locomotive.

Brake indicator means a device which indicates the brake application range and indicates whether brakes are applied and released.

Brake, inoperative means a primary brake that, for any reason, no longer applies or releases as intended.

Brake, inoperative dynamic means a dynamic brake that, for any reason, no longer provides its designed retarding force on the train.

Brake, parking means a brake that can be applied by means other than by hand, such as spring, hydraulic, or air pressure when the brake pipe air is depleted, or by an electrical motor.

Brake pipe means the system of piping (including branch pipes, angle cocks, cutout cocks, dirt collectors, hoses, and hose couplings) used for connecting locomotives and all railroad cars for the passage of compressed air.

Brake, primary means those components of the train brake system necessary to stop the train within the signal spacing distance without thermal damage to friction braking surfaces.

Brake, secondary means those components of the train brake system which develop supplemental brake retarding force that is not needed to stop the train within signal spacing distances or to prevent thermal damage to wheels.

Emergency application means an irretrievable brake application resulting in the maximum retarding force available from the train brake system.

End-of-train device, one-way means two pieces of equipment linked by radio that meet the requirements of § 232.403.

End-of-train device, two-way means two pieces of equipment linked by radio that meet the requirements of §§ 232.403 and 232.405.

Foul means any condition which restricts the intended movement of one or more brake system components because the component is snagged, entangled, or twisted.

Freight car means a vehicle designed to carry freight, or railroad personnel, by rail and a vehicle designed for use in a work or wreck train or other non-passenger train.

Initial terminal means the location where a train is originally assembled.

Locomotive means a piece of railroad on-track equipment, other than hi-rail, specialized maintenance, or other similar equipment, which may consist of one or more units operated from a single control stand—

(1) With one or more propelling motors designed for moving other railroad equipment;

(2) With one or more propelling motors designed to transport freight or passenger traffic or both; or

(3) Without propelling motors but with one or more control stands.

Locomotive cab means that portion of the superstructure designed to be occupied by the crew operating the locomotive.

Locomotive, controlling means the locomotive from which the engineer exercises control over the train.

Off air means not connected to a continuous source of compressed air of at least 60 pounds per square inch (psi).

Ordered date or date ordered means the date on which notice to proceed is given by a procuring railroad to a contractor or supplier for new equipment.

Piston travel means the amount of linear movement of the air brake hollow rod (or equivalent) or piston rod when forced outward by movement of the piston in the brake cylinder or actuator and limited by the brake shoes being forced against the wheel or disc.

Pre-revenue service acceptance testing plan means a document, as further specified in § 232.505, prepared by a railroad that explains in detail how pre-revenue service tests of certain equipment demonstrate that the equipment meets Federal safety standards and the railroad's own safety design requirements.

Previously tested equipment means equipment that has received a Class I brake test pursuant to § 232.205 and has not been off air for more than four hours.

Primary responsibility means the task that a person performs at least 50 percent of the time. The totality of the circumstances will be considered on a case-by-case basis in circumstances where an individual does not spend 50 percent of the day engaged in any one readily identifiable type of activity.

Qualified mechanical inspector means a qualified person who has received, as a part of the training, qualification, and designation program required under § 232.203, instruction and training that includes ''hands-on'' experience (under appropriate supervision or apprenticeship) in one or more of the following functions: troubleshooting, inspection, testing, maintenance or repair of the specific train brake components and systems for which the person is assigned responsibility. This person shall also possess a current understanding of what is required to properly repair and maintain the safety-critical brake components for which the person is assigned responsibility. Further, the qualified mechanical inspector shall be a person whose primary responsibility includes work generally consistent with the functions listed in this definition.

Qualified person means a person who has received, as a part of the training, qualification, and designation program required under § 232.203, instruction and training necessary to perform one or more functions required under this part. The railroad is responsible for determining that the person has the knowledge and skills necessary to perform the required function for which the person is assigned responsibility. The railroad determines the qualifications and competencies for employees designated to perform various functions in the manner set forth in this part. Although the rule uses the term ''qualified person'' to describe a person responsible for performing various functions required under this part, a person may be deemed qualified to perform some functions but not qualified to perform other functions. For example, although a person may be deemed qualified to perform the Class II/intermediate brake test required by this part, that same person may or may not be deemed qualified to perform the Class I/initial Terminal brake test or authorize the movement of defective equipment under this part. The railroad will determine the required functions for which an individual will be deemed a ''qualified person'' based upon the instruction and training the individual has received pursuant to § 232.203 concerning a particular function.

Railroad means any form of non-highway ground transportation that runs on rails or electromagnetic guideways, including:

(1) Commuter or short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and

(2) High speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads. The term ''railroad'' is also intended to mean a person that provides transportation by railroad, whether directly or by contracting out operation of the railroad to another person. The term does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

Rebuilt equipment means equipment that has undergone overhaul identified by the railroad as a capital expense under the Surface Transportation Board's accounting standards.

Refresher training means periodic retraining required for employees or contractors to remain qualified to perform specific equipment troubleshooting, inspection, testing, maintenance, or repair functions.

Respond as intended means to produce the result that a device or system is designed to produce.

''Roll-by'' inspection means an inspection performed while equipment is moving.

Service application means a brake application that results from one or more service reductions or the equivalent.

Service reduction means a decrease in brake pipe pressure, usually from 5 to 25 psi at a rate sufficiently rapid to move the operating valve to service position, but at a rate not rapid enough to move the operating valve to emergency position.

Solid block of cars means two or more freight cars consecutively coupled together and added to or removed from a train as a single unit.

State inspector means an inspector of a participating State rail safety program under part 212 of this chapter.

Switching service means the classification of freight cars according to commodity or destination; assembling of cars for train movements; changing the position of cars for purposes of loading, unloading, or weighing; placing of locomotives and cars for repair or storage; or moving of rail equipment in connection with work service that does not constitute a train movement.

Tourist, scenic, historic, or excursion operations are railroad operations that carry passengers, often using antiquated equipment, with the conveyance of the passengers to a particular destination not being the principal purpose.

Train means one or more locomotives coupled with one or more freight cars, except during switching service.

Train line means the brake pipe or any non-pneumatic system used to transmit the signal that controls the locomotive and freight car brakes.

Train, unit or *train, cycle* means a train that, except for the changing of locomotive power and the removal or replacement of defective equipment, remains coupled as a consist and continuously operates from location A to location B and back to location A.

Transfer train means a train that travels between a point of origin and a point of final destination not exceeding 20 miles. Such trains may pick up or deliver freight equipment while en route to destination.

Yard air means a source of compressed air other than from a locomotive.

§ 232.7 Waivers.

(a) Any person subject to a requirement of this part may petition the Administrator for a waiver of compliance with such requirement. The filing of such a petition does not affect that person's responsibility for compliance with that requirement while the petition is being considered.

(b) Each petition for waiver must be filed in the manner and contain the information required by part 211 of this chapter.

(c) If the Administrator finds that a waiver of compliance is in the public interest and is consistent with railroad safety, the Administrator may grant the waiver subject to any conditions the Administrator deems necessary. If a waiver is granted, the Administrator

publishes a notice in the **Federal Register** containing the reasons for granting the waiver.

§ 232.9 Responsibility for compliance.

(a) A railroad subject to this part shall not use, haul, permit to be used or hauled on its line, offer in interchange, or accept in interchange any train, railroad car, or locomotive with one or more conditions not in compliance with this part; however, a railroad shall not be liable for a civil penalty for such action if such action is in accordance with § 232.15. For purposes of this part, a train, railroad car, or locomotive will be considered in use prior to departure but after it has received, or should have received, the inspection required for movement and is deemed ready for service.

(b) Although many of the requirements of this part are stated in terms of the duties of a railroad, when any person performs any function required by this part, that person (whether or not a railroad) is required to perform that function in accordance with this part.

(c) Any person performing any function or task required by this part shall be deemed to have consented to FRA inspection of the person's operation to the extent necessary to determine whether the function or task is being performed in accordance with the requirements of this part.

§ 232.11 Penalties.

(a) Any person (including but not limited to a railroad; any manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any employee of such owner, manufacturer, lessor, lessee, or independent contractor) who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least $500, but not more than $11,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed $22,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. Appendix A to this part contains a schedule of civil penalty amounts used in connection with this rule.

(b) Any person who knowingly and willfully falsifies a record or report required by this part is subject to criminal penalties under 49 U.S.C. 21311.

§ 232.13 Preemptive effect.

(a) Under 49 U.S.C. 20106, issuance of the regulations in this part preempts any State law, rule, regulation, order, or standard covering the same subject matter, except for a provision necessary to eliminate or reduce a local safety hazard if that provision is not incompatible with this part and does not impose an undue burden on interstate commerce.

(b) Preemption should also be considered pursuant to the Locomotive Boiler Inspection Act (now codified at 49 U.S.C. 20701–20703), the Safety Appliance Acts (now codified at 49 U.S.C. 20301–20304), and the Commerce Clause based on the relevant case law pertaining to preemption under those provisions.

(c) FRA does not intend by issuance of the regulations in this part to preempt provisions of State criminal law that impose sanctions for reckless conduct that leads to actual loss of life, injury, or damage to property, whether such provisions apply specifically to railroad employees or generally to the public at large.

§ 232.15 Movement of defective equipment.

(a) *General provision.* Except as provided in paragraph (c) of this section, a railroad car or locomotive with one or more conditions not in compliance with this part may be used or hauled without civil penalty liability under this part only if *all* of the following conditions are met:

(1) The defective car or locomotive is properly equipped in accordance with the applicable provisions of 49 U.S.C. chapter 203 and the requirements of this part.

(2) The car or locomotive becomes defective while it is being used by the railroad on its line or becomes defective on the line of a connecting railroad and is properly accepted in interchange for repairs in accordance with paragraph (a)(7) of this section.

(3) The railroad first discovers the defective condition of the car or locomotive prior to moving it for repairs.

(4) The movement of the defective car or locomotive for repairs is from the location where the car or locomotive is first discovered defective by the railroad.

(5) The defective car or locomotive cannot be repaired at the location where the railroad first discovers it to be defective.

(6) The movement of the car or locomotive is necessary to make repairs to the defective condition.

(7) The location to which the car or locomotive is being taken for repair is the nearest available location where necessary repairs can be performed on the line of the railroad where the car or locomotive was first found to be defective or is the nearest available location where necessary repairs can be performed on the line of a connecting railroad if:

(i) The connecting railroad elects to accept the defective car or locomotive for such repair; and

(ii) The nearest available location where necessary repairs can be performed on the line of the connecting railroad is no farther than the nearest available location where necessary repairs can be performed on the line of the railroad where the car or locomotive was found defective.

(8) The movement of the defective car or locomotive for repairs is not by a train required to receive a Class I brake test at that location pursuant to § 232.205.

(9) The movement of the defective car or locomotive for repairs is not in a train in which less than 85 percent of the cars have operative and effective brakes.

(10) The defective car or locomotive is tagged, or information is recorded, as prescribed in paragraph (b) of this section.

(11) Except for cars or locomotives with brakes cut out en route, the following additional requirements are met:

(i) A qualified person shall determine—

(A) That it is safe to move the car or locomotive; and

(B) The maximum safe speed and other restrictions necessary for safely conducting the movement.

(ii) The person in charge of the train in which the car or locomotive is to be moved shall be notified in writing and inform all other crew members of the presence of the defective car or locomotive and the maximum speed and other restrictions determined under paragraph (a)(11)(i)(B) of this section. A copy of the tag or card described in paragraph (b) of this section may be used to provide the notification required by this paragraph.

(iii) The defective car or locomotive is moved in compliance with the maximum speed and other restrictions determined under paragraph (a)(11)(i)(B) of this section.

(12) The defective car or locomotive is not subject to a Special Notice for Repair under part 216 of this chapter, unless the movement of the defective

car is made in accordance with the restrictions contained in the Special Notice.

(b) *Tagging of defective equipment.*

(1) At the place where the railroad first discovers the defect, a tag or card shall be placed on both sides of the defective equipment or locomotive and in the cab of the locomotive, or an automated tracking system approved for use by FRA shall be provided with the following information about the defective equipment:

(i) The reporting mark and car or locomotive number;

(ii) The name of the inspecting railroad;

(iii) The name and job title of the inspector;

(iv) The inspection location and date;

(v) The nature of each defect;

(vi) A description of any movement restrictions;

(vii) The destination of the equipment where it will be repaired; and

(viii) The signature, or electronic identification, of the person reporting the defective condition.

(2) The tag or card required by paragraph (b)(1) of this section shall remain affixed to the defective equipment until the necessary repairs have been performed.

(3) An electronic or written record or a copy of each tag or card attached to or removed from a car or locomotive shall be retained for 90 days and, upon request, shall be made available within 15 calendar days for inspection by FRA or State inspectors.

(4) Each tag or card removed from a car or locomotive shall contain the date, location, reason for its removal, and the signature of the person who removed it from the piece of equipment.

(5) Any automated tracking system approved by FRA to meet the tagging requirements contained in paragraph (b)(1) of this section shall be capable of being reviewed and monitored by FRA at any time to ensure the integrity of the system. FRA's Associate Administrator for Safety may prohibit or revoke a railroad's authority to utilize an approved automated tracking system in lieu of tagging if FRA finds that the automated tracking system is not properly secure, is inaccessible to FRA or a railroad's employees, or fails to adequately track and monitor the movement of defective equipment. FRA will record such a determination in writing, include a statement of the basis for such action, and provide a copy of the document to the railroad.

(c) *Movement for unloading or purging of defective cars.* If a defective car is loaded with a hazardous material or contains residue of a hazardous material, the car may not be placed for unloading or purging unless unloading or purging is consistent with determinations made and restrictions imposed under paragraph (a)(11)(i) of this section and the unloading or purging is necessary for the safe repair of the car.

(d) *Computation of percent operative power brakes.*

(1) The percentage of operative power brakes in a train shall be based on the number of control valves in the train. The percentage shall be determined by dividing the number of control valves that are cut-in by the total number of control valves in the train. A control valve shall not be considered cut-in if the brakes controlled by that valve are inoperative. Both cars and locomotives shall be considered when making this calculation.

(2) The following brake conditions not in compliance with this part are not considered inoperative power brakes for purposes of this section:

(i) Failure or cutting out of secondary brake systems;

(ii) Inoperative or otherwise defective handbrakes or parking brakes;

(iii) Piston travel that is in excess of the Class I brake test limits required in § 232.205 but that does not exceed the outside limits contained on the stencil, sticker, or badge plate required by § 232.103(g) for considering the power brakes to be effective; and

(iv) Power brakes overdue for inspection, testing, maintenance, or stenciling under this part.

(e) *Placement of equipment with inoperative brakes.*

(1) A freight car or locomotive with inoperative brakes shall not be placed as the rear car of the train.

(2) No more than two freight cars with either inoperative brakes or not equipped with power brakes shall be consecutively placed in the same train.

(3) Multi-unit articulated equipment shall not be placed in a train if the equipment has more than two consecutive individual control valves cut-out or if the brakes controlled by the valves are inoperative.

(f) *Guidelines for determining locations where necessary repairs can be performed.* The following guidelines will be considered by FRA when determining whether a location is a location where repairs to a car's brake system or components can be performed and whether a location is the nearest location where the needed repairs can be effectuated.

(1) The following general factors and guidelines will be considered when making determinations as to whether a location is a location where brake repairs can be performed:

(i) The accessibility of the location to persons responsible for making repairs;

(ii) The presence of hazardous conditions that affect the ability to safely make repairs of the type needed at the location;

(iii) The nature of the repair necessary to bring the car into compliance;

(iv) The need for railroads to have in place an effective means to ensure the safe and timely repair of equipment;

(v) The relevant weather conditions at the location that affect accessibility or create hazardous conditions;

(vi) A location need not have the ability to effectuate every type of brake system repair in order to be considered a location where some brake repairs can be performed;

(vii) A location need not be staffed continuously in order to be considered a location where brake repairs can be performed;

(viii) The ability of a railroad to perform repair track brake tests or single car tests at a location shall not be considered; and

(ix) The congestion of work at a location shall not be considered

(2) The general factors and guidelines outlined in paragraph (f)(1) of this section should be applied to the following locations:

(i) A location where a mobile repair truck is used on a regular basis;

(ii) A location where a mobile repair truck originates or is permanently stationed;

(iii) A location at which a railroad performs mechanical repairs other than brake system repairs; and

(iv) A location that has an operative repair track or repair shop;

(3) In determining whether a location is the nearest location where the necessary brake repairs can be made, the distance to the location is a key factor but should not be considered the determining factor. The distance to a location must be considered in conjunction with the factors and guidance outlined in paragraphs (f)(1) and (f)(2) of this section. In addition, the following safety factors must be considered in order to optimize safety:

(i) The safety of the employees responsible for getting the equipment to or from a particular location; and

(ii) The potential safety hazards involved with moving the equipment in the direction of travel necessary to get the equipment to a particular location.

(g) Based on the guidance detailed in paragraph (f) of this section and consistent with other requirements contained in this part, a railroad and the representatives of the railroad's

employees may submit, for FRA approval, a joint proposal containing a plan designating locations where brake system repairs will be performed. Approval of such plans shall be made in writing by FRA's Associate Administrator for Safety and shall be subject to any modifications or changes determined by FRA to be necessary to ensure consistency with the requirements and guidance contained in this part.

§ 232.17 Special approval procedure.

(a) *General.* The following procedures govern consideration and action upon requests for special approval of an alternative standard under §§ 232.305 and 232.307; and for special approval of pre-revenue service acceptance testing plans under subpart F of this part.

(b) *Petitions for special approval of an alternative standard.* Each petition for special approval of an alternative standard shall contain:

(1) The name, title, address, and telephone number of the primary person to be contacted with regard to review of the petition;

(2) The alternative proposed, in detail, to be substituted for the particular requirement of this part;

(3) Appropriate data or analysis, or both, for FRA to consider in determining whether the alternative will provide at least an equivalent level of safety; and

(4) A statement affirming that the railroad has served a copy of the petition on designated representatives of its employees, together with a list of the names and addresses of the persons served.

(c) *Petitions for special approval of pre-revenue service acceptance testing plan.* Each petition for special approval of a pre-revenue service acceptance testing plan shall contain:

(1) The name, title, address, and telephone number of the primary person to be contacted with regard to review of the petition; and

(2) The elements prescribed in § 232.505.

(d) *Service.*

(1) Each petition for special approval under paragraph (b) or (c) of this section shall be submitted in triplicate to the Associate Administrator for Safety, Federal Railroad Administration, 400 7th Street, SW., Washington, DC 20590.

(2) Service of each petition for special approval of an alternative standard under paragraph (b) of this section shall be made on the following:

(i) Designated employee representatives responsible for the equipment's operation, inspection, testing, and maintenance under this part;

(ii) Any organizations or bodies that either issued the standard incorporated in the section(s) of the rule to which the special approval pertains or issued the alternative standard that is proposed in the petition; and

(iii) Any other person who has filed with FRA a current statement of interest in reviewing special approvals under the particular requirement of this part at least 30 days but not more than 5 years prior to the filing of the petition. If filed, a statement of interest shall be filed with FRA's Associate Administrator for Safety and shall reference the specific section(s) of this part in which the person has an interest.

(e) ***Federal Register** notice.* FRA will publish a notice in the **Federal Register** concerning each petition under paragraph (b) of this section.

(f) *Comment.* Not later than 30 days from the date of publication of the notice in the **Federal Register** concerning a petition under paragraph (b) of this section, any person may comment on the petition.

(1) A comment shall set forth specifically the basis upon which it is made, and contain a concise statement of the interest of the commenter in the proceeding.

(2) The comment shall be submitted in triplicate to the Associate Administrator for Safety, Federal Railroad Administration, 400 7th Street, SW., Washington, DC 20590.

(3) The commenter shall certify that a copy of the comment was served on each petitioner.

(g) *Disposition of petitions.*

(1) If FRA finds that the petition complies with the requirements of this section and that the proposed alternative standard or pre-revenue service plan is acceptable and justified, the petition will be granted, normally within 90 days of its receipt. If the petition is neither granted nor denied within 90 days, the petition remains pending for decision. FRA may attach special conditions to the approval of any petition. Following the approval of a petition, FRA may reopen consideration of the petition for cause.

(2) If FRA finds that the petition does not comply with the requirements of this section and that the alternative standard or pre-revenue service plan is not acceptable or justified, the petition will be denied, normally within 90 days of its receipt.

(3) When FRA grants or denies a petition, or reopens consideration of the petition, written notice is sent to the petitioner and other interested parties.

§ 232.19 Availability of records.

Except as otherwise provided, the records and plans required by this part shall be made available to representatives of FRA and States participating under part 212 of this chapter for inspection and copying upon request.

§ 232.21 Information Collection.

(a) The information collection requirements of this part were reviewed by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) and are assigned OMB control number 2130–0008.

(b) The information collection requirements are found in the following sections: §§ 229.27, 231.31, 232.1, 232.3, 232.7, 232.11, 232.15, 232.17, 232.103, 232.105, 232.107, 232.109, 232.111, 232.203, 232.205, 232.207, 232.209, 232.211, 232.213, 232.303, 232.307, 232.309, 232.403, 232.405, 232.407, 232.409, 232.503, 232.505.

Subpart B—General Requirements

§ 232.101 Scope.

This subpart contains general operating, performance, and design requirements for each railroad that operates freight or other non-passenger trains and for specific equipment used in those operations.

§ 232.103 General requirements for all train brake systems.

(a) The primary brake system of a train shall be capable of stopping the train with a service application from its maximum operating speed within the signal spacing existing on the track over which the train is operating.

(b) If the integrity of the train line of a train brake system is broken, the train shall be stopped. If a train line uses other than solely pneumatic technology, the integrity of the train line shall be monitored by the brake control system.

(c) A train brake system shall respond as intended to signals from the train line.

(d) One hundred percent of the brakes on a train shall be effective and operative brakes prior to use or departure from any location where a Class I brake test is required to be performed on the train pursuant to § 232.205.

(e) A train shall not move if less than 85 percent of the cars in that train have operative and effective brakes.

(f) Each car in a train shall have its air brakes in effective operating condition unless the car is being moved for repairs in accordance with § 232.15. The air brakes on a car are not in effective

operating condition if its brakes are cut-out or otherwise inoperative or if the piston travel exceeds:

(1) 10½ inches for cars equipped with nominal 12-inch stroke brake cylinders; or

(2) The piston travel limits indicated on the stencil, sticker, or badge plate for the brake cylinder with which the car is equipped.

(g) Except for cars equipped with nominal 12-inch stroke (8½ and 10-inch diameters) brake cylinders, all cars shall have a legible decal, stencil, or sticker affixed to the car or shall be equipped with a badge plate displaying the permissible brake cylinder piston travel range for the car at Class I brake tests and the length at which the piston travel renders the brake ineffective, if different from Class I brake test limits. The decal, stencil, sticker, or badge plate shall be located so that it may be easily read and understood by a person positioned safely beside the car.

(h) All equipment ordered on or after August 1, 2002, or placed in service for the first time on or after April 1, 2004, shall have train brake systems designed so that an inspector can observe from a safe position either the piston travel, an accurate indicator which shows piston travel, or any other means by which the brake system is actuated. The design shall not require the inspector to place himself or herself on, under, or between components of the equipment to observe brake actuation or release.

(i) All trains shall be equipped with an emergency application feature that produces an irretrievable stop, using a brake rate consistent with prevailing adhesion, train safety, and brake system thermal capacity. An emergency application shall be available at all times, and shall be initiated by an unintentional parting of the train line or loss of train brake communication.

(j) A railroad shall set the maximum main reservoir working pressure.

(k) The maximum brake pipe pressure shall not be greater than 15 psi less than the air compressor governor starting or loading pressure.

(l) Except as otherwise provided in this part, all equipment used in freight or other non-passenger trains shall, at a minimum, meet the Association of American Railroads (AAR) Standard S–469–47, ''Performance Specification for Freight Brakes,'' contained in the AAR *Manual of Standards and Recommended Practices, Section E* (April 1, 1999). The incorporation by reference of this AAR standard was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy of the incorporated document from the Association of American Railroads, 50 F Street, NW, Washington, DC. 20001. You may inspect a copy of the document at the Federal Railroad Administration, Docket Clerk, 1120 Vermont Avenue, NW, Suite 7000, Washington, DC or at the Office of the Federal Register, 800 North Capitol Street, NW, Suite 700, Washington, DC 20408.

(m) If a train qualified by the Air Flow Method as provided for in subpart C of this part experiences a brake pipe air flow of greater than 60 CFM or brake pipe gradient of greater than 15 psi while en route and the movable pointer does not return to those limits within a reasonable time, the train shall be stopped at the next available location and be inspected for leaks in the brake system.

(n) *Securement of unattended equipment.* A train's air brake shall not be depended upon to hold equipment standing unattended on a grade (including a locomotive, a car, or a train whether or not locomotive is attached). For purposes of this section, ''unattended equipment'' means equipment left standing and unmanned in such a manner that the brake system of the equipment cannot be readily controlled by a qualified person. Unattended equipment shall be secured in accordance with the following requirements:

(1) A sufficient number of hand brakes shall be applied to hold the equipment. Railroads shall develop and implement a process or procedure to verify that the applied hand brakes will sufficiently hold the equipment with the air brakes released.

(2) Where possible, an emergency brake application of the air brakes shall be initiated prior to leaving equipment unattended.

(3) The following requirements apply to the use of hand brakes on unattended locomotives:

(i) All hand brakes shall be fully applied on all locomotives in the lead consist of an unattended train.

(ii) All hand brakes shall be fully applied on all locomotives in an unattended locomotive consist outside of yard limits.

(iii) At a minimum, the hand brake shall be fully applied on the lead locomotive in an unattended locomotive consist within yard limits.

(4) A railroad shall adopt and comply with a process or procedures to verify that the applied hand brakes will sufficiently hold an unattended locomotive consist. A railroad shall also adopt and comply with instructions to address throttle position, status of the reverse lever, position of the generator field switch, status of the independent brakes, position of the isolation switch, and position of the automatic brake valve on all unattended locomotives. The procedures and instruction required in this paragraph shall take into account winter weather conditions as they relate to throttle position and reverser handle.

(5) Any hand brakes applied to hold unattended equipment shall not be released until it is known that the air brake system is properly charged.

(o) Air pressure regulating devices shall be adjusted for the following pressures:

Locomotives	PSI
(1) Minimum brake pipe air pressure:	
Road Service	90
Switch Service	60
(2) Minimum differential between brake pipe and main reservoir air pressures, with brake valve in running position	15
(3) Safety valve for straight air brake	30–55
(4) Safety valve for LT, ET, No. 8–EL, No. 14 El, No. 6–DS, No. 6–BL and No. 6–SL equipment	30–68
(5) Safety valve for HSC and No. 24–RL equipment	30–75
(6) Reducing valve for independent or straight air brake	30–50
(7) Self-lapping portion for electro-pneumatic brake (minimum full application pressure)	50
(8) Self-lapping portion for independent air brake (full application pressure)	30 or less
(9) Reducing valve for high-speed brake (minimum)	50

(p) Railroad or contract supervisors shall be held jointly responsible with the inspectors and train crew members they supervise for the condition and proper functioning of train brake systems to the extent that it is possible

to detect defective equipment by the inspections and tests required by this part.

§ 232.105 General requirements for locomotives.

(a) The air brake equipment on a locomotive shall be in safe and suitable condition for service.

(b) All locomotives ordered on or after August 1, 2002, or placed in service for the first time on or after April 1, 2004, shall be equipped with a hand or parking brake that is:

(1) Capable of application or activation by hand;

(2) Capable of release by hand; and

(3) Capable of holding the unit on a three (3) percent grade.

(c) On locomotives so equipped, the hand or parking brake as well as its parts and connections shall be inspected, and necessary repairs made, as often as service requires but no less frequently than every 368 days. The date of the last inspection shall be either entered on Form FRA F 6180–49A or suitably stenciled or tagged on the locomotive.

(d) The amount of leakage from the equalizing reservoir on locomotives and related piping shall be zero, unless the system is capable of maintaining the set pressure at any service application with the brakes control valve in the freight position. If such leakage is detected en route, the train may be moved only to the nearest forward location where the equalizing-reservoir leakage can be corrected. On locomotives equipped with electronic brakes, if the system logs or displays a fault related to equalizing reservoir leakage, the train may be moved only to the nearest forward location where the necessary repairs can be made.

(e) Use of the feed or regulating valve to control braking is prohibited.

(f) The passenger position on the locomotive brake control stand shall be used only if the trailing equipment is designed for graduated brake release or if equalizing reservoir leakage occurs en route and its use is necessary to safely control the movement of the train until it reaches the next forward location where the reservoir leakage can be corrected.

(g) When taking charge of a locomotive or locomotive consist, an engineer must know that the brakes are in operative condition.

§ 232.107 Air source requirements and cold weather operations.

(a) *Monitoring plans for yard air sources.*

(1) A railroad shall adopt and comply with a written plan to monitor all yard air sources, other than locomotives, to determine that they operate as intended and do not introduce contaminants into the brake system of freight equipment.

(2) This plan shall require the railroad to:

(i) Inspect each yard air source at least two times per calendar year, no less than five months apart, to determine it operates as intended and does not introduce contaminants into the brake system of the equipment it services.

(ii) Identify yard air sources found not to be operating as intended or found introducing contaminants into the brake system of the equipment it services.

(iii) Repair or take other remedial action regarding any yard air source identified under paragraph (a)(2)(ii) of this section.

(3) A railroad shall maintain records of the information and actions required by paragraph (a)(2). These records shall be maintained for a period of at least one year from the date of creation and may be maintained either electronically or in writing.

(b) Condensation and other contaminants shall be blown from the pipe or hose from which compressed air is taken prior to connecting the yard air line or motive power to the train.

(c) No chemicals which are known to degrade or harm brake system components shall be placed in the train air brake system.

(d) Yard air reservoirs shall either be equipped with an operable automatic drain system or be manually drained at least once each day that the devices are used or more often if moisture is detected in the system.

(e) A railroad shall adopt and comply with detailed written operating procedures tailored to the equipment and territory of that railroad to cover safe train operations during cold weather. For purposes of this provision, ''cold weather'' means when the ambient temperature drops below 10 degrees Fahrenheit (F) (minus 12.2 degrees Celsius).

§ 232.109 Dynamic brake requirements.

(a) Except as provided in paragraph (i) of this section, a locomotive engineer shall be informed of the operational status of the dynamic brakes on all locomotive units in the consist at the initial terminal or point of origin for a train and at other locations where a locomotive engineer first begins operation of a train. The information required by this paragraph may be provided to the locomotive engineer by any means determined appropriate by the railroad; however, a written or electronic record of the information shall be maintained in the cab of the controlling locomotive.

(b) Except as provided in paragraph (e) of this section, all inoperative dynamic brakes shall be repaired within 30 calendar days of becoming inoperative or at the locomotive's next periodic inspection pursuant to § 229.23 of this chapter, whichever occurs first.

(c) Except as provided in paragraph (e) of this section, a locomotive discovered with inoperative dynamic brakes shall have a tag bearing the words ''inoperative dynamic brake'' securely attached and displayed in a conspicuous location in the cab of the locomotive. This tag shall contain the following information:

(1) The locomotive number;

(2) The name of the discovering carrier;

(3) The location and date where condition was discovered; and

(4) The signature of the person discovering the condition.

(d) An electronic or written record of repairs made to a locomotive's dynamic brakes shall be retained for 92 days.

(e) A railroad may elect to declare the dynamic brakes on a locomotive deactivated without removing the dynamic brake components from the locomotive, only if all of the following conditions are met:

(1) The locomotive is clearly marked with the words ''dynamic brake deactivated'' in a conspicuous location in the cab of the locomotive; and

(2) The railroad has taken appropriate action to ensure that the deactivated locomotive is incapable of utilizing dynamic brake effort to retard or control train speed.

(f) If a locomotive consist is intended to have its dynamic brakes used while in transit, a locomotive with inoperative or deactivated dynamic brakes or a locomotive not equipped with dynamic brakes shall not be placed in the controlling (lead) position of a consist unless the locomotive has the capability of:

(1) Controlling the dynamic braking effort in trailing locomotives in the consist that are so equipped; and

(2) Displaying to the locomotive engineer the deceleration rate of the train or the total train dynamic brake retarding force.

(g) All locomotives equipped with dynamic brakes and ordered on or after August 1, 2002, or placed in service for the first time on or after April 1, 2004, shall be designed to:

(1) Test the electrical integrity of the dynamic brake at rest; and

(2) Display the available total train dynamic brake retarding force at various speed increments in the cab of the controlling (lead) locomotive.

(h) All rebuilt locomotives equipped with dynamic brakes and placed in service on or after April 1, 2004, shall be designed to:

(1) Test the electrical integrity of the dynamic brake at rest; and

(2) Display either the train deceleration rate or the available total train dynamic brake retarding force at various speed increments in the cab of the controlling (lead) locomotive.

(i) The information required by paragraph (a) of this section is not required to be provided to the locomotive engineer if all of the locomotives in the lead consist of a train are equipped in accordance with paragraph (g) of this section.

(j) A railroad operating a train with a brake system that includes dynamic brakes shall adopt and comply with written operating rules governing safe train handling procedures using these dynamic brakes under all operating conditions, which shall be tailored to the specific equipment and territory of the railroad. The railroad's operating rules shall:

(1) Ensure that the friction brakes are sufficient by themselves, without the aid of dynamic brakes, to stop the train safely under all operating conditions.

(2) Include a ''miles-per-hour-overspeed-stop'' rule. At a minimum, this rule shall require that any train, when descending a grade of 1 percent or greater, shall be immediately brought to a stop, by an emergency brake application if necessary, when the train's speed exceeds the maximum authorized speed for that train by more than 5 miles per hour. A railroad shall reduce the 5 mile per hour overspeed restriction if validated research indicates the need for such a reduction. A railroad may increase the 5 mile per hour overspeed restriction only with approval of FRA and based upon verifiable data and research.

(k) A railroad operating a train with a brake system that includes dynamic brakes shall adopt and comply with specific knowledge, skill, and ability criteria to ensure that its locomotive engineers are fully trained in the operating rules prescribed by paragraph (j) of this section. The railroad shall incorporate such criteria into its locomotive engineer certification program pursuant to Part 240 of this chapter,

§ 232.111 Train handling information.

(a) A railroad shall adopt and comply with written procedures to ensure that a train crew employed by the railroad is given accurate information on the condition of the train brake system and train factors affecting brake system performance and testing when the crew takes over responsibility for the train. The information required by this paragraph may be provided to the locomotive engineer by any means determined appropriate by the railroad; however, a written or electronic record of the information shall be maintained in the cab of the controlling locomotive.

(b) The procedures shall require that each train crew taking charge of a train be informed of:

(1) The total weight and length of the train, based on the best information available to the railroad;

(2) Any special weight distribution that would require special train handling procedures;

(3) The number and location of cars with cut-out or otherwise inoperative brakes and the location where they will be repaired;

(4) If a Class I or Class IA brake test is required prior to the next crew change point, the location at which that test shall be performed; and

(5) Any train brake system problems encountered by the previous crew of the train.

Subpart C—Inspection and Testing Requirements

§ 232.201 Scope.

This subpart contains the inspection and testing requirements for brake systems used in freight and other non-passenger trains. This subpart also contains general training requirements for railroad and contract personnel used to perform the required inspections and tests.

§ 232.203 Training requirements.

(a) Each railroad and each contractor shall adopt and comply with a training, qualification, and designation program for its employees that perform brake system inspections, tests, or maintenance. For purposes of this section, a ''contractor'' is defined as a person under contract with the railroad or car owner. The records required by this section may be maintained either electronically or in writing.

(b) As part of this program, the railroad or contractor shall:

(1) Identify the tasks related to the inspection, testing, and maintenance of the brake system required by this part that must be performed by the railroad or contractor and identify the skills and knowledge necessary to perform each task.

(2) Develop or incorporate a training curriculum that includes both classroom and ''hands-on'' lessons designed to impart the skills and knowledge identified as necessary to perform each task. The developed or incorporated training curriculum shall specifically address the Federal regulatory requirements contained in this part that are related to the performance of the tasks identified.

(3) Require all employees to successfully complete a training curriculum that covers the skills and knowledge the employee will need to possess in order to perform the tasks required by this part that the employee will be responsible for performing, including the specific Federal regulatory requirements contained in this part related to the performance of a task for which the employee will be responsible;

(4) Require all employees to pass a written or oral examination covering the skills and knowledge the employee will need to possess in order to perform the tasks required by this part that the employee will be responsible for performing, including the specific Federal regulatory requirements contained in this part related to the performance of a task for which the employee will be responsible for performing;

(5) Require all employees to individually demonstrate ''hands-on'' capability by successfully applying the skills and knowledge the employee will need to possess in order to perform the tasks required by this part that the employee will be responsible for performing to the satisfaction of the employee's supervisor or designated instructor;

(6) Consider training and testing, including efficiency testing, previously received by an employee in order to meet the requirements contained in paragraphs (b)(3) through (b)(5) of this section; provided, such training and testing can be documented as required in paragraph (e) of this section;

(7) Require supervisors to exercise oversight to ensure that all the identified tasks are performed in accordance with the railroad's written procedures and the specific Federal regulatory requirements contained in this part;

(8) Require periodic refresher training at an interval not to exceed three years that includes classroom and ''hands-on'' training, as well as testing. Efficiency testing may be used to meet the ''hands-on'' portion of this requirement; provided, such testing is documented as required in paragraph (e) of this section; and

(9) Add new brake systems to the training, qualification and designation program prior to its introduction to revenue service.

(c) A railroad that operates trains required to be equipped with a two-way

end-of-train telemetry device pursuant to Subpart E of this part, and each contractor that maintains such devices shall adopt and comply with a training program which specifically addresses the testing, operation, and maintenance of two-way end-of-train devices for employees who are responsible for the testing, operation, and maintenance of the devices.

(d) A railroad that operates trains under conditions that require the setting of air brake pressure retaining valves shall adopt and comply with a training program which specifically addresses the proper use of retainers for employees who are responsible for using or setting retainers.

(e) A railroad or contractor shall maintain adequate records to demonstrate the current qualification status of all of its personnel assigned to inspect, test, or maintain a train brake system. The records required by this paragraph may be maintained either electronically or in writing and shall be provided to FRA upon request. These records shall include the following information concerning each such employee:

(1) The name of the employee;

(2) The dates that each training course was completed;

(3) The content of each training course successfully completed;

(4) The employee's scores on each test taken to demonstrate proficiency;

(5) A description of the employee's ''hands-on'' performance applying the skills and knowledge the employee needs to possess in order to perform the tasks required by this part that the employee will be responsible for performing and the basis for finding that the skills and knowledge were successfully demonstrated;

(6) A record that the employee was notified of his or her current qualification status and of any subsequent changes to that status;

(7) The tasks required to be performed under this part which the employee is deemed qualified to perform; and

(8) Identification of the person(s) determining that the employee has successfully completed the training necessary to be considered qualified to perform the tasks identified in paragraph (e)(7) of this section.

(9) The date that the employee's status as qualified to perform the tasks identified in paragraph (e)(7) of this section expires due to the need for refresher training.

(f) A railroad or contractor shall adopt and comply with a plan to periodically assess the effectiveness of its training program. One method of validation and assessment could be through the use of efficiency tests or periodic review of employee performance.

§ 232.205 Class I brake test-initial terminal inspection.

(a) Each train and each car in the train shall receive a Class I brake test as described in paragraph (b) of this section by a qualified person, as defined in § 232.5, at the following points:

(1) The location where the train is originally assembled (''initial terminal'');

(2) A location where the train consist is changed other than by:

(i) Adding a single car or a solid block of cars;

(ii) Removing a single car or a solid block of cars;

(iii) Removing cars determined to be defective under this chapter; or

(iv) A combination of the changes listed in paragraphs (a)(2)(i) through (a)(2)(iii) of this section (See §§ 232.209 and 232.211 for requirements related to the pick-up of cars and solid blocks of cars en route.);

(3) A location where the train is off air for a period of more than four hours;

(4) A location where a unit or cycle train has traveled 3,000 miles since its last Class I brake test; and

(5) A location where the train is received in interchange if the train consist is changed other than by:

(i) Removing a car or a solid block of cars from the train;

(ii) Adding a previously tested car or a previously tested solid block of cars to the train;

(iii) Changing motive power;

(iv) Removing or changing the caboose; or

(v) Any combination of the changes listed in paragraphs (a)(5) of this section.

(A) If changes other than those contained in paragraph (a)(5)(i)–(a)(5)(v) of this section are made to the train consist when it is received in interchange and the train will move 20 miles or less, then the railroad may conduct a brake test pursuant to § 232.209 on those cars added to the train.

(B) Reserved.

(b) A Class I brake test of a train shall consist of the following tasks and requirements:

(1) Brake pipe leakage shall not exceed 5 psi per minute or air flow shall not exceed 60 cubic feet per minute (CFM).

(i) *Leakage Test.* The brake pipe leakage test shall be conducted as follows:

(A) Charge the air brake system to the pressure at which the train will be operated, and the pressure at the rear of the train shall be within 15 psi of the pressure at which the train will be operated, but not less than 75 psi, as indicated by an accurate gauge or end-of-train device at the rear end of train;

(B) Upon receiving the signal to apply brakes for test, make a 20-psi brake pipe service reduction;

(C) If the locomotive used to perform the leakage test is equipped with a means for maintaining brake pipe pressure at a constant level during a 20-psi brake pipe service reduction, this feature shall be cut out during the leakage test; and

(D) With the brake valve lapped and the pressure maintaining feature cut out (if so equipped) and after waiting 45–60 seconds, note the brake pipe leakage as indicated by the brake-pipe gauge in the locomotive, which shall not exceed 5 psi per minute.

(ii) *Air Flow Method Test.* When a locomotive is equipped with a 26-L brake valve or equivalent pressure maintaining locomotive brake valve, a railroad may use the Air Flow Method Test as an alternate to the brake pipe leakage test. The Air Flow Method (AFM) Test shall be performed as follows:

(A) Charge the air brake system to the pressure at which the train will be operated, and the pressure at the rear of the train shall be within 15 psi of the pressure at which the train will be operated, but not less than 75 psi, as indicated by an accurate gauge or end-of-train device at the rear end of train; and

(B) Measure air flow as indicated by a calibrated AFM indicator, which shall not exceed 60 cubic feet per minute (CFM).

(iii) The AFM indicator shall be calibrated for accuracy at periodic intervals not to exceed 92 days. The AFM indicator calibration test orifices shall be calibrated at temperatures of not less than 20 degrees Fahrenheit. AFM indicators shall be accurate to within ± 3 standard cubic feet per minute (CFM).

(2) The inspector shall position himself/herself, taking positions on each side of each car sometime during the inspection process, so as to be able to examine and observe the functioning of all moving parts of the brake system on each car in order to make the determinations and inspections required by this section. A ''roll-by'' inspection of the brake release as provided for in paragraph (b)(8) of this section shall not constitute an inspection of that side of the train for purposes of this requirement;

(3) The train brake system shall be charged to the pressure at which the

train will be operated, and the pressure at the rear of the train shall be within 15 psi of the pressure at which the train will be operated, but not less than 75 psi, angle cocks and cutout cocks shall be properly positioned, air hoses shall be properly coupled and shall not kink, bind, or foul or be in any other condition that restricts air flow. An examination must be made for leaks and necessary repairs made to reduce leakage to the required minimum. Retaining valves and retaining valve pipes shall be inspected and known to be in proper condition for service;

(4) The brakes on each car and shall apply in response to a 20-psi brake pipe service reduction and shall remain applied until a release of the air brakes has been initiated by the controlling locomotive or yard test device. The brakes shall not be applied or released until the proper signal is given. A car found with brakes that fail to apply or remain applied may be retested and remain in the train if the retest is conducted at the pressure the train will be operated from the controlling locomotive, head end of the consist, or a suitable test device, as described in § 232.217(a) of this part, positioned at one end of the car(s) being retested and the brakes remain applied until a release is initiated after a period which is no less than three minutes. If the retest is performed at the car(s) being retested with a suitable device, the compressed air in the car(s) shall be depleted prior to disconnecting the hoses between the car(s) to perform the retest;

(5) For cars equipped with 8½-inch or 10-inch diameter brake cylinders, piston travel shall be within 7 to 9 inches. If piston travel is found to be less than 7 inches or more than 9 inches, it must be adjusted to nominally 7½ inches. For cars not equipped with 8½-inch or 10-inch diameter brake cylinders, piston travel shall be within the piston travel stenciled or marked on the car or badge plate. Minimum brake cylinder piston travel of truck-mounted brake cylinders must be sufficient to provide proper brake shoe clearance when the brakes are released. Piston travel must be inspected on each freight car while the brakes are applied;

(6) Brake rigging shall be properly secured and shall not bind or foul or otherwise adversely affect the operation of the brake system;

(7) All parts of the brake equipment shall be properly secured. On cars where the bottom rod passes through the truck bolster or is secured with cotter keys equipped with a locking device to prevent their accidental removal, bottom rod safety supports are not required; and

(8) When the release is initiated by the controlling locomotive or yard test device, the brakes on each freight car shall be inspected to verify that it did release; this may be performed by a ''roll-by'' inspection. If a ''roll-by'' inspection of the brake release is performed, train speed shall not exceed 10 MPH and the qualified person performing the ''roll-by'' inspection shall communicate the results of the inspection to the operator of the train. The operator of the train shall note successful completion of the release portion of the inspection on the record required in paragraph (d) of this section.

(c) Where a railroad's collective bargaining agreement provides that a carman is to perform the inspections and tests required by this section, a carman alone will be considered a qualified person. In these circumstances, the railroad shall ensure that the carman is properly trained and designated as a qualified person or qualified mechanical inspector pursuant to the requirements of this part.

(d) A railroad shall notify the locomotive engineer that the Class I brake test was satisfactorily performed and provide the information required in this paragraph to the locomotive engineer or place the information in the cab of the controlling locomotive following the test. The information required by this paragraph may be provided to the locomotive engineer by any means determined appropriate by the railroad; however, a written or electronic record of the information shall be retained in the cab of the controlling locomotive until the train reaches its destination. The written or electronic record shall contain the date, time, number of freight cars inspected, and identify the qualified person(s) performing the test and the location where the Class I brake test was performed.

(e) Before adjusting piston travel or working on brake rigging, cutout cock in brake pipe branch must be closed and air reservoirs must be voided of all compressed air. When cutout cocks are provided in brake cylinder pipes, these cutout cocks only may be closed and air reservoirs need not be voided of all compressed air.

(f) Except as provided in § 232.209, each car or solid block of cars, as defined in § 232.5, that has not received a Class I brake test or that has been off air for more than four hours and that is added to a train shall receive a Class I test when added to a train. A Class III brake test as described in § 232.211 shall then be performed on the entire new train.

§ 232.207 Class IA brake tests—1,000-mile inspection.

(a) Except as provided in § 232.213, each train shall receive a Class IA brake test performed by a qualified person, as defined in § 232.5, at a location that is not more than 1,000 miles from the point where any car in the train last received a Class I or Class IA brake test. The most restrictive car or block of cars in the train shall determine the location of this test.

(b) A Class IA brake test of a train shall consist of the following tasks and requirements:

(1) Brake pipe leakage shall not exceed 5 psi per minute or air flow shall not exceed 60 cubic feet per minute (CFM). The brake pipe leakage test or air flow method test shall be conducted pursuant to the requirements contained in § 232.205(b)(1);

(2) The inspector shall position himself/herself, taking positions on each side of each car sometime during the inspection process, so as to be able to examine and observe the functioning of all moving parts of the brake system on each car in order to make the determinations and inspections required by this section;

(3) The air brake system shall be charged to the pressure at which the train will be operated, and the pressure at the rear of the train shall be within 15 psi of the pressure at which the train will be operated, but not less than 75 psi, as indicated by an accurate gauge or end-of-train device at rear end of train;

(4) The brakes on each car shall apply in response to a 20-psi brake pipe service reduction and shall remain applied until the release is initiated by the controlling locomotive. A car found with brakes that fail to apply or remain applied may be retested and remain in the train if the retest is conducted as prescribed in § 232.205(b)(4); otherwise, the defective equipment may only be moved pursuant to the provisions contained in § 232.15, if applicable;

(5) Brake rigging shall be properly secured and shall not bind or foul or otherwise adversely affect the operation of the brake system; and

(6) All parts of the brake equipment shall be properly secured.

(c) A railroad shall designate the locations where Class IA brake tests will be performed, and the railroad shall furnish to the Federal Railroad Administration upon request a description of each location designated. A railroad shall notify FRA's Associate Administrator for Safety in writing 30 days prior to any change in the locations designated for such tests and inspections.

(1) Failure to perform a Class IA brake test on a train at a location designated pursuant to this paragraph constitutes a failure to perform a proper Class IA brake test if the train is due for such a test at that location.

(2) In the event of an emergency that alters normal train operations, such as a derailment or other unusual circumstance that adversely affects the safe operation of the train, the railroad is not required to provide prior written notification of a change in the location where a Class IA brake test is performed to a location not on the railroad's list of designated locations for performing Class IA brake tests, provided that the railroad notifies FRA's Associate Administrator for Safety and the pertinent FRA Regional Administrator within 24 hours after the designation has been changed and the reason for that change.

§ 232.209 Class II brake tests—intermediate inspection.

(a) At a location other than the initial terminal of a train, a Class II brake test shall be performed by a qualified person, as defined in § 232.5, on the following equipment when added to a train:

(1) Each car or solid block of cars, as defined in § 232.5, that has not previously received a Class I brake test or that has been off air for more than four hours;

(2) Each solid block of cars, as defined in § 232.5, that is comprised of cars from more than one previous train; and

(3) Each solid block of cars that is comprised of cars from only one previous train but the cars of which have not remained continuously and consecutively coupled together with the train line remaining connected, other than for removing defective equipment, since being removed from its previous train.

(b) A Class II brake test shall consist of the following tasks and requirements:

(1) Brake pipe leakage shall not exceed 5 psi per minute or air flow shall not exceed 60 cubic feet per minute (CFM). The brake pipe leakage test or air flow method test shall be conducted on the entire train pursuant to the requirements contained in § 232.205(b)(1);

(2) The air brake system shall be charged to the pressure at which the train will be operated, and the pressure at the rear of the train shall be within 15 psi of the pressure at which the train will be operated, but not less than 75 psi, as indicated by an accurate gauge or end-of-train device at the rear end of train;

(3) The brakes on each car added to the train and on the rear car of the train shall be inspected to ensure that they apply in response to a 20-psi brake pipe service reduction and remain applied until the release is initiated from the controlling locomotive. A car found with brakes that fail to apply or remain applied may be retested and remain in the train if the retest is conducted as prescribed in § 232.205(b)(4); otherwise, the defective equipment may only be moved pursuant to the provisions contained in § 232.15, if applicable;

(4) When the release is initiated, the brakes on each car added to the train and on the rear car of the train shall be inspected to verify that they did release; this may be performed by a ''roll-by'' inspection. If a ''roll-by'' inspection of the brake release is performed, train speed shall not exceed 10 MPH, and the qualified person performing the ''roll-by'' inspection shall communicate the results of the inspection to the operator of the train; and

(5) Before the train proceeds the operator of the train shall know that the brake pipe pressure at the rear of the train is being restored.

(c) As an alternative to the rear car brake application and release portion of the test, the operator of the train shall determine that brake pipe pressure of the train is being reduced, as indicated by a rear car gauge or end-of-train telemetry device, and then that the brake pipe pressure of the train is being restored, as indicated by a rear car gauge or end-of-train telemetry device. (When an end-of-train telemetry device is used to comply with any test requirement in this part, the phrase ''brake pipe pressure of the train is being reduced'' means a pressure reduction of at least 5 psi, and the phrase ''brake pipe pressure of the train is being restored'' means a pressure increase of at least 5 psi). If an electronic communication link between a controlling locomotive and a remotely controlled locomotive attached to the rear end of a train is utilized to determine that brake pipe pressure is being restored, the operator of the train shall know that the air brakes function as intended on the remotely controlled locomotive.

(d) Each car or solid block of cars that receives a Class II brake test pursuant to this section when added to the train shall receive a Class I brake test at the next forward location where facilities are available for performing such a test. A Class III brake test as described in § 232.211 shall then be performed on the entire train.

§ 232.211 Class III brake tests-trainline continuity inspection.

(a) A Class III brake test shall be performed on a train by a qualified person, as defined in § 232.5, to test the train brake system when the configuration of the train has changed in certain ways. In particular, a Class III brake test shall be performed at the location where any of the following changes in the configuration of the train occur:

(1) Where a locomotive or a caboose is changed;

(2) Where a car or a block of cars is removed from the train with the consist otherwise remaining intact;

(3) At a point other than the initial terminal for the train, where a car or a solid block of cars that is comprised of cars from only one previous train the cars of which have remained continuously and consecutively coupled together with the trainline remaining connected, other than for removing defective equipment, since being removed from its previous train that has previously received a Class I brake test and that has not been off air for more than four hours is added to a train;

(4) At a point other than the initial terminal for the train, where a car or a solid block of cars that has received a Class I or Class II brake test at that location, prior to being added to the train, and that has not been off air for more than four hours is added to a train; or

(5) Whenever the continuity of the brake pipe is broken or interrupted.

(b) A Class III brake test shall consist of the following tasks and requirements:

(1) The train brake system shall be charged to the pressure at which the train will be operated, and the pressure at the rear of the train shall be within 15 psi of the pressure at which the train will be operated, but not less than 75 psi, or 60 psi for transfer trains, as indicated at the rear of the train by an accurate gauge or end-of-train device;

(2) The brakes on the rear car of the train shall apply in response to a 20-psi brake pipe service reduction and shall remain applied until the release is initiated by the controlling locomotive;

(3) When the release is initiated, the brakes on the rear car of the train shall be inspected to verify that it did release; and

(4) Before proceeding the operator of the train shall know that the brake pipe pressure at the rear of freight train is being restored.

(c) As an alternative to the rear car brake application and release portion of the test, it shall be determined that the brake pipe pressure of the train is being reduced, as indicated by a rear car gauge

or end-of-train telemetry device, and then that the brake pipe pressure of the train is being restored, as indicated by a rear car gauge or end-of-train telemetry device. If an electronic or radio communication link between a controlling locomotive and a remotely controlled locomotive attached to the rear end of a train is utilized to determine that brake pipe pressure is being restored, the operator of the train shall know that the air brakes function as intended on the remotely controlled locomotive.

§ 232.213 Extended haul trains.

(a) A railroad may be permitted to move a train up to, but not exceeding, 1,500 miles between brake tests and inspections if the railroad designates a train as an extended haul train. In order for a railroad to designate a train as an extended haul train, all of the following requirements must be met:

(1) The railroad must designate the train in writing to FRA's Associate Administrator for Safety. This designation must include the following:

(i) The train identification symbol or identification of the location where extended haul trains will originate and a description of the trains that will be operated as extended haul trains from those locations;

(ii) The origination and destination points for the train;

(iii) The type or types of equipment the train will haul; and

(iv) The locations where all train brake and mechanical inspections and tests will be performed.

(2) A Class I brake test pursuant to § 232.205 shall be performed at the initial terminal for the train by a qualified mechanical inspector as defined in § 232.5.

(3) A freight car inspection pursuant to part 215 of this chapter shall be performed at the initial terminal for the train and shall be performed by an inspector designated under § 215.11 of this chapter.

(4) All cars having conditions not in compliance with part 215 of this chapter at the initial terminal for the train shall be either repaired or removed from the train. Except for a car developing such a condition en route, no car shall be moved pursuant to the provisions of § 215.9 of this chapter in the train.

(5) The train shall have no more than one pick-up and one set-out en route, except for the set-out of defective equipment pursuant to the requirements of this chapter.

(i) Cars added to the train en route shall be inspected pursuant to the requirements contained in paragraphs (a)(2) through (a)(5) of this section at the location where they are added to the train.

(ii) Cars set out of the train en route shall be inspected pursuant to the requirements contained in paragraph (a)(6) of this section at the location where they are set out of the train.

(6) At the point of destination, if less than 1,500 miles from the train's initial terminal, or at the point designated by the railroad pursuant to paragraph (a)(1)(iv) of this section, not to exceed 1,500 miles, an inbound inspection of the train shall be conducted by a qualified mechanical inspector to identify any defective, inoperative, or ineffective brakes or any other condition not in compliance with this part as well as any conditions not in compliance with part 215 and part 231 of this chapter.

(7) The railroad shall maintain a record of all defective, inoperative, or ineffective brakes as well as any conditions not in compliance with part 215 and part 231 of this chapter discovered at anytime during the movement of the train. These records shall be retained for a period of one year and made available to FRA upon request. The records required by this section may be maintained either electronically or in writing.

(8) In order for an extended haul train to proceed beyond 1,500 miles, the following requirements shall be met:

(i) If the train will move 1,000 miles or less from that location before receiving a Class IA brake test or reaching destination, a Class I brake test shall be conducted pursuant to § 232.205 to ensure 100 percent effective and operative brakes. The inbound inspection required by paragraph (a)(6) of this section may be used to meet this requirement provided it encompasses all the inspection elements contained in § 232.205.

(ii) If the train will move greater than 1,000 miles from that location without another brake inspection, the train must be identified as an extended haul train for that movement and shall meet all the requirements contained in paragraphs (a)(1) through (a)(7) of this section. Such trains shall receive a Class I brake test pursuant to § 232.205 by a qualified mechanical inspector to ensure 100 percent effective and operative brakes, a freight car inspection pursuant to part 215 of this chapter by an inspector designated under § 215.11 of this chapter, and all cars containing non-complying conditions under part 215 of this chapter shall either be repaired or removed from the train. The inbound inspection required by paragraph (a)(6) of this section may be used to meet these inspection requirements provided it encompasses all the inspection elements contained paragraphs (a)(2) through (a)(4) of this section.

(9) FRA inspectors shall have physical access to visually observe all brake and freight car inspections and tests required by this section.

(b) Failure to comply with any of the requirements contained in paragraph (a) of this section will be considered an improper movement of a designated priority train for which appropriate civil penalties may be assessed as outlined in Appendix A to this part. Furthermore, FRA's Associate Administrator for Safety may revoke a railroad's ability to designate any or all trains as extended haul trains for repeated or willful noncompliance with any of the requirements contained in this section. Such a determination will be made in writing and will state the basis for such action.

§ 232.215 Transfer train brake tests.

(a) A transfer train, as defined in § 232.5, shall receive a brake test performed by a qualified person, as defined in § 232.5, that includes the following:

(1) The air brake hoses shall be coupled between all freight cars;

(2) After the brake system is charged to not less than 60 psi as indicated by an accurate gauge or end-of-train device at the rear of the train, a 15-psi service brake pipe reduction shall be made; and

(3) An inspection shall be made to determine that the brakes on each car apply and remain applied until the release is initiated by the controlling locomotive. A car found with brakes that fail to apply or remain applied may be retested and remain in the train if the retest is conducted as prescribed in § 232.205(b)(4); otherwise, the defective equipment may only be moved pursuant to the provisions contained in § 232.15, if applicable.

(b) Cars added to transfer trains en route shall be inspected pursuant to the requirements contained in paragraph (a) of this section at the location where the cars are added to the train.

(c) If a train's movement will exceed 20 miles or is not a transfer train as defined in § 232.5, the train shall receive a Class I brake test in accordance with § 232.205 prior to departure.

§ 232.217 Train brake tests conducted using yard air.

(a) When a train air brake system is tested from a yard air source, an engineer's brake valve or a suitable test device shall be used to provide any increase or reduction of brake pipe air pressure at the same, or slower, rate as an engineer's brake valve.

(b) The yard air test device must be connected to the end of the train or block of cars that will be nearest to the controlling locomotive. However, if the railroad adopts and complies with written procedures to ensure that potential overcharge conditions to the train brake system are avoided, the yard air test device may be connected to other than the end nearest to the controlling locomotive.

(c) Except as provided in this section, when a yard air is used the train air brake system must be charged and tested as prescribed by § 232.205(b) and when practicable should be kept charged until road motive power is coupled to train, after which, a Class III brake test shall be performed as prescribed by § 232.211.

(1) If the cars are off air for more than four hours, these cars shall be retested in accordance with § 232.205(b) through (e).

(2) At a minimum, yard air pressure shall be 60 psi at the end of the consist or block of cars opposite from the yard test device and shall be within 15 psi of the regulator valve setting on yard test device.

(3) If the air pressure of the yard test device is less than the pressure at which the train will be operated, then a leakage or air flow test shall be conducted at the operating pressure of the train when the locomotives are attached in accordance with § 232.205(b)(1).

(d) Mechanical yard air test devices and gauges shall be calibrated every 92 days. Electronic yard test devices and gauges shall be calibrated annually. Mechanical and electronic yard air test devices and gauges shall be calibrated so that they are accurate to within ± 3 psi.

(e) If used to test a train, a yard air test device and any yard air test equipment shall be accurate and function as intended.

§ 232.219 Double heading and helper service.

(a) When more than one locomotive is attached to a train, the engineer of the controlling locomotive shall operate the brakes. In case it becomes necessary for the controlling locomotive to give up control of the train short of the destination of the train, a Class III brake test pursuant to § 232.211 shall be made to ensure that the brakes are operative from the automatic brake valve of the locomotive taking control of the train.

(b) When one or more helper locomotives are placed in a train, a visual inspection shall be made of each helper locomotive brake system to determine that the brake system operates as intended in response to a 20-psi reduction initiated from the controlling locomotive of the train. A helper locomotive with inoperative or ineffective brakes shall be repaired prior to use or removed from the train.

(c) If a helper locomotive utilizes a Helper Link device or a similar technology, the locomotive and device shall be equipped, designed, and maintained as follows:

(1) The locomotive engineer shall be notified by a distinctive alarm of any loss of communication between the device and the two-way end-of-train device of more than 25 seconds;

(2) A method to reset the device shall be provided in the cab of the helper locomotive that can be operated from the engineer's usual position during operation of the locomotive;

(3) The device shall be tested for accuracy and calibrated if necessary according to the manufacturer's specifications and procedures every 365 days. This shall include testing radio frequencies and modulation of the device. A legible record of the date and location of the last test or calibration shall be maintained with the device.

Subpart D—Periodic Maintenance and Testing Requirements

§ 232.301 Scope.

This subpart contains the periodic brake system maintenance and testing requirements for equipment used in freight and other non-passenger trains.

§ 232.303 General requirements.

(a) *Definitions.* The following definitions are intended solely for the purpose of identifying what constitutes a shop or repair track under this subpart.

(1) *Shop or repair track* means:

(i) A fixed repair facility or track designated by the railroad as a shop or repair track;

(ii) A fixed repair facility or track which is regularly and consistently used to perform major repairs;

(iii) track which is used at a location to regularly and consistently perform both minor and major repairs where the railroad has not designated a certain portion of that trackage as a repair track;

(iv) A track designated or used by a railroad to regularly and consistently perform minor repairs during the period when major repairs are being conducted on such a track; and

(v) The facilities and tracks identified in paragraphs (a)(1)(i) through (a)(1)(iv) shall be considered shop or repair tracks regardless of whether a mobile repair vehicle is used to conduct the repairs.

(2) *Major repair* means a repair of such a nature that it would normally require greater than four man-hours to accomplish or would involve the use of specialized tools and equipment. Major repairs would include such things as coupler replacement, draft gear repair, and repairs requiring the use of an air jack.

(3) *Minor repair* means repairs, other than major repairs, that can be accomplished in a short period of time with limited tools and equipment. Minor repairs would include such things as safety appliance straightening, handhold replacement, air hose replacement, lading adjustment, and coupler knuckle or knuckle pin replacement.

(b) A car on a shop or repair track shall be tested to determine that the air brakes apply and remain applied until a release is initiated.

(c) A car on a shop or repair track shall have its piston travel inspected. For cars equipped with 8½-inch or 10-inch diameter brake cylinders, piston travel shall be within 7 to 9 inches. If piston travel is found to be less than 7 inches or more than 9 inches, it must be adjusted to nominally 7½ inches. For cars not equipped with 8½-inch or 10-inch diameter brake cylinders, piston travel shall be within the piston travel stenciled or marked on the car or badge plate.

(d) Before a car is released from a shop or repair track, a qualified person shall ensure:

(1) The brake pipe is securely clamped;

(2) Angle cocks are properly located with suitable clearance and properly positioned to allow maximum air flow;

(3) Valves, reservoirs, and cylinders are tight on supports and the supports are securely attached to the car;

(4) Hand brakes are tested, inspected, and operate as intended; and

(5) Brake indicators, on cars so equipped, are accurate and operate as intended.

(e) If the repair track air brake test or single car test required in §§ 232.305 and 232.307 cannot be conducted at the point where repairs can be made to the car, the car may be moved after the repairs are effectuated to the next forward location where the test can be performed. Inability to perform a repair track air brake test or single car test does not constitute an inability to effectuate the necessary repairs.

(1) If it is necessary to move a car from the location where the repairs are performed in order to perform a repair track air brake test or a single car test required by this part, a tag or card shall be placed on both sides of the equipment, or an automated tracking system approved for use by FRA, with

the following information about the equipment:

(i) The reporting mark and car number;

(ii) The name of the inspecting railroad;

(iii) The location where repairs were performed and date;

(iv) Indication whether the car requires a repair track brake test or single car test;

(v) The location where the appropriate test is to be performed; and

(vi) The name, signature, if possible, and job title of the qualified person approving the move.

(2) The tag or card required by paragraph (e)(1) of this section shall remain affixed to the equipment until the necessary test has been performed.

(3) An electronic or written record or copy of each tag or card attached to or removed from a car or locomotive shall be retained for 90 days and, upon request, shall be made available within 15 calendar days for inspection by FRA or State inspectors.

(4) The record or copy of each tag or card removed from a car or locomotive shall contain the date, location, and the signature or identification of the qualified person removing it from the piece of equipment.

(f) The location and date of the last repair track brake test or single car test required by §§ 232.305 and 232.307 of this part shall be clearly stenciled, marked, or labeled in two-inch high letters or numerals on the side of the equipment. Alternatively, the railroad industry may use an electronic or automated tracking system to track the required information and the performance of the tests required by §§ 232.305 and 232.307 of this part.

(1) Electronic or automated tracking systems used to meet the requirement contained in this paragraph shall be capable of being reviewed and monitored by FRA at any time to ensure the integrity of the system. FRA's Associate Administrator for Safety may prohibit or revoke the railroad industry's authority to utilize an electronic or automated tracking system in lieu of stenciling or marking if FRA finds that the electronic or automated tracking system is not properly secure, is inaccessible to FRA or railroad employees, or fails to adequately track and monitor the equipment. FRA will record such a determination in writing, include a statement of the basis for such action, and will provide a copy of the document to the affected railroads.

(2) [Reserved.]

§ 232.305 Repair track air brake tests.

(a) Repair track brake tests shall be performed by a qualified person in accordance with either Section 3.0, ''Procedures for Repair Track Test for Air Brake Equipment,'' of the Association of American Railroads Standard S–486–99, ''Code of Air Brake System Tests for Freight Equipment,'' contained in the AAR *Manual of Standards and Recommended Practices, Section E* (April 1, 1999) or an alternative procedure approved by FRA pursuant to § 232.17. The incorporation by reference of this AAR standard was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy of the incorporated document from the Association of American Railroads, 50 F Street, NW., Washington, DC 20001. You may inspect a copy of the document at the Federal Railroad Administration, Docket Clerk, 1120 Vermont Avenue, NW., Suite 7000, Washington, DC or at the Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC.

(b) Except as provided in § 232.303(e), a railroad shall perform a repair track brake test on a car when:

(1) A car has its brakes cut-out or inoperative when removed from a train or when placed on a shop or repair track;

(2) A car is on a repair or shop track, as defined in § 232.303(a), for any reason and has not received a repair track brake test within the previous 12 month period;

(3) A car is found with missing or incomplete repair track brake test information;

(4) One or more of the following conventional air brake equipment items is removed, repaired, or replaced:

(i) Brake reservoir;

(ii) Control valve mounting gasket; or

(iii) Pipe bracket stud.

(5) A car is found with one or more of the following wheel defects:

(i) Built-up tread, unless known to be caused by hand brake left applied;

(ii) Slid flat wheel, unless known to be caused by hand brake left applied; or

(iii) Thermal cracks.

(c) Except as provided in paragraph (d) of this section, each car shall receive a repair track brake test no less than every 5 years.

(d) Each car shall receive a repair track brake test no less than 8 years from the date the car was built or rebuilt.

§ 232.307 Single car tests.

(a) Single car tests shall be performed by a qualified person in accordance with either Section 4.0, ''Tests-Standard Single Capacity Freight Brake Equipment (Single Car Test),'' of the Association of American Railroads Standard S–486–99, ''Code of Air Brake System Tests for Freight Equipment,'' contained in the AAR *Manual of Standards and Recommended Practices, Section E* (April 1, 1999) or an alternative procedure approved by FRA pursuant to § 232.17. The incorporation by reference of this AAR standard was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy of the incorporated document from the Association of American Railroads, 50 F Street, NW., Washington, DC 20001. You may inspect a copy of the document at the Federal Railroad Administration, Docket Clerk, 1120 Vermont Avenue, NW., Suite 7000, Washington, DC or at the Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC.

(b) Except as provided in § 232.303(e), a railroad shall perform a single car test on a car when one or more of the following conventional air brake equipment items is removed, repaired or replaced:

(1) Service portion;

(2) Emergency portion; or

(3) Pipe bracket.

(c) A single car test pursuant to paragraph (a) of this section shall be performed on a new or rebuilt car prior to placing or using the car in revenue service.

§ 232.309 Repair track air brake test and single car test equipment and devices.

(a) Test equipment and devices used to perform repair track air brake tests or single car tests shall be tested for correct operation at least once each calendar day of use.

(b) Except for single car test devices, mechanical test devices such as pressure gauges, flow meters, orifices, etc. shall be calibrated once every 92 days.

(c) Electronic test devices shall be calibrated at least once every 365 days.

(d) Test equipment and single car test devices placed in service shall be tagged or labeled with the date its next calibration is due.

(e) Each single car test device shall be tested not less frequently than every 92 days after being placed in service and may not continue in service if more than one year has passed since its last 92-day test.

(f) Each single car test device shall be disassembled and cleaned not less frequently than every 365 days after being placed in service.

Subpart E—End-of-Train Devices

§ 232.401 Scope.

This subpart contains the requirements related to the performance, operation, and testing of end-of-train devices. Unless expressly excepted in this subpart, the requirements of this subpart apply to all trains operating on track which is part of the general railroad system of transportation.

§ 232.403 Design standards for one-way end-of-train devices.

(a) *General.* A one-way end-of-train device shall be comprised of a rear-of-train unit (rear unit) located on the last car of a train and a front-of-train unit (front unit) located in the cab of the locomotive controlling the train.

(b) *Rear unit.* The rear unit shall be capable of determining the brake pipe pressure on the rear car and transmitting that information to the front unit for display to the locomotive engineer. The rear unit shall be—

(1) Capable of measuring the brake pipe pressure on the rear car with an accuracy of ±3 pounds per square inch (psig) and brake pipe pressure variations of ±1 psig;

(2) Equipped with a ''bleeder valve'' that permits the release of any air under pressure from the rear of train unit or the associated air hoses prior to detaching the rear unit from the brake pipe;

(3) Designed so that an internal failure will not cause an undesired emergency brake application;

(4) Equipped with either an air gauge or a means of visually displaying the rear unit's brake pipe pressure measurement; and

(5) Equipped with a pressure relief safety valve to prevent explosion from a high pressure air leak inside the rear unit.

(c) *Reporting rate.* Multiple data transmissions from the rear unit shall occur immediately after a variation in the rear car brake pipe pressure of ±2 psig and at intervals of not greater than 70 seconds when the variation in the rear car brake pipe pressure over the 70-second interval is less than ±2 psig.

(d) *Operating environment.* The rear unit shall be designed to meet the performance requirements of paragraphs (b) and (c) of this section under the following environmental conditions:

(1) At temperatures from −40°C to 60°C;

(2) At a relative humidity of 95% noncondensing at 50°C;

(3) At altitudes of zero to 12,000 feet mean sea level;

(4) During vertical and lateral vibrations of 1 to 15 Hz., with 0.5 g. peak to peak, and 15 to 500 Hz., with 5 g. peak to peak;

(5) During the longitudinal vibrations of 1 to 15 Hz., with 3 g. peak to peak, and 15 to 500 Hz., with 5 g. peak to peak; and

(6) During a shock of 10 g. peak for 0.1 second in any axis.

(e) *Unique code.* Each rear unit shall have a unique and permanent identification code that is transmitted along with the pressure message to the front-of-train unit. A code obtained from the Association of American Railroads, 50 F Street, NW., Washington, DC 20036 shall be deemed to be a unique code for purposes of this section. A unique code also may be obtained from the Office of Safety Assurance and Compliance (RRS–10), Federal Railroad Administration, Washington, DC 20590.

(f) *Front unit.* (1) The front unit shall be designed to receive data messages from the rear unit and shall be capable of displaying the rear car brake pipe pressure in increments not to exceed one pound.

(2) The display shall be clearly visible and legible in daylight and darkness from the engineer's normal operating position.

(3) The front device shall have a means for entry of the unique identification code of the rear unit being used. The front unit shall be designed so that it will display a message only from the rear unit with the same code as entered into the front unit.

(4) The front unit shall be designed to meet the requirements of paragraphs (d)(2), (3), (4), and (5) of this section. It shall also be designed to meet the performance requirements in this paragraph under the following environmental conditions:

(i) At temperatures from 0°C to 60°C;

(ii) During a vertical or lateral shock of 2 g. peak for 0.1 second; and

(iii) During a longitudinal shock of 5 g. peak for 0.1 second.

(g) *Radio equipment.* (1) The radio transmitter in the rear unit and the radio receiver in the front unit shall comply with the applicable regulatory requirements of the Federal Communications Commission (FCC) and use of a transmission format acceptable to the FCC.

(2) If power is supplied by one or more batteries, the operating life shall be a minimum of 36 hours at 0°C.

§ 232.405 Design and performance standards for two-way end-of-train devices.

Two-way end-of-train devices shall be designed and perform with the features applicable to one-way end-of-train devices described in § 232.403, except those included in § 232.403(b)(3). In addition, a two-way end-of-train device shall be designed and perform with the following features:

(a) An emergency brake application command from the front unit of the device shall activate the emergency air valve at the rear of the train within one second.

(b) The rear unit of the device shall send an acknowledgment message to the front unit immediately upon receipt of an emergency brake application command. The front unit shall listen for this acknowledgment and repeat the brake application command if the acknowledgment is not correctly received.

(c) The rear unit, on receipt of a properly coded command, shall open a valve in the brake line and hold it open for a minimum of 15 seconds. This opening of the valve shall cause the brake line to vent to the exterior.

(d) The valve opening shall have a minimum diameter of ¾ inch and the internal diameter of the hose shall be ⅝ inch to effect an emergency brake application.

(e) The front unit shall have a manually operated switch which, when activated, shall initiate an emergency brake transmission command to the rear unit or the locomotive shall be equipped with a manually operated switch on the engineer control stand designed to perform the equivalent function. The switch shall be labeled ''Emergency'' and shall be protected so that there will exist no possibility of accidental activation.

(f) All locomotives ordered on or after August 1, 2001, or placed in service for the first time on or after August 1, 2003, shall be designed to automatically activate the two-way end-of-train device to effectuate an emergency brake application whenever it becomes necessary for the locomotive engineer to place the train air brakes in emergency.

(g) The availability of the front-to-rear communications link shall be checked automatically at least every 10 minutes.

(h) Means shall be provided to confirm the availability and proper functioning of the emergency valve.

(i) Means shall be provided to arm the front and rear units to ensure the rear unit responds to an emergency command only from a properly associated front unit.

§ 232.407 Operations requiring use of two-way end-of-train devices; prohibition on purchase of nonconforming devices.

(a) *Definitions.* The following definitions are intended solely for the purpose of identifying those operations subject to the requirements for the use of two-way end-of-train devices.

(1) *Heavy grade* means:

(i) For a train operating with 4,000 trailing tons or less, a section of track with an average grade of two percent or greater over a distance of two continuous miles; and

(ii) For a train operating with greater than 4,000 trailing tons, a section of track with an average grade of one percent or greater over a distance of three continuous miles.

(2) *Train* means one or more locomotives coupled with one or more rail cars, except during switching operations or where the operation is that of classifying cars within a railroad yard for the purpose of making or breaking up trains.

(3) *Local train* means a train assigned to perform switching en route which operates with 4,000 trailing tons or less and travels between a point of origin and a point of final destination, for a distance that is no greater than that which can normally be operated by a single crew in a single tour of duty.

(4) *Work train* means a non-revenue service train of 4,000 trailing tons or less used for the administration and upkeep service of the railroad.

(5) *Trailing tons* means the sum of the gross weights—expressed in tons—of the cars and the locomotives in a train that are not providing propelling power to the train.

(b) *General.* All trains not specifically excepted in paragraph (e) of this section shall be equipped with and shall use either a two-way end-of-train device meeting the design and performance requirements contained in § 232.405 or a device using an alternative technology to perform the same function.

(c) *New devices.* Each newly manufactured end-of-train device purchased by a railroad after January 2, 1998 shall be a two-way end-of-train device meeting the design and performance requirements contained in § 232.405 or a device using an alternative technology to perform the same function.

(d) *Grandfathering.* Each two-way end-of-train device purchased by any person prior to July 1, 1997 shall be deemed to meet the design and performance requirements contained in § 232.405.

(e) *Exceptions.* The following types of trains are excepted from the requirement for the use of a two-way end-of-train device:

(1) Trains with a locomotive or locomotive consist located at the rear of the train that is capable of making an emergency brake application, through a command effected by telemetry or by a crew member in radio contact with the controlling locomotive;

(2) Trains operating in the push mode with the ability to effectuate an emergency brake application from the rear of the train;

(3) Trains with an operational caboose placed at the rear of the train, carrying one or more crew members in radio contact with the controlling locomotive, that is equipped with an emergency brake valve;

(4) Trains operating with a secondary, fully independent braking system capable of safely stopping the train in the event of failure of the primary system;

(5) Trains that do not operate over heavy grades and do not exceed 30 mph;

(6) Local trains, as defined in paragraph (a)(3) of this section, that do not operate over heavy grades;

(7) Work trains, as defined in paragraph (a)(4) of this section, that do not operate over heavy grades;

(8) Trains that operate exclusively on track that is not part of the general railroad system;

(9) Trains that must be divided into two sections in order to traverse a grade (*e.g.,* doubling a hill). This exception applies only to the extent necessary to traverse the grade and only while the train is divided in two for such purpose;

(10) Passenger trains in which all of the cars in the train are equipped with an emergency brake valve readily accessible to a crew member;

(11) Passenger trains that have a car at the rear of the train, readily accessible to one or more crew members in radio contact with the engineer, that is equipped with an emergency brake valve readily accessible to such a crew member; and

(12) Passenger trains that have twenty-four (24) or fewer cars (not including locomotives) in the consist and that are equipped and operated in accordance with the following train-configuration and operating requirements:

(i) If the total number of cars in a passenger train consist is twelve (12) or fewer, a car located no less than halfway through the consist (counting from the first car in the train) must be equipped with an emergency brake valve readily accessible to a crew member;

(ii) If the total number of cars in a passenger train consist is thirteen (13) to twenty-four (24), a car located no less than two-thirds (⅔) of the way through the consist (counting from the first car in the train) must be equipped with an emergency brake valve readily accessible to a crew member;

(iii) Prior to descending a section of track with an average grade of two percent or greater over a distance of two continuous miles, the engineer of the train shall communicate with the conductor, to ensure that a member of the crew with a working two-way radio is stationed in the car with the rearmost readily accessible emergency brake valve on the train when the train begins its descent; and

(iv) While the train is descending a section of track with an average grade of two percent or greater over a distance of two continuous miles, a member of the train crew shall occupy the car that contains the rearmost readily accessible emergency brake valve on the train and be in constant radio communication with the locomotive engineer. The crew member shall remain in this car until the train has completely traversed the heavy grade.

(f) *Specific requirements for use.* If a train is required to use a two-way end-of-train device:

(1) That device shall be armed and operable from the time the train departs from the point where the device is installed until the train reaches its destination. If a loss of communication occurs at the location where the device is installed, the train may depart the location at restricted speed for a distance of no more than one mile in order to establish communication. When communication is established, the quantitative values of the head and rear unit shall be compared pursuant to § 232.409(b) and the device tested pursuant to § 232.409(c), unless the test was performed prior to installation.

(2) The rear unit batteries shall be sufficiently charged at the initial terminal or other point where the device is installed and throughout the train's trip to ensure that the end-of-train device will remain operative until the train reaches its destination.

(3) The device shall be activated to effectuate an emergency brake application either by using the manual toggle switch or through automatic activation, whenever it becomes necessary for the locomotive engineer to initiate an emergency application of the air brakes using either the automatic brake valve or the conductor's emergency brake valve.

(g) *En route failure of device on a freight or other non-passenger train.* Except on passenger trains required to be equipped with a two-way end-of-train device (which are provided for in paragraph (h) of this section), en route failures of a two-way end-of-train device shall be handled in accordance with this paragraph. If a two-way end-of-train device or equivalent device fails en route (*i.e.,* is unable to initiate an emergency brake application from the rear of the train due to certain losses of communication (front to rear) or due to

other reasons, the speed of the train on which it is installed shall be limited to 30 mph until the ability of the device to initiate an emergency brake application from the rear of the train is restored. This limitation shall apply to a train using a device that uses an alternative technology to serve the purpose of a two-way end-of-train device. With regard to two-way end-of-train devices, a loss of communication between the front and rear units is an en route failure only if the loss of communication is for a period greater than 16 minutes and 30 seconds. Based on the existing design of the devices, the display to an engineer of a message that there is a communication failure indicates that communication has been lost for 16 minutes and 30 seconds or more.

(1) If a two-way end-of-train device fails en route, the train on which it is installed, in addition to observing the 30-mph speed limitation, shall not operate over a section of track with an average grade of two percent or greater for a distance of two continuous miles, unless one of the following alternative measures is provided:

(i) Use of an occupied helper locomotive at the end of the train. This alternative may be used only if the following requirements are met:

(A) The helper locomotive engineer shall initiate and maintain two-way voice radio communication with the engineer on the head end of the train; this contact shall be verified just prior to passing the crest of the grade.

(B) If there is a loss of communication prior to passing the crest of the grade, the helper locomotive engineer and the head-end engineer shall act immediately to stop the train until voice communication is resumed, in accordance with the railroad's operating rules.

(C) If there is a loss of communication once the descent has begun, the helper locomotive engineer and the head-end engineer shall act to stop the train, in accordance with the railroad's operating rules, if the train has reached a predetermined rate of speed that indicates the need for emergency braking.

(D) The brake pipe of the helper locomotive shall be connected and cut into the train line and tested to ensure operation.

(ii) Use of an occupied caboose at the end of the train with a tested, functioning brake valve capable of initiating an emergency brake application from the caboose. This alternative may be used only if the train service employee in the caboose and the engineer on the head end of the train establish and maintain two-way voice radio communication and respond appropriately to the loss of such communication in the same manner as prescribed for helper locomotives in paragraph (g)(1)(i) of this section.

(iii) Use of a radio-controlled locomotive at the rear of the train under continuous control of the engineer in the head end by means of telemetry, but only if such radio-controlled locomotive is capable of initiating an emergency application on command from the lead (controlling) locomotive.

(2) [Reserved.]

(h) *En route failure of device on a passenger train.*

(1) A passenger train required to be equipped with a two-way end-of-train device that develops an en route failure of the device (as explained in paragraph (g) of this section) shall not operate over a section of track with an average grade of two percent or greater over a distance of two continuous miles until an operable two-way end-of-train device is installed on the train or an alternative method of initiating an emergency brake application from the rear of the train is achieved.

(2) Except as provided in paragraph (h)(1) of this section, a passenger train required to be equipped with a two-way end-of-train device that develops an en route failure of the device (as explained in paragraph (g) of this section) shall be operated in accordance with the following:

(i) A member of the train crew shall be immediately positioned in the car which contains the rearmost readily accessible emergency brake valve on the train and shall be equipped with an operable two-way radio that communicates with the locomotive engineer; and

(ii) The locomotive engineer shall periodically make running tests of the train's air brakes until the failure is corrected; and

(3) Each en route failure shall be corrected at the next location where the necessary repairs can be conducted or at the next location where a required brake test is to be performed, whichever is reached first.

§ 232.409 Inspection and testing of end-of-train devices.

(a) After each installation of either the front or rear unit of an end-of-train device, or both, on a train and before the train departs, the railroad shall determine that the identification code entered into the front unit is identical to the unique identification code on the rear unit.

(b) After each installation of either the front or rear unit of an end-of-train device, or both, on a train and before the train departs, the functional capability of the device shall be determined, after charging the train, by comparing the quantitative value of the air pressure displayed on the front unit with the quantitative value of the air pressure displayed on the rear unit or on a properly calibrated air gauge. The end-of-train device shall not be used if the difference between the two readings exceeds three pounds per square inch.

(c) A two-way end-of-train device shall be tested at the initial terminal or other point of installation to ensure that the device is capable of initiating an emergency power brake application from the rear of the train. If this test is conducted by a person other than a member of the train crew, the locomotive engineer shall be notified that a successful test was performed. The notification required by this paragraph may be provided to the locomotive engineer by any means determined appropriate by the railroad; however, a written or electronic record of the notification shall be maintained in the cab of the controlling locomotive and shall include the date and time of the test, the location where the test was performed, and the name of person conducting the test.

(d) The telemetry equipment shall be tested for accuracy and calibrated if necessary according to the manufacturer's specifications and procedures at least every 365 days. This shall include testing radio frequencies and modulation of the device. The date and location of the last calibration or test as well as the name of the person performing the calibration or test shall be legibly displayed on a weather-resistant sticker or other marking device affixed to the outside of both the front unit and the rear unit; however, if the front unit is an integral part of the locomotive or is inaccessible, then the information may be recorded on Form FRA F6180–49A instead, provided the serial number of the unit is recorded.

Subpart F—Introduction of New Brake System Technology

§ 232.501 Scope.

This subpart contains general requirements for introducing new brake system technologies. This subpart is intended to facilitate the introduction of new complete brake system technologies or major upgrades to existing systems which the current regulations do not adequately address (*i.e.,* electronic brake systems). This subpart is not intended for use in the introduction of a new brake component or material.

§ 232.503 Process to introduce new brake system technology.

(a) Pursuant to the procedures contained in § 232.17, each railroad shall obtain special approval from the FRA Associate Administrator for Safety of a pre-revenue service acceptance testing plan, developed pursuant to § 232.505, for the new brake system technology, prior to implementing the plan.

(b) Each railroad shall complete a pre-revenue service demonstration of the new brake system technology in accordance with the approved plan, shall fulfill all of the other requirements prescribed in § 232.505, and shall obtain special approval from the FRA Associate Administrator for Safety under the procedures of § 232.17 prior to using such brake system technology in revenue service.

§ 232.505 Pre-revenue service acceptance testing plan.

(a) *General; submission of plan.* Except as provided in paragraph (f) of this section, before using a new brake system technology for the first time on its system the operating railroad or railroads shall submit a pre-revenue service acceptance testing plan containing the information required by paragraph (e) of this section and obtain the approval of the FRA Associate Administrator for Safety, under the procedures specified in § 232.17.

(b) *Compliance with plan.* After receiving FRA approval of the pre-revenue service testing plan and before introducing the new brake system technology into revenue service, the operating railroad or railroads shall:

(1) Adopt and comply with such FRA-approved plan, including fully executing the tests required by the plan;

(2) Report to the FRA Associate Administrator for Safety the results of the pre-revenue service acceptance tests;

(3) Correct any safety deficiencies identified by FRA in the design of the equipment or in the inspection, testing, and maintenance procedures or, if safety deficiencies cannot be corrected by design or procedural changes, agree to comply with any operational limitations that may be imposed by the Associate Administrator for Safety on the revenue service operation of the equipment; and

(4) Obtain FRA approval to place the new brake system technology in revenue service.

(c) *Compliance with limitations.* The operating railroad shall comply with each operational limitation, if any, imposed by the Associate Administrator for Safety.

(d) *Availability of plan.* The plan shall be made available to FRA for inspection and copying upon request.

(e) *Elements of plan.* The plan shall include all of the following elements:

(1) An identification of each waiver, if any, of FRA or other Federal safety regulations required for the tests or for revenue service operation of the equipment.

(2) A clear statement of the test objectives. One of the principal test objectives shall be to demonstrate that the equipment meets the safety design and performance requirements specified in this part when operated in the environment in which it is to be used.

(3) A planned schedule for conducting the tests.

(4) A description of the railroad property or facilities to be used to conduct the tests.

(5) A detailed description of how the tests are to be conducted. This description shall include:

(i) An identification of the equipment to be tested;

(ii) The method by which the equipment is to be tested;

(iii) The criteria to be used to evaluate the equipment's performance; and

(iv) The means by which the test results are to be reported to FRA.

(6) A description of any special instrumentation to be used during the tests.

(7) A description of the information or data to be obtained.

(8) A description of how the information or data obtained is to be analyzed or used.

(9) A description of any criteria to be used as safety limits during the testing.

(10) A description of the criteria to be used to measure or determine the success or failure of the tests. If acceptance is to be based on extrapolation of less than full level testing results, the analysis to be done to justify the validity of the extrapolation shall be described.

(11) A description of any special safety precautions to be observed during the testing.

(12) A written set of standard operating procedures to be used to ensure that the testing is done safely.

(13) Quality control procedures to ensure that the inspection, testing, and maintenance procedures are followed.

(14) Criteria to be used for the revenue service operation of the equipment.

(15) A description of all testing of the equipment that has previously been performed, if any.

(f) *Exception.* For brake system technologies that have previously been used in revenue service in the United States, the railroad shall test the equipment on its system, prior to placing it in revenue service, to ensure the compatibility of the equipment with the operating system (track, signals, etc.) of the railroad. A description of such testing shall be retained by the railroad and made available to FRA for inspection and copying upon request.

Appendix A to Part 232—Schedule of Civil Penalties [1]

Section	Violation	Willful violation
Subpart A—General		
232.15 Movement of power brake defects:		
(a) Improper movement, general	([1])	([1])
(11) Failure to make determinations and provide notification of en route defect	$2,500	$5,000
(b) Complete failure to tag	2,500	5,000
(1) Insufficient tag or record	1,000	2,000
(2), (4) Improper removal of tag	2,000	4,000
(3) Failure to retain record of tag	2,000	4,000
(c) Improper loading or purging	2,500	5,000
(e) Improper placement of defective equipment	2,500	5,000
232.19 Availability of records	([1])	([1])
Subpart B—General Requirements		
232.103 All train brake systems:		
(a)–(c), (h)–(i) Failure to meet general design requirements	2,500	5,000
(d) Failure to have proper percentage of operative brakes from Class I brake test	5,000	7,500
(e) Operating with less than 85 percent operative brakes	5,000	7,500
(f) Improper use of car with inoperative or ineffective brakes	2,500	5,000
(g) Improper display of piston travel	2,500	5,000

Section	Violation	Willful violation
(m) Failure to stop train with excess air flow or gradient	2,500	5,000
(n) Securement of unattended equipment:.		
(1) Failure to apply sufficient number of hand brakes; failure to develop or implement procedure to verify number applied	5,000	7,500
(2) Failure to initiate emergency	2,500	5,000
(3) Failure to apply hand brakes on locomotives	2,500	5,000
(4) Failure to adopt or comply with procedures for securing unattended locomotive	5,000	7,500
(o) Improper adjustment of air regulating devices	2,500	5,000
(p) Failure to hold supervisors jointly responsible	2,500	5,000
232.105 Locomotives:		
(a) Air brakes not in safe and suitable condition	1,000-5,000	2,000-7,500
(b) Not equipped with proper hand or parking brake	5,000	7,500
(c)(1) Failure to inspect/repair hand or parking brake	2,500	5,000
(2) Failure to properly stencil, tag, or record	2,000	4,000
(d) Excess leakage from equalizing reservoir	2,500	5,000
(e) Improper use of feed or regulating valve braking	2,500	5,000
(f) Improper use of passenger position	2,500	5,000
(g) Brakes in operative condition	2,500	5,000
232.107 Air sources/cold weather operations:		
(a)(1), (2) Failure to adopt or comply with monitoring program for yard air sources	5,000	7,500
(3) Failure to maintain records	2,500	5,000
(b) Failure to blow condensation	2,500	5,000
(c) Use of improper chemicals	5,000	7,500
(d) Failure to equip or drain yard air reservoirs	2,500	5,000
(e) Failure to adopt or comply cold weather operating procedures	5,000	7,500
232.109 Dynamic brakes:		
(a) Failure to provide information	5,000	7,500
(b) Failure to make repairs	5,000	7,500
(c) Failure to properly tag	2,500	5,000
(d) Failure to maintain record of repair	2,000	4,000
(e) Improper deactivation	2,500	5,000
(f) Improper use of locomotive as controlling unit	2,500	5,000
(g) Locomotive not properly equipped with indicator	2,500	5,000
(h) Rebuilt locomotive not properly equipped	2,500	5,000
(j) Failure to adopt or comply with dynamic brake operating rules	5,000	7,500
(k) Failure to adopt or comply with training on operating procedures	5,000	7,500
232.111 Train handling information:		
(a) Failure to adopt and comply with procedures	5,000	7,500
(b) Failure to provide specific information	2,500	5,000
Subpart C—Inspection and Testing Requirements		
232.203 Training requirements:		
(a) Failure to develop or adopt program	7,500	11,000
(b)(1)–(9) Failure to address or comply with specific required item or provision of program	5,000	7,500
(c) Failure to adopt or comply with two-way EOT program	5,000	7,500
(d) Failure to adopt or comply with retaining valve program	5,000	7,500
(e) Failure to maintain adequate records	5,000	7,500
(f) Failure to adopt and comply with periodic assessment plan	7,500	11,000
232.205 Class I brake test—initial terminal inspection:		
(a) Complete failure to perform inspection	[1] 10,000	15,000
(b)(1)–(4), (6)–(8) Partial failure to perform inspection	5,000	7,500
(b)(5) Failure to properly adjust piston travel (per car)	2,500	5,000
(c) Failure to use carman when required	5,000	7,500
(d) Failure to provide proper notification	2,500	5,000
(e) Failure to void compressed air	2,500	5,000
(f) Failure to perform inspection on cars added	5,000	7,500
232.207 Class IA brake tests—1,000-mile inspection:		
(a) Complete failure to perform inspection	[1] 15,000	7,500
(b)(1)–(6) Partial failure to perform inspection	2,500	5,000
(c) Failure to properly designate location	5,000	7,500
(c)(1) Failure to perform at designated location	5,000	7,500
(c)(2) Failure to provide notification	2,500	5,000
232.209 Class II brake tests—intermediate inspection:		
(a) Complete failure to perform inspection	[1] 5,000	7,500
(b)(1)–(5), (c) Partial failure to perform inspection	2,500	5,000
232.211 Class III brake tests—trainline continuity inspection:		
(a) Complete failure to perform inspection	5,000	7,500
(b)(1)–(4), (c) Partial failure to perform inspection	2,500	5,000
232.213 Extended haul trains:		
(a)(1) Failure to properly designate an extended haul train	5,000	7,500
(a)(2)–(3), (5)(i), (8) Failure to perform inspections	[2]	[2]
(a)(4) Failure to remove defective car (per car)	2,000	4,000
(a)(5)(ii), (6) Failure to conduct inbound inspection	5,000	7,500
(a)(7) Failure to maintain record of defects (per car)	2,000	4,000

Section	Violation	Willful violation
232.215 Transfer train brake tests:		
(a) Failure to perform inspection	5,000	7,500
(b) Failure to perform on cars added	2,500	5,000
232.217 Train brake system tests conducted using yard air:		
(a) Failure to use suitable device	2,500	5,000
(b) Improper connection of air test device	5,000	7,500
(c) Failure to properly perform inspection	([2])	([2])
(d) Failure to calibrate test device	2,500	5,000
(e) Failure to use accurate device	2,500	5,000
232.219 Double heading and helper service:		
(a) Failure to perform inspection or inability to control brakes	2,500	5,000
(b) Failure to make visual inspection	2,500	5,000
(c) Use of improper helper link device	2,500	5,000
Subpart D—Periodic Maintenance and Testing Requirements		
232.303 General requirements:		
(b)–(d) Failure to conduct inspection or test when car on repair track	2,500	5,000
(e) Improper movement of equipment for testing	2,500	5,000
(e)(1) Failure to properly tag equipment for movement	2,000	5,000
(e)(2)–(4) Failure to retain record or improper removal of tag or card	2,000	4,000
(f) Failure to stencil or track test information	2,500	5,000
232.305 Repair track air brake tests:		
(a) Failure to test in accord with required procedure	2,500	5,000
(b)–(d) Failure to perform test	2,500	5,000
232.307 Single car tests:		
(a) Failure to test in accord with required procedure	2,500	5,000
(b)–(c) Failure to perform test	2,500	5,000
232.309 Repair track air brake test and single car test equipment and devices:		
(a)–(f) Failure to properly test or calibrate	2,500	5,000
Subpart E—End-of-Train Devices		
232.403 Design standards for one-way devices:		
(a)–(g) Failure to meet standards	2,500	5,000
232.405 Design standards for two-way devices:		
(a)–(i) Failure to meet standards	2,500	5,000
232.407 Operating requirements for two-way devices:		
(b) Failure to equip a train	5,000	7,500
(c) Improper purchase	2,500	5,000
(f)(1) Failure of device to be armed and operable	5,000	7,500
(f)(2) Insufficient battery charge	2,500	5,000
(f)(3) Failure to activate the device	2,500	5,000
(g) Improper handling of en route failure, freight or other non-passenger	5,000	7,500
(h) Improper handling of en route failure, passenger	5,000	7,500
232.409 Inspection and testing of devices:		
(a) Failure to have unique code	2,500	5,000
(b) Failure to compare quantitative values	2,500	5,000
(c) Failure to test emergency capability	5,000	7,500
(d) Failure to properly calibrate	2,500	5,000
Subpart F—Introduction of New Brake System Technology		
232.503 Process to introduce new technology:		
(b) Failure to obtain FRA approval	10,000	15,000
232.505 Pre-revenue service acceptance testing plan:		
(a) Failure to obtain FRA approval	5,000	7,500
(b) Failure to comply with plan	2,500	5,000
(f) Failure to test previously used technology	5,000	7,500

[1] A penalty may be assessed against an individual only for a willful violation. Generally when two or more violations of these regulations are discovered with respect to a single unit of equipment that is placed or continued in service by a railroad, the appropriate penalties set forth above are aggregated up to a maximum of $11,000 per day. An exception to this rule is the $15,000 penalty for willful violation of § 232.503 (failure to get FRA approval before introducing new technology) with respect to a single unit of equipment; if the unit has additional violative conditions, the penalty may routinely be aggregated to $15,000. Although the penalties listed for failure to perform the brake inspections and tests under § 232.205 through § 232.209 may be assessed for each train that is not properly inspected, failure to perform any of the inspections and tests required under those sections will be treated as a violation separate and distinct from, and in addition to, any substantive violative conditions found on the equipment contained in the train consist. Moreover, the Administrator reserves the right to assess a penalty of up to $22,000 for any violation where circumstances warrant. *See* 49 CFR part 209, appendix A.

Failure to observe any condition for movement of defective equipment set forth in § 232.15(a) will deprive the railroad of the benefit of the movement-for-repair provision and make the railroad and any responsible individuals liable for penalty under the particular regulatory section(s) concerning the substantive defect(s) present on the equipment at the time of movement.

Failure to provide any of the records or plans required by this part pursuant to § 232.19 will be considered a failure to maintain or develop the record or plan and will make the railroad liable for penalty under the particular regulatory section(s) concerning the retention or creation of the document involved.

Failure to properly perform any of the inspections specifically referenced in § 232.213 and § 232.217 may be assessed under each section of this part or this chapter, or both, that contains the requirements for performing the referenced inspection.

Appendix B to Part 232—Part 232 Prior to April 1, 2001

PART 232—RAILROAD POWER BRAKES AND DRAWBARS

Sec.
232.0 Applicability and penalties.
232.1 Power brakes; minimum percentage.
232.2 Drawbars; standard height.
232.3 Power brakes and appliances for operating power-brake systems.
232.10 General rules; locomotives.
232.11 Train air brake system tests.
232.12 Initial terminal road train airbrake tests.
232.13 Road train and intermediate terminal train air brake tests.
232.14 Inbound brake equipment inspection.
232.15 Double heading and helper service.
232.16 Running tests.
232.17 Freight and passenger train car brakes.
232.19 End of train device.
232 App A Appendix A to Part 232
232 App B Appendix B to Part 232

Authority: 45 U.S.C. 1, 3, 5, 6, 8–12, and 16, as amended; 45 U.S.C. 431, 438, as amended; 49 app. U.S.C. 1655(e), as amended; Pub. L. 100–342; and 49 CFR 1.49(c), (g), and (m).

§ 232.0 Applicability and penalties.

(a) Except as provided in paragraph (b), this part applies to all standard gage railroads.

(b) This part does not apply to:

(1) A railroad that operates only on track inside an installation which is not part of the general railroad system of transportation; or

(2) Rapid transit operations in an urban area that are not connected with the general railroad system of transportation.

(c) As used in this part, carrier means ''railroad,'' as that term is defined below.

(d) Railroad means all forms of non-highway ground transportation that run on rails or electromagnetic guideways, including (1) commuter or other short-haul rail passenger service in a metropolitan or suburban area, and (2) high speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads. Such term does not include rapid transit operations within an urban area that are not connected to the general railroad system of transportation.

(e) Any person (including a railroad and any manager, supervisor, official, or other employee or agent of a railroad) who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least $250 and not more than $10,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed $20,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense.

§ 232.1 Power brakes; minimum percentage.

On and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 percent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-brake cars in every such train which are associated together with the 85 percent shall have their brakes so used and operated.

§ 232.2 Drawbars; standard Height.

Not included in this Appendix. Moved to 49 CFR part 231.

§ 232.3 Power brakes and appliances for operating power-brake systems.

(a) The specifications and requirement for power brakes and appliances for operating power-brake systems for freight service set forth in the appendix to the report on further hearing, of May 30, 1945, are hereby adopted and prescribed. (See appendix to this part for order in Docket 13528.)

Rules for Inspection, Testing and Maintenance of Air Brake Equipment

§ 232.10 General rules; locomotives.

(a) Air brake and hand brake equipment on locomotives including tender must be inspected and maintained in accordance with the requirements of the Locomotive Inspection and United States Safety Appliance Acts and related orders and regulations of the Federal Railroad Administrator (FRA).

(b) It must be known that air brake equipment on locomotives is in a safe and suitable condition for service.

(c) Compressor or compressors must be tested for capacity by orifice test as often as conditions require but not less frequently than required by law and orders of the FRA.

(d) Main reservoirs shall be subjected to tests periodically as required by law and orders of the FRA.

(e) Air gauges must be tested periodically as required by law and orders of the FRA, and whenever any irregularity is reported. They shall be compared with an accurate deadweight tester, or test gauge. Gauges found inaccurate or defective must be repaired or replaced.

(f)(1) All operating portions of air brake equipment together with dirt collectors and filters must be cleaned, repaired and tested as often as conditions require to maintain them in a safe and suitable condition for service, and not less frequently than required by law and orders of the FRA.

(2) On locomotives so equipped, hand brakes, parts, and connections must be inspected, and necessary repairs made as often as the service requires, with date being suitably stenciled or tagged.

(g) The date of testing or cleaning of air brake equipment and the initials of the shop or station at which the work was done shall be placed on a card displayed under transparent covering in the cab of each locomotive unit.

(h)(1) Minimum brake cylinder piston travel must be sufficient to provide proper brake shoe clearance when brakes are released.

(2) Maximum brake cylinder piston travel when locomotive is standing must not exceed the following:

	Inches
Steam locomotives:	
Cam type of driving wheel brake	3½
Other types of driving wheel brakes	6
Engine truck brake	8
Engine trailer truck brake	8
Tender brake (truck mounted and tender bed mounted)	8
Tender brake (body mounted)	9
Locomotives other than steam:	
Driving wheel brake	6
Swivel type truck brake with brakes on more than one truck operated by one brake cylinder	7
Swivel type truck brake equipped with one brake cylinder	8
Swivel type truck brake equipped with two or more brake cylinders	6

(i)(1) Foundation brake rigging, and safety supports, where used, must be maintained in a safe and suitable condition for service. Levers, rods, brake beams, hangars and pins must be of ample strength and must not bind or foul in any way that will affect proper operation of brakes. All pins must be properly applied and secured in place with suitable locking devices. Brake shoes must be properly applied and kept approximately in line with treads of wheels or other braking surfaces.

(2) No part of the foundation brake rigging and safety supports shall be closer to the rails than specified by law and orders of the FRA.

(j)(1) Main reservoir leakage: Leakage from main air reservoir and related piping shall not exceed an average of 3 pounds per minute in a test of three minutes' duration, made after the pressure has been reduced 40 percent below maximum pressure.

(2) Brake pipe leakage: Brake pipe leakage must not exceed 5 pounds per minute after a reduction of 10 pounds has been made from brake pipe air pressure of not less than 70 pounds.

(3) Brake cylinder leakage: With a full service application of brakes, and with communication to the brake cylinders closed, brakes must remain applied not less than five minutes.

(4) The main reservoir system of each unit shall be equipped with at least one safety valve, the capacity of which shall be sufficient to prevent an accumulation of pressure of more than 10 pounds per square inch above the maximum setting of the compressor governor fixed by the chief mechanical officer of the carrier operating the locomotive.

(5) A suitable governor shall be provided that will stop and start the air compressor within 5 pounds above or below the pressures fixed.

(6) Compressor governor when used in connection with the automatic air brake system shall be so adjusted that the compressor will start when the main reservoir pressure is not less than 15 pounds above the maximum brake-pipe pressure fixed by the rules of the carrier and will not stop the compressor until the reservoir pressure has increased not less than 10 pounds.

(k) The communicating signal system on locomotives when used in passenger service must be tested and known to be in a safe and suitable condition for service before each trip.

(l) Enginemen when taking charge of locomotives must know that the brakes are in operative condition.

(m) In freezing weather drain cocks on air compressors of steam locomotives must be left open while compressors are shut off.

(n) Air pressure regulating devices must be adjusted for the following pressures:

	Pounds
Locomotives:	
(1) Minimum brake pipe air pressure:	
Road Service	70
Switch Service	60
(2) Minimum differential between brake pipe and main reservoir air pressures, with brake valve in running position	15
(3) Safety valve for straight air brake	30–55
(4) Safety valve for LT, ET, No. 8–EL, No. 14 El, No. 6–DS, No. 6–BL and No. 6–SL equipment	30–68
(5) Safety valve for HSC and No. 24–RL equipment	30–75
(6) Reducing valve for independent or straight air brake	30–50
(7) Self-lapping portion for electro-pneumatic brake (minimum full application pressure)	50
(8) Self-lapping portion for independent air brake (full application pressure)	30–50
(9) Reducing valve for air signal	40–60
(10) Reducing valve for high-speed brake (minimum)	50
Cars:	
(11) Reducing valve for high-speed brake	58–62
(12) Safety valve for PS, LN, UC, AML, AMU and AB–1–B air brakes	58–62
(13) Safety valve for HSC air brake	58–77
(14) Governor valve for water raising system	60
(15) Reducing valve for water raising system	20–30

§ 232.11 Train Air Brake System Tests.

(a) Supervisors are jointly responsible with inspectors, enginemen and trainmen for condition of train air brake and air signal equipment on motive power and cars to the extent that it is possible to detect defective equipment by required air tests.

(b) Communicating signal system on passenger equipment trains must be tested and known to be in a suitable condition for service before leaving terminal.

(c) Each train must have the air brakes in effective operating condition, and at no time shall the number and location of operative air brakes be less than permitted by Federal requirements. When piston travel is in excess of 10½ inches, the air brakes cannot be considered in effective operating condition.

(d) Condensation must be blown from the pipe from which air is taken before connecting yard line or motive power to train.

§ 232.12 Initial Terminal Road Train Airbrake Tests.

(a)(1) Each train must be inspected and tested as specified in this section by a qualified person at points—

(i) Where the train is originally made up (initial terminal);

(ii) Where train consist is changed, other than by adding or removing a solid block of cars, and the train brake system remains charged; and

(iii) Where the train is received in interchange if the train consist is changed other than by—

(A) Removing a solid block of cars from the head end or rear end of train;

(B) Changing motive power;

(C) Removing or changing the caboose; or

(D) Any combination of the changes listed in (A), (B), and (C) of this subparagraph.

Where a carman is to perform the inspection and test under existing or future collective bargaining agreement, in those circumstances a carman alone will be considered a qualified person.

(2) A qualified person participating in the test and inspection or who has knowledge that it was made shall notify the engineer that the initial terminal road train air brake test has been satisfactorily performed. The qualified person shall provide the notification in writing if the road crew will report for duty after the qualified person goes off duty. The qualified person also shall provide the notification in writing if the train that has been inspected is to be moved in excess of 500 miles without being subjected to another test pursuant to either this section or § 232.13 of this part.

(b) Each carrier shall designate additional inspection points not more than 1,000 miles apart where intermediate inspection will be made to determine that—

(1) Brake pipe pressure leakage does not exceed five pounds per minute;

(2) Brakes apply on each car in response to a 20-pound service brake pipe pressure reduction; and

(3) Brake rigging is properly secured and does not bind or foul.

(c) Train airbrake system must be charged to required air pressure, angle cocks and cutout cocks must be properly positioned, air hose must be properly coupled and must be in condition for service. An examination must be made for leaks and necessary repairs made to reduce leakage to a minimum. Retaining valves and retaining valve pipes must be inspected and known to be in condition for service. If train is to be operated in electro-pneumatic brake operation, brake circuit cables must be properly connected.

(d)(1) After the airbrake system on a freight train is charged to within 15 pounds of the setting of the feed valve on the locomotive, but to not less than 60 pounds, as indicated by an accurate gauge at rear end of train, and on a passenger train when charged to not less than 70 pounds, and upon receiving the signal to apply brakes for test, a 15-pound brake pipe service reduction must be made in automatic brake operations, the brake valve lapped, and the number of pounds of brake pipe leakage per minute noted as

indicated by brake pipe guage, after which brake pipe reduction must be increased to full service. Inspection of the train brakes must be made to determine that angle cocks are properly positioned, that the brakes are applied on each car, that piston travel is correct, that brake rigging does not bind or foul, and that all parts of the brake equipment are properly secured. When this inspection has been completed, the release signal must be given and brakes released and each brake inspected to see that all have released.

(2) When a passenger train is to be operated in electro-pneumatic brake operation and after completion of test of brakes as prescribed by paragraph (d)(1) of this section the brake system must be recharged to not less than 90 pounds air pressure, and upon receiving the signal to apply brakes for test, a minimum 20 pounds electro-pneumatic brake application must be made as indicated by the brake cylinder gage. Inspection of the train brakes must then be made to determine if brakes are applied on each car. When this inspection has been completed, the release signal must be given and brakes released and each brake inspected to see that all have released.

(3) When the locomotive used to haul the train is provided with means for maintaining brake pipe pressure at a constant level during service application of the train brakes, this feature must be cut out during train airbrake tests.

(e) Brake pipe leakage must not exceed 5 pounds per minute.

(f)(1) At initial terminal piston travel of body-mounted brake cylinders which is less than 7 inches or more than 9 inches must be adjusted to nominally 7 inches.

(2) Minimum brake cylinder piston travel of truck-mounted brake cylinders must be sufficient to provide proper brake shoe clearance when brakes are released. Maximum piston travel must not exceed 6 inches.

(3) Piston travel of brake cylinders on freight cars equipped with other than standard single capacity brake, must be adjusted as indicated on badge plate or stenciling on car located in a conspicuous place near the brake cylinder.

(g) When test of airbrakes has been completed the engineman and conductor must be advised that train is in proper condition to proceed.

(h) During standing test, brakes must not be applied or released until proper signal is given.

(i)(1) When train airbrake system is tested from a yard test plant, an engineer's brake valve or an appropriate test device shall be used to provide increase and reduction of brake pipe air pressure or electro-pneumatic brake application and release at the same or a slower rate as with engineer's brake valve and yard test plant must be connected to the end which will be nearest to the hauling road locomotive.

(2) When yard test plant is used, the train airbrakes system must be charged and tested as prescribed by paragraphs (c) to (g) of this section inclusive, and when practicable should be kept charged until road motive power is coupled to train, after which, an automatic brake application and release test of airbrakes on rear car must be made. If train is to be operated in electro-pneumatic brake operation, this test must also be made in electro-pneumatic brake operation before proceeding.

(3) If after testing the brakes as prescribed in paragraph (i)(2) of this section the train is not kept charged until road motive power is attached, the brakes must be tested as prescribed by paragraph (d)(1) of this section and if train is to be operated in electro-pneumatic brake operation as prescribed by paragraph (d)(2) of this section.

(j) Before adjusting piston travel or working on brake rigging, cutout cock in brake pipe branch must be closed and air reservoirs must be drained. When cutout cocks are provided in brake cylinder pipes, these cutout cocks only may be closed and air reservoirs need not be drained.

§ 232.13 Road train and intermediate terminal train air brake tests.

(a) *Passenger trains.* Before motive power is detached or angle cocks are closed on a passenger train operated in either automatic or electro-pneumatic brake operation, except when closing angle cocks for cutting off one or more cars from the rear end of train, automatic air brake must be applied. After recouping, brake system must be recharged to required air pressure and before proceeding and upon receipt of proper request or signal, application and release tests of brakes on rear car must be made from locomotive in automatic brake operation. If train is to be operated in electro-pneumatic brake operation, this test must also be made in electro-pneumatic brake operation before proceeding. Inspector or trainman must determine if brakes on rear car of train properly apply and release.

(b) *Freight trains.* Before motive power is detached or angle cocks are closed on a freight train, brakes must be applied with not less than a 20-pound brake pipe reduction. After recoupling, and after angle cocks are opened, it must be known that brake pipe air pressure is being restored as indicated by a rear car gauge or device. In the absence of a rear car gauge or device, an air brake test must be made to determine that the brakes on the rear car apply and release.

(c)(1)At a point other than an initial terminal where a locomotive or caboose is changed, or where one or more consecutive cars are cut off from the rear end or head end of a train with the consist otherwise remaining intact, after the train brake system is charged to within 15 pounds of the feed valve setting on the locomotive, but not less than 60 pounds as indicated at the rear of a freight train and 70 pounds on a passenger train, a 20-pound brake pipe reduction must be made and it must be determined that the brakes on the rear car apply and release. As an alternative to the rear car brake application and release test, it shall be determined that brake pipe pressure of the train is being reduced as indicated by a rear car gauge or device and then that brake pipe pressure of the train is being restored as indicated by a rear car gauge or device.

(2) Before proceeding it must be known that brake pipe pressure as indicated at rear of freight train is being restored.

(3) On trains operating with electro-pneumatic brakes, with brake system charged to not less than 70 pounds, test must be made to determine that rear brakes apply and release properly from a minimum 20 pounds electro-pneumatic brake application as indicated by brake cylinder gauge.

(d)(1) At a point other than a terminal where one or more cars are added to a train, after the train brake system is charged to not less than 60 pounds as indicated by a gauge or device at the rear of a freight train and 70 pounds on a passenger train. A brake test must be made by a designated person as described in § 232.12 (a)(1) to determine that brake pipe leakage does not exceed five (5) pounds per minute as indicated by the brake pipe gauge after a 20-pound brake pipe reduction has been made. After the test is completed, it must be determined that piston travel is correct, and the train airbrakes of these cars and on the rear car of the train apply and remain applied, until the release signal is given. As an alternative to the rear car brake application and release portion of the test, it shall be determined that brake pipe pressure of the train is being reduced as indicated by a rear car gauge or device and then that brake pipe pressure of the train is being restored as indicated by a rear car gauge or device. Cars added to a train that have not been inspected in accordance with § 232.12 (c) through (j) must be so inspected and tested at the next terminal where facilities are available for such attention.

(d)(2)(i) At a terminal where a solid block of cars, which has been previously charged and tested as prescribed by § 232.13 (c) through (j), is added to a train, it must be determined that the brakes on the rear car of the train apply and release. As an alternative to the rear car application and release test, it shall be determined that brake pipe pressure of the train is being reduced as indicated by a rear car gauge or device and then that brake pipe pressure of the train is being restored as indicated by a rear car gauge or device.

(d)(2)(ii) When cars which have not been previously charged and tested as prescribed by § 232.12 (c) through (j) are added to a train, such cars may either be given inspection and tests in accordance with § 232.12 (c) through (j), or tested as prescribed by paragraph (d)(1) of this section prior to departure in which case these cars must be inspected and tested in accordance with § 232.12 (c) through (j) at next terminal.

(3) Before proceeding it must be known that the brake pipe pressure at the rear of freight train is being restored.

(e)(1) Transfer train and yard train movements not exceeding 20 miles, must have the air brake hose coupled between all cars, and after the brake system is charged to not less than 60 pounds, a 15 pound service brake pipe reduction must be made to determine that the brakes are applied on each car before releasing and proceeding.

(2) Transfer train and yard train movements exceeding 20 miles must have brake inspection in accordance with § 232.12 (c)–(j).

(f) The automatic air brake must not be depended upon to hold a locomotive, cars or train, when standing on a grade, whether locomotive is attached or detached from cars

or train. When required, a sufficient number of hand brakes must be applied to hold train, before air brakes are released. When ready to start, hand brakes must not be released until it is known that the air brake system is properly charged.

(g) As used in this section, device means a system of components designed and inspected in accordance with § 232.19.

(h) When a device is used to comply with any test requirement in this section, the phrase brake pipe pressure of the train is being reduced means a pressure reduction of at least five pounds and the phrase brake pipe pressure of the train is being restored means a pressure increase of at least five pounds.

§ 232.14 Inbound Brake Equipment Inspection.

(a) At points where inspectors are employed to make a general inspection of trains upon arrival at terminals, visual inspection must be made of retaining valves and retaining valve pipes, release valves and rods, brake rigging, safety supports, hand brakes, hose and position of angle cocks and make necessary repairs or mark for repair tracks any cars to which yard repairs cannot be promptly made.

(b) Freight trains arriving at terminals where facilities are available and at which special instructions provide for immediate brake inspection and repairs, trains shall be left with air brakes applied by a service brake pipe reduction of 20 pounds so that inspectors can obtain a proper check of the piston travel. Trainmen will not close any angle cock or cut the locomotive off until the 20 pound service reduction has been made. Inspection of the brakes and needed repairs should be made as soon thereafter as practicable.

§ 232.15 Double Heading and Helper Service.

(a) When more than one locomotive is attached to a train, the engineman of the leading locomotive shall operate the brakes. On all other motive power units in the train the brake pipe cutout cock to the brake valve must be closed, the maximum main reservoir pressure maintained and brake valve handles kept in the prescribed position. In case it becomes necessary for the leading locomotive to give up control of the train short of the destination of the train, a test of the brakes must be made to see that the brakes are operative from the automatic brake valve of the locomotive taking control of the train.

(b) The electro-pneumatic brake valve on all motive power units other than that which is handling the train must be cut out, handle of brake valve kept in the prescribed position, and air compressors kept running if practicable.

§ 232.16 Running Tests.

When motive power, engine crew or train crew has been changed, angle cocks have been closed except for cutting off one or more cars from the rear end of train or electro-pneumatic brake circuit cables between power units and/or cars have been disconnected, running test of train air brakes on passenger train must be made, as soon as speed of train permits, by use of automatic brake if operating in automatic brake operation or by use of electro-pneumatic brake if operating in electro-pneumatic brake operation. Steam or power must not be shut off unless required and running test must be made by applying train air brakes with sufficient force to ascertain whether or not brakes are operating properly. If air brakes do not properly operate, train must be stopped, cause of failure ascertained and corrected and running test repeated.

§ 232.17 Freight and passenger train car brakes

(a) *Testing and repairing brakes on cars while on shop or repair tracks.* (1) When a freight car having brake equipment due for periodic attention is on shop or repair tracks where facilities are available for making air brake repairs, brake equipment must be given attention in accordance with the requirements of the currently effective AAR Code of Rules for cars in interchange. Brake equipment shall then be tested by use of a single car testing device as prescribed by the currently effective AAR Code of Tests.

(2)(i) When a freight car having an air brake defect is on a shop or repair track, brake equipment must be tested by use of a single car testing device as prescribed by currently effective AAR Code of Tests.

(ii) All freight cars on shop or repair tracks shall be tested to determine that the air brakes apply and release. Piston travel on a standard body mounted brake cylinder which is less than 7 inches or more than 9 inches must be adjusted to nominally 7 inches. Piston travel of brake cylinders on all freight cars equipped with other than standard single capacity brake, must be adjusted as indicated on badge plate or stenciling on car located in a conspicuous place near brake cylinder. After piston travel has been adjusted and with brakes released, sufficient brake shoe clearance must be provided.

(iii) When a car is equipped for use in passenger train service not due for periodical air brake repairs, as indicated by stenciled or recorded cleaning dates, is on shop or repair tracks, brake equipment must be tested by use of single car testing device as prescribed by currently effective AAR Code of Tests. Piston travel of brake cylinders must be adjusted if required, to the standard travel for that type of brake cylinder. After piston travel has been adjusted and with brakes released, sufficient brake shoe clearance must be provided.

(iv) Before a car is released from a shop or repair track, it must be known that brake pipe is securely clamped, angle cocks in proper position with suitable clearance, valves, reservoirs and cylinders tight on supports and supports securely attached to car.

(b)(1) Brake equipment on cars other than passenger cars must be cleaned, repaired, lubricated and tested as often as required to maintain it in a safe and suitable condition for service but not less frequently than as required by currently effective AAR Code of Rules for cars in interchange.

(2) Brake equipment on passenger cars must be clean, repaired, lubricated and tested as often as necessary to maintain it in a safe and suitable condition for service but not less frequently than as required in Standard S–045 in the Manual of Standards and Recommended Practices of the AAR.

(3) Copies of the materials referred to in this section can be obtained from the Association of American Railroads, 1920 L Street, NW., Washington, DC 20036.

§ 232.19 through § 232.25 Provisions related to end-of-train devices.

Not included in this Appendix as they are contained in Subpart E of this rule.

Issued in Washington, DC, on January 4, 2001.

John V. Wells,

Acting Administrator, Federal Railroad Administration.

[FR Doc. 01–606 Filed 1–16–01; 8:45 am]

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Wednesday,

January 17, 2001

Part IV

Department of Health and Human Services

Office of the Secretary

48 CFR Chapter 3

Acquistition Regulation Revision; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

48 CFR Chapter 3

Acquisition Regulation Revision

AGENCY: Department of Health and Human Services (HHS).

ACTION: Final rule.

SUMMARY: The Department of Health and Human Services is finalizing its acquisition regulation (HHSAR) to streamline and simplify it in accordance with the tenets of the National Performance Review. In doing so, the Department has eliminated procedural guidance which it believes is too encumbering for a simplified system and has empowered appropriate levels of management and contracting personnel with the authorities required for them to successfully accomplish their mission with the least amount of resistance and oversight.

EFFECTIVE DATE: January 17, 2001.

FOR FURTHER INFORMATION CONTACT: E. S. Lanham, Office of Acquisition Management, telephone (202) 690–7590.

SUPPLEMENTARY INFORMATION: The HHSAR was published as a proposed rule on January 8, 1999 (64 FR Vol 5 pps 1343—1390). Comments were received from several departmental contracting activities and one outside source. All comments have been analyzed and considered in the formulation of this final rule.

As a result of the publication of this regulation, the existing HHSAR at 48 CFR Chapter 3, including Appendix A, is canceled. Pertinent subject matter from Appendix A has been incorporated into this version of the HHSAR.

The Department reemphasizes that it is not making significant amendments to the existing HHSAR. The amendments being made to the HHSAR concern internal procedural matters which are administrative in nature, and will not have a major effect on the general public, or to contractors or offerors of the Department. The majority of the amendments eliminate procedural guidance no longer deemed necessary, or change contracting review and approval authorities to situate them at levels more appropriate to simplification, streamlining, and empowerment.

The Department of Health and Human Services certifies this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*); therefore, no regulatory flexibility statement has been prepared. Since this rule conveys existing acquisition policies or procedures and does not promulgate any new policies or procedures which would impact the public, it has been determined that this rule will not have a significant economic effect on a substantial number of small entities, and , thus, a regulatory flexibility analysis was not performed.

Furthermore, this document does not contain new information collection requirements needing approval by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Existing approvals cited in 48 CFR section 301.106 remain in effect. The provisions of this regulation are issued under 5 U.S.C. 301; 40 U.S.C. 486 (c).

List of Subjects in 48 CFR Parts 301 through 370

Government procurement.

Under the authority of 5 U.S.C. 301; 40 U.S.C. 486(c), the Department of Health and Human Services revises 48 CFR Chapter 3 as set forth below.

Dated: December 14, 2000.

John J. Callahan,

Assistant Secretary for Management and Budget.

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PART 301—HHS ACQUISITION REGULATION SYSTEM

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Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 301.1—Purpose, Authority, Issuance

301.101 Purpose.

(a) The Department of Health and Human Services Acquisition Regulation (HHSAR) is issued to establish uniform acquisition policies and procedures for the Department of Health and Human

Services (HHS) which conform to the Federal Acquisition Regulation (FAR) System.

(b) The HHSAR implements and supplements the FAR. (Implementing material expands upon or indicates the manner of compliance with related FAR material. Supplementing material is new material which has no counterpart in the FAR.)

(c) The HHSAR contains all formal departmental policies and procedures that govern the acquisition process or otherwise control contracting relationships between the Department's contracting offices and contractors.

301.103 Authority.

(b) The HHSAR is prescribed by the Assistant Secretary for Management and Budget under the authority of 5 U.S.C. 301 and section 205(c) of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 486(c)), as delegated by the Secretary.

(c) The HHSAR is issued in the Code of Federal Regulations (CFR) as Chapter 3 of Title 48, Department of Health and Human Services Acquisition Regulation. It may be referenced as ''48 CFR Chapter 3.''

301.106 OMB approval under the Paperwork Reduction Act.

(a) The following OMB control numbers apply to the information collection and recordkeeping requirements contained in this chapter:

HHSAR segment	OMB control No.
315.4	0990–0139
324.70	0990–0136
342.7101	0990–0131
352.224–70	0990–0137
352.224–70	0990–0136
352.233–70	0990–0133
352.270–1	0990–0129
352.270–2	0990–0129
352.270–3	0990–0129
352.270–5	0990–0130
352.270–8	0990–0128
352.270–9	0990–0128
370.1	0990–0129
370.2	0990–0129

(b) The OMB control number ''OMB No. 0990–0115'' is to be included in the upper right corner of the first page of all solicitations, purchase orders, and contracts issued by departmental contracting activities. The number represents approval of the HHS acquisition process and covers recordkeeping and reporting requirements which are unique to individual acquisitions (*e.g.,* requirements contained in specifications, statements of work, etc.).

Subpart 301.2—Administration

301.270 Executive Committee for Acquisition.

(a) The Deputy Assistant Secretary for Grants and Acquisition Management has established the Executive Committee for Acquisition (ECA) to assist and facilitate the planning and development of departmental acquisition policies and procedures and to assist in responding to other agencies and organizations concerning policies and procedures impacting the Federal acquisition process.

(b) The ECA consists of members and alternates from the Office of Acquisition Management, Administration for Children and Families, Agency for Healthcare Research and Quality, Health Care Financing Administration, Program Support Center, Centers for Disease Control and Prevention, Food and Drug Administration, Health Resources and Services Administration, Indian Health Service, National Institutes of Health, and Substance Abuse and Mental Health Services Administration. The ECA is chaired by the Director, Office of Acquisition Management. All meetings will be held at the call of the Chair, and all activities will be carried out under the direction of the Chair.

(c) The ECA, to facilitate the planning, development, and coordination of governmentwide and departmentwide acquisition policies and procedures, is to:

(1) Advise and assist the Chair concerning major acquisition policy matters;

(2) Review and appraise, at appropriate intervals, the overall effectiveness of existing policies and procedures; and

(3) Review and appraise the impact of new major acquisition policies, procedures, regulations, and development on current acquisition policies and procedures.

(d) The Chair will periodically issue a list of current members and alternates specifying the name, title, organization, address, and telephone number of each. The member organizations are responsible for apprising the Chair whenever a new member or alternate is to be appointed to the ECA, or an organizational change retitles the individual or organization.

Subpart 301.4—Deviations From the FAR

301.403 Individual deviations.

Requests for individual deviations to either the FAR or HHSAR shall be prepared in accordance with 301.470 and forwarded through administrative channels to the Director, Office of Acquisition Management for review and approval.

301.404 Class deviations.

Requests for class deviations to either the FAR or HHSAR shall be prepared in accordance with 301.470 and forwarded through administrative channels to the Deputy Assistant Secretary for Grants and Acquisition Management for review and approval.

301.470 Procedure.

(a) When a contracting office determines that a deviation is needed, it shall prepare a deviation request in memorandum form and forward it through administrative channels to the official designated in 301.403 or 301.404. In an exigency situation, the contracting office may request a deviation verbally, through normal acquisition channels, but is required to confirm the request in writing as soon as possible.

(b) A deviation request shall clearly and precisely set forth the:

(1) Nature of the needed deviation;

(2) Identification of the FAR or HHSAR citation from which the deviation is needed;

(3) Circumstances under which the deviation would be used;

(4) Intended effect of the deviation;

(5) Period or applicability;

(6) Reasons which will contribute to complete understanding and support of the requested deviation. A copy of pertinent background papers such as a contractor's request should accompany the deviation request.; and

(7) Suggested wording for the deviation (if applicable).

Subpart 301.6—Career Development, Contracting Authority, and Responsibilities

301.602 Contracting officers.

301.602–3 Ratification of unauthorized commitments.

(b) *Policy.* (1) The Government is not bound by agreements or contractual commitments made to prospective contractors by persons to whom contracting authority has not been delegated. However, execution of otherwise proper contracts made by individuals without contracting authority, or by contracting officers in excess of the limits of their delegated authority, may be later ratified. The ratification must be in the form of a written document clearly stating that ratification of a previously unauthorized act is intended and must be signed by the head of the contracting activity (HCA).

(2) The HCA is the official authorized to ratify an unauthorized commitment (but see paragraph (b)(3) of this section).

(3) Ratification authority for actions up to $25,000 may be redelegated by the HCA to the chief of the contracting office (CCO). No other redelegations are authorized.

(c) *Limitations.* (5) The concurrence of legal counsel concerning the payment issue is optional.

(e) *Procedures.* (1) The individual who made the unauthorized contractual commitment shall furnish the reviewing contracting officer all records and documents concerning the commitment and a complete written statement of facts, including, but not limited to: a statement as to why the contracting office was not used, a statement as to why the proposed contractor was selected, a list of other sources considered, a description of work to be performed or products to be furnished, the estimated or agreed contract price, a citation of the appropriation available, and a statement whether the contractor has commenced performance.

(2) The contracting officer will review the submitted material, and prepare the ratification document if he/she determines that the commitment may be ratifiable. The contracting officer shall forward the ratification document and the submitted material to the HCA or CCO with any comments or information which should be considered in evaluation of the request for ratification. If legal review is desirable, the HCA or CCO will coordinate the request for ratification with the Office of General Counsel, Business and Administrative Law Division.

(3) If ratification is authorized by the HCA or CCO, the file will be returned, along with the ratification document, to the contracting officer for issuance of a purchase order or contract, as appropriate.

301.603 Selection, appointment, and termination of appointment.

301.603–1 General.

(a) The appointment and termination of appointment of contracting officers shall be made by the head of the contracting activity (HCA). This authority is not delegable.

(b) The contracting officer appointment document for personnel in the GS–1101, 1102, and 1105 series, as well as personnel in any other series who will obligate the Government to the expenditure of funds in excess of the micro-purchase threshold, shall be the Standard Form (SF)—1402, Certificate of Appointment. The HCA may determine an alternative appointment document for appointments at or below that threshold. Changes to appointments shall be made by issuing a new appointment document. Each appointment document shall be prepared and maintained in accordance with FAR 1.603–1 and shall state the limits of the individual's authority.

(c) An individual must be certified at the appropriate level under the HHS Acquisition Certification Program as a prerequisite to being appointed as a contracting officer with authority to obligate funds in excess of the micro-purchase threshold (see 301.603–3(a)). The HCA will determine and require appropriate training for individuals appointed as contracting officers at lower dollar levels. An individual shall be appointed as a contracting officer only in instances where a valid organizational need can be demonstrated. Factors to be considered in assessing the need for an appointment of a contracting officer include volume of actions, complexity of work, and structure of the organization.

301.603–2 Selection.

Nominations for appointment of contracting officers shall be submitted to the HCA through appropriate organizational channels for review. The nomination package, which is usually initiated by the prospective contracting officer's immediate supervisor, shall normally include the nominee's current personal qualifications statement or job history, including the information required by FAR 1.603–2, a copy of his/her most recent performance appraisal, and a copy of the certificate issued under the HHS Acquisition Certification Program indicating the nominee's current certification level, if applicable. The HCA will determine the documentation required, consistent with FAR 1.603–2, when the resulting appointment and authority will not exceed the micro-purchase threshold.

301.603–3 Appointment.

(a) Contracting officer appointments shall be made at levels commensurate with nominees' certification levels as follows:

(1) Level I—Purchasing Agent—Required for all personnel in the GS–1102 and 1105 series having signature authority for simplified acquisitions, including orders from GSA sources over the micro-purchase threshold.

(2) Level II—Acquisition Official—Required for all personnel in the GS–1102 series. Sufficient for delegation of contracting officer authority up to $500,000.

(3) Level III—Senior Acquisition Official—Required for all personnel in the GS–1102 series for delegation of contracting officer authority above $500,000.

(4) Level IV—Acquisition Manager—Required for delegation of pre-award review and approval authority as specified in subpart 304.71.

(b) If it is essential to appoint an individual who does not fully meet the certification requirements of this section for the contracting officer authority sought, an interim appointment may be granted by the HCA. Interim appointments may not exceed one (1) year in total, and shall not be granted unless the individual can meet the certification requirements within one year from the date of appointment. If the certification requirements are not met by that date, the appointment will automatically terminate and cannot be renewed.

301.603–4 Termination.

Termination of contracting officer appointments shall be accomplished in accordance with FAR 1.603–4.

301.603–70 Delegation of contracting officer responsibilities.

(a) Contracting officer responsibilities which do not involve the obligation (or deobligation) of funds or result in establishing or modifying contractual provisions may be delegated by the contracting officer by means of a written memorandum which clearly delineates the delegation and its limits.

(b) Contracting officers may designate individuals as ordering officials to make purchases or place orders under blanket purchase agreements, indefinite delivery contracts, or other pre-established mechanisms. Ordering officials, including those under NIH's DELPRO, are not contracting officers.

(c) Project officers are required to complete the training specified in 307.170, while ordering officials and others should receive sufficient instruction from the contracting officer to ensure the appropriate exercise of the responsibilities and knowledge of their limitations.

PART 302—DEFINITIONS OF WORDS AND TERMS

Subpart 302.1—Definitions

Sec.
302.101 Definitions.

Subpart 302.2—Definitions Clause

302.201 Contract clause.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 302.1—Definitions

302.101 Definitions.

Chief of the contracting office (CCO) is a mid-level management official in charge of a contracting office who controls and oversees the daily contracting operation of an Operating Division (OPDIV) or major component of an OPDIV. The CCO is subordinate to the head of the contracting activity, and is located at a management level above other contracting personnel, usually as a branch chief or division director.

Head of the agency or *agency head,* unless otherwise specified, means the head of the Operating Division (OPDIV) for ACF, AHRQ, HCFA, PSC, CDCP, FDA, HRSA, IHS, NIH, and SAMHSA, or the Assistant Secretary for Management and Budget (ASMB) for the Office of the Secretary (OS).

Head of the contracting activity (HCA) is defined in terms of certain organizational positions within the Office of Grants and Acquisition Management (OGAM), Administration for Children and Families (ACF), Agency for Healthcare Research and Quality (AHRQ), Health Care Financing Administration (HCFA), Program Support Center (PSC), Centers for Disease Control and Prevention (CDCP), Food and Drug Administration (FDA), Health Resources and Services Administration (HRSA), Indian Health Service (IHS), National Institutes of Health (NIH), and Substance Abuse and Metal Health Services Administration (SAMHSA), as follows:

OGAM–OS—Director, Office of Acquisition Management
ACF—Director, Division of Acquisition Management
AHRQ—Director, Division of Contracts Management
HCFA—Director, Acquisition and Grants Group
PSC—Director, Division of Acquisition Management
CDCP—Director, Procurement and Grants Office
FDA—Director, Policy, Evaluation and Support Staff, Office of Facilities, Acquisition, and Central Services
HRSA—Director, Division of Grants and Procurement Management
IHS—Director, Division of Acquisitions and Grants Management
NIH—Director, Office of Acquisition Management and Policy
SAMHSA—Director, Division of Contracts Management

In addition, the Deputy Assistant Secretary for Grants and Acquisition Management (DASGAM) is designated as an HCA. Each HCA is responsible for conducting an effective and efficient acquisition program. Adequate controls shall be established to assure compliance with applicable laws, regulations, procedures, and the dictates of good management practices. Periodic reviews shall be conducted and evaluated by qualified personnel, preferably assigned to positions other than in the contracting office being reviewed, to determine the extent of adherence to prescribed policies and regulations, and to detect a need for guidance and/or training. The HCA shall be certified, or be certifiable, at Level IV of the HHS Acquisition Certification Program. Individuals appointed as HCA's who do not meet the Level IV requirements shall have one year from the date of appointment to obtain Level IV certification. The heads of contracting activities may redelegate their HCA authorities to the extent that redelegation is not prohibited by the terms of their respective delegations of authority, by law, by the Federal Acquisition Regulation, by the HHS Acquisition Regulation, or by other regulations. However, HCA and other contracting approvals and authorities shall not be redelegated below the levels specified in the HHS Acquisition Regulation or, in the absence of coverage in the HHS Acquisition Regulation, the Federal Acquisition Regulation. To ensure proper control of redelegated acquisition authorities, HCA's shall maintain a file containing successive delegations of HCA authority through and including the contracting officer level. Personnel delegated responsibility for acquisition functions must possess a level of experience, training, and ability commensurate with the complexity and magnitude of the acquisition actions involved.

Subpart 302.2—Definitions clause

302.201 Contract clause.

The FAR clause, Definitions, at 52.202–1 shall be used as prescribed in FAR 2.201, except as follows:

(a) Paragraph (a) at 352.202–1 shall be used in place of paragraph (a) of the FAR clause.

(b) Paragraph (h), or its alternate, at 352.202–1 shall be added to the end of the FAR clause. Use paragraph (h) when a fixed-priced contract is anticipated; use the alternate to paragraph (h) when a cost-reimbursement contract is anticipated. This is an authorized deviation.

PART 303—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

Subpart 303.1—Safeguards

Sec.
303.101 Standards of conduct.
303.101–3 Agency regulations.

Subpart 303.2—Contract Gratuities to Government Personnel

303.203 Reporting suspected violations of the Gratuities clause.

Subpart 303.3—Reports of Suspected Antitrust Violations

303.303 Reporting suspected antitrust violations.

Subpart 303.4—Contingent Fees

303.405 Misrepresentations or violations of the Covenant Against Contingent Fees.

Subpart 303.6—Contracts With Government Employees or Organizations Owned or Controlled by Them

303.602 Exceptions.

Subpart 303.7—Voiding and Rescinding Contracts

303.704 Policy.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 303.1—Safeguards

301.101 Standards of conduct.

303.101–3 Agency regulations.

The Department of Health and Human Services' Standards of Conduct are prescribed in 45 CFR part 73.

Subpart 303.2—Contractor Gratuities to Government Personnel

303.203 Reporting suspected violations of the Gratuities clause.

Departmental personnel shall report suspected violations of the Gratuities clause in accordance with subpart M, Reporting Violations, of 45 CFR part 73. Refer to subpart B, Gifts from Outside Sources, (5 CFR 2635.201) for an explanation regarding what is prohibited and what is permitted.

Subpart 303.3—Reports of Suspected Antitrust Violations

303.303 Reporting suspected antitrust violations.

A copy of each report of suspected antitrust violations submitted to the Attorney General by the HCA shall also be submitted to the Director, Office of Acquisition Management.

Subpart 303.4—Contingent Fees

303.405 Misrepresentations or violations of the Covenant Against Contingent Fees.

(c) Reports shall be made promptly to the contracting officer.

(d)(4) Suspected fraudulent or criminal matters to be reported to the Department of Justice shall be prepared in letter format and forwarded through acquisition channels to the head of the contracting activity for signature. The letter must contain all pertinent facts

and background information considered by the contracting officer and chief of the contracting office that led to the decision that fraudulent or criminal matters may be present. A copy of the signed letter shall be sent to the Director, Office of Acquisition Management.

Subpart 303.6—Contracts With Government Employees or Organizations Owned or Controlled by Them

303.602 Exceptions.

Approval of an exception to the policy stated in FAR 3.601 shall be made by the HCA (not delegable).

Subpart 303.7—Voiding and Rescinding Contracts

303.704 Policy.

For purposes of implementing FAR subpart 3.7, the authorities granted to the ''agency head or designee'' shall be exercised by the HCA (not delegable).

PART 304—ADMINISTRATIVE MATTERS

Subpart 304.6—Contract Reporting

Sec.

304.602 Federal Procurement Data System.

Subpart 304.8—Government Contract Files

304.804–70 Contract closeout audits.

Subpart 304.70—Acquisition Instrument Identification Numbering System

304.7000 Scope of subpart.
304.7001 Numbering acquisitions.

Subpart 304.71—Review and Approval of Proposed Contract Awards

304.7100 Policy.
304.7101 Procedures.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 304.6—Contracting Reporting

304.602 Federal Procurement Data System (FPDS).

The Departmental Contracts Information System (DCIS) represents the Department's implementation of the FPDS. All departmental contracting activities are required to participate in the DCIS and follow the procedures stated in the Enhanced Departmental Contracts Information System Manual and amendments to it. The HCA (not delegable) shall ensure that all required contract information is collected, submitted, and received into the DCIS on or before the 15th of each month for all appropriate contract and contract modifications award of the prior month.

Subpart 304.8—Government Contract Files

304.804–70 Contract closeout audits.

(a) Contracting officers shall rely, to the maximum extent possible, on non-Federal single audits to close physically completed cost-reimbursement contracts with colleges and universities, hospitals, non-profit firms, and State and local governments. In addition, where appropriate, a sample of these contractors may be selected for audit, in accordance with the decision-making process set forth in the following paragraph (b).

(b) Contracting officers shall request contract closeout audits on physically completed, cost-reimbursement, for-profit contracts in accordance with the following:

(1) Decisions on: The need for and allocation of contract audit resources and services; the selection of contracts or contractors to be audited; the identification of the audit agency to perform the audit; and the type or scope of closeout audit to be conducted, shall be made by the Office of Inspector General (OIG) and Office of Grants and Acquisition Management, in consultation with the Department's Contract Audit Users Work Group. These decisions shall be based upon the needs of the customer, risk analysis, return on investment, and the availability of audit resources. When an audit is warranted prior to closing a contract, the contracting officer shall submit the audit request to the OIG's Office of Audit via the appropriate OPDIV representative on the Contract Audit Users Work Group.

(2) Except where a contracting officer suspects misrepresentation or fraud, contract closeout field audits shall not be requested if the cost of performance is likely to exceed the potential cost recovery. Contracts that are not selected for a field audit may be closed on the basis of a desk review, subject to any later on-site audit findings. The release executed by the contractor shall contain the following statement:

> The Contractor agrees, pursuant to the clause in this contract entitled ''Allowable Cost'' or ''Allowable Cost and Fixed Fee'' (as appropriate), that the amount of any sustained audit exceptions resulting from any audit made after final payment shall be refunded to the Government.''

Subpart 304.70—Acquisition Instrument Identification Numbering System

304.7000 Scope of subpart.

This subpart prescribes policy and procedures for assigning identifying numbers to contracts and related instruments, including solicitation documents, purchase orders, and delivery orders. The HCA (not delegable) is responsible for establishing the numbering system within the OPDIV.

304.7001 Numbering acquisitions.

(a) *Acquisitions which require numbering.* The following acquisitions shall be numbered in accordance with the system prescribed in paragraphs (b) and (c) of this section:

(1) Contracts, including letter contracts and task orders under basic ordering agreements, which involve the payment of $2,500 or more for the acquisition of personal property or nonpersonal services. (The number assigned to a letter contract shall be assigned to the superseding definitized contract).

(2) Contracts which involve the payment of $2,000 or more for construction (including renovation or alteration).

(3) Contracts which involve more than one payment regardless of amount.

(4) Requests for proposals and invitations for bids.

(5) Requests for quotations.

(6) Basic ordering agreements.

(b) *Numbering system for contracts.* All contracts which require numbering (paragraphs (a)(1) through (3) of this section) shall be assigned a number consisting of the following:

(1) The three digit identification code assigned to the contracting office by the Office of Grants and Acquisition Management (OGAM).

(2) A two digit fiscal year designation; and

(3) A four digit serial number. For example, the initial contract executed by the Office of Acquisition Management, OS, for fiscal year 1996 would be numbered 100–96–0001. While it is required that a different series of four digit serial numbers be used for each fiscal year, serial numbers assigned need not be sequential.

(c) *Numbering system for other acquisitions.* The HCA is responsible for developing a numbering system for the acquisitions other than contracts listed in paragraphs, (a)(4) through (a)(6) of this section, and any other types of acquisitions that may be used.

(d) *Assignment of identification codes.* Each contracting office of the Department shall be assigned a three digit identification code by the OGAM. Requests for the assignment of codes for newly established contracting offices shall be submitted by the headquarters acquisition staff office of the contracting activity to the OGAM. A listing of the

contracting office identification codes currently in use is contained in the Enhanced Departmental Contracts Information System Manual.

Subpart 304.71—Review and Approval of Proposed Contract Awards

304.7100 Policy.

This subpart requires each HCA (not delegable) to establish review and approval procedures for proposed contracts actions to ensure that:

(a) Contract awards are in conformance with law, established policies and procedures, and sound business practices;

(b) Contractual documents properly reflect the mutual understanding of the parties; and

(c) The contracting officer is informed of deficiencies and items of questionable acceptability, and corrective action is taken.

304.7101 Procedures.

(a) All contractual documents, regardless of dollar value, are to be reviewed by the contracting officer prior to award.

(b) The HCA is responsible for establishing review and approval procedures and designating acquisition officials to serve as reviewers. Each HCA is responsible for determining the criterion (criteria) to be used in determining which contracts are to be reviewed, and that a sampling of proposed contracts not included in the ''to be reviewed'' group are reviewed and approved.

(c) Officials assigned responsibility for review and approval of contract actions must possess qualifications in the field of acquisition commensurate with the level of review performed, and, at a minimum, possess those acquisition skills expected of a contracting officer. However, if any official is to serve as the contracting officer and sign the contractual document, the review and approval function shall be performed by an appropriate official at least one level above.

PART 305—PUBLICIZING CONTRACT ACTIONS

Subpart 305.2—Synopsis of Proposed Contract Actions

Sec.

305.202 Exceptions.

Subpart 305.3—Synopsis of Contract Awards

305.303 Announcement of contract awards.

Subpart 305.5—Paid Advertisements

305.502 Authority.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 305.2—Synopsis of Proposed Contract Actions

305.202 Exceptions.

(b) When a contracting office believes that it has a situation where advance notice is not appropriate or reasonable, it shall prepare a memorandum citing all pertinent facts and details and send it, through normal acquisition channels, to the Deputy Assistant Secretary for Grants and Acquisition Management (DASGAM) requesting relief from synopsizing. The DASGAM shall review the request and decide whether an exception to synopsizing is appropriate or reasonable. If it is, the DASGAM shall take the necessary coordinating actions required by FAR 5.202 (b). Whatever the decision is on the request, the DASGAM shall promptly notify the contracting office when a determination has been made.

Subpart 305.3—Synopses of Contract Awards

305.303 Announcement of contract awards.

(a) *Public announcement.* Any contract, contract modification, or delivery order in the amount of $3 million or more shall be reported by the contracting officer to the Office of the Deputy Assistant Secretary for Legislation (Congressional Liaison), Room 406G, Hubert H. Humphrey Building. Notification shall be accomplished by providing a copy of the contract or award document face page to the referenced office prior to the day of award, or in sufficient time to allow for an announcement to be made by 5 p.m. Washington, DC time on the day of award.

Subpart 305.5—Paid Advertisements

305.502 Authority.

The contracting officer is authorized to publish advertisements, notices, and notices that proposals are being sought in newspapers and periodicals in accordance with the requirements and conditions referenced in FAR subpart 5.5.

PART 306—COMPETITION REQUIREMENTS

Subpart 306.2—Full and Open Competition After Exclusion of Sources

Sec.

306.202 Establishing or maintaining alternative sources.

Subpart 306.3—Other Than Full and Open Competition

306.302 Circumstances permitting other than full and open competition.
306.302–1 Only one responsible source and no other supplies or services will satisfy agency requirements.
306.302–7 Public interest.
306.303 Justification.
306.303–1 Requirements
306.303–2 Content.
306.304 Approval of the justification.

Subpart 306.5—Competition Advocates

306.501 Requirement.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 306.2—Full and Open Competition After Exclusion of Sources

306.202 Establishing or maintaining alternative sources.

(a) The reference to the agency head in FAR 6.202 (a) shall mean the appropriate competition advocate cited in 306.501.

(b)(1) The required determination and findings (D&F) shall be prepared by the contracting officer based on the data provided by program personnel, and shall be signed by the appropriate competition advocate. The D&F signatory is not delegable.

Subpart 306.3—Other Than Full and Open Competition

306.302 Circumstances permitting other than full and open competition.

306.302–1 Only one responsible source and no other supplies or services will satisfy agency requirements.

(a) (2) (ii) Follow-on contracts for the continuation of major research and development studies on long-term social and health programs, major research studies, or clinical trials may be deemed to be available only from the original source when it is likely that award to any other source would result in unacceptable delays in fulfilling the Department's or OPDIV's requirements.

(b) *Application.* (4) When the head of the program office has determined that a specific item of technical equipment or parts must be obtained to meet the activity's program responsibility to test and evaluate certain kinds and types of products, and only one source is available. (This criterion is limited to testing and evaluation purposes only and may not be used for initial outfitting or repetitive acquisitions. Project officers should support the use of this criterion with citations from their agency's legislation and the technical rationale for the item of equipment required.)

306.302–7 Public interest.

(a) *Authority.* (2) Agency head, in this instance, means the Secretary.

(c) *Limitations.* An ''approval package'' must be prepared by the contracting officer and staffed through departmental acquisition channels to the Secretary. The package shall include a determination and findings for the Secretary to sign that contains all pertinent information to support justification for exercising the exemption to competition, and a letter for the Secretary to sign notifying Congress of the determination to award a contract under the authority of 41 U.S.C. 253(c)(7).

306.303 Justifications.

306.303–1 Requirements.

(b) Preliminary arrangements or agreements with the proposed contractor shall have no effect on the rationale used to support an acquisition for other than full and open competition.

(f) When a program office desires to obtain certain goods or services by contract without full and open competition, it shall, at the time of forwarding the requisition or request for contract, furnish the contracting office a justification explaining why full and open competition is not feasible. All justifications shall be initially reviewed by the contracting officer.

(1) Justifications in excess of the simplified acquisition threshold shall be in the form of a separate, self-contained document, prepared in accordance with FAR 6.303 and 306.303, and called a ''JOFOC'' (Justification for Other Than Full and Open Competition). Justifications at or below the simplified acquisition threshold may be in the form of a paragraph or paragraphs contained in the requisition or request for contract.

(2) Justifications, whether over or under the simplified acquisition threshold, shall fully describe what is to be acquired, offer reasons which go beyond inconvenience, and explain why it is not feasible to obtain competition. The justifications shall be supported by verifiable facts rather than mere opinions. Documentation in the justification should be sufficient to permit an individual with technical competence in the area to follow the rationale.

306.303–2 Content.

(a)(1) The program office and name, address, and telephone number of the project officer shall also be included.

(2) This item shall include project identification such as the authorizing program legislation, to include citations or other internal program identification data such as title, contract number, etc.

(3) The description may be in the form of a statement of work, purchase description, or specification. A statement is to be included to explain whether the acquisition is an entity in itself, whether it is one in a series, or part of a related group of acquisitions.

(c) Each JOFOC shall conclude with at least signature lines for the project officer, project officer's immediate supervisor, contracting officer, and approving official.

306.304 Approval of the justification.

(a)(2) The competition advocates are listed in 306.501. This authority is not delegable.

(3) The competition advocate shall exercise this approval authority, except where the individual designated as the competition advocate does not meet the requirements of FAR 6.304 (a)(3)(ii). This authority is not delegable.

(4) The senior procurement executive of the Department is the Assistant Secretary for Management and Budget.

(c) A class justification shall be processed the same as an individual justification.

Subpart 306.5—Competition Advocates

306.501 Requirement.

The Department's competition advocate is the Deputy Assistant Secretary for Grants and Acquisition Management. The competition advocates for the Department's primary contracting officers are as follows:

ACF—Director, Office of Management Services
HCFA—Director, Office of Internal Customer Support
OS—Deputy Assistant Secretary for Grants and Acquisition Management
PSC—Director, Administrative Operations Service
AHRQ—Executive Officer
CDCP—Director, Office of Program Support
FDA—Director, Office of Facilities, Acquisition, and Central Services
HRSA—Associate Administrator for Operations and Management
IHS—Director, Office of Management and Support
NIH—(R&D)—Director, Office of Extramural Research (Other than R&D)—Director, Office of Intramural Research
SAMHSA—Associate Administrator for Management

PART 307—ACQUISITION PLANNING

Subpart 307.1—Acquisition Plans

Sec.
307.104 General procedures.
307.105 Contents of written acquisition plans.
307.170 Program training requirements.
307.170–1 Policy exceptions.
307.170–2 Training course prerequisites.

Subpart 307.3—Contractor Versus Government Performance

307.302 General.
307.303 Determining availability of private commercial sources.
307.304 Procedures.
307.307 Appeals.

Subpart 307.70—Considerations in Selecting an Award Instrument

307.7000 Scope of subpart.
307.7001 Distinction between acquisition and assistance.
307.7002 Procedures.

Subpart 307.71—Requests for Contract

307.7100 Scope of subpart.
307.7101 General.
307.7102 Procedures.
307.7103 Responsibilities.
307.7104 Transmittal.
307.7105 Format and content.
307.7106 Statement of work.
307.7107 Review.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 307.1—Acquisition Planning

307.104 General procedures.

(d) Each contracting activity shall prepare an Annual Acquisition Plan (AAP). The AAP is a macro plan, containing a list of anticipated contract actions over the simplified acquisition threshold and their associated funding, as well as the aggregate planned dollars for simplified acquisitions by quarter, developed for each fiscal year. The AAP shall conform to reasonable budget expectations and shall be reviewed at least quarterly and modified as appropriate. The chief of the contracting office (CCO) shall obtain this information from the program planning/budget office of the contracting activity and use the AAP to provide necessary reports and monitor the workload of the contracting office. For contract actions, the plan shall contain, at a minimum:

(1) A brief description (descriptive title, perhaps one or two sentences if necessary);

(2) Estimated award amount;

(3) Requested award date;

(4) Name and phone number of contact person (usually the project officer);

(5) Other information required for OPDIV needs.

(e) Once the AAP is obtained, the contracting officer/contract specialist shall initiate discussions with the assigned project officer for each planned negotiated acquisition over $100,000 except for:

(1) Acquisitions made under interagency agreements, and

(2) Contract modifications which exercise options, make changes authorized by the Changes clause, or add funds to an incrementally funded contract. (The HCA may prescribe procedures for contract actions not covered by this subpart.)

(f) The purpose of the discussions between the contracting and project officers is to develop an individual acquisition planning schedule and to address the things that will need to be covered in the request for contract (RFC), including clearances, acquisition strategy, sources, etc. The project officer must either have a statement of work (SOW) ready at this time or must discuss in more detail the nature of the services/supplies that will be required.

(g) Standard lead-times for processing various types of acquisitions and deadlines for submission of acceptable RFCs (that is, RFCs which include all required elements such as clearances, funding documents, and an acceptable SOW) for award in a given fiscal year shall be established by the HCA or designee not lower than the CCO.

(h) The outcome of the discussions referenced in paragraph (f) of this section between the project officer and the contracting officer/contracting specialist will be an agreement concerning the dates of significant transaction-specific acquisition milestones, including the date of submission of the RFC to the contracting officer. This milestone schedule document will be prepared with those dates and will be signed by the project officer and the contracting officer. The milestones cannot be revised except by mutual agreement of these same individuals. If the planning schedule indicates the need to obtain approval of a Justification for Other than Full and Open Competition, the CCO must sign the milestone agreement. This document shall be retained in the contract file. All other considerations that will affect the acquisition (technical, business, management) shall be addressed in the RFC (see 307.71).

307.105 Contents of written acquisition plans.

The written acquisition plan required by FAR 7.105 must be contained in the request for contract, as specified in subpart 307.71, and is the final product of the planning process.

307.170 Program training requirements.

(i) All program personnel selected to serve as project officers for HHS contracts shall have successfully completed either the Department's appropriate ''Basic Project Officer'' course, or an equivalent course (see paragraph (c) of this section).

(b) At least fifty percent of the HHS program personnel performing the function of technical proposal evaluator on a technical evaluation team or panel for any competitively solicited HHS contract shall have successfully completed the appropriate ''Basic Project Officer'' course, or an equivalent course (see paragraph (c) of this section). This requirement applies to the initial technical proposal evaluation and any subsequent technical evaluations that may be required.

(c) Determination of course equivalency shall be made by the HCA (not delegable) of the cognizant contracting activity. The contracting officer is responsible for ensuring that the project officer and technical proposal evaluators have successfully completed the required training discussed in 307.170–2.

307.170–1 Policy exceptions.

In the event there is an urgent requirement for a specific individual to serve as a project officer and that individual has not successfully completed the prerequisite training course, the HCA (not delegable) may waive the training requirement and authorize the individual to perform the project duties, provided that:

(a) The individual first meets with the cognizant contracting officer to review the DHHS Project Officers' Contracting Handbook,'' and to discuss the important aspects of the contracting—program office relationship as appropriate to the circumstances; and

(b) The individual attends the next scheduled and appropriate ''Basic Project Officer'' course.

307.170–2 Training course prerequisites.

(a) *Project officers.* (1) Newly appointed project officers, and project officers with less than three years experience and no previous related training, are required to take the appropriate ''Basic Project Officer'' course. (The grade level for project officers attending the course should be GS–7 and above.) All project officers are encouraged to take the appropriate ''Writing Statements of Work'' course.

(2) Project officers with more than three years experience, and project officers with less than three years experience who have successfully completed the appropriate basic course, are qualified (and encouraged) to take the ''Advanced Project Officer'' course.

(3) Additional information on prerequisites for attendance of these courses may be found in the ''DHHS Acquisition Training and Certification Program Handbook.''

(b) *Technical proposal evaluators.* Technical proposal evaluators, regardless of experience, are required to take the appropriate ''Basic Project Officer'' course or its equivalent. Upon successful completion of the basic course, it is recommended that they take the appropriate ''Advanced Project Officer'' course. Peer and objective reviewers are excluded from these requirements.

Subpart 307.3—Contractor Versus Government Performance

307.302 General.

(a) General Administration Manual (GAM) Chapter 18–10, Commercial-Industrial Activities of the Department of Health and Human Services Providing Products or Services for Government Use, assigns responsibilities for making method-of-performance decisions (contract vs. in-house performance) to various management levels within the Department depending on the dollar amount of capital investment or annual operating costs. It also requires that each operating division (OPDIV) and staff division (STAFFDIV) designate a ''Commercial-Industrial Control Officer'' (CICO) to be responsible for ensuring compliance with the requirements of the Chapter.

307.303 Determining availability of private commercial sources.

In accordance with the provisions of GAM Chapter 18–10, OPDIVs and STAFFDIVs must prepare and maintain a complete inventory of all individual commercial or industrial activities. They must also conduct periodic reviews of each activity and contract in the inventory to determine if the existing performance, in-house or by contract, continues to be in accordance with the policy guidelines of GAM Chapter 18–10.

307.304 Procedures.

Contracting officers shall ensure that no acquisition action involving a commercial-industrial activity is initiated unless it is in compliance with the requirements of GAM Chapter 18–10. The contracting officer must check each request for contract expected to result in a contract in excess of $100,000 to ensure that it contains a statement as to whether the proposed contract is or is not subject to review under GAM Chapter 18–10 requirements. If the contracting officer has any questions regarding the determination of applicability or nonapplicability, or if the required statement is missing, the

program office submitting the request for contract should be contacted and the situation rectified. If the issue cannot be resolved with the program office, the contracting office shall refer the matter to the CICO for a final determination. The HCA is responsible for ensuring that contracting activities are in full compliance with FAR Subpart 7.3.

307.307 Appeals.

The review and appeals procedure discussed in FAR 7.307 are addressed in GAM Chapter 18–10.

Subpart 307.70—Considerations in Selecting an Award Instrument

307.7000 Scope of subpart.

This subpart provides guidance on the appropriate selection of award instruments consistent with 31 U.S.C. 6301–6308. This subpart explains the use of the contract as the award instrument for acquisition relationships, and the grant or cooperative agreement as the instrument for assistance relationships. This subpart provides guidance for determining whether to use the acquisition or assistance process to fulfill program needs.

307.7001 Distinction between acquisition and assistance.

(a) 31 U.S.C. 6301–6308 requires the use of contracts to acquire property or services for the direct benefit or use of the Government and grants or cooperative agreements to transfer money, property, services, or anything of value to recipients to accomplish a public purpose of support or stimulation authorized by Federal statute.

(b) A contract is to be used as the legal instrument to reflect a relationship between the Federal Government and a recipient whenever:

(1) The principal purpose of the instrument is the acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; *or*

(2) The Department determines in a specific instance that the use of a type of contract is appropriate. That is, it is determined in a certain situation that specific needs can be satisfied best by using the acquisition process. However, this authority does not permit circumventing the criteria for use of acquisition or assistance instruments. Use of this authority is restricted to extraordinary circumstances and only with the prior approval of the Deputy Assistant Secretary for Grants and Acquisition Management (DASGAM).

(c) A grant or cooperative agreement is to be used as the legal instrument to reflect a relationship between the Federal Government and a recipient whenever the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the recipient to accomplish a public purpose of support or stimulation authorized by Federal statute.

(1) A grant is the legal instrument to be used when no substantial involvement is anticipated between the Department and the recipient during performance of the contemplated activity.

(2) A cooperative agreement is the legal instrument to be used when substantial involvement is anticipated between the Department and the recipient during performance of the contemplated activity.

(d) As a general rule, contracts are to be used for the following purposes:

(1) Evaluation (including research of an evaluative nature) of the performance of Government programs or projects or grantee activity initiated by the funding agency for its direct benefit or use.

(2) Technical assistance rendered to the Government, or on behalf of the Government, to any third party, including those receiving grants or cooperative agreements.

(3) Surveys, studies, and research which provide specific information desired by the Government for its direct activities, or for dissemination to the public.

(4) Consulting services or professional services of all kinds if provided to the Government or, on behalf of the Government, to any third party.

(5) Training projects where the Government selects the individuals or specific groups whose members are to be trained or specifies the content of the curriculum (not applicable to fellowship awards.)

(6) Planning for Government use.

(7) Production of publications or audiovisual materials required primarily for the conduct of the direct operations of the Government.

(8) Design or development of items for Government use or pursuant to agency definition or specifications.

(9) Conferences conducted on behalf of the Government.

(10) Generation of management information or other data for Government use.

307.7002 Procedures.

(a) OPDIV program officials should use existing budget and program planning procedures to propose new activities and major changes in ongoing programs. It is the responsibility of these program officials to meet with the HCA and the principal grants management official, or their designees, to distinguish the relationships and determine whether award is to be made through the acquisition process or assistance process. This determination should be made prior to the time when the annual acquisition plan is reviewed and approved so that the plan will reflect all known proposed contract actions. The cognizant contracting officer will confirm the appropriateness of the use of the contract instrument when reviewing the request for contract.

(b) Shifts from one award instrument to another must be fully documented in the appropriate files to show a fundamental change in program purpose that unequivocally justifies the rationale for the shift.

(c) OPDIVs must ensure that the choice of instrument is determined in accordance with 31 U.S.C. 6301–6308 and applicable departmental policies. If, however, there are major individual transactions or programs which contain elements of both acquisition and assistance in such a way that they cannot be characterized as having a principal purpose of one or the other, guidance should be obtained from the DASGAM, through normal channels, before proceeding with a determination.

(d) Any public notice, program announcement, solicitation, or request for applications or proposals must indicate whether the intended relationship will be one of acquisition or assistance and specify the award instrument to be used.

Subpart 307.71—Requests for Contract

307.7100 Scope of subpart.

This subpart prescribes the format and contents of the request for contract (RFC) and provides procedures for its preparation and submission.

307.7101 General.

The program office's preparation of the RFC and submission to the contracting office completes the presolicitation phase of the acquisition planning process and commences the solicitation phase. The RFC is the formal document which initiates the preparation of the solicitation by the contracting office and sets the acquisition process in motion. It is the result of the planning by the project officer and contracting officer and contains much of the pertinent information necessary for the development of a sound, comprehensive solicitation.

307.7102 Procedures.

The program office should submit the RFC to the contracting office no later than the date agreed to by the

contracting officer and the project officer in the milestone schedule (see 307.104(h)), unless a revised due date has been established by mutual agreement.

307.7103 Responsibilities.

(a) It is the responsibility of the project officer to prepare the RFC so that it complies with the requirements of this subpart and any OPDIV guidance issued in accordance with this subpart.

(b) Prior to the submission of the RFC to the contracting office, the head of the program office sponsoring the project shall review the RFC to ensure that all required information is provided in the prescribed format, and a technical review of the statement of work has been made. The level and extent of the technical review is to be commensurate with the estimated cost, importance, and complexity of the proposed acquisition, and must be thorough enough to ensure that vague and ambiguous language is eliminated, the statement of work is structured by phases or tasks, if appropriate, and methods are available for assessing the contractor's technical, cost, and delivery performance.

307.7104 Transmittal.

The RFC must be conveyed to the contracting office by use of a covering memorandum or other form of transmittal. The transmittal document must be signed by the head of the sponsoring program office and include both a statement attesting to the conclusiveness of the review described in 307.7103(b) and a list identifying all attachments to the RFC.

307.7105 Format and content.

The Department does not prescribe a standard format for the RFC. A format similar to what is in this section is recommended. However, any document or group of documents will be acceptable as an RFC as long as all of the required information (paragraph (a) of this section), and as much of the optional information (paragraph (b) of this section) as is relevant, is included.

(a) The RFC must include:

(1) *Purpose of the contract.* A brief, general description of the requirement, including the citation of the legislation which authorizes the program or project, and a statement as to the intended purpose/use of the proposed contract.

(2) *Period of performance.* The number of months (or other time period) required for total performance and, if applicable, for each phase of work indicated in the statement of work, as well as the proposed starting date.

(3) *Estimated cost and funds citation.* An estimate of the total cost of the proposed contract and, if applicable, the estimate for each phase indicated in the statement of work. The project officer must provide a cost breakdown of all contributing cost factors, an estimate of the technical staff hours, direct material, subcontracting, travel, etc., and may consult with contracting and cost advisory personnel in developing this information. This section must include the certification of funds availability for the proposed acquisition, along with the appropriation and accounting information citations. When funds for the proposed acquisition are not currently available for obligation but are anticipated, a statement of intent to commit funds from the financial management officer shall be included in lieu of the certification of funds availability. (Contracts cannot be awarded unless funds are available, but see FAR 32.703–2).

(4) *Specification, purchase description, or statement or work.* A description of the work to be performed that may be in the form of a specification, purchase description, or statement of work. Guidance concerning the statement of work and its contents is contained in 307.7106. Use of the specification is primarily limited to supply or service contracts where the material end item or service to be delivered is well defined by the Government. To the maximum extent possible, requirements should be defined as performance-based statements of work that focus on outcomes or results. If the RFC for a service contract is not utilizing a performance-based statement of work, with associated measures and a quality surveillance plan, the rationale for this determination must be documented. If a performance-based service contract is utilized, the RFC must detail the performance standards that must be met, the quality surveillance plan that will be implemented and the performance incentives to be used, if applicable.

(5) *Schedule of deliverables/reporting requirements.* A description of what is to be delivered, including, if applicable, technical and financial progress reports and any final report, and the required date of delivery for each deliverable. Reporting requirements should be tailored to the instant acquisition and should not be unnecessarily extensive or detailed. All delivery and reporting requirements shall include the quantities, the place of delivery, and time of delivery.

(6) *Sources for solicitation.* A list of known potential sources by name, size, type of ownership, and mailing address. The project officer is encouraged to use trade and professional journals and publications and conduct a thorough market research to identify new prospective sources to supplement the list of known sources. Efforts to identify set-aside possibilities, e.g., 8(a), HUBZone, and small business, and efforts to identify sources such as small disadvantaged and women-owned small businesses must be documented.

(7) *Project officer and alternate.* The project officer's name, title, organization, mailing address, and telephone number, along with the same data for the project officer's alternate, and a statement that these individuals have completed the Department's project officer training course (see 307.l70)

(b) The RFC must include, if applicable to the acquisition:

(1) *Background and need.* The background, history, and necessity for the proposed contract. This section is to include prior, present, and planned efforts by the program office in the same or related areas, and a description of efforts by other departmental activities and Federal agencies in the same or related program areas, if known. In addition, specific project information, such as the relevance or contribution to overall program objectives, reasons for the need, priority, and project overlap are to be provided.

(2) *Reference materials.* A list, by title and description, of study reports, plans, drawings, and other data to be made available to prospective offerors for use in preparation of proposals and/or the contractor for use in performance of the contract. The project officer must indicate whether this material is currently available or when it will be available, and how it may be accessed by potential offerors.

(3) *Technical evaluation criteria and instructions.* Technical evaluation criteria, which have been developed based on the requirements of the specific project, and any instructions and information which will assist in the preparation of prospective offerors' technical proposals. Evaluation factors may include understanding of the problem, technical approach, experience, personnel, facilities, etc. Criteria areas discussed in the statement of work and the relative order of importance or weights assigned to each of these areas for technical evaluation purposes must be identified.

(4) *Special program clearances or approvals.* Any required clearance or approval. The following special program clearances or approvals should be reviewed for applicability to each

acquisition. The ones which are applicable should be addressed during the planning discussions between the project officer and contracting officer/contract specialist (see 307.104(f)) and immediate action should be initiated by the project officer to obtain the necessary clearances or approvals. Comprehensive checklists of these and any OPDIV special approvals, clearances, and requirements shall be provided for reference purposes to program offices by the servicing contracting activity. If the approval or clearance has been requested and is being processed at the time of RFC submission, a footnote to this effect, including all pertinent details, must be included in this section.

(i) *Commercial activities.* (OMB Circular No. A–76). A request for contract (RFC) must contain a statement as to whether the proposed solicitation is or is not to be used as part of an OMB Circular No. A–76 cost comparison. (See General Administration Manual (GAM) Chapter 18–10; FAR subpart 7.3, subpart 307.3; OMB Circular No. A–76.)

(ii) *Printing.* The acquisition of printing and high volume duplicating by contract is prohibited unless it is authorized by the Joint Committee on Printing of the U.S. Congress. Procedures to be followed are contained in the ''Government Printing and Binding Regulations'' and the HHS Printing Management Manual and FAR subpart 8.8.

(iii) *Paperwork Reduction Act.* Under the Paperwork Reduction Act of 1995, a Federal agency shall not collect information or sponsor the collection of information from ten or more persons (other than Federal employees acting within the scope of their employment) unless, in advance, the agency has submitted a request for Office of Management and Budget (OMB) review, to the OMB, and the OMB has approved the proposed collection of information. Procedures for the approval may be obtained by contacting the OPDIV reports clearance officer. (See 5 CFR part 1320).

(iv) *Publications.* All projects that will result in contracts which include publications development (print products, electronic bulletin boards, posting on the internet) require review and approval by the Office of the Assistant Secretary for Public Affairs (OASPA). Form HHS–615, Publication Planning and Clearance Request, must be forwarded to OASPA through the OPDIV public affairs officer. Publications are defined in Chapter 5–00–15 of the Public Affairs Management Manual.

(v) *Public affairs services.* Projects for the acquisition of public affairs services in excess of $5,000 must be submitted to the Office of the Assistant Secretary for Public Affairs (OASPA) for review and approval on Form HHS–524, Request for Public Affairs Services Contract.

(vi) *Audiovisual.* All projects which will result in contracts which include audiovisuals, regardless of the audio, video, or audiovisual medium employed, require review and approval by the Office of the Assistant Secretary for Public Affairs (OASPA). Form HHS–524A, Publication Planning and Clearance Request, must be forwarded to OASPA through the OPDIV public affairs officer. Audiovisuals are defined in chapter 6–00–15 of the Public Affairs Management Manual.

(vii) *Privacy Act (5 U.S.C. 552a).* Whenever the Department contracts for the design, development, operation, or maintenance of a system of records on individuals on behalf of the Department to accomplish a departmental function, the Privacy Act is applicable. The program official, after consultation with the activity's Privacy Act Coordinator and the Office of General Counsel, as necessary, shall include a statement in the request for contract as to the applicability of the Act. Whenever an acquisition is subject to the Act, the program official prepares a ''system notice'' and has it published in the **Federal Register**. (See HHS Privacy Act regulation, 45 CFR part 5b; FAR subpart 24.1 and subpart 324.1.)

(viii) *Foreign research.* All foreign research contract projects to be conducted in a foreign country and financed by HHS funds (U.S. dollars) must have clearance by the Department of State with respect to consistency with foreign policy objectives. This clearance should be obtained prior to negotiation. Procedures for obtaining this clearance are set forth in the HHS General Administration Manual, Chapter 20–60.

(5) *Identification and disposition of data.* Identification of the data expected to be generated by the acquisition and an indication of whether the data are to be delivered to the Department or to be retained by the contractor is required. The project officer must also include information relative to the use, maintenance, disclosure, and disposition of data. The project officer must include a statement as to whether or not another acquisition, based upon the data generated by the proposed acquisition, is anticipated.

(6) *Government property.* If known, the type of Government property, individual items, and quantities of Government property to be furnished to, or allowed to be acquired by, the resultant contractor should be indicated. The project officer must specify when the Government property is to be made available.

(7) *Special terms and conditions.* Any suggested special terms and conditions not already covered in the statement of work or the applicable contract general provisions is required.

(8) *Justification for other than full and open competition.* If the proposed acquisition is to be awarded using other than full and open competition, a justification prepared in accordance with FAR subpart 6.3 and subpart 306.3 is required.

307.7106 Statement of work.

(a) *General.* A statement of work (SOW) differs from a specification and purchase description primarily in that it describes work or services to be performed in reaching an end result rather than a detailed, well defined description or specification of the end product. The SOW may enumerate or describe the methods (statistical, clinical, laboratory, etc.) that will be used. However, it is preferable for the offeror to propose the method of performing the work. The SOW should specify the desired results, functions, or end items without telling the offeror what has to be done to accomplish those results unless the method of performance is critical or required for the successful performance of the contract. The SOW should be clear and concise and must completely define the responsibilities of the Government and the contractor. The SOW should be worded so as to make more than one interpretation virtually impossible because it has to be read and interpreted by persons of varied backgrounds, such as attorneys, contracting personnel, cost estimators, accountants, scientists, educators, functional specialists, etc. The SOW must clearly define the obligations of both the contractor and the Government so as to protect the interests of both. Ambiguous statements of work can create unsatisfactory performance, delays, and disputes, and can result in higher costs.

(b) *Term (level of effort) vs. completion work statement.* Careful distinctions must be drawn between term (level of effort) SOWs, which essentially require the furnishing of technical effort and which may include a report thereof, and completion type work statements, which require development of tangible items designed to meet specific performance and/or design characteristics. (See FAR 16.306(d) for distinction).

(1) *Term (or level of effort).* A term or level of effort type SOW is appropriate for research where one seeks to discover the feasibility of later development, or to gather general information. A term or level of effort type SOW may only specify that some number of labor-hours be expended on a particular course of research, or that a certain number of tests be run, without reference to any intended conclusion.

(2) *Completion.* A completion type SOW is appropriate to development work where the feasibility of producing an end item is already known. A completion type SOW may describe what is to be achieved through the contracted effort, such as development of new methods, new end items, or other tangible results.

(c) *Phasing.* Individual research, development, or demonstration projects frequently lie well beyond the present state of the art and entail procedures and techniques of great complexity and difficulty. Under these circumstances, a contractor, no matter how carefully selected, may be unable to deliver the desired result. Moreover, the job of evaluating the contractor's progress is often difficult. Such a contract is frequently phased and often divided into stages of accomplishment, each of which must be completed and approved before the contractor may proceed to the next. Phasing makes it necessary to develop methods and controls, including reporting requirements for each phase of the contract and criteria for evaluation of the report submitted, that will provide, at the earliest possible time, appropriate data for making decisions relative to future phases. A phased contract may include stages of accomplishment such as research, development, and demonstration. Within each phase, there may be a number of tasks which should be included in the SOW. When phases of work can be identified, the SOW will provide for phasing and the request for proposals will require the submission of proposed costs by phases. The resultant contract will reflect costs by phases, require the contractor to identify incurred costs by phases, establish delivery schedules by phase, and require the written acceptance of each phase. The provisions of the Limitation of Cost clause shall apply to the estimated cost of each phase. Contractors shall not be allowed to incur costs for phases which are dependent upon successful completion of earlier phases until written acceptance of the prior work is obtained from the contracting officer.

(d) *Elements of the SOW.* The elements of the SOW will vary with the objective, complexity, size, and nature of the acquisition. In general, it should cover the following matters as appropriate.

(1) *A general description of the required objectives and desired results.* Initially, a broad, nontechnical statement of the nature of the work to be performed. This should summarize the actions to be performed by the contractor and the results that the Government expects.

(2) *Background information helpful to a clear understanding of the requirements and how they evolved.* Include a brief historical summary as appropriate and the relationship to overall program objectives.

(3) *A detailed description of the technical requirements.* A comprehensive description of the work to be performed to provide whatever details are necessary for prospective offerors to submit meaningful proposals.

(4) *Subordinate tasks or types of work.* A listing of the various tasks or types of work (it may be desirable in some cases to indicate that this is not all-inclusive). The degree of task breakout is directly dependent on the size and complexity of the work to be performed and the logical groupings. A single cohesive task should not be broken out merely to conform to a format. Indicate whether the tasks are sequential or concurrent for offeror planning purposes.

(5) *Reference material.* All reference material to be used in the conduct of the project that tells how the work is to be carried out must be identified. Applicability should be explained, and a statement made as to where the material can be obtained.

(6) *Level of effort.* When a level of effort is required, the number and type of personnel required should be stated. If known, the type and degree of expertise should be specified.

(7) *Special requirements.* (as applicable). An unusual or special contractual requirement, which would impact on contract performance, should be included as a separate section.

(8) *Deliverables reporting requirements.* All deliverables and/or reports must be clearly and completely described.

307.7107 Review.

Upon receipt of the RFC, the contracting officer shall review its contents to ensure that all pertinent information has been provided by the program office and that it includes an acceptable SOW. If pertinent information is missing or the SOW is inadequate, the contracting officer shall obtain or clarify the information as soon as possible so that the acquisition schedule can be met. If the program office delays furnishing the information or clarification, the contracting officer should notify the head of the sponsoring program office, in writing, of the possible slippage in the acquisition schedule and the need for an expeditious remedy. The contracting officer should also notify the chief of the contracting office. A program office's or project officer's continued failure to adhere to agreed on milestones should also be reported to the head of the contracting activity.

PART 309—CONTRACTOR QUALIFICATIONS

Subpart 309.4—Debarment, Suspension, and Ineligibility

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309.470–1 Situations where reports are required.
309.470–2 Contents of reports.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 309.4—Debarment, Suspension, and Ineligibility

309.403 Definitions.

Acquiring agency's head or designee, as used in the FAR, shall mean, unless otherwise stated in this subpart, the head of the contracting activity. Acting in the capacity of the acquiring agency's head, the head of the contracting activity may make the required justifications or determinations, and take the necessary actions, specified in FAR 9.405, 9.406 and 9.407 for his or her respective activity, but only after obtaining the written approval of the debarring or suspending official, as the case may be.

Debarring official means the Assistant Secretary for Management and Budget, or his/her designee.

Initiating official means either the contracting officer, the head of the contracting activity, the Deputy Assistant Secretary for Grants and Acquisition Management, or the Inspector General.

Suspending official means the Assistant Secretary for Management and Budget, or his/her designee.

309.404 List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

(c) The Office of Grants and Acquisition Management (OGAM) shall perform the actions required by FAR 9.404(c).

(4) OGAM shall maintain all documentation submitted by the initiating official recommending the debarment or suspension action and all correspondence and other pertinent documentation generated during the OGAM review.

309.405 Effect of listing.

(a) The head of the contracting activity (HCA) (not delegable) may, with the written concurrence of the debarring or suspending official, make the determinations referenced in FAR 9.405(a), regarding contracts for their respective activities.

(1) If a contracting officer considers it necessary to award a contract, or consent to a subcontract with a debarred or suspended contractor, the contracting officer shall prepare a determination, including all pertinent documentation, and submit it through acquisition channels to the head of the contracting activity. The documentation must include the date by which approval is required and a compelling reason for the proposed action. Some examples of circumstances that may constitute a compelling reason for the award to, or consent to a subcontract with, a debarred or suspended contractor include:

(i) The property or services to be acquired are available only from the listed contractor;

(ii) The urgency of the requirement dictates that the Department deal with the listed contractor; or

(iii) There are other compelling reasons which require business dealings with the listed contractor.

(2) If the HCA decides to approve the requested action, he/she shall request the concurrence of the debarring or suspending official and, if given, shall inform the contracting officer in writing of the decision within the required time period.

309.406 Debarment.

309.406–3 Procedures.

(a) *Investigation and referral.* Whenever an apparent cause for debarment becomes known to an initiating official, that person shall prepare a report incorporating the information required by 309.470–2, if known, and forward it through appropriate channels with a written recommendation, to the debarring official. Contracting officers shall forward their reports in accordance with 309.470–1. The debarring official shall initiate an investigation through such means as he/she deems appropriate.

(b) *Decisionmaking process.* The debarring official shall review the results of the investigation, if any, and make a written determination whether or not debarment procedures are to be commenced. A copy of the determination shall be promptly sent through appropriate channels to the initiating official, and the contracting officer, if necessary. If the debarring official determines to commence debarment procedures, he/she shall, after consultation with the Office of the General Counsel, notify the contractor in accordance with FAR 9.406–3(c). If the proposed action is not based on a conviction or judgement and the contractor's submission in response to the notice raises a genuine dispute over facts material to the proposed debarment, the debarring official shall arrange for fact-finding hearings and take the necessary action specified in FAR 9.406–3(b)(2). The debarring official shall also ensure that written findings of facts are prepared, and shall base the debarment decisions on the facts as found, after considering information and argument submitted by the contractor and any other information in the administrative record. The Office of the General Counsel shall represent the Department at any fact-finding hearing and may present witnesses for HHS and question any witnesses presented by the contractor.

309.407 Suspension.

309.407–3 Procedures.

(a) *Investigation and referral.* Whenever an apparent cause for suspension becomes known to an initiating official, that person shall prepare a report incorporating the information required by 309.470–2, if known, and forward it through appropriate channels, with a written recommendation, to the suspending official. Contracting officers shall forward their reports in accordance with 309.470–1. The suspending official shall initiate an investigation through such means as he/she deems appropriate.

(b) *Decisionmaking process.* The suspending official shall review the results of the investigation, if any, and make a written determination whether or not suspension should be imposed. A copy of this determination shall be promptly sent through appropriate channels to the initiating official and the contracting officer, if necessary. If the suspending official determines to impose suspension, he/she shall, after consultation with the Office of the General Counsel, notify the contractor in accordance with FAR 9.407–3(c). If the action is not based on an indictment, and, subject to the provisions of FAR 9.407–3(b)(2), the contractor's submission in response to the notice raises a genuine dispute over facts material to the suspension, the suspending official shall, after suspension has been imposed, arrange for fact-finding hearings and take the necessary actions specified in FAR 9.407–3(b)(2).

309.470 Reporting of suspected causes for debarment or suspension, or the taking of evasive actions.

309.470–1 Situations where reports are required.

A report incorporating the information required by 309.470–2 shall be forwarded, in duplicate, by the contracting officer through acquisition channels to OGAM when:

(a) A contractor has committed, or is suspected of having committed, any of the acts described in FAR 9.406–2 or FAR 9.407–2; or

(b) A contractor is suspected of attempting to evade the prohibitions of debarment or suspension imposed under this subject, or any other comparable regulation, by changes of address, multiple addresses, formation of new companies, or by other devices.

309.470–2 Contents of reports.

Each report prepared under 309.470–1 shall be coordinated with the Office of the General Counsel and shall include the following information, where available:

(a) Name and address of contractor.

(b) Name of the principal officers, partners, owners, or managers.

(c) All known affiliates, subsidiaries, or parent firms, and the nature of the affiliation.

(d) Description of the contract or contracts concerned, including the contract number, and office identifying numbers or symbols, the amount of each contract, the amount paid the contractor and the amount still due, and the percentage of work completed and to be completed.

(e) The status of vouchers.

(f) Whether contract funds have been assigned pursuant to the Assignment of Claims Act, as amended, (31 U.S.C. 3727, 41 U.S.C. 15), and, if so assigned, the name and address of the assignee and a copy of the assignment.

(g) Whether any other contracts are outstanding with the contractor or any affiliates, and, if so, the amount of the contracts, whether these funds have

been assigned pursuant to the Assignment of Claims Act, as amended, (31 U.S.C. 3727, 41 U.S.C. 15), and the amounts paid or due on the contracts.

(h) A complete summary of all available pertinent evidence.

(i) A recommendation as to the continuation of current contracts.

(j) An estimate of damages, if any, sustained by the Government as a result of the action of the contractor, including an explanation of the method used in making the estimate.

(k) The comments and recommendations of the contracting officer and statements regarding whether the contractor should be suspended or debarred, whether any limitations should be applied to the action, and the period of any proposed debarment.

(l) As an enclosure, a copy of the contract(s) or pertinent excerpts therefrom, appropriate exhibits, testimony or statements of witnesses, copies of assignments, and other relevant documentation or a written summary of any information for which documentation is not available.

PART 313—SIMPLIFIED ACQUISITION PROCEDURES

Subpart 313.3—Simplified Acquisition Methods

Sec.
313.301 Governmentwide commercial purchase card.
313.303 Blanket purchase agreements (BPAs).
313.303–5 Purchases under BPAs.
313.305 Imprest funds and third party drafts.
313.305–1 General.
313.306 SF 44, Purchase Order—Invoice—Voucher.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 313.3—Simplified Acquisition Methods.

313.301 Governmentwide commercial purchase card.

(b) The Department has issued general guidance concerning the use of governmentwide commercial purchase cards, and has authorized the OPDIVs to establish procedures for the use, administrative and management controls, and training necessary to comply with FAR 13.301.

313.303 Blanket Purchase Agreements (BPAs).

313.303–5 Purchases under BPAs.

(e)(5) Delivery documents, invoices, etc., signed by the Government employee receiving the item or service will be forwarded to the fiscal office or other paying office as designated by the OPDIV. Payment will be made on the basis of the signed document, invoice, etc. Contracting offices will ensure that established procedures allowing for availability of funds are in effect prior to placement of orders.

313.305 Imprest funds and third party drafts.

313.305–1 General.

Requests to establish imprest funds shall be made to the responsible fiscal office. At larger activities where the cashier may not be conveniently located near the purchasing office, a Class C Cashier may be installed in the purchasing office. Documentation of cash purchases shall be in accordance with instructions contained in the HHS Voucher Audit Manual Part 1, Chapter 1–10.

313.306 SF 44, Purchase Order—Invoice—Voucher.

(d) Since the Standard Form (SF) 44 is an accountable form, a record shall be maintained of serial numbers of the form, to whom issued, and date issued. SF 44's shall be kept under adequate lock and key to prevent unauthorized use. A reservation of funds shall be established to cover total anticipated expenditures prior to use of the SF 44.

PART 314—SEALED BIDDING

Subpart 314.2—Solicitation of Bids

Sec.
314.202 General rules for solicitation of bids.
314.202–7 Facsimile bids.
314.213 Annual submission of representations and certifications.

Subpart 314.4—Opening of Bids and Award of Contract

314.404 Rejection of bids.
314.404–1 Cancellation of invitations after opening.
314.407 Mistakes in bids.
314.407–3 Other mistakes disclosed before award.
314.407–4 Mistakes after award.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 314.2—Solicitation of Bids

314.202 General rules for solicitation of bids.

314.202–7 Facsimile bids.

If the head of the contracting activity (HCA) (not delegable) has determined that the contracting activity will allow use of facsimile bids and proposals, the HCA shall prescribe internal procedures, in accordance with the FAR, to ensure uniform processing and control.

314.213 Annual submission of representations and certifications.

Each HCA (not delegable) shall determine whether the contracting activity will allow use of the annual submission of representations and certifications by bidders.

Subpart 314.4—Opening of Bids and Award of Contract

314.404 Rejection of bids.

314.404–1 Cancellation of invitations after opening.

The chief of the contracting office (CCO) (not delegable) shall make the determinations required to be made by the agency head in FAR 14.404–1.

314.407 Mistakes in bids.

314.407–3 Other mistakes disclosed before award.

(e) Authority has been delegated to the Departmental Protest Control Officer, Office of Acquisition Management, Office of Grants and Acquisition Management, to make administrative determinations in connection with mistakes in bid alleged after opening and before award. This authority may not be redelegated.

(f) Each proposed determination shall have the concurrence of the Chief, Business Law Branch, Business and Administrative Law Division, Office of General Counsel.

(i) Doubtful cases shall not be submitted by the contracting officer directly to the Comptroller General, but shall be submitted to the Departmental Protest Control Officer.

314.407–4 Mistakes after award.

(c) Authority has been delegated to the Departmental Protest Control Officer to make administrative determinations in connection with mistakes in bid alleged after award. This authority may not be redelegated.

(d) Each proposed determination shall have the concurrence of the Chief, Business Law Branch, Business and Administrative Law Division, Office of the General Counsel.

PART 315—CONTRACTING BY NEGOTIATION

Subpart 315.2—Solicitation and Receipt of Proposals and Information

Sec.
315.204 Contract format.
315.204–5 Part IV—Representations and instructions.
315.208 Submission, modification, revision, and withdrawal of proposals.
315.209 Solicitation provisions and contract clauses.

Subpart 315.3—Source Selection

315.305 Proposal evaluation.
315.306 Exchanges with offerors after receipt of proposals.
315.307 Proposal revisions.
315.370 Finalization of details with the selected source.
315.371 Contract preparation and award.
315.372 Preparation of negotiation memorandum.

Subpart 315.4—Contract Pricing

315.404 Proposal analysis.
315.404–2 Information to support proposal analysis.
315.404–4 Profit.

Subpart 315.6—Unsolicited Proposals

315.605 Content of unsolicited proposals.
315.606 Agency procedures.
315.606–1 Receipt and initial review.
315.609 Limited use of data.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 315.2—Solicitation and Receipt of Proposals and Information

315.204 Contract format.

315.204–5 Part IV—Representations and instructions.

(a) *Section K, Representations, certifications, and other statements of offerors.*

(1) This section shall begin with the following and continue with the applicable representations and certifications:

To Be Completed by the Offeror: (The Representations and Certifications must be executed by an individual authorized to bind the offeror.) The offeror makes the following Representations and Certifications as part of its proposal (check or complete all appropriate boxes or blanks on the following pages).

_____
(Name of Offeror)

_____
(RFP No.)

_____
(Signature of Authorized Individual)

_____
(Date)

_____
(Typed Name of Authorized Individual)

Note: The penalty for making false statements in offers is prescribed in 18 U.S.C. 1001.

(c) *Section M, Evaluation factors for award.*

(1) *General.* (i) The evaluation factors must be developed by the project officer and submitted to the contracting officer in the request for contract (RFC) for inclusion in the request for proposal (RFP). Development of these factors and the assignment of the relative importance or weight to each require the exercise of judgment on a case-by-case basis because they must be tailored to the requirements of the individual acquisition. Since the factors will serve as a standard against which all proposals will be evaluated, it is imperative that they be chosen carefully to emphasize those considered to be critical in the selection of a contractor.

(ii) The finalized evaluation factors cannot be changed except by a formal amendment to the RFP issued by the contracting officer. No factors other than those set forth in the RFP shall be used in the evaluation of proposals.

(2) *Review of evaluation factors.*

(i) The evaluation factors should be reviewed by the contracting officer in terms of the work statement. This review is not intended to dictate technical requirements to the program office or project officer, but rather to ensure that the evaluation factors are clear, concise, and fair so that all potential offerors are fully aware of the bases for proposal evaluation and are given an equal opportunity to compete.

(ii) The project officer and the contracting officer should then review the evaluation factors together to ascertain the following:

(A) The factors are described in sufficient detail to provide the offerors (and evaluators) with a total understanding of the factors to be involved in the evaluation process;

(B) The factors address the key programmatic concerns which the offerors must be aware of in preparing proposals;

(C) The factors are specifically applicable to the instant acquisition and are not merely restatements of factors from previous acquisitions which are not relevant to this acquisition; and

(D) The factors are selected to represent only the significant areas of importance which must be emphasized rather than a multitude of factors. (All factors tend to lose importance if too many are included. Using too many factors will prove as detrimental as using too few.)

(3) *Examples of topics that form a basis for evaluation factors.* Typical examples of topics that form a basis for the development of evaluation factors are listed in the following paragraphs. These examples are intended to assist in the development of actual evaluation factors for a specific acquisition and should only be used if they are applicable to that acquisition. They are not to be construed as actual examples of evaluation factors to be included in the RFP.

(i) Understanding of the problem and statement of work:

(ii) Method of accomplishing the objectives and intent of the statement of work;

(iii) Soundness of the scientific or technical approach for executing the requirements of the statement of work (to include, when applicable, preliminary layouts, sketches, diagrams, other graphic representations, calculations, curves, and other data necessary for presentation, substantiation, justification, or understanding of the approach);

(iv) Special technical factors, such as experience or pertinent novel ideas in the specific branch of science or technology involved;

(v) Feasibility and/or practicality of successfully accomplishing the requirements (to include a statement and discussion of anticipated major difficulties and problem areas and recommended approaches for their resolution);

(vi) Availability of required special research, test, and other equipment or facilities;

(vii) Managerial capability (ability to achieve delivery or performance requirements as demonstrated by the proposed use of management and other personnel resources, and to successfully manage the project, including subcontractor and/or consultant efforts, if applicable, as evidenced by the management plan and demonstrated by previous experience);

(viii) Availability, qualifications, experience, education, and competence of professional, technical, and other personnel, to include proposed subcontractors and consultants (as evidenced by resumes, endorsements, and explanations of previous efforts);

(ix) Soundness of the proposed staff time or labor hours, propriety of personnel classifications (professional, technical, others), necessity for type and quantity of material and facilities proposed, validity of proposed subcontracting, and necessity of proposed travel;

(x) Quality of offeror's past performance on recent projects of similar size and scope; and

(xi) Extent of proposed participation of small disadvantaged business concerns in performance of the contract.

315.208 Submission, modification, revision, and withdrawal of proposals.

(b) When the head of the contracting activity (HCA) for a health agency determines that certain classes of biomedical or behavioral research and development acquisitions should be subject to conditions other than those specified in FAR 52.215–1(c)(3), the HCA may authorize the use of the provision at 352.215–70 in addition to the provision at FAR 52.215–1. This is an authorized deviation.

(2) When the provision at 352.215–70 is included in the solicitation and a proposal is received after the exact time specified for receipt, the contracting officer, with the assistance of cost and technical personnel, shall make a written determination as to whether the proposal meets the requirements of the provision at 352.215–70 and, therefore, can be considered.

315.209 Solicitation provisions and contract clauses.

(a) Paragraph (e) of the provision at 352.215–1 shall be used in place of that specified at FAR 52.215–1(e). This is an authorized deviation.

(g) If the head of the contracting activity (HCA)(not delegable) has determined that the contracting activity will allow the use of the annual submission of representations and certifications by offerors, the provisions of FAR 14.213 shall be followed.

Subpart 315.3—Source Selection

315.305 Proposal evaluation.

(a)(1) *Cost or price evaluation.* The contracting officer shall evaluate business proposals adhering to the requirements for cost or price analysis included in FAR 15.404. The contracting officer must determine the extent of analysis in each case depending on the amount of the proposal, the technical complexity, and related cost or price. The contracting officer should request the project officer to analyze items such as the number of labor hours proposed for various labor categories; the mix of labor hours and categories of labor in relation to the technical requirements of the project; the kinds and quantities of material, equipment, and supplies; types, numbers and hours/days of proposed consultants; logic of proposed subcontracting; analysis of the travel proposed including number of trips, locations, purpose, and travelers; and kinds and quantities of information technology. The project officer shall provide his/her opinion as to whether these elements are necessary and reasonable for efficient contract performance. Exceptions to proposed elements shall be supported by adequate rationale to allow for effective negotiations or award if discussions are not conducted. The contracting officer should also request the assistance of a cost/price analyst when considered necessary. In all cases, the negotiation memorandum must include the rationale used in determining that the price or cost is fair and reasonable.

(2) *Past performance evaluation.*

When evaluating past performance, the contracting officer is responsible for conducting reference checks to obtain information concerning the performance history of offerors. The contracting officer may require the assistance of the project officer as well as other Government technical personnel in performing this function.

(3) *Technical evaluation.*

(i) Technical evaluation plan.

(A) A technical evaluation plan may be required by the contracting officer, at his/her discretion, when an acquisition is sufficiently complex as to warrant a formal plan.

(B) The technical evaluation plan should include at least the following:

(*1*) A list of recommended technical evaluation panel members, their organizations, a list of their major consulting clients (if applicable), their qualifications, and curricula vitae (if applicable);

(*2*) A justification for using non-Government technical evaluation panel members. (Justification is not required if non-Government evaluators will be used in accordance with standard contracting activity procedures or policies);

(*3*) A statement that there is no apparent or actual conflict of interest regarding any recommended panel member;

(*4*) A copy of each rating sheet, approved by the contracting officer, to be used to assure consistency with the evaluation criteria; and

(*5*) A brief description of the general evaluation approach.

(C) The technical evaluation plan must be signed by an official within the program office in a position at least one level above the project officer, or in accordance with contracting activity procedures.

(D) The technical evaluation plan should be submitted to the contracting officer for review and approval before the solicitation is issued. The contracting officer shall make sure that the significant factors and subfactors relating to the evaluation are reflected in the evaluation criteria when conducting the review of the plan.

(ii) Technical evaluation panel.

(A) *General.* (*1*) A technical evaluation panel is required for all acquisitions subject to this subpart which are expected to exceed $500,000 and in which technical evaluation is considered a key element in the award decision. The contracting officer has the discretion to require a technical evaluation panel for acquisitions not exceeding $500,000 based on the complexity of the acquisition.

(*2*) The technical evaluation process requires careful consideration regarding the size, composition, expertise, and function of the technical evaluation panel. The efforts of the panel can result in the success or failure of the acquisition.

(B) *Role of the project officer.* (*1*) The project officer is the contracting officer's technical representative for the acquisition action. The project officer may be a voting member of the technical evaluation panel, and may also serve as the chairperson of the panel, unless he/she is prohibited by law or contracting activity procedures to do so.

(*2*) The project officer is responsible for recommending panel members who are knowledgeable in the technical aspects of the acquisition and who are competent to identify strengths and weaknesses of the various proposals. The program training requirements specified in 307.170 must be adhered to when selecting prospective panel members (government employees).

(*3*) The project officer shall ensure that persons possessing expertise and experience in addressing issues relative to sex, race, national origin, and handicapped discrimination are included as panel members in acquisitions which address those issues. The intent is to balance the composition of the panel so that qualified and concerned individuals may provide insight to other panel members regarding ideas for, and approaches to be taken in, the evaluation of proposals.

(*4*) The project officer is to submit the recommended list of panel members to an official within the program office in a position at least one level above the project officer, or in accordance with contracting activity procedures. This official will review the recommendations and select the chairperson.

(*5*) The project officer shall arrange for adequate and secure working space for the panel.

(C) *Role of the contracting officer.* (*1*) The term ''contracting officer,'' as used in this subpart, may be the contracting officer or his/her designated representative within the contracting office.

(*2*) The contracting officer shall not serve as a member of the technical evaluation panel but should be available to:

(*i*) Address the initial meeting of the technical evaluation panel;

(*ii*) Provide assistance to the evaluators as required; and

(*iii*) Ensure that the scores adequately reflect the written technical report comments.

(D) *Conflict of interest.* (*1*) If a panel member has an actual or apparent conflict of interest related to a proposal

under evaluation, he/she shall be removed from the panel and replaced with another evaluator. If a suitable replacement is not available, the panel shall perform the review without a replacement.

(*2*) For the purposes of this subpart, conflicts of interest are defined in the Standards of Ethical Conduct for Employees of the Executive Branch (5 CFR part 2635), Supplemental Standards of Ethical Conduct for Employees of the Department of Health and Human Services (5 CFR part 5501), and the Procurement Integrity Act. For outside evaluators serving on the technical evaluation panel, see paragraph (a)(3)(ii)(F) of this section.

(E) *Continuity of evaluation process.* (*1*) The technical evaluation panel is responsible for evaluating the original proposals, making recommendations to the chairperson regarding weaknesses and deficiencies of proposals, and, if required by the contracting officer, assisting the contracting officer during communications and discussions, and reviewing supplemental, revised and/or final proposal revisions. To the extent possible, the same evaluators should be available throughout the entire evaluation and selection process to ensure continuity and consistency in the treatment of proposals. The following are examples of circumstances when it would not be necessary for the technical evaluation panel to evaluate revised proposals submitted during the acquisition:

(*i*) The answers to questions do not have a substantial impact on the proposal;

(*ii*) Final proposal revisions are not materially different from the original proposals; or

(*iii*) The rankings of the offerors are not affected because the revisions to the proposals are relatively minor.

(*2*) The chairperson, with the concurrence of the contracting officer, may decide not to have the panel evaluate the revised proposals. Whenever this decision is made, it must be fully documented by the chairperson and approved by the contracting officer.

(*3*) When technical evaluation panel meetings are considered necessary by the contracting officer, the attendance of evaluators is mandatory. When the chairperson determines that an evaluator's failure to attend the meetings is prejudicial to the evaluation, the chairperson shall remove and/or replace the individual after discussing the situation with the contracting officer and obtaining his/her concurrence and the approval of the official responsible for appointing the panel members.

(*4*) Whenever continuity of the evaluation process is not possible, and either new evaluators are selected or a reduced panel is decided upon, each proposal which is being reviewed at any stage of the acquisition shall be reviewed at that stage by all members of the revised panel unless it is impractical to do so because of the receipt of an unusually large number of proposals.

(F) *Use of outside evaluators.* (*1*) The National Institutes of Health (NIH) and the Substance Abuse and Mental Health Services Administration (SAMHSA) are required to have a peer review of research and development contracts in accordance with Public Law 93–352 as amended by Public Law 94–63; 42 U.S.C. 289 a and 42 U.S.C. 290aa–3 respectively. This legislation requires peer review of projects and proposals, and not more than one-fourth of the members of a peer review group may be officers or employees of the United States. NIH and SAMHSA are therefore exempt from the provisions of 315.305(a)(3)(ii) to the extent that 42 U.S.C. 289a and 290aa–3 apply. Conflicts of interest are addressed at 42 CFR part 52h. Other agencies subject to statutory scientific peer review requirements are also exempt from the requirements of paragraph (a)(3)(ii) of this section to the extent that these requirements are inconsistent with their legislative requirements.

(*2*) In general, decisions to disclose proposals outside the Government for evaluation purposes shall be made by the official responsible for appointing panel members for the acquisition, after consultation with the contracting officer and in accordance with operating division procedures. The decision to disclose either a solicited or unsolicited proposal outside the Government for the purpose of obtaining an evaluation shall take into consideration the avoidance of organizational conflicts of interest and any competitive relationship between the submitter of the proposal and the prospective evaluator(s).

(*3*) When it is determined to disclose a solicited proposal outside the Government for evaluation purposes, the following or similar conditions shall be included in the written agreement with evaluator(s) prior to disclosure:

Conditions for Evaluating Proposals

The evaluator agrees to use the data (trade secrets, business data, and technical data) contained in the proposal only for evaluation purposes.

The foregoing requirement does not apply to data obtained from another source without restriction.

Any notice or legend placed on the proposal by either the Department or the submitter of the proposal shall be applied to any reproduction or abstract provided to the evaluator or made by the evaluator. Upon completion of the evaluation, the evaluator shall return the Government furnished copy of the proposal or abstract, and all copies thereof, to the Departmental office which initially furnished the proposal for evaluation.

Unless authorized by the Department's initiating office, the evaluator shall not contact the submitter of the proposal concerning any aspects of its contents.

The evaluator is obligated to obtain commitments from its employees and subcontractors, as necessary, to effect the purposes of these conditions.

(iii) Receipt of proposals.

(A) After the closing date set by the solicitation for the receipt of proposals, the contracting officer will use a transmittal memorandum to forward the technical proposals to the project officer or chairperson for evaluation. The business proposals will be retained by the contracting officer for evaluation.

(B) The transmittal memorandum shall include at least the following:

(*1*) A list of the names of the organizations submitting proposals;

(*2*) A reference to the need to preserve the integrity of the source selection process;

(*3*) A statement that only the contracting officer is to conduct discussions.

(*4*) A requirement for a technical evaluation report in accordance with paragraph (a)(3)(vi) of this section; and

(*5*) The establishment of a date for receipt of the technical evaluation report.

(iv) Convening the technical evaluation panel.

(A) Normally, the technical evaluation panel will convene to evaluate the proposals. However, there may be situations when the contracting officer determines that it is not feasible for the panel to convene. Whenever this decision is made, care must be taken to assure that the technical review is closely monitored to produce acceptable results.

(B) When a panel is convened, the chairperson is responsible for the control of the technical proposals provided to him/her by the contracting officer for use during the evaluation process. The chairperson will generally distribute the technical proposals prior to the initial panel meeting and will establish procedures for securing the proposals whenever they are not being evaluated to insure their confidentiality. After the evaluation is complete, all proposals must be returned to the contracting officer by the chairperson.

(C) The contracting officer shall address the initial meeting of the panel and state the basic rules for conducting

the evaluation. The contracting officer shall provide written guidance to the panel if he/she is unable to attend the initial panel meeting. The guidance should include:

(*1*) Explanation of conflicts of interest;

(*2*) The necessity to read and understand the solicitation, especially the statement of work and evaluation criteria, prior to reading the proposals;

(*3*) The need for evaluators to restrict the review to only the solicitation and the contents of the technical proposals;

(*4*) The need for each evaluator to review all the proposals;

(*5*) The need to watch for ambiguities, inconsistencies, errors, and deficiencies which should be surfaced during the evaluation process;

(*6*) An explanation of the evaluation process and what will be expected of the evaluators throughout the process;

(*7*) The need for the evaluators to be aware of the requirement to have complete written documentation of the individual strengths and weaknesses which affect the scoring of the proposals; and

(*8*) An instruction directing the evaluators that, until the award is made, information concerning the acquisition must not be disclosed to any person not directly involved in the evaluation process.

(v) Rating and ranking of proposals. The evaluators will individually read each proposal, describe tentative strengths and weaknesses, and independently develop preliminary scores in relation to each evaluation factor set forth in the solicitation. After this has been accomplished, the evaluators shall discuss in detail the individual strengths and weakness described by each evaluator and, if possible, arrive at a common understanding of the major strengths and weaknesses and the potential for correcting each offeror's weakness(es). Each evaluator will score each proposal, and then the technical evaluation panel will collectively rank the proposals. Generally, ranking will be determined by adding the numerical scores assigned to the evaluation factors and finding the average for each offeror. The evaluators should then identify whether each proposal is acceptable or unacceptable. Predetermined cutoff scores shall not be employed.

(vi) Technical evaluation report. A technical evaluation report shall be prepared and furnished to the contracting officer by the chairperson and maintained as a permanent record in the contract file. The report must reflect the ranking of the proposals and identify each proposal as acceptable or unacceptable. The report must also include a narrative evaluation specifying the strengths and weaknesses of each proposal, a copy of each signed rating sheet, and any reservations, qualifications, or areas to be addressed that might bear upon the selection of sources for negotiation and award. Concrete technical reasons supporting a determination of unacceptability with regard to any proposal must be included. The report should also include specific points and questions which are to be raised in discussions or negotiations.

315.306 Exchanges with offerors after receipt of proposals.

(d) *Exchanges with offerors after establishment of the competitive range.* The contracting officer and project officer should discuss the uncertainties and/or deficiencies that are included in the technical evaluation report for each proposal in the competitive range. Technical questions should be developed by the project officer and/or the technical evaluation panel and should be included in the technical evaluation report. The management, past performance and cost or price questions should be prepared by the contracting officer with assistance from the project officer and/or panel as required. The method of requesting offerors in the competitive range to submit the additional information will vary depending on the complexity of the questions, the extent of additional information requested, the time needed to analyze the responses, and the time frame for making the award. However, to the extent practicable, all questions and answers should be in writing. Each offeror in the competitive range shall be given an equitable period of time for preparation of responses to questions to the extent practicable. The questions should be developed so as to disclose the ambiguities, uncertainties, and deficiencies of the offeror.

315.307 Proposal revisions.

(b) Final proposal revisions are subject to a final evaluation of price or cost and other salient factors by the contracting officer and project officer with assistance from a cost/price analyst, and an evaluation of technical factors by the technical evaluation panel, as necessary. Proposals may be technically rescored and reranked by the technical evaluation panel and a technical evaluation report prepared. To the extent practicable, the evaluation shall be performed by the same evaluators who reviewed the original proposals. A final evaluation of past performance will be made by the contracting officer and project officer. The technical evaluation panel may be involved in the final evaluation of past performance if the panel is comprised solely of Government personnel.

315.370 Finalization of details with the selected source.

(a) After selection of the successful proposal, finalization of details with the selected offeror may be conducted if deemed necessary. However, no factor which could have any effect on the selection process may be introduced after the common cutoff date for receipt of final proposal revisions. The finalization process shall not in any way prejudice the competitive interest or rights of the unsuccessful offerors. Finalization of details with the selected offeror shall be restricted to definitizing the final agreement on terms and conditions, assuming none of these factors were involved in the selection process.

(b) Caution must be exercised by the contracting officer to insure that the finalization process is not used to change the requirements contained in the solicitation, nor to make any other changes which would impact on the source selection decision. Whenever a material change occurs in the requirements, the competition must be reopened and all offerors submitting final proposal revisions must be given an opportunity to resubmit proposals based on the revised requirements. Whenever there is a question as to whether a change is material, the contracting officer should obtain the advice of technical personnel and legal counsel before reopening the competition. Significant changes in the offeror's cost proposal may also necessitate a reopening of competition if the changes alter the factors involved in the original selection process.

(c) Should finalization details beyond those specified in paragraph (a) of this section be required for any reason, discussions must be reopened with all offerors submitting final proposal revisions.

(d) Upon finalization of details, the contracting officer should obtain a confirmation letter from the successful offeror which includes any revisions to the technical proposal, the agreed to price or cost, and, as applicable, a certificate of current cost or pricing data.

315.371 Contract preparation and award.

(a) The contracting officer must perform the following actions after finalization details have been completed:

(1) Prepare the negotiation memorandum in accordance with 315.372;

(2) Prepare the contract containing all agreed to terms and conditions and clauses required by law or regulation;

(3) Include in the contract file the pertinent documents referenced in FAR 4.803; and

(4) Obtain the appropriate approval of the proposed contract award(s) in accordance with subpart 304.71 and contracting activity procedures.

(b) After receiving the required approvals, the contract should be transmitted to the prospective contractor for signature. The prospective contractor must be informed that the contract is not effective until accepted by the contracting officer.

(c) The contract shall not be issued until the finance office certifies that the funds are available for obligation.

315.372 Preparation of negotiation memorandum.

The negotiation memorandum or summary of negotiations is a complete record of all actions leading to award of a contract and is prepared by the contract negotiator to support the source selection decision discussed in FAR 15.308. It should be in sufficient detail to explain and support the rationale, judgments, and authorities upon which all actions were predicated. The memorandum will document the negotiation process and reflect the negotiator's actions, skills, and judgments in concluding a satisfactory agreement for the Government. Negotiation memorandums shall contain discussion of the following or a statement of nonapplicability; however, information already contained in the contract file need not be reiterated. A reference to the document which contains the required information is acceptable.

(a) *Description of articles and services and period of performance.* A description of articles and services, quantity, unit price, total contract amount, and period of contract performance should be set forth (if Supplemental Agreement—show previous contract amount as revised, as well as information with respect to the period of performance).

(b) *Acquisition planning.* Summarize or reference any acquisition planning activities that have taken place.

(c) *Synopsis of acquisition.* A statement as to whether the acquisition has or has not been publicized in accordance with FAR Subpart 5.2. A brief statement of explanation should be included with reference to the specific basis for exemption under the FAR, if applicable.

(d) *Contract type.* Provide sufficient detail to support the type of contractual instrument recommended for the acquisition. If the contract is a cost-sharing type, explain the essential cost-sharing features.

(e) *Extent of competition.* The extent to which full and open competition was solicited and obtained must be discussed. The discussion shall include the date of solicitation, sources solicited, and solicitation results. If a late proposal was received, discuss whether or not the late proposal was evaluated and the rationale for the decision.

(f) *Technical evaluation.* Summarize or reference the results presented in the technical evaluation report.

(g) *Business evaluation.* Summarize or reference results presented in the business report.

(h) *Past performance.* Summarize or reference results of past performance evaluation and reference checks.

(i) *Competitive range (if applicable).* Describe how the competitive range was determined and state the offerors who were included in the competitive range and the ones who were not.

(j) *Cost breakdown and analysis.* Include a complete cost breakdown together with the negotiator's analysis of the estimated cost by individual cost elements. The negotiator's analysis should contain information such as:

(1) A comparison of cost factors proposed in the instant case with actual factors used in earlier contracts, using the same cost centers of the same supplier or cost centers of other sources having recent contracts for the same or similar item.

(2) Any pertinent Government-conducted audit of the proposed contractor's record of any pertinent cost advisory report.

(3) Any pertinent technical evaluation inputs as to necessity, allocability and reasonableness of labor, material and other direct expenses.

(4) Any other pertinent information to fully support the basis for and rationale of the cost analysis.

(5) If the contract is an incentive type, discuss all elements of profit and fee structure.

(6) A justification of the reasonableness of the proposed contractor's estimated profit or fixed fee, considering the requirements of FAR 15.404–4 and HHSAR 315.404–4.

(k) *Cost realism.* Describe the cost realism analysis performed on proposals.

(l) *Government-furnished property and Government-provided facilities.* With respect to Government-furnished or Government-provided facilities, equipment, tooling, or other property, include the following:

(1) Where no property is to be provided, a statement to that effect.

(2) Where property is to be provided, a full description, the estimated dollar value, the basis of price comparison with competitors, and the basis of rental charge, if rental is involved.

(3) Where the furnishing of any property or the extent has not been determined and is left open for future resolution, a detailed explanation.

(m) *Negotiations.* Include a statement as to the date and place negotiations were conducted, and identify members of both the Government and contractor negotiating teams by area of responsibility. Include negotiation details relative to the statement of work, terms and conditions, and special provisions. The results of cost or price negotiations must include the information required by FAR 31.109 and 15.406–3. In addition, if cost or pricing data was required to be submitted, the negotiation record must also contain the extent to which the contracting officer relied upon the factual cost or pricing data submitted and used in negotiating the cost or price.

(n) *Other considerations.* Include coverage of areas such as:

(1) Financial data with respect to a contractor's capacity and stability.

(2) Determination of contractor responsibility.

(3) Details as to why the method of payment, such as progress payment, advance payment, etc., is necessary. Also cite any required D & F's.

(4) Information with respect to obtaining of a certificate of current cost or pricing data.

(5) Other required special approvals.

(6) If the contract represents an extension of previous work, the status of funds and performance under the prior contract(s) should be reflected. Also, a determination should be made that the Government has obtained enough actual or potential value from the work previously performed to warrant continuation with the same contractor. (Project officer should furnish the necessary information.)

(7) If the contract was awarded by full and open competition, state where the unsuccessful offerors' proposals are filed.

(8) State that equal opportunity provisions of the proposed contract have been explained to the contractor, and it is aware of its responsibilities. Also state whether or not a clearance is required.

(9) If the contract is for services, a statement must be made, in accordance with FAR 37.103, that the services to be acquired are nonpersonal in nature.

(o) *Terms and conditions.* Identify the general and special clauses and conditions that are contained in the contract, such as option arrangements, incremental funding, anticipatory costs, deviations from standard clauses, etc. The basis and rationale for inclusion of any special terms and conditions must be stated and, where applicable, the document which granted approval for its use identified.

(p) *Recommendation.* A brief statement setting forth the recommendations for award.

(q) *Signature.* The memorandum must be signed by the contract negotiator who prepared the memorandum.

Subpart 315.4—Contract Pricing

315.404 Proposal analysis.

315.404–2 Information to support proposal analysis.

(a)(2) When some or all information sufficient to determine the reasonableness of the proposed cost or price is already available or can be obtained by phone from the cognizant audit agency, contracting officers may request less-than-complete field pricing support (specifying in the request the information needed) or may waive in writing the requirement for audit and field pricing support by documenting the file to indicate what information is to be used instead of the audit report and the field pricing report.

(3) When initiating audit and field pricing support, the contracting officer shall do so by sending a request to the cognizant administrative contracting officer (ACO), with an information copy to the cognizant audit office. When field pricing support is not available, the contracting officer shall initiate an audit by sending, in accordance with agency procedures, two (2) copies of the request to the OIG Office of Audits' Regional Audit Director. In both cases, the contracting officer shall, in the request:

(i) Prescribe the extent of the support needed;

(ii) State the specific areas for which input is required;

(iii)Include the information necessary to perform the review (such as the offeror's proposal and the applicable portions of the solicitation, particularly those describing requirements and delivery schedules);

(iv) Provide the complete address of the location of the offeror's financial records that support the proposal;

(v) Identify the office having audit responsibility if other than the HHS Regional Audit Office; and

(vi) Specify a due date for receipt of a verbal report to be followed by a written audit report. (If the time available is not adequate to permit satisfactory coverage of the proposal, the auditor shall so advise the contracting officer and indicate the additional time needed.) One copy of the audit request letter that was submitted to the Regional Audit Director and a complete copy of the contract price proposal shall be submitted to OIG/OA/DAC. Whenever, an audit review has been conducted by the Office of Audits, two (2) copies of the memorandum of negotiation shall be forwarded to OIG/OA/DAC by the contracting officer.

315.404–4 Profit.

(b) *Policy.* (1) The structured approach for determining profit or fee (hereafter referred to as profit) provides contracting officers with a technique that will ensure consideration of the relative value of the appropriate profit factors described in paragraph (d) of this section in the establishment of a profit objective for the conduct of negotiations. The contracting officer's analysis of these profit factors is based on information available to him/her prior to negotiations. The information is furnished in proposals, audit data, assessment reports, preaward surveys and the like. The structured approach also provides a basis for documentation of this objective, including an explanation of any significant departure from this objective in reaching an agreement. The extent of documentation should be directly related to the dollar value and complexity of the proposed acquisition. Additionally, the negotiation process does not require agreement on either estimated cost elements or profit elements. The profit objective is a part of an overall negotiation objective which, as a going-in objective, bears a distinct relationship to the cost objective and any proposed sharing arrangement. Since profit is merely one of several interrelated variables, the Government negotiator generally should not complete the profit negotiation without simultaneously agreeing on the other variables. Specific agreement on the exact weights or values of the individual profit factors is not required and should not be attempted.

(ii) The profit-analysis factors set forth at FAR 15.404–4(d) shall be used for establishing profit objectives under the following listed circumstances. Generally, it is expected that this method will be supported in a manner similar to that used in the structured approach (profit factor breakdown and documentation of the profit objective); however, factors within FAR 15.404–4(d) considered inapplicable to the acquisition will be excluded from the profit objective.

(A) Contracts not expected to exceed $100,000;

(B) Architect-engineer contracts;

(C) Management contracts for operations and/or maintenance of Government facilities;

(D) Construction contracts;

(E) Contracts primarily requiring delivery of material supplies by subcontractors;

(F) Termination settlements; and

(G) Cost-plus-award-fee contracts (However, contracting officers may find it advantageous to perform a structured profit analysis as an aid in arriving at an appropriate fee arrangement). Other exceptions may be made in the negotiation of contracts having unusual pricing situations, but shall be justified in writing by the contracting officer in situations where the structured approach is determined to be unsuitable.

(c) *Contracting officer responsibilities.* A profit objective is that part of the estimated contract price objective or value which, in the judgment of the contracting officer, constitutes an appropriate amount of profit for the acquisition being considered. This objective should realistically reflect the total overall task to be performed and the requirements placed on the contractor. Development of a profit objective should not begin until a thorough review of proposed contract work has been made; a review of all available knowledge regarding the contractor pursuant to FAR subpart 9.1, including audit data, preaward survey reports and financial statements, as appropriate, has been conducted; and an analysis of the contractor's cost estimate and comparison with the Government's estimate or projection of cost has been made.

(d) *Profit—analysis factors* (1) *Common factors.* The following factors shall be considered in all cases in which profit is to be negotiated. The weight ranges listed after each factor shall be used in all instances where the structured approach is used.

Profit factors	Weight ranges (in percent)
Contractor effort:	
Material acquisition	1 to 5.
Direct labor	4 to 15.
Overhead	4 to 9.
General management (G&A).	4 to 8.

Profit factors	Weight ranges (in percent)
Other costs	1 to 5.
Other factors:	
Cost risk	0 to 7.
Investment	−2 to +2.
Performance	−1 to +1.
Socioeconomic programs	−.5 to +.5.
Special situations..	

(i) Under the structured approach, the contracting officer shall first measure ''Contractor Effort'' by the assignment of a profit percentage within the designated weight ranges to each element of contract cost recognized by the contracting officer. The amount calculated for the cost of money for facilities capital is not to be included for the computation of profit as part of the cost base. The suggested categories under ''Contractor Effort'' are for reference purposes only. Often individual proposals will be in a different format, but since these categories are broad and basic, they provide sufficient guidance to evaluate all other items of cost.

(ii) After computing a total dollar profit for ''Contractor Effort,'' the contracting officer shall then calculate the specific profit dollars assigned for cost risk, investment, performance, socioeconomic programs, and special situations. This is accomplished by multiplying the total Government Cost Objective, exclusive of any cost of money for facilities capital, by the specific weight assigned to the elements within the ''Other Factors'' category. Form HHS–674, Structured Approach Profit/Fee Objective, should be used, as appropriate, to facilitate the calculation of this profit objective. Form HHS–674 is illustrated in 353.370–674.

(iii) In making a judgment of the value of each factor, the contracting officer should be governed by the definition, description, and purpose of the factors together with considerations for evaluating them.

(iv) The structured approach was designed for arriving at profit objectives for other than nonprofit organizations. However, if appropriate adjustments are made to reflect differences between profit and nonprofit organizations, the structured approach can be used as a basis for arriving at profit objectives for nonprofit organizations. Therefore, the structured approach, as modified in paragraph (d)(1)(iv)(B) of this section, shall be used to establish profit objectives for nonprofit organizations.

(A) For purposes of this section, nonprofit organizations are defined as those business entities organized and operated exclusively for charitable, scientific, or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual, and which are exempt from Federal income taxation under Section 501 of the Internal Revenue Code.

(B) For contracts with nonprofit organizations where profit is involved, an adjustment of up to 3 percentage points will be subtracted from the total profit objective percentage. In developing this adjustment, it will be necessary to consider the following factors;

(*1*) Tax position benefits;

(*2*) Granting of financing through advance payments; and

(*3*) Other pertinent factors which may work to either the advantage or disadvantage of the contractor in its position as a nonprofit organization.

(2) *Contractor effort.* Contractor effort is a measure of how much the contractor is expected to contribute to the overall effort necessary to meet the contract performance requirement in an efficient manner. This factor, which is apart from the contractor's responsibility for contract performance, takes into account what resources are necessary and what the contractor must do to accomplish a conversion of ideas and material into the final service or product called for in the contract. This is a recognition that within a given performance output, or within a given sales dollar figure, necessary efforts on the part of individual contractors can vary widely in both value and quantity, and that the profit objective should reflect the extent and nature of the contractor's contribution to total performance. A major consideration, particularly in connection with experimental, developmental, or research work, is the difficulty or complexity of the work to be performed, and the unusual demands of the contract, such as whether the project involves a new approach unrelated to existing technology and/or equipment or only refinements to these items. The evaluation of this factor requires an analysis of the cost content of the proposed contract as follows:

(i) *Material acquisition.* (Subcontracted items, purchased parts, and other material.) Analysis of these cost items shall include an evaluation of the managerial and technical effort necessary to obtain the required subcontracted items, purchased parts, material or services. The contracting officer shall determine whether the contractor will obtain the items or services by routine order from readily available sources or by detailed subcontracts for which the prime contractor will be required to develop complex specifications. Consideration shall also be given to the managerial and technical efforts necessary for the prime contractor to select subcontractors and to perform subcontract administration functions. In application of this criterion, it should be recognized that the contribution of the prime contractor to its purchasing program may be substantial. Normally, the lowest unadjusted weight for direct material is 2 percent. A weighting of less than 2 percent would be appropriate only in unusual circumstances when there is a minimal contribution by the contractor.

(ii) *Direct labor.* (Professional, service, manufacturing and other labor). Analysis of the various labor categories of the cost content of the contract should include evaluation of the comparative quality and quantity of professional and semiprofessional talents, manufacturing and service skills, and experience to be employed. In evaluating professional and semiprofessional labor for the purpose of assigning profit dollars, consideration should be given to the amount of notable scientific talent or unusual or scarce talent needed in contrast to nonprofessional effort. The assessment should consider the contribution this talent will provide toward the achievement of contract objectives. Since nonprofessional labor is relatively plentiful and rather easily obtained by the contractor and is less critical to the successful performance of contract objectives, it cannot be weighted nearly as high as professional or semiprofessional labor. Service contract labor should be evaluated in a like manner by assigning higher weights to engineering or professional type skills required for contract performance. Similarly, the variety of manufacturing and other categories of labor skills required and the contractor's manpower resources for meeting these requirements should be considered. For purposes of evaluation, categories of labor (*i.e.,* quality control, receiving and inspection, etc.) which do not fall within the definition for professional, service or manufacturing labor may be categorized as appropriate. However, the same evaluation considerations as outlined in this paragraph will be applied.

(iii) *Overhead and general management* (G&A). (A) Analysis of these overhead items of cost should include the evaluation of the makeup of these expenses and how much they contribute to contract performance. To the extent practicable, analysis should include a determination of the amount of labor within these overhead pools and how this labor should be treated if it were considered as direct labor under

the contract. The allocable labor elements should be given the same profit considerations that they would receive if they were treated as direct labor. The other elements of these overhead pools should be evaluated to determine whether they are routine expenses, such as utilities and maintenance, and hence given lesser profit consideration, or whether they are significant contributing elements. The composite of the individual determinations in relation to the elements of the overhead pools will be the profit consideration given the pools as a whole. The procedure for assigning relative values to these overhead expenses differs from the method used in assigning values of the direct labor. The upper and lower limits assignable to the direct labor are absolute. In the case of overhead expenses, individual expenses may be assigned values outside the range as long as the composite ratio is within the range.

(B) It is not necessary that the contractor's accounting system break down overhead expenses within the classifications of research overhead, other overhead pools, and general administrative expenses, unless dictated otherwise by Cost Accounting Standards (CAS). The contractor whose accounting system reflects only one overhead rate on all direct labor need not change its system (if CAS exempt) to correspond with these classifications. The contracting officer, in an evaluation of such a contractor's overhead rate, could break out the applicable sections of the composite rate which could be classified as research overhead, other overhead pools, and general and administrative expenses, and follow the appropriate evaluation technique.

(C) Management problems surface in various degrees and the management expertise exercised to solve them should be considered as an element of profit. For example, a contract for a new program for research or an item which is on the cutting edge of the state of the art will cause more problems and require more managerial time and abilities of a higher order than a follow-on contract. If new contracts create more problems and require a higher profit weight, follow-ons should be adjusted downward because many of the problems should have been solved. In any event, an evaluation should be made of the underlying managerial effort involved on a case-by-case basis.

(D) It may not be necessary for the contracting officer to make a separate profit evaluation of overhead expenses in connection with each acquisition action for substantially the same project with the same contractor. Where an analysis of the profit weight to be assigned to the overhead pool has been made, that weight assigned may be used for future acquisitions with the same contractor until there is a change in the cost composition of the overhead pool or the contract circumstances, or the factors discussed in paragraph (d)(2)(iii)(C) of this section are involved.

(iv) *Other costs.* Analysis of this factor should include all other direct costs associated with contractor performance (*e.g.,* travel and relocation, direct support, and consultants). Analysis of these items of cost should include, the significance of the cost of contract performance, nature of the cost, and how much they contribute to contract performance. Normally, travel costs require minimal administrative effort by the contractor and, therefore, usually receive a weight no greater than 1%. Also, the contractor may designate individuals as ''consultants'' but in reality these individuals may be obtained by the contractor to supplement its workforce in the performance of routine duties required by contract. These costs would normally receive a minimum weight. However, there will be instances when the contractor may be required to locate and obtain the services of consultants having expertise in fields such as medicine or human services. In these instances, the contractor will be required to expend greater managerial and technical effort to obtain these services and, consequently, the costs should receive a much greater weight.

(3) *Other factors* (i) *Contract cost risk.* The contract type employed basically determines the degree of cost risk assumed by the contractor. For example, where a portion of the risk has been shifted to the Government through cost-reimbursement provisions, unusual contingency provisions, or other risk-reducing measures, the amount of profit should be less than where the contractor assumes all the risk.

(A) In developing the prenegotiation profit objective, the contracting officer will need to consider the type of contract anticipated to be negotiated and the contractor risk associated therewith when selecting the position in the weight range for profit that is appropriate for the risk to be borne by the contractor. This factor should be one of the most important in arriving at prenegotiation profit objective. Evaluation of this risk requires a determination of the degree of cost responsibility the contractor assumes; the reliability of the cost estimates in relation to the task assumed; and the complexity of the task assumed by the contractor. This factor is specifically limited to the risk of contract costs. Thus, risks on the part of the contractor such as reputation, losing a commercial market, risk of losing potential profits in other fields, or any risk which falls on the contracting office, such as the risk of not acquiring a satisfactory report, are not within the scope of this factor.

(B) The first and basic determination of the degree of cost responsibility assumed by the contractor is related to the sharing of total risk of contract cost by the Government and the contractor through the selection of contract type. The extremes are a cost-plus-a-fixed-fee contract requiring the contractor to use its best efforts to perform a task and a firm fixed-price contract for a service or a complex item. A cost-plus-a-fixed-fee contract would reflect a minimum assumption of cost responsibility, whereas a firm-fixed-price contract would reflect a complete assumption of cost responsibility. Where proper contract selection has been made, the regard for risk by contract type would usually fall into the following percentage ranges:

	Percent
Cost-reimbursement type contracts	0–3
Fixed-price type contracts	2–7

(C) The second determination is that of the reliability of the cost estimates. Sound price negotiation requires well-defined contract objectives and reliable cost estimates. Prior experience assists the contractor in preparing reliable cost estimates on new acquisitions for similar related efforts. An excessive cost estimate reduces the possibility that the cost of performance will exceed the contract price, thereby reducing the contractor's assumption of contract cost risk.

(D) The third determination is that of the difficulty of the contractor's task. The contractor's task can be difficult or easy, regardless of the type of contract.

(E) Contractors are likely to assume greater cost risk only if contracting officers objectively analyze the risk incident to proposed contracts and are willing to compensate contractors for it. Generally, a cost-plus-fixed fee contract will not justify a reward for risk in excess of 0.5 percent, nor will a firm fixed-price contract justify a reward of less than the minimum in the structured approach. Where proper contract-type selection has been made, the reward for risk, by contract type, will usually fall into the following percentage ranges:

(*1*) Type of contract and percentage ranges for profit objectives developed by using the structured approach for

research and development and manufacturing contracts:

	Percent
Cost-Plus-fixed fee	0 to 0.5
Cost-plus-incentive fee:	
With cost incentive only	1 to 2
With multiple incentives	1.5 to 3
Fixed-price-incentive:	
With cost incentive only	2 to 4
With multiple incentives	3 to 5
Prospective price redetermination.	3 to 5
Firm fixed-price	5 to 7

(*2*) Type of contract and percentage ranges for profit objectives developed by using the structured approach for service contracts:

	Percent
Cost-plus-fixed-fee	0 to 0.5
Cost-plus-incentive fee	1 to 2
Fixed-price incentive	2 to 3
Firm fixed-price	3 to 4

(F) These ranges may not be appropriate for all acquisitions. For instance, a fixed-price-incentive contract that is closely priced with a low ceiling price and high incentive share may be tantamount to a firm fixed-price contract. In this situation, the contracting officer may determine that a basis exists for high confidence in the reasonableness of the estimate and that little opportunity exists for cost reduction without extraordinary efforts. On the other hand, a contract with a high ceiling and low incentive formula can be considered to contain cost-plus incentive-fee contract features. In this situation, the contracting officer may determine that the Government is retaining much of the contract cost responsibility and that the risk assumed by the contractor is minimal. Similarly, if a cost-plus-incentive-fee contract includes an unlimited downward (negative) fee adjustment on cost control, it could be comparable to a fixed-price-incentive contract. In such a pricing environment, the contracting officer may determine that the Government has transferred a greater amount of cost responsibility to the contractor than is typical under a normal cost-plus-incentive-fee contract.

(G) The contractor's subcontracting program may have a significant impact on the contractor's acceptance or risk under a contract form. It could cause risk to increase or decrease in terms of both cost and performance. This consideration should be a part of the contracting officer's overall evaluation in selecting a factor to apply for cost risk. It may be determined, for instance, that the prime contractor has effectively transferred real cost risk to a subcontractor and the contract cost risk evaluation may, as a result, be below the range which would otherwise apply for the contract type being proposed. The contract cost risk evaluation should not be lowered, however, merely on the basis that a substantial portion of the contract costs represents subcontracts without any substantial transfer of contractor's risk.

(H) In making a contract cost risk evaluation in an acquisition action that involves definitization of a letter contract, unpriced change orders, and unpriced orders under basic ordering agreements, consideration should be given to the effect on total contract cost risk as a result of having partial performance before definitization. Under some circumstances it may be reasoned that the total amount of cost risk has been effectively reduced. Under other circumstances it may be apparent that the contractor's cost risk remained substantially unchanged. To be equitable, the determination of profit weight for application to the total of all recognized costs, both those incurred and those yet to be expended, must be made with consideration to all attendant circumstances—not just the portion of costs incurred or percentage of work completed prior to definitization.

(I) Time and material and labor hour contracts will be considered to be cost-plus-a-fixed-fee contracts for the purpose of establishing profit weights unless otherwise exempt under paragraph (b)(1)(ii) of this section in the evaluation of the contractor's assumption of contract cost risk.

(ii) *Investment.* HHS encourages its contractors to perform their contracts with the minimum of financial, facilities, or other assistance from the Government. As such, it is the purpose of this factor to encourage the contractor to acquire and use its own resources to the maximum extent possible. The evaluation of this factor should include an analysis of the following:

(A) *Facilities.* (Including equipment). To evaluate how this factor contributes to the profit objective requires knowledge of the level of facilities utilization needed for contract performance, the source and financing of the required facilities, and the overall cost effectiveness of the facilities offered. Contractors who furnish their own facilities which significantly contribute to lower total contract costs should be provided with additional profit. On the other hand, contractors who rely on the Government to provide or finance needed facilities should receive a corresponding reduction in profit. Cases between these examples should be evaluated on their merits with either positive or negative adjustments, as appropriate, in profit being made. However, where a highly facilitized contractor is to perform a contract which does not benefit from this facilitization or where a contractor's use of its facilities has a minimum cost impact on the contract, profit need not be adjusted. When applicable, the prospective contractor's computation of facilities capital cost of money for pricing purposed under CAS 414 can help the contracting officer identify the level of facilities investment to be employed in contract performance.

(B) *Payments.* In analyzing this factor, consideration should be given to the frequency of payments by the Government to the contractor. The key to this weighting is to give proper consideration to the impact the contract will have on the contractor's cash flow. Generally, negative consideration should be given for advance payments and payments more frequent than monthly with maximum reduction being given as the contractor's working capital approaches zero. Positive consideration should be given for payments less frequent than monthly with additional consideration given for a capital turn-over rate on the contract which is less than the contractor's or the industry's normal capital turn-over rate.

(iii) *Performance.* (Cost-control and other past accomplishments.) The contractor's past performance should be evaluated in such areas as quality of service or product, meeting performance schedules, efficiency in cost control (including need for and reasonableness of cost incurred), accuracy and reliability of previous cost estimates, degree of cooperation by the contractor (both business and technical), timely processing of changes and compliance with other contractual provisions, and management of subcontract programs. Where a contractor has consistently achieved excellent results in these areas in comparison with other contractors in similar circumstances, this performance merits a proportionately greater opportunity for profit. Conversely, a poor record in this regard should be reflected in determining what constitutes a fair and reasonable profit.

(iv) *Federal socioeconomic programs.* This factor, which may apply to special circumstances or particular acquisitions, relates to the extent of a contractor's successful participation in Government sponsored programs such as small business, small disadvantaged business, women-owned small business, and energy conservation efforts. The contractor's policies and procedures which energetically support

Government socioeconomic programs and achieve successful results should be given positive considerations. Conversely, failure or unwillingness on the part of the contractor to support Government socioeconomic programs should be viewed as evidence of poor performance for the purpose of establishing a profit objective.

(v) *Special situations* (A) *Inventive and developmental contributions.* The extent and nature of contractor-initiated and financed independent development should be considered in developing the profit objective, provided that the contracting officer has made a determination that the effort will benefit the contract. The importance of the development in furthering health and human services purposes, the demonstrable initiative in determining the need and application of the development, the extent of the contractor's cost risk, and whether the development cost was recovered directly or indirectly from Government sources should be weighed.

(B) *Unusual pricing agreements.* Occasionally, unusual contract pricing arrangements are made with the contractor wherein it agrees to cost ceilings, *e.g.,* a ceiling on overhead rates for conditions other than those discussed at FAR 42.707. In these circumstances, the contractor should receive favorable consideration in developing the profit objective.

(C) *Negative factors.* Special situations need not be limited to those which only increase profit levels. A negative consideration may be appropriate when the contractor is expected to obtain spin-off-benefits as a direct result of the contract (*e.g.,* products or services with commercial application).

(4) *Facilities capital cost of money.* When facilities capital cost of money (cost of capital committed to facilities) is included as an item of cost in the contractor's proposal, a reduction in the profit objective shall be made in an amount equal to the amount of facilities capital cost of money allowed in accordance with the Facilities Capital Cost-of Money Cost Principal. If the contractor does not propose this cost, a provision must be inserted in the contract that facilities capital cost of money is not an allowable cost.

Subpart 315.6—Unsolicited Proposals

315.605 Content of unsolicited proposals.

(d) Certification by offeror—To ensure against contacts between Department employees and prospective offerors which would exceed the limits of advance guidance set forth in FAR 15.604 resulting in an unfair advantage to an offeror, the contracting officer shall ensure that the following certification is furnished to the prospective offeror and the executed certification is included as part of the resultant unsolicited proposal:

Unsolicited Proposal

Certification by Offeror

This is to certify, to the best of my knowledge and belief, that:

(a) This proposal has not been prepared under Government supervision.

(b) The methods and approaches stated in the proposal were developed by this offeror.

(c) Any contact with employees of the Department of Health and Human Services has been within the limits of appropriate advance guidance set forth in FAR 15.604.

(d) No prior commitments were received from departmental employees regarding acceptance of this proposal.

Date: _____

Organization: _____

Name: _____

Title: _____

(This certification shall be signed by a responsible official of the proposing organization or a person authorized to contractually obligate the organization.)

315.606 Agency procedures.

(a) The HCA is responsible for establishing procedures to comply with FAR 15.606(a).

(b) The HCA or his/her designee shall be the point of contract for coordinating the receipt and handling of unsolicited proposals.

315.606–1 Receipt and initial review.

(d) An unsolicited proposal shall not be refused consideration merely because it was initially submitted as a grant application. However, contracts shall not be awarded on the basis of unsolicited proposals which have been rejected for grant support on the grounds that they lack scientific merit.

315.609 Limited use of data.

The legend, Use and Disclosure of Data, prescribed in FAR 15.609(a) is to be used by the offeror to restrict the use of data for evaluation purposes only. However, data contained within the unsolicited proposal may have to be disclosed as a result of a request submitted pursuant to the Freedom of Information Act. Because of this possibility, the following notice shall be furnished to all prospective offerors of unsolicited proposals whenever the legend is provided in accordance with FAR 15.604(a)(7):

The Government will attempt to comply with the ''Use and Disclosure of Data'' legend.

However, the Government may not be able to withhold a record (data, document, etc.) nor deny access to a record requested by an individual (the public) when an obligation is imposed on the Government under the Freedom of Information Act, 5 U.S.C. 552, as amended. The Government determination to withhold or disclose a record will be based upon the particular circumstances involving the record in question and whether the record may be exempted from disclosure under the Freedom of Information Act. Records which the offeror considers to be trade secrets and commercial or financial information and privileged or confidential must be identified by the offeror as indicated in the referenced legend.

PART 316—TYPES OF CONTRACTS

Subpart 316.3—Cost-Reimbursement Contracts

Sec.
316.307 Contract clauses.

Subpart 316.6—Time-and-Materials, Labor-Hour, and Letter Contracts

316.603 Letter contracts.
316.603–3 Limitations.
316.603–70 Information to be furnished when requesting authority to issue a letter contract.
316.603–71 Approval for modifications to letter contracts.

Subpart 316.7—Agreements

316.770 Unauthorized types of agreements.
316.770–1 Letter of intent.
316.770–2 Memorandums of understanding.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 316.3—Cost-Reimbursement Contracts

316.307 Contract clauses.

(a) If the contract is with a hospital (profit or nonprofit) for research and development, modify the ''Allowable Cost and Payment'' clause at FAR 52.216–7 by deleting from paragraph (a) the words ''Subpart 31.2 of the Federal Acquisition Regulation (FAR)'' and substituting ''45 CFR Part 74 Appendix E.''

(j) The contracting officer shall insert the clause at 352.216–72, Additional Cost Principles, in all solicitations and resultant cost-reimbursement contracts.

Subpart 316.6—Time-and-Materials, Labor-Hour, and Letter Contracts

316.603 Letter contracts.

316.603–3 Limitations.

An official one level above the contracting officer shall execute the prescribed written statement.

316.603–70 Information to be furnished when requesting authority to issue a letter contract.

The following information should be included by the contracting officer in any memorandum requesting approval to issue a letter contract:

(a) Name and address of proposed contractor.

(b) Location where contract is to be performed.

(c) Contract number, including modification number, if possible.

(d) Brief description of work and services to be performed.

(e) Performance or delivery schedule.

(f) Amount of letter contract.

(g) Estimated total amount of definitized contract.

(h) Type of definitive contract to be executed (fixed price, cost-reimbursement, etc.)

(i) Statement of the necessity and advantage to the Government of the use of the proposed letter contract.

(j) Statement of percentage of the estimated cost that the obligation of funds represents. In rare instances where the obligation represents 50 percent or more of the proposed estimated cost of the acquisition, a justification for that obligation must be included which would indicate the basis and necessity for the obligation (e.g., the contractor requires a large initial outlay of funds for major subcontract awards or an extensive purchase of materials to meet an urgent delivery requirement). In every case, documentation must assure that the amount to be obligated is not in excess of an amount reasonably required to perform the work.

(k) Period of effectiveness of a proposed letter contract. If more than 180 days, complete justification must be given.

(l) Statement of any substantive matters that need to be resolved.

316.603–71 Approval for modifications to letter contracts.

All letter contract modifications (amendments) must be approved one level above the contracting officer. Request for authority to issue letter contract modifications shall be processed in the same manner as requests for authority to issue letter contracts and shall include the following:

(a) Name and address of the contractor.

(b) Description of work and services.

(c) Date original request was approved and indicate approving official.

(d) Letter contract number and date issued.

(e) Complete justification as to why the letter contract cannot be definitized at this time.

(f) Complete justification as to why the level of funding must be increased.

(g) Complete justification as to why the period of effectiveness is increased beyond 180 days, if applicable.

(h) If the funding of the letter contract is to be increased to more than 50 percent of the estimated cost of the acquisition, the information required by 316.603–70(j) must be included.

Subpart 316.7—Agreements

316.770 Unauthorized types of agreements.

316.770–1 Letters of intent.

A letter of intent is an informal unauthorized agreement between the Government and a prospective contractor which indicates that products or services will be produced after completion of funding and/or other contractual formalities. Letters of intent are often solicited by prospective contractors or may be originated by Government personnel. Letters of intent are not authorized by the FAR and are prohibited for use by Department personnel.

316.770–2 Memorandums of understanding.

A ''memorandum of understanding'' is an unauthorized agreement, usually drafted during the course of negotiations, to modify mandatory FAR and HHSAR provisions in such a manner as to make them more acceptable to a prospective contractor. It may be used to bind the contracting officer in attempting to exercise rights given the Government under the contract, or may contain other matters directly contrary to the language of the solicitation or prospective contractual document. Use of memorandums of understanding is not authorized. Any change in a solicitation or contract shall be made by amendment or modification to that document. When a change to a prescribed contract clause is considered necessary, a deviation shall be requested.

PART 317—SPECIAL CONTRACTING METHODS

Subpart 317.2—Options

Sec.
317.201 Definition.

Subpart 317.71—Supply and Service Acquisitions Under the Government Employees Training Act.

317.7100 Scope of subpart.
317.7101 Applicable regulations.
317.7102 Acquisition of training.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 317.2—Options

317.201 Definitions.

An option must:

(a) Identify the supplies or services as a discrete option quantity in addition to the basic quantity of supplies or services to be delivered under the initial contract award;

(b) Establish a price or specify a method of calculation which will make the price certain;

(c) Be agreed to and included in the initial contract award; and

(d) Permit the Government the right to exercise the option unilaterally.

Subpart 317.71—Supply and Service Acquisitions Under the Government Employees Training Act

317.7100 Scope of subpart.

This subpart provides alternate methods for obtaining training under the Government Employees Training Act (GETA), 5 U.S.C. Chapter 41.

317.7101 Applicable regulations.

Basic policy, standards, and delegations of authority to approve training are contained in HHS Personnel Manual Instruction 410–1.

317.7102 Acquisition of training.

(a) Off-the-shelf training, whether for individuals or for groups of employees, shall be acquired under the GETA by officials delegated authority in HHS Transmittal 95.5, Personnel Manual (3/30/95).

(b) Training must be acquired through the contracting office if there are costs for training course development or for modification of off-the-shelf training courses.

PART 319—SMALL BUSINESS PROGRAMS

Subpart 319.2—Policies

Sec.
319.201 General policy.

Subpart 319.5—Set-Asides for Small Business

319.501 General.
319.506 Withdrawing or modifying set-asides.

Subpart 319.7—Subcontracting with Small Business, Small Disadvantaged Business and Women-Owned Small Business Concerns

319.705 Responsibilities of the contracting officer under the subcontracting assistance program.
319.705–5 Awards involving subcontracting plans.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 319.2—Policies

319.201 General policy.

(d) The functional management responsibilities for the Department's Small Business Program, (small, HUBZone, small disadvantaged, and women-owned small business programs) are delegated to the Director of the Office of Small and Disadvantaged Business Utilization (OSDBU).

(e) (1) The Department's Small Business Program shall be carried out by appointed small business specialists (SBS) at the OPDIV Level. Appointments, and termination of appointments, shall be made in writing by the head of the OPDIV after consultation and concurrence by the Director, OSDBU. The small business specialist shall be responsible directly to the appointing authority and shall be at an organizational level outside the direct acquisition chain of command, i.e., should report directly to the head of the OPDIV or designee. The Director, OSDBU will exercise functional management authority over small business specialists regarding the small business programs.

(2) The head of each OPDIV shall appoint a qualified full-time small business specialist (SBS) in the following activities: Administration for Children and Families (ACF), Agency for Healthcare Research and Quality (AHRQ), Health Care Financing Administration (HCFA), Substance Abuse and Mental Health Services Administration (SAMHSA), Food and Drug Administration (FDA), Health Resources and Services Administration (HRSA), Indian Health Service (IHS), National Institutes of Health (NIH), Centers for Disease Control and Prevention (CDCP), and Program Support Center (PSC). A SBS shall also be appointed for the Office of the Secretary (OS). As deemed necessary, additional small business specialists may be appointed in larger contracting activities. When the volume of contracting does not warrant assignment of a full-time SBS, an individual shall be appointed as the specialist on a part-time basis. The responsibilities of this assignment shall take precedence over other responsibilities.

Subpart 319.5—Set-Asides For Small Business

319.501 General.

(d) Subsequent to the contracting officer's recommendation on Form HHS653, Small Business Set-Aside Review Form, the SBS shall review each proposed acquisition and either concur or non-concur with the contracting officer's recommendation. If the contracting officer disapproves the SBS's set-aside recommendation, the reasons must be documented on the Form HHS–653, and the form placed in the contract file. The contracting officer will make the final determination as to whether the proposed acquisition will be set-aside or not.

319.506 Withdrawing or modifying set-asides.

(d) Immediately upon notice from the contracting officer, the SBS shall provide telephone notification regarding all set-aside withdrawals to the OSDBU Director.

Subpart 319.7—Subcontracting with Small Business, Small Disadvantaged Business and Women-Owned Small Business Concerns

319.705 Responsibilities of the contracting officer under the subcontracting assistance program.

319.705–5 Awards involving subcontracting plans.

(a)(3) The SBA PCR shall be allowed a period of one to five working days to review the contract award package, depending upon the circumstances and complexity of the individual acquisition.

PART 323—ENVIRONMENT, CONSERVATION, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

Subpart 323.70—Safety and Health

Sec.

323.7000 Scope of subpart.
323.7001 Policy.
323.7002 Actions required.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 323.70—Safety and Health

323.7000 Scope of subpart.

This subpart prescribes the use of a safety and health clause in contracts involving hazardous materials or operations, and provides procedures for administering safety and health provisions.

323.7001 Policy.

Various statutes and regulations (e.g. Walsh-Healy Act; Service Contract Act) require adherence to minimum safety and health standards by contractors engaged in potentially hazardous work. The guidance contained in FAR subpart 23.3 shall be used for hazardous materials as the primary reference. When the guidance is judged insufficient or does not meet the safety and health situation in the instant acquisition, this subpart shall be followed.

323.7002 Actions required.

(a) *Contracting activities.* Contracting activities shall use the clause set forth in 352.223–70, or a clause reading substantially the same, in prospective contracts and subcontracts involving hazardous materials or operations for the following:

(1) Services or products;

(2) Research, development, or test projects;

(3) Transportation of hazardous materials; and

(4) Construction, including construction of facilities on the contractor's premises.

(b) *Safety officers.* OPDIV safety officers shall advise and assist initiators of acquisition requests and contracting officers in:

(1) Determining whether safety and health provisions should be included in a prospective contract;

(2) Evaluating a prospective contractor's safety and health programs; and

(3) Conducting post-award reviews and surveillance to the extent deemed necessary.

(c) *Initiators.* Initiators of acquisition requests for items described in paragraph (a) of this section shall:

(1) During the preparation of a request for contract, and in the solicitation, ensure that hazardous materials and operations to be used in the performance of the contract are clearly identified; and

(2) During the period of performance:

(i) Apprise the contracting office of any noncompliance with safety and health provisions identified in the contract; and

(ii) Cooperate with the safety officer in conducting review and surveillance activities.

PART 324—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

Subpart 324.1—Protection of Individual Privacy

Sec.

324.100 Scope of subpart.
324.102 General.
324.103 Procedures.

Subpart 324.2—Freedom of Information Act

324.202 Policy.

Subpart 324.70—Confidentiality of Information

324.7001 General.
324.7002 Policy.
324.7003 Applicability.
324.7004 Required clause.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 324.1—Protection of Individual Privacy

324.100 Scope of subpart.

This subpart implements 45 CFR Part 5b, Privacy Act Regulations, and FAR Subpart 24.1, Protection of Individual Privacy, which implements the Privacy Act of 1974 (Public Law 93–579, December 31, 1974; 5 U.S.C. 552a) and OMB Circular No. A–108, July 9, 1975.

324.102 General.

(a) It is the Department's policy to protect the privacy of individuals to the maximum possible extent while permitting the exchange of records required to fulfill the Department's administrative and program responsibilities and its responsibilities for disclosing records to which the general public is entitled under the Freedom of Information Act (5 U.S.C. 552). The Privacy Act of 1974 and the Department's implementation under 45 CFR part 5b apply ''when an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish any agency function* * *'' The key factor is whether a departmental function is involved. Therefore, the Privacy Act requirements apply to a departmental contract when, under the contract, the contractor must maintain or operate a system of records to accomplish a departmental function.

(e) The program official, and, as necessary, the official designated as the activity's Privacy Act Coordinator and the Office of General Counsel, shall determine the applicability of the Act to each proposed acquisition. The program official is required to include a statement in the request for contract indicating whether the Privacy Act is or is not applicable to the proposed acquisition.

(f) Whenever the contracting officer is informed that the Privacy Act is not applicable, but the resultant contract will involve the collection of individually identifiable personal data by the contractor, the contracting officer shall include provisions to protect the confidentiality of the records and the privacy of individuals identified in the records (see subpart 324.70).

324.103 Procedures.

(a) All requests for contract shall be reviewed by the contracting officer to determine whether the Privacy Act requirements are applicable. If applicable, the contracting officer shall include the solicitation notification and contract clause required by FAR 24.104 in the solicitation, and the contract clause in the resultant contract. In addition, the contracting officer shall ensure that the solicitation notification, contract clause, and other pertinent information specified in this subpart are included in any contract modification which results in the Privacy Act requirements becoming applicable to a contract.

(b)(1) The contracting officer shall identify the system(s) of records on individuals in solicitations, contracts, and contract modifications to which the Privacy Act and the implementing regulations are applicable.

(2) The contracting officer shall include a statement in the contract notifying the contractor that the contractor and its employees are subject to criminal penalties for violations of the Act (5 U.S.C. 552a(i)) to the same extent as employees of the Department. The statement shall require that the contractor assure that each contractor employee knows the prescribed rules of conduct, and each contractor employee is aware that he/she can be subjected to criminal penalties for violations of the Act. The contracting officer shall provide the contractor with a copy of the rules of conduct and other requirements set forth in 45 CFR part 5b.

(c) The contracting officer shall include in the contract the disposition to be made of the system(s) of records on individuals upon completion of performance of the contract. For example, the contract may require the contractor to completely destroy the records, to remove personal identifiers, to turn the records over to the Department, or to keep the records but take certain measures to keep the records confidential and protect the individuals' privacy.

(d) Whenever an acquisition is determined to be subject to the Privacy Act requirements, a ''system notice,'' prepared by the program official and describing the Department's intent to establish a new system of records on individuals, to make modifications to an existing system, or to disclose information in regard to an existing system, is required to be published in the **Federal Register**. A copy of the ''system notice'' shall be attached to the request for contract or purchase request. If a ''system notice'' is not attached, the contracting officer shall inquire about its status and shall obtain a copy from the program official for inclusion in the contract file. If a ''system notice'' has not been published in the **Federal Register**, the contracting officer may proceed with the acquisition but shall not award the contract until the ''system notice'' is published, and publication is verified by the contracting officer.

Subpart 324.2—Freedom of Information Act

324.202 Policy.

(a) The Department's regulation implementing the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended, is set forth in 45 CFR part 5.

(b) The contracting officer, upon receiving a FOIA request, shall follow Department and operating division procedures. As necessary, actions should be coordinated with the cognizant Freedom of Information (FOI) Officer and the Business and Administrative Law Division of the Office of General Counsel. The contracting officer must remember that only the FOI Officer has the authority to release or deny release of records. While the contracting officer should be familiar with the entire FOIA regulation in 45 CFR part 5, particular attention should be focused on §§ 5.65 and 5.66; also of interest are §§ 5.32, 5.33, and 5.35.

Subpart 324.70—Confidentiality of Information

324.7001 General.

In performance of certain HHS contracts, it is necessary for the contractor to generate data, or be furnished data by the Government, which is about individuals, organizations, or Federal programs. This subpart and the accompanying contract clause require contractors to prudently handle disclosure of certain types of information not subject to the Privacy Act or the HHS human subject regulations set forth in 45 CFR part 46. This subpart and contract clause address the kinds of data to be generated by the contractor and/or data to be furnished by the Government that are considered confidential and how it should be treated.

324.7002 Policy.

It is the policy of HHS to protect personal interests of individuals, corporate interests of non-governmental organizations, and the capacity of the Government to provide public services when information from or about individuals, organizations, or Federal agencies is provided to or obtained by contractors in performance of HHS contracts. This protection depends on the contractor's recognition and proper handling of the information. As a result, the ''Confidentiality of Information'' contract clause was developed.

324.7003 Applicability.

(a) The ''Confidentiality of Information'' clause, set forth in 352.224–70, should be used in

solicitations and resultant contracts whenever the need exists to keep information confidential. Examples of situations where the clause may be appropriate include:

(1) Studies performed by the contractor which generate information or involve Government-furnished information that is personally identifiable, such as medical records, vital statistics, surveys, and questionnaires;

(2) Contracts which involve the use of salary structures, wage schedules, proprietary plans or processes, or confidential financial information of organizations other than the contractor's; and

(3) Studies or research which may result in preliminary or invalidated findings which, upon disclosure to the public, might create erroneous conclusions which, if acted upon, could threaten public health or safety.

(b) With regard to protecting individuals, this subpart and contract clause are not meant to regulate or control the method of selecting subjects and performing studies or experiments involving them. These matters are dealt with in the HHS regulation entitled ''Protection of Human Subjects,'' 45 CFR Part 46. If a system of records under contract, or portions thereof, is determined to be subject to the requirements of the Privacy Act, in accordance with FAR 24.1 and 324.1 and Title 45 CFR part 5b, the procedures cited in those references are applicable and the Privacy Act contract clause shall be included in the contract. If the contract also involves confidential information, as described in this section, which is not subject to the Privacy Act, the contract shall include the ''Confidentiality of Information'' clause in addition to the Privacy Act clause.

324.7004 Required clause.

The clause set forth in 352.224–70 shall be included in any RFP and resultant contract(s) where it has been determined that confidentiality of information provisions may apply. Any RFP announcing the intent to include this clause in any resultant contract(s) shall indicate, as specifically as possible, the types of data which would be covered and requirements for handling the data.

PART 325—FOREIGN ACQUISITION

Subpart 325.1—Buy American Act—Supplies

Sec.

325.102 Policy.
325.108 Excepted articles, materials, and supplies.

Subpart 325.3—Balance of Payments Program

325.302 Policy.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 325.1—Buy American Act—Supplies

325.102 Policy.

(b) The head of the contracting activity (not delegable) shall make the determinations required by FAR 25.102(a)(1) through (5) and 25.102(b)(2).

325.108 Excepted articles, materials, and supplies.

(b) Articles, materials, and supplies not listed in FAR 25.108(d) may be excepted only after a written determination has been made by the head of the contracting activity (not delegable). These determinations are required only in instances where it has been determined that only suppliers of foreign source end items shall be solicited. However, approvals and determinations covering individual acquisitions in the following categories may be made by the contracting officer:

(1) Acquisition of spare and replacement parts for foreign manufactured items, if the acquisition must be restricted to the original manufacturer or its supplier; and

(2) Acquisition of foreign drugs when it has been determined, in writing, by the responsible program official, that only the requested foreign drug will fulfill the requirement.

Subpart 325.3—Balance of Payments Program

325.302 Policy.

All determinations addressed in FAR 25.302 shall be made by the head of the contracting activity (not delegable).

PART 328—BONDS AND INSURANCE

Subpart 328.3—Insurance

Sec.

328.301 Policy.
328.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.
328.311–2 Agency solicitation provisions and contract clauses.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 328.3—Insurance

328.301 Policy.

It is Department policy to limit the Government's reimbursement of its contractors' liability to third persons for claims not covered by insurance in cost-reimbursement contracts to the Limitation of Funds or Limitation of Cost clause of the contract. In addition, the amount of the Government's reimbursement will be limited to final judgments or settlements approved in writing by the Government.

328.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.

328.311–2 Agency solicitation provisions and contract clauses.

The contracting officer shall insert the clause at 352.228–7, Insurance—Liability to Third Persons, in all solicitations and resulting cost-reimbursement contracts, in lieu of the clause at FAR 52.228–7 required by FAR 28.311–1. This is an authorized deviation.

PART 330—COST ACCOUNTING STANDARDS

Subpart 330.2—CAS Program Requirements

Sec.

330.201 Contract requirements.
330.201–5 Waiver.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 330.2—CAS Program Requirements

330.201 Contract requirements.

330.201–5 Waiver.

(c) The requirements of FAR 30.201–5 shall be exercised by the Director, Office of Acquisition Management (DOAM). Requests for waivers shall be forwarded through normal acquisition channels to the DOAM.

PART 332—CONTRACT FINANCING

Subpart 332.4—Advance Payments for Non-Commercial Items

Sec.

332.402 General.
332.403 Applicability.
332.407 Interest.
332.409 Contracting officer action.
332.409–1 Recommendation for approval.

Subpart 332.5—Progress Payments Based on Costs

332.501 General.
332.501–2 Unusual progress payments.

Subpart 332.7—Contract Funding

332.702 Policy.
332.703 Contract funding requirements.
332.703–1 General.
332.704 Limitations of cost or funds.
332.705 Contract clauses.
332.705–2 Clauses for limitation of costs or funds.

Subpart 332.9—Prompt Payment

332.902 Definitions.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 332.4—Advance Payments for Non-Commercial Items

332.402 General.

(e) The determination that the making of an advance payment is in the public interest (see FAR 32.402(c)(1)(iii)(A)) shall be made by the respective chief of the contracting office (CCO)(not delegable).

332.403 Applicability.

All contracts for research work with educational institutions located in the United States shall provide for financing by use of advance payments, in reasonable amounts, unless otherwise prohibited by law.

332.407 Interest.

(d) The HCA (not delegable) is authorized to make the determinations in FAR 32.407(d) and as follows. In addition to the interest-free advance payments for the types of contracts listed in FAR 32.407(d), advance payments without interest may be approved for nonprofit contracts which are without fee with educational institutions and other nonprofit organizations, whether public or private, which are for the performance of work involving health services, educational programs, or social service programs, including, but not limited to, programs such as:

(1) Community health representative services for an Indian Tribe or Band;

(2) Narcotic addict rehabilitative services;

(3) Comprehensive health care service program for Model Neighborhood programs;

(4) Planning and development of health maintenance organizations;

(5) Dissemination of information derived from educational research;

(6) Surveys or demonstrations in the field of education;

(7) Producing or distributing educational media for handicapped persons including captioned films for the hearing impaired;

(8) Operation of language or area centers;

(9) Conduct of biomedical research and support services;

(10) Research surveys or demonstrations involving the training and placement of health manpower and health professionals, and dissemination of related information; and

(11) Surveys or demonstrations in the field of social service.

332.409 Contracting officer action.

332.409–1 Recommendation for approval.

The information in FAR 32.409–1 (or FAR 32.409–2) shall be transmitted to the HCA in the form of a briefing memorandum.

Subpart 332.5—Progress Payments Based on Cost

332.501 General.

332.501–2 Unusual progress payments.

(a)(3) The approval of an unusual progress payment shall be made by the head of the contracting activity (HCA)(not delegable).

Subpart 332.7—Contract Funding

332.702 Policy.

An incrementally funded contract is a contract in which the total work effort is to be performed over multiple time periods and funds are allotted to cover discernible phases or increments of performance.

(a) Incremental funding may be applied to cost-reimbursement type contracts for the acquisition of research and development and other types of nonpersonal, nonseverable services. It shall not be applied to contracts for construction services, architect-engineer services, or severable services.Incremental funding allows nonseverable cost-reimbursement contracts, awarded for more than one year, to be funded from succeeding fiscal years.

(b) It is departmental policy that contracts for projects of multiple year duration be fully funded, whenever possible, to cover the entire project. However, incrementally funded contracts may be used when:

(1) A project, which is part of an approved program, is anticipated to be of multiple year duration, but funds are not currently available to cover the entire project;

(2) The project represents a valid need for the fiscal year in which the contract is awarded and of the succeeding fiscal years of the project's duration, during which additional funds may be obligated by increasing the allotment to the contract;

(3) The project is so significant to the approved program that there is reasonable assurance that it will command a high priority for proposed appropriations to cover the entire multiple year duration; and

(4) The statement of work is specific and is defined by separate phases or increments so that, at the completion of each, progress can be effectively measured.

332.703 Contract funding requirements.

332.703–1 General.

(b) The following general guidelines are applicable to incrementally funded contracts:

(1) The estimated total cost of the project (all planned phases or increments) is to be taken into consideration when determining the requirements which must be met before entering into the contract; i.e., justification for noncompetitive acquisition, approval or award, etc.

(2) The RFP and resultant contract are to include a statement of work which describes the total project covering the proposed multiple year period of performance and indicating timetables consistent with planned phases or increments and corresponding allotments of funds.

(3) Offerors will be expected to respond to RFPs with technical and cost proposals for the entire project indicating distinct break-outs of the planned phases or increments, and the multiple year period of performance.

(4) Negotiations will be conducted based upon the total project, including all planned phases or increments, and the multiple year period of performance.

(5) Sufficient funds must be obligated under the basic contract to cover no less than the first year of performance, unless the contracting officer determines it is advantageous to the Government to fund the contract for a lesser period. In that event, the contracting officer shall ensure that the obligated funds are sufficient to cover a complete phase or increment of performance representing a material and measurable part of the total project, and the contract period shall be reduced accordingly.

(6) Because of the magnitude of the scope of work and multiple year period of performance under an incrementally funded contract, there is a critical need for careful program planning. Program planning must provide for appropriate surveillance of the contractor's performance and adequate controls to ensure that projected funding will not impinge on the program office's ability to support, within anticipated appropriations, other equally important contract or grant programs.

(7) An incrementally funded contract must contain precise requirements for progress reports to enable the project officer to effectively monitor the contract. The project officer should be required to prepare periodic performance evaluation reports to facilitate the program office's ultimate decision to allot additional funds under the contract.

332.704 Limitation of cost or funds.

For detailed instruction regarding administrative actions in connection with anticipated cost overruns, see subpart 342.71

332.705 Contract clauses.

332.705–2 Clauses for limitation of costs or funds.

(c)(1) When using the Limitation of Funds clause (FAR 52.232–22) in the solicitation and resultant incrementally funded contract, the contracting officer shall insert the following legend between the clause title and the clause text:

(This clause supersedes the Limitation of Cost clause found in the General Provisions of this contract.)

(2) The contracting officer shall also include a clause reading substantially as that shown in 352.232–74 in the Special Provisions of the resultant incrementally funded contract.

(3) The request for proposals must inform prospective offerors of the Department's intention to enter into an incrementally funded contract. Therefore, the contracting officer shall include the provision at 352.232–75 in the request for proposals whenever the use of incremental funding is contemplated.

Subpart 332.9—Prompt Payment

332.902 Definitions.

Fiscal office means the office responsible for: determining whether interest penalties are due a contractor and, if so, the amount; determining whether an invoice offers a financially advantageous discount; maintaining records for and submission of prompt payment reports to the Deputy Assistant Secretary, Finance (DASF), ASMB, OS; and processing payments to the Treasury Department to allow for payment to a contractor when due. The fiscal office may fulfill the roles of the ''designated billing office'' and the ''designated payment office.''

PART 333—PROTESTS, DISPUTES, AND APPEALS

Subpart 333.1—Protests

Sec.
333.102 General.
333.103 Protests to the agency.
333.104 Protests to GAO.

Subpart 333.2—Disputes and Appeals

333.203 Applicability.
333.209 Suspected fraudulent claims.
333.211 Contracting officer's decision.
333.212 Contracting officer's duties upon appeal.
333.212–70 Formats.
333.213 Obligation to continue performance.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 333.1—Protests

333.102 General.

(a) Contracting officers shall consider all protests or objections regarding the award of a contract, whether submitted before or after award, provided the protests are filed in a timely manner and are submitted by interested parties. To be considered timely, protests based on alleged improprieties in any type of solicitation which are apparent before bid opening or the closing date for receipt of proposals shall be filed prior to bid opening or the closing date for receipt of proposals. In the case of negotiated acquisitions, alleged improprieties which do not exist in initial solicitations, but which are subsequently incorporated by amendment, must be protested not later than the next closing date for receipt of proposals following the incorporation of the amendment. In other cases, protests shall be filed not later than ten (10) calendar days after the basis for protest is known or should have been known, whichever is earlier. Provided a protest has been filed initially with the contracting officer, any subsequent protest to the Secretary or GAO filed within ten (10) calendar days of notification of adverse action will be considered. Written confirmation of all oral protests shall be requested from protestants and must be timely filed.

(g)(1) The Office of Acquisition Management (OAM) has been designated as the headquarters office to serve as the liaison for protests lodged with GAO. Within the OAM, the Departmental Protest Control Officer (DPCO) has been designated as the individual to be contacted by GAO.

(2) Each contracting activity shall designate a protest control officer to serve as an advisor to the contracting officer and to monitor protests from the time of initial notification until the protest has been resolved. The protest control officer should be a senior acquisition specialist in the headquarters acquisition staff office. In addition, contracting activities should designate similar officials within their principal components to the extent practicable and feasible. A copy of each appointment and termination of appointment of protest control officers shall be forwarded to the Director, OAM.

333.103 Protests to the agency.

(f)(1) The contracting officer is authorized to make the determination, using the criteria in FAR 33.104(b), to award a contract notwithstanding the protest after obtaining the concurrence of the contracting activity's protest control officer and the Office of General Counsel—Business and Administrative Law Division (OGC–BAL). If the protest has been lodged with the Secretary, is addressed to the Secretary, or requests referral to the Secretary, approval shall also be obtained from the Director, OAM before making the award.

(2) The contracting officer shall require written confirmation of any oral protest. To be considered timely, the written confirmation must be filed in accordance with the applicable provisions in 333.102(a). In the following cases, written protests received by the contracting officer before award shall be forwarded, through acquisition channels, to the DPCO for processing. Files concerning these protests shall be submitted in duplicate, or as otherwise specified by the DPCO and sent in the most expeditious manner, marked ''IMMEDIATE ACTION—PROTEST BEFORE AWARD'', and contain the documentation referenced in 333.104(a)(3).

(i) The protestant requests referral to the Secretary of Health and Human Services;

(ii) The protest is known to have been lodged with the Comptroller General or the Secretary, or is addressed to either; or

(iii) The contracting officer entertains some doubt as to the proper action regarding the protest or believes it to be in the best interest of the Government that the protest be considered by the Secretary or the Comptroller General. Otherwise, protests addressed to the contracting officer may be answered by the contracting officer, with the concurrence of the contracting activity's protest control officer and OGC–BAL.

(3) Protests received after award shall be treated as indicated in FAR 33.103(b)(3).

333.104 Protests to GAO.

(a) *General procedures.* (3) Protests lodged with GAO, whether before or after award, shall be processed by the DPCO. Protest files shall be prepared by the contracting office and distributed as follows: two copies to the DPCO, one copy to the contracting activity's protest control officer, and one copy to OGC–BAL. Files shall include the following documentation:

(i) The contracting officer's statement of facts and circumstances, including a discussion of the merits of the protest, and conclusions and recommendations,

including documentary evidence on which they are based.

(ii) A copy of the IFB or RFP.

(iii) A copy of the abstract of bids or proposals.

(iv) A copy of the bid or proposal of the successful offeror to whom award has been made or is proposed to be made.

(v) A copy of the bid or proposal of the protestant, if any.

(vi) The current status of award. When award has been made, this shall include whether performance has commenced, shipment or delivery has been made, or a stop work order has been issued.

(vii) A copy of any mutual agreement to suspend work on a no-cost basis, when appropriate (see FAR 33.104(c)(4)).

(viii) Copies of the notice of protest given offerors and other parties when the notice is appropriate (see FAR 33.104(a)(2)).

(ix) A copy of the technical evaluation report, when applicable, and a copy of each evaluator's rating for relevant proposals.

(x) A copy of the negotiation memorandum, when applicable.

(xi) The name and telephone number of the person in the contracting office who may be contacted for information relevant to the protest.

(xii) A copy of the competitive range memorandum. and

(xiii) Any document which is referred to in the contracting officer's statement of facts. The files shall be assembled in an orderly manner and shall include an index of enclosures.

(4) The DPCO is responsible for making the necessary distributions referenced in FAR 33.104 (a)(4).

(5) The contracting officer shall furnish the protest file containing the documentation specified in paragraph (a)(3) of this section, except the item in paragraph (a)(3)(i), to the DPCO within fourteen (14) calendar days from receipt of the protest. The contracting officer shall provide the documentation required by item (a)(3)(i) of this section to the DPCO within twenty-one (21) calendar days from receipt of the protest. Since the statute allows only a short time period in which to respond to protests lodged with GAO, the contracting officer shall handle each protest on a priority basis. The DPCO shall prepare the report and submit it and the protest file to GAO in accordance with FAR 33.104(a)(4)(i).

(6) Since the DPCO will furnish the report to GAO, the protestor, and other interested parties, comments on the report from the protestor and other interested parties will be requested to be sent to the DPCO.

(7) The Office of Acquisition Management (OAM) has been designated as the headquarters office, and the DPCO as the individual, that GAO should contact concerning all protests lodged with GAO.

(b) *Protests before award.* (1) To make an award notwithstanding a protest, the contracting officer shall prepare a finding using the criteria in FAR 33.104(b)(1), have it executed by the head of the contracting activity (HCA)(not delegable), and forward it, along with a written request for approval to make the award, to the Deputy Assistant Secretary for Grants and Acquisition Management (DASGAM).

(2) If the request to make an award notwithstanding the protest is approved by the DASGAM, the DPCO shall notify GAO. Whether the request is approved or not, the DPCO shall telephonically notify the contracting activity's protest control officer of the decision of the DASGAM, and the contracting activity's protest control officer shall immediately notify the contracting officer. The DPCO shall confirm the decision by memorandum to the contracting activity's protest control officer.

(4) The contracting officer shall prepare the protest file in accordance with paragraph (a)(3) of this section, and forward the required number of copies to the DPCO (see paragraph (a)(5) of this section).

(c) *Protests after award.* (2) If the contracting officer believes performance should be allowed to continue notwithstanding the protest, a finding shall be prepared by the contracting officer using the criteria in FAR 33.104(c)(2), executed by the HCA (not delegable), and forwarded, along with a written request for approval, to the Director, OAM. The same procedures for notification stated in paragraph (b)(2) of this section shall be followed.

(6) The contracting officer shall prepare the protest file in accordance with paragraph (a)(3) of this section, and forward the required number of copies to the DPCO (see paragraph (a)(5) of this section).

(d) *Findings and notice.* The contracting officer shall perform the actions required by FAR 33.104 (d); however, notification to GAO and other interested parties shall be made by the DPCO.

(g) *Notice to GAO.* The Deputy Assistant Secretary for Grants and Acquisition Management shall be the official to comply with the requirements of FAR 33.104 (g).

(i) *Express option.* When GAO invokes the express option, the contracting officer shall prepare the complete protest file as described in paragraph (a)(3) of this section, to include the item in paragraph (a)(3)(i), and deliver it (hand-carry, if necessary) to the DPCO in time to meet the submittal date established by GAO. The DPCO will notify the contracting officer of the submittal date after GAO has finalized its requirements.

Subpart 333.2—Disputes and Appeals

333.203 Applicability.

(c) The Armed Services Board of Contract Appeals (ASBCA) has been designated by the Secretary as the authorized ''Board'' to hear and determine disputes for the Department.

333.209 Suspected fraudulent claims.

The contracting officer shall submit any instance of a contractor's suspected fraudulent claim to the Office of the Inspector General for investigation.

333.211 Contracting officer's decision.

(a)(2) The contracting officer shall refer a proposed final decision to the Office of General Counsel, Business and Administrative Law Division (OGC–BAL), for advice as to the legal sufficiency and format before sending the final decision to the contractor. The contracting officer shall provide OGC–BAL with the pertinent documents with the submission of each proposed final decision.

(a)(4)(v) When using the paragraph in FAR 33.211 (a)(4)(v), the contracting officer shall insert the words ''Armed Services'' before each mention of the term ''Board of Contract Appeals''.

(h) At any time within the period of appeal, the contracting officer may modify or withdraw his/her final decision. If an appeal from the final decision has been taken to the ASBCA, the contracting officer will forward his/her recommended action to OGC–BAL with the supplement to the contract file which supports the recommended correction or amendment.

333.212 Contracting officer's duties upon appeal.

(a) Appeals shall be governed by the rules set forth in the ''Rules of the Armed Services Board of Contract Appeals'', or by the rules established by the U.S. Court of Federal Claims, as appropriate.

(b) OGC–BAL is designated as the Government Trial Attorney to represent the Government in the defense of appeals before the ASBCA. A decision by the ASBCA will be transmitted by the Government Trial Attorney to the

appropriate contracting officer for compliance in accordance with the ASBCA's decision.

(c) If an appeal is filed with the ASBCA, the contracting officer shall assemble a file within 30 days of receipt of an appeal, or advice that an appeal has been filed, that consists of all documents pertinent to the appeal, including:

(1) The decision and findings of fact from which the appeal is taken;

(2) The contract, including specifications and pertinent modifications, plans and drawings;

(3) All correspondence between the parties pertinent to the appeal, including the letter or letters of claim in response to which the decision was issued;

(4) Transcripts of any testimony taken during the course of proceedings, and affidavits or statements of any witness on the matter in dispute made prior to the filing of the notice of appeal with the Board; and

(5) Any additional information considered pertinent. The contracting officer shall furnish the appeal file to the Government Trial Attorney for review and approval. After approval, the contracting officer shall prepare four copies of the file, one for the ASBCA, one for the appellant, one for the Government Trial Attorney, and one for the contracting office.

(d) At all times after the filing of an appeal, the contracting officer shall render whatever assistance is requested by the Government Trial Attorney. When an appeal is set for hearing, the concerned contracting officer, acting under the guidance of the Government Trial Attorney, shall be responsible for arranging for the presence of Government witnesses and specified physical and documentary evidence at both the pre-hearing conference and hearing.

(e) If a contractor which has filed an appeal with the ASBCA elects to accept fully the decision from which the appeal was taken, or any modification to it, and gives written notification of acceptance to the Government Trial Attorney or the concerned contracting officer, the Government Trial Attorney will notify the ASBCA of the disposition of the dispute in accordance with Rule 27 of the ASBCA.

(f) If the contractor has elected to appeal to the U.S. Court of Federal Claims, the U.S. Department of Justice will represent the Department. However, the contracting officer shall still coordinate all actions through OGC–BAL.

333.212–70 Formats.

(a) The following format is suggested for use in transmitting appeal files to the ASBCA:

Your reference: _____
(Docket No.)

(Name)

Recorder, Armed Services Board of Contract Appeals

Skyline Six
5109 Leesburg Pike
Falls Church, Virginia 22041
Dear (Name):

Transmitted herewith are documents relative to the appeal under Contract No. _____ with the _____
(*Name of contractor*)
in accordance with the procedures under Rule 4. The Government Trial Attorney for this case is

_____

_____

(Insert Division of Business and Administrative Law, Office of General Counsel, Department of Health and Human Services, 330 Independence Avenue, SW., Washington, DC 20201).

The request for payment of charges resulting from the processing of this appeal should be addressed to:

_____
(Insert name and address of cognizant finance office.)

_____

Sincerely yours,

Contracting Officer
Enclosures

(b) The following format is suggested for use in notifying the appellant that the appeal file was submitted to the ASBCA:

(Contractor Address)

_____

_____

Dear _____:

An appeal file has been compiled relative to the appeal under Contract No. _____, and has been submitted to the Armed Services Board of Contract Appeals (ASBCA). The enclosed duplicate of the appeal file is identical to that submitted to the Board, except that contract documents which you already have been excluded. You may furnish or suggest any additional information deemed pertinent to the appeal to the Armed Services Board of Contract Appeals according to their rules.

The ASBCA will provide you with further information concerning this appeal.

Sincerely yours,

Contracting Officer
Enclosure

333.213 Obligation to continue performance.

(a) The Disputes clause at FAR 52.233–1 shall be used without the use of Alternate I. However, if the contracting officer determines that the Government's interest would be better served by use of paragraph (i) in Alternate I, he/she must request approval for its use from the chief of the contracting office.

PART 334—MAJOR SYSTEM ACQUISITION

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

334.003 Responsibilities.

The Department's implementation of OMB Circular No. A–109 may be found in Chapter 1–150 of the General Administration Manual.

PART 335—RESEARCH AND DEVELOPMENT CONTRACTING

Sec.

335.070 Cost-sharing.
335.070–1 Policy.
335.070–2 Amount of cost-sharing.
335.070–3 Method of cost-sharing.
335.070–4 Contract award.
335.071 Special determinations and findings affecting research and development contracting.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

335.070 Cost-sharing.

335.070–1 Policy.

(a) The use of cost-sharing type contracts should be encouraged to contribute to the cost of performing research where there is a probability that the contractor will receive present or future benefits from participation, such as, increased technical know-how, training to employees, acquisition of equipment, use of background knowledge in future contracts, etc. Cost-sharing is intended to serve the mutual interests of the Government and the performing organization by helping to assure efficient utilization of the resources available for the conduct of research projects and by promoting sound planning and prudent fiscal policies by the performing organization. Encouragement should be given to organizations to contribute to the cost of performing research under contracts unless the contracting officer determines that a request for cost-sharing would not be appropriate because of the following circumstances:

(1) The particular research objective or scope of effort for the project is specified by the Government rather than proposed by the performing organization. This would usually include any formal Government request for proposals for a specific project.

(2) The research effort has only minor relevance to the non-Federal activities of the performing organization, and the organization is proposing to undertake the research primarily as a service to the Government.

(3) The organization has little or no non-Federal sources or funds from which to make a cost contribution. Cost-sharing should generally not be requested if cost-sharing would require the Government to provide funds through some other means (such as fees) to enable the organization to cost-share. It should be recognized that those organizations which are predominantly engaged in research and development and have little or no production or other service activities may not be in a favorable position to make a cost contribution.

(b) The responsibility for negotiating cost-sharing is that of the contracting office. Each research contract file should show whether the contracting officer considered cost-sharing appropriate for that particular contract and in what amount. If cost-sharing was not considered appropriate, the file must indicate the factual basis for that decision, e.g., ''Because the contractor will derive no benefits from this award that can be applied to its commercial activities, cost-sharing is not considered appropriate.'' The contracting officer may wish to coordinate with the project officer before documenting this decision.

(c) If the contracting officer considers cost-sharing to be appropriate for a research contract and the contractor refuses to accept this type of contract, the award may be made without cost-sharing, if the contracting officer concludes that payment of the full cost of the research effort is necessary in order to obtain the services of that particular contractor.

335.070–2 Amount of cost-sharing.

When cost-sharing is determined to be appropriate, the following guidelines shall be utilized in determining the amount of cost participation by the contractor.

(a) The amount of cost participation should depend to a large extent on whether the research effort or results are likely to enhance the performing organization's capability, expertise, or competitive position, and the value of this enhancement to the performing organization. It should be recognized that those organizations which are predominantly engaged in research and development have little or no production or other service activities and may not be in a favorable position to derive a monetary benefit from their research under Federal agreements. Therefore, contractor cost participation could reasonably range from as little as 1 percent or less of the total project cost, to more than 50 percent of the total project cost. Ultimately, the contracting officer should bear in mind that cost-sharing is a negotiable item. As such, the amount of cost-sharing should be proportional to the anticipated value of the contractor's gain.

(b) If the performing organization will not acquire title or the right to use inventions, patents, or technical information resulting from the research project, it would generally be appropriate to obtain less cost-sharing than in cases in which the performer acquires these rights.

(c) A fee or profit will usually not be paid to the performing organization if the organization is to contribute to the cost of the research effort, but the amount of cost-sharing may be reduced to reflect the fact that the organization is foregoing its normal fee or profit in the research. However, if the research is expected to be of only minor value to the performing organization and if cost-sharing is not required by statute, it may be appropriate for the performer to make a contribution in the form of a reduced fee or profit rather than sharing costs of the project.

(d) The organization's participation may be considered over the total term of the project so that a relatively high contribution in one year may be offset by a relatively low contribution in another.

(e) A relatively low degree of cost-sharing may be appropriate if, in the view of the operating divisions or their subordinate elements, an area of research requires special stimulus in the national interest.

335.070–3 Method of cost-sharing.

Cost-sharing on individual contracts may be accomplished either by a contribution of part or all of one or more elements of allowable cost of the work being performed, or by a fixed amount or stated percentage of the total allowable costs of the project. Costs so contributed may not be charged to the Government under any other grant or contract (including allocations to other grants or contracts as part of any independent research and development program).

335.070–4 Contract award.

In consonance with the Department's objectives of competition and support of the small business program, award of contracts should not be made solely on the basis of ability or willingness to cost-share. Awards should be made primarily on the contractor's competence and only after adequate competition has been obtained among large and small business organizations whenever possible. The offeror's willingness to share costs should not be considered in the technical evaluation process but as a business consideration, which is secondary to selecting the best qualified source.

335.071 Special determinations and findings affecting research and development contracting.

OPDIV heads for health agencies shall sign individual and class determinations and findings for:

(a) Acquisition or construction of equipment or facilities on property not owned by the United States pursuant to 42 U.S.C. 241(a)(7); and

(b) Use of an indemnification provision in a research contract pursuant to 42 U.S.C. 241(a)(7).

PART 342—CONTRACT ADMINISTRATION

Subpart 342.7—Indirect Cost Rates

342.705 Final indirect cost rates.

Subpart 342.70—Contract Monitoring

Sec.
342.7001 Purpose.
342.7002 Contract monitoring responsibilities.
342.7003 Withholding of contract payments.
342.7003–1 Policy.
342.7003–2 Procedures.
342.7003–3 Withholding payments.

Subpart 342.71—Administrative Actions for Cost Overruns

342.7001 Scope of subpart.
342.7101 Contract administration.
342.7101–1 General.
342.7101–2 Procedures.
342.7102 Contract modifications.

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 342.7—Indirect Cost Rates

342.705 Final indirect cost rates.

The Director, Division of Cost Allocation of the Program Support Center within the servicing HHS regional office has been delegated the authority to establish indirect cost rates, research patient care rates, and, as necessary, fringe benefit, computer, and other special costing rates for use in contracts and grants awarded to State and local governments, colleges and universities, hospitals, and other nonprofit organizations.

Subpart 342.70—Contract Monitoring

342.7001 Purpose.

Contract monitoring is an essential element of contract administration and the acquisition process. This subpart describes the Department's operating concepts regarding contract monitoring, performed jointly by the project officer and the contracting officer, to ensure

that the required monitoring is performed, timely remedial action is taken when necessary, and a determination is made that contract objectives have been met.

342.7002 Contract monitoring responsibilities.

(a) Upon execution of the contract, the mutual obligations of the Government and the contractor are established by, and limited to, the written stipulations in the contract. Unless authorized by the contracting officer, HHS personnel shall not direct or request the contractor to assume any obligation or take any actions not specifically required by the contract. Only the contracting officer may impose a requirement which will result in a change to the contract. All contract changes must be directed in writing or confirmed in writing by the contracting officer.

(b) The contracting officer is responsible for assuring compliance with all terms of the contract, especially the statutory, legal, business, and regulatory provisions. Whether or not a postaward conference is held, the contracting officer shall inform the contractor by letter (if not already stipulated by contract provisions) of the authorities and responsibilities of the Government personnel with whom the contractor will be dealing throughout the life of the contract.

(c) The contracting officer must depend on program, technical, and other personnel for assistance and advice in monitoring the contractor's performance, and in other areas of postaward administration. The contracting officer must assure that responsibilities assigned to these personnel are understood and carried out. The individual roles and corresponding responsibilities typically involve, but are not limited to, the following:

(1) The role of program and technical personnel in monitoring the contract to assist or advise the contracting officer (or act as his/her representative when so designated by the contracting officer) in activities such as:

(i) Providing technical monitoring during contract performance, and issuing letters to the contractor and contracting officer relating to delivery, acceptance, or rejection in accordance with the terms of the contract;

(ii) Assessing contractor performance, including inspection and testing of products and evaluation of reports and data;

(iii) Recommending necessary changes to the schedule of work and period of performance in order to accomplish the objectives of the contract. This shall be accomplished by a written request to the contracting officer, together with an appropriate justification and funds availability citation;

(iv) Reviewing invoices/vouchers and recommending approval/disapproval action by the contracting officer, to include comments regarding anything unusual discovered in the review;

(v) Reviewing and recommending approval or disapproval of subcontractors, overtime, travel, and key personnel changes; and

(vi) Participating, as necessary, in various phases of the contract closeout process.

(2) The role of the project officer in performing required aspects of the contract monitoring process. In addition to those applicable activities set forth in paragraph (c)(1) of this section, the project officer shall:

(i) Submit periodic reports to the contracting officer that concisely explain the status of the contract, and include recommended actions for any problems reported. Provide the contracting officer with written notification of evaluation and approval/disapproval of contract deliverables and of completion of tasks or phases. The contracting officer will, in turn, provide the contractor with written notification of approval or disapproval unless the responsibility has been delegated by the contracting officer, in which case the person responsible for such action will notify the contractor and provide a copy to the contracting officer for inclusion in the contract file;

(ii) Monitor the technical aspects of the contractor's business and technical progress, identify existing and potential problems that threaten performance, and immediately inform the contracting officer of deviations from contract objectives, or from any technical or delivery requirements, so that remedial measures may be instituted accordingly;

(iii) Provide immediate notification to the head of the program office responsible for the program whenever it is determined that program objectives are not being met, together with specific recommendations of action to be taken. A copy of the project officer's report and recommendation shall be transmitted to the contracting officer for appropriate action;

(iv) Submit, within 120 days after contract completion, a final assessment report to the contracting officer. The report should include analysis of the contractor's performance, including the contract and program objectives achieved and missed. A copy of the final assessment report shall be forwarded to the head of the program office responsible for the program for management review and follow-up, as necessary; and

(v) Accompany and/or provide, when requested, technical support to the HHS auditor in the conduct of floor checks.

(3) The role of the contract administrator, auditor, cost analyst, and property administrator in assisting or advising the contracting officer in postaward administration activities such as:

(i) Evaluation of contractor systems and procedures, to include accounting policies and procedures, purchasing policies and practices, property accounting and control, wage and salary plans and rate structures, personnel policies and practices, etc.;

(ii) Processing of disputes under the Disputes clause and any resultant appeals;

(iii) Modification or termination of the contract; and

(iv) Determination of the allowability of cost charges to incentive or cost-reimbursement type contracts and progress payments under fixed-price contracts. This is especially important when award is made to new organizations or those with financial weaknesses.

(d) The contracting officer is responsible for assuring that contractor performance and contract monitoring are carried out in conformance with contract provisions. If performance is not satisfactory or if problems are anticipated, it is essential that the contracting officer take immediate action to protect the Government's rights under the contract. The contracting officer shall notify his/her immediate supervisor of problems that cannot be resolved within contract limitations and whenever contract or program objectives are not met. The notification shall include a statement of action being take by the contracting officer.

342.7003 Withholding of contract payments.

342.7003–1 Policy.

(a) All solicitations and resultant contracts shall contain the withholding of contract payments clause at 352.232–9, and an excusable delays clause, or a clause which incorporates the definition of excusable delays. The excusable delays clause at 352.249–14 shall be used when the solicitation and resultant contract (other than purchase orders) does not contain a default or other excusable delays clause.

(b) The transmittal letter used to convey the contract to each contractor shall contain a notice which highlights

the contractor's agreement with the withholding of contract payments clause.

(c) No contract payment shall be made when any report required to be submitted by the contractor is overdue, or the contractor fails to perform or deliver work or services as required by the contract.

(d) The contracting officer shall issue a ten-day cure notice or initiate appropriate termination action for any failure in the contractor's performance as stated in paragraph (c) of this section.

342.7003–2 Procedures.

(a) The contracting officer is responsible for initiating immediate action to protect the Government's rights whenever the contractor fails to comply with either the delivery or reporting provisions of the contract. Compliance with the reporting provisions includes those reports to be submitted directly to the payment office. If such a report is not submitted on time, the contracting officer is to be notified promptly by the payment officer.

(b) When the contract contains a termination for default clause, the contractor's failure to either submit any required report when due or perform or deliver services or work when required by the contract is to be considered a default in performance. In either circumstance, the contracting officer is to immediately issue a formal ten-day cure notice pursuant to the default clause. The cure notice is to follow the format prescribed in FAR 49.607 and is to include a statement to the effect that contract payments will be withheld if the default is not cured or is not determined to be excusable.

(1) If the default is cured or is determined to be excusable, the contracting officer is not to initiate the withholding action.

(2) If the default is not determined to be excusable or a response is not received within the allotted time, the contracting officer is to initiate withholding action on all contract payments and is to determine whether termination for default or other action would be in the best interest of the Government.

(c) When the contract does not contain a termination for default clause, the contractor's failure to either submit any required report when due or perform or deliver services or work when required by the contract is to be considered a failure to perform. In either circumstance, the contracting officer is to immediately issue a written notice to the contractor specifying the failure and providing a period of ten days, or longer period as determined necessary by the contracting officer, in which the contractor is to cure the failure or establish an excusable delay. The contracting officer is to include a statement in the written notice to the effect that contract payments will be withheld if the failure is not cured or is not determined to be excusable.

(1) If the failure is cured or is determined to be excusable, the contracting officer is not to initiate the withholding action.

(2) If the failure is not determined to be excusable or a response is not received within the allotted time, the contracting officer is to initiate withholding action on all contract payments and is to determine whether termination for convenience or other action would be in the best interest of the Government.

(d) The contracting officer should consult FAR subpart 49.4 for further guidance before taking any of the actions described in this section.

342.7003–3 Withholding payments.

(a) When making the determination that contract payments should be withheld in accordance with the Withholding of Contract Payments clause, the contracting officer is to immediately notify the servicing finance office in writing of the determination to suspend payments. The notice of suspension is to contain all elements of information required by the payment office to properly identify the contract and the applicable accounts involved.

(b) The contracting officer is to immediately notify the contractor in writing that payments have been suspended until the default or failure is cured.

(c) When the contractor cures the default or failure, the contracting officer is to immediately notify, in writing, all recipients of the notice of suspension that the suspension is to be lifted and contract payments are to be resumed.

(d) When exercising actions regarding the withholding of payment procedures, the contracting officer must be careful not to waive any of the Government's rights when corresponding with the contractor or when taking any other actions.

Subpart 342.71—Administrative Actions for Cost Overruns

342.7100 Scope of subpart.

This subpart sets forth the procedures to be followed when a cost overrun is anticipated; i.e., the allowable actual cost of performing a cost-reimbursement type contract is expected to exceed the total estimated cost specified in the contract.

342.7101 Contract administration.

342.7101–1 General.

Upon receipt of information that a contractor's accumulated cost and projected expenditures will exceed the limit of funds obligated by the contract, the contracting officer shall coordinate immediately with the appropriate program office to determine whether the contract should be modified or terminated. If the contracting officer receives information from a source other than the contractor that a cost overrun is anticipated, the contracting officer shall verify the information with the contractor, and remind the contractor of the notification requirements of the Limitation of Cost clause.

342.7101–2 Procedures.

(a) Upon notification that a cost overrun is anticipated, the contracting officer shall inform the contractor to submit a request for additional funds which is to include:

(1) Name and address of contractor.

(2) Contract number and expiration date.

(3) Contract item(s) and amount(s) creating overrun.

(4) The elements of cost which changed from the original estimate (i.e., labor, material, travel, overhead, etc.) to be furnished in the following format:

(i) Original estimate,

(ii) Costs incurred to date,

(iii) Estimated cost to completion,

(iv) Revised estimate, and

(v) Amount of adjustment.

(5) The factors responsible for the increase, i.e., error in estimate, changed conditions, etc.

(6) The latest date by which funds must be available for commitment to avoid contract slippage, work stoppage, or other program impairment.

(b) When the contractor submits a notice of an impending overrun, the contracting officer shall:

(1) Immediately advise the appropriate program office and furnish a copy of the notice and any other data received;

(2) Request audit or cost advisory services, and technical support, as necessary, for evaluation of information and data received; and

(3) Maintain continuous follow-up with the program office to obtain a timely decision as to whether the work under the contract should be continued and additional funds provided, or the contract terminated. The decision of the program office must be supported by an appropriate written statement and funding authority, or a formal request for termination, when applicable. After a programming and funding decision is

received from the program office, the contracting officer shall promptly notify the contractor in writing that:

(i) A specified amount of additional funds has been allotted to the contract by a contractual instrument; or

(ii) Work will be discontinued when the funds allotted to the contract have been exhausted, and that any work performed after that date is at the contractor's risk; or

(iii) The Government is considering whether additional funds should be allotted to the contract and will notify the contractor as soon as possible, but that any work performed after the funds then allocated to the contract have been exhausted is at the contractor's risk. Timely, formal notification of the Government's intention is essential in order to preclude loss of contractual rights in the event of dispute, termination, or litigation.

(c) If program requirements permit, contracting officers should refrain from issuing any contractual documents which will require new work or an extension of time, pending resolution of an overrun or additional fund request.

342.7102 Contract modifications.

(a) Modifications to contracts containing the Limitation of Cost clause shall include either:

(1) A provision increasing the estimated or ceiling amount referred to in the Limitation of Cost clause of the contract and stating that the clause will thereafter apply in respect to the increased amount; or

(2) A provision stating that the estimated or ceiling amount referred to in the contract is not changed by the modification and that the Limitation of Cost clause will continue to apply with respect to the amount in effect prior to the modification.

(b) A fixed-fee provided in a contract shall not be changed when funding a cost overrun. Changes in fixed-fee will be made only to reflect changes in the scope of work which justify an increase or decrease in fee.

PART 352—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 352.2—Texts of Provisions and Clauses

Sec.

352.202–1 Definitions.
352.215–1 Instructions to offerors—Competitive acquisition.
352.215–70 Late proposals and revisions.
352.216–72 Additional cost principles.
352.223–70 Safety and health.
352.224–70 Confidentiality of information.
352.228–7 Insurance—Liability to third persons.
352.232–9 Withholding of contract payments.
352.232–74 Estimated cost and fixed fee—Incrementally funded contract.
352.232–75 Incremental funding.
352.233–70 Litigation and claims.
352.242–71 Final decisions on audit findings.
352.249–14 Excusable delays.
352.270–1 Accessibility of meetings, conferences, and seminars to persons with disabilities.
352.270–2 Indian preference.
352.270–3 Indian preference program.
352.270–4 Pricing of adjustments.
352.270–5 Key personnel.
352.270–6 Publications and publicity.
352.270–7 Paperwork Reduction Act.
352.270–8 Protection of human subjects.
352.270–9 Care of laboratory animals.

Authority: 5 U.S.C. 301, 40 U.S.C. 486(c).

Subpart 352.2—Texts of Provisions and Clauses

352.202–1 Definitions.

As prescribed in 302.201, the FAR Definitions clause at 52.202–1 is to be used as modified:

Definitions (Jan. 2001)

(a) Substitute the following as paragraph (a):

''(a) The term ''Secretary'' or ''Head of the Agency'' (also called ''Agency Head'') means the Secretary, Under Secretary, or any Assistant Secretary, Administrator or Commissioner of the Department of Health and Human Services; and the term ''his/her duly authorized representative'' means any person, persons, or board authorized to act for the Secretary.''

(b) Add the following paragraph (h) or its alternate, as appropriate:

''(h) The term ''Project Officer'' means the person representing the Government for the purpose of technical monitoring of contract performance. The Project Officer is not authorized to issue any instructions or directions which effect any increases or decreases in the scope of work or which would result in the increase or decrease of the price of this contract or a change in the delivery dates or performance period of this contract.''

or

Alternate:

''(h) The term ''Project Officer'' means the person representing the Government for the purpose of technical monitoring of contract performance. The Project Officer is not authorized to issue any instructions or directions which effect any increases or decreases in the scope of work or which would result in the increase or decrease of the cost of this contract or a change in performance period of this contract. In addition, the Project Officer is not authorized to receive or act upon the Contractor's notification of a revised cost estimate pursuant to the Limitation of Cost or Limitation of Funds clause of this contract.''

352.215–1 Instructions to offerors—Competitive acquisition.

Insert the following paragraph (e) in place of paragraph (e) of the provision at FAR 52.215–1:

(e) *Restriction on disclosure and use of data.* (1) The proposal submitted in response to this request may contain data (trade secrets; business data, e.g., commercial information, financial information, and cost and pricing data; and technical data) which the offeror, including its prospective subcontractor(s), does not want used or disclosed for any purpose other than for evaluation of the proposal. The use and disclosure of any data may be so restricted; provided, that the Government determines that the data is not required to be disclosed under the Freedom of Information Act, 5 U.S.C. 552, as amended, and the offeror marks the cover sheet of the proposal with the following legend, specifying the particular portions of the proposal which are to be restricted in accordance with the conditions of the legend. The Government's determination to withhold or disclose a record will be based upon the particular circumstances involving the record in question and whether the record may be exempted from disclosure under the Freedom of Information Act. The legend reads:

Unless disclosure is required by the Freedom of Information Act, 5 U.S.C. 552, as amended, (the Act) as determined by Freedom of Information (FOI) officials of the Department of Health and Human Services, data contained in the portions of this proposal which have been specifically identified by page number, paragraph, etc. by the offeror as containing restricted information shall not be used or disclosed except for evaluation purposes.

The offeror acknowledges that the Department may not be able to withhold a record (data, document, etc.) nor deny access to a record requested pursuant to the Act and that the Department's FOI officials must make that determination. The offeror hereby agrees that the Government is not liable for disclosure if the Department has determined that disclosure is required by the Act.

If a contract is awarded to the offeror as a result of, or in connection with, the submission of this proposal, the Government shall have right to use or disclose the data to the extent provided in the contract. Proposals not resulting in a contract remain subject to the Act.

The offeror also agrees that the Government is not liable for disclosure or use of unmarked data and may use or disclose the data for any purpose, including the release of the information pursuant to requests under the Act. The data subject to this restriction are contained in pages (insert page numbers, paragraph designations, etc. or other identification).

(2) In addition, the offeror should mark each page of data it wishes to restrict with the following statement:

''Use or disclosure of data contained on this page is subject to the restriction on the cover sheet of this proposal or quotation.''

(3) Offerors are cautioned that proposals submitted with restrictive legends or

statements differing in substance from the above legend may not be considered for award. The Government reserves the right to reject any proposal submitted with a nonconforming legend.

352.215–70 Late proposals and revisions.

As prescribed in 315.208, the following provision may be included in the solicitation:

Late Proposals and Revisions (Nov. 1986)

Notwithstanding the procedures contained in FAR 52.215–1(c)(3) of the provision of this solicitation entitled Instructions to Offerors-Competitive Acquisition, a proposal received after the date specified for receipt may be considered if it offers significant cost or technical advantages to the Government; and it was received before proposals were distributed for evaluation, or within five calendar days after the exact time specified for receipt, whichever is earlier.

(End of provision)

352.216–72 Additional cost principles.

As prescribed in 316.307(j), insert the following clause in all solicitations and resultant cost-reimbursement contracts:

Additional Cost Principles (Oct. 1990)

(a) *Bid and proposal costs.* (1) Bid and proposal costs are the immediate costs of preparing bids, proposals, and applications for potential Federal and non-Federal contracts, grants, and agreements, including the development of scientific, cost, and other data needed to support the bids, proposals, and applications.

(2) Bid and proposal costs of the current accounting period are allowable as indirect costs.

(3) Bid and proposal costs of past accounting periods are unallowable in the current period. However, if the organization's established practice is to treat these costs by some other method, they may be accepted if they are found to be reasonable and equitable.

(4) Bid and proposal costs do not include independent research and development costs covered by the following paragraph, or preaward costs covered by paragraph 38 of Attachment B to OMB Circular A–122.

(b) *Independent research and development costs.* (1) Independent research and development is research and development conducted by an organization which is not sponsored by Federal or non-Federal contracts, grants, or other agreements.

(2) Independent research and development shall be allocated its proportionate share of indirect costs on the same basis as the allocation of indirect costs to sponsored research and development.

(3) The cost of independent research and development, including its proportionate share of indirect costs, are unallowable.

(End of clause)

352.223–70 Safety and health.

The following clause, or one reading substantially the same, shall be used as prescribed in 323.7002:

Safety and Health (Jan. 2001)

(a) To help ensure the protection of the life and health of all persons, and to help prevent damage to property, the Contractor shall comply with all Federal, State and local laws and regulations applicable to the work being performed under this contract. These laws are implemented and/or enforced by the Environmental Protection Agency, Occupational Safety and Health Administration and other agencies at the Federal, State and local levels (Federal, State and local regulatory/enforcement agencies).

(b) Further, the Contractor shall take or cause to be taken additional safety measures as the Contracting Officer, in conjunction with the project or other appropriate officers, determines to be reasonably necessary. If compliance with these additional safety measures results in an increase or decrease in the cost or time required for performance of any part of work under this contract, an equitable adjustment will be made in accordance with the applicable ''Changes'' clause set forth in this contract.

(c) The Contractor shall maintain an accurate record of, and promptly report to the Contracting Officer, all accidents or incidents resulting in the exposure of persons to toxic substances, hazardous materials or hazardous operations; the injury or death of any person; and/or damage to property incidental to work performed under the contract and all violations for which the Contractor has been cited by any Federal, State or local regulatory/enforcement agency. The report shall include a copy of the notice of violation and the findings of any inquiry or inspection, and an analysis addressing the impact these violations may have on the work remaining to be performed. The report shall also state the required action(s), if any, to be taken to correct any violation(s) noted by the Federal, State or local regulatory/enforcement agency and the time frame allowed by the agency to accomplish the necessary corrective action.

(d) If the Contractor fails or refuses to comply with the Federal, State or local regulatory/enforcement agency's directive(s) regarding any violation(s) and prescribed corrective action(s), the Contracting Officer may issue an order stopping all or part of the work until satisfactory corrective action (as approved by the Federal, State or local regulatory/enforcement agencies) has been taken and documented to the Contracting Officer. No part of the time lost due to any stop work order shall be subject to a claim for extension of time or costs or damages by the Contractor.

(e) The Contractor shall insert the substance of this clause in each subcontract involving toxic substances, hazardous materials, or hazardous operations. Compliance with the provisions of this clause by subcontractors will be the responsibility of the Contractor.

(End of Clause)

352.224–70 Confidentiality of information.

The following clause is covered by the policy set forth in subpart 324.70 and is to be used in accordance with the instructions set forth in 324.7004.

Confidentiality of Information (Apr. 1984)

(a) Confidential information, as used in this clause, means information or data of a personal nature about an individual, or proprietary information or data submitted by or pertaining to an institution or organization.

(b) In addition to the types of confidential information described in paragraph (a) of this clause, information which might require special consideration with regard to the timing of its disclosure may derive from studies or research, during which public disclosure of preliminary unvalidated findings could create erroneous conclusions which might threaten public health or safety if acted upon.

(c) The Contracting Officer and the Contractor may, by mutual consent, identify elsewhere in this contract specific information and/or categories of information which the Government will furnish to the Contractor or that the Contractor is expected to generate which is confidential. Similarly, the Contracting Officer and the Contractor may, by mutual consent, identify such confidential information from time to time during the performance of the contract. Failure to agree will be settled pursuant to the ''Disputes'' clause.

(d) If it is established elsewhere in this contract that information to be utilized under this contract, or a portion thereof, is subject to the Privacy Act, the Contractor will follow the rules and procedures of disclosure set forth in the Privacy Act of 1974, 5 U.S.C. 552a, and implementing regulations and policies, with respect to systems of records determined to be subject to the Privacy Act.

(e) Confidential information, as defined in paragraph (a) of this clause, that is information or data of a personal nature about an individual, or proprietary information or data submitted by or pertaining to an institution or organization, shall not be disclosed without the prior written consent of the individual, institution, or organization.

(f) Written advance notice of at least 45 days will be provided to the Contracting Officer of the Contractor's intent to release findings of studies or research, which have the possibility of adverse effects on the public or the Federal agency, as described in paragraph (b) of this clause. If the Contracting Officer does not pose any objections in writing within the 45-day period, the Contractor may proceed with disclosure. Disagreements not resolved by the Contractor and the Contracting Officer will be settled pursuant to the ''Disputes'' clause.

(g) Whenever the Contractor is uncertain with regard to the proper handling of material under the contract, or if the material in question is subject to the Privacy Act or is confidential information subject to the provisions of this clause, the Contractor should obtain a written determination from the Contracting Officer prior to any release, disclosure, dissemination, or publication.

(h) Contracting Officer determinations will reflect the result of internal coordination with appropriate program and legal officials.

(i) The provisions of paragraph (e) of this clause shall not apply when the information is subject to conflicting or overlapping

provisions in other Federal, State or local laws.

(End of clause)

352.228–7 Insurance—Liability to third persons.

As prescribed in 328.311–2, contracting officers shall include the following clause in all cost-reimbursement contracts, in lieu of the clause at FAR 52.228–7:

Insurance—Liability to Third Persons (Dec. 1991)

(a)(1) Except as provided in paragraph (a)(2) immediately following, or in paragraph (h) of this clause (if the clause has a paragraph (h)), the Contractor shall provide and maintain workers' compensation, employer's liability, comprehensive general liability (bodily injury), comprehensive automobile liability (bodily injury and property damage) insurance, and such other insurance as the Contracting Officer may require under this contract.

(2) The Contractor may, with the approval of the Contracting Officer, maintain a self-insurance program; provided that, with respect to workers' compensation, the Contractor is qualified pursuant to statutory authority.

(3) All insurance required by this paragraph shall be in form and amount and for those periods as the Contracting Officer may require or approve and with insurers approved by the Contracting Officer.

(b) The Contractor agrees to submit for the Contracting Officer's approval, to the extent and in the manner required by the Contracting Officer, any other insurance that is maintained by the Contractor in connection with performance of this contract and for which the Contractor seeks reimbursement.

(c) Except as provided in paragraph (h) of this clause (if the clause has a paragraph (h)), the Contractor shall be reimbursed:

(1) For that portion of the reasonable cost of insurance allocable to this contract, and required or approved under this clause; and

(2) For certain liabilities (and expenses incidental to such liabilities) to third persons not compensated by insurance or otherwise within the funds available under the Limitation of Cost or the Limitation of Funds clause of this contract. These liabilities must arise out of the performance of this contract, whether or not caused by the negligence of the Contractor or the Contractor's agents, servants, or employees, and must be represented by final judgments or settlements approved in writing by the Government. These liabilities are for:

(i) Loss of or damage to property (other than property owned, occupied, or used by the Contractor, rented to the Contractor, or in the care, custody, or control of the Contractor); or

(ii) Death or bodily injury.

(d) The Government's liability under paragraph (c) of this clause is limited to the amounts reflected in final judgements, or settlements approved in writing by the Government, but in no event to exceed the funds available under the Limitation of Cost or Limitation of Funds clause of this contract. Nothing in this contract shall be construed as implying that, at a later date, the Government will request, or the Congress will appropriate, funds sufficient to meet any deficiencies.

(e) The Contractor shall not be reimbursed for liabilities (and expenses incidental to such liabilities):

(1) For which the Contractor is otherwise responsible under the express terms of any clause specified in the Schedule or elsewhere in the contract:

(2) For which the Contractor has failed to insure or to maintain insurance as required by the Contracting Officer; or

(3) That result from willful misconduct or lack of good faith on the part of the Contractor's directors, officers, managers, superintendents, or other representatives who have supervision or direction of:

(i) All or substantially all of the Contractor's business;

(ii) All or substantially all of the Contractor's operations at any one plant or separate location in which this contract is being performed; or

(iii) A separate and complete major industrial operation in connection with the performance of this contract.

(f) The provisions of paragraph (e) of this clause shall not restrict the right of the Contractor to be reimbursed for the cost of insurance maintained by the Contractor in connection with the performance of this contract, other than insurance required in accordance with this clause; *provided,* that such cost is allowable under the Allowable Cost and Payment clause of this contract.

(g) If any suit or action is filed or any claim is made against the Contractor, the cost and expense of which may be reimbursable to the Contractor under this contract, and the risk of which is then uninsured or is insured for less than the amount claimed, the Contractor shall:

(1) Immediately notify the Contracting Officer and promptly furnish copies of all pertinent papers received;

(2) Authorize Government representatives to collaborate with counsel for the insurance carrier in settling or defending the claim when the amount of the liability claimed exceeds the amount of coverage; and

(3) Authorize Government representatives to settle or defend the claim and to represent the Contractor in or to take charge of any litigation, if required by the Government, when the liability is not insured or covered by the bond. The Contractor may, at its own expense, be associated with the Government representatives in any such claim or litigation.

(End of clause)

Alternate I (APR 1984). If the successful offeror represents in the offer that the offeror is *partially* immune from tort liability as a State agency, add the following paragraph (h) to the basic clause:

(h) Notwithstanding paragraphs (a) and (c) of this clause—

(1) The Government does not assume any liability to third persons, nor will the Government reimburse the Contractor for its liability to third persons, with respect to loss due to death, bodily injury, or damage to property resulting in any way from the performance of this contract or any subcontract under this contract; and

(2) The Contractor need not provide or maintain insurance coverage as required by paragraph (a) of this clause; provided, that the Contractor may obtain any insurance coverage deemed necessary, subject to approval by the Contracting Officer as to form, amount, and duration. The Contractor shall be reimbursed for the cost of such insurance and, to the extent provided in paragraph (c) of this clause, to liabilities to third persons for which the Contractor has obtained insurance coverage as provided in this paragraph, but for which such coverage is insufficient in amount.

(End of clause)

Alternate II (APR 1984). If the successful offeror represents in the offer that the offeror is totally immune from tort liability as a State agency, substitute the following paragraphs (a) and (b) for paragraphs (a) and (b) of the basic clause:

(a) The Government does not assume any liability to third persons, nor will the Government reimburse the Contractor for its liability to third persons, with respect to loss due to death, bodily injury, or damage to property resulting in any way from the performance of this contract or any subcontract under this contract.

(b) If any suit or action is filed, or if any claim is made against the Contractor, the cost and expense of which may be reimbursable to the Contractor under this contract, the Contractor shall immediately notify the Contracting Officer and promptly furnish copies of all pertinent papers received by the Contractor. The Contractor shall, if required by the Government, authorize Government representatives to settle or defend the claim and to represent the Contractor in or take charge of any litigation. The Contractor may, at its own expense, be associated with the Government representatives in any such claims or litigation

(End of clause)

352.232–9 Withholding of contract payments.

Insert the following clause in all solicitations and contracts other than purchase orders:

Withholding of Contract Payments (Apr. 1984)

Notwithstanding any other payment provisions of this contract, failure of the Contractor to submit required reports when due or failure to perform or deliver required work, supplies, or services, will result in the withholding of payments under this contract unless such failure arises out of causes beyond the control, and without the fault or negligence of the Contractor as defined by the clause entitled ''Excusable Delays'' or ''Default'', as applicable. The Government shall promptly notify the Contractor of its intention to withhold payment of any invoice or voucher submitted.

(End of clause)

352.232–74 Estimated cost and fixed fee-Incrementally funded contract.

The following clause, or one reading substantially as it, shall be included in

the Special Provisions of an incrementally funded contract:

Consideration-Estimated Cost and Fixed Fee (Apr. 1984)

(a) It is estimated that the total cost to the Government for full performance of this contract will be $_____, of which the sum of $_____ represents the estimated reimbursable costs and $_____ represents the fixed-fee.

(b) Total funds currently available for payment and allotted to this contract are $_____, of which $_____ represents the estimated reimbursable costs and $_____ represents the fixed-fee. For further provisions on funding, see the Limitation of Funds clause.

(c) It is estimated that the amount currently allotted will cover performance of Phase I which is scheduled to be completed by (date)_____.

(d) The Contracting Officer may allot additional funds to the contract without the concurrence of the Contractor.

(End of clause)

352.232–75 Incremental funding.

The following provision shall be included in all requests for proposals whenever the use of incremental funding is contemplated:

Incremental Funding (Jan. 2001)

(a) It is the Government's intention to negotiate and award a contract using the incremental funding concepts described in the clause entitled Limitation of Funds. Under the clause, which will be included in the resultant contract, initial funds will be obligated under the contract to cover the first year of performance. Additional funds are intended to be allotted to the contract by contract modification, up to and including the full estimated cost of the contract, to accomplish the entire project. While it is the Government's intention to progressively fund this contract over the entire period of performance up to and including the full estimated cost, the Government will not be obligated to reimburse the Contractor for costs incurred in excess of the periodic allotments, nor will the Contractor be obligated to perform in excess of the amount allotted.

(b) The Limitation of Funds clause to be included in the resultant contract shall supersede the Limitation of Cost clause found in the General Provisions.

(End of provision)

352.233–70 Litigation and claims.

Insert the following clause in all solicitations and resultant cost-reimbursement contracts:

Litigation and Claims (Apr. 1984)

The Contractor shall give the Contracting Officer immediate notice in writing of any action, including any proceeding before an administrative agency, filed against the Contractor arising out of the performance of this contract, including, but not limited to the performance of any subcontract hereunder; and any claim against the Contractor the cost and expense of which is allowable under the clause entitled ''Allowable Cost and Payment.'' Except as otherwise directed by the Contracting Officer, the Contractor shall furnish immediately to the Contracting Officer copies of all pertinent papers received by the Contractor with respect to such action or claim. To the extent not in conflict with any applicable policy of insurance, the Contractor may, with the Contracting Officer's approval, settle any such action or claim. If required by the Contracting Officer, the Contractor shall effect an assignment and subrogation in favor of the Government of all the Contractor's rights and claims (except those against the Government) arising out of any such action or claim against the Contractor; and authorize representatives of the Government to settle or defend any such action or claim and to represent the Contractor in, or to take charge of, any action. If the settlement or defense of an action or claim is undertaken by the Government, the Contractor shall furnish all reasonable assistance in effecting a settlement or asserting a defense. Where an action against the Contractor is not covered by a policy of insurance, the Contractor shall, with the approval of the Contracting Officer, proceed with the defense of the action in good faith. The Government shall not be liable for the expense of defending any action or for any costs resulting from the loss thereof to the extent that the Contractor would have been compensated by insurance which was required by law or regulation or by written direction of the Contracting Officer, but which the Contractor failed to secure through its own fault or negligence. In any event, unless otherwise expressly provided in this contract, the Contractor shall not be reimbursed or indemnified by the Government for any liability loss, cost or expense, which the Contractor may incur or be subject to by reason of any loss, injury or damage, to the person or to real or personal property of any third parties as may accrue during, or arise from, the performance of this contract.

(End of clause)

352.242–71 Final decisions on audit findings.

Insert the following clause in all solicitations and resultant cost-reimbursement contracts.

Final Decisions on Audit Findings (Apr. 1984)

For the purpose of issuing final decisions under the Disputes clause of this contract concerning monetary audit findings, the Contracting Officer shall be that person with ultimate responsibility for making that decision in accordance with Chapter 1–105, Resolution of Audit Findings, of the Department's Grants Administration Manual.

(End of clause)

352.249–14 Excusable delays.

Insert the following clause in all solicitations and resultant contracts other than purchase orders which do not have either a default or excusable delays clause, as prescribed in 342.7003–1(a):

Excusable Delays (Apr. 1984)

(a) Except with respect to failures of subcontractors, the Contractor shall not be considered to have failed in performance of this contract if such failure arises out of causes beyond the control and without the fault or negligence of the Contractor.

(b) Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather, but in every case the failure to perform must be beyond the control and without the fault or negligence of the Contractor. If the failure to perform is caused by the failure of a subcontractor to perform, and if such failure arises out of causes beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either of them, the Contractor shall not be deemed to have failed in performance of the contract, unless: the supplies or services to be furnished by the subcontractor were obtainable from other sources, the Contracting Officer shall have ordered the Contractor in writing to procure such supplies or services from such other sources, and the Contractor shall have failed to comply reasonably with such order. Upon request of the Contractor, the Contracting officer shall ascertain the facts and extent of such failure and, if he/she shall determine that any failure to perform was occasioned by any one or more of the said causes, the delivery schedule shall be revised accordingly, subject to the rights of the Government under the termination clause hereof. (As used in this clause, the terms ''subcontractor'' and ''subcontractors'' mean subcontractor(s) at any tier.)

(End of clause)

352.270–1 Accessibility of meetings, conferences, and seminars to persons with disabilities.

The following clause is to be used in accordance with 370.102:

Accessibility of Meetings, Conferences, and Seminars to Persons with Disabilities (Jan. 2001)

The Contractor agrees as follows:

(a) *Planning.* The Contractor will develop a plan to assure that any meeting, conference, or seminar held pursuant to this contract will meet or exceed the minimum accessibility standards set forth in 28 CFR 36.101–36.500 and Appendix A: ADA Accessibility Guidelines (ADAAG). The plan shall be submitted to the project officer for approval prior to initiating action. (A consolidated or master plan for contracts requiring numerous meetings, conferences, or seminars may be submitted in lieu of separate plans.)

(b) *Facilities.* Any facility to be utilized for meetings, conferences, or seminars in performance of this contract shall be in compliance with 28 CFR 36.101–36.500 and Appendix A. The Contractor shall determine, by an on-site inspection, that the facility meets these requirements.

(1) *Parking.* Parking shall be in compliance with 28 CFR 36.101–36.500 and Appendix A.

(2) *Entrances.* Entrances shall be in compliance with 28 CFR 36.101–36.500 and Appendix A.

(3) *Meeting Rooms.* Meeting rooms, including seating arrangements, shall be in compliance with 28 CFR 36.101–36.500 and Appendix A. In addition, stages, speaker platforms, etc. which are to be used by persons in wheelchairs must be accessible by ramps or lifts. When used, the ramp may not necessarily be independently negotiable if space does not permit. However, any slope over 1:12 must be approved by the Project Officer and the Contractor must provide assistance to negotiate access to the stage or platform.

(4) *Restrooms.* Restrooms shall be in compliance with 28 CFR 36.101–36.500 and Appendix A.

(5) *Eating Facilities.* Eating facilities in the meeting facility must also comply with 28 CFR 36.101–36.500 and Appendix A.

(6) *Overnight Facilities.* If overnight accommodations are required, the facility providing the overnight accommodations shall also comply with 28 CFR 36.101–36.500 and Appendix A.

(7) *Water Fountains.* Water fountains shall comply with 28 CFR 36.101–36.500 and Appendix A.

(8) *Telephones.* Public telephones shall comply with 28 CFR 36.101–36.500 and Appendix A.

(c) *Provisions of Services for Attendees with Sensory Impairments.*

(1) The Contractor, in planning the meeting, conference, or seminar, shall include in all announcements and other materials pertaining to the meeting, conference, or seminar a notice indicating that services will be made available to persons with sensory impairments attending the meeting, if requested within five (5) days of the date of the meeting, conference, or seminar. The announcement(s) and other material(s) shall indicate that persons with sensory impairments may contact a specific person(s), at a specific address and phone number(s), to make their service requirements known. The phone number(s) shall include a telecommunication device for the deaf (TDD).

(2) The Contractor shall provide, at no additional cost to the individual, those services required by persons with sensory impairments to insure their complete participation in the meeting, conference, or seminar.

(3) As a minimum, when requested in advance, the Contractor shall provide the following services:

(i) For persons with hearing impairments, qualified interpreters. Also, the meeting rooms will be adequately illuminated so signing by interpreters can be easily seen.

(ii) For persons with vision impairments, readers and/or cassette materials, as necessary, to enable full participation. Also, meeting rooms will be adequately illuminated.

(iii) Agenda and other conference material(s) shall be translated into a usable form for persons with sensory impairments. Readers, braille translations, large print text, and/or tape recordings are all acceptable. These materials shall be available to individuals with sensory impairments upon their arrival.

(4) The Contractor is responsible for making a reasonable effort to ascertain the number of individuals with sensory impairments who plan to attend the meeting, conference, or seminar. However, if it can be determined that there will be no person with sensory impairment in attendance, the provision of those services under paragraph (c) of this clause for the nonrepresented group, or groups, is not required.

(End of clause)

352.270–2 Indian preference.

The following clause shall be used as prescribed in 370.202(a):

Indian Preference (Apr. 1984)

(a) The Contractor agrees to give preference in employment opportunities under this contract to Indians who can perform required work, regardless of age (subject to existing laws and regulations), sex, religion, or tribal affiliation. To the extent feasible and consistent with the efficient performance of this contract, the Contractor further agrees to give preference in employment and training opportunities under this contract to Indians who are not fully qualified to perform regardless of age (subject to existing laws and regulations), sex, religion, or tribal affiliation. The Contractor also agrees to give preference to Indian organizations and Indian-owned economic enterprises in the awarding of any subcontracts to the extent feasible and consistent with the efficient performance of this contract. The Contractor shall maintain statistical records as are necessary to indicate compliance with this paragraph.

(b) In connection with the Indian employment preference requirements of this clause, the Contractor shall provide opportunities for training incident to such employment. Such training shall include on-the-job, classroom or apprenticeship training which is designed to increase the vocational effectiveness of an Indian employee.

(c) If the Contractor is unable to fill its employment and training opportunities after giving full consideration to Indians as required by this clause, those needs may be satisfied by selection of persons other than Indians in accordance with the clause of this contract entitled ''Equal Opportunity.''

(d) If no Indian organizations or Indian-owned economic enterprises are available under reasonable terms and conditions, including price, for awarding of subcontracts in connection with the work performed under this contract, the Contractor agrees to comply with the provisions of this contract involving utilization of small business concerns, small disadvantaged business concerns, and women-owned small business concerns.

(e) As used in this clause:

(1) ''Indian'' means a person who is a member of an Indian Tribe. If the Contractor has reason to doubt that a person seeking employment preference is an Indian, the Contractor shall grant the preference but shall require the individual to provide evidence within thirty (30) days from the Tribe concerned that the person is a member of the Tribe.

(2) ''Indian Tribe'' means an Indian Tribe, pueblo, band, nation, or other organized group or community, including Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688; 43 U.S.C. 1601) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(3) ''Indian organization'' means the governing body of any Indian Tribe or entity established or recognized by such governing body in accordance with the Indian Financing Act of 1974 (88 Stat. 77; 25 U.S.C. 1451); and

(4) ''Indian-owned economic enterprise'' means any Indian-owned commercial, industrial, or business activity established or organized for the purpose of profit, provided that such Indian ownership shall constitute not less than 51 percent of the enterprise, and that ownership shall encompass active operation and control of the enterprise.

(f) The Contractor agrees to include the provisions of this clause, including this paragraph (f) of this clause, in each subcontract awarded at any tier under this contract.

(g) In the event of noncompliance with this clause, the Contracting Officer may terminate the contract in whole or in part or may impose any other sanctions authorized by law or by other provisions of the contract.

(End of clause)

352.270–3 Indian preference program.

The following clause shall be used as prescribed in 370.202(b):

Indian Preference Program (Apr. 1984)

(a) In addition to the requirements of the clause of this contract entitled ''Indian Preference,'' the Contractor agrees to establish and conduct an Indian preference program which will expand opportunities for Indians to receive preference for employment and training in connection with the work to be performed under this contract, and which will expand the opportunities for Indian organizations and Indian-owned economic enterprises to receive a preference in the awarding of subcontracts. In this connection, the Contractor shall:

(1) Designate a liaison officer who will maintain liaison with the Government and the Tribe(s) on Indian preference matters; supervise compliance with the provisions of this clause; and administer the Contractor's Indian preference program.

(2) Advise its recruitment sources in writing and include a statement in all advertisements for employment that Indian applicants will be given preference in employment and training incident to such employment.

(3) Not more than twenty (20) calendar days after award of the contract, post a written notice in the Tribal office of any reservations on which or near where the work under this contract is to be performed

that sets forth the Contractor's employment needs and related training opportunities. The notice shall include the approximate numbers and types of employees needed; the approximate dates of employment; the experience or special skills required for employment, if any; training opportunities available; and other pertinent information necessary to advise prospective employees of any other employment requirements. The Contractor shall also request the Tribe(s) on or near whose reservation(s) the work is to be performed to provide assistance to the Contractor in filling its employment needs and training opportunities. The Contracting Officer will advise the Contractor of the name, location, and phone number of the Tribal officials to contact in regard to the posting of notices and requests for Tribal assistance.

(4) Establish and conduct a subcontracting program which gives preference to Indian organizations and Indian-owned economic enterprises as subcontractors and suppliers under this contract. The Contractor shall give public notice of existing subcontracting opportunities and, to the extent feasible and consistent with the efficient performance of this contract, shall solicit bids or proposals only from Indian organizations or Indian-owned economic enterprises. The Contractor shall request assistance and information on Indian firms qualified as suppliers or subcontractors from the Tribe(s) on or near whose reservation(s) the work under the contract is to be performed. The Contracting Officer will advise the Contractor of the name, location, and phone number of the Tribal officials to be contacted in regard to the request for assistance and information. Public notices and solicitations for existing subcontracting opportunities shall provide an equitable opportunity for Indian firms to submit bids or proposals by including: A clear description of the supplies or services required, including quantities, specifications, and delivery schedules which facilitate the participation of Indian firms; A statement indicating that preference will be given to Indian organizations and Indian-owned economic enterprises in accordance with section 7(b) of Public Law 93–638 (88 Stat. 2205; 25 U.S.C. 450e(b)); Definitions for the terms ''Indian organization'' and ''Indian-owned economic enterprise'' as prescribed under the ''Indian Preference'' clause of this contract; A statement to be completed by the bidder or offeror that it is an Indian organization or Indian-owned economic enterprise; and A closing date for receipt of bids or proposals which provides sufficient time for preparation and submission of a bid or proposal. If after soliciting bids or proposals from Indian organizations and Indian-owned economic enterprises, no responsive bid or acceptable proposal is received, the Contractor shall comply with the requirements of paragraph (d) of the ''Indian Preference'' clause of this contract. If one or more responsible bids or acceptable proposals are received, award shall be made to the low responsible bidder or acceptable offeror if the price is determined to be reasonable. If the low responsive bid or acceptable proposal is determined to be unreasonable as to price, the Contractor shall attempt to negotiate a reasonable price and award a subcontract. If a reasonable price cannot be agreed upon, the Contractor shall comply with the requirements of paragraph (d) of the ''Indian Preference'' clause of this contract.

(5) Maintain written records under this contract which indicate: The numbers of Indians seeking employment for each employment position available under this contract; The number and types of positions filled by Indians and non-Indians, and the total number of Indians employed under this contract; For those positions where there are both Indian and non-Indian applicants, and a non-Indian is selected for employment, the reason(s) why the Indian applicant was not selected; Actions taken to give preference to Indian organizations and Indian-owned economic enterprises for subcontracting opportunities which exist under this contract; Reasons why preference was not given to Indian firms as subcontractors or suppliers for each requirement where it was determined by the Contractor that such preference would not be consistent with the efficient performance of the contract; and The number of Indian organizations and Indian-owned economic enterprises contacted, and the number receiving subcontract awards under this contract.

(6) Submit to the Contracting Officer for approval a quarterly report which summarizes the Contractor's Indian preference program and indicates the number and types of available positions filled by Indians and non-Indians, and the dollar amounts of all subcontracts awarded to Indian organizations and Indian-owned economic enterprises, and to all other firms.

(7) Maintain records pursuant to this clause and keep them available for review by the Government until expiration of one (1) year after final payment under this contract, or for such longer period as may be required by any other clause of this contract or by applicable law or regulation.

(b) For purposes of this clause, the following definitions of terms shall apply:

(1) The terms ''Indian,'' ''Indian Tribe,'' ''Indian Organization,'' and ''Indian-owned economic enterprise'' are defined in the clause of this contract entitled ''Indian Preference.''

(2) ''Indian reservation'' includes Indian reservations, public domain Indian Allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act (85 Stat. 688; 43 U.S.C. 1601 *et seq.*)

(3) ''On or near an Indian Reservation'' means on a reservation or reservations or within that area surrounding an Indian reservation(s) where a person seeking employment could reasonably be expected to commute to and from in the course of a work day.

(c) Nothing in the requirements of this clause shall be interpreted to preclude Indian Tribes from independently developing and enforcing their own Indian preference requirements. Such requirements must not conflict with any Federal statutory or regulatory requirement dealing with the award and administration of contracts.

(d) The Contractor agrees to include the provisions of this clause, including this paragraph (d), in each subcontract awarded at any tier under this contract and to notify the Contracting Officer of such subcontracts.

(e) In the event of noncompliance with this clause, the Contracting Officer may terminate the contract in whole or in part or may impose any other sanctions authorized by law or by other provisions of the contract.

(End of clause)

352.270–4 Pricing of adjustments.

Insert the following clause in all solicitations and resultant fixed-priced contracts other than purchase orders.

Pricing of Adjustments (Jan. 2001)

When costs are a factor in determination of a contract price adjustment pursuant to the ''Changes'' clause or any provision of this contract, such costs shall be determined in accordance with the applicable cost principles and procedures set forth below:

Principles	Types of organizations
(a) Subpart 31.2 of the Federal Acquisition Regulation.	Commercial.
(b) Subpart 31.3 of the Federal Acquisition Regulation.	Educational.
(c) Subpart 31.6 of the Federal Acquisition Regulation.	State, local, and federally recognized Indian tribal governments.
(d) 45 CFR Part 74 Appendix E.	Hospitals (permforming research and development contracts only.
(e) Subpart 31.7 of the Federal Acquisition Regulation.	Other nonprofit institutions.

(End of clause)

352.270–5 Key personnel.

Insert the following clause in all solicitations and resultant cost-reimbursement contracts.

Key Personnel (Apr. 1984)

The personnel specified in this contract are considered to be essential to the work being performed hereunder. Prior to diverting any of the specified individuals to other programs, the Contractor shall notify the Contracting Officer reasonably in advance and shall submit justification (including proposed substitutions) in sufficient detail to permit evaluation of the impact on the program. No diversion shall be made by the Contractor without the written consent of the Contracting Officer; provided, that the Contracting Officer may ratify in writing such diversion and such ratification shall constitute the consent of the Contracting Officer required by this clause. The contract may be modified from time to time during the course of the contract to either add or delete personnel, as appropriate.

(End of clause)

352.270–6 Publications and Publicity.

Insert the following clause in all solicitations and resultant contracts.

Publications and Publicity (Jul. 1991)

(a) Unless otherwise specified in this contract, the Contractor is encouraged to publish the results of its work under this contract. A copy of each article submitted by the Contractor for publication shall be promptly sent to the Project Officer. The Contractor shall also inform the Project Officer when the article or other publication is published, and furnish a copy of it as finally published.

(b) The Contractor shall include in any publication resulting from work performed under this contract a disclaimer reading as follows:

The content of this publication does not necessarily reflect the views or policies of the Department of Health and Human Services, nor does mention of trade names, commercial products, or organizations imply endorsement by the U.S. Government.''

(End of clause)

352.270–7 Paperwork Reduction Act.

Insert the following clause in all solicitations and contracts.

Paperwork Reduction Act (Jan. 2001)

(a) In the event that it subsequently becomes a contractual requirement to collect or record information calling either for answers to identical questions from 10 or more persons other than Federal employees, or information from Federal employees which is outside the scope of their employment, for use by the Federal government or disclosure to third parties, the Paperwork Reduction Act of 1995 (Pub. L. 104–13) shall apply to this contract. No plan, questionnaire, interview guide or other similar device for collecting information (whether repetitive or single-time) may be used without first obtaining clearance from the Office of Management and Budget (OMB). Contractors and Project Officers should be guided by the provisions of 5 CFR Part 1320, Controlling Paperwork Burdens on the Public, and seek the advice of the HHS operating division or Office of the Secretary Reports Clearance Officer to determine the procedures for acquiring OMB clearance.

(b) The Contractor shall obtain the required OMB clearance through the Project Officer before expending any funds or making public contracts for the collection of data. The authority to expend funds and proceed with the collection of information shall be in writing by the Contracting Officer. The Contractor must plan at least 120 days for OMB clearance. Excessive delays caused by the Government which arises out of causes beyond the control and without the fault or negligence of the Contractor will be considered in accordance with the Excusable Delays or Default clause of this contract

(End of clause)

352.270–8 Protection of human subjects.

(a) The following provision shall be included in solicitations expected to involve human subjects:

Notice to Offerors of Requirements of 45 CFR Part 46, Protection of Human Subjects (Jan. 2001)

(a) Copies of the Department of Health and Human Services (Department) regulations for the protection of human subjects, 45 CFR Part 46, are available from the Office for Protection from Research Risks (OPRR), National Institutes of Health, Bethesda, Maryland 20892. The regulations provide a systematic means, based on established ethical principles, to safeguard the rights and welfare of individuals who participate as subjects in research activities supported or conducted by the Department.

(b) The regulations define a human subject as a living individual about whom an investigator (whether professional or student) conducting research obtains data through intervention or interaction with the individual, or identifiable private information. The regulations extend to the use of human organs, tissue, and body fluids from individually identifiable human subjects as well as to graphic, written, or recorded information derived from individually identifiable human subjects. The use of autopsy materials is governed by applicable State and local law and is not directly regulated by 45 CFR Part 46.

(c) Activities in which the only involvement of human subjects will be in one or more of the categories set forth in 45 CFR 46.101(b)(1–6) are exempt from coverage.

(d) Inappropriate designations of the noninvolvement of human subjects or of exempt categories of research in a project may result in delays in the review of a proposal. The National Institutes of Health will make a final determination of whether the proposed activities are covered by the regulations or are in an exempt category, based on the information provided in the proposal. In doubtful cases, prior consultation with OPRR, (telephone: 301–496–7014), is recommended.

(e) In accordance with 45 CFR Part 46, prospective Contractors being considered for award shall be required to file with OPRR an acceptable Assurance of Compliance with the regulations, specifying review procedures and assigning responsibilities for the protection of human subjects. The initial and continuing review of a research project by an institutional review board shall assure that the rights and welfare of the human subjects involved are adequately protected, that the risks to the subjects are reasonable in relation to the potential benefits, if any, to the subjects and the importance of the knowledge to be gained, and that informed consent will be obtained by methods that are adequate and appropriate. Prospective Contractors proposing research that involves human subjects shall be contacted by OPRR and given detailed instructions for establishing an institutional review board and filing an Assurance of Compliance.

(f) It is recommended that OPRR be consulted for advice or guidance concerning either regulatory requirements or ethical issues pertaining to research involving human subjects.

(End of provision)

(b) The following clause shall be included in solicitations and resultant contracts involving human subjects:

Protection of Human Subjects (Jan. 2001)

(a) The Contractor agrees that the rights and welfare of human subjects involved in research under this contract shall be protected in accordance with 45 CFR Part 46 and with the Contractor's current Assurance of Compliance on file with the Office for Protection from Research Risks (OPRR), National Institutes of Health (NIH). The Contractor further agrees to provide certification at least annually that the Institutional Review Board has reviewed and approved the procedures, which involve human subjects in accordance with 45 CFR Part 46 and the Assurance of Compliance.

(b) The Contractor shall bear full responsibility for the performance of all work and services involving the use of human subjects under this contract in a proper manner and as safely as is feasible. The parties hereto agree that the Contractor retains the right to control and direct the performance of all work under this contract. Nothing in this contract shall be deemed to constitute the Contractor or any subcontractor, agent or employee of the Contractor, or any other person, organization, institution, or group of any kind whatsoever, as the agent or employee of the Government. The Contractor agrees that it has entered into this contract and will discharge its obligations, duties, and undertakings and the work pursuant thereto, whether requiring professional judgement or otherwise, as an independent contractor without imputing liability on the part of the Government for the acts of the Contractor or its employees.

(c) If at any time during the performance of this contract, the Contracting officer determines, in consultation with the OPRR, NIH, that the Contractor is not in compliance with any of the requirements and/or standards stated in paragraphs (a) and (b) above, the Contracting Officer may immediately suspend, in whole or in part, work and further payments under this contract until the Contractor corrects the noncompliance. Notice of the suspension may be communicated by telephone and confirmed in writing. If the Contractor fails to complete corrective action within the period of time designated in the Contracting Officer's written notice of suspension, the Contracting Officer may, in consultation with OPRR, NIH, terminate this contract in a whole or in part, and the Contractor's name may be removed

form the list of those contractors with approved Health and Human Services Human Subject Assurances.

(End of clause)

352.270–9 Care of laboratory animals.

(a) The following provision shall be included in solicitations expected to involve vertebrate animals:

Notice to Offerors of Requirement for Adequate Assurance of Protection of Vertebrate Animal Subjects (Sep. 1985)

The PHS Policy on Humane Care and Use of Laboratory Animals by Awardee Institutions establishes a number of requirements for research activities involving animals. Before award may be made to an applicant organization, the organization shall file, with the Office for Protection from Research Risks (OPRR), National Institutes of Health (NIH), a written Animal Welfare Assurance which commits the organization to comply with the provisions of the PHS Policy on Humane Care and Use of Laboratory Animals by Awardee Institutions, the Animal Welfare Act, and the Guide for the Care and Use of Laboratory Animals prepared by the Institute of Laboratory Animal Resources. In accordance with the PHS Policy on Humane Care and Use of Laboratory Animals by Awardee Institutions, applicant organizations must establish a committee, qualified through the experience and expertise of its members, to oversee the institution's animal program, facilities and procedures. No award involving the use of animals shall be made unless the Animal Welfare Assurance has been approved by OPRR. Prior to award, the Contracting Officer will notify Contractor(s) selected for projects that involve live vertebrate animals that an Animal Welfare Assurance is required. The Contracting Officer will request that OPRR negotiate an acceptable Animal Welfare Assurance with those Contractor(s). For further information, OPRR may be contacted at NIH, Bethesda, Maryland 20892 (301–496–7041).

(End of provision)

(b) The following clause shall be included in all solicitations and resultant contracts involving research on vertebrate animals:

Care of Live Vertebrate Animals (Jan.2001)

(a) Before undertaking performance of any contract involving animal related activities, the Contractor shall register with the Secretary of Agriculture of the United States in accordance with 7 U.S.C. 2136 and 9 CFR sections 2.25 through 2.28. The Contractor shall furnish evidence of the registration to the Contracting Officer.

(b) The Contractor shall acquire vertebrate animals used in research from a dealer licensed by the Secretary of Agriculture under 7 U.S.C. 2133 and 9 CFR Sections 2.1–2.11, or from a source that is exempt from licensing under those sections.

(c) The Contractor agrees that the care and use of any live vertebrate animals used or intended for use in the performance of this contract will conform with the PHS Policy on Humane Care of Use of Laboratory Animals, the current Animal Welfare Assurance, the Guide for the Care and Use of Laboratory Animals prepared by the Institute of Laboratory Animal Resources and the pertinent laws and regulations of the United States Department of Agriculture (see 7 U.S.C. 2131 *et seq.* and 9 CFR Subchapter A, Parts 1–4). In case of conflict between standards, the more stringent standard shall be used.

(d) If at any time during performance of this contract, the Contracting Officer determines, in consultation with the Office for Protection from Research Risks (OPRR), National Institutes of Health (NIH), that the Contractor is not in compliance with any of the requirements and/or standards stated in paragraphs (a) through (c) above, the Contracting Officer may immediately suspend, in whole or in part, work and further payments under this contract until the Contractor corrects the noncompliance. Notice of the suspension may be communicated by telephone and confirmed in writing. If the Contractor fails to complete corrective action within the period of time designated in the Contracting Officer's written notice of suspension, the Contracting Officer may, in consultation with OPRR, NIH, terminate this contract in whole or in part, and the Contractor's name may be removed from the list of those contractors with approved PHS Animal Welfare Assurances.

Note: Note: The Contractor may request registration of its facility and a current listing of licensed dealers from the Regional Office of the Animal and Plant Health Inspection Service (APHIS), USDA, for the region in which its research facility is located. The location of the appropriate APHIS Regional Office, as well as information concerning this program may be obtained by contacting the Animal Care Staff, USDA/APHIS, 4700 River Road, Riverdale, Maryland 20737.

(End of Clause)

PART 353—FORMS

Subpart 353.3—Illustrations of Forms

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 353.3—Illustrations of Forms

353.370–674 Form HHS 674, Structured Approach Profit/Fee Objective.

This form is available from local cost advisory personnel. For copies of the form, contact the Program Support Center at (301) 443–6740.

PART 370—SPECIAL PROGRAMS AFFECTING ACQUISITION

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Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

Subpart 370.1—Accessibility of Meetings, Conferences, and Seminars to Persons with Disabilities

370.101 Policy.

(a) It is the policy of HHS that all meetings, conferences, and seminars be accessible to persons with disabilities. For the purpose of this policy, accessibility is defined as both physical access to meeting, conference, and seminar sites, and aids and services to enable individuals with sensory disabilities to fully participate in meetings, conferences, and seminars.

(b) In regard to acquisition, the policy is applicable to all contracts where the statement of work requires the contractor to conduct meetings, conferences, or seminars that are open to the public or involve HHS personnel, but not to ad hoc meetings that may be necessary or incidental to contract performance.

370.102 Responsibilities.

(a) The contracting officer shall include the clause in 352.270–1 in every solicitation and resulting contract when the statement of work requires the contractor to conduct meetings, conferences, or seminars in accordance with 370.101(b).

(b) The project officer shall be responsible for obtaining, reviewing, and approving the contractor's plan, which is to be submitted in response to

paragraph (a) of the contract clause in 352.270–1. A consolidated or master plan for contracts requiring numerous meetings, conferences, or seminars will be acceptable. The project officer, prior to approving the plan, should consult with the Office of Engineering Services serving the region where the meeting, conference, or seminar is to be held, to assure that the contractor's plan meets the accessibility requirements of the contract clause. The Office of Engineering Services should determine the adequacy of the contractor's plan, and notify the project officer, in writing, within ten (10) working days of receiving the request from the project officer.

Subpart 370.2—Indian Preference in Employment, Training, and Subcontracting Opportunities

370.201 Statutory requirements.

Section 7(b) of the Indian Self-Determination and Education Assistance Act, Public Law 93–638, 88 Stat. 2205, 25 U.S.C. 450e(b), requires:

''Any contract, subcontract, grant, or subgrant pursuant to this Act, the Act of April 16, 1934 (48 Stat. 596), as amended, or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible:

(1) Preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and

(b) Preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 (88 Stat. 77).''

370.202 Applicability.

The Indian Preference clause set forth in 352.270–2 and the Indian Preference Program clause set forth in 352.270–3 have been developed to implement section 7 (b) of Public Law 93–638 for all activities of the Department. The clauses shall be used by any affected departmental contracting activity as follows, except solicitations issued and contracts awarded pursuant to Title I of Public Law 93–638 (25 U.S.C. 450 et seq.) are exempted:

(a) The Indian Preference clause (352.270–2) shall be included in each solicitation and resultant contract, regardless of dollar amount:

(1) When the contract is to be awarded pursuant to an act specifically authorizing contracts with Indian organizations; or

(2) Where the work to be performed under the contract is specifically for the benefit of Indians and is in addition to any incidental benefits which might otherwise accrue to the general public.

(b) The Indian Preference Program clause (352.270–3) shall be included in each solicitation and resultant contract when:

(1) The dollar amount of the acquisition is expected to equal or exceed $50,000 for nonconstruction work or $100,000 for construction work;

(2) The Indian Preference clause is to be included in the solicitation and resultant contract; and

(3) The determination is made, prior to solicitation, that the work to be performed under the resultant contract will take place in whole or in substantial part on or near an Indian reservation(s). In addition, the Indian Preference Program clause may be included in any solicitation and resultant contract below the $50,000 or $100,000 level for nonconstruction or construction contracts, respectively, but which meet the requirements of paragraphs (b)(2) and (3) of this section 370.202, and, in the opinion of the contracting activity, offer substantial opportunities for Indian employment, training, and subcontracting.

370.203 Definitions.

For purposes of this subpart 370.2, the following definitions shall apply:

(a) *Indian* means a person who is a member of an Indian Tribe. If the contractor has reason to doubt that a person seeking employment preference is an Indian, the contractor shall grant the preference but shall require the individual to provide evidence within thirty (30) days from the Tribe concerned that the person is a member of the Tribe.

(b) *Indian Tribe* means an Indian Tribe, pueblo, band, nation, or other organized group or community, including any Alaska Native Village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688, 43 U.S.C. 1601) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(c) *Indian organization* means the governing body of any Indian Tribe or entity established or recognized by such governing body in accordance with the Indian Financing Act of 1974 (88 Stat. 77, 25 U.S.C. 1451).

(d) *Indian-owned economic enterprise* means any Indian-owned commercial, industrial, or business activity established or organized for the purpose of profit, provided that such Indian ownership shall constitute not less than 51 percent of the enterprise, and the ownership shall encompass active operation and control of the enterprise.

(e) *Indian reservation* includes Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act (85 Stat. 688, 43 U.S.C. 1601 *et seq.*)

(f) *On or near an Indian Reservation* means on a reservation or reservations or within that area surrounding an Indian reservation(s) where a person seeking employment could reasonably be expected to commute to and from in the course of a work day.

370.204 Compliance enforcement.

(a) The concerned contracting activity shall be responsible for conducting periodic reviews to insure contractor compliance with the requirements of the clauses set forth in 352.270–2 and 352.270–3. These reviews may be conducted with the assistance of the Indian Tribe(s) concerned.

(b) Complaints of noncomplaince with the requirements of the clauses set forth in 352.270–2 and 352.270–3 which are filed in writing with the contracting activity shall be promptly investigated and resolved by the contracting officer.

370.205 Tribal preference requirements.

(a) Where the work under a contract is to be performed on an Indian reservation, the contracting activity may supplement the clause set forth in 352.270–3 by adding specific Indian preference requirements of the Tribe on whose reservation the work is to be performed. The supplemental requirements shall be jointly developed for the contract by the contracting activity and the Tribe. Supplemental preference requirements must represent a further implementation of the requirements of section 7(b) of Public Law 93–638 and must be approved by the affected program director and approved for legal sufficiency by the Business and Administrative Law Division, OGC, or a regional attorney before being added to a solicitation and resultant contract. Any supplemental preference requirements to be added to the clause in 352.270–3 shall be included in the solicitation and clearly identified in order to insure uniform understanding of the additional requirements by all prospective bidders or offerors.

(b) Nothing in this part shall be interpreted to preclude Tribes from independently developing and enforcing their own tribal preference requirements. Such independently

developed tribal preference requirements shall not, except as provided in paragraph (a) of this section, become a requirement in contracts covered under this subpart 370.2, and must not conflict with any Federal statutory or regulatory requirement concerning the award and administration of contracts.

Subpart 370.3—Acquisitions Involving Human Subjects

370.300 Scope of subpart.

This subpart applies to all research and development activities involving human subjects conducted under contract (see 45 CFR 46.102(d) and (f)).

370.301 Policy.

It is the policy of the Department of Health and Human Services (DHHS) that no contract involving human subjects shall be awarded until acceptable assurance has been given that the activity will be subject to initial and continuing review by an appropriate Institutional Review Board (IRB) as described in DHHS regulations at 45 CFR 46.103. An applicable Multiple Project Assurance (MPA) or Single Project Assurance (SPA), approved by the Office for Protection from Research Risks (OPRR), National Institutes of Health (NIH), shall be required of each contractor, subcontractor, or cooperating institution having responsibility for human subjects involved in performance of the contract. The OPRR, NIH, is responsible for negotiating assurances covering all DHHS-supported or DHHS-conducted activities involving human subjects. Contracting officers shall be guided by OPRR regarding nonaward or termination of a contract due to inadequate assurance or breach of assurance for protection of human subjects.

370.302 Types of assurances.

Assurances may be one of two types:

(a) *Multiple Project Assurance (MPA).* An MPA describes the oversight procedures applicable to all DHHS-supported human subjects activities within an institution having a significant number of concurrent projects. An MPA listed in OPRR's current ''List of Institutions Which Have an Approved MPA'' will be considered acceptable for purposes of this policy.

(b) *Single Project Assurance (SPA).* An SPA describes the oversight procedures applicable to a single DHHS-supported human subjects activity. SPAs may be approved in modified form to meet unusual requirements. SPAs are not solicited from institutions with OPRR approved MPAs. Copies of proposals selected for negotiation and requiring one or more SPAs shall be forwarded to the Human Subjects Assurance Branch, OPRR, NIH MSC 7507, 6100 Executive Blvd., Room 3B01, Rockville, Maryland 20892, as early as possible so that timely action may be taken to secure the SPA(s).

370.303 Notice to offerors.

(a) Solicitations shall contain the notice to offerors in 352.270–8(a) whenever contract performance is expected to involve human subjects.

(b) IRB approval of proposals submitted by institutions having an OPRR-approved MPA should be certified in the manner required by instructions for completion of the contract proposal; or by completion of a DHHS Form 310, Protection of Human Subjects Assurance Identification/Certification/Declaration; or by letter indicating the institution's OPRR-assigned MPA number, the date of IRB review and approval, and the type of review (convened or expedited). The date of IRB approval must not be more than 12 months prior to the deadline for proposal submission.

(c) SPAs for contractors, subcontractors, or cooperating institutions generally will not be requested prior to determination that a contract proposal has been selected for negotiation. When an SPA is submitted, it provides certification for the initial contract period. No additional documentation is required. If the contract provides for additional years to complete the project, the noncompetitive renewal proposal shall be certified in the manner described in the preceding paragraph.

370.304 Contract clause.

The clause set forth in 352.270–8(b) shall be inserted in all solicitations and resultant contracts involving human subjects.

Subpart 370.4—Acquisitions Involving the Use of Laboratory Animals

370.400 Scope of subpart.

This subpart applies to all research, research training and biological testing activities involving live vertebrate animals conducted under contract (see Public Health Service Policy on Humane Care and Use of Laboratory Animals (PHS Policy), Rev. 1986, Repr. 1996).

370.401 Policy.

(a) It is the policy of the Department of Health and Human Services (DHHS) and the Public Health Service agencies that no contract involving live vertebrate animals shall be awarded until acceptable assurance has been given that the activity will be subject to initial and continuing review by an appropriate Institutional Animal Care and Use Committee (IACUC) as described in the PHS Policy at IV. B. 6. and 7. An applicable Full Animal Welfare Assurance or Interinstitutional Agreement/Assurance, approved by the Office for Protection from Research Risks (OPRR), National Institutes of Health (NIH), shall be required of each contractor, subcontractor, or cooperating institution having responsibility for animal care and use involved in performance of the contract (see PHS Policy II., IV. A., and V. B.).

(b) The OPRR, NIH, is responsible for negotiating assurances covering all DHHS/PHS-supported or DHHS/PHS-conducted activities involving the care and use of live vertebrate animals. Contracting officers shall be guided by OPRR regarding adequate animal care, and use, approval, disapproval, restriction, or withdrawal of approval of assurances (see PHS Policy V. A.).

370.402 Assurances.

(a) Assurances may be one of two types:

(1) *Full Animal Welfare Assurance (AWA).* An AWA describes the institution's complete program for the care and use of animals, including but not limited to the facilities, occupational health, training, veterinary care, IACUC procedures and lines of authority and responsibility. An AWA listed in OPRR's list of institutions which have an approved full AWA will be considered acceptable for purposes of this policy.

(2) *Interinstitutional Agreement/Assurance (IAA).* An IAA describes the arrangements between an offeror and usually a subcontractor where animal activities will occur. An IAA is limited to the specific award or single project.

(b) Copies of proposals selected for negotiation and requiring an assurance shall be forwarded to the Assurance Branch, Division of Animal Welfare, OPRR, NIH MSC 7507, 6100 Executive Blvd., Room 3B01, Rockville, Maryland 20892, as early as possible in order that timely action may be taken to secure the necessary assurances.

(c) A contractor providing animal care services at an assured entity, such as a Government-owned, contractor-operated (GOCO) site, does not need a separate assurance because the GOCO site normally covers the contractor services in the GOCO site assurance.

370.403 Notice to offerors.

Solicitations shall contain the notice to offerors in 352.270–9(a) whenever contract performance is expected to involve the use of live vertebrate animals.

(a) For offerors having a full AWA on file with OPRR, IACUC approval of the use of animals shall be submitted in the manner required by instructions for completion of the contract proposal, but prior to the technical review of the proposal. The date of IACUC review and approval must not be more than 36 months prior to the deadline for proposal submission.]

(b) Non-assured offerors are not required to submit assurances or IACUC approval with proposals. OPRR will contact contractors, subcontractors and cooperating institutions to negotiate necessary assurances and verify IACUC approvals when requested by appropriate DHHS/PHS staff.

370.404 Contract clause.

The clause set forth in 352.270–9(b) shall be included in all solicitations and resultant contracts involving the care and use of live vertebrate animals.

Subpart 370.5—Acquisitions Under the Buy Indian Act

370.500 Scope of subpart.

This subpart sets forth the policy on preferential acquisition from Indians under the negotiation authority of the Buy Indian Act. Applicability of this subpart is limited to acquisitions made by or on behalf of the Indian Health Service of the Public Health Service.

370.501 Policy.

(a) The Indian Health Service will utilize the negotiation authority of the Buy Indian Act to give preference to Indians whenever the use of that authority is authorized and is practicable. The Buy Indian Act, 25 U.S.C. 47, prescribes the application of the advertising requirements of section 3709 of the Revised Statutes to the acquisition of Indian supplies. As set out in 25 U.S.C. 47, the Buy Indian Act provides as follows:

> So far as may be practicable Indian labor shall be employed, and purchases of the products (including, but not limited to printing, notwithstanding any other law) of Indian industry may be made in open market in the discretion of the Secretary of the Interior.

(b) The functions, responsibilities, authorities, and duties of the Secretary of the Interior for maintenance and operation of hospital and health facilities for Indians and for the conservation of the health of Indians are transferred to the Surgeon General of the United States under the supervision of the Secretary of Health and Human Services, 42 U.S.C. 2001 (a). Accordingly, the Secretary of Health and Human Services is authorized to use the Buy Indian Act in the acquisition of products of Indian industry in connection with the maintenance and operation of hospital and health facilities for Indians and for the conservation of the health of Indians. This authority has been delegated exclusively to the Indian Health Service and is not available for use by any other HHS component (unless that component is making an acquisition on behalf of the Indian Health Service).

(c) Use of the Buy Indian Act negotiation authority has been emphasized in subsequent legislation, particularly Public Law 94–437 and Public Law 96–537.

370.502 Definitions.

Buy Indian contract means any contract involving activities covered by the Buy Indian Act that is negotiated under the provisions of 41 U.S.C. 252(c) and 25 U.S.C. 47 between an Indian firm and a contracting officer representing the Indian Health Service.

Indian means a member of any tribe, pueblo, band, group, village or community that is recognized by the Secretary of the Interior as being Indian or any individual or group of individuals that is recognized by the Secretary of the Interior or the Secretary of Health and Human Services. The Secretary of Health and Human Services in making determinations may take into account the determination of the tribe with which affiliation is claimed.

Indian firm means a sole enterprise, partnership, corporation, or other type of business organization owned, controlled, and operated by one or more Indians (including, for the purpose of sections 301 and 302 of Public Law 94–437, former or currently federally recognized Indian tribes in the State of New York) or by an Indian firm; or a nonprofit firm organized for the benefit of Indians and controlled by Indians (see 370.503(a)).

Product of Indian industry means anything produced by Indians through physical labor or by intellectual effort involving the use and application of skills by them.

370.503 Requirements.

(a) *Indian ownership.* The degree of Indian ownership of an Indian firm shall be at least 51 percent during the period covered by a Buy Indian contract.

(b) *Joint ventures.* An Indian firm may enter into a joint venture with other entities for specific projects as long as the Indian firm is the managing partner. However, the joint venture must be approved by the contracting officer prior to the award of a contract under the Buy Indian Act.

(c) *Bonds.* In the case of contracts for the construction, alteration, or repair of public buildings or public works, performance and payment bonds are required by the Miller Act (40 U.S.C. 270a–270f) and FAR part 28. In the case of contracts with Indian tribes or public nonprofit organizations serving as governmental instrumentalities of an Indian tribe, bonds are not required. However, bonds are required when dealing with private business entities which are owned by an Indian tribe or members of an Indian tribe. Bonds may be required of private business entities which are joint ventures with, or subcontractors of, an Indian tribe or a public nonprofit organization serving as a governmental instrumentality of an Indian tribe. A bid guarantee or bid bond is required only when a performance or payment bond is required.

(d) *Indian preference in employment, training and subcontracting.* Contracts awarded under the Buy Indian Act are subject to the requirements of section 7(b) of the Indian Self-Determination and Education Assistance Act 25 U.S.C. 450e, which requires that preference be given to Indians in employment, training, and subcontracting. The Indian Preference clause set forth in 352.270–2 shall be included in all Buy Indian solicitations and resultant contracts. The Indian Preference Program clause set forth in 352.270–3 shall be used as specified in 370.202(b). All requirements set forth in subpart 370.2 which are applicable to the instant Buy Indian acquisition shall be followed by the contracting officer, e.g., sections 370.204 and 370.205.

(e) *Subcontracting.* Not more than 50 percent of the work to be performed under a prime contract awarded pursuant to the Buy Indian Act shall be subcontracted to other than Indian firms. For this purpose, work to be performed does not include the provision of materials, supplies, or equipment.

(f) *Wage rates.* A determination of the minimum wage rates by the Secretary of Labor as required by the Davis-Bacon Act (40 U.S.C. 276a) shall be included in all contracts awarded under the Buy Indian Act for over $2,000 for construction, alteration, or repair, including painting and decorating, of public buildings and public works,

except contracts with Indian tribes or public nonprofit organizations serving as governmental instrumentalities of an Indian tribe. The wage rate determination is to be included in contracts with private business entities even if they are owned by an Indian tribe or a member of an Indian tribe and in connection with joint ventures with, or subcontractors of, an Indian tribe or a public nonprofit organization serving as a governmental instrumentality of an Indian tribe.

370.504 Competition.

(a) Contracts to be awarded under the Buy Indian Act shall be subject to competition among Indians or Indian concerns to the maximum extent that competition is determined by the contracting officer to be practicable. When competition is determined not to be practicable, a Justification for Other than Full and Open Competition shall be prepared in accordance with 306.303 and subsequently retained in the contract file.

(b) Solicitations must be synopsized and publicized in the Commerce Business Daily and copies of the synopses sent to the tribal office of the Indian tribal government directly concerned with the proposed acquisition as well as to Indian concerns and others having a legitimate interest. The synopsis should state that the acquisition is restricted to Indian firms under the Buy Indian Act.

370.505 Responsibility determinations.

(a) A contract may be awarded under the Buy Indian Act only if it is first determined that the project or function to be contracted for is likely to be satisfactorily performed under that contract and the project or function is likely to be properly completed or maintained under that contract.

(b) The determination called for by paragraph (a) of this section, to be made prior to the award of a contract, will be made in writing by the contracting officer reflecting an analysis of the standards set forth in FAR 9.104–1.

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Federal Register

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Part V

Department of Commerce

National Oceanic and Atmospheric Administration

15 CFR Part 922

Florida Keys National Marine Sanctuary Regulations; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 922

[Docket No. 000510129–1004–02]

RIN 0648–A018

Florida Keys National Marine Sanctuary Regulations

AGENCY: National Marine Sanctuary Program (NMSP), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Final rule; notice of boundary expansion; supplemental management plan.

SUMMARY: By this document, NOAA expands the boundary of the Florida Keys National Marine Sanctuary (FKNMS or Sanctuary) in the remote westernmost portion of the Sanctuary by 96 square nautical miles (nm^2) and establishes the Tortugas Ecological Reserve (Ecological Reserve or Reserve) (a 151 nm^2 no-take zone) in the expanded area and in 55 nm^2 of the existing Sanctuary, to protect important coral reef resources. This document publishes the boundary coordinates for the expansion area and for the Reserve, announces the availability of the Supplemental Management Plan (SMP) for the Reserve, and publishes the text of the Revised Designation Document for the Sanctuary. The SMP details the goals and objectives, management responsibilities, research activities, interpretive and educational programs, and enforcement, including surveillance activities, for the Reserve. By this document, NOAA also issues regulations to implement the boundary expansion and the establishment of the Reserve and to regulate activities in the Reserve consistent with the purposes of its establishment and to make minor revisions to the existing Sanctuary boundary and to the boundaries of various zoned areas within that boundary to correct errors, provide clarification, and reflect more accurate data. This action is necessary to comprehensively protect some of the healthiest and most diverse coral reefs in the Florida Keys. The intended effect of this rule is to protect the deep water coral reef community in this area from being degraded by human activities.

DATE: Pursuant to Section 304(b) of the National Marine Sanctuaries Act (NMSA) 16 U.S.C. 1434(b), the Revised Designation and regulations shall take effect and become final after the close of a review period of 45 days of continuous session of Congress, beginning on the day on which this document is published in the **Federal Register**, unless the Governor of the State of Florida certifies to the Secretary of Commerce that the Revised Designation or any of its terms is unacceptable, in which case the Revised Designation or any unacceptable term shall not take effect. Announcement of the effective date of the Final Regulations will be published in the **Federal Register**.

ADDRESSES: Copies of the Final Supplemental Environmental Impact Statement/Supplemental Management Plan (FSEIS/SMP) and the Record of Decision for the Tortugas Ecological Reserve are available upon request to the Office of National Marine Sanctuaries, National Ocean Service, National Oceanic and Atmospheric Administration, 1305 East-West Highway, 11th Floor, Silver Spring, MD, 20910, (301) 713–3125. The FSEIS/SMP is also available on the Internet at: http://www.fknms.nos.noaa.gov. Comments regarding the collection-of-information requirements contained in this rule should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC, 20503 (Attention: Desk Officer for NOAA) and to Richard Roberts, NOAA, Work Station 8118, 1305 East-West Highway, 8th Floor, Silver Spring, MD, 20910.

FOR FURTHER INFORMATION CONTACT: Billy Causey, Sanctuary Superintendent, (305) 743–2437.

SUPPLEMENTARY INFORMATION:

I. Introduction

NOAA establishes the Tortugas Ecological Reserve (a no-take zone) in the Tortugas region (Tortugas or region) of the Florida Keys to protect nationally significant coral reef resources and to protect an area that serves as a source of biodiversity for the Sanctuary as well as for the southwest shelf of Florida. Establishment of the Reserve includes expansion of the Sanctuary boundary to ensure that the Reserve protects sensitive coral habitats lying outside the existing boundary of the Sanctuary.

With this expansion, the FKNMS, which was designated by the Florida Keys National Marine Sanctuary and Protection Act (FKNMSPA, Pub. L. 101–605) on November 16, 1990, consists of approximately 2900 nm^2 (9660 square kilometers) of coastal and oceanic waters, and the submerged lands thereunder, surrounding the Florida Keys and the Dry Tortugas.

NOAA expands the boundary of the FKNMS and establishes the Tortugas Ecological Reserve to protect the nationally significant coral reef resources of the Tortugas region. This action furthers the objectives of the National Marine Sanctuaries Act (NMSA, 16 U.S.C. 1431 *et seq.*) and the FKNMSPA and meets the objectives of E.O. 13089, Coral Reef Protection. With the addition of the Tortugas Ecological Reserve, the network of no-take zones in the FKNMS is increased to 24, two of which are ecological reserves (Western Sambo and Tortugas Ecological Reserves).

II. Background

The Tortugas region is located in the westernmost portion of the FKNMS approximately 70 miles west of Key West, a very strategic position oceanographically that makes it an ideal location for an ecological reserve. It contains the healthiest coral reefs found in the Sanctuary. Coral pinnacles as high as forty feet with the highest coral cover (>30%) found in the Keys jut up from the ocean floor. These coral formations are bathed by some of the clearest and cleanest waters found in the Florida Keys. This occurs where the tropical waters of the Caribbean mingle with the more temperate waters of the Gulf of Mexico.

Recent studies reveal that the Tortugas region is unique in its location and the extent to which oceanographic processes impact the area. The Tortugas plays a dynamic role in supporting marine ecosystems throughout south Florida and the Florida Keys. Larvae that are spawned from adult populations in the Tortugas are spread throughout the Keys and south and southwest Florida by a persistent system of currents and eddies that provide the retention and current pathways necessary for successful recruitment of both local and foreign spawned juveniles with larval stages remaining from hours for some coral species up to one year for spiny lobster. In addition, the upwellings and convergences of the current systems provide the necessary food supplies in concentrated frontal regions to support larval growth stages.

The Tortugas is located at the transition between the Gulf of Mexico and the Atlantic and is strongly impacted by two major current systems, the Loop Current in the eastern Gulf of Mexico and the Florida Current in the Straits of Florida, as well as by the system of eddies that form and travel along the boundary of these currents. Of particular importance to the marine communities of the Tortugas and Florida Keys is the formation of a large

counterclockwise rotating gyre (large eddy) that forms just south of the Tortugas where the Loop Current turns abruptly into the Straits of Florida. This gyre can persist for several months before it is forced downstream along the Keys decreasing in size and increasing in forward speed until its demise in the middle Keys. This gyre serves as a retention mechanism for local recruits and as a pathway to inshore habitats for foreign recruits. It may also serve as a potential food provider through plankton production and concentration.

The Tortugas is also located adjacent to two coastal current systems, including the wind-driven currents of both the Florida Keys coastal zone and the west Florida Shelf.

Persistent westward winds over the Keys create a downwelling system that drives a westward coastal countercurrent along the lower Keys to the Tortugas. The countercurrent provides a return route to the Tortugas and its gyre-dominated circulation, and onshore surface Ekman transport (a process whereby wind-driven upwelling bottom water is transported 45 degrees to the left of the actual wind direction in the northern hemisphere) provide a mechanism for larval entry into coastal habitats. Circulation on the west Florida shelf is strongly influenced by wind forcing, but there also appears to be a significant southward mean flow, possibly due to the Loop Current. The effect of these currents on the Tortugas is to provide a larval return mechanism to the Florida Bay nursery grounds during periods of southeast winds, as well as the transport mechanism for low-salinity shelf waters from the north when the mean southward flow is strong.

The combination of downstream transport in the Florida Current, onshore Ekman transport along the downwelling coast, upstream flow in the coastal countercurrent and recirculation in the Tortugas gyre forms a recirculating recruitment pathway stretching from the Dry Tortugas to the middle Keys that enhances larval retention and recruitment into the Keys coastal waters of larvae spawned locally or foreign larvae from remote upstream areas of the Gulf of Mexico and Caribbean Sea. Convergences between the Florida Current front and coastal gyres provide a mechanism to concentrate foreign and local larvae, as well as their planktonic food supply. Onshore Ekman transport and horizontal mixing from frontal instabilities enhance export from the oceanic waters into the coastal zone. A wind- and gyre-driven countercurrent provides a return leg to aid larval retention in local waters. Seasonal cycles of the winds, countercurrent and Florida Current favor recruitment to the coastal waters during the fall when the countercurrent can extend the length of the Keys from the Dry Tortugas to Key Largo, onshore Ekman transport is maximum and downstream flow in the Florida Current is minimum. The mix and variability of the different processes forming the recruitment conveyor provide ample opportunity for local recruitment of species with larval stages ranging from days to several months. For species with longer larval stages, such as the spiny lobster, which has a six to 12-month larval period, a local recruitment pathway exists that utilizes retention in the Tortugas gyre and southwest Florida shelf and return via the Loop Current and the Keys conveyor system. Return from the southwest Florida shelf could also occur through western Florida Bay and the Keys coastal countercurrent, due to a net southeastward flow recently observed connecting the Gulf of Mexico to the Atlantic through the Keys.

The Tortugas North portion of the Tortugas Ecological Reserve consists of coral reef communities that are unparalleled in the Florida Keys in their diversity and composition. Several carbonate banks of varying size and depth (30 feet to 75 feet) and low relief hardbottom habitats with patches of sand and rubble characterize Tortugas North. The most prominent features in the Tortugas North portion of the Reserve are Tortugas Bank and Sherwood Forest. Tortugas Bank crests at 66 feet and supports abundant attached reef organisms such as sponges, corals, and soft corals. North of Tortugas Bank, in an area previously believed to be composed only of sand, are several pinnacles covered with hard and soft corals and reef fish.

Sherwood Forest is an ancient stony coral forest exhibiting 30% or more bottom cover located along the western flank of Tortugas Bank (compared to 10% for the rest of the Florida Keys). The area's name was inspired by the bizarre mushroom-shaped coral heads that are an adaptation to the low light conditions. There seem to be indications that the mushroom shape is the result of a composite of two coral species. The coral reef is so well developed, that it forms a veneer over the true bottom approximately three feet below the reef. It is an area of low relief but high coral cover that rises to a depth of about 65 feet and covers an area of many acres. The area exhibits a complex habitat with various rock ledges, holes, and caves, providing hiding places for marine life. Unusual coral formations and previously unidentified coral species associations have been observed in this location. Gorgonians and black corals (Antipathies sp.), which are not common elsewhere in the Florida Keys, are also prolific. An abundance of groupers has been documented in Sherwood Forest as have sightings of uncommon and rare fish species such as jewfish, white-eyed goby, and orangeback bass.

The Tortugas South portion of the Reserve includes a wide range of deep water coral reef habitats that will protect and conserve many rare and unusual reef species, and incorporates sufficient area to provide a buffer to the critical coral reef community. The upper portion of Tortugas South includes the relatively shallow Riley's Hump area in less than 100 feet of water. Riley's Hump consists of attached algae, scattered small coral colonies, sand, and hardbottom habitats. It is also a known fish aggregating and spawning site for several snapper-grouper species.

Deep reef habitats with numerous soft corals but few stony corals are found in Tortugas South in depths from 200 to 400 feet. A series of small pinnacles that surround a larger seamount have been identified as part of an east-west running ledge that begins around 250 feet and drops to close to 400 feet in a nearly vertical profile. This is unlike any other coral reef habitat discovered within Sanctuary waters. These complex habitats support numerous fish species including streamer bass, yellowmouth grouper, snowy grouper, scamp, speckled hind, creole fish, bank butterflyfish, amberjack, and almaco.

The deepest portions (1,600 to 1,800 feet) of Tortugas South encompass limestone ledges where unusual deep-dwelling sea life such as lantern fish (myctophids), tilefish, golden crabs, and giant isopods have been observed. The sand bottom habitat has been observed to be teeming with unique deep sea species of shrimp, fish, sea cucumbers, anemones, and crabs.

These critical deep water communities of Tortugas South are vulnerable to a wide range of impacts from fishing gear including deep water trawls and traps, and impacts from anchoring. Fishing gear impacts have been observed on sand and limestone substrates in some deep water areas.

In order for the Reserve to be biologically effective and to ensure protection and conservation of the full range of coral reef habitats and species in the Tortugas region, it is critical that all of the various benthic habitats and their associated marine communities, from the shallowest to the greatest

depths, be included within the boundary of the Reserve.

Despite its beauty and productivity, the Tortugas has been exploited for decades, greatly diminishing its potential as a source of larval recruits to the downstream portion of the Florida Keys and to itself. Fish and lobster populations have been significantly depleted thus threatening the integrity and natural dynamics of the ecosystem. Large freighters have been using Riley's Hump as a secure place to anchor between port visits. The several-ton anchors and chains of these ships have devastated large areas of fragile coral reef habitat that provide the foundation for economically important fisheries.

Visitation to the Tortugas region has increased dramatically over the past 10 years. Visitation in the DRTO increased 300% from 1984 through 1998. The population of South Florida is projected to increase from the current 6.3 million people to more than 12 million by 2050. With continued technological innovations such as global positioning systems (GPS), electronic fish finders, better and faster vessels, this increase in population will translate to more pressure on the resources in the Tortugas. By designating this area an ecological reserve, NOAA hopes to create a seascape of promise—a place where the ecosystem's full potential can be realized and a place that humans can experience, learn from and respect. This goal is consistent with E.O. 13089, Coral Reef Protection, and the U.S. Coral Reef Task Force's recommendations.

The FSEIS/SMP supplements the Final Environmental Impact Statement/Final Management Plan (FEIS/MP) for the Sanctuary and fulfills the requirements of the National Environmental Policy Act of 1969 (NEPA) for the Sanctuary boundary expansion, the establishment of the Reserve, and the issuance of the regulations implementing the boundary expansion and the Reserve. Because establishment of the Tortugas Ecological Reserve includes a Sanctuary boundary expansion NOAA has followed the procedures and has complied with the requirements of section 304(a) of the NMSA, 16 U.S.C. 1434(a).

Other actions by various other jurisdictions are underway to ensure comprehensive protection of the unique resources of the Tortugas region:

- The National Park Service (NPS) is revising the General Management Plan for the Dry Tortugas National Park (DRTO) that will include as the preferred alternative a proposal to create a Research/Natural Area (RNA) within the Park. The proposed boundary and regulations for the RNA will be compatible with the establishment of the Tortugas Ecological Reserve.
- Under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the Gulf of Mexico Fishery Management Council (GMFMC) has primary federal responsibility and expertise for the development of fishery management plans (FMPs) throughout the Gulf of Mexico. The GMFMC has developed an amendment for addressing Essential Fish Habitat requirements for the various Gulf of Mexico Fishery Management Plans (GMFMPs) which cover the area of the Tortugas Ecological Reserve. The GMFMPs are implemented by regulations promulgated by the National Marine Fisheries Service (NMFS) (50 CFR part 622). At the GMFMC's meeting on November 9, 1999, the NOS and NMFS requested that the GMFMC take steps to prohibit fishing, consistent with the purpose of the Tortugas Ecological Reserve. The GMFMC accepted this request and at its July 10–13, 2000 meeting, adopted the Generic Amendment for Addressing Essential Fish Habitat Requirements for Fishery Management Plans of the Gulf of Mexico. That amendment to the GMFMPs is consistent with the Tortugas Ecological Reserve and the regulations governing ecological reserves within the FKNMS, at 15 CFR 922.164(d).
- NMFS intends to issue regulations consistent with the no-take status of the Tortugas Ecological Reserve for the species covered by the GMFMPs and for Atlantic tunas, Swordfish, sharks, and Atlantic billfishes.
- The State of Florida is drafting regulations to prohibit fishing in those portions of Tortugas North that lie within State waters.

Combined with the establishment of the Tortugas Ecological Reserve, these actions would result in comprehensive protection for the nationally significant coral reef habitats from shallow to deep water extending from the DRTO into Sanctuary and GMFMC waters.

The process by which NOAA arrived at its proposal to establish the Tortugas Ecological Reserve is described in the preamble to the Proposed Rule published on May 18, 2000 (65 FR 31634). The five boundary alternatives and the four regulatory alternatives considered by NOAA are also set forth and described in the preamble to the Proposed Rule and in the FSEIS.

Consistent with the proposal, NOAA has selected Boundary Alternative III (the Preferred Boundary Alternative) (Figure 1) and expands the boundary of the Sanctuary by approximately 96 nm^2 to include two significant coral reef areas known as Sherwood Forest and Riley's Hump. The boundary of the Sanctuary in its northwesternmost corner is expanded by approximately 36 nm^2 to include Sherwood Forest and in its southwesternmost corner is expanded by adding a noncontiguous area of approximately 60 nm^2 to include Riley's Hump. By the final regulations issued with this document, NOAA establishes a Tortugas Ecological Reserve of approximately 151 nm^2. The Tortugas Ecological Reserve incorporates the expanded area and approximately 55 nm^2 of the existing Sanctuary in its northwest corner. The area of the Reserve surrounding Sherwood Forest encompasses approximately 91 nm^2 and is called Tortugas North; the area surrounding Riley's Hump is called Tortugas South.

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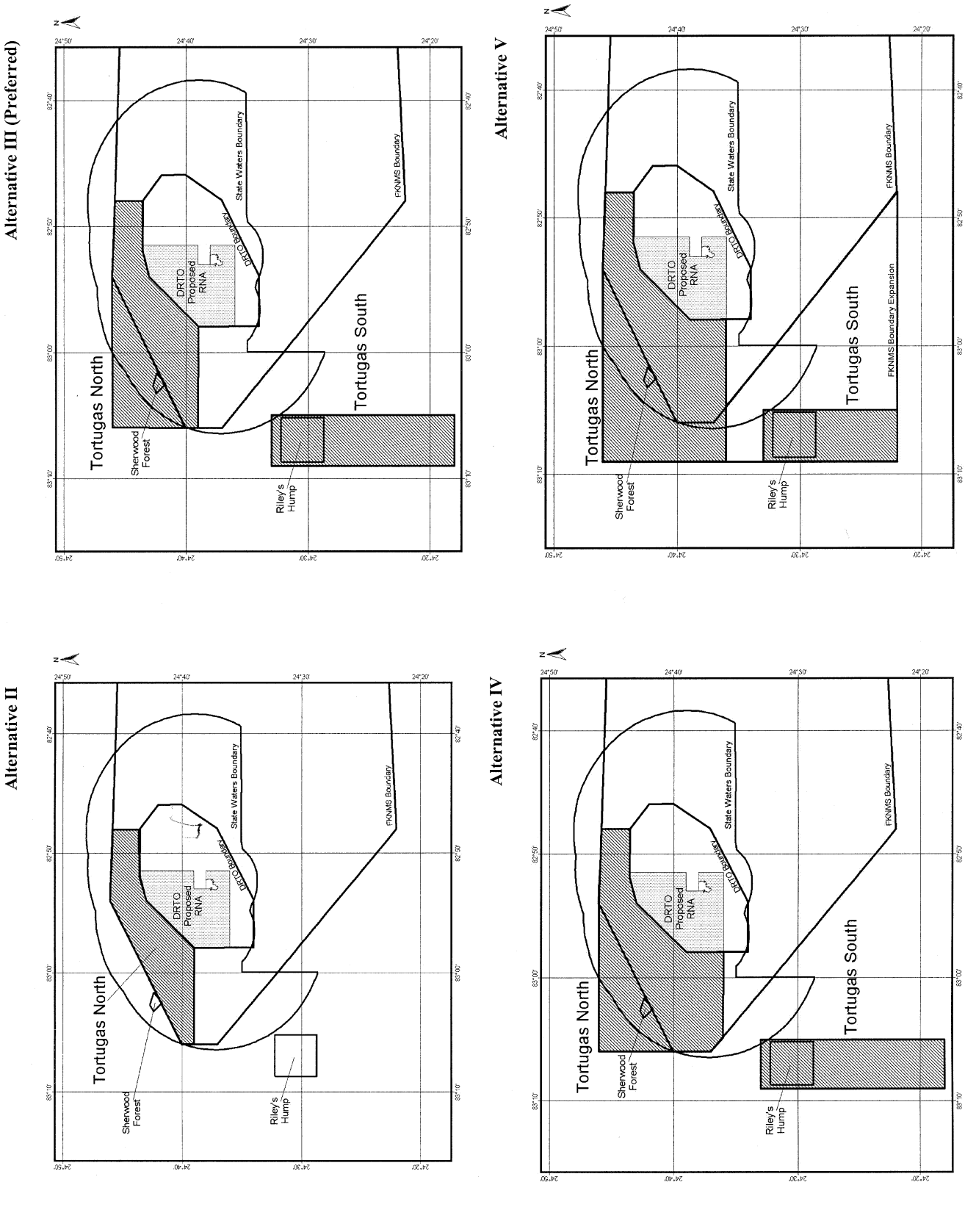

Figure 1. Boundary Alternatives II - V.

While NOAA proposed Regulatory Alternative C as its Preferred Regulatory Alternative, NOAA has selected Regulatory Alternative D and implements it by the final regulations issued with this document. The

difference between Regulatory Alternatives C and D is that Regulatory Alternative D prohibits access in Tortugas South except for continuous transit, law enforcement, or for scientific research or educational activities pursuant to a sanctuary permit. Under Alternative C, which is less restrictive, access to Tortugas South would have been allowed and, except for continuous transit and law enforcement purposes, would have required a simple, no-cost permit and call-in for entering and leaving.

The GMFMC, at its July 10–13, 2000, meeting, took final action on its Generic Amendment Addressing the Establishment of Tortugas Marine Reserves, which would create the Council's own 60 nm^2 marine reserve in the same location as Tortugas South and in the 13 nm^2 portion of Tortugas North that is within the Council's jurisdiction. The GMFMC has proposed a prohibition on any fishing (consumptive activity) or anchoring by fishing vessels. The Council also requested that NOAA prohibit anchoring by all vessels in the reserve and that NOAA prohibit all diving in the areas of Tortugas North and Tortugas South that are subject to Council jurisdiction.

The GMFMC expressed concern that non-consumptive diving would make the no-take prohibitions difficult to enforce, particularly with regard to diving for lobsters and spearfishing. The Council believes that eliminating all diving activities would greatly simplify enforcement. In addition, the GMFMC stated that non-consumptive diving can impact and damage bottom habitat through the inadvertent contact with coral or by stirring up sand and silt on the bottom. The Council also expressed concern about the biological impact of diving on the behavior of reef fish populations. Tortugas South is a known spawning area for many fish including red snapper, yellow tail snapper, mutton snapper, mangrove snapper, snowy grouper, black grouper, red grouper, red hind, and rock hind. The Council believes that the potential for diver impact on fish spawning would be eliminated by the closure. In addition, other commentors expressed concern over the effects of non-consumptive diving on sensitive coral reef resources.

Based on the comments received, NOAA revised the Preferred Alternative in the FSEIS from the Preferred Alternative in the DSEIS to prohibit all diving in Tortugas South except for research or educational activities pursuant to a Sanctuary permit. Non-consumptive diving will still be allowed in Tortugas North. The resources of Tortugas North are not as sensitive to diver impacts as those in Tortugas South and permitting non-consumptive diving in Tortugas North with careful monitoring of the impacts of such diving will provide exceptional resource appreciation and public education benefits. Also, prohibiting diving in Tortugas South will provide a reference for assessing the impact of diving activities in Tortugas North.

Socio-economic impacts, determined by analyzing the costs and benefits of no-take regulations on various industries, indicate moderate impacts on fishermen, mostly lobster and handline fishermen, and some recreational charter operators, and minimal or small impacts on recreational fishermen, commercial shippers, and treasure salvors. The potential for benefits to non-consumptive users and the scientific community is high due to the educational and research value of a no-take ecological reserve. Positive effects to surrounding areas through long-term fisheries replenishment are also likely.

The action taken today adequately protects the nationally significant coral reef resources of the Tortugas region and fulfills the objectives of the FKNMSPA and the National Marine Sanctuaries Act (NMSA). The Tortugas Ecological Reserve established by this action is of sufficient size and the regulations impose adequate protective measures to achieve the goals and objectives of the FKNMSPA and the NMSA while not unduly impacting user groups.

III. Revised Designation Document

The Designation Document for the Sanctuary is revised to incorporate the coordinates for the expanded boundary of the Sanctuary, to authorize the regulation of entering or leaving specified areas of the Sanctuary, and to make necessary technical and editorial corrections of the Designation Document. The text of the Revised Designation Document follows:

REVISED DESIGNATION DOCUMENT FOR THE FLORIDA KEYS NATIONAL MARINE SANCTUARY

Article I. Designation and Effect

On November 16, 1990, the Florida Keys National Marine Sanctuary and Protection Act, Pub. L. 101–605 (16 U.S.C. 1433 note), became law. That Act designated an area of waters and submerged lands, including the living and nonliving resources within those waters, as described therein, as the Florida Keys National Marine Sanctuary (Sanctuary). By this revised Designation Document, the boundary of the Sanctuary is expanded to include important coral reef resources and resources in two areas known as Sherwood Forest and Riley's Hump, just beyond the westernmost portion of the statutory Sanctuary boundary.

Section 304 of the National Marine Sanctuaries Act (NMSA), 16 U.S.C. 1431 *et seq.,* authorizes the Secretary of Commerce to issue such regulations as are necessary and reasonable to implement the designation, including managing and protecting the conservation, recreational, ecological, historical, scientific, educational, cultural, archaeological or aesthetic resources and qualities of a national marine sanctuary. Section 1 of Article IV of this Designation Document lists activities of the type that are presently being regulated or may have to be regulated in the future, in order to protect Sanctuary resources and qualities. Listing in section 1 does not mean that a type of activity will be regulated in the future, however, if a type of activity is not listed, it may not be regulated, except on an emergency basis, unless section 1 is amended, following the procedures for designation of a sanctuary set forth in paragraphs (a) and (b) of section 304 of the NMSA, to include the type of activity.

Nothing in this Designation Document is intended to restrict activities that do not cause an adverse effect on the resources or qualities of the Sanctuary or on Sanctuary property or that do not pose a threat of harm to users of the Sanctuary.

Article II. Description of the Area

The Florida Keys National Marine Sanctuary boundary encompasses approximately 2900 nm^2 (9,800 square kilometers) of coastal and ocean waters, and the submerged lands thereunder, surrounding the Florida Keys in Florida. The easternmost point of the Sanctuary is the northeasternmost point of Biscayne National Park and the westernmost point is approximately 15 kilometers to the west of the western boundary of Dry Tortugas National Park, a linear distance of approximately 335 kilometers. The contiguous area boundary on the Atlantic Ocean side of the Florida Keys runs south from Biscayne National Park generally following the 300-foot isobath, curving in a southwesterly direction along the Florida Keys archipelago until south of the Dry Tortugas. The contiguous area boundary on the Gulf of Mexico side of the Florida Keys runs from this southern point in a straight line to the northwest and then when directly west of the Dry Tortugas in a straight line to the north. The boundary then turns to the east and slightly south and follows a straight line to just west of Key West and then turns to the northeast and follows a straight line parallel to the Florida Keys approximately five miles to the south, and then follows the Everglades National Park boundary until Division Point where the boundary then follows the western shore of Manatee Bay, Barnes Sound, and Card Sound. The boundary then follows the southern boundary of Biscayne National Park and up its eastern boundary until its northeasternmost point. Starting just to the east of the most western boundary line of the contiguous portion of the Sanctuary there is a vertical rectangular shape area of 60 nm^2 just to the south.

The shoreward boundary of the Sanctuary is the mean high-water mark except around

the Dry Tortugas where it is the boundary of the Dry Tortugas National Park. The Sanctuary boundary encompasses the entire Florida coral reef tract, all of the mangrove islands of the Florida Keys, and some of the sea grass meadows of the Florida Keys. The precise boundary of the Sanctuary is set forth at the end of this Designation Document.

Article III. Characteristics of the Area That Give it Particular Value

The Florida Keys extend approximately 223 miles southwest from the southern tip of the Florida peninsula. Adjacent to the Florida Keys land mass are located spectacular unique, nationally significant marine environments, including sea grass meadows, mangrove islands, and extensive living coral reefs. These marine environments support rich biological communities possessing extensive conservation, recreational, commercial, ecological, historical, research, educational, and aesthetic values which give this area special national significance. These environments are the marine equivalent of tropical rain forests in that they support high levels of biodiversity, are fragile and easily susceptible to damage from human activities, and possess high value to humans if properly conserved. These marine environments are subject to damage and loss of their ecological integrity from a variety of sources of disturbance.

The Florida Keys are a limestone island archipelago. The Keys are located at the southern edge of the Florida Plateau, a large carbonate platform made of a depth of up to 7000 meters of marine sediments, which have been accumulating for 150 million years and which have been structurally modified by subsidence and sea level fluctuation. The Keys region is generally divided into five distinct areas: the Florida reef tract, one of the world's largest coral reef tracts and the only barrier reef in the United States; Florida Bay, described as an active lime-mud factory because of the high carbonate content of its silts and muds; the Southwest Continental Shelf; the Straits of Florida; and the Keys themselves.

The 2.5 million-acre Sanctuary contains one of North America's most diverse assemblages of terrestrial, estuarine, and marine fauna and flora, including, in addition to the Florida reef tract, thousands of patch reefs, one of the world's largest sea grass communities covering 1.4 million acres, mangrove fringed shorelines, mangrove islands, and various hardbottom habitats. These diverse habitats provide shelter and food for thousands of species of marine plants and animals, including more than 50 species of animals identified under Federal or State law, as endangered or threatened. The Keys were at one time a major seafaring center for European and American trade routes to the Caribbean, and the submerged cultural and historic resources (*i.e.,* shipwrecks) abound in the surrounding waters. In addition, the Sanctuary may contain substantial archaeological resources of pre-European cultures.

The uniqueness of the marine environment draws multitudes of visitors to the Keys. The major industry in the Florida Keys is tourism, including activities related to the Keys' marine resources, such as dive shops, charter fishing and dive boats and marinas, as well as hotels and restaurants. The abundance of the resources also supports a large commercial fishing employment sector.

The number of visitors to the Keys grows each year, with a concomitant increase in the number of residents, homes, jobs, and businesses. As population grows and the Keys accommodate ever-increasing resource-use pressures, the quality and quantity of Sanctuary resources are increasingly threatened. These pressures require coordinated and comprehensive monitoring and researching of the Florida Keys' region.

Article IV. Scope of Regulations

Section 1. Activities Subject to Regulation

The following activities are subject to regulation under the NMSA, either throughout the entire Sanctuary or within identified portions of it or, as indicated, in areas beyond the boundary of the Sanctuary, to the extent necessary and reasonable. Such regulation may include prohibitions to ensure the protection and management of the conservation, recreational, ecological, historical, scientific, educational, cultural, archaeological or aesthetic resources and qualities of the area. Because an activity is listed here does not mean that such activity is being or will be regulated. All listing means is that the activity can be regulated, after compliance with all applicable regulatory laws, without going through the designation procedures required by paragraphs (a) and (b) of section 304 of the NMSA, 16 U.S.C. 1434(a) and (b). Further, no regulation issued under the authority of the NMSA except an emergency regulation issued with the approval of the Governor of the State of Florida may take effect in the area of the Sanctuary lying within the seaward boundary of the State of Florida if the Governor of the State of Florida certifies to the Secretary of Commerce that such regulation is unacceptable within the forty-five-day review period specified in NMSA. Detailed definitions and explanations of the following ''activities subject to regulation'' appear in the Sanctuary Management Plan:

1. Exploring for, developing, or producing oil, gas, and/or minerals (*e.g.,* clay, stone, sand, gravel, metalliferous ores, nonmetalliferous ores) in the Sanctuary;

2. Touching, climbing on, taking, removing, moving, collecting, harvesting, injuring, destroying or causing the loss of, or attempting to take, remove, move, collect, harvest, injure, destroy or cause the loss of, coral in the Sanctuary;

3. Drilling into, dredging or otherwise altering the seabed of the Sanctuary, except incidental to allowed fishing and boating practices or construction activities permitted by county, state or federal regulatory agencies; or constructing, placing or abandoning any structure, material or other matter on the seabed of the Sanctuary, except as authorized by appropriate permits or incidental to allowed fishing practices;

4. Discharging or depositing, within or beyond the boundary of the Sanctuary, any material that subsequently enters the Sanctuary and injures a Sanctuary resource or quality;

5. Operating water craft in the Sanctuary

(a) in a manner that could injure coral, hardbottoms, seagrass, mangroves, or any other immobile organism attached to the seabed,

(b) in a manner that could injure or endanger the life of divers, fishermen, boaters or other users of the Sanctuary,

(c) in a manner that could disturb marine mammals, marine reptiles, or bird rookeries;

6. Diving or boating activities in the Sanctuary including anchoring that could harm Sanctuary resources, Sanctuary property, or other users of the Sanctuary;

7. Stocking within the Sanctuary or releasing within the Sanctuary or from beyond the boundary of the Sanctuary, native or exotic species of plant, invertebrate, fish, amphibian or mammals;

8. Defacing, marking, or damaging in any way or displacing, removing, or tampering with any markers, signs, notices, placards, navigational aids, monuments, stakes, posts, mooring buoys, boundary buoys, trap buoys, or scientific equipment in the Sanctuary;

9. Removing, injuring, preserving, curating, and managing historic resources within the Sanctuary without all required state and/or federal permits;

10. Taking, removing, moving, catching, collecting, harvesting, feeding, injuring, destroying, or causing the loss of, or attempting to take, remove, move, catch, collect, harvest, feed, injure, destroy or cause the loss of any marine mammal, marine reptile, or bird within the Sanctuary, without all required state and/or federal permits;

11. Possessing, moving, harvesting, removing, taking, damaging, disturbing, breaking, cutting, spearing, or otherwise injuring any marine invertebrate, fish, bottom formation, algae, seagrass or other living or dead organism, including shells, or attempting any of these activities in any area of the Sanctuary designated as an Existing Management Area, Wildlife Management Area, Ecological Reserve, Sanctuary Preservation Area, or Special-Use Area;

12. Carrying or possessing specified fishing gear in any area of the Sanctuary designated as an Existing Management Area, Wildlife Management Area, Ecological Reserve, Sanctuary Preservation Area, or Special-Use Area except for passage through without interruption;

13. Entering and leaving any Wildlife Management Area, Ecological Reserve, Sanctuary Preservation Area, or Special-Use Area except for passage through without interruption or for law enforcement purposes;

14. Harvesting marine life as defined and regulated by the State of Florida under its marine life rule;

15. Mariculture;

16. Possessing or using explosives or releasing electrical charges or substances poisonous or toxic to fish and other living marine resources within the Sanctuary or beyond the boundary of the Sanctuary (possession of ammunition shall not be considered possession of explosives);

17. Removing and disposing of lost, out-of-season, or illegal gear discovered within the Sanctuary; removing of vessels grounded, lodged, stuck or otherwise perched on coral

reefs, hardbottom, or seagrasses within the Sanctuary; and removing and disposing of derelict or abandoned vessels or other vessels within the Sanctuary for which ownership cannot be determined or for which the owner takes no action for removal or disposal; and salvaging and towing of vessels abandoned or disabled within the Sanctuary vessels or of vessels within the Sanctuary otherwise needing salvaging or towing; and

18. Interfering with, obstructing, delaying or preventing an investigation, search, seizure or deposition of seized property in connection with enforcement of the NMSA or any regulation or permit issued under the NMSA.

Section 2. Emergency Regulation

Where necessary to prevent or minimize the destruction of, loss of, or injury to a Sanctuary resource or quality; or to minimize the imminent risk of such destruction, loss or injury, any activity, including any not listed in Section 1 of this article, is subject to immediate temporary regulation, including prohibition. However, no such regulation may take effect in any area of the Sanctuary lying within the seaward boundary of the State of Florida without the approval of the Governor of the State of Florida.

Article V. Effect on Leases, Permits, Licenses, and Rights

Pursuant to paragraph (c)(1) of section 304 of the NMSA, 16 U.S.C. 1434(c)(1), no valid lease, permit, license, approval or other authorization issued by any federal, State, or local authority of competent jurisdiction, or any right of subsistence use or access, may be terminated by the Secretary of Commerce, or his or her designee, as a result of a designation, or as a result of any sanctuary regulation, if such authorization or right was in effect on the effective date of the designation (November 16, 1990 with respect to the statutory Sanctuary boundary; _____, 2001 with respect to the revision to the Sanctuary boundary expansion made by this Revised Designation Document).

In no event may the Secretary of Commerce or his or her designee issue a permit authorizing, or otherwise approving: (1) the exploration for, development of, or production of oil, gas, or minerals within the Sanctuary; or (2) the disposal of dredged materials within the Sanctuary (except by certification in accordance with applicable National Marine Sanctuary Program regulations of valid authorizations in existence on the effective date of Sanctuary designation). Any purported authorizations issued by other authorities after the effective date of Sanctuary designation for any of these activities within the Sanctuary shall be invalid.

Article VI. Alteration of this Designation

The terms of designation, as defined in paragraph (a) of section 304 of the NMSA, 16 U.S.C. 1434(a), may be modified only by the procedures outlined in paragraphs (a) and (b) of section 304 of the NMSA, 16 U.S.C. 1434(a) and (b), including public hearings, consultation with interested federal, state, and local government agencies, review by the appropriate Congressional committees, review by the Governor of the State of Florida, and approval by the Secretary of Commerce, or his or her designee. No designation, term of designation, or implementing regulation may take effect in the area of the Sanctuary lying within the seaward boundary of the State of Florida if the Governor of the State of Florida certifies to the Secretary of Commerce that such designation or term of designation regulation is unacceptable within the forty-five-day review period specified in NMSA.

Florida Keys National Marine Sanctuary Boundary Coordinates (based on North American datum of 1983)

The boundary of the Florida Keys National Marine Sanctuary—

(a) begins at the northeasternmost point of Biscayne National Park located at a point approximately 25 degrees 39 minutes north latitude, 80 degrees 05 minutes west longitude, then runs eastward to the point located at 25 degrees 39 minutes north latitude, 80 degrees 04 minutes west longitude; and

(b) then runs southward and connects in succession the points at the following coordinates:

(i) 25 degrees 34 minutes north latitude, 80 degrees 04 minutes west longitude,

(ii) 25 degrees 28 minutes north latitude, 80 degrees 05 minutes west longitude,

(iii) 25 degrees 21 minutes north latitude, 80 degrees 07 minutes west longitude, and

(iv) 25 degrees 16 minutes north latitude, 80 degrees 08 minutes west longitude;

(c) then runs southwesterly and connects in succession the points at the following coordinates:

(i) 25 degrees 07 minutes north latitude, 80 degrees 13 minutes west longitude,

(ii) 24 degrees 57 minutes north latitude, 80 degrees 21 minutes west longitude,

(iii) 24 degrees 39 minutes north latitude, 80 degrees 52 minutes west longitude,

(iv) 24 degrees 30 minutes north latitude, 81 degrees 23 minutes west longitude,

(v) 24 degrees 25 minutes north latitude, 81 degrees 50 minutes west longitude,

(vi) 24 degrees 22 minutes north latitude, 82 degrees 48 minutes west longitude,

(vii) 24 degrees 37 minutes north latitude, 83 degrees 06 minutes west longitude,

(viii) 24 degrees 46 minutes north latitude, 83 degrees 06 minutes west longitude,

(ix) 24 degrees 46 minutes north latitude, 82 degrees 54 minutes west longitude,

(x) 24 degrees 44 minutes north latitude, 81 degrees 55 minutes west longitude,

(xi) 24 degrees 51 minutes north latitude, 81 degrees 26 minutes west longitude, and

(xii) 24 degrees 55 minutes north latitude, 80 degrees 56 minutes west longitude;

(d) then follows the boundary of Everglades National Park in a southerly then northeasterly direction through Florida Bay, Buttonwood Sound, Tarpon Basin, and Blackwater Sound;

(e) after Division Point, then departs from the boundary of Everglades National Park and follows the western shoreline of Manatee Bay, Barnes Sound, and Card Sound;

(f) then follows the southern boundary of Biscayne National Park to the southeasternmost point of Biscayne National Park; and

(g) then follows the eastern boundary of Biscayne National Park to the beginning point specified in paragraph (a).

The shoreward boundary of the Florida Keys National Marine Sanctuary is the mean high-water mark except around the Dry Tortugas where the boundary is conterminous with that of the Dry Tortugas National Park, formed by connecting in succession the points at the following coordinates:

(i) 24 degrees 34 minutes 0 seconds north latitude, 82 degrees 54 minutes 0 seconds west longitude;

(ii) 24 degrees 34 minutes 0 seconds north latitude, 82 degrees 58 minutes 0 seconds west longitude;

(iii) 24 degrees 39 minutes 0 seconds north latitude, 82 degrees 58 minutes 0 seconds west longitude;

(iv) 24 degrees 43 minutes 0 seconds north latitude, 82 degrees 54 minutes 0 seconds west longitude;

(v) 24 degrees 43 minutes 32 seconds north latitude, 82 degrees 52 minutes 0 seconds west longitude;

(vi) 24 degrees 43 minutes 32 seconds north latitude, 82 degrees 48 minutes 0 seconds west longitude;

(vii) 24 degrees 42 minutes 0 seconds north latitude, 82 degrees 46 minutes 0 seconds west longitude;

(viii) 24 degrees 40 minutes 0 seconds north latitude, 82 degrees 46 minutes 0 seconds west longitude;

(ix) 24 degrees 37 minutes 0 seconds north latitude, 82 degrees 48 minutes 0 seconds west longitude; and

(x) 24 degrees 34 minutes 0 seconds north latitude, 82 degrees 54 minutes 0 seconds west longitude.

The Florida Keys National Marine Sanctuary also includes the area located within the boundary formed by connecting in succession the points at the following coordinates;

(i) 24 degrees 33 minutes north latitude, 83 degrees 09 minutes west longitude,

(ii) 24 degrees 33 minutes north latitude, 83 degrees 05 minutes west longitude,

(iii) 24 degrees 18 minutes north latitude, 83 degrees 05 minutes west longitude,

(iv) 24 degrees 18 minutes north latitude, 83 degrees 09 minutes west longitude, and

(v) 24 degrees 33 minutes north latitude, 83 degrees 09 minute west longitude.

(End of Revised Designation Document.)

IV. Supplemental Management Plan

The Supplemental Management Plan (SMP) complements the existing Sanctuary Management Plan (MP) in several respects. Many of the strategies described in the MP that are now being implemented in the Sanctuary will be applied to the Tortugas Ecological Reserve. However, due to the unique characteristics of the Tortugas region (remoteness, deep water) some new strategies have been developed and will be implemented. Some of these strategies are described below. The SMP adds strategies to the Education and Outreach Action Plan, Enforcement

Action Plan, Mooring and Boundary Buoy Action Plan, Research Monitoring Action Plan and adds an Administrative Action Plan.

Administrative Action Plan

The SMP adds an Administrative Action Plan to the Management Plan. It targets the development of a Memorandum of Understanding (MOU) to clearly define the roles and responsibilities of the various agencies responsible for resource management in the Tortugas region. The MOU will cover, at a minimum, the following activities: cooperative enforcement, research, and sharing of facilities. Management of the Reserve necessitates a high degree of coordination and cooperation between the affected agencies, particularly NOAA and the NPS. Both agencies have similar missions and responsibilities. Consequently, cooperation will not only save money but will also improve resource protection. The NPS has a variety of assets such as land, housing, and dockage that, under a workable agreement, could potentially be used to support management of the Reserve. An agreement on the use of these lands and facilities will be pursued by NOAA and NPS.

The State of Florida is the co-trustee for a significant portion of the waters and marine resources within the Reserve and will co-manage these resources with the NOAA.

NOAA's National Marine Fisheries Service (NMFS) has considerable expertise and some assets that could be utilized in managing the reserve, particularly in the areas of research and monitoring. The NMFS Office of Law Enforcement has responsibility for enforcing fishing regulations and has assets and technology that could potentially be used for enforcement.

The U.S. Coast Guard has responsibility for enforcing fishing regulations in federal waters of the Reserve. They have several large offshore patrol vessels based in Key West that could be used, in conjunction with Sanctuary patrol vessels, for enforcement of the reserve areas.

Strategy 1: Memorandum of Understanding (MOU)

Develop and enter into an MOU that clearly defines the roles and responsibilities of the various agencies responsible for resource management in the Tortugas region. The MOU should cover, at a minimum, the following activities: cooperative enforcement, research, and sharing of facilities and assets.

Education and Outreach Action Plan

The SMP supplements the Education and Outreach Plan in the MP by adding education and outreach strategies for the Reserve. These strategies are expected to have a significant effect on protecting and preserving the natural resources found in the Tortugas by enhancing the general public's understanding of this unique region and the regulations applicable to the reserve. These strategies were developed according to the Sanctuary Education and Outreach goals and outcomes identified in the MP.

Strategy E.13: Tortugas Site Brochure

To a large extent, marine reserves rely on visitor compliance and understanding in order for their regulations to be effective. This is even more critical when reserves like the Tortugas Ecological Reserve are remotely located or large in size. NOAA has learned from experience that an important tactic for increasing regulatory compliance is to provide appropriate educational products and information to visitors of protected areas. This strategy is to produce a site brochure which details the regulations and boundaries for the Reserve, how to obtain a permit to enter and visit Tortugas North area, the locations and numbers of mooring buoys, and the unique ecological features of the area. This product will complement the existing Sanctuary regional site brochures, and will interpret an area of the Sanctuary that is not currently covered in any existing products.

Activity 1—Design layout and content of brochure;

Activity 2—Identify partners to assist with brochure costs;

Activity 3—Print and distribute brochure.

Strategy E.14: Tortugas Ecological Reserve Exhibit, Garden Key

Most visitors to the Tortugas Ecological Reserve will stop at Fort Jefferson on Garden Key in the DRTO at some point during their visit. Garden Key provides a convenient anchorage for private pleasure boats, commercial fishing vessels, live-aboard dive vessels, recreational fishing guides, and ferries and seaplanes that bring campers and day visitors from Key West. This strategy involves the development and construction of an information kiosk at Fort Jefferson that will take advantage of this contact point to educate visitors about the Reserve. The exhibit will include practical information on reserve boundaries and regulations, as well as information on the habitats and marine life found in the reserve and the reasons for designating the Reserve. The exhibit will be visually appealing, educational and interesting for the general public, while still conveying necessary regulatory information for those visitors who may be entering the reserve.

Activity 1—Consult with National Park Service staff to determine size and location of kiosk. Review construction designs and materials of similar kiosks;

Activity 2—Design content and layout for kiosk;

Activity 3—Produce and install kiosk.

Strategy E.15: Interagency Visitor Center, Key West

Due to the geographical remoteness of the Tortugas area and considerable depths at which unique coral reef resources are located, it is important to provide educational opportunities for the over 2.5 million visitors to the Keys that will not see these special features first-hand. NOAA, working in conjunction with the NPS and the United States Fish and Wildlife Service, is establishing an interagency visitor center in Key West. This strategy will develop an exhibit for the visitor center in which the natural characteristics and habitats of the Tortugas region are featured. This exhibit will educate the visitor about natural resources while interpreting the multi-agency jurisdiction of the region. The development and designation of the Tortugas Ecological Reserve and the DRTO's Research Natural Area will also be explained.

Activity 1—Consult with National Park Service staff to determine content, design, and layout of exhibit;

Activity 2—Identify other possible agency or private partners for exhibit production;

Activity 3—Produce and install exhibit.

Strategy E.16: Tortugas Site Characterization

Several years ago a comprehensive site characterization of the FKNMS was produced. This 10 volume series is rich in biological, oceanographic, chemical, geological, and other scientific information. A similar, though less voluminous, site characterization of the Tortugas region was produced as a component of the Tortugas Ecological Reserve planning process. In order to heighten the Reserve users' awareness of the oceanographic and biological uniqueness of the Tortugas resources, a layperson's summary of the site characterization will be developed under this strategy. NOAA will seek to create a product in cooperation with the National Park Service that takes an

ecosystem approach to interpretation, starting at the islands of the Park, and progressing through the deep-water environments of the Reserve. This product will be produced in both electronic and printed format to increase accessibility and reduce printing costs. The web site document will contain hyperlinks to the full site characterization document and to research data from the region, including GIS maps.

Activity 1—Obtain electronic versions of Tortugas Site Characterization document and upload to Sanctuary web site;

Activity 2—Write summary of Site Characterization and conduct review of summary by original authors;

Activity 3—Produce printed version of summary and post electronic version to web site;

Activity 4—Improve web site page by identifying and creating relevant links to data, photos, and GIS maps.

Strategy E.17: Tortugas Ecological Reserve Documentary

This strategy will produce a video documentary on the Tortugas Ecological Reserve to interpret the unique ecological resources of the reserve, explain the necessity of protection, summarize the use of marine zoning as an effective management tool, and explain the process by which the Reserve was created. NOAA has received and continues to receive multiple requests from national and international sources on the process used to create the Reserve. This documentary will convey the breadth of information associated with the reserve and its creation. The documentary will also be duplicated for use by the many agencies that have undertaken action within the Tortugas area relative to reserve designation (e.g., National Park Service, regional fishery management councils, the State of Florida).

Activity 1—Contract with videographer to produce documentary;

Activity 2—Produce duplicate copies of documentary and distribute as needed.

Strategy E.18: Traveling Exhibit on Marine Zoning

Sanctuary Education and Outreach staff participate in more than twenty-five community fairs, trade shows, scientific and management conferences, and related events annually. A variety of traveling exhibits and display materials are used to interpret Sanctuary resources, regulations, and special projects. This strategy involves the development and production of a traveling exhibit on marine zoning in the Sanctuary, including the Tortugas Ecological Reserve. Components of the exhibit will be interchangeable, focusing on a variety of topics such as zone designation, resources protected by various zone types, regulations, research and monitoring of zone performance, and the use of marine zoning in other national and international arenas.

Activity 1—Design content and layout for traveling exhibit;

Activity 2—Produce exhibit components.

Strategy E.19: Interpretive Wayside Exhibits on the Tortugas Ecological Reserve

Of the 2.5 million visitors to the Florida Keys annually, 14.4% participate in boating activities using private vessels. In recent years, visitation to the DRTO has increased from 18,000 visitors in 1984 to 72,000 in 1998. This strategy aims to educate private boaters traveling to the Tortugas by developing and installing interpretive wayside exhibits such as information signs at boat ramps, chambers of commerce, and other strategic locations. Exhibits will provide important information about the Tortugas waters, natural resources, and regulations for the new reserve. The signs will also display information on minimal impact usage and safety considerations for traveling to this remote area.

Activity 1—Identify number of exhibits needed and appropriate locations for exhibits. Prioritize exhibit placement;

Activity 2—Investigate production costs and possible partners for funding exhibits;

Activity 3—Design content and layout for wayside exhibits;

Activity 4—Produce and install exhibits by priority area as funding permits.

Enforcement Action Plan

The SMP supplements the Enforcement Action Plan in the MP by adding the goals of gaining the highest level of compliance by the public who enter and visit the Tortugas Ecological Reserve. This compliance can be achieved through several management actions including education and outreach and on the water presence of Sanctuary staff in programs such as Team OCEAN, where Sanctuary information is distributed along the waterfront or boat to boat by Sanctuary staff and volunteers.

The most effective management action that can be used to achieve compliance with Sanctuary regulations is an effective law enforcement program. Currently, the primary enforcement of Sanctuary regulations is accomplished through an enforcement agreement between NOAA/Office of National Marine Sanctuaries and the State of Florida Fish and Wildlife Conservation Commission. The enforcement efforts are consistent with the goals and objectives for enforcement described in the MP. The MP also calls for cross-deputization of other agency law enforcement personnel (*e.g.,* National Park Service Rangers) to accomplish law enforcement responsibilities within the Sanctuary. This approach to enforcement continues to remain an option.

The success of the Reserve will depend to a large extent on the level of enforcement resources dedicated to the Reserve. Several enforcement options are presently available and are being evaluated for deployment in the Reserve. These options include:

- Installation and monitoring of a long-range radar unit at the Dry Tortugas National Park. This would allow remote monitoring of vessels entering and leaving the Reserve.
- Place two 82' vessels into service for patrolling the Ecological Reserve.
- Cross-deputize and fund National Park Service Rangers to assist in enforcement in the Tortugas Ecological Reserve.

The SMP commits substantial enforcement resources for the Reserve. The SMP sets forth the law enforcement budget as follows:

Personnel

Law Enforcement Officers (4–6) $50,000 per position
General Support $50,000

Vessels

82' Patrol Vessels (2) No Cost—Agency Property Transfer

NOAA will work with the FWC and other enforcement agencies to develop the enforcement resources that are necessary to assure the success of the Reserve.

Other Enforcement Factors

Because vessels are prohibited from stopping within the Tortugas South portion of the Tortugas Ecological Reserve, except for law enforcement or for scientific research or educational activities pursuant to a sanctuary permit, it will be possible to monitor vessel traffic remotely by radar and response will only be necessary when vessels without a permit stop within Tortugas South. Additionally, access to Tortugas North will be allowed only by permit. This will help Sanctuary managers monitor the level of visitor

use in the reserve and will facilitate enforcement efforts.

Mooring and Boundary Buoy Action Plan

The SMP supplements the MP by revising the title to the Mooring Buoy Action to read Mooring and Boundary Buoy Action Plan and by adding several strategies specific to the Tortugas Ecological Reserve.

Tortugas Ecological Reserve Supplement

Strategy 1. Install and maintain boundary buoys for Tortugas North.

Strategy 2. Install and maintain an adequate number of mooring buoys in Tortugas North in appropriate locations.

Strategy 3. Determine whether buoys are appropriate for Tortugas South and, if so, determine the number, type, and locations of buoys.

Regulatory Action Plan

The SMP supplements the Regulatory Action Plan in the MP by calling for extensive coordination with other governmental entities, particularly the State of Florida, to ensure that all required regulations are put in place. The Plan calls for publication on NOAA nautical charts of the new boundaries for the Sanctuary and the reserve.

Research and Monitoring Action Plan

The SMP supplements the Regulatory Action Plan in the MP by identifying and describing research and monitoring strategies for the Tortugas Ecological Reserve. These strategies are expected to have significant effects on Sanctuary resources by providing the knowledge necessary to make informed decisions about protecting the biological diversity and natural ecosystem processes of the Tortugas region. These strategies were developed according to the Sanctuary Research and Monitoring goals and objectives identified in the MP.

Strategy T.1: Ecological Reserve Support Staff

This strategy involves hiring support staff to assist with regulatory implementation and interpretation of the Tortugas Ecological Reserve. This staff member will establish a permit issuance and tracking system for entrance into Tortugas North, answer inquiries from the general public while on-site at the reserve, and assist with research and other reserve issues as needed.

Activity 1—Review support staff logistics (office space, communications, lodging) with National Park Service personnel.

Activity 2—Advertise for and hire support staff.

Strategy T.2: Design and Implement Long-term Ecological Monitoring to Test the Efficacy and Ecological Integrity of the Tortugas Ecological Reserve

Ecological reserves are established within the Sanctuary to protect and enhance biodiversity and to provide natural spawning, nursery, and permanent residence areas for marine life. This strategy establishes monitoring activities that compare reserve areas before and after designation, as well as monitoring which captures changes occurring inside and outside the protected area, which is critical to gauge the effectiveness of ecological reserves as a management tool. This monitoring will also assist Sanctuary management in determining if the area's biodiversity, productivity, and ecological integrity are being adequately protected by the regulations in place.

Consistent with the existing Zone Monitoring Program, indicators for assessing ecosystem function and ecological integrity (such as changes in coral and fish diversity, trophic structure, and water quality) will be monitored. An important element will be monitoring diving impacts by comparing changes in gross habitat morphology in Tortugas South and Tortugas North, particularly around mooring buoys.

Activity 1—Assess existing Tortugas monitoring activities. Prioritize baseline monitoring data needs and provide support to existing monitoring programs to gather necessary data. Contract with additional researchers as needed to fill baseline data gaps.

Activity 2—Develop post-implementation monitoring plan for the Tortugas Ecological Reserve and adjacent areas of varying protection levels.

Activity 3—Convene annual or biannual meeting of Tortugas researchers to share monitoring data with Sanctuary management and review monitoring schedule.

Strategy T.3: Dry Tortugas Marine Laboratory and Research Support Feasibility Study

Historically, the Dry Tortugas have been a place of marine research, supporting early pioneers in the fields of coral reef biology, ecology, oceanography, and underwater photography. A remote marine research station supported by the Carnegie Institution existed in the late 1800's and early 1900's on Loggerhead Key. The Carnegie facility was closed and dismantled decades ago, and since that time research efforts in the region have been sporadic. This strategy undertakes a feasibility study for the re-establishment of this laboratory or a similar facility. Such a facility would address the growing interest in Tortugas research and support the collection of much-needed data to assist National Park Service and Sanctuary managers in future decisions about Tortugas resources. Additionally, the feasibility study will consider other logistical needs to support researchers working in the Dry Tortugas area, such as shore-based lodging.

Activity 1—Meet with NPS personnel to plan feasibility study and desired conditions of research station. Discuss funding options for feasibility study.

Activity 2—Conduct feasibility study and discuss results with NPS. Implement next steps as appropriate.

Strategy T.4: Wireless Data Transfer

This strategy will establish wireless data transfer capabilities using the existing Motorola two-way radio network.

Activity 1—Contact Motorola to determine wireless data transfer capabilities using the existing two way radio network.

Activity 2—If the existing network can be used to transfer data, procure needed software and hardware.

Activity 3—Train staff on wireless data transfer.

Activity 4—Maintain and upgrade system as needed.

Activity 5—If existing two way radio network will not permit data transfer, research additional options.

Strategy T.5: Automated Oceanographic Data Collection

Throughout the Sanctuary a series of automated, continuously functioning sensors mounted on remote platforms or structures (C–MAN Stations) collect physical oceanographic data and report this information real-time to the Internet. This strategy will expand the C–MAN network to include similar data collection at a remote location in the Tortugas. Additionally, instruments that continuously collect data on biological parameters will also be installed.

Activity 1—Assess existing remote data collection activities in the Dry Tortugas.

Activity 2—Contract with current C–MAN Station research team to install a new station in the Tortugas area. Develop maintenance plan.

Activity 3—Investigate instrument capabilities and costs to expand data collection to include biological parameters. Purchase and install necessary instrumentation.

Strategy T.6: Tortugas Region Non-Use Valuation Study

In the development of the Sanctuary Final Management Plan, user attitude and economic values of the Sanctuary were established through a comprehensive socio-economic study. This strategy will complement the existing socio-economic studies of the Sanctuary by specifically identifying the non-use values that exist within the Tortugas region. Establishing these non-use values is critical for managers to accurately estimate the economic benefits and costs of newly designated reserve areas.

Activity 1—Discuss non-use valuation study requirements with Sanctuary economist.

Activity 2—Contract with economist to conduct study and publish results.

V. Summary of Final Regulations

The regulations applicable to the Reserve start with the current Sanctuary-wide regulations (15 CFR part 922, subpart P, in particular, § 922.163) and those additional regulations applicable to ecological reserves (15 CFR 922.164(d)). The Sanctuary-wide regulations prohibit mineral and hydrocarbon exploration; removal of, injury to, or possession of coral or live rock; alteration of, or construction on, the seabed; discharge or deposit of materials or other matter; operation of vessels in a manner that injures or endangers life, marine resources, or property; diving or snorkeling without flying a diver's down flag; releasing exotic species; damaging or removing markers; moving, removing, injuring, or possessing Sanctuary historical resources; taking or possessing protected wildlife; possessing or using explosives or electrical charges; harvesting or possessing marine life species not in accordance with the Florida Administrative Code; and interfering with law enforcement authorities.

The ecological reserve regulations prohibit the discharge or deposit of any material except cooling water or engine exhaust; taking, disturbing or injuring any dead or living organism; fishing; touching living or dead coral; and anchoring when a mooring buoy is available or on living or dead coral. Transit by vessels is allowed provided that all fishing gear is stowed away.

In addition to the Sanctuary-wide and ecological reserve regulations, the regulations for the Tortugas Ecological Reserve:

• Prohibit anchoring in, prohibit mooring by vessels more than 100 ft in length overall (LOA), and control access to Tortugas North, other than for continuous transit or for law enforcement purposes, via access permit and require permitted vessels to call-in prior to entering or when leaving.

• Prohibit anchoring in, prohibit mooring by vessels more than 100 ft in length overall (LOA), and restrict access to Tortugas South, other than for continuous transit with fishing gear stowed away or for law enforcement purposes, to research or educational purposes. A National Marine Sanctuary General Permit (see 15 CFR 922.166(a)) would be required for all research or educational activities.

The access permit for Tortugas North is free, no paperwork is required, and Sanctuary staff will be available year-round to handle requests. Applicants must call the Key West or Marathon Sanctuary office to request a permit and must radio into the Sanctuary staff person at Fort Jefferson (DRTO) prior to entering and upon leaving the reserve.

Applicants must furnish the following information:

1. Names, addresses, and telephone numbers of owner, captain, and applicant.
2. Vessel name and home port.
3. USCG documentation number, state license, or boat registration number.
4. Length of vessel and primary propulsion type (*i.e.,* motor or sail).
5. Number of divers.
6. Requested effective date and duration of permit.

The permit will be valid for the time the vessel is in the area, not to exceed two weeks. Vessels longer than 100 ft LOA exceed the capacity of the mooring buoys and are therefore prohibited from using them. Advance reservations will not be accepted more than one month in advance. Doubling-up on mooring buoys is permitted and leave and return privileges (dive during the day, stay at the park overnight) are allowed within the time period covered by the permit. Permit holders must notify FKNMS staff at Fort Jefferson by radio no less than 30 minutes and no more than six hours before entering the reserve and upon leaving.

The regulations issued today implement Regulatory Alternative D and amend 15 CFR 922.161 to expand the boundary of the FKNMS to be consistent with Boundary Alternative III. The revised Sanctuary boundary coordinates are set forth in Appendix I to Part 922 which is also revised to make minor revisions in the existing boundary to correct errors, provide clarification, and reflect more accurate data and, in the area of Biscayne National Park, to provide a fixed enforceable boundary. Appendix IV to Part 922 is also revised to make the area within the coordinates for Boundary Alternative III an ecological reserve, to provide clarification, and to remove no longer needed introductory text. Appendices II, V, VI, and VII are revised to correct errors, provide clarification, and reflect more accurate data.

The regulations prohibit anchoring in the Tortugas Ecological Reserve; entering the Tortugas North area of the Ecological Reserve without a valid access permit (except for continuous transit or law enforcement purposes); entering the Tortugas South area of the Ecological Reserve except for continuous transit or law enforcement, or for scientific research or educational activities pursuant to a sanctuary permit; or tying a vessel greater than 100 ft (30.48 meters) LOA to a mooring buoy in the Tortugas Ecological Reserve or tying more than one vessel (other than vessels carried on board a vessel), if the combined lengths would exceed 100 feet (30.48 meters) in length overall (LOA), to a mooring buoy or to a vessel tied to a mooring buoy in the ecological reserve. The reason for the length restriction is to prevent a buoy from being ripped off its mooring.

Because all anchoring is prohibited in the northern portion of the Tortugas Bank no-anchoring zone established by 15 CFR 922.164(g), the regulations revise the zone to be consistent. The existing zone is an area within the Sanctuary boundary where vessels 50 meters or greater in LOA are prohibited from anchoring. The northern portion of the zone overlaps the reserve.

The regulations add a new section to provide for permits for access to the Tortugas North area of the Ecological Reserve. A person with a valid access permit is allowed to enter the Tortugas North area of the Ecological Reserve. Access permits do not require written applications or the payment of any fee. Access permits must be requested at least 72 hours but no longer than one month before the date the permit would be effective. Permits may be requested via telephone or radio by contacting FKNMS at the Sanctuary offices at Key West or Marathon. Permit applicants must provide, as applicable, the following information: vessel name; the names, addresses, and telephone number of the owner, operator and applicant; USCG documentation, state license, or registration number; home port; length of vessel and propulsion type (*i.e.,* motor or sail); number of divers; and the requested effective date and duration of permit (two weeks, maximum). The Sanctuary Superintendent will issue a permit to the owner or to the owner's

representative for the vessel when all applicable information has been provided. FKNMS will provide a permit number to the applicant and confirm the effective date and duration period of the permit. Written confirmation of permit issuance will be provided upon request. Permit holders must notify FKNMS staff at the Dry Tortugas National Park office by telephone or radio no less than 30 minutes and no more than six hours, before entering and upon leaving the Tortugas Ecological Reserve. Permit holders may leave and return to the Tortugas North area of the ecological reserve during the time their permit is effective.

Finally, the regulations add a new definition to 15 CFR 922.162, to define ''length overall (LOA) or length of a vessel.''

VI. Differences Between the Proposed and Final Regulations

There are two primary differences between the proposed and final regulations. The first is a prohibition on all activities in Tortugas South, including non-consumptive diving. The proposed regulations would have allowed non-consumptive activities in Tortugas South including diving. The second is that the prohibition on fishing does not exclude fishing in the Tortugas Ecological Reserve that might be authorized by NMFS under 50 CFR parts 622 and 635. The final regulation applies the existing ecological reserve regulations at § 922.164(d)(iii) to prohibit fishing in the Reserve. This is consistent with the Gulf of Mexico Fishery Management Council's recommendation for a total ban on all fishing in the Reserve. As discussed in the preamble, no-take protection for the critically important coral reef ecosystem of the Tortugas is necessary to preserve the richness of species and help the fish stocks in the Tortugas and throughout the Florida Keys. Preservation of the full biodiversity of the area cannot be accomplished if exceptions are made to the no-take prohibition. Additional changes to the regulations have been made to correct errors, provide clarification and reflect more accurate boundary coordinate data.

VII. Summary of Comments and Responses

More than 4,000 comments were received on the DSEIS/SMP and the proposed implementing regulations for the proposed Tortugas Ecological Reserve. All comments received were treated as being directed to both the DSEIS/SMP and the proposed regulations. Almost 3000 of the comments were form letters expressing general support for the creation of the Tortugas Ecological Reserve. Two hundred and forty-five persons commented by signing a petition. The substantive comments received are summarized below followed by the agency's responses. Multiple but similar comments have been treated as one comment for purposes of response. Comments merely stating personal support or opposition to the establishment of the proposed Tortugas Ecological Reserve and comments supporting the process employed or complimenting the many individuals who participated in that process, while certainly appreciated, do not require responses. Comments beyond the scope of the proposed action, such as establishment of an ecological reserve within the Dry Tortugas National Park, establishing more ecological reserves in the Sanctuary, or making the entire Sanctuary a ''no-take'' zone, are neither summarized nor responded to. No comments were received on the Initial Regulatory Flexibility Act Analysis (IFRA) per se. However, a number of the comments requested changes to the Preferred Alternative because of impacts on users, all of which are considered small entities for purposes of the Regulatory Flexibility Act. Comments 1, 3, 4, 9, 13, 16–19, 21–23, 36, 41–43, and 50 and the responses thereto summarize the significant issues raised by those comments and the assessment of the agency of such issues. Although changes were made to the proposed regulations, no changes were made as a result of those comments.

Comment 1: A commentor wrote on behalf of over 100 commercial fishermen who are opposed to ecological reserves in the Sanctuary. They believe that ecological reserves are unnecessary for stock or environmental preservation and that reserves are a ''back-door'' approach to the eventual elimination of all commercial fishing within the Sanctuary. They believe that the statement in the DSEIS that the Tortugas process was a joint effort with the commercial fishing industry is misleading and highly offensive to the rank and file fishermen who oppose the reserve. The commentor stated that he did not participate in the process because he believed that establishment of the Tortugas Ecological Reserve was a ''done deal'' from the beginning. He requested that the FSEIS not state that establishment of the Reserve was supported by the commercial fishing industry.

Response: NOAA disagrees. NOAA recognizes that some individual fishermen oppose reserves in the Sanctuary. However, NOAA worked with leaders in the commercial fishing industry who served on the Sanctuary Advisory Council, as well as the Tortugas 2000 Working Group. The commercial fishing representatives contacted other commercial fishermen for their input into the Tortugas 2000 process. Dozens of commercial fishermen participated in the process to draft the boundary alternatives for the proposed Tortugas Ecological Reserve. NOAA also worked cooperatively with the Gulf of Mexico Fishery Management Council in the development of the Reserve.

The successful use of ecological reserves or marine reserves as management tools to conserve, protect, and preserve stocks and marine environments is documented in the scientific literature. NOAA has its own positive experiences with the use of ''no-take'' reserves in the FKNMS since July 1997, as data from scientific research and monitoring of these areas supports the positive benefits of reserves. The Tortugas Ecological Reserve is proposed to protect remote areas that include varied habitats, exceptional coral reefs, and excellent water quality.

NOAA strongly disagrees that reserves are a ''back-door'' approach to the eventual elimination of commercial fishing in the Sanctuary. The proposal in no way represents an effort to eliminate commercial fishing from the rest of the Sanctuary. Including the Tortugas Reserve, approximately 6% of the total geographical area of the Sanctuary will be closed to fishing.

NOAA recognizes that some of the commercial fishing that formerly occurred in the Reserve will relocate to other areas within and outside the Sanctuary.

Comment 2: NOAA should select Boundary Alternative III (Preferred Boundary Alternative). This alternative provides distinct longitudinal and latitudinal boundary lines for both compliance and enforcement purposes; incorporates important benthic communities that serve as critical foraging areas for coral reef species; provides important buffer areas to the critical coral reef community; protects Riley's Hump, a known fish aggregating and fish spawning site; and protects a wide range of deep water coral reef habitats.

Response: NOAA agrees. Boundary Alternative III remains the Preferred Boundary Alternative. The protection of the diverse and productive benthic communities of the Tortugas region is consistent with the FKNMSPA and NMSA, and it is therefore critical that the full extent of coral reef and related

habitats lying within Boundary Alternative III be included in the Tortugas Ecological Reserve. Expansion of the Sanctuary boundary as proposed in the Preferred Boundary Alternative is necessary to include unique coral structures and significant habitats lying outside the present boundary, such as Sherwood Forest and Riley's Hump. The on-going and immediate threat of anchor damage and other direct human impacts to the coral reef community outside the existing Sanctuary boundary further supports the Preferred Alternative.

The provision of buffer areas within the design of the Tortugas Ecological Reserve is necessary for several reasons. NOAA has learned from the Western Sambo Ecological Reserve and the Sanctuary Preservation Areas that fishermen will fish along the boundaries of these areas due to the success of no-take areas in increasing fish and other marine life abundance. Without an adequate buffer, traps and other fishing gear could become entangled in coral, threatening the effectiveness of the Ecological Reserve. Several different groups of scientists over the past two years have documented shrimp nets entangled on sensitive coral reef habitat in the proposed Tortugas North portion of the Reserve.

Scientists conducting research in the area of the proposed Tortugas Ecological Reserve have found that benthic primary production provides the base for the food web on this portion of the west Florida shelf. They also found that high levels of fishery production associated with the live bottom habitats are in fact directly supported by the surrounding open sand, algae and seagrass communities in the area. Buffer areas that include these habitat types will contribute to the overall functionality of the Ecological Reserve.

The Tortugas North portion of the Ecological Reserve as contained in Boundary Alternative III (Preferred Boundary Alternative) consists of coral reef communities that are unparalleled in the Florida Keys in their diversity and composition. Several carbonate banks of varying size and depth (30 feet to 75 feet) and low relief hardbottom habitats with patches of sand and rubble characterize Tortugas North. The most prominent features in the Tortugas North reserve are Tortugas Bank and Sherwood Forest. Tortugas Bank crests at 66 feet and supports abundant attached reef organisms such as sponges, corals, and soft corals. North of Tortugas Bank, in an area previously believed to be composed only of sand, are several pinnacles covered with hard and soft corals and reef fish.

Sherwood Forest is an ancient stony coral forest exhibiting 30% or more bottom cover located along the western flank of Tortugas Bank. The top of Sherwood Forest rises to a depth of about 65 feet and covers an area of many acres. The area exhibits a complex habitat with various rock ledges, holes, and caves, providing hiding places for marine life. Unusual coral formations and previously unidentified coral species associations have been observed in this location. Gorgonians and black corals (Antipathies sp.), which are not common elsewhere in the Florida Keys, are also prolific. An abundance of groupers has been documented in Sherwood Forest as have sightings of uncommon and rare fish species such as jewfish, white-eyed goby, and orangeback bass.

The Tortugas South portion of the Ecological Reserve as contained in Boundary Alternative III (Preferred Boundary Alternative) includes a wide range of deep water coral reef habitats that will protect and conserve many rare and unusual reef species, and incorporates sufficient area to provide a buffer to the critical coral reef community. The upper portion of Tortugas South includes the relatively shallow Riley's Hump area in less than 100 feet of water. Riley's Hump consists of attached algae, scattered small coral colonies, sand, and hardbottom habitats. It is also a known fish aggregating and spawning site for several snapper-grouper species.

During the 2000 Sustainable Seas Expedition (SSE), submersible pilots explored the lower (southern) portions of Tortugas South. Deep reef habitats with numerous soft corals but few stony corals were found in depths from 200 to 400 feet. A series of small pinnacles that surround a larger seamount were identified as part of an east-west running ledge that begins around 250 feet and drops to close to 400 feet in a nearly vertical profile. This is unlike any other coral reef habitat discovered within Sanctuary waters. These complex habitats support numerous fish species including streamer bass, yellowmouth grouper, snowy grouper, scamp, speckled hind, creole fish, bank butterflyfish, amberjack, and almaco.

The deepest portions (1,600 to 1,800 feet) of Tortugas South encompass limestone ledges where unusual deep-dwelling sea life such as lantern fish (myctophids), tilefish, golden crabs, and giant isopods have been observed by submersible pilots. Contrary to some opinions that these depths were devoid of life, the sand bottom habitat was observed to be teeming with unique deep sea species of shrimp, fish, sea cucumbers, anemones, and crabs.

These critical deep water communities of Tortugas South are vulnerable to a wide range of impacts from fishing gear including deep water trawls and traps, and impacts from anchoring. Fishing gear impacts have been observed on sand and limestone substrates in some deep water areas.

In order for the Ecological Reserve to be biologically effective and to ensure protection and conservation of the full range of coral reef habitats and species in the Tortugas region, it is critical that all of the various benthic habitats and their associated marine communities, from the shallowest to the greatest depths, be included within the boundary of the Tortugas Ecological Reserve.

Comment 3: NOAA should select the No-Action Alternative I. NOAA should not expand the FKNMS boundary or create an ecological reserve. The reserve ''punishes the general public for the sins of commercial interests.''

Response: NOAA disagrees. If the no-action alternative is selected and the Sanctuary boundary is not expanded to create the Tortugas Ecological Reserve as contained in the Preferred Alternative, significant coral reef resources would be left at risk to physical destruction by ship and boat anchors and other human impacts including fishing. If the Sanctuary boundary is not expanded to include the geographical extent of the Tortugas Ecological Reserve as proposed in the Preferred Boundary Alternative (III), some of this nation's most significant coral reef resources would be left vulnerable (see environmental description contained in Response to Comment 2).

The Sanctuary boundary established by Congress in the FKNMSPA in 1990 was based upon the very best information available at the time related to the coral reef resources located to the far-western extent of the Florida Keys. Over the last decade scientists and managers have learned and documented a considerable amount about the existence of extensive and unique coral reef resources that are located outside the boundary of the FKNMS. This new information regarding those significant coral reef resources and the threats to them emphasizes the critical need to take action and protect them.

The Tortugas Ecological Reserve is intended to preserve for all, including future generations, the critical coral reef ecosystem of the Tortugas and the extraordinary resources and qualities that are found there. Consumptive recreational activities have resource

impacts that are inconsistent with the protection needed for these resources. All consumptive commercial and recreational activities are being prohibited in the Reserve. Most of the data used in the analysis of the environmental consequences and socio-economic impacts in the DSEIS/SMP refer to commercial activities because commercial activities represent the majority of use of the Tortugas area and because commercial data are more readily available.

Comment 4: NOAA should adopt Boundary Alternative II.

Response: NOAA disagrees. The benthic community contained within the boundary of Alternative II does not include the significant and biologically diverse coral community known as Sherwood Forest. Unless this area is included within the Ecological Reserve, some of this nation's most significant coral reef resources will not be adequately protected for future generations. These unique coral reefs comprise some of the most biologically diverse coral reef communities and best water quality in the Florida Keys. Failure to protect these unique coral reefs will result in their decline from a variety of human impacts.

Additionally, Boundary Alternative II does not contain Riley's Hump, a known fish aggregating and spawning site, or its adjacent deep water shelf communities. Boundary Alternative II would not offer protection and preservation of these unique deep water habitats and their associated fish and invertebrate species (see description contained in Response to Comment 2).

Comment 5: NOAA should adopt Boundary Alternative IV.

Response: NOAA disagrees. While this alternative would protect a larger area than the Preferred Alternative and provide greater ecological benefits, the adverse socio-economic impacts of this alternative on various fishing activities such as recreational charter fishing, commercial fishing, and spearfishing, would be significantly greater because all of Tortugas Bank would be closed to consumptive activities. On balance, the benefits of the increased area protected would be outweighed by the greater socio-economic costs.

Comment 6: NOAA should adopt Boundary Alternative V.

Response: NOAA disagrees. While Alternative V would protect an even larger area than Alternative IV, it would not protect the full range of critical deep water habitat at the southern end of Tortugas South that would be protected by Alternatives III and IV (see description contained in Response to Comment 2). While it would expand protection to the west, the majority of the benthic communities located there are not as threatened from direct impact as those located within the boundary of the Preferred Alternative. Alternative V would not result in significant increased protection to coral reef communities located outside Alternative III, yet would have increased socio-economic costs.

Comment 7: Alternatives IV and V are more consistent than Alternative III with the goals that the Sanctuary has set for the ecological reserve, in addition to being more consistent with Executive Order 13089 by protecting nationally significant coral reef resources.

Response: NOAA disagrees. See Responses to Comments 2, 5 and 6. Boundary Alternative III is the Preferred Boundary Alternative because it will protect ecosystem integrity; protect biodiversity; enhance scientific understanding of marine ecosystems; facilitate human uses to the extent consistent with the other objectives; minimize socio-economic impacts to the extent consistent with the other objectives; and facilitate enforcement and compliance. The Preferred Alternative is of sufficient size, together with the Dry Tortugas National Park, to protect all known nationally significant coral reef resources of the Tortugas region and fulfill the objectives of the FKNMSPA and the NMSA, while not unduly impacting user groups, and is consistent with Executive Order 13089.

The Preferred Boundary Alternative (Alternative III) provides an appropriate balance of significant resource protection while leaving other areas of Tortugas Bank available for consumptive uses, including commercial and recreational fishing, and spearfishing. A detailed comparison of the alternatives and an explanation for the selection of the Preferred Alternative is set forth in the FSEIS. The Preferred Boundary Alternative is consistent with the criteria and objectives established for selecting a Preferred Alternative.

Comment 8: NOAA should adopt Regulatory Alternative D (Preferred Regulatory Alternative).

Response: NOAA agrees. Regulatory Alternative D (Preferred Regulatory Alternative) differs from Regulatory Alternative C (the Preferred Regulatory Alternative in the DSEIS) by prohibiting all activities in Tortugas South except for continuous transit, law enforcement, and, pursuant to a sanctuary permit, scientific research and educational activities. Both Regulatory Alternatives C and D would prohibit any take. The reasons that Alternative D is now the Preferred Regulatory Alternative are to more fully protect fish spawning aggregations found on Riley's Hump, to permit effective enforcement of Tortugas South, the most remote region of the Sanctuary, and to provide a reference area for comparison to gauge the impacts of non-consumptive activities in Tortugas North. Riley's Hump is a known fish spawning aggregation site for at least five species of snapper and several species of grouper. Riley's Hump is also one of the only known spawning aggregation sites for mutton snapper, a highly targeted species for commercial fisheries.

Comment 9: NOAA should adopt Regulatory Alternative C.

Response: NOAA disagrees. See Response to Comment 8.

Comment 10: The resources in the Tortugas area are in good shape overall and do not need the protection of an ecological reserve. The size and number of recreationally and commercially important species of fish remain healthy.

Response: The importance of the resources of the Tortugas region to the rest of the Florida Keys is documented throughout the DSEIS and FSEIS. Over the past few decades the Florida Keys have experienced a significant increase in visitation, particularly at Dry Tortugas National Park where visitation increased 300% from 1984 to 1998 (18,000 to 72,000 visitors). The current population of South Florida of approximately 6 million is expected to double by 2050. It is likely that population pressures, increase in tourism, and improved boating and fishing technology making it easier for more people to regularly visit the same remote sites, located well offshore, will result in greater visitation and pressure on the resources of the Tortugas area. By protecting the resources of the Tortugas area now, NOAA will be able to maintain them in a nearly pristine state, for the benefit of present and future generations. The protection of areas of the marine environment of special national significance due to their resource or human use values, such as the Tortugas region, is consistent with the FKNMSPA and NMSA.

Fisheries biologists have documented alarming declines in the size and abundance of commercially and recreationally important species of snapper, grouper, and grunts throughout the Florida Keys including the Tortugas region.

Comment 11: NOAA must provide an adequate number of mooring buoys in the Reserve. One commentor suggested that NOAA place at least 25 buoys in Tortugas North and a lesser number in

Tortugas South. Several commentors suggested rotation of mooring buoys.

Response: NOAA agrees that an adequate number of mooring buoys will have to be provided in Tortugas North. It is not now known how many mooring buoys will be needed and where they should be installed. Some buoys will be installed at the more popular dive locations in Tortugas North prior to the effective date of the regulations. Non-consumptive users, such as dive charter operators, will be consulted to determine a desirable number and appropriate locations for buoys. The rotation of mooring buoys will be considered.

It has not yet been determined whether buoys will be installed in Tortugas South because, under the Preferred Alternative, diving will only be allowed for scientific research and educational purposes. Submerged moorings (*i.e.,* moorings located beneath the surface) are being considered as a means to facilitate scientific research activities in this portion of the Ecological Reserve.

Comment 12: Non-consumptive diving should be prohibited throughout the Reserve to prevent any disturbance to the ecosystem. Even non-consumptive diving activity can cause substantial damage to corals.

Response: Prohibiting non-consumptive diving in Tortugas North is not needed to protect the resources or their ecosystem. One of the basic tenets of the FKNMSPA, the NMSA and indeed the Designation Document for the FKNMS, is to allow activities in the Sanctuary that do not cause an adverse effect on the resources or qualities of the Sanctuary, or that do not pose a threat of harm to users of the Sanctuary. However, the resources of Tortugas South, particularly the spawning aggregation areas, are unique and warrant the additional protection of prohibiting diving. Enforcement surveillance in this remote part of the Reserve would be facilitated by prohibiting all activities in Tortugas South except for continuous transit, law enforcement, and, pursuant to a sanctuary permit, scientific research and educational activities. Additionally, prohibiting diving in Tortugas South will provide a baseline to gauge the effects of non-consumptive activities on the resources in Tortugas North.

Tortugas North is less remote and protection and conservation can be more easily afforded to it than to Tortugas South. Allowing non-consumptive diving that is carefully monitored in Tortugas North will provide significant educational and resource appreciation benefits. Further, prohibiting non-consumptive diving in Tortugas North would unnecessarily increase adverse socio-economic impacts on charter dive operators without providing corresponding resource protection. The permit system for Tortugas North will allow the level of diving activity to be monitored, and combined with the reference of Tortugas South, will allow the effects of non-consumptive diving on resources in Tortugas North to be determined.

Education and outreach programs are being implemented that will continue to raise the awareness of divers about the potential impact from their activity on coral reefs. The presence of ''no-take'' divers in the Reserve is viewed by marine reserve experts as important to help convey the message of the benefits of marine reserves.

Comment 13: NOAA should prohibit commercial fishing in the Tortugas Ecological Reserve but allow recreational fishing, especially catch-and-release fishing. Recreational spearfishing should be allowed in the Reserve because it has little impact on the fish populations of the Tortugas region.

Response: NOAA disagrees. No-take protection for the critically important coral reef ecosystem of the Tortugas is necessary to preserve the richness of species and health of fish stocks in the Tortugas and throughout the Florida Keys. Preservation of the full biodiversity of the area cannot be accomplished if exceptions are made to the ''no-take'' prohibition.

Even catch-and-release fishing can result in direct and indirect mortality. According to biologists, release mortality can be a significant contribution to total mortality depending on the intensity of fishing. Reef fishes are particularly vulnerable to catch-and-release mortality because of their behavior, long lives, and ecology. Fisheries biologists have reported mortalities ranging from 15–30% of fish that are caught and released. One study suggests high mortality for Barracuda that fight for an extended period.

Spearfishers tend to target the largest members of particular species. Scientists have demonstrated the impact spearfishing activities have of removing top predators in the food chain. The selective removal of the largest individuals of a fish species by spearfishing affects the over-all trophic structure of coral reef communities. Spearfishing charters in the Tortugas region, in particular, often target ''trophy'' fish for their customers. Research at the Looe Key National Marine Sanctuary between 1983 and 1985 demonstrated a marked increase in fish populations after spearfishing was prohibited. Continued spearfishing in the Tortugas Reserve would adversely affect fish populations and undermine the ecological integrity of the Reserve.

Impacts from commercial and recreational fishing activities are occurring in the Tortugas, where the average size of black grouper has decreased from 22.5 pounds to 9 pounds. The scientific literature as well as NOAA's own experience in the Sanctuary have shown that prohibiting fishing in select areas directly benefits species abundance, size and diversity. Prohibiting all consumptive activities, including commercial and recreational fishing, will greatly help the species within the Reserve achieve greater ecological and demographic potential. As described in the FSEIS, this should result in benefits to some fish populations outside the Reserve. Prohibiting all forms of take will also yield significant scientific benefits because the Reserve will more accurately reflect a natural system against which the effects of extractive human activities can be compared.

In addition, enforcement of the remote Tortugas Ecological Reserve would be complicated significantly if limited extractive activities such as catch and release fishing or spearfishing were not prohibited. NOAA's experience with the existing Sanctuary Preservation Areas is that no-take regulations are more easily enforced and gain more compliance and acceptance from visitors than areas that allow varying extractive activities.

Comment 14: Adequate law enforcement cannot be provided for the Tortugas Ecological Reserve. The 90+ square mile Oculina Marine Reserve off Fort Pierce is unenforceable and the Tortugas Reserve will be, also.

Response: NOAA disagrees. The proposed Tortugas Ecological Reserve is substantially different with respect to enforcement than the Oculina Marine Reserve. The Oculina Reserve is located in a remote area, well offshore of the east coast of Florida. It is not associated with an existing marine protected area and does not have the benefits of all the management programs that help increase the public's awareness of the reserve and the regulations with which they must comply. Education and outreach are important tools that help to gain the compliance of the general public, the majority of which are law-abiding citizens. The Management Plan commits substantial enforcement resources for the Reserve.

As set forth in the Enforcement Action Plan of the Supplemental Management Plan, one of the goals of

Sanctuary management is to gain the highest level of compliance by the public who enter and visit the Tortugas Ecological Reserve. This compliance can be achieved through several management actions including education and outreach and on-the-water presence of Sanctuary staff in programs such as Team OCEAN, where Sanctuary information is distributed along the waterfront or boat to boat by Sanctuary staff and volunteers.

The most effective management action that can be used to achieve compliance to Sanctuary regulations is an effective law enforcement program. Currently, the primary enforcement of Sanctuary regulations is accomplished through an enforcement agreement between NOAA/National Marine Sanctuary Program and the State of Florida Fish and Wildlife Conservation Commission. The enforcement efforts are consistent with the goals and objectives for enforcement described in the Final Management Plan for the FKNMS (July 1997). The Final Management Plan for the Sanctuary also calls for cross-deputization of other agency law enforcement personnel (*e.g.,* National Park Service Rangers) to accomplish law enforcement responsibilities within the Sanctuary. This approach to enforcement continues to remain an option.

A successful Ecological Reserve will depend to a large extent on the level of enforcement resources dedicated to the Reserve. Several enforcement options are presently available and are being evaluated for deployment in the Reserve. These options include:

- Installation and monitoring of a long-range radar unit at the Dry Tortugas National Park. This would allow remote monitoring of vessels entering and leaving the Reserve.
- Place two 82' vessels into service for patrolling the Ecological Reserve.
- Cross-deputize and fund National Park Service Rangers to assist in enforcement in the Tortugas Ecological Reserve.

Prohibiting vessels from stopping within Tortugas South except pursuant to a valid sanctuary permit for scientific research or educational activities will facilitate enforcement. This will make it possible to monitor vessel traffic remotely by radar and response will only be necessary when vessels without a permit stop within the reserve.

The permit system for Tortugas North will help Sanctuary managers monitor the level of visitor use in the reserve and facilitate enforcement efforts.

As set forth in the Management Plan for the Reserve, the law enforcement budget is as follows:

Personnel

Law Enforcement Officers (4–6) $50,000 per position
General Support $50,000

Vessels

82' Patrol Vessels (2) No Cost—Agency Property Transfer

Comment 15: The economic analysis contained in the DSEIS/SMP did not adequately consider activities of fishing clubs in the Tortugas Ecological Reserve Study Area. In public testimony, one fishing club estimated that its membership had 673 person-days of fishing in the Dry Tortugas National Park area in 1998 and was not contacted for input for the socio-economic analyses.

Response: The recreational use of the Tortugas region has been adjusted in the socio-economic impact analysis in the FSEIS/SMP to reflect this comment. In preparing the DSEIS/SMP, NOAA staff relied on directory assistance search to locate private fishing clubs. Only one was found, and that was in Miami. The president of that club indicated that very few if any of its members went to the Dry Tortugas region. He provided names of a few members who were knowledgeable of the region's fishing patterns. Phone calls to these contacts produced no new information and their names were not kept. Additionally, commercial operators who work in the Tortugas area were asked if they saw other boats in the Tortugas but outside the boundaries of the Dry Tortugas National Park. They consistently said that they did not. Some members of the club said they fished in the National Park, but not in the Tortugas Ecological Reserve Study Area (TERSA). NOAA was not able to identify any private households that did any activity in the TERSA.

Comment 16: Representatives of shrimping activities criticized the socio-economic impact analyses on the shrimp industry provided in Leeworthy and Wiley (October 1999). First, they claim that the total catch estimate of 58,374 pounds of shrimp from the area within the Preferred Boundary Alternative should be one million pounds instead. Second, they claim the prices for shrimp used were incorrect and a higher price should have been used. Third, they claim that the assumption that shrimp lost from the no-take areas could be caught elsewhere is incorrect.

Response: The use of the total catch estimate of 58,374 pounds of shrimp caught in the area within the Preferred Boundary Alternative is valid. The commentors offered no quantitative support to justify their assertion that the estimate should be one million pounds. The only information they offered was boat tracking data. No quantities of catch were offered, only that 30 percent of their fishing time was spent in the Tortugas North area. The sample of shrimp fishermen used in the socio-economic impact analysis accounted for 90 percent of the 58,374 pounds that was estimated. Non-sampled fishermen, including those that landed shrimp in counties other than Monroe and Lee (*i.e.,* Hillsborough, Pinellas and Franklin) accounted for the other 10 percent. If all the shrimp catch from the non-sampled population estimated in the TERSA were caught in the area within the Preferred Boundary Alternative, this would only amount to 71,500 pounds. If 30 percent of all the shrimp caught in the Florida Marine Research Institute (FMRI) areas 2.0 and 2.9 and landed in Hillsborough, Pinellas and Franklin counties (183,319 pounds) were caught from the area within the Preferred Boundary Alternative, this would only amount to 54,996 pounds. None of these estimates support an estimate of one million pounds. Not even all the shrimp catch estimated in the TERSA (715,500 pounds) is close to the one million pound estimate and the economists' sample accounted for 90 percent of all the shrimp caught in FMRI areas 2.0 and 2.9.

NOAA economists used an average price per pound at the ex-vessel level of $2.40. This estimate was derived from the NMFS landings and ex-vessel value reported for Monroe County for the year 1997. The landings for Monroe County were reported in a mix of heads-on and heads-off (tails). NOAA economists converted all weights to heads-on before deriving the price per pound (price per pound is equal to total ex-vessel value divided by total pounds of heads-on weight). Data provided by the commentors included a table showing pounds and ex-vessel value from the National Marine Fisheries Service (NMFS) and yields an average price of $4.31 per pound. Both of these prices are correct, however the commentors did not specify the geographic region or the species mix of the sample with which they calculated their price. Furthermore, the NMFS weights cited by the commentors are heads-off weight, whereas the socio-economic analysis used heads-on weight. Most of the shrimp caught in the TERSA was landed in either Monroe County (Stock Island) or in Lee County (Ft. Myers Beach). NOAA economists concluded that the Monroe County landings price per

pound was the appropriate price to use in the analysis.

The commentors stated that lost catch cannot be replaced by catch from other areas. This presumes that they are fishing all areas as intensely as they can be fished. This is why the socio-economic study uses 58,374 pounds of shrimp as the upper bound estimate of maximum potential loss of from the Preferred Boundary Alternative.

Comment 17: Shrimping should not be prohibited in areas outside the 20 fathom contour at the western end of the Tortugas North because these are not areas of high environmental value or special ecological sensitivity. The eastern boundary of Tortugas North, above the DRTO, should be moved to the west from 82E 47′ to 82E 57′ to accommodate shrimping. Shrimpers are already prohibited from fishing within a 3 million acre Tortugas Shrimp Nursery year-round in State waters and seasonally in EEZ waters. Shrimpers cannot afford to be excluded from any additional areas in the Tortugas region.

Response: A substantial sand buffer area around the coral reef community is needed to provide foraging areas for reef inhabitants without the potential of capture by shrimp trawling. Additionally, the bycatch of shrimping activities is well-known and documented. Trawling outside the 20 fathom contour at the western end of Tortugas North or moving the eastern boundary of Tortugas North to the west would result in mortality of reef fish species and other reef inhabitants through bycatch. Other shrimp fishermen have questioned the need to move the eastern boundary of Tortugas North in light of the bathymetric profile in this area.

Scientists have discovered and documented the remains of shrimp nets entangled around living corals in the proposed Tortugas Ecological Reserve. It is well known and stated by shrimp trawlers that they do not trawl on coral reefs. However, they do trawl off the reefs. Prohibiting shrimping in the Reserve will eliminate the incidental impact of shrimping gear to the living coral reefs.

Preservation of the richness of the species and health of the fish stocks in the Tortugas region and throughout the Florida Keys, and indeed preservation of the biodiversity of the Tortugas region, cannot be accomplished if only the coral reefs are protected. The protection of diverse habitats including sand and other benthic habitats is essential. A recent scientific study has substantiated the importance of sand and other ''barren'' habitats to the ecology of the west shelf of Florida. Scientists conducting research in the proposed Tortugas Ecological Reserve have found that benthic primary production provides the base for the food web on this portion of the west Florida shelf. They also found that high levels of fishery production associated with the live bottom habitats are in fact directly supported by the surrounding open sand, algae and seagrass communities in the area.

Comment 18: Shrimpers were not, but should have been, represented on the Tortugas 2000 Working Group.

Response: Prior to the establishment of the Working Group, shrimpers stated that the 110 square mile area to the east of the Dry Tortugas National Park originally proposed for the ecological reserve should not be established because it would have an adverse economic impact on their shrimping. In response to them and to other fishers, NOAA did not include this area in the proposed ecological reserve.

Commercial fishing representatives on the Tortugas 2000 Working Group communicated with and received input from shrimpers regarding the proposal and reported this information back to the Working Group. Shrimpers, when shown the proposed boundaries, expressed no concern over the proposed Tortugas Ecological Reserve boundaries. No shrimper expressed an interest in participating in the Tortugas Working Group.

Additionally, 18 of the 28 shrimp operations known to fish in the area were interviewed by NOAA economists. These operations accounted for 65 of the 75 shrimp vessels and 193 of the 213 captains or crew that fish in the TERSA.

Comment 19: The following comments were provided by a charter spearfishing operation:

1. The majority of the reefs where the company takes passengers spearfishing are in the proposed Reserve area. Areas south of Fort Jefferson (not on Tortugas Bank) are not suitable for spearfishing because they are too deep and therefore unsafe, and have poor visibility. The Tortugas Bank area south of the proposed Reserve (south of 24E 30′) is mostly sand and low patch reef, with poor conditions for spearfishing.

2. The company provided detailed information to NOAA regarding the number of trips, days, and passengers the company takes. The survey that was done on the company in 1988 indicates 60 trips per year, 180 days with 550 divers. The information on pages 46 and 47 of the DSEIS is incorrect. The DSEIS does not reflect the company's information and it appears that deliberately falsified information was provided to the Working Group. The Working Group was provided incorrect information regarding the socio-economic impact on small businesses creating a false impression that small businesses would not be negatively impacted.

3. The commentor questioned the data attributed to one of the other two operators. The commentor requested the identity of the operator.

4. The company will go out of business and its employees will lose their jobs if it cannot conduct spearfishing charters in the area of the proposed Reserve, because 90% of the company's business is on the reefs north of latitude 24E 39′. South of that area are sandy patch reefs. A permit should be issued to the company allowing it to continue its business or the southern boundary of Tortugas North should be moved to 24E 40′ 50″N.

5. The DSEIS does not reflect that the company conducts approximately 30 spearfishing trips per year on Riley's Hump.

6. The commentor challenged specific conclusions regarding his business at pages 46, 47, and 123 of the DSEIS, which indicate a maximum potential loss of $13,700.00 of lost revenue and $5,580.00 of lost profits. The commentor claims that his business has grown significantly and that he now operates in the Tortugas more than 260 days per year. He states that he would lose $288,000.00 in revenues and experience a potential profit loss of $144,000.00. The real potential loss could be $460,000.

7. The figures on the Nitrox membrane system are not accurate. The amount should be increased by $10,000.

8. Statements about increased visits to Dry Tortugas National Park are misleading because most visitors only go to Garden Key because of the daily ferry boat service from Key West. These visitors never leave the island and do not impact the reefs.

Response: The DSEIS reports a total maximum potential adverse impact on spearfishing revenues of $66,816 for Boundary Alternatives II and III, $196,944 for Alternative IV, and $230,380 for Alternative V. The analysis and estimates of impacts were based upon survey data collected in 1998 and included information provided by three spearfishing operators. Data provided by the company submitting the above comment indicated that it operated in 48 one square nautical mile grid cells identified in the study area. Boundary Alternatives II and III would exclude the company from only 8 of those grid cells (16.67%). Alternative IV would exclude the company from 26 grid cells (54.17%) and Alternative V would

exclude the company from 29 of the 48 grid cells (60.42%). The DSEIS and information provided to the Working Group accurately reflect the information that was reported by the three operators in response to the survey.

The impact estimates in the DSEIS are the maximum losses from displacement of the consumptive recreational activities. Based on the existing patterns of use provided by each of the three operators, it was concluded that they could relocate to other sites in the study area that they indicated they are using and completely offset their losses. While monitoring would be required to verify this conclusion, the estimates of maximum potential loss in the DSEIS represent the upper bound of potential losses based on the data collected in 1998. The FSEIS has been revised based on the assumed validity of the more recent data provided by the commentor. While it is hoped that the spearfishing operators will be able to shift to different locations and to different economic activities (such as non-consumptive dive charters), the need to protect the ecosystem of the Tortugas Ecological Reserve from the impacts of spearfishing justifies the adverse economic impacts on the operators. See also the Response to Comment 13.

NOAA accurately forwarded information to the Working Group. No information was falsified.

The laws governing the collection of business information by the government prevent the disclosure of proprietary information.

The cost estimate for the Nitrox system has been revised.

The overall trend in tourism at Dry Tortugas National Park suggests increased visitor use in the Tortugas area, particularly with the ability of larger, faster vessels from Key West to reach the Park and reef areas beyond the Park. See Response to Comment 10. One company has indicated that its business has increased in the Tortugas area in the last two years.

Comment 20: The National Marine Fisheries Service (NMFS) commented that it is incorrect to state, ''the National Marine Fisheries Service (NMFS) is amending the Final Fishery Management Plan for Atlantic Tunas, Swordfish and Sharks (FMP) and its implementing regulations to be consistent with the no-take status of the proposed reserve.''

Response: The FSEIS/SMP has been corrected to reflect this, as it is not necessary under that FMP's framework provision to amend the FMP.

Comment 21: NMFS stated that there is a lack of analyses of impacts on commercial and other fishermen and businesses from other counties who may be displaced by the proposed Reserve.

Response: The socio-economic analyses includes catch landed in Monroe, Collier and Lee Counties from each boundary alternative. Catch from the Tortugas that was landed in other counties was insignificant. The quantities and values cited by NMFS are irrelevant as far as impact, since the numbers referred to measure the total catch from FMRI areas 2.0 and 2.9. In Leeworthy and Wiley (October 1999), a set of steps are described showing how they estimated the proportion of this catch from the Tortugas Ecological Reserve Study Area (TERSA). The TERSA is a 1,020 nm^2 area and is a subset of the larger FMRI Areas 2.0 and 2.9. They estimated how much of the TERSA catch was caught in each boundary alternative. These are the relevant numbers for potential impact. They included all catch landed in all counties but only reported estimates of impact for Monroe, Collier and Lee counties because the catch in all other counties impacted was not significant. Below are summarized the steps used in estimating the impacts from shrimp catch since it was the most valuable portion of total catch, but the same procedures were followed for all species.

Steps in Estimating Economic Impact

Step 1. Examine Landings Data in FMRI Areas 2.0 and 2.9 FMRI areas 2.0 and 2.9 represent a large area generally referred to as the Tortugas, but also include the Marquesas. FMRI keeps landings and value information for this large statistical grid from Florida's trip ticket. The landings cited by NMFS for FMRI areas 2.0 and 2.9 are correct. But these values do not represent impact by the proposed Tortugas Ecological Reserve. Only a small portion of these landings are impacted by any of the proposed boundary alternatives.

Step 2. Examine Landings from the Tortugas Ecological Reserve Study Area (TERSA). Leeworthy and Wiley selected a portion of FMRI Areas 2.0 and 2.9 for the study area and a 1,020 nautical square mile area, called the Tortugas Ecological Reserve Study Area (TERSA). NOAA attempted to collect information on catch from all commercial fishermen that reported catch from FMRI areas 2.0 and 2.9. Thomas Murray and Associates limited the sample to those in Monroe, Dade, Collier and Lee counties for cost reasons and because the catch from FMRI areas 2.0 and 2.9 landed outside Monroe, Collier and Lee counties was only a small proportion of total catch. For example, 97.21 percent of the shrimp caught in FMRI areas 2.0 and 2.9 was landed in Monroe and Lee counties. The other 2.79 percent was landed in Hillsborough, Pinellas and Franklin counties which amounted to 183,319 pounds valued at $450,021.

The sample of shrimp fishermen included 18 of the 28 shrimp operations known to fish in FMRI areas 2.0 and 2.9. These 18 operations accounted for 65 of the 75 shrimp vessels and 193 of the 213 captain or crew shrimping in the area. The sample accounted for over 90 percent of the shrimp catch in FMRI areas 2.0 and 2.9.

The sample indicated they caught only 10 percent of all their catch from FMRI areas 2.0 and 2.9 in the TERSA. Using an average of 1997–1998 catch in FMRI areas 2.0 and 2.9, Leeworthy and Wiley estimated that 715,500 pounds of shrimp were caught from the TERSA. This amount includes those amounts landed in all counties of Florida, not just Monroe and Lee counties. NOAA used a factor of 1.10 to account for the non-sampled shrimp catch. This factor was applied to each one square mile grid cell to extrapolate sampled shrimp catch to the total population estimate of shrimp catch. See Leeworthy and Wiley (October 1999). The 715,000 pounds of shrimp caught in the TERSA still do not represent impacted catch, it simply represents the total amount estimated for the study area.

Step 3. Examine Landings Potentially Impacted by a Particular Boundary Alternative for the No-Take Area.

The spatial distribution of shrimp catch from our sample of shrimpers was used to derive the distribution of all shrimp catch for the TERSA. The Leeworthy and Wiley sample accounted for 665,500 pounds of the total of 715,500 pounds of shrimp catch estimated for the TERSA. The key assumption used was that the non-sampled catch had the same distribution as the sampled catch.

Catch within a boundary alternative was labeled maximum potential loss under the assumption that all catch within the no-take area could not be replaced. For the Preferred Boundary Alternative, they estimated the maximum potential loss of 58,374 pounds of shrimp. This amount includes catch landed in all counties of Florida including Monroe, Lee, Hillsborough, Pinellas and Franklin counties. Since 2.79 percent of the total shrimp catch from FMRI areas 2.0 and 2.9 was landed in Hillsborough, Pinellas and Franklin counties, this would imply that only 1,629 pounds of shrimp (.0279 times 58,374) valued at $3,910 would be lost from the three counties. Given the insignificance of this amount, they did not present separate estimates of this

impact in Leeworthy and Wiley (October 1999). Actually, Leeworthy and Wiley included the amounts in the impacts for Monroe, Collier and Lee counties, thus slightly overstating the impacts in these counties. But again, these amounts are insignificant.

The same procedures were followed for finfish and all other species and are documented in Leeworthy and Wiley (October 1999). The document Proposed Tortugas 2000 Ecological Reserve, Draft Socio-economic Impact Analysis of Alternatives, October 1999 by Dr. Vernon R. (Bob) Leeworthy and Peter C. Wiley can be found at http://www-orca.nos.noaa.gov/projects/econkeys.econkeys.html.

Comment 22: NMFS stated that ''the economic outcomes relative to private recreational fishing and diving do not appear to be addressed.''

Response: Leeworthy and Wiley (October 1999) and the DSEIS documented that no information could be found to support private household use for any recreational activity in the TERSA. Leeworthy and Wiley identified the known population of charter/party operators in the TERSA. The Rod and Reel Club, Inc. in Miami, Florida, provided other contacts and which also reported no activity in the TERSA. Leeworthy and Wiley found that although some members of the club occasionally went to the Dry Tortugas National Park, they did not fish in the TERSA. In addition, each of the commercial operators that operated in the TERSA was asked whether s/he had seen any private household boats in the TERSA and all reported seeing each other, but no private household boats. Leeworthy and Wiley concluded that the private household boat usage, if it existed at all, was insignificant. In this case, usage was close enough to zero to be treated as zero.

Comment 23: NMFS stated that the DSEIS lacks an analysis of community impacts and should be analyzed at the City or Census Designated Place level.

Response: Leeworthy and Wiley had Thomas Murray and Associates go back to the data and assign FIPSCODES for City and Census Designated Places for where commercial fishermen live and where they landed their catch. They did the same for recreational charter boat operations.

Comment 24: The United States Environmental Protection Agency (EPA) rated the DSEIS as ''EC–2'' which means EPA has environmental concerns regarding the proposed Reserve, and believes more information is needed to fully assess the impacts. In particular, EPA stated further details are needed regarding measurable activities that could be used to manage natural resources in the Reserve, such as the number of permits NOAA plans to issue and the amount of visitor education/communication expected. Information should also be given regarding the frequency of ecological monitoring activities. It would also be helpful if the FSEIS included a map that showed the formerly proposed area that was in the Draft EIS and DMP for the FKNMS (1997) but that was later rejected, as compared to the Preferred Alternative in the DSEIS (2000), explaining how the Preferred Alternative protects the environment and prevents adverse economic impacts, as contrasted with the former proposal.

Response: At this time, there are no plans to limit the number of access permits for Tortugas North. However, as described in the Final Supplemental Management Plan, it will be possible to use the access permit system to determine the number of divers visiting Tortugas North annually and the areas in the vicinity of mooring buoys will be examined as primary sites for diver impact. This will enable sites to be monitored for impacts from diving. This information can then be used to determine whether it is necessary to limit the number of access permits for those who visit Tortugas North. The questions regarding public education and outreach and the frequency of ecological monitoring have also been addressed in the Education and Outreach Action Plan and Research and Monitoring Action Plan of the FSEIS/SMP. A map showing the previously considered site for the Reserve has not been added to the FSEIS because NOAA believes it would confuse the public with regards to the current Ecological Reserve proposal.

Comment 25: The United States Department of the Interior, Fish and Wildlife Service, commented that the importance of the Tortugas area as a spawning site and as a ''source'' reef for the fish communities found in the Key West and Great White Heron National Wildlife Refuges is just beginning to be understood scientifically. The ability of the Refuges to maintain a healthy ecosystem for the wildlife that inhabit them is directly dependent upon a healthy marine component. The avian resources of the Refuges feed upon the fish communities of the Refuges. Those fish communities depend upon a healthy ''upstream'' ecosystem, which includes the Tortugas region. Marine reserves are a viable tool for resource protection. The protection of marine resources in the Tortugas region will benefit the Refuges. Because of this, the USFWS endorses the Tortugas 2000 Preferred Alternative and proposed rules.

Response: The FSEIS has been revised to reflect the importance of the Tortugas area to the Key West and Great White Heron National Wildlife Refuges. It is recognized that the Tortugas Ecological Reserve will serve as important feeding grounds for many bird species that frequent the Key West and Great White Heron National Wildlife Refuges. Additionally, several threatened and endangered sea turtles that nest in the Key West National Wildlife Refuge spend a portion of their life cycle in the Tortugas Ecological Reserve region.

Comment 26: The Florida Fish and Wildlife Conservation Commission (FWC) was concerned that no limits were being placed on the level of non-consumptive diving that would be allowed. The FWC stated that non-consumptive diving results in some morbidity and mortality to coral reef habitat and asked that controls be placed on the number of divers and dive trips to assure minimal acceptable damage to the habitat. The FWC was also concerned over the adequacy of the enforcement resources. The FWC believes that the minimal enforcement resources needed to enforce the Reserve would be two vessels 50 feet or greater in length with a Lieutenant and two officers for each vessel. The FWC encourages NOAA to work with it to develop these enforcement resources in order to assure the success of the reserve.

Response: Regulatory Alternative D allowing non-consumptive diving in Tortugas North but closing Tortugas South to all diving except for scientific research or educational purposes, pursuant to a valid sanctuary permit, provides an appropriate degree of public access. See Response to Comment 12 regarding non-consumptive diving in the Reserve. If the monitoring of impacts from non-consumptive diving in Tortugas North demonstrates that its carrying capacity is being exceeded, limits can be imposed. See Response to Comment 14 regarding the Enforcement Action Plan for the Tortugas Reserve. NOAA will work with the FWC and its other enforcement partners to develop the enforcement resources that all agree are necessary to assure the success of the Reserve.

Comment 27: The Gulf of Mexico Fishery Management Council (GMFMC) requested that the Sanctuary Program use its authority to prohibit anchoring and all diving within the portions of Tortugas North and Tortugas South that are within the Council's jurisdiction (all of Tortugas South and 13 nm^2 of Tortugas North). Non-consumptive

diving can impact and damage bottom habitat through the inadvertent touching of corals or the stirring up of sand and silt on the bottom. Non-consumptive diving can adversely affect sensitive habitats, the normal behavior of fish, and spawning activity. Anchoring and non-consumptive diving could also adversely affect essential fish habitat in the Reserve. In addition, if non-consumptive diving is allowed, it will be difficult to enforce prohibitions against spearfishing and the taking of lobster.

Response: Under the Preferred Alternative, all anchoring in Tortugas North and South would be prohibited as well as all activities in Tortugas South except for continuous transit, law enforcement, and, pursuant to a sanctuary permit, scientific research and educational activities. Non-consumptive diving will be allowed in all of Tortugas North. See Responses to Comments 8 and 12. NOAA does not anticipate that there will be significant non-consumptive diving in the area of Tortugas North within the GMFMC's jurisdiction because of the lack of coral reef formations.

Comment 28: Monroe County commented that the socio-economic section of the DSEIS seems to have been inserted out of context. This rather lengthy section should be reduced to some simpler explanations, tables and conclusions, then attach the larger document as an appendix.

Response: NOAA has retained the socio-economic section in the main body of the FSEIS/SMP but has revised it to make it clearer.

Comment 29: Monroe County commented that the FSEIS should provide some additional explanation concerning the table of benthic habitats in the DSEIS. It is not clear whether the 59% of unmapped acreage is a less significant area within the overall total (it should be noted if so). If it is not, then this area needs significant additional exploration.

Response: The benthic habitats categorized in Table 1 of the FSEIS represent those identified as the result of one mapping project based on aerial photographs and limited groundtruthing in the Tortugas region. Extensive characterization of the benthic communities within Dry Tortugas National Park has been completed (Agassiz 1883, Davis 1982, and Jaap 1998). Also, scientific exploration of benthic habitats within the proposed Tortugas Ecological Reserve area has occurred since the completion of the DSEIS (Miller, unpubl. data). However, NOAA agrees that additional mapping and exploration are needed to accurately assess the full extent of marine resources throughout the Tortugas region.

Comment 30: Monroe County commented that the FSEIS should include a table summarizing the regulatory alternatives.

Response: A table summarizing the regulatory alternatives has been added to the FSEIS.

Comment 31: The management plan should be designed to: (1) Protect ecosystem structure, function, and integrity; (2) improve fishery yields; (3) expand knowledge and understanding of marine systems; and (4) enhance non-consumptive opportunities.

Response: The regulations implementing the designation of the reserve are designed to protect ecosystem structure, function and integrity and should improve fishery yields outside of the closed areas. The management plan has been redesigned with many objectives including better understanding of marine systems as well as providing better opportunities for non-consumptive activities within the Tortugas North area of the Reserve.

Comment 32: The regulations concerning fishing in the Reserve should be issued pursuant to the National Marine Sanctuaries Act and the exception clause that would authorize fishing pursuant to regulations issued pursuant to the Magnuson-Stevens Fishery Conservation and Management Act at 50 CFR Parts 622 and 635 should be eliminated from the fishing prohibition.

Response: The fishing regulations will be issued under the National Marine Sanctuaries Act and have been revised to prohibit all fishing in the reserve without exception.

Comment 33: Fishing and other consumptive activities should be prohibited in the Reserve, including all forms of diving-related extraction. Carefully regulated non-consumptive diving should be allowed to continue to the extent consistent with resource protection.

Response: See Response to Comment 12. All consumptive activities are prohibited within the Reserve. As described in the FSEIS/SMP, the permit system for Tortugas North will allow NOAA to monitor the level of non-consumptive diving activity and its effect on resources in Tortugas North.

Comment 34: The Reserve should be permanent and should not be subject to sunset provisions.

Response: The only portion of the Tortugas Reserve that would be subject to termination would be the areas located in State waters. Pursuant to NOAA's Memorandum of Agreement with the State of Florida, the State has the right to review the portions of the Sanctuary located in State waters and the applicable regulations after 5 years. Based on its review, the Governor of the State may object to the designation of any portion of the Sanctuary in State waters and the continued application of the regulations.

Comment 35: NOAA should implement the Tortugas Reserve with strong enforcement, research and monitoring, education and outreach programs, and interagency cooperation to maximize the value of the Reserve.

Response: The Final Supplemental Management Plan so provides. See Response to Comment 14.

Comment 36: The economic analysis contains a bias toward hypothetical, short-term economic losses to a handful of consumptive users. Such losses are highly speculative in real-world terms and the quantitative analysis provided in the DSEIS lends them more weight than appears appropriate. The economic analysis also does not appear to account adequately for likely future migration of fishing economic activity to other economic sectors. The likelihood of continuing future reductions in fishing activities as a result of overfishing do not appear to be incorporated into the DSEIS' discussion.

Response: NOAA staff primarily analyzed data from users engaged in activities within the Tortugas Ecological Reserve Study Area. To assess maximum economic impacts, they assumed that the users could not replace their losses if the Tortugas Reserve were closed to consumptive activities. This is a very conservative assumption because, as stated in the DSEIS, many users will likely be able to relocate their activities outside of the Reserve. The protections afforded to the habitats in the Tortugas Reserve will also benefit displaced users by increasing production in areas outside of the Reserve. However, there is no hard data indicating the extent of mitigation or the likely future migration of fishing economic activity to other economic sectors.

Comment 37: The DSEIS does not describe clearly defined and scientifically justifiable goals. In particular, there are five fundamental objectives that are consistent with the overarching goal of maintaining the native biodiversity of a region in perpetuity: (1) represent all ecosystem types across their natural range or variation; (2) maintain or restore viable populations of all native species in natural patterns of abundance and distribution; (3) sustain ecological and evolutionary processes within their

natural ranges of variability; (4) build a conservation network that is adaptable and resilient to short-term and long-term environmental change; and (5) regulate human uses that are consistent with conservation of native biodiversity, and eliminate those that are not.

The Plan should also consider additional criteria in order to protect endangered, threatened, rare or imperiled species, small populations, species with limited vitality, species with very specific habitat requirements, areas of high endemism, areas of productivity, areas of high diversity, and movement and migration corridors.

Response: Most of the five biodiversity goals are contained within the criteria for choosing the location and protection measures for the Ecological Reserve (see Part VI of this FSEIS). Specific subcriteria have been added to clarify what is contained in each criterion. Likewise, protecting endangered, threatened, rare, or imperiled species is included within the criterion ''Protecting biodiversity, including the maintenance or restoration of viable populations of native species.''

Part II of the FSEIS includes clear objectives for the Reserve. As stated, the goal for the Sanctuary zoning plan is to protect areas representing diverse Sanctuary habitats and areas important for maintaining natural resources and ecosystem functions. The objectives of the Reserve are to: protect ecosystem integrity; protect biodiversity including the maintenance or restoration of viable populations of native species; enhance scientific understanding of marine ecosystems; and facilitate human uses to the extent consistent with the other objectives. These are scientifically justifiable goals and objectives.

The goals listed by the commentor are essentially the goals and objectives that the establishment of the Reserve and issuance of the implementing regulations are designed to achieve. Likewise, the Supplemental Management Plan is designed to achieve the goals and objectives for which the reserve is being established and regulated.

Comment 38: The DSEIS does not define or identify indicators for assessing ecological integrity.

Response: Indicators for assessing ecological integrity have been incorporated in the Research and Monitoring Action Plan. These indicators include: changes in fish and coral diversity, changes in predation, herbivory and trophic structure, changes in water quality (nutrients and transmissivity), and changes in user activities.

Comment 39: The Draft Supplemental Management Plan is inadequate and needs to be more comprehensive. It should include:

- Specific goals and objectives;
- Performance measures with an implementation schedule;
- An estimate of management costs for implementing and maintaining the reserve;
- An expanded education plan;
- An expanded enforcement plan;
- A description of the permitting system with defined criteria and capacity limits;
- A mooring and boundary buoy component that includes criteria for placement and costs for placement and maintenance; and
- An expanded research and monitoring plan that includes a resource inventory, monitoring of ecological performance measures, cooperative research agreements, and database of research.

Response: See Response to Comment 37. The FSEIS/SMP includes:

- Specific goals and objectives;
- Estimate of management costs for implementing and maintaining the reserve;
- An expanded education plan;
- An expanded enforcement plan;
- A description of the permitting system;
- A mooring and boundary buoy component that includes costs for placement and maintenance; and
- An expanded research and monitoring plan that includes a resource inventory, monitoring of ecological performance measures for assessing ecological integrity, and cooperative research agreements.

Comment 40: NOAA should develop a broader research initiative including, at a minimum:

- Further identification and study of spawning aggregations including grouper, snapper and jewfish;
- Further studies of patterns of short- and long-distance larval dispersal;
- Complete inventories of biodiversity and habitat structure in the Reserve and Sanctuary waters in the region;
- Further documentation of the distribution and abundance of threatened, endangered, and rare species in the Reserve; and,
- Field experiments and comparative studies to test hypotheses generated by these studies.

Response: The Research and Monitoring Action Plan has been expanded to include long-term ecological monitoring to test the efficacy of the Reserve. As modified, the Plan will compare reserve areas before and after designation, as well as monitor changes occurring inside and outside the protected areas, in order to determine the overall effectiveness of the reserve. Over time, these efforts will examine larval dispersion and spawning aggregations. There should also be complete inventories of biodiversity and habitat structure in the Reserve, which would include more complete descriptions of the presence of endangered, threatened and rare species. Also the Plan has been expanded to monitor the effects of non-consumptive diving activities on the resources in Tortugas North using the reference provided by Tortugas South.

Comment 41: Scuba diving and underwater exploration in the Reserve should be permitted only in the company of a qualified guide.

Response: NOAA disagrees. It is not necessary to require that diving in the Reserve be conducted with a guide to adequately protect coral reef resources. As explained elsewhere (see Response to Comment 12) diving effects will be monitored to determine whether the Reserve's resources are being impacted. Also, a sufficient enforcement presence will be maintained to deter and detect violations of the no-take provisions.

Comment 42: Neither the Everglades National Park nor the Dry Tortugas National Park prohibit recreational fishing and they have the best fishery management system in the world. NOAA should not prohibit recreational fishing in the Tortugas Reserve.

Response: NOAA disagrees. See Responses to Comments 3 and 13. The Dry Tortugas National Park is proposing changes to its management plan that would prohibit recreational fishing in approximately 40% of the Park that would be adjacent to the Tortugas Reserve.

Comment 43: The United States Government does not have jurisdiction over the area that would be included in the proposed reserve.

Response: NOAA disagrees. The Tortugas Reserve is within the Exclusive Economic Zone and the authority of the United States to establish and manage the Reserve is well-established and consistent with international law. In 1983, President Ronald Reagan declared a 200 nautical mile Exclusive Economic Zone, in which the United States may conserve and manage natural resources, consistent with international law (Presidential Proclamation 5030, March 10, 1983). The NMSA expressly applies to the EEZ. In 1989, President Reagan extended the territorial sea to twelve nm (Presidential Proclamation 5928, December 27, 1988). In 1999, President William J. Clinton extended the

contiguous zone from twelve to twenty-four nm, extending the jurisdiction of the United States over customs, fiscal, immigration, and sanitary laws (Presidential Proclamation 7219, August 2, 1999).

Comment 44: Sanctuary staff working at Dry Tortugas National Park should live and work aboard ships rather than increase environmental pressure on existing facilities at the Park.

Response: NOAA will work with the National Park Service so that Sanctuary personnel will be stationed at the Park in a manner that is consistent with environmental protection of the islands and waters in the Park.

Comment 45: NOAA's plan for a visitor center in Key West is redundant and would detract from other visitor centers in Key West dedicated to interpretation of the marine environment.

Response: NOAA disagrees. The creation of the visitor facility in Key West is not a part of this action. The facility has already been established and is located within the existing Dr. Nancy Foster Environmental Center at the Truman Annex. The visitor center complements existing interpretive centers in Key West. Among other things, the facility will present information derived from research conducted within the Sanctuary (including the Reserve) as well as describe ongoing research projects and other various activities related to the Sanctuary.

Comment 46: A nominal charge should be assessed for access permits to the Reserve.

Response: NOAA disagrees. As proposed, the access permit system will require minimal effort by users and will be relatively inexpensive for NOAA to operate. The system will be simple and reduce the time imposed on permit applicants. The cost to NOAA of administering the access permit system is expected to be small. If a fee were charged to offset the cost, the system would increase in complexity, increasing the cost that would need to be offset as well as increasing the burden on users applying for permits. In the interest of administrative efficiency and of not placing a burden on permit applicants, a permit fee is not being imposed.

Comment 47: The greatest threat to the marine resources of the area is pollution and degradation of water quality. Vessel discharges should not be permitted in the Reserve.

Response: Pollution and degradation of water quality is a serious threat to Sanctuary resources. Under the regulations applicable to ecological reserves, only engine cooling water and exhaust can be discharged in the Reserve.

Comment 48: Select a Preferred Alternative for the reserve that allows for fishing to the northwest of Loggerhead Key.

Response: The only alternative that would allow fishing to the northwest of Loggerhead Key is the No-Action Alternative (see Response to Comment 3).

Comment 49: Prohibit the use of motorized Personal Watercraft in the Ecological Reserve.

Response: While the use of Personal Watercraft has not been documented in the TERSA, Regulatory Alternative D will prohibit all activities in Tortugas South except for continuous transit, law enforcement, and pursuant to a Sanctuary permit, scientific research and educational activities. Should the use of motorized Personal Watercraft in Tortugas North be documented as a problem, NOAA will consider initiating appropriate rulemaking.

Comment 50: The Tortugas 2000 Working Group did not have a representative of the tourism industry and did not consider non-consumptive activities.

Response: Among its membership, the Tortugas 2000 Working Group had two non-consumptive diving representatives and one citizen-at-large representative. Additionally, the Working Group's proposal was recommended to Sanctuary managers by the Sanctuary Advisory Council which, among its members, has representatives of the tourism industry and other non-consumptive interests.

Comment 51: Several commentors addressed vessel discharge restrictions, pumpout facilities, and other public access issues related to the DRTO and surrounding Sanctuary waters. One commentor suggested that NOAA charts be updated to reflect any new regulatory changes in the Tortugas area.

Response: The NPS General Management Plan revisions are taking into consideration pressures and limitations on infrastructure and other Park resources. Sanctuary regulations will prohibit vessel discharges in the Tortugas Ecological Reserve, with the exception of engine cooling water and exhaust. NOAA nautical charts will be updated to include relevant information once regulations to implement the Ecological Reserve are issued and effective.

Comment 52: A number of commentors suggested various education, mooring buoy, research and monitoring, and enforcement programs for the Tortugas Ecological Reserve.

Response: The Final Supplemental Management Plan has been updated to reflect these comments and suggestions.

Comment 53: A commentor stated that it appeared that several disparate agency processes were going on with regard to an appropriate fishing regime for the Tortugas area and that no proposal should be adopted until all disparate processes are concluded.

Response: Providing comprehensive protection to the critical coral reef resources of the Tortugas must take precedence over awaiting the completion of the many other agency processes. However, NOAA has gathered input from the seven resource management agencies with jurisdiction in the TERSA with the ultimate goal of achieving a consensus to the extent consistent with requirements of the FKNMSPA, NMSA, and other applicable law. The Tortugas 2000 Working Group process, boundary and regulatory alternative development, and subsequent public hearings effectively brought all resource management entities to the table and ensured that federal and state regulations will be thoroughly integrated. This process has served as a model for interagency and stakeholder collaboration.

VIII. Miscellaneous Rulemaking Requirements

Marine Protection, Research, and Sanctuaries Act

Paragraph (b)(1) of section 304 of the NMSA, 16 U.S.C. 1434(b)(1), requires the Secretary, in designating a national marine sanctuary, to publish in the **Federal Register** a notice of the designation together with final regulations to implement the designation and any other matters required by law, and submit such notice to the Congress. The Secretary also is required to advise the public of the availability of the final management plan and the final environmental impact statement with respect to the Sanctuary. While this action does not designate a new national marine sanctuary, it revises the boundary and changes the terms of designation of an existing sanctuary, the FKNMS, and therefore must satisfy the requirements of section 304. In accordance with section 304, the public was advised on December 1, 2000 (65 FR 75285) of the availability of the FSEIS/SMP and this notice is being submitted to the Congress for its review.

Executive Order 12866

This action has been determined to be significant for purposes of E.O. 12866. That Order requires that the draft text of the final regulations, a reasonably

detailed description of the need for the action, an explanation of how the action will meet that need, and an assessment of the potential costs and benefits, including an explanation of the manner in which the action is consistent with statutory mandates, and, to the extent permitted by law, promotes the President's priorities and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions (referred to as a Regulatory Impact Review (RIR)) be prepared and be submitted to the Office of Management and Budget for review. In accordance with the requirements of the Executive Order, NOAA has prepared a RIR for this action and has submitted it to OMB for review. The RIR is contained in part V of the FSEIS/SMP.

Regulatory Flexibility Act

In accordance with the requirements of section 603(a) of the Regulatory Flexibility Act (5 U.S.C. 603(a)), NOAA prepared an initial regulatory flexibility analysis (IFRA) describing the impact of the proposed action on small entities. No comments were received on the Initial Regulatory Flexibility Act Analysis (IFRA) per se. However, a number of the comments requested changes to the Preferred Alternative because of impacts on users, all of which are considered small entities for purposes of the Regulatory Flexibility Act. Comments 1, 3, 4, 9, 13, 16–19, 21–23, 36, 41–43, and 50 and the responses thereto summarize the significant issues raised by those comments and the assessment of the agency of such issues. Although changes were made to the proposed regulations, no changes were made as a result of those comments.

Section 604(b) (5 U.S.C. 604(b)) requires that NOAA prepare a final regulatory flexibility analysis (FRFA) for this action. The FRFA is required to 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 IRFA, a summary of the assessment of the agency of such issues, a statement of any changes made to 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, record keeping and other compliance requirements of the regulations, including an estimate of the classes of small entities that will be subject to these requirements and the type of professional skills necessary to prepare any required 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 of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

NOAA has prepared the required FRFA. The complete FRFA is contained in Parts I, IV, V, VI and Appendix H of the FSEIS/SMP. The following is a summary of the FRFA.

Statement of Need

As previously set forth in this regulatory preamble.

Goals, Objectives and Legal Basis

As previously set forth in this regulatory preamble.

Summary of the Significant Issues Raised by the Public Comments in Response to the IRFA, a Summary of the Assessment of the Agency of Such Issues, a Statement of Any Changes Made to the Proposed Rule as a Result of Such Comments

No comments were received on the IFRA per se. However, a number of the comments requested changes to the Preferred Alternative because of impacts on users, all of which are considered small entities for purposes of the Regulatory Flexibility Act. Comments 1, 3, 4, 9, 13, 16–19, 21–23, 36, 41–43, and 50 and the responses thereto appearing in Section VI Summary of Comments and Responses, above, summarizing the significant issues raised by those comments and the assessment of the agency of such issues. Although changes were made to the proposed regulations, no changes were made as a result of those comments.

Discussion of All Relevant State and Federal Rules Which May Duplicate, Overlap or Conflict with the Regulations

Under the Magnuson-Stevens Act, the GMFMC has primary federal responsibility and expertise for the development of FMPs throughout the Gulf of Mexico and has developed an Essential Fish Habitat Amendment for the various GMFMPs, which includes the area of the proposed Tortugas Ecological Reserve. The GMFMPs are implemented by regulations promulgated by the NMFS (50 CFR 622). At the GMFMC's meeting on November 9, 1999, the NOS and NMFS requested that the GMFMC take steps to prohibit fishing, consistent with the purpose of the proposed ecological reserve. The GMFMC accepted this request and at its July 10–13, 2000 meeting, adopted a Generic Amendment Addressing the Establishment of Tortugas Marine Reserves. That amendment to the GMFMPs is consistent with the no-take Tortugas Ecological Reserve proposed by NOAA and NOAA's regulations for ecological reserves in the FKNMS, at 15 CFR 922.164(d).

NMFS intends to issue regulations under the Magnuson-Stevens Act consistent with the no-take status of the Tortugas Ecological Reserve for the species covered by the GMFMPs and for Atlantic tunas, swordfish, sharks, and billfish. In federal waters, these regulations will duplicate and overlap, but not conflict, with the Sanctuary regulations prohibiting fishing in the Tortugas Ecological Reserve. Regulations issued under the Magnuson-Stevens Act must satisfy the requirements of that Act including the National Standards set forth in that Act. Sanctuary regulations including those governing fishing are issued under the NMSA. While some of the goals and objectives of the two Acts are similar, many of the goals and objectives of the two statutes are different.

The State of Florida may implement a no-fishing rule for the area of Tortugas North within State waters. In State waters, this rule could duplicate and overlap with the Sanctuary, but not conflict with the Sanctuary no-take rule for the Reserve. The State of Florida is co-manager of the Reserve with NOAA and Sanctuary regulations affecting State waters must have the approval of the State.

Description of the Projected Reporting, Record Keeping and Other Compliance Requirements of the Regulations, Including an Estimate of the Classes of Small Entities that Will be Subject to These Requirements and the Type of Professional Skills Necessary to Prepare Any Required Report or Record

The access permit application and call in requirements are described in the Summary of Final Regulations, above. Any entity desiring to enter Tortugas North for other than continuous transit or for law enforcement purposes will be subject to these requirements. It is anticipated that dive charters operators and individuals wishing to dive from private vessels will be the primary class of small entity subject to this requirement. No special skills will be necessary to comply with the permitting or call-in requirements.

Any entity desiring to conduct educational or scientific research activities in Tortugas South will be

required to apply for a National Marine Sanctuary General Permit. Each permit applicant will be required to provide a detailed description of the proposed activity, including a timetable for completion of the activity and the equipment, personnel and methodology to be employed; the qualifications and experience of all personnel; a statement of the financial resources available to the applicant to conduct and complete the proposed activity; a statement as to why it is necessary to conduct the activity within the Sanctuary; a statement of the potential impacts of the activity, if any, on Sanctuary resources and qualities; and a statement of the benefit to be derived from the activity; and such other information as the Director may request. Copies of all other required licenses, permits, approvals, or other authorizations must be attached to the application. The application requirements for such a permit are set forth in 15 CFR 922.166(e). There will be additional reporting and record keeping requirements associated with a Sanctuary permit. These will include submitting interim reports on the status of the activity and final reports including relevant research findings.

It is anticipated that marine scientists affiliated with public and private research institutions, universities, and conservation organizations, and associated graduate students or assistants, will be the primary class of small entity subject to this requirement.

The skills necessary for preparing a permit application and subsequent reports are the same as those that are required to prepare research proposals, grant applications, and their associated activity reporting requirements.

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 of the Other Significant Alternatives to the Rule Considered by the Agency Which Affect the Impact on Small Entities was Rejected

In the DEIS/MP for the FKNMS, NOAA proposed a boundary for a 110 nm^2 Replenishment Reserve (Ecological Reserve) in the Tortugas area to protect significant coral resources while minimizing or avoiding adverse impacts to users. NOAA postponed establishing a reserve in part because public comment identified serious adverse economic impacts on commercial fishers from the proposed boundary and the proposed no-take regulations. Accepting these comments, NOAA went back to the drawing board by convening an ad hoc 25 member Working Group (WG) of the Sanctuary Advisory Council (SAC), that included key stakeholder representatives from the fishing, diving, and recreation industries, as well as eight SAC members, and government agency representatives with resource management authority in the Tortugas area to recommend a ''Preferred Boundary Alternative'' for the reserve.

The WG held five meetings in 1998 and 1999. In addition to ecological information, socio-economic data were gathered from the commercial and recreational users of the area. This was an unprecedented data collection effort spearheaded by Dr. Vernon R. (Bob) Leeworthy of NOAA. His contractors first determined that approximately 105–110 commercial fishermen used the area. They then collected information on catch, costs, and trips from 90 of the fishermen. These 90 fishermen caught over 90% of the total harvest from the Tortugas. The entire population of recreational charter users was interviewed and data on trips and costs were obtained. Through the help of the Florida Marine Research Institute, the commercial and recreational data were input into a GIS format and maps were produced showing intensity of use.

A critical aspect of this GIS data was the creation of maps at a consistent scale using the same grid cell framework so comparisons could be made between maps. The study area was partitioned into one minute by one minute (approximately one square nautical mile) grid cells which facilitated the collection and analysis of data and the creation of boundary alternatives.

In February 1999, the WG developed criteria for the ecological reserve that addressed ecological and socio-economic concerns. One of the objectives of these criteria was to try to choose an area and craft recommendations that would serve to minimize adverse socio-economic impacts on established users of resources in the area. The preferred alternative recommended by the WG (and that subsequently was selected by NOAA as its Preferred Alternative in the DSEIS/SMP) was selected, in part, because it provided environmental protection while leaving open significant fishing grounds for lobster and reef fish such as the southern half of Tortugas Bank, which is an important fishing area in the winter, and leaves open fishing areas for King mackerel.

The SAC unanimously adopted the WG's recommendation, recognizing that the WG's proposal for an ecological reserve would protect biodiversity and minimize impacts to users. The SAC that adopted the WG's recommendation included members from the fishing, diving, boating, and tourism industries. The geographical area for an ecological reserve and application of no-take regulations recommended by the SAC have been adopted by NOAA as the Preferred Alternative.

NOAA encouraged the public to comment on the alternatives contained in the DSEIS and held a series of public hearings throughout South Florida to accept comments. More than 4,000 comments were received and considered.

Approach to the Analysis of Alternatives

The analysis of the alternatives focuses on market economic impacts as measured by direct revenue, costs, and profits of the business firms directly affected by the ''no-take'' regulations. These impacts are then translated into the secondary or multiplier impacts on the local economy. For the recreational industry, the impact area is defined as Monroe County, Florida and, for the commercial fisheries the impact areas are Monroe County and Lee/Collier counties. For the commercial fisheries, the results presented here are an aggregation of the impacts on both Monroe and Lee/Collier Counties. The market economic impacts include estimates of output/sales, income and employment. The details by impacted area can be found in Leeworthy and Wiley (2000). Although the results are only presented for impacts on Monroe and Lee/Collier Counties, the impacts are based on catch landed in all counties. The results for Monroe and Lee/Collier counties are slightly overstated because they include the amounts landed in other counties, but for the boundary alternatives, these amounts are insignificant.

The approach begins by first analyzing the affects of the ''no-take'' regulation for each boundary alternative. Analyses are presented for the recreation industry (broken down into consumptive and non-consumptive), the commercial fisheries, commercial shipping, treasure salvors and then other benefits (non-users, scientific and education values). The next step is to analyze other regulations. Other regulations include the no anchoring/required mooring buoy use regulation, access restrictions, and sanctuary-wide regulations (for boundary alternatives that include areas outside current Sanctuary boundary). For most of the sanctuary-wide regulations, there is no additional or

incremental impact over the ''no-take'' regulation.

The approach proceeds in two basic steps for the recreation industry and the commercial fisheries. First, the impacts are estimated under the assumption that all the activities displaced result in complete loss. This is done by summing all the activities within the geographic area defined by an ecological reserve boundary (i.e., the no-take area) and applying the appropriate economic parameters. Second, whether the results from step 1 are likely to occur is assessed by using a qualitative analysis. Mitigating and offsetting factors are taken into account and whether net benefits or costs exist in the short and longer terms is assessed. Over the long term, the ecological reserve is expected to generate replenishment effects to the fisheries. In the commercial reef fisheries, there may be some short term losses, however over the longer term, the expectation is that there would be long-term benefits even to commercial reef fishermen and related dependent businesses.

Results are presented in four sections. The first section addresses the recreation industry. Consumptive recreation is separated from non-consumptive recreation since consumptive recreation activities are displaced from the ''no-take'' areas and may potentially be negatively impacted, while non-consumptive activities would be beneficiaries of the ''no-take'' area in Tortugas North. The second section addresses the commercial fisheries which would all be displaced from the ''no-take'' areas and thus potentially negatively impacted. The third section addresses other potential benefits of the ''no-take'' areas including non-use economic values, scientific values, and education values. The fourth section addresses the costs of the management action to create the reserve. This analysis assumes that all entities impacted are small entities within the meaning of the Regulatory Flexibility Act.

Analysis of Alternatives

Definition of the Study Area

For purposes of this analysis, NOS examined a 1,020 nm^2 area called the Tortugas Ecological Reserve Study Area (TERSA) (Figure 2). All socio-economic information was collected and organized for the TERSA at a geographical resolution of one nm^2. Detailed descriptions of the data are included for the recreation industry and for the commercial fisheries. Four separate boundary alternatives were identified within the TERSA and analyzed using the information collected for the TERSA.

Boundary Alternatives (Figure 1)

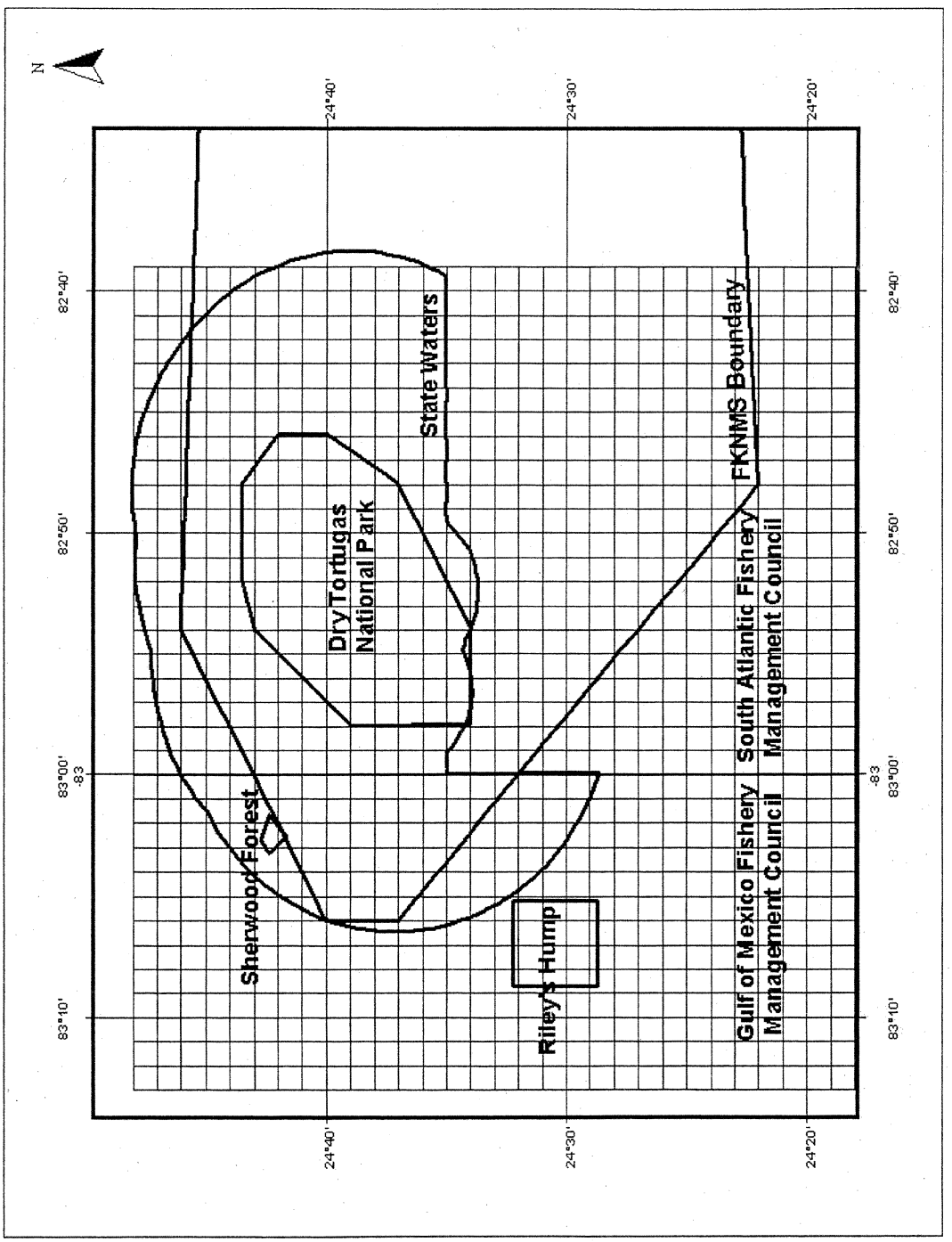

Figure 2. Tortugas Ecological Reserve Study Area (TERSA)

Boundary Alternative I. This alternative would be taking no-action, that is, not expanding the Sanctuary boundary and not establishing a Tortugas Ecological Reserve.

Boundary Alternative II. This alternative would limit the reserve to the existing Sanctuary boundary for a total area of approximately 55 nm^2. This alternative includes a portion of Sherwood Forest and the coral pinnacles north of Tortugas Bank; it does not include Riley's Hump. It includes some coral and hardbottom habitat north of the DRTO.

Boundary Alternative III (Preferred Boundary Alternative). This alternative would expand the boundary of the Sanctuary and its westernmost corner by approximately 36 nm^2 to include Sherwood Forest. In addition, this alternative would expand the boundary by adding a non-contiguous area of approximately 60 nm^2 to include Riley's Hump. The Reserve would also incorporate approximately 55 nm^2 of the existing Sanctuary in its northern section, for a total area of approximately 151 nm^2. The area of the Reserve surrounding Sherwood Forest would be called Tortugas North and encompass approximately 91 nm^2; the area surrounding Riley's Hump would be called Tortugas South and encompass approximately 60 nm^2.

Boundary Alternative IV. This alternative would increase the area of Tortugas North over that in Alternative III by an additional 23 nm^2 to make it conterminous with the DRTO's proposed Research/Natural Area for a total area of approximately 175 nm^2. It would involve the same boundary expansion as in Alternative III. The Tortugas South area would be the same as in Alternative III.

Boundary Alternative V. This alternative would expand the Sanctuary boundary to the west by 3 nm over Alternatives III and IV to make the boundary extend as far west as the western boundary of Tortugas South. The area of Tortugas North would be expanded over Alternatives III and IV to include the three nm boundary expansion. The area of Tortugas North would be approximately 145 nm^2. The area of Tortugas South would be approximately 45 nm^2, by reducing its southern extent over alternatives III and IV. Under Alternative V the overall area of the Reserve would be approximately 190 nm^2.

No-take Regulations

Recreation Industry

Boundary Analysis. The estimates from the geographic information system (GIS) analysis for the different boundary alternatives are the sum of each measurement within the boundaries of each alternative. The estimates therefore represent the maximum total potential loss from displacement of the consumptive recreational activities. This analysis ignores possible mitigating factors and the possibility of net benefits that might be derived if the proposed ecological reserve has replenishment effects. Although the extent of the mitigating factors or the potential benefits from replenishment is unknown, this analysis discusses these as well as other potential benefits of the proposed ecological reserve after the maximum potential losses from displacement of the current consumptive recreational uses are presented and discussed.

There are two types of potential losses identified and quantified in the analysis, non-market economic values and market economic values.

Non-Market Economic Values. There are two types of non-market economic values. The first is consumer's surplus, which is the amount an individual is willing to pay for a good or service over and above what he or she is required to pay for the good or service. It is a net benefit to the consumer and in the context of recreation use of natural resources, where the natural resources go unpriced in markets, this value is often referred to as the net user value of the natural resource. The second type of non-market economic value is one received by producers or owners of the businesses providing goods or services to the users of the natural resources. This is commonly referred to as producer's surplus. The concept is similar to consumer's surplus in that the businesses do not pay a price for the use of natural resources when providing goods or services to users of the resources. However, this concept is a little more complicated because, in ''welfare economics'', not all producer's surplus is considered a proper indicator in the improvement of welfare. Only that portion of producer's surplus called ''economic rent'' is appropriate for inclusion. Economic rent is the amount of profit a business receives over and above a normal return on investment (*i.e.*, the amount of return on investment that could be earned by switching to some alternative activity). Again, because businesses that depend on natural resources in the Tortugas do not have to pay for the use of them, there exists the possibility of earning above normal rates of return on investment or ''economic rent''. This like consumer's surplus, would be additional economic value attributable to the natural resources (*i.e.*, another user value).

Economic rents are different from consumer's surplus in that supply and demand conditions are often likely to lead to dissipation of the economic rents. This is generally true for most open access situations. As new firms enter the industry because of the lure of higher than normal returns on investment, the net effect is to eliminate most if not all of the economic rent. However, given the remoteness of the TERSA, it is likely that all economic rents would not be eliminated. Accounting profits are used as a proxy for economic rents in the analysis. The absolute levels of accounting profits are not a good proxy for economic rents, however, they are used here as an index for assessing the relative impacts across the different boundary alternatives.

The estimates for consumer's surplus were derived by combining estimates of person-days from all the operators in the TERSA with estimates of consumer's surplus per person-day from Leeworthy and Bowker (1997). The estimates were derived separately by season (see Leeworthy and Wiley 2000).

Market Economic Values. Revenues from the charter boat operations that provided service to the consumptive recreational users provide the basis for this portion of the analysis. Total output/sales, income and employment impacts on the Monroe County economy are then derived from these estimates. These impacts include the ripple or multiplier impacts. Total output/sales is equal to business revenue times the total output multiplier of 1.12 from English et al 1996. Income is then derived by taking the total output/sales impact and dividing by the total output-to-income ratio (2.63) from English et al. Total employment was derived by dividing the total income impact by the total income-to-employment ratio ($23,160) from English et al.

Boundary Alternative I: No Action

The no-action alternative is not establishing a reserve and not issuing the implementing regulations. The costs of imposing the no-take regulations, for any given alternative with no-take regulations, would be the benefits of the no-action alternative. That is, by not adopting the no-take regulations, the costs are avoided. Similarly, any benefits from imposing the no-take regulations, for any given alternative with no-take regulations, would be the costs of the no-action alternative. That is, by not adopting the no-take regulations, the costs are the benefits lost by not adopting the no-take regulations. Said another way, the costs are the opportunities lost. The impacts of the no-action alternative can only be understood by comparing it to one of the alternatives. Thus the impacts of the no-action alternative can be obtained by reading the impacts from any of the alternatives in reverse (Tables 1–8). Table 1 shows the 1997 baseline conditions.

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Table 1. Boundary Analysis Summary: TERSA - Consumptive Recreation

	Diving for Lobsters	Fishing	Spearfishing	Total	
Within FKNMS Boundary					
Person-Days	1,442	12,215	1,569	15,226	
Revenue	$ 99,282	$ 579,143	$ 291,898	$ 970,323	
Cost	$ 68,372	$ 471,657	$ 149,503	$ 689,532	
Profit	$ 30,909	$ 107,497	$ 142,395	$ 280,801	
Number of Firms	2	10	3	12	[1]
Consumer Surplus	$ 131,222	$ 996,744	$ 144,034	$ 1,272,000	
Outside FKNMS Boundary					
Person-Days	288	4,163	303	4,754	
Revenue	$ 19,868	$ 267,597	$ 41,795	$ 329,260	
Cost	$ 13,680	$ 217,794	$ 22,926	$ 254,400	
Profit	$ 6,188	$ 49,804	$ 18,869	$ 74,861	
Number of Firms	2	4	2	5	[1]
Consumer Surplus	$ 26,208	$ 339,619	$ 27,815	$ 393,642	
Total					
Person-Days	1,730	16,378	1,872	19,980	
Revenue	$ 119,150	$ 846,740	$ 333,693	$ 1,299,583	
Cost	$ 82,052	$ 689,451	$ 172,429	$ 943,932	
Profit	$ 37,097	$ 157,301	$ 161,264	$ 355,662	
Number of Firms	2	10	3	12	[1]
Consumer Surplus	$ 157,430	$ 1,336,363	$ 171,850	$ 1,665,643	

1. Number of firms does not add up to the total because individual firms may engage in more than one activity.

Table 2. Boundary Analysis Summary: Alternative II/Regulatory alternative D - Consumptive Recreation

Charter/Party Boat Operators	Diving for Lobsters[2]		Fishing[2]		Spearfishing[2]		Total[2]		
Within FKNMS Boundary									
Person-Days	461	(31.97%)	200	(1.64%)	485	(30.91%)	1,146	(7.53%)	
Revenue	$ 31,732	(31.96%)	$ 24,691	(4.26%)	$ 66,816	(22.89%)	$ 123,239	(12.70%)	
Cost	$ 21,862	(31.98%)	$ 14,496	(3.07%)	$ 36,656	(24.52%)	$ 73,014	(10.59%)	
Profit	$ 9,870	(31.93%)	$ 10,195	(9.48%)	$ 30,160	(21.18%)	$ 50,225	(17.89%)	
Number of Firms	2	(100.00%)	8	(80.00%)	3	(100.00%)	9	(75.00%)	[1]
Consumer Surplus	$ 41,977	(31.99%)	$ 15,859	(1.59%)	$ 44,548	(30.93%)	$ 102,384	(8.05%)	
Outside FKNMS Boundary									
Person-Days	-	(0.00%)	-	(0.00%)	-	(0.00%)	-	(0.00%)	
Revenue	$ -	(0.00%)	$ -	(0.00%)	$ -	(0.00%)	$ -	(0.00%)	
Cost	$ -	(0.00%)	$ -	(0.00%)	$ -	(0.00%)	$ -	(0.00%)	
Profit	$ -	(0.00%)	$ -	(0.00%)	$ -	(0.00%)	$ -	(0.00%)	
Number of Firms	-	(0.00%)	-	(0.00%)	-	(0.00%)	-	(0.00%)	[1]
Consumer Surplus	$ -	(0.00%)	$ -	(0.00%)	$ -	(0.00%)	$ -	(0.00%)	
Total									
Person-Days	461	(26.65%)	200	(1.22%)	485	(25.91%)	1,146	(5.74%)	
Revenue	$ 31,732	(26.63%)	$ 24,691	(2.92%)	$ 66,816	(20.02%)	$ 123,239	(9.48%)	
Cost	$ 21,862	(26.64%)	$ 14,496	(2.10%)	$ 36,656	(21.26%)	$ 73,014	(7.74%)	
Profit	$ 9,870	(26.61%)	$ 10,195	(6.48%)	$ 30,160	(18.70%)	$ 50,225	(14.12%)	
Number of Firms	2	(100.00%)	8	(80.00%)	3	(100.00%)	9	(75.00%)	[1]
Consumer Surplus	$ 41,977	(26.66%)	$ 15,859	(1.19%)	$ 44,548	(25.92%)	$ 102,384	(6.15%)	
Private Boats[3]									
Person-Days	-	n/a	673	(100.00%)	-	n/a	673	(100.00%)	
Consumer's surplus	$ -	n/a	$ 53,392	(100.00%)	$ -	n/a	$ 53,392	(100.00%)	

1. Number of firms does not add up to the total because individual firms may engage in more than one activity.
2. Percent of TERSA (See Table 1) by activity and total in parentheses.
3. Private boat activity does not involve losses to commercial recreation operators, therefore the only impacts are in loss of person-days of activity and in consumer's surplus. Lacking any information with regard to the distribution of the activity, the assumption was made that all of the activity takes place within the boundary alternative.

Boundary Alternative II

Non-Market Economic Values. This alternative would displace over 26% of the total person-days of diving for lobsters, about 26% of the spearfishing, and just over 1% of the fishing. Across all three consumptive recreational activities just under 6% of the person-days would be displaced (Table 2). This alternative is entirely within the FKNMS boundary. Because of the way in which consumer's surpluses are calculated, they generally mirror the patterns in displaced use. Minor differences would be due to the distributions across activities by season. Only in the case of diving for lobsters are the impacts on person-days and profits equal. For spearfishing, the impacts on profits are lower than the affect on person-days (18.7% versus 25.9%), while for fishing the affect is greater on profits than on person-days (6.5% versus 1.2%). The GIS generated maps show why diving for lobsters and spearfishing are relatively more affected than fishing. The reason is that diving for lobsters and spearfishing are concentrated on Tortugas Bank, while relatively little fishing currently takes place on the Tortugas Bank. Private boat usage does not impact commercial recreational fishing operations, therefore the only impacts are the loss of person days and the non-market value (consumer's surplus) of the activity. During the public comment period it was noted that there were 673 person days of activity taking place in the TERSA. This translates to a maximum potential loss of $53,392 in consumer's surplus.

Market Economic Values. Presently, there are 12 charter boats operating within the TERSA, nine of which would be potentially affected by this alternative. Direct business revenue would include potential losses of 26.6% for diving for lobsters, 20% for spearfishing, and 3% for fishing. Across all three consumptive recreational activities, 9.5% of revenue would be potentially affected (Table 2).

Through the ripple or multiplier effects, 11–13% of output/sales, income and employment associated with all the consumptive recreational activities in the TERSA could potentially be lost (Table 7). Although these costs could have an effect on the nine firms operating in the TERSA, the effect would not likely be noticed in the Monroe County economy because the effect would amount to only a fraction of a percent of the total economy supported by recreating visitors to the Florida Keys (Table 8).

Boundary Alternative III (Preferred Boundary Alternative)

Non-Market Economic Values. Because the portion of this alternative that is within the FKNMS boundary is exactly the same as Alternative II, the analysis for these two activities is exactly the same for the two alternatives. This alternative would displace over 26% of the total person-days of diving for lobsters, about 26% of the spearfishing, and just over 3% of the fishing. Across all three consumptive recreational activities over 7% of the person-days would be displaced (Table 3). For fishing, 40% of the displaced activity would be from within the FKNMS boundary. Consumer's surpluses generally mirror patterns of displaced use. Again, minor differences would be due to the distributions across activities by season. Only in the case of diving for lobsters are the effects on person-days and profits equal. For spearfishing, the effects on profits is lower than the effect on person-days (18.7% versus 25.9%), while for fishing the effect is greater on profits than on person-days (10.02% versus 3.0%).

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Table 3. Boundary Analysis Summary: Alternative III/ Regulatory alternative D - Consumptive Recreation

Charter/Party Boat Operators

	Diving for Lobsters[2]		Fishing[2]		Spearfishing[2]		Total[2]		
Within FKNMS Boundary									
Person-Days	461	(31.97%)	200	(1.64%)	485	(30.91%)	1,146	(7.53%)	
Revenue	$ 31,732	(31.96%)	$ 24,691	(4.26%)	$ 66,816	(22.89%)	$ 123,239	(12.70%)	
Cost	$ 21,862	(31.98%)	$ 14,496	(3.07%)	$ 36,656	(24.52%)	$ 73,014	(10.59%)	
Profit	$ 9,870	(31.93%)	$ 10,195	(9.48%)	$ 30,160	(21.18%)	$ 50,225	(17.89%)	
Number of Firms	2	(100.00%)	8	(80.00%)	3	(100.00%)	9	(75.00%)	[1]
Consumer Surplus	$ 41,976	(31.99%)	$ 15,859	(1.59%)	$ 44,548	(30.93%)	$ 102,383	(8.05%)	
Outside FKNMS Boundary									
Person-Days	-	(0.00%)	297	(7.13%)	-	(0.00%)	297	(6.25%)	
Revenue	$ -	(0.00%)	$ 28,815	(10.77%)	$ -	(0.00%)	$ 28,815	(8.75%)	
Cost	$ -	(0.00%)	$ 23,254	(10.68%)	$ -	(0.00%)	$ 23,254	(9.14%)	
Profit	$ -	(0.00%)	$ 5,561	(11.17%)	$ -	(0.00%)	$ 5,561	(7.43%)	
Number of Firms	-	(0.00%)	2	(50.00%)	-	(0.00%)	2	(40.00%)	[1]
Consumer Surplus	$ -	(0.00%)	$ 23,570	(6.94%)	$ -	(0.00%)	$ 23,570	(5.99%)	
Total									
Person-Days	461	(26.65%)	497	(3.03%)	485	(25.91%)	1,443	(7.22%)	
Revenue	$ 31,732	(26.63%)	$ 53,506	(6.32%)	$ 66,816	(20.02%)	$ 152,054	(11.70%)	
Cost	$ 21,862	(26.64%)	$ 37,750	(5.48%)	$ 36,656	(21.26%)	$ 96,268	(10.20%)	
Profit	$ 9,870	(26.61%)	$ 15,756	(10.02%)	$ 30,160	(18.70%)	$ 55,786	(15.69%)	
Number of Firms	2	(100.00%)	8	(80.00%)	3	(100.00%)	9	(75.00%)	[1]
Consumer Surplus	$ 41,976	(26.66%)	$ 39,429	(2.95%)	$ 44,548	(25.92%)	$ 125,953	(7.56%)	
Private Boats[3]									
Person-Days	-	n/a	673	(100.00%)	-	n/a	673	(100.00%)	
Consumer's surplus	$ -	n/a	$ 53,392	(100.00%)	$ -	n/a	$ 53,392	(100.00%)	

1. Number of firms does not add up to the total because individual firms may engage in more than one activity.

2. Percent of TERSA (See Table 1) by activity and total in parentheses.

3. Private boat activity does not involve losses to commercial recreation operators, therefore the only impacts are in loss of person-days of activity and in consumer's surplus. Lacking any information with regard to the distribution of the activity, the assumption was made that all of the activity takes place within the boundary alternative.

Private boat usage does not impact commercial recreational fishing operations, therefore the only impacts are the loss of person days and the non-market value (consumer's surplus) of the activity. A total of 673 person days of private boat use takes place in the TERSA. This translates to a maximum potential loss of $53,392 in consumer's surplus.

Market Economic Values. Nine of the twelve charter boats operating within the TERSA would be potentially affected by this alternative. Direct business revenue would include potential losses of 26.6% for diving for lobsters, 20.0% for spearfishing, and 6.3% for fishing. Across all three consumptive recreational activities, 11.7% of revenue would be potentially affected (Table 3).

Through the ripple or multiplier effects, 16–17% of output/sales, income and employment associated with all the consumptive recreational activities in the TERSA could potentially be lost (Table 7). Although these costs could have an effect on the nine firms operating in the TERSA, the effect would not likely be noticed in the Monroe County economy because it would amount to only a fraction of a percent of the total economy supported by recreating visitors to the Florida Keys (Table 8).

Boundary Alternative IV

Non-Market Economic Values. This alternative would displace over 73% of the total person-days of diving for lobsters, just under 72% of the spearfishing, and over 6% of the fishing. Across all three consumptive recreational activities over 18% of the person-days would be displaced (Table 4). All the diving for lobsters and spearfishing activity displaced would be from within the FKNMS boundary. For fishing, 71% of the displaced activity would be from within the FKNMS boundary. Similarly to the other alternatives, consumer's surpluses mirror the patterns in displaced use because of the way in which they are calculated. Minor differences would be due to the distributions across activities by season. Again, profits are only equal to the effect on person-days for diving for lobsters. For spearfishing, the effects on profits is lower than the effect on person-days (56.2% versus 71.7%), while for fishing the effect is greater on profits than on person-days (17.6% versus 6.3%).

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Table 4. Boundary Analysis Summary: Alternative IV/ Regulatory alternative D - Consumptive Recreation

Charter/Party Boat Operators	Diving for Lobsters[2]		Fishing[2]		Spearfishing[2]		Total[2]		
Within FKNMS Boundary									
Person-Days	1,269	(88.00%)	736	(6.03%)	1,343	(85.60%)	3,348	(21.99%)	
Revenue	$ 87,361	(87.99%)	$ 60,261	(10.41%)	$ 196,944	(67.47%)	$ 344,566	(35.51%)	
Cost	$ 60,165	(88.00%)	$ 38,093	(8.08%)	$ 106,360	(71.14%)	$ 204,618	(29.67%)	
Profit	$ 27,196	(87.99%)	$ 22,168	(20.62%)	$ 90,584	(63.61%)	$ 139,948	(49.84%)	
Number of Firms	2	(100.00%)	8	(80.00%)	3	(100.00%)	10	(83.33%)	[1]
Consumer Surplus	$ 115,449	(87.98%)	$ 58,501	(5.87%)	$ 123,271	(85.58%)	$ 297,221	(23.37%)	
Outside FKNMS Boundary									
Person-Days	-	(0.00%)	297	(7.13%)	-	(0.00%)	297	(6.25%)	
Revenue	$ -	(0.00%)	$ 28,815	(10.77%)	$ -	(0.00%)	$ 28,815	(8.75%)	
Cost	$ -	(0.00%)	$ 23,254	(10.68%)	$ -	(0.00%)	$ 23,254	(9.14%)	
Profit	$ -	(0.00%)	$ 5,561	(11.17%)	$ -	(0.00%)	$ 5,561	(7.43%)	
Number of Firms	-	(0.00%)	2	(50.00%)	-	(0.00%)	2	(40.00%)	[1]
Consumer Surplus	$ -	(0.00%)	$ 23,570	(6.94%)	$ -	(0.00%)	$ 23,570	(5.99%)	
Total									
Person-Days	1,269	(73.35%)	1,033	(6.31%)	1,343	(71.74%)	3,645	(18.24%)	
Revenue	$ 87,361	(73.32%)	$ 89,076	(10.52%)	$ 196,944	(59.02%)	$ 373,381	(28.73%)	
Cost	$ 60,165	(73.33%)	$ 61,347	(8.90%)	$ 106,360	(61.68%)	$ 227,872	(24.14%)	
Profit	$ 27,196	(73.31%)	$ 27,729	(17.63%)	$ 90,584	(56.17%)	$ 145,509	(40.91%)	
Number of Firms	2	(100.00%)	8	(80.00%)	3	(100.00%)	10	(83.33%)	[1]
Consumer Surplus	$ 115,449	(73.33%)	$ 82,071	(6.14%)	$ 123,271	(71.73%)	$ 320,791	(19.26%)	
Private Boats[3]									
Person-Days	-	n/a	673	(100.00%)	-	n/a	673	(100.00%)	
Consumer's surplus	$ -	n/a	$ 53,392	(100.00%)	$ -	n/a	$ 53,392	(100.00%)	

1. Number of firms does not add up to the total because individual firms may engage in more than one activity.
2. Percent of TERSA (See Table 1) by activity and total in parentheses.
3. Private boat activity does not involve losses to commercial recreation operators, therefore the only impacts are in loss of person-days of activity and in consumer's surplus. Lacking any information with regard to the distribution of the activity, the assumption was made that all of the activity takes place within the boundary alternative.

Private boat usage does not impact commercial recreational fishing operations, therefore the only impacts are the loss of person days and the non-market value (consumer's surplus) of the activity. A total of 673 person days of private boat use takes place in the TERSA. This translates to a maximum potential loss of $53,392 in consumer's surplus.

Market Economic Values. Ten of the twelve charter boats operating within the TERSA would be potentially affected by this alternative. Direct business revenue would include potential losses of 73.4% for diving for lobsters, 59.0% for spearfishing, and 10.5% for fishing. Across all three consumptive recreational activities, 28.7% of revenue would be potentially affected (Table 4).

Through the ripple or multiplier effects, 38–39% of output/sales, income and employment associated with all the consumptive recreational activities in the TERSA could potentially be lost (Table 7). Although these impacts could have significant effect on the ten firms operating in the TERSA, the effect would not likely be noticed in the Monroe County economy because the effect would amount to only a fraction of a percent of the total economy supported by recreating visitors to the Florida Keys (Table 8).

Boundary Alternative V

Non-Market Economic Values. This alternative would displace over 86% of the total person-days of diving for lobsters, over 84% of the spearfishing, and over 7% of the fishing. Across all three consumptive recreational activities over 21% of the person-days would be displaced (Table 5). For diving for lobsters 85% of the displaced activity would be from within the FKNMS boundary, 59% of the fishing, and 85% of the spearfishing. Because of the way in which consumer's surpluses are calculated, they generally mirror the patterns in displaced use. Minor differences would be due to the distributions across activities by season. Profits are only equal to the affect on person-days for diving for lobsters. For spearfishing, the effects on profits are lower than the affect on person-days (65.5% versus 84.7%), while for fishing the affect is greater on profits than on person-days (21.9% versus 7.6%).

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Table 5. Boundary Analysis Summary: Alternative V/Regulatory alternative D - Consumptive Recreation

Charter/Party Boat Operators	Diving for Lobsters[2]		Fishing[2]		Spearfishing[2]		Total[2]		
Within FKNMS Boundary									
Person-Days		1,269	(88.00%)	736	(6.03%)	1,343	(85.60%)	3,348	(21.99%)
Revenue	$	87,361	(87.99%)	$ 60,261	(10.41%)	$ 196,944	(67.47%)	$ 344,566	(35.51%)
Cost	$	60,165	(88.00%)	$ 38,093	(8.08%)	$ 106,360	(71.14%)	$ 204,618	(29.67%)
Profit	$	27,196	(87.99%)	$ 22,168	(20.62%)	$ 90,584	(63.61%)	$ 139,948	(49.84%)
Number of Firms		2	(100.00%)	10	(100.00%)	3	(100.00%)	10	(83.33%) [1]
Consumer Surplus	$	115,449	(87.98%)	$ 58,501	(5.87%)	$ 123,271	(85.58%)	$ 297,221	(23.37%)
Outside FKNMS Boundary									
Person-Days		231	(80.21%)	511	(12.27%)	243	(80.20%)	985	(20.72%)
Revenue	$	15,894	(80.00%)	$ 48,832	(18.25%)	$ 33,436	(80.00%)	$ 98,162	(29.81%)
Cost	$	10,944	(80.00%)	$ 36,495	(16.76%)	$ 18,341	(80.00%)	$ 65,780	(25.86%)
Profit	$	4,950	(79.99%)	$ 12,337	(24.77%)	$ 15,095	(80.00%)	$ 32,382	(43.26%)
Number of Firms		2	(100.00%)	3	(75.00%)	2	(100.00%)	3	(60.00%) [1]
Consumer Surplus	$	20,992	(80.10%)	$ 40,617	(11.96%)	$ 22,277	(80.09%)	$ 83,886	(21.31%)
Total									
Person-Days		1,500	(86.71%)	1,247	(7.61%)	1,586	(84.72%)	4,333	(21.69%)
Revenue	$	103,255	(86.66%)	$ 109,093	(12.88%)	$ 230,380	(69.04%)	$ 442,728	(34.07%)
Cost	$	71,109	(86.66%)	$ 74,588	(10.82%)	$ 124,701	(72.32%)	$ 270,398	(28.65%)
Profit	$	32,146	(86.65%)	$ 34,505	(21.94%)	$ 105,679	(65.53%)	$ 172,330	(48.45%)
Number of Firms		2	(100.00%)	10	(100.00%)	3	(100.00%)	11	(91.67%) [1]
Consumer Surplus	$	136,441	(86.67%)	$ 99,118	(7.42%)	$ 145,548	(84.69%)	$ 381,108	(22.88%)
Private Boats[3]									
Person-Days		-	n/a	673	(100.00%)	-	n/a	673	(100.00%)
Consumer's surplus	$	-	n/a	$ 53,392	(100.00%)	$ -	n/a	$ 53,392	(100.00%)

1. Number of firms does not add up to the total because individual firms may engage in more than one activity.

2. Percent of TERSA (See Table 1) by activity and total in parentheses.

3. Private boat activity does not involve losses to commercial recreation operators, therefore the only impacts are in loss of person-days of activity and in consumer's surplus. Lacking any information with regard to the distribution of the activity, the assumption was made that all of the activity takes place within the boundary alternative.

Private boat usage does not impact commercial recreational fishing operations, therefore the only impacts are the loss of person days and the non-market value (consumer's surplus) of the activity. A total of 673 person days of private boat use takes place in the TERSA. This translates to a maximum potential loss of $53,392 in consumer's surplus.

Market Economic Values. Eleven of the twelve charter boats operating within the TERSA would be potentially affected by this alternative. Direct business revenue would include potential losses of 86.7% for diving for lobsters, 69.0% for spearfishing, and 12.9% for fishing. Across all three consumptive recreational activities, 34.1% of revenue would be potentially affected (Table 5).

Through the ripple or multiplier effects, 45% of output/sales, income and employment associated with all the consumptive recreational activities in the TERSA could potentially be lost (Table 7). Although these effects could have significant affect on the ten firms operating in the TERSA, the affect would not likely be noticed in the Monroe County economy because the affect would amount to only a fraction of a percent of the total economy supported by recreating visitors to the Florida Keys (Table 8).

Table 6. Calculation of Maximum Potential Market Economic Losses: Consumptive Recreation

	TERSA	Alternative II		III Preferred Alternative		Alternative IV		Alternative V	
Within FKNMS Boundary									
Revenue[1]	$ 970,323	$ 123,239	(12.70%)	$ 123,239	(12.70%)	$ 344,566	(35.51%)	$ 344,566	(35.51%)
Output/Sales[2,5]	$ 1,086,762	$ 138,028	(12.70%)	$ 138,028	(12.70%)	$ 385,914	(35.51%)	$ 385,914	(35.51%)
Income[3,5]	$ 413,217	$ 52,482	(12.70%)	$ 52,482	(12.70%)	$ 146,735	(35.51%)	$ 146,735	(35.51%)
Employment[4,5]	18	2	(12.70%)	2	(12.70%)	6	(35.51%)	6	(35.51%)
Outside FKNMS Boundary									
Revenue[1]	$ 329,260	$ -	(0.00%)	$ 28,815	(8.75%)	$ 28,815	(8.75%)	$ 98,162	(29.81%)
Output/Sales[2,5]	$ 368,771	$ -	(0.00%)	$ 32,273	(8.75%)	$ 32,273	(8.75%)	$ 109,941	(29.81%)
Income[3,5]	$ 140,217	$ -	(0.00%)	$ 12,271	(8.75%)	$ 12,271	(8.75%)	$ 41,803	(29.81%)
Employment[4,5]	6	0	(0.00%)	1	(8.75%)	1	(8.75%)	2	(29.81%)
Total									
Revenue[1]	$ 1,299,583	$ 123,239	(9.48%)	$ 152,054	(11.70%)	$ 373,381	(28.73%)	$ 442,728	(34.07%)
Output/Sales[2,5]	$ 1,455,533	$ 138,028	(9.48%)	$ 170,300	(11.70%)	$ 418,187	(28.73%)	$ 495,855	(34.07%)
Income[3,5]	$ 553,435	$ 52,482	(9.48%)	$ 64,753	(11.70%)	$ 159,006	(28.73%)	$ 188,538	(34.07%)
Employment[4,5]	24	2	(9.48%)	3	(11.70%)	7	(28.73%)	8	(34.07%)

1. Total Revenue from Tables 2-5.

2. Output is derived by multiplying Revenue by a multiplier of 1.12.

3. Income is calculated by dividing total output by the total output to total income ratio for Monroe County (2.63).

4. Employment is calculated by dividing total income by the total income to jobs ratio for Monroe County (23,160).

5. The multiplier, total output to total income ratio, and total income to jobs ratio are taken from English, et. al. 1996

Table 7. Summary of Maximum Total Potential Loss from Displacement: Summary: Consumptive Recreation

	TERSA	Alternative II		Alternative III Preferred Alternative[1]		Alternative IV		Alternative V	
Market Impacts									
Output/Sales	$ 1,455,533	$ 138,028	(9.48%)	$ 170,300	(11.70%)	$418,187	(28.73%)	$ 495,855	(34.07%)
Income	$ 553,435	$ 52,482	(9.48%)	$ 64,753	(11.70%)	$159,006	(28.73%)	$ 188,538	(34.07%)
Employment	24	2	(8.37%)	3	(12.55%)	7	(29.29%)	8	(33.48%)
Non-market Impacts									
Consumer's Surplus	$ 1,665,643	$ 102,965	(6.18%)	$ 127,029	(7.63%)	$320,791	(19.26%)	$ 381,108	(22.88%)
Producer's Surplus (profit)	$ 355,662	$ 50,225	(14.12%)	$ 55,786	(15.69%)	$145,509	(40.91%)	$ 172,330	(48.45%)

1. Percent of TERSA in parentheses.

Table 8. Comparison to the Economic Contribution of Visitors to Florida Keys to Monroe County

	Monroe County	Alternative II	III Preferred Alternative[1]	Alternative IV	Alternative V
Output/Sales	$1,548,762,097	0.009%	0.011%	0.027%	0.032%
Income	$ 573,566,049	0.009%	0.011%	0.028%	0.033%
Employment	18,892	0.011%	0.016%	0.037%	0.042%

1. For year June 1997 - May 1998. Represents total impact of spending by recreating visitors (non-residents of Monroe County) on economy of Monroe County. See Leeworthy and Vanasse, 1999.

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Addendum to Economic Impact Estimates Based on One Commentor's Revised Input

Economic Impact Estimates Based on Commentor's Revised Input. In the course of the public comment period, several pieces of correspondence were received from a charter spearfishing operator indicating information and data that differ from that which he provided to us during our initial interview with him conducted on December 10, 1998. The following are the impact estimates based on the revised information received. These estimates are based on the assumption of a constant rate of profit, where no revised profit is indicated and a constant relationship between revenue and person-days of activity. The first column is the company's revised estimates, the second is the revised estimates for Spearfishing and the third is the revised estimates for Total Consumptive Recreational Activities.

The revised estimates indicate maximum potential impact on spearfishing and total consumptive recreational use based on the commentor's revised estimates. These estimates were submitted after the analysis based upon the alternative boundaries, including the Preferred Alternative, was complete.

Data from original survey—Revised Assumption: All activity takes place within Preferred Boundary Alternative (based on comments received in June 2000).

	Commentor	Spearfishing total	Total consumptive
Revenue	$214,000	$245,142	$301,565
Profit	$124,000	$130,160	$150,225
Person-days of activity	1,650	1,860	3,194
Total Output/Sales Impact	$239,680	$274,519	$337,713
Total Income Impact	$91,133	$104,395	$128,423
Total Employment Impact	4	4	5
Consumer's Surplus	$151,465	$170,743	$284,812

Revised Assumption: Revenue $288,000, Profit $144,000 and all activity takes place within Preferred Boundary Alternative (based on comments submitted in June 2000).

	Commentor	Spearfishing total	Total consumptive
Revenue	$288,000	$319,142	$375,565
Profit	$144,000	$150,160	$170,225
Person-days of activity	2,221	2,431	3,765
Total Output/Sales Impact	$322,560	$357,399	$420,593
Total Income Impact	$122,646	$135,908	$159,936
Total Employment Impact	5	5	6
Consumer's Surplus	$203,841	$223,119	$337,188

Revised Assumption: Revenue $416,000 and all activity takes place within Preferred Boundary Alternative (based on comments submitted in June 2000).

	Commentor	Spearfishing total	Total consumptive
Revenue	$416,000	$447,142	$503,565
Profit	$241,047	$247,207	$267,272
Person-days of activity	3,207	3,417	4,751
Total Output/Sales Impact	$465,920	$500,759	$563,953
Total Income Impact	$177,156	$190,418	$214,446
Total Employment Impact	8	8	9
Consumer's Surplus	$294,437	$313,715	$427,784

Revised Assumption: Revenue $460,000 and all activity takes place within Preferred Boundary Alternative (based on comments submitted in May 2000).

	Commentor	Spearfishing total	Total consumptive
Revenue	$460,000	$491,142	$547,565
Profit	$266,542	$272,702	$292,767
Person-days of activity	3,547	3,757	5,091
Total Output/Sales Impact	$515,200	$550,039	$613,233
Total Income Impact	$195,894	$209,156	$233,184
Total Employment Impact	8	8	9
Consumer's Surplus	$325,579	$344,857	$458,926

Mitigating Factors—Are the Potential Losses Likely?

In the above GIS-based analysis, effects are referred to as ''potential losses.'' The reason is that there are several factors that could mitigate these potential losses and further there is a possibility that there might not be any losses at all. It is quite possible that there might be actual benefits to even the current displaced users. These factors are referred to only in qualitative terms because it is not possible to quantify them. Below two possible mitigating factors, how likely they might mitigate the potential losses from displacement, and further how this might differ for each of the three alternatives, are discussed.

Substitution. If displaced users are simply able to relocate their activities, they may be able to fully or partially mitigate their losses. This of course depends on the availability of substitute sites and further depends on the substitute site qualities. Several scenarios are possible. Even when total activity remains constant (i.e., person-days remain the same as they simply go to other sites), if the quality of the site is lower there could be some loss in consumer's surplus. If it costs more to get to the substitute sites, there could still be increases in costs and thus lower profits. If there is not a completely adequate supply of substitute sites, then there could be losses in total activity and in all the non-market and market economic measures referenced in our above analysis of displaced use. The possibilities for substitution vary by alternative.

Long-term benefits from Replenishment Effects. Ecological reserves or marine reserves may have beneficial effects beyond the direct ecological protection for the sites themselves. That is, both the size and number of fish, lobster and other invertebrates both inside and outside the reserves may increase. The following quote from Davis (1998) summarizes the replenishment effect of reserves:

> [W]e found 31 studies that tested whether protected areas had an effect on the size, reproductive output, diversity, and recruitment of fish in adjacent areas. Fisheries targeted species were two to 25 times more abundant in no-take areas than in surrounding areas for fish, crustaceans, and mollusks on coral and temperate reefs in Australia, New Zealand, the Philippines, Japan, Kenya, South Africa, the Mediterranean Sea, Venezuela, Chile, and the United States (California, Florida and Rhode Island). Mean sizes of fished species protected in no-take zones were 12 to 200 percent larger than those in surrounding areas for all fishes studied and in 75 to 78 percent of the invertebrates. Eighty-six percent of the studies that tested fishery yields found that catches within three kilometers of the marine protected areas were 46 to 50 percent higher than before no-take zones were created. It is clear that fishers all over the world believe no-take zones increase yields because they fish as close to the boundaries as possible.

The long-term benefits from the reserve could offset any losses from displacement and may also result in long-term benefits and no costs to recreational users that are displaced by the proposed Tortugas Ecological Reserve. Again, this conclusion may still vary by alternative.

Boundary Alternative II

Substitution. Complete mitigation by substituting to alternative sites has a high probability for this alternative because over half of the Tortugas Bank would still be available for all consumptive recreation activities. Given the equal distribution of use for diving for lobsters and spearfishing on the Tortugas Bank, it is not likely that increased costs of relocation would occur or that there would be losses from users forced to go to sites of lower quality. Crowding effects, by pushing all the use currently spread over the whole Tortugas Bank onto half the bank, would also be unlikely given the small absolute amounts of activity. For fishing, only 1% of the activity would be displaced, so for this activity it would also be expected there would be no crowding effects and recreational fishermen would not likely suffer any losses.

Long-term Benefits from Replenishment Effects. Eight fish spawning areas have been identified in the western portion of the TERSA. One of these spawning areas is in the Alternative II boundary area. Alternative II is the portion of the Preferred Alternative that lies within the existing boundary of the Sanctuary. Therefore the long-term benefits to stocks derived from the portion of the Preferred Alternative that lies outside of the FKNMS boundary would not be realized. This alternative has the smallest area of those analyzed here and so the potential long-term benefits to stocks outside the protected area would be smaller than the other alternatives. But by the same token, the displaced activity to be mitigated is also much smaller and thus on net there is a high likelihood that there would be long-term benefits to all the consumptive recreational users in the TERSA.

Boundary Alternative III (Preferred Boundary Alternative)

Substitution. As with Alternative II, complete mitigation by substituting to alternative sites has a high probability for this alternative because of the small proportion of the Tortugas Bank included in the alternative. Given the equal distribution of use for diving for lobsters and spearfishing on the Tortugas Bank, it is not likely that increased costs of relocation would occur or that there would be losses from users forced to go to sites of lower quality. Crowding effects, again, would be unlikely given the small absolute amounts of activity. For fishing, only 3% of the activity would be displaced, so recreational fishermen would not likely suffer any losses.

Long-term Benefits from Replenishment Effects. Five of the eight fish spawning sites in the western portion of the TERSA are located within the boundary of this alternative. Because this alternative includes areas outside the Sanctuary, the potential long-term benefits to stocks outside the protected area would be comparatively larger than it would be for Alternative II. The mitigating effort required on the part of operators in the boundary alternative would also be comparatively larger, but as mentioned above, because of the small percentage of the active recreational area included in the

alternative, the effect is likely to be very small. Therefore, there is a high likelihood that there would be long-term benefits to all the consumptive recreational users in the TERSA.

Boundary Alternative IV

Substitution. Under this alternative, about 73% of the diving for lobsters and 72% of the spearfishing would be displaced. The potential for substituting to other sites is greatly reduced as compared with Alternatives II and III. The reason is that under this alternative all of the Tortugas Bank falls within this boundary alternative. Some substitution is possible, but the probability of crowding effects rises considerably for diving for lobsters and spearfishing.

For fishing, substitution mitigating all the losses is still highly probable since only about 6% of the fishing activity would be displaced. This represents a relatively low amount of activity and given the wide distribution of this activity in the study area, crowding effects are still a low probability under this alternative.

Long-term Benefits from Replenishment Effects. Seven of the eight fish spawning sites in the western portion of the TERSA are located within the boundary of this alternative. For diving for lobsters and spearfishing, it is not clear whether there would be significant benefits offsite given that most of this activity currently takes place on the Tortugas Bank and none of the bank is available for the activity. Not much is currently known about other areas which might benefit from the stock effect and where they could relocate to reap these benefits. Whether those doing the activities displaced could find alternative sites where both the quantity and quality of activity could be maintained or enhanced seems less likely given the extent of displacement.

For fishing, however, the small amount of displacement relative to the entire area plus the wider distribution of fishing activity still makes it highly likely that the long-term benefits of replenishment would more than offset the potential losses from displacement resulting in net benefits to this group.

Boundary Alternative V

Substitution. This alternative displaces about 87% of the diving for lobsters and 85% of the spearfishing. Substitution possibilities for these activities are reduced even more, meaning that losses given in Table 7 are more likely to actually occur.

For fishing, mitigating all the losses through substitution is still highly probable since only about 8% of the fishing activity would be displaced. This again, represents a relatively low amount of activity and given the wide distribution of this activity in the study area, crowding effects are still a low probability under this alternative.

Long-term Benefits from Stock Effects. Seven of the eight fish spawning sites identified in the western portion of the TERSA are located within the boundary of this alternative. However, because the entire Tortugas Bank would be closed to diving for lobsters and spearfishing and the additionally large area encompassed by the proposed reserve, it is highly unlikely that these two user groups would benefit from the enhanced stocks of lobster and fish. Therefore, under this alternative, the maximum potential losses listed in Table 7 are highly likely to occur.

For fishing, however, the stock effects for the reserve could be substantial. Whether the benefits would be large enough to offset the displacement cannot immediately be determined. But given the past experience with reserves, it is still somewhat likely that the long-term benefits would offset the displacement costs yielding net benefits.

Benefits of the Tortugas Ecological Reserve to Recreational Users

Recreational Users on Entire Florida Keys Reef Tract. The possibility that consumptive recreational users could possibly benefit if there were long-term offsite impacts was discussed above. Given the work by Ault et al. (1998), Bohnsack and Ault (1996), Bohnsack and McClellan (1998), and Lee et al. (1994 and 1999), there is also the possibility that a protected area in the Tortugas could yield beneficial stock effects to a wide variety of species all along the entire Florida Keys reef tract and to species such as sailfish that are primarily offshore species. Even small increases in recreational tourist activities along the entire Florida Keys reef tract could more than offset the total displacements from the most extreme alternative analyzed here. Table 8 shows the total effects for each alternative relative to the total Florida Keys recreational visitor economic contribution. They are only fractions of a percent of the total recreational visitor economic contribution. One-tenth of one percent increase in the total recreational visitor contribution along the entire Florida Keys reef tract would more than offset the maximum potential losses from Alternative V (Table 7).

Non-consumptive Users (Divers) in Tortugas. Currently there is one operator that brings divers to the TERSA for non-consumptive diving. There were 1,048 person-days of non-consumptive diving which account for 4.98% of the total recreational activity in the TERSA (excluding the National Park). Of the total non-consumptive diving, 83.3% is currently done within the FKNMS boundary. Table 9 summarizes the information for non-consumptive divers. It is expected that this group would be benefited by Tortugas North. As the site improves in quality, it is expected that the demand for this site would increase and person-days, consumer's surplus, business revenues and profits would all increase. This would be expected to vary by alternative with the more protective alternatives having greater benefits.

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Table 9. Non-consumptive Diving

	TERSA	Alternative II		III Preferred Alternative		Alternative IV		Alternative V	
Within FKNMS Boundary									
Person-Days	873	279	(31.96%)	279	(31.96%)	768	(87.97%)	768	(87.97%)
Revenue	$ 95,123	$ 30,439	(32.00%)	$ 30,439	(32.00%)	$ 83,708	(88.00%)	$ 83,708	(88.00%)
Cost	$ 58,157	$ 18,610	(32.00%)	$ 18,610	(32.00%)	$ 51,178	(88.00%)	$ 51,178	(88.00%)
Profit	$ 36,966	$ 11,829	(32.00%)	$ 11,829	(32.00%)	$ 32,530	(88.00%)	$ 32,530	(88.00%)
Number of Firms	1	1	(100.00%)	1	(100.00%)	1	(100.00%)	1	(100.00%)
Consumer Surplus	$ 77,198	$ 24,710	(32.01%)	$ 24,710	(32.01%)	$ 67,954	(88.03%)	$ 67,954	(88.03%)
Outside FKNMS Boundary									
Person-Days	175	-	(0.00%)	-	(0.00%)	-	(0.00%)	140	(80.00%)
Revenue	$ 19,025	$ -	(0.00%)	$ -	(0.00%)	$ -	(0.00%)	$ 15,220	(80.00%)
Cost	$ 11,631	$ -	(0.00%)	$ -	(0.00%)	$ -	(0.00%)	$ 9,305	(80.00%)
Profit	$ 7,393	$ -	(0.00%)	$ -	(0.00%)	$ -	(0.00%)	$ 5,915	(80.01%)
Number of Firms	1	-	(0.00%)	-	(0.00%)	-	(0.00%)	1	(100.00%)
Consumer Surplus	$ 15,475	$ -	(0.00%)	$ -	(0.00%)	$ -	(0.00%)	$ 12,355	(79.84%)
Total									
Person-Days	1,048	279	(26.62%)	279	(26.62%)	768	(73.28%)	908	(86.64%)
Revenue	$ 114,148	$ 30,439	(26.67%)	$ 30,439	(26.67%)	$ 83,708	(73.33%)	$ 98,928	(86.67%)
Cost	$ 69,788	$ 18,610	(26.67%)	$ 18,610	(26.67%)	$ 51,178	(73.33%)	$ 60,483	(86.67%)
Profit	$ 44,359	$ 11,829	(26.67%)	$ 11,829	(26.67%)	$ 32,530	(73.33%)	$ 38,445	(86.67%)
Number of Firms	1	1	(100.00%)	1	(100.00%)	1	(100.00%)	1	(100.00%)
Consumer Surplus	$ 92,673	$ 24,710	(26.66%)	$ 24,710	(26.66%)	$ 67,954	(73.33%)	$ 80,309	(86.66%)

Commercial Fishery

Boundary Analysis

Boundary Analysis Methodology. In performing the boundary analysis, for the each alternative, the impact estimates are broken out by ''within the FKNMS boundary'' and ''outside the FKNMS boundary.''

Commercial fishing is prohibited in the DRTO so these grid cells are ''true'' zeroes in the analysis. Before breaking out the impact, the status of each grid cell (i.e., inside or outside of the boundary) had to be determined. Two methods were considered to carry out this task: the ''centroid method'' and the ''intersection method.'' The centroid method characterizes a grid cell as within a boundary if the center point of the cell is within the boundary. The intersection method characterizes a grid cell as within a boundary if any part of the cell is intersected by the boundary. The centroid method was selected because it was more consistent with how the data were collected (i.e., 1 nm^2 grid cells was the finest resolution).

The estimates from the geographic information system (GIS) analysis for the different boundary alternatives are the sum of each measurement within the boundary for each alternative. The estimates therefore represent the maximum total potential loss from displacement of the commercial fishing activities. This analysis ignores possible mitigating factors and the possibility of net benefits that might be derived if the proposed ecological reserve has replenishment effect. Although the extent of the mitigating factors or the potential benefits from replenishment cannot be quantified, these as well as other potential benefits of the proposed ecological reserve are discussed after presenting and discussing the maximum potential losses from displacement of the current commercial fisheries.

The boundary analysis is driven by the catch summed across grid cells within each boundary alternative. The set of relationships, measures and methods described in Leeworthy and Wiley (1999) are then used to translate catch into estimates of market and non-market economic values potentially affected. These estimates are broken-down by area both inside and outside FKNMS boundary and are done by species. Table 10 shows the results for catch for each alternative. Catch for the total TERSA is also presented to allow assessment of the proportion of the TERSA fishery potentially affected by each alternative.

Table 10. TERSA Catch Potentially Lost from Displacement, 1997

Alternative/Area	Species/Species Group (Pounds)/Percent							
	King Mackerel		Lobster		Reef Fish		Shrimp	
TERSA	**96,346**		**937,952**		**574,642**		**715,500**	
Inside FKNMS	77,285	(80.22%)	568,399	(60.60%)	293,374	(51.05%)	183,262	(25.61%)
Outside FKNMS	19,061	(19.78%)	369,553	(39.40%)	281,268	(48.95%)	532,238	(74.39%)
Alternative II	**4,057**		**56,625**		**74,494**		**7,940**	
Inside FKNMS	4,057	(100.00%)	56,625	(100.00%)	74,494	(100.00%)	7,940	(100.00%)
Outside FKNMS	-	(0.00%)	-	(0.00%)	-	(0.00%)	-	(0.00%)
Preferred Alternative	**13,489**		**108,639**		**116,642**		**58,374**	
Inside FKNMS	4,057	(30.08%)	56,802	(52.29%)	74,494	(63.87%)	7,940	(13.60%)
Outside FKNMS	9,432	(69.92%)	51,837	(47.71%)	42,148	(36.13%)	50,434	(86.40%)
Alternative IV	**14,999**		**153,778**		**161,997**		**58,374**	
Inside FKNMS	5,568	(37.12%)	101,940	(66.29%)	119,849	(73.98%)	7,940	(13.60%)
Outside FKNMS	9,431	(62.88%)	51,838	(33.71%)	42,148	(26.02%)	50,434	(86.40%)
Alternative V	**14,999**		**164,908**		**169,907**		**73,427**	
Inside FKNMS	5,568	(37.12%)	101,940	(61.82%)	119,849	(70.54%)	7,940	(10.81%)
Outside FKNMS	9,431	(62.88%)	62,968	(38.18%)	50,058	(29.46%)	65,487	(89.19%)

1. Percents of catch inside and outside FKNMS in parentheses.

The boundary alternatives are ordered according to size and potential impact. Alternative I is the ''No Action'' alternative and is the least protective alternative. Alternative III is the ''Preferred Alternative''. Alternatives IV and V are the largest and ''most protective'' alternatives. For catch, generally the higher the alternative number the greater the potential affect on catch, except for King mackerel and shrimp. Potential affect on King mackerel catch is the same for both alternatives IV and V and, the potential affect on shrimp catch is the same for the Preferred Alternative (III) and alternative IV.

Both the market and non-market economic values potentially lost from displacement for each alternative, except the ''No-action'' Alternative (Boundary Alternative I), are summarized in Leeworthy and Wiley (2000), includes greater detail by species/species groups, and for the market economic values, separate estimates for Monroe and Collier/Lee counties. Although the impacts on only Monroe and Collier/Lee counties are presented, the catch impacted that is landed in other counties is included in the analyses. The result is that the impacts in Monroe and Collier/Lee Counties are slightly overstated. However, in the boundary alternative analyses only a small amount of catch is landed in other counties and the amounts are insignificant.

Table 11. Maximum Potential Losses to the Commercial Fisheries from Displacement

Area/Measure	Total TERSA	Alternatives: Alternative II	Preferred Alternative	Alternative IV	Alternative V
Total TERSA					
Market[1]					
Harvest Revenue	$ 6,884,992	$ 411,632	$ 843,583	$ 1,126,237	$ 1,224,849
Total Output	$ 14,957,717	$ 865,819	$ 1,817,843	$ 2,400,730	$ 2,621,627
Total Income	$ 9,273,785	$ 536,808	$ 1,127,063	$ 1,488,453	$ 1,625,409
Total Employment	404	23	49	65	71
Non-market					
Consumer's Surplus [2]	$ 7,537,781	$ 473,097	$ 879,973	$ 1,103,808	$ 1,239,587
Producer's Surplus [3]	$ -	$ -	$ -	$ -	$ -
Return to Labor & Capital [4]	$ 1,926,162	$ 106,789	$ 221,968	$ 300,599	$ 326,880
Inside FKNMS					
Market					
Harvest Revenue	$ 3,476,456	$ 411,632	$ 411,632	$ 694,284	$ 694,284
Total Output	$ 7,292,387	$ 865,819	$ 865,819	$ 1,448,700	$ 1,448,700
Total Income	$ 4,521,280	$ 536,808	$ 536,808	$ 898,194	$ 898,194
Total Employment	197	23	23	39	39
Non-market					
Consumer's Surplus	$ 3,890,933	$ 473,097	$ 473,097	$ 696,932	$ 696,932
Producer's Surplus	$ -	$ -	$ -	$ -	$ -
Return to Labor & Capital	$ 1,029,118	$ 106,789	$ 106,789	$ 185,420	$ 185,420
Outside FKNMS					
Market					
Harvest Revenue	$ 3,408,536	$ -	$ 431,951	$ 431,953	$ 530,565
Total Output	$ 7,665,330	$ -	$ 952,024	$ 952,030	$ 1,172,927
Total Income	$ 4,752,505	$ -	$ 590,255	$ 590,259	$ 727,215
Total Employment	207	-	26	26	32
Non-market					
Consumer's Surplus	$ 3,646,848	$ -	$ 406,876	$ 406,876	$ 542,655
Producer's Surplus	$ -	$ -	$ -	$ -	$ -
Return to Labor & Capital	$ 897,044	$ -	$ 115,179	$ 115,179	$ 141,460

1. Market economic measures include impacts on Monroe County and Collier/Lee counties. See Appendix A, Tables A.6 – A.11 in Leeworthy and Wiley (1999) for details by species and counties.
2. Maximum values from each species were used when range of estimates was generated multiple demand equations. See Appendix B in Leeworthy and Wiley (1999) for detailed calculations by species and alternatives.
3. Producer's surplus or economic rents were assumed to be zero for two reasons. First, all fisheries, except spiny lobsters, are open access fisheries and therefore economic would be zero i.e., firms are earning only normal rates of return on investment. Second, even using total return to labor & capital, which overstates return on investment, does not yield rates of return on investment above normal rates of return.
4. Return to Labor & Capital is not a non-market value but would include rent if it existed.

Boundary Alternative I: No Action

The no-action alternative is not establishing a reserve and not issuing the implementing regulations. The costs of imposing the no-take regulations, for any given alternative with no-take regulations, would be the benefits of the no-action alternative. That is, by not adopting the no-take regulations, the costs are avoided. Similarly, any benefits from imposing the no-take regulations, for any given alternative with no-take regulations, would be the costs of the no-action alternative. That is, by not adopting the no-take regulations, the costs are the benefits lost by not adopting the no-take regulations. Said another way, the costs are the opportunities lost. The impacts of the no-action alternative can only be understood by comparing it to one of

the alternatives. Thus the effects of the no action alternative can be obtained by reading the effects from any of the proposed alternatives in reverse.

Boundary Alternative II

Market Economic Values. This alternative could potentially affect 4.2% of the catch of King mackerel, 6% of the lobster catch, 12.96% of the Reef Fish catch, and 1% of the shrimp catch in the TERSA. This would lead to a reduction in about $411 thousand in harvest revenue or 6% of the TERSA harvest revenue. This reduction in revenue would result in a reduction of 5.8% of total output, income and employment generated by the TERSA fishery. Since this alternative was restricted to reside within FKNMS current boundary, the effects are all inside FKNMS boundary. Although these effects may be significant to those firms that might potentially be affected, the overall affect on the local economies would be so small they would not be noticed. Harvest revenue potentially impacted was only 0.67% of all harvest revenue of catch landed in Monroe County. In addition, this lost revenue would translate (accounting for the multiplier effects) into only fractions of a percent of the total Monroe County economy; 0.035% of total output, 0.046% of total income and 0.045% of total employment.

Non-market Economic Values. For all species/species groups, this alternative could result in a potential loss of over $473 thousand in consumer's surplus. This is 6.28% of the consumer's surplus generated by the entire TERSA. Although producer's surplus or economic rents are estimated to be zero, about 5.54% of the return to labor and capital of the TERSA fishery is potentially affected by this alternative.

Boundary Alternative III (Preferred Boundary Alternative)

Market Economic Values. This alternative could potentially affect 14% of the catch of King mackerel, 11.58% of the lobster catch, 20.30% of the Reef Fish catch, and 8.16% of the shrimp catch in the TERSA. This would lead to a reduction in about $844,000 in harvest revenue or 12.26% of the TERSA harvest revenue. This reduction in revenue would result in a reduction of 12.16% of total output, income and employment generated by the TERSA fishery. The impacts are split almost evenly between the areas inside and outside the FKNMS boundary. Although these costs may be significant to those firms that might potentially be affected, the overall affect on the local economies would be so small they would not be noticed. Harvest revenue potentially affected was only 1.16% of all harvest revenue of catch landed in Monroe County. In addition, this lost revenue would translate (accounting for the multiplier effects) into only fractions of a percent of the total Monroe County economy; 0.0596% of total output, 0.0779% of total income and 0.0785% of total employment.

Non-market Economic Values. For all species/species groups, this alternative could result in a potential loss of about $880,000 in consumer's surplus. This was 11.7% of the consumer's surplus generated by the entire TERSA. Whereas the market economic values were almost evenly split inside and outside the FKNMS, 53.76% of the consumer's surplus potentially affected is from inside the FKNMS boundary. This is due to the distributions of lobster and reef fish catch where a higher proportion of the potentially affected catch come from inside the FKNMS boundary, whereas the distributions of shrimp and King mackerel come largely from outside the FKNMS boundary.

Although producer's surplus or economic rents are estimated to be zero, about 11.5% of the return to labor and capital of the TERSA fishery is potentially affected by this alternative. The distribution inside versus outside the FKNMS boundary follows that of the market economic values with 48% from catch inside the FKNMS boundary.

Boundary Alternative IV

Market Economic Values. This alternative could potentially affect 15.57% of the catch of King mackerel, 16.4% of the lobster catch, 28.19% of the Reef Fish catch, and 8.16% of the shrimp catch in the TERSA. This would lead to a reduction in about $1.126 million in harvest revenue or 16.45% of the TERSA harvest revenue. This reduction in revenue would result in a reduction of 16.05% of total output, income and employment generated by the TERSA fishery. About 61.65% of the harvest revenue and 60.34% of the output, income and employment impacts would come from catch displaced from within FKNMS boundary. Although the costs may be significant to those firms that might potentially be affected, the overall impact on the local economies would be so small they would not be noticed. Harvest revenue potentially affected was only 1.82% of all harvest revenue of catch landed in Monroe County. In addition, this lost revenue would translate (accounting for the multiplier effects) into only fractions of a percent of the total Monroe County economy; 0.0968% of total output, 0.127% of total income and 0.1281% of total employment.

Non-market Economic Values. For all species/species groups, this alternative could result in a potential loss of about $1.1 million in consumer's surplus. This is 14.64% of the consumer's surplus generated by the entire TERSA. Approximately 63.14% of the consumer's surplus potentially affected is from catch from inside the FKNMS boundary. This is due to the distributions of lobster and reef fish catch where a higher proportion of the potentially affected catch come from inside the FKNMS boundary, whereas the distributions of shrimp and King mackerel come largely from outside the FKNMS boundary.

Although producer's surplus or economic rents are estimated to be zero, about 15.6% of the return to labor and capital of the TERSA fishery is potentially affected by this alternative. The distribution inside versus outside the FKNMS boundary follows that of the market economic values with 61.68% from catch inside the FKNMS.

Boundary Alternative V

Market Economic Values. This alternative could potentially affect 15.57% of the catch of King mackerel, 17.58% of the lobster catch, 29.57% of the Reef Fish catch, and 10.26% of the shrimp catch in the TERSA. This would lead to a reduction in about $1.224 million in harvest revenue or 17.89% of the TERSA harvest revenue. This reduction in revenue would result in a reduction of 17.5% of total output, income and employment generated by the TERSA fishery. About 56.68% of the harvest revenue and 55.26% of the output, income and employment impacts would come from catch displaced from within the FKNMS boundary. Although the costs may be significant to those firms that might potentially be affected, the overall impact on the local economies would be so small they would not be noticed. Harvest revenue potentially affected was only 1.98% of all harvest revenue of catch landed in Monroe County. In addition, this lost revenue would translate (accounting for the multiplier effects) into only fractions of a percent of the total Monroe County economy; 0.106% of total output, 0.138% of total income and 0.1399% of total employment.

Non-market Economic Values. For all species/species groups, this alternative could result in a potential loss of about $1.24 million in consumer's surplus. This was 16.4% of the consumer's surplus generated by the entire TERSA. 56.2% of the consumer's surplus

potentially affected is from catch from inside the FKNMS boundary. This is due to the distributions of lobster and reef fish catch where a higher proportion of the potentially affected catch come from inside the FKNMS boundary, whereas the distributions of shrimp and King mackerel come largely from outside the FKNMS boundary.

Although producer's surplus or economic rents are estimated to be zero, about 16.97% of the return to labor and capital of the TERSA fishery is potentially affected by this alternative. The distribution inside versus outside the FKNMS boundary follows that of the market economic values with 56.7% from catch inside the FKNMS boundary.

Profiles of Fishermen Potentially Affected

A profile of the approximately 110 fishermen using TERSA based on a sample of 90 was completed with a comparison with other commercial fishermen in Monroe County. The profiles of those potentially affected by each alternative were compared. The profiles are summarized in Table 12. Statistical tests were performed comparing the sample distributions for the groups that fished within each boundary alternative as compared with TERSA fishermen as a whole. Except for the number of fishing operations potentially affected, the only significant differences for all alternatives were in membership in organizations and in fish house usage.

Fishermen potentially affected by Boundary Alternative II were the only group that was significantly different for any other characteristics listed in Table 12. These fishermen had less experience fishing in Monroe County than the general TERSA fishermen, however they were not significantly different with respect to years fishing in the TERSA. Fishermen potentially affected by Boundary Alternative II also earned a significantly lower proportion of their income from fishing than the general TERSA fishermen; however, they earned a significantly higher proportion of their income from fishing within the TERSA than the general TERSA fishermen.

Fishermen potentially affected by Boundary Alternative II were also significantly different from the general TERSA fishermen in the distribution of their primary hauling port. A significantly higher proportion of those potentially affected by this alternative used Key West/Stock Island and Tavenier than the general TERSA fishermen, and they used Big Pine Key, Marathon and Naples/Ft. Myers significantly less than the general TERSA fishermen.

Fifty-one (51) or 57% of the sampled fishing operations could be potentially affected by Boundary Alternative II followed by 64 operations or 71% for Alternative III, and 65 operations or 72% for both Alternatives IV and V. Twenty-four (24) of the 28 or 86% of all the lobster operations could be potentially affected by Boundary Alternative II, while 27 of the 28 lobster operations or 96% are potentially affected by Boundary Alternatives III, IV, and V. Six (6) of the 18 or 33.3% of the shrimp operations are potentially affected by Alternative II, while Alternative III could potentially affect 15 of 18 or 83% of the shrimp operations. Boundary Alternatives IV and V could potentially affect 14 of the 18 or 78% of the shrimp operations. Fifteen (15) of the 16 King mackerel operations could be potentially affected by Boundary Alternative II, while Boundary Alternatives III, IV and V could potentially affect all 16 of the King mackerel operations. Thirty-seven (37) of the 42 or 88% of the reef fish operations could be potentially affected by Alternative II, while 40 or 95% of the reef fish fishing operations could be potentially affected by Alternative III. Boundary Alternatives IV and V could potentially affect all 42 reef fish operations.

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Table 12. Profile of TERSA Fishermen Compared to Other Keys Fishermen

	TERSA (%)	Alternative II	Preferred Alternative	Alternative IV	Alternative V
			Age		
18-30	13.3	19.6	15.6	15.4	15.4
31-40	18.9	19.6	18.8	20.0	20.0
41-50	36.7	29.4	34.4	33.8	33.8
51-60	20.0	21.6	21.9	21.5	21.5
Over 60	11.1	9.8	9.4	9.2	9.2
			Years of Fishing in Monroe		
Less than one year	1.1	**2.0**	1.6	1.5	1.5
1-5 years	6.7	**9.8**	7.8	7.7	7.7
6-10 years	12.4	**13.7**	12.5	12.3	12.3
11-20 years	16.9	**19.6**	17.2	18.5	18.5
21 or more years	62.9	**54.9**	60.9	60.0	60.0
			Years of Fishing in TERSA		
1-5 years	10.1	9.8	10.9	10.8	10.8
6-10 years	25.8	25.5	20.3	21.5	21.5
11-20 years	16.9	17.6	17.2	18.5	18.5
21 or more years	47.2	47.1	51.6	49.2	49.2
			Race/Ethnicity		
Anglo-American	76.7	74.5	78.1	78.5	78.5
Hispanic	21.1	25.5	20.3	20.0	20.0
African-American	2.2	0.0	1.6	1.5	1.5
			Membership in Organizations		
Conch Coalition	7.0	**3.9**	**3.1**	**3.1**	**3.1**
OFF	12.0	**9.8**	**7.8**	**7.7**	**7.7**
MCCF	38.0	**23.5**	**21.9**	**21.5**	**21.5**
Environmental	2.0	**3.9**	**4.7**	**4.6**	**4.6**
Chambers of Commerce	303.0	**2.0**	**4.7**	**4.6**	**4.6**

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Table 12. (Continued)

	TERSA (%)	Alternative II	Preferred Alternative	Alternative IV	Alternative V
			Occupation		
Full-time Commercial Fishing	87.8	84.3	85.9	86.2	86.2
Part-time Commercial Fishing	1.1	2.0	1.6	1.5	1.5
Charter Boat (sell some catch)	11.1	13.7	12.5	12.3	12.3
			Income		
Percent Income from Fishing	89.1	**84.3**	87.3	87.5	87.5
Percent Income from Fishing in TERSA	44.7	**51.2**	46.8	45.9	45.9
			Family Members Supported		
1 (Myself)	19.3	17.0	15.5	16.9	16.9
2	28.9	27.7	29.3	27.1	27.1
3	22.9	29.8	27.6	28.8	28.8
4 or more	28.9	25.5	27.6	27.2	27.2
			Primary Hauling Port		
Key West/Stock Island	74.4	**82.4**	75.0	72.3	72.3
Big Pine Key	4.4	**3.9**	4.7	4.6	4.6
Marathon	3.3	**0.0**	0.0	1.5	1.5
Tavernier	2.2	**3.9**	3.1	3.1	3.1
Naples/Ft. Myers	15.6	**9.8**	17.2	18.5	18.5
Fish House Usage (% Yes)	41.1	**35.3**	**35.9**	**36.9**	**36.9**
Number in Sample	90	51	64	65	65
Lobster Operations	28	24	27	27	27
Shrimp Operations	18	6	15	14	14
King Mackerel Operations	16	15	16	16	16
Reef Fish Operations	42	37	40	42	42

1. Numbers in bold identify statistically significant differences compared to total

Kolgromov-Smirnoff two-sample test at 5 percent level of significance.

Other Potential Costs and Mitigating Factors—Are the Potential Losses Likely?

In the above GIS-based analysis, the effects are referred to as ''potential losses'' or ''maximum potential losses''. There is the possibility that there could be an additional cost not discussed but which cannot be quantified, that is, crowding and the resulting conflicts among users forced to compete in a smaller area. There are also several factors that could mitigate all the potential losses and further there is a possibility that there might not be any losses at all. It is quite possible that there might be actual net benefits to even the current displaced users. Below the issue of crowding costs and the mitigating factors and potential for beneficial outcomes are discussed in qualitative terms because it is not possible for us to quantify them. Two mitigating factors, how likely they might mitigate the potential losses from displacement, and how this might differ for each of the alternatives are discussed.

Crowding. As shown above, each of the alternatives would result in a certain amount of displacement. Displacement of commercial fishing activity is a certainty under all boundary alternatives, except Alternative I, the No-action Alternative. If this displacement results in the activity being transferred to other sites, there is a potential for crowding effects. Crowding effects could raise the costs of fishing, both private costs to each fishing operation and social costs in resolving conflicts.

Crowding conflicts were one of the issues mentioned when the State of Florida created the lobster trap certificate program which was designed to reduce the number of lobster traps. If fishing stocks outside the protected area are already fished to their limits (i.e., limits of sustainable harvests), then displacement could also lead to adverse stock effects and a lower level of catch from all commercial fisheries. Crowding effects would represent a potential cost not accounted for in our above GIS-based analysis and the potential for the existence of crowding effects would vary by alternative. Whether crowding effects are experienced would depend on the status of the fisheries outside the proposed protected area, the extent of displacement, the current knowledge and fishing patterns of the displaced fishermen, and other potential regulations. The trap reduction program is an example where crowding effects could be mitigated by making room for the displaced traps.

Relocation. If displaced commercial fishermen are simply able to relocate their fishing effort and they are able to partially or completely replace their lost catch by fishing elsewhere, then there might be less or no effect. However, the possibility exists that displacement, even if it does not result in lower overall catch, may result in higher costs. This would result in lower profits to fishing operations. Whether fishermen are able to relocate to other fishing sites and replace lost catch or avoid cost increases would depend, like with the issue of crowding, on the status of the fisheries outside the proposed protected area, the extent of the displacement, the current knowledge and fishing patterns of the displaced fishermen, and other potential regulations.

Long-term benefits from Replenishment Effects. Ecological reserves or marine reserves may have beneficial effects beyond the direct ecological protection from the sites themselves. That is, both the size and number of fish, lobster, and other invertebrates both inside and outside the reserves may increase i.e., the replenishment effect. The following quote from Davis 1998 summarizes the replenishment effect of reserves:

> [W]e found 31 studies that tested whether protected areas had an effect on the size, reproductive output, diversity, and recruitment of fish in adjacent areas. Fisheries targeted species were two to 25 times more abundant in no-take areas than in surrounding areas for fish, crustaceans, and mollusks on coral and temperate reefs in Australia, New Zealand, the Philippines, Japan, Kenya, South Africa, the Mediterranean Sea, Venezuela, Chile, and the United States (California, Florida and Rhode Island). Mean sizes of fished species protected in no-take zones were 12 to 200% larger than those in surrounding areas for all fishes studied and in 75 to 78% of the invertebrates. Eighty-six percent of the studies that tested fishery yields found that catches within three kilometers of the marine protected areas were 46 to 50% higher than before no-take zones were created. It is clear that fishers all over the world believe no-take zones increase yields because they fish as close to the boundary as possible.

The long-term benefits from the reserve could offset any losses from displacement and may also result in long-term benefits and no costs (net benefits) to commercial fishermen that would be displaced by a proposed reserve. Again, this conclusion may vary by alternative.

Boundary Alternative II

Crowding and Relocation. For the lobster fishery, it appears that the lobster trap reduction program could fully mitigate the potential for crowding costs. This boundary alternative would displace 2,228 traps. A ten percent reduction in traps in the TERSA would provide space for 3,690 traps. Further, lobster fishermen in the TERSA only catch 68% of their lobsters from the TERSA. Thus, lobster fishermen are knowledgeable about fishing in other areas of the Keys where they might move their displaced traps. Thus, under this boundary alternative there would be no crowding costs for lobsters and they would be able to replace catch from other areas. Thus, for lobsters, the potential economic losses identified in Table 11 are not likely to occur under Alternative II.

Crowding is not an issue for King mackerel because they are a pelagic species and thus move around and catching them elsewhere is highly likely without interfering with other fishermen. Shrimp fishermen currently only catch ten percent of their total shrimp catch from the TERSA. Displacement of shrimp catch under Boundary Alternative II would only be about one percent of their TERSA catch and less than one percent of their total shrimp catch. It would seem highly likely that there would be no crowding costs from displacement and given the small amounts of catch affected, it is highly likely that shrimp fishermen would be able to replace lost catch from other sites. However, some shrimp fishermen have said that they cannot replace lost catch from other sites. Thus, for King mackerel, the potential economic losses identified in Table 11 are not likely to occur under Boundary Alternative II, but for shrimp the economic losses could range from zero to the maximum potential losses reported in Table 11.

Reef Fish fishermen comprise the largest group of TERSA fishermen. Under Boundary Alternative II, 37 of the sampled 42 fishermen would be affected. Reef fishermen are knowledgeable of other fishing locations outside the TERSA. In 1997, they caught 52% of their reef fish from areas in the Keys outside the TERSA. However, stocks of reef fish in the TERSA and throughout the Keys appear to be overfished. Alternative II displaces about 13% of the reef fish catch in the TERSA. Given the status of reef fish stocks, the losses identified in Table 11 are likely to occur in the short-term until the benefits of replenishment could off-set these losses in the longer-term.

Replenishment. No replenishment benefits to King mackerel or shrimp are expected. For lobsters and reef fish, replenishment benefits are expected. Davis (1998) provided an estimate that

invertebrates and reef fish at other marine reserves had shown increases in yields of 46–50% within three kilometers of the protected areas. Eight fish spawning areas have been identified in the western portion of the TERSA. Only one of the eight fish spawning areas is located within the Alternative II boundary and would be protected, and to thus support the replenishment effect. For lobsters, long-term net benefits to the commercial fishery of the TERSA are expected. For reef fish, it is not clear whether the full 13% lost catch from displacement would be replaced from replenishment, but the costs of displacement would be mitigated and the losses expected to be less than the 13% reductions that are the basis for the losses calculated and presented in Table 11.

Boundary Alternative III (Preferred Boundary Alternative)

Crowding and Relocation. For the lobster fishery, there is some potential for crowding costs. This boundary alternative would displace 4,346 traps. A ten percent reduction in traps in the TERSA would provide space for 3,690 traps. However, if the remaining 656 traps are relocated to zones 1–3 in the Keys, there would be more than adequate space given the 10% reduction in traps that took place in Monroe County between 1997–98 and 1998–99 (475,094 to 428, 411). See FMRI, 1998. Lobster fishermen in the TERSA only catch 68% of their lobsters from the TERSA. Thus, lobster fishermen are knowledgeable about fishing in other areas of the Keys where they might move their displaced traps. Thus, under this alternative their would be no crowding costs for lobsters and it is expected that they would be able to replace catch from other areas. Thus, for lobsters, the potential economic losses identified in Table 11 are not likely to occur under this alternative.

Crowding is not an issue for King mackerel because they are a pelagic species and thus move around and catching them elsewhere is highly likely without interfering with other fishermen. Shrimp fishermen currently only catch ten percent of their total shrimp catch from the TERSA. Displacement of shrimp catch under Boundary Alternative III (Preferred Boundary Alternative) would only be about eight percent of their TERSA catch and less than one percent of their total shrimp catch. It would seem highly likely that there would be no crowding costs from displacement and given the small amounts of catch affected, it is highly likely that shrimp fishermen would be able to replace lost catch from other sites. However, some shrimp fishermen have said that they cannot replace lost catch from other sites. Thus, for King mackerel, the potential economic losses identified in Table 11 are not likely to occur under Boundary Alternative III, but for shrimp the economic losses could range from zero to the maximum potential losses reported in Table 11.

Reef Fish fishermen comprise the largest group of TERSA fishermen. Under Boundary Alternative III (Preferred Boundary Alternative), 40 of the sampled 42 fishermen would be affected. Reef fishermen are knowledgeable of other fishing locations outside the TERSA. In 1997, they caught 52% of their reef fish from areas in the Keys outside the TERSA. However, stocks of reef fish in the TERSA and throughout the Keys appear to be overfished. Boundary Alternative III (Preferred Boundary Alternative) displaces 20% of the reef fish catch in the TERSA. Given the status of reef fish stocks, the losses identified in Table 11 are likely to occur in the short-term until the benefits of replenishment could offset these losses in the longer-term.

Replenishment. No replenishment benefits to King mackerel or shrimp are expected. For lobsters and reef fish, replenishment benefits are expected. Davis (1998) reports increases in yields of invertebrates and reef fish of 46–50% within three kilometers of the protected areas at other marine reserves. Five of the eight fish spawning areas identified in the western portion of the TERSA are located within the Alternative III boundary and would be protected, thus bolstering the replenishment effect. For lobsters, long-term net benefits would be expected under Boundary Alternative III (Preferred Boundary Alternative). For reef fish, it is not clear whether the full 20% lost catch from displacement would be replaced from replenishment, but the costs of displacement would be mitigated and the losses expected to be less than the 20% reductions that are the basis for the losses calculated and presented in Table 11.

Boundary Alternative IV

Crowding and Relocation. For the lobster fishery, there is some potential for crowding costs. It is estimated that this boundary alternative would displace 6,050 traps. A ten percent reduction in traps in the TERSA would provide space for 3,690 traps. However, if the remaining 2,360 traps are relocated to zones 1–3 in the Keys, there would be more than adequate space given the 10% reduction in traps that took place in Monroe County between 1997–98 and 1998–99 (475,094 to 428, 411). See FMRI, 1998. Lobster fishermen in the TERSA only catch 68% of their lobsters from the TERSA. Thus, lobster fishermen are knowledgeable about fishing in other areas of the Keys where they might move their displaced traps. Thus, under this alternative there would be no crowding costs for lobsters and fishermen would be able to replace catch from other areas. Thus, for lobsters, the potential economic losses identified in Table 11 are not likely to occur under Boundary Alternative IV.

Crowding is not an issue for King mackerel because they are a pelagic species and thus move around and catching them elsewhere is highly likely without interfering with other fishermen. Shrimp fishermen currently only catch ten percent of their total shrimp catch from the TERSA. Displacement of shrimp catch under Boundary Alternative IV would only be about eight percent of their TERSA catch and less than one percent of their total shrimp catch. It would seem highly likely that there would be no crowding costs from displacement and given the small amounts of catch affected, it is highly likely that shrimp fishermen would be able to replace lost catch from other sites. However, some shrimp fishermen have said that they cannot replace lost catch from other sites. Thus, for King mackerel, the potential economic losses identified in Table 11 are not likely to occur under Boundary Alternative IV, but for shrimp the economic losses could range from zero to the maximum potential losses reported in Table 11.

Reef fish fishermen comprise the largest group of TERSA fishermen. Under Boundary Alternative IV, all 42 of the sampled fishermen would be affected. Reef fishermen are knowledgeable of other fishing locations outside the TERSA. In 1997, they caught 52% of their reef fish from areas in the Keys outside the TERSA. However, stocks of reef fish in the TERSA and throughout the Keys appear to be overfished. Boundary Alternative IV displaces 28% of the reef fish catch in the TERSA. Given the status of reef fish stocks, the losses identified in Table 11 are likely to occur in the short-term until the benefits of replenishment could off-set these losses in the longer-term.

Replenishment. No replenishment benefits to King mackerel or shrimp are expected. For lobsters and reef fish, replenishment benefits are expected. Davis (1998) reports increases in yields of invertebrates and reef fish of 46–50% within three kilometers of the protected areas at other marine reserves. Seven of

the eight fish spawning areas identified in the western portion of the TERSA are located within the Alternative IV boundary and would be protected, thus bolstering the replenishment effect. For lobsters, long-term net benefits to the commercial fishery of the TERSA are expected. For reef fish, it is not clear whether the full 28% lost catch from displacement would be replaced from replenishment, but the costs of displacement would be mitigated and the losses expected to be less than the 28% reductions that are the basis for the losses calculated and presented in Table 11.

Boundary Alternative V

Crowding and Relocation. For the lobster fishery, there is some potential for crowding costs. This boundary alternative would displace 6,487 traps. A ten percent reduction in traps in the TERSA would provide space for 3,690 traps. However, if the remaining 2,797 traps are relocated to zones 1–3 in the Keys, there would be more than adequate space given the 10% reduction in traps that took place in Monroe County between 1997–98 and 1998–99 (475,094 to 428,411). See FMRI, 1998. Lobster fishermen in the TERSA only catch 68% of their lobsters from the TERSA and they are knowledgeable about fishing in other areas of the Keys where they might move their displaced traps. Thus, under this boundary alternative there would be no crowding costs for lobsters and fishermen would be able to replace catch from other areas. Therefore, for lobsters, the potential economic losses identified in Table 11 are not likely to occur under Boundary Alternative V.

Crowding is not an issue for King mackerel because they are a pelagic species and thus move around and catching them elsewhere is highly likely without interfering with other fishermen. Shrimp fishermen currently only catch ten percent of their total shrimp catch from the TERSA. Displacement of shrimp catch under Boundary Alternative V would only be about ten percent of their TERSA catch and about one percent of their total shrimp catch. It would seem highly likely that there would be no crowding costs from displacement and given the small amounts of catch affected, it is highly likely that shrimp fishermen would be able to replace lost catch from other sites. However, some shrimp fishermen have said that they cannot replace lost catch from other sites. Thus, for King mackerel, the potential economic losses identified in Table 11 are not likely to occur under Boundary Alternative V, but for shrimp the economic losses could range from zero to the maximum potential losses reported in Table 11.

Reef fish fishermen comprise the largest group of TERSA fishermen. Of the 90 TERSA fishermen sampled, 42 were reef fish fishermen. Under Boundary Alternative V, all 42 would be affected. Reef fishermen are knowledgeable of other fishing locations outside the TERSA. In 1997, they caught 52% of their reef fish from areas in the Keys outside the TERSA. However, stocks of reef fish in the TERSA and throughout the Keys appear to be overfished. Boundary Alternative V displaces 29% of the reef fish catch in the TERSA. Given the status of reef fish stocks, the losses identified in Table 11 are likely to occur in the short-term until the benefits of replenishment could off-set these losses in the longer-term.

Replenishment. No replenishment benefits to King mackerel or shrimp are expected. For lobsters and reef fish, replenishment benefits are expected. Davis (1998) reports increases in yields of invertebrates and reef fish of 46–50% within three kilometers of the protected areas at other marine reserves. Seven of the eight spawning areas identified in the western portion of the TERSA are located within the Alternative V boundary and would be protected, thus bolstering the replenishment effect. For lobsters, long-term net benefits under Alternative V are expected. For reef fish, it is not clear whether the full 29% lost catch from displacement would be replaced from replenishment, but the costs of displacement would be mitigated and the losses expected to be less than the 29% reductions that are the basis for the losses calculated and presented in Table 11.

Commercial Shipping

No effect for any of the alternatives.

Treasure Salvors

No expected effect for any of the alternatives. One permit for inventorying submerged cultural resources in Sanctuary waters was issued for the Tortugas area of the Sanctuary. There were no submerged cultural resources found on the Tortugas Bank. Whether there are any submerged cultural resources on Riley's Hump is unknown.

Other Potential Benefits

In both the recreation industry (fishing and diving) and the commercial fishery sections above, the potential benefits to recreational and commercial fisheries from the replenishment effect of an ecological reserve were discussed. Also discussed in the recreation industry section were the potential benefits to non-consumptive recreational users (divers). Below, some of the most important benefits of an ecological reserve—scientific values, and education values—are discussed.

Ecological reserves provide a multitude of environmental benefits. Sobel (1996) provides a long list of these benefits. Most of those benefits have been described above. Sobel (1996) categorizes scientific and education values into those things a reserve provides that increase knowledge and understanding of marine systems. Sobel provides the following lists of benefits:

Scientific Values:

- Provides long-term monitoring sites
- Provides focus for study
- Provides continuity of knowledge in undisturbed site
- Provides opportunity to restore or maintain natural behaviors
- Reduces risks to long-term experiments
- Provides controlled natural areas for assessing anthropogenic impacts, including fishing and other impacts

Education Values:

- Provides sites for enhanced primary and adult education
- Provides sites for high-level graduate education

Other Regulations

Each of the four regulatory alternatives (A–D) are analyzed for each boundary alternative (I–V).

Boundary Alternative I

This is the No-Action Alternative and would not result in the expansion of the Sanctuary boundary and would not establish a Tortugas Ecological Reserve. None of the regulatory alternatives would apply.

Boundary Alternative II

This alternative limits the reserve to the existing Sanctuary boundary for a total area of approximately 55 nm^2. (Figure 1). This alternative includes a portion of Sherwood Forest and the coral pinnacles north of Tortugas Bank; it does not include Riley's Hump. It includes some coral and hardbottom habitat north of the DRTO. Tortugas South would not exist under Boundary Alternative II. None of the regulatory alternatives would apply to the Tortugas South area.

Regulatory Alternative A: Apply existing Sanctuary-wide and existing ecological reserve regulations to Tortugas North and South. The Sanctuary-wide regulations already

apply to Tortugas North and the effects of the ecological reserve regulations have been analyzed under the no-take discussion above. The existing and proposed Sanctuary regulations and their impacts are presented in Table 13. More detailed descriptions of the regulations are included in Appendix C to the FSEIS/SMP. The existing ecological reserve regulations would prohibit fishing in the Reserve consistent with 15 CFR 922.164(d), Ecological Reserves and Sanctuary Preservation Areas.

Regulatory Alternative B: Apply existing Sanctuary-wide and existing ecological reserve regulations to Tortugas North and South (as described in Regulatory Alternative A); and prohibit anchoring in and control access to Tortugas South, other than for continuous transit or law enforcement purposes, via permit, require call-in for entering and leaving, and prohibit vessels longer than 100 ft LOA from using a mooring buoy. The existing and proposed Sanctuary regulations and their impacts are presented in Table 13. More detailed descriptions of the regulations are included in Appendix C to the FSEIS/SMP. The Sanctuary-wide regulations already apply to Tortugas North and the effects of the ecological reserve regulations have been analyzed under the no-take discussion above. The existing ecological reserve regulations would prohibit fishing in the Tortugas Ecological Reserve consistent with 15 CFR 922.164(d) Ecological Reserves and Sanctuary Preservation Areas.

Regulatory Alternative C: Apply existing Sanctuary-wide and existing ecological reserve regulations to Tortugas North and South (as described in Regulatory Alternative A); and prohibit anchoring in and control access to Tortugas North and South, other than for continuous transit or law enforcement purposes, via permit, require call-in for entering and leaving, and prohibit vessels longer than 100 ft LOA from using a mooring buoy (as described in Regulatory Alternative B). The existing and proposed Sanctuary regulations and their impacts are presented in Table 13. More detailed descriptions of the regulations are included in Appendix C to the FSEIS/SMP. The Sanctuary-wide regulations already apply to Tortugas North and the effects of the ecological reserve regulations have been analyzed under the no-take discussion above. The existing ecological reserve regulations would prohibit fishing in the Reserve consistent with 15 CFR 922.164(d), Ecological Reserves and Sanctuary Preservation Areas.

This regulatory alternative has no incremental impact on commercial fishing or recreational consumptive users since they are displaced by the ''no-take'' regulation. The dive operator servicing non-consumptive diving and currently operating in Tortugas North would be prohibited from anchoring. His vessel is less than 100 ft LOA and thus he would be unaffected by the prohibition on mooring. The location and availability of mooring buoys would constrain the number and choice of available dive sites. Whether this would have any impact on the future business volume of dive operators or the quality of the experience to non-consumptive divers is unknown. The extent of impact would be dependent on the number and locations of mooring buoys (to be determined).

This regulatory alternative would have little impact on commercial shipping because continuous transit would be allowed. Vessels 50m or greater in registered length are already prohibited from anchoring in 19.3% of Tortugas North. The main effect would be to ban such vessels from anchoring on the remainder of Tortugas North. There would be no incremental impact to treasure salvors since they would be displaced by the ''no-take'' regulation. The one dive operator servicing non-consumptive diving and currently operating in Tortugas North would be required to obtain Tortugas access permits. Any new dive operators would also be required to obtain permits. There would be minor time costs associated with obtaining a permit for calling-in and calling-out to access the reserve. It is expected that fulfilling all the permit requirements and calling-in and calling-out will not exceed 10 minutes of each permittee's time for each visit to the reserve. No special professional skills would be necessary to apply for a permit.

Regulatory Alternative D (Preferred Regulatory Alternative): Apply existing Sanctuary-wide and existing ecological reserve regulations to Tortugas North and South (as described in Regulatory Alternative A); prohibit anchoring in and control access to Tortugas North via permit, require call-in for entering and leaving, and prohibit vessels longer than 100 ft LOA from using a mooring buoy (as described in Regulatory Alternative B); and prohibit anchoring and restrict access to Tortugas South, other than for continuous transit or law enforcement purposes, to research or education activities only pursuant to a sanctuary permit. The existing and proposed Sanctuary regulations and their impacts are presented in Table 13. More detailed descriptions of the regulations are included in Appendix C to the FSEIS/SMP. The impacts of this regulatory alternative for this boundary alternative are the same as those described for Regulatory Alternative C, above. The existing ecological reserve regulations would prohibit fishing in the Reserve consistent with 15 CFR 922.164(d), Ecological Reserves and Sanctuary Preservation Areas.

Boundary Alternative III (Preferred Boundary Alternative)

This alternative would expand the boundary of the Sanctuary and its westernmost corner by approximately 36 nm^2 to include Sherwood Forest. In addition, this alternative would expand the boundary by adding a non-contiguous area of approximately 60 nm^2 to include Riley's Hump. The Reserve would also incorporate approximately 55 nm^2 of the existing Sanctuary in its northern section, for a total area of approximately 151 nm^2. The area of the Reserve surrounding Sherwood Forest would be called Tortugas North and encompass approximately 91 nm^2; the area surrounding Riley's Hump would be called Tortugas South and encompass approximately 60 nm^2. A small portion of Tortugas North and all of Tortugas South would be outside the existing Sanctuary boundary. (Figure 1).

Regulatory Alternative A: Apply existing Sanctuary-wide and existing ecological reserve regulations to Tortugas North and South. Boundary Alternative III includes areas currently outside the Sanctuary boundary. The Sanctuary-wide regulations would become effective in the expansion areas of Tortugas North and South. The existing and proposed Sanctuary regulations and their impacts are presented in Table 13. More detailed descriptions of the regulations are included in Appendix C to the FSEIS/SMP. The effects of the ecological reserve regulations have been analyzed under the no-take discussion above. The existing ecological reserve regulations would prohibit fishing in the Reserve consistent with 15 CFR 922.164(d), Ecological Reserves and Sanctuary Preservation Areas.

Regulatory Alternative B: Apply existing Sanctuary-wide and existing ecological reserve regulations to Tortugas North and South (as described in Regulatory Alternative A); and prohibit anchoring in and control access to Tortugas South, other than for continuous transit or law enforcement purposes, via permit, require call-in for entering and leaving, and prohibit vessels longer than 100 ft LOA from using a mooring buoy. The Sanctuary-

wide regulations would become effective in the expansion areas of Tortugas North and South. The existing and proposed Sanctuary regulations and their impacts are presented in Table 13. More detailed descriptions of the regulations are included in Appendix C to the FSEIS/SMP. The existing ecological reserve regulations would prohibit fishing in the Reserve consistent with 15 CFR 922.164(d), Ecological Reserves and Sanctuary Preservation Areas.

The effects of the ecological reserve regulations have been analyzed under the no-take discussion above. The prohibition on anchoring would have no incremental impact on commercial fishing or recreational consumptive users since they are displaced by the ''no-take'' regulation. The one dive operator servicing non-consumptive diving and currently operating in Tortugas North would be prohibited from anchoring. There are no known recreational dive operators servicing Tortugas South. The location and availability of mooring buoys would constrain the number and choice of available dive sites. Whether this would have any impact on the future business volume of dive operators or the quality of the experience to non-consumptive divers is unknown. The extent of impact would be dependent on the number and locations of mooring buoys (to be determined). The prohibition on anchoring would impact commercial shipping in the boundary expansion areas, especially in Tortugas South. The prohibition on anchoring in Tortugas North is discussed under Boundary/Regulatory Alternative IIC above. Anchoring by large commercial vessels is known to occur in Tortugas South on Riley's Hump. The impact of this regulation on commercial vessel operators is expected to be small since other anchorages are available a short distance outside the Sanctuary boundary.

There would be no incremental impact on treasure salvors from the no-anchoring prohibition since they would be displaced by the ''no-take'' regulation. The permit requirements would have no incremental impact on fishermen or salvors because they would be displaced by the ''no-take'' regulations. There are no known non-consumptive dive operators currently operating in Tortugas South. Any non-consumptive dive operators operating in Tortugas South in the future would be required to obtain Tortugas access permits. It is not possible to gauge the extent of any such future activity. There would be minor time costs associated with obtaining a permit and calling-in and calling-out to access the reserve. It is expected that fulfilling all the permit requirements and calling-in and calling-out would not exceed 10 minutes of each permittee's time for each visit to the reserve. No special professional skills would be necessary to apply for a permit.

Regulatory Alternative C: Apply existing Sanctuary-wide and existing ecological reserve regulations to Tortugas North and South (as described in Regulatory Alternative A); and prohibit anchoring in and control access to Tortugas North and South, other than for continuous transit or law enforcement purposes, via permit, require call-in for entering and leaving, and prohibit vessels longer than 100 ft LOA from using a mooring buoy (as described in Regulatory Alternative B). The only difference between the impacts of this regulatory alternative from those discussed under Regulatory Alternative B would be those associated with the requirement to obtain a permit for other than continuous transit access to Tortugas North. The permit requirements would have no incremental impact on fishermen or salvors because they would be displaced by the ''no-take'' regulations. There is only one known non-consumptive dive operator currently operating in Tortugas North. He and any new non-consumptive dive operators operating in Tortugas North would be required to obtain Tortugas access permits. There would be minor time costs associated with obtaining a permit and calling-in and calling-out to access the reserve. It is expected that fulfilling all the permit requirements and calling-in and calling-out would not exceed 10 minutes of each permittee's time for each visit to the reserve. No special professional skills would be necessary to apply for a permit. The existing and proposed Sanctuary regulations and their impacts are presented in Table 13. More detailed descriptions of the regulations are included in Appendix C to the FSEIS/SMP. The existing ecological reserve regulations would prohibit fishing in the Reserve consistent with 15 CFR 922.164(d), Ecological Reserves and Sanctuary Preservation Areas.

Regulatory Alternative D (Preferred Regulatory Alternative): Apply existing Sanctuary-wide and existing ecological reserve regulations to Tortugas North and South (as described in Regulatory Alternative A); prohibit anchoring in and control access to Tortugas North via permit, require call-in for entering and leaving, and prohibit vessels longer than 100 ft LOA from using a mooring buoy (as described in Regulatory Alternative B); and prohibit anchoring and restrict access to Tortugas South, other than for continuous transit or law enforcement purposes, to research or education activities only pursuant to a sanctuary permit. The only difference between the impacts of this regulatory alternative from those discussed under Regulatory Alternative C would be those associated with limiting noncontinuous transit access to Tortugas South to research/educational purposes. For the commercial fisheries, salvors, and recreational consumptive users, there would be no incremental impacts since the ''no-take'' regulation would displace these user groups. There are no known non-consumptive dive operators currently operating in Tortugas South and no recreational diving is known to occur there. Under this alternative, none would be allowed in the future. The existing and proposed Sanctuary regulations and their impacts are presented in Table 13. More detailed descriptions of the regulations are included in Appendix C to the FSEIS/SMP. The existing ecological reserve regulations would prohibit fishing in the Reserve consistent with 15 CFR 922.164(d), Ecological Reserves and Sanctuary Preservation Areas.

Boundary Alternative IV

Over Boundary Alternative III, this alternative would expand Tortugas North to the south by 23 nm^2 to be conterminous with the NPS's proposed Research/Natural Area within the DRTO. The total area of the Reserve would be approximately 175 nm^2. It also involves the same boundary expansion as Boundary Alternative III. A small portion of Tortugas North and all of Tortugas South would be outside the existing Sanctuary boundary. (Figure 1).

Regulatory Alternative A: Apply existing Sanctuary-wide and existing ecological reserve regulations to Tortugas North and South. The Sanctuary-wide regulations would become effective in the expansion areas of Tortugas North and South. The existing and proposed Sanctuary regulations and their impacts are presented in Table 13. More detailed descriptions of the regulations are included in Appendix C to the FSEIS/FSMP. The effects of the ecological reserve regulations which, under Boundary Alternative IV would apply to a larger area because of the southern expansion of Tortugas North, have been analyzed under the no-take discussion above. The existing ecological reserve regulations would prohibit fishing in the Reserve consistent with 15 CFR 922.164(d), Ecological Reserves and Sanctuary Preservation Areas.

Regulatory Alternative B: Apply existing Sanctuary-wide and existing ecological reserve regulations to Tortugas North and South (as described in Regulatory Alternative A); and prohibit anchoring in and control access to Tortugas South, other than for continuous transit or law enforcement purposes, via permit, require call-in for entering and leaving, and prohibit vessels longer than 100 ft LOA from using a mooring buoy. The Sanctuary-wide regulations would become effective in the expansion areas of Tortugas North and South. The existing and proposed Sanctuary regulations and their impacts are presented in Table 13. More detailed descriptions of the regulations are included in Appendix C to the FSEIS/FMP. The existing ecological reserve regulations would prohibit fishing in the Reserve consistent with 15 CFR 922.164(d), Ecological Reserves and Sanctuary Preservation Areas.

The effects of the ecological reserve regulations which under Boundary Alternative IV would apply to a larger area because of the southern expansion of Tortugas North have been analyzed under the no-take discussion above. The prohibition on anchoring would have no incremental impact on commercial fishing or recreational consumptive users since they are displaced by the ''no-take'' regulation. There are no known recreational dive operators servicing Tortugas South. The location and availability of mooring buoys would constrain the number and choice of available dive sites. Whether this would have any impact on the future business volume of dive operators or the quality of the experience to non-consumptive divers is unknown. The extent of impact would be dependent on the number and locations of mooring buoys (to be determined).

The prohibition on anchoring would impact commercial shipping in the boundary expansion areas, especially in Tortugas South. The prohibition on anchoring in Tortugas North is discussed under Boundary/Regulatory Alternative IIC above. Anchoring by large commercial vessels is known to occur in Tortugas South on Riley's Hump. The impact of this regulation on commercial vessel operators is expected to be small since other non-coral reef anchorages outside the Sanctuary boundary are available a short distance away.

There would be no incremental impact on treasure salvors from the no-anchoring prohibition since they would be displaced by the ''no-take'' regulation.

The permit requirements would have no incremental impact on fishermen or salvors because they would be displaced by the ''no-take'' regulations. There are no known non-consumptive dive operators currently operating in Tortugas South. Any non-consumptive dive operators operating in Tortugas South in the future would be required to obtain Tortugas access permits. It is not possible to gauge the extent of any such future activity. There would be minor time costs associated with obtaining a permit and calling-in and calling-out to access the reserve. It is expected that fulfilling all the permit requirements and calling-in and calling-out would not exceed 10 minutes of each permittee's time for each visit to the reserve. No special professional skills would be necessary to apply for a permit.

Regulatory Alternative C: Apply existing Sanctuary-wide and existing ecological reserve regulations to Tortugas North and South (as described in Regulatory Alternative A); and prohibit anchoring in and control access to Tortugas North and South, other than for continuous transit or law enforcement purposes, via permit, require call-in for entering and leaving, and prohibit vessels longer than 100 ft LOA from using a mooring buoy (as described in Regulatory Alternative B). The only difference between the impacts of this regulatory alternative from those discussed under Alternative B would be those associated with the requirement to obtain a permit for other than continuous transit access to Tortugas North. Under this boundary alternative there are 2.75 more person-days of recreational non-consumptive use than under Boundary Alternatives II and III. While the area of Tortugas North would be increased by the expansion to the south, the permit requirements would have no incremental impact on fishermen or salvors because they would be displaced by the ''no-take'' regulations. There is only one known non-consumptive dive operator currently operating in Tortugas North. He and any new non-consumptive dive operators operating in Tortugas North would be required to obtain Tortugas access permits. There would be minor time costs associated with obtaining a permit and calling-in and calling-out to access the reserve. It is expected that fulfilling all the permit requirements and calling-in and calling-out would not exceed ten minutes of each permittee's time for each visit to the reserve. No special professional skills would be necessary to apply for a permit. The existing and proposed Sanctuary regulations and their impacts are presented in Table 13. More detailed descriptions of the regulations are included in Appendix C to the FSEIS/SMP. The existing ecological reserve regulations would prohibit fishing in the Reserve consistent with 15 CFR 922.164(d), Ecological Reserves and Sanctuary Preservation Areas.

Regulatory Alternative D (Preferred Regulatory Alternative): Apply existing Sanctuary-wide and existing ecological reserve regulations to Tortugas North and South (as described in Regulatory Alternative A); prohibit anchoring in and control access to Tortugas North via permit, require call-in for entering and leaving, and prohibit vessels longer than 100 ft LOA from using a mooring buoy (as described in Regulatory Alternative B); and prohibit anchoring and restrict access to Tortugas South, other than for continuous transit or law enforcement purposes, to research or education activities only pursuant to a sanctuary permit. The only difference between the impacts of this regulatory alternative from those discussed under regulatory Alternative C would be those associated with limiting non-continuous transit access to Tortugas South to research/educational purposes. For the commercial fisheries, salvors, and recreational consumptive users, there would be no incremental impacts since the ''no-take'' regulation would displace these user groups. There are no known non-consumptive dive operators currently operating in Tortugas South and no recreational diving is known to occur there. Under this alternative, none would be allowed in the future. The existing and proposed Sanctuary regulations and their impacts are presented in Table 13. More detailed descriptions of the regulations are included in Appendix C to the FSEIS/SMP. The existing ecological reserve regulations would prohibit fishing in the Reserve consistent with 15 CFR 922.164(d), Ecological Reserves and Sanctuary Preservation Areas.

Boundary Alternative V

Over Boundary Altenative III, this alternative would expand the Sanctuary boundary to the west by three minutes ending at longitude 83°09′ instead of 83°06′ and would increase the reserve area to 190 nm^2. Tortugas North would be expanded to the west and Tortugas South would be shortened to the north. A small portion of Tortugas North and all of Tortugas South would be outside the existing Sanctuary boundary. (Figure 1).

Regulatory Alternative A: Apply existing Sanctuary-wide and existing ecological reserve regulations to

Tortugas North and South. The Sanctuary-wide regulations would become effective in the expansion area. The existing and proposed Sanctuary regulations and their impacts are presented in Table 13. More detailed descriptions of the regulations are included in Appendix C to the FSEIS/FSMP. The effects of the ecological reserve regulations which, under Boundary Alternative V apply to a larger area because of the Sanctuary expansion, have been analyzed under the no-take discussion above. The existing ecological reserve regulations would prohibit fishing in the Reserve consistent with 15 CFR 922.164(d), Ecological Reserves and Sanctuary Preservation Areas.

Regulatory Alternative B: Apply existing Sanctuary-wide and existing ecological reserve regulations to Tortugas North and South (as described in Regulatory Alternative A); and prohibit anchoring in and control access to Tortugas South, other than for continuous transit or law enforcement purposes, via permit, require call-in for entering and leaving, and prohibit vessels longer than 100 ft LOA from using a mooring buoy. The Sanctuary-wide regulations would become effective in the expansion area. The existing and proposed Sanctuary regulations and their impacts are summarized in Table 13. More detailed descriptions of the regulations are included in Appendix C to the FSEIS/FSMP. The existing ecological reserve regulations would prohibit fishing in the Reserve consistent with 15 CFR 922.164(d), Ecological Reserves and Sanctuary Preservation Areas.

The effects of the ecological reserve regulations which, under Boundary Alternative V would apply to a larger area because of the Sanctuary expansion, have been analyzed under the no-take discussion above. The prohibition on anchoring would have no incremental impact on commercial fishing or recreational consumptive users since they are displaced by the ''no-take'' regulation. There are no known recreational dive operators servicing Tortugas South. The location and availability of mooring buoys would constrain the number and choice of available dive sites. Whether this would have any impact on the future business volume of dive operators or the quality of the experience to non-consumptive divers is unknown. The extent of impact would be dependent on the number and locations of mooring buoys (to be determined).

The prohibition on anchoring would impact commercial shipping in the boundary expansion area, especially in Tortugas South. Anchoring by large commercial vessels is known to occur in Tortugas South on Riley's Hump. The impact of this prohibition on commercial vessel operators would be small since other non-coral reef anchorages are available a short distance away outside the Sanctuary boundary.

There would be no incremental impact on treasure salvors from the no-anchoring prohibition since they would be displaced by the ''no-take'' regulation.

The permit requirements would have no incremental impact on fishermen or salvors because they would be displaced by the ''no-take'' regulations.

There are no known non-consumptive dive operators currently operating in Tortugas South. Any non-consumptive dive operators operating in Tortugas South in the future would be required to obtain Tortugas access permits. It is not possible to gauge the extent of any such future activity. There would be minor time costs associated with obtaining a permit and calling-in and calling-out to access the reserve. It is expected that fulfilling all the permit requirements and calling-in and calling-out would not exceed 10 minutes of each permittee's time for each visit to the reserve. No special professional skills would be necessary to apply for a permit.

Regulatory Alternative C: Apply existing Sanctuary-wide and existing ecological reserve regulations to Tortugas North and South (as described in Regulatory Alternative A); and prohibit anchoring in and control access to Tortugas North and South, other than for continuous transit or law enforcement purposes, via permit, require call-in for entering and leaving, and prohibit vessels longer than 100 ft LOA from using a mooring buoy (as described in Regulatory Alternative B). The only difference between the impacts of this regulatory alternative from those discussed under Regulatory Alternative B would be those associated with the requirement to obtain a permit for other than continuous transit access to Tortugas North. Under this boundary alternative there are 3.25 more person-days of recreational non-consumptive use than under Boundary Alternatives IV. While the area of Tortugas North would be increased by the expansion to the west, the permit requirements would have no incremental impact on fishermen or salvors because they would be displaced by the ''no-take'' regulations. There is one known non-consumptive dive operator currently operating in Tortugas North. He and any new non-consumptive dive operators operating in Tortugas North would be required to obtain Tortugas access permits. There would be minor time costs associated with obtaining a permit and calling-in and calling-out to access the reserve. It is expected that fulfilling all the permit requirements and calling-in and calling-out would not exceed 10 minutes of each permittee's time for each visit to the reserve. No special professional skills would be necessary to apply for a permit. The existing and proposed Sanctuary regulations and their impacts are presented in Table 13. More detailed descriptions of the regulations are included in Appendix C to the FSEIS/SMP. The existing ecological reserve regulations would prohibit fishing in the Reserve consistent with 15 CFR 922.164(d), Ecological Reserves and Sanctuary Preservation Areas.

Regulatory Alternative D (Preferred Regulatory Alternative): Apply existing Sanctuary-wide and existing ecological reserve regulations to Tortugas North and South (as described in Regulatory Alternative A); prohibit anchoring in and control access to Tortugas North via permit, require call-in for entering and leaving, and prohibit vessels longer than 100 ft LOA from using a mooring buoy (as described in Regulatory Alternative B); and prohibit anchoring and restrict access to Tortugas South, other than for continuous transit or law enforcement purposes, to research or education activities only pursuant to a sanctuary permit. The only difference between the impacts of this regulatory alternative from those discussed under Regulatory Alternative C would be those associated with limiting noncontinuous transit access to Tortugas South to research/educational purposes. For the commercial fisheries, salvors, and recreational consumptive users, there would be no incremental impacts since the ''no-take'' regulation would displace these user groups. There are no known non-consumptive dive operators currently operating in Tortugas South and no recreational diving is known to occur there. Under this alternative, none would be allowed in the future. The existing and proposed Sanctuary regulations and their impacts are presented in Table 13. More detailed descriptions of the regulations are included in Appendix C to the FSEIS/SMP. The existing ecological reserve regulations would prohibit fishing in the Reserve consistent with 15 CFR 922.164(d), Ecological Reserves and Sanctuary Preservation Areas.

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Table 13. Impacts on Small Businesses

	Industries Impacted				
Regulation	**Commercial Fishing**	**Recreation Consumptive**	**Recreation Non-consumptive Boundary Alternative II**	**Commercial Shipping**	**Treasure Salvors**
1. No Take					
(a) Possessing, moving, harvesting, removing, taking, damaging, disturbing, breaking, cutting, spearing, or otherwise injuring any coral, marine invertebrate, fish, bottom formation, algae, seagrass or other living or dead organism, including shells, or attempting any of these activities. However, fish, invertebrates, and marine plants may be possessed aboard a vessel in the ecological reserve provided such resources can be shown not to have been harvested within, removed from, or taken within, the ecological reserve, as applicable, by being stowed in a cabin, locker, or similar storage area prior to entering and during transit through	**A. Maximum Potential Loss** 51 of the 105 to 110 commercial fishing operations are potentially impacted. Some operations are multi-species fisheries. 24 lobster, 6 shrimp, 15 king mackerel, and 37 reef fish operations potentially impacted directly. About $411 thousand in harvest revenue potentially lost or 6 % of the harvest revenue from the TERSA. On average, about $8,000 per fishing operation. Additionally, potential losses to 10 fish houses and other small businesses through the multiplier impact.	**A. Maximum Potential Loss** 9 of 12 charter boat operations operating within the TERSA would be potentially impacted. Direct business revenue would include 26.6% for diving for lobsters, 20% for spear fishing, and 2.9% for fishing. Across all three recreation consumptive activities, 9.48% of revenue would be potentially impacted and about 14% of profits. On average, maximum potential losses are estimated to be about $13,700 of lost revenue and $5,580 of lost profits per operation. Additional potential losses to an unknown number of small firms through the multiplier	**A. Maximum Potential Loss** No losses. Potential gains to one charter boat dive operation providing services to non-consumptive divers. Indirect gains to several small businesses due to the multiplier impacts. Gains from improvements in quality of sites in terms of diversity, number and size of various sea life. Improvements in quality of experience leading to increase in demand for charter boat services and corresponding multiplier impacts on other small businesses.	**A. Maximum Potential Loss** No impact. **B. Mitigating Factors, Off-setting Factors and Net Impact** No impact.	**A. Maximum Potential Loss** No expected impact. One permit for inventorying submerged cultural resources in Sanctuary waters was issued for the Tortugas area of the Sanctuary. There were no submerged cultural resources found. **B. Mitigating Factors, Off-setting Factors and Net Impact** No mitigating factors or offsetting factors. Sanctuary will not issue permits for treasure salvaging in the ecological reserve. Since no submerged cultural resources were located on Tortugas Bank, no expected impact.

Table 13. Impacts on Small Businesses (continued)

Regulation	Industries Impacted				
	Commercial Fishing	Recreation Consumptive	Recreation Non-consumptive	Commercial Shipping	Treasure Salvors
	Boundary Alternative II (continued)				
1. No Take (continued)					
such reserve, provided further that such vessel is in continuous transit through the ecological reserve. (b) Fishing by any means. (c) Touching living or dead coral, including but not limited to, standing on a living or dead coral formation.	**B. Mitigating Factors, Off-setting Factors and Net Impact** Relocation. For lobster fishing operations, the potential losses are not likely to occur because the State of Florida's trap reduction program and fishermen are knowledgeable of other fishing locations throughout the Sanctuary. For king mackerel operations, potential losses are not likely to occur because king mackerel is a pelagic species that is highly mobile and could be caught in other locations. For shrimp operations, losses are not likely to occur because shrimp caught in the proposed reserve are such a small percentage of total catch.	impacts. Only a fraction of a percent of the total tourist/recreation business in Monroe County. **B. Mitigating Factors, Off-setting Factors and Net Impact** Substitution. Complete mitigation with no losses is a high probability because only a small portion of the Tortugas Bank is included in the ecological reserve. All users can substitute to other sites on the southern half of Tortugas Bank. Long-term Benefits from Replenishment Effect. Net result is no short term losses and long-term gains to small businesses that are directly and indirectly dependent on recreational			

Table 13. Impacts on Small Businesses (continued)

	Industries Impacted					
Regulation	**Commercial Fishing**	**Recreation Consumptive**	**Recreation Non-consumptive**	**Commercial Shipping**	**Treasure Salvors**
	Boundary Alternative II (continued)				
1. No Take (continued)					
	For reef fish, the potential losses are likely to occur in the short term because reef fish stocks are overfished throughout the Sanctuary. Long-term Benefits from Replenishment. No expected benefits to king mackerel or shrimp operations. For lobster operations, expected net benefits from replenishment effect of ecological reserve. For reef fish operations, it is not clear whether the full 13 percent lost catch from displacement would be replaced from replenishment, but the costs of displacement would be mitigated and the losses to be less than the 13 percent reduction in the maximum loss case.	Consumptive use in the TERSA.			

Table 13. Impacts on Small Businesses (continued)

Regulation	Industries Impacted				
	Commercial Fishing	Recreation Consumptive	Recreation Non-consumptive	Commercial Shipping	Treasure Salvors
	Boundary Alternative II (continued)				
2. No Anchoring/Required Mooring Buoy Use/No Discharges or Deposits					
(a) Anchoring on coral. (b) Anchoring when mooring buoys or designated anchoring areas are available (c) Discharges or deposits except cooling water or engine exhaust.	No incremental impact since "no take" regulations already displace all commercial fishing.	No incremental impact since recreational consumptive users are already displaced by "no take" regulations.	One charter operation that currently operates in Tortugas North potentially impacted. Mooring buoy use will constrain number and choice of available dive sites. It is unknown whether this will impact on future business of dive operators. Impact is dependent on the number and distribution (locations) of mooring buoys (to be determined). Prohibition against discharges or deposits will result in no incremental impact.	No impact.	No incremental impact since treasure salvaging displaced by "no take" regulations.
3. No Access					
Alternative A: Apply existing ecological reserve regulations to Tortugas North and South.	No incremental impact. See regulations 1 and 2 above. Tortugas South not in this boundary alternative.	No incremental impact. See regulations 1 and 2 above. Tortugas South not in this boundary alternative.	No incremental impact. See regulations 1 and 2 above. Tortugas South not in this boundary alternative.	No incremental impact. See regulations 1 and 2 above. Tortugas South not in this boundary alternative.	No incremental impact since "no take" regulations displace treasure salvaging.

Table 13. Impacts on Small Businesses (continued)

	Industries Impacted				
Regulation	**Commercial Fishing**	**Recreation Consumptive**	**Recreation Non-consumptive**	**Commercial Shipping**	**Treasure Salvors**
	Boundary Alternative II (continued)				
3. No Access (continued)					
Alternative B: Apply existing ecological reserve regulations to Tortugas North and South (as described in Alternative A). Prohibit anchoring in and control access to Tortugas South via permit and require call-in, call-out. Use of mooring buoys by vessels 100' or less in length.	No incremental impact. See regulations 1 and 2 above. Tortugas South not in this boundary alternative.	No incremental impact. See regulations 1 and 2 above. Tortugas South not in this boundary alternative.	No incremental impact. See regulations 1 and 2 above. Tortugas South not in this boundary alternative.	No impact.	No incremental impact since "no take" regulations displaces treasure salvaging.
Alternative C: Apply existing ecological reserve regulations to Tortugas North and South (as described in Alternative A). Prohibit anchoring in and control access to Tortugas North and South via permit and require call-in, call-out (as described in Alternative B). Use of mooring buoys by vessels 100' or less in length.	No incremental impact because commercial fishing is already displaced by "no take" regulations.	No incremental impact because recreational consumptive users are already displaced by "no take" regulations.	Currently one charter dive operator operates in Tortugas North, while none operate in the South. Minor amount of time cost to charter operations in reporting to Sanctuary staffer to obtain permit and to notify when entering a leaving ecological reserve. None of the current operators have vessels over 100 feet in length. Time costs expected to be limited to less than 15 minutes to obtain permit and access permission per operation per visit to the reserve.	No impact.	No incremental impact since "no take" regulations displace treasure salvaging.

Table 13. Impacts on Small Businesses (continued)

	Industries Impacted				
Regulation	**Commercial Fishing**	**Recreation Consumptive**	**Recreation Non-consumptive**	**Commercial Shipping**	**Treasure Salvors**
	Boundary Alternative II (continued)				
3. No Access (continued)					
Alternative D (Preferred): Apply existing ecological reserve regulations to Tortugas North and Tortugas South (as described in Alternative A). Prohibit anchoring in Tortugas North and South and control accesss to Tortugas North via permit and require call-in, call-out (as described in Alternative B). Restrict access to Tortugas South to research or educational activities only. Use of mooring buoys by vessels 100' or less in length.	No incremental impact since commercial fishing is already displaced by "no take" regulations.	No incremental impact since recreational consumptive users are already displaced by "no take" regulations.	Currently one dive operator operates in Tortugas North, none in Tortugas South. Minor time costs to dive charter operators in reporting to Sanctuary staffer to obtain permit and to notify when entering and leaving ecological reserve. Time cost is expected to be less than 15 minutes per operation per visit to the reserve.	No impact.	No incremental impact since "no take" regulations displace treasure salvaging.

Table 13. Impacts on Small Businesses (continued)

	Industries Impacted				
Regulation	**Commercial Fishing**	**Recreation Consumptive**	**Recreation Non-consumptive**	**Commercial Shipping**	**Treasure Salvors**
			Boundary Alternative III: Preferred		
1. No Take					
(a) Possessing, moving, harvesting, removing, taking, damaging, disturbing, breaking, cutting, spearing, or otherwise injuring any coral, marine invertebrate, fish, bottom formation, algae, seagrass or other living or dead organism, including shells, or attempting any of these activities. However, fish, invertebrates, and marine plants may be possessed aboard a vessel in the ecological reserve provided such resources can be shown not to have been harvested within, removed from, or taken within, the ecological reserve, as applicable, by being stowed in a cabin, locker, or similar storage area prior to entering and during transit through	**A. Maximum Potential Loss** 64 of the 105 to 110 commercial fishing operations are potentially impacted. Some operations are multi-species fisheries. 27 lobster, 15 shrimp, 16 king mackerel, and 40 reef fish operations potentially impacted directly. About $844 thousand in harvest revenue potentially lost or 12 % of the harvest revenue from the TERSA. On average, about $13,000 per fishing operation. Additionally, potential losses to 10 fish houses and other small businesses through the multiplier impact.	**A. Maximum Potential Loss** 9 of 12 charter boat operations operating within the TERSA would be potentially impacted. Direct business revenue would include 26.6% for diving for lobsters, 20% for spear fishing, and 6.3% for fishing. Across all three recreation consumptive activities, 11.7% of revenue would be potentially impacted and almost 16% of profits. On average, maximum potential losses are estimated to be about $13,700 of lost revenue and $5,580 of lost profits per operation. Additional potential losses to an unknown number of small firms through the multiplier impacts. Only a fraction	**A. Maximum Potential Loss** No losses. Potential gains to one charter boat dive operation providing services to non-consumptive divers. Indirect gains to several small businesses due to the multiplier impacts. Gains from improvements in quality of sites in terms of diversity, number and size of various sea life. Improvements in quality of experience leading to increase in demand for charter boat services and corresponding multiplier impacts on other small businesses. **B. Mitigating Factors, Off-setting Factors and Net Impact** No mitigating or off-setting factors. Net gains (see A above).	**A. Maximum Potential Loss** No impact. **B. Mitigating Factors, Off-setting Factors and Net Impact** No impact.	**A. Maximum Potential Loss** No expected impact. One permit for inventorying submerged cultural resources in Sanctuary waters was issued for the Tortugas area of the Sanctuary. There were no submerged cultural resources found. **B. Mitigating Factors, Off-setting Factors and Net Impact** No mitigating factors or offsetting factors. Sanctuary will not issue permits for treasure salvaging in the ecological reserve. Since no submerged cultural resources were located on Tortugas Bank, no expected impact.

Table 13. Impacts on Small Businesses (continued)

	Industries Impacted					
Regulation	**Commercial Fishing**	**Recreation Consumptive**	**Recreation Non-consumptive**	**Commercial Shipping**	**Treasure Salvors**	
Boundary Alternative III: Preferred (continued)						
1. No Take (continued) such reserve, provided further that such vessel is in continuous transit through the ecological reserve. (b) Fishing by any means. (c) Touching living or dead coral, including but not limited to, standing on a living or dead coral formation.	**B. Mitigating Factors, Off-setting Factors and Net Impact** Relocation. For lobster fishing operations, the potential losses are not likely to occur because the State of Florida's trap reduction program and fishermen are knowledgeable of other fishing locations throughout the Sanctuary. For king mackerel operations, potential losses are not likely to occur because king mackerel is a pelagic species that is highly mobile and could be caught in other locations. For shrimp operations, losses are not likely to occur because shrimp caught in the proposed reserve are such a small percentage of total catch.	of a percent of the total tourist/recreation business in Monroe County. **B. Mitigating Factors, Off-setting Factors and Net Impact** Substitution. Complete mitigation with no losses is a high probability because only a small portion of the Tortugas Bank is included in the ecological reserve. All users can substitute to other sites on the southern half of Tortugas Bank. Long-term Benefits from Replenishment Effect. Net result is no short term losses and long-term gains to small businesses that are directly and indirectly dependent on				

Table 13. Impacts on Small Businesses (continued)

	Industries Impacted				
Regulation	**Commercial Fishing**	**Recreation Consumptive**	**Recreation Non-consumptive**	**Commercial Shipping**	**Treasure Salvors**
Boundary Alternative III: Preferred (continued)					
1. No Take (continued)					
	For reef fish, the potential losses are likely to occur in the short term because reef fish stocks are overfished throughout the Sanctuary. Long-term Benefits from Replenishment. No expected benefits to king mackerel or shrimp operations. For lobster operations, expected net benefits from replenishment effect of ecological reserve. For reef fish operations, it is not clear whether the full 20 percent lost catch from displacement would be replaced from replenishment, but the costs of displacement would be mitigated and the losses to be less than the 20 percent reduction in the maximum loss case.	recreational consumptive use in the TERSA.			

Table 13. Impacts on Small Businesses (continued)

	Industries Impacted				
Regulation	**Commercial Fishing**	**Recreation Consumptive**	**Recreation Non-consumptive**	**Commercial Shipping**	**Treasure Salvors**
Boundary Alternative III: Preferred (continued)					
2. No Anchoring/Required Mooring Buoy Use/No Discharges or Deposits.					
(a) Anchoring on coral. (b) Anchoring when mooring buoys or designated anchoring areas are available (c) Discharges or deposits except cooling water or engine exhaust.	No incremental impact since "no take" regulations already displace all commercial fishing.	No incremental impact since recreational consumptive users are already displaced by "no take" regulations.	One charter operation that currently operates in Tortugas North potentially impacted. Mooring buoy use will constrain number and choice of available dive sites. It is unknown whether this will impact on future business of dive operators. Impact is dependent on the number and distribution (locations) of mooring buoys (to be determined). Prohibition against discharges or deposits results in no incremental impact.	No impact.	No incremental impact since treasure salvaging displaced by "no take" regulations.
3. No Access					
Alternative A: Apply existing ecological reserve regulations to Tortugas North and South.	No incremental impact. See regulations 1 and 2 above.	No incremental impact. See regulations 1 and 2 above.	No incremental impact. See regulations 1 and 2 above.	No incremental impact. See regulations 1 and 2 above.	No incremental impact since "no take" regulations displace treasure salvaging.

Table 13. Impacts on Small Businesses (continued)

	Industries Impacted				
Regulation	**Commercial Fishing**	**Recreation Consumptive**	**Recreation Non-consumptive**	**Commercial Shipping**	**Treasure Salvors**
	Boundary Alternative III: Preferred (continued)				
3. No Access (continued)					
Alternative B: Apply existing ecological reserve regulations to Tortugas North and South (as described in Alternative A). Prohibit anchoring in and control access to Tortugas South via permit and require call-in, call-out. Use of mooring buoys by vessels 100' or less in length.	No incremental impact. See regulations 1 and 2 above.	No incremental impact. See regulations 1 and 2 above.	No incremental impact. See regulations 1 and 2 above.	No impact.	No incremental impact since "no take" regulations displace treasure salvaging.
Alternative C: Apply existing ecological reserve regulations to Tortugas North and South (as described in Alternative A). Prohibit anchoring in and control access to Tortugas North and South via permit and require call-in, call-out (as described in Alternative B). Use of mooring buoys by vessels 100' or less in length.	No incremental impact because commercial fishing is already displaced by "no take" regulations.	No incremental impact because recreational consumptive users are already displaced by "no take" regulations.	Currently one charter dive operator operate in Tortugas North, while none operate in the South. Minor amount of time cost to charter operations in reporting to Sanctuary staffer to obtain permit and to notify when entering and leaving ecological reserve. permission. None of the current operators have vessels over 100 feet in length. Time costs expected to be limited to less than 15 minutes to obtain permit and access permission per operation per visit to the reserve.	No impact.	No incremental impact since "no take" regulations displace treasure salvaging.

Table 13. Impacts on Small Businesses (continued)

Regulation	Industries Impacted				
	Commercial Fishing	Recreation Consumptive	Recreation Non-consumptive	Commercial Shipping	Treasure Salvors
	Boundary Alternative III: Preferred (continued)				
3. No Access (continued)					
Alternative D (Preferred): Apply existing ecological reserve regulations to Tortugas North and Tortugas South (as described in Alternative A). Prohibit anchoring in Tortugas North and South and control accesss to Tortugas North via permit and require call-in, call-out (as described in Alternative B). Restrict access to Tortugas South to research or educational activities only. Use of mooring buoys by vessels 100' or less in length.	No incremental impact since commercial fishing is already displaced by "no take" regulations.	No incremental impact since recreational consumptive users are already displaced by "no take" regulations.	Currently one dive operator operates in Tortugas North, none in Tortugas South. Minor time costs to dive charter operators in reporting to Sanctuary staffer to obtain permit and to notify when entering and leaving ecological reserve. Time cost is expected to be less than 15 minutes per operation per visit to the reserve.	No impact.	No incremental impact since "no take" regulations displace treasure salvaging.
4. Boundary Expansion Areas: Additional Sanctuary-wide Regulations					
Prohibited Activities					
a. Mineral and hydrocarbon exploration, development and production.	No impact because the regulations only affect mineral and hydrocarbon firms (they are not small businesses).	No impact because the regulations only affect mineral and hydrocarbon firms (they are not small businesses).	No impact because the regulations only affect mineral and hydrocarbon firms (they are not small businesses).	No impact because the regulations only affect mineral and hydrocarbon firms (they are not small businesses).	No impact because the regulations only affect mineral and hydrocarbon firms (they are not small businesses).

Table 13. Impacts on Small Businesses (continued)

Regulation	Industries Impacted				
	Commercial Fishing	Recreation Consumptive	Recreation Non-consumptive	Commercial Shipping	Treasure Salvors
	Boundary Alternative III: Preferred (continued)				
4. Boundary Expansion Areas: Additional Sanctuary-wide Regulations (continued)					
Prohibited Activities (continued)					
b. Removal of, injury to, or possession of coral or live rock.	No impact because the commercial and personal taking of coral and live rock is currently illegal. Live rock aquaculture permits will not be issued and none are currently in existence.	No impact because the commercial and personal taking of coral and live rock is currently illegal.	Not applicable.	Not applicable.	Not applicable.
c. Alteration of, or construction on the seabed (exemptions are made for installation of nav aids & mooring buoys).	Not applicable.	Not applicable.	Not applicable.	Not applicable.	Not applicable.
d. Discharge or deposit of materials or other matter except cooling water or engine exhaust.	No impact. Other existing regulations already prohibit such discharges.	No impact. Other existing regulations already prohibit such discharges.	No impact. Other existing regulations already prohibit such discharges.	No impact. Other existing regulations already prohibit such discharges.	No incremental impact since " no take" regulations displace treasure salvaging.

Table 13. Impacts on Small Businesses (continued)

	Industries Impacted				
Regulation	**Commercial Fishing**	**Recreation Consumptive**	**Recreation Non-consumptive**	**Commercial Shipping**	**Treasure Salvors**
	Boundary Alternative III: Preferred (continued)				
4. Boundary Expansion Areas: Additional Sanctuary-wide Regulations (continued)					
Prohibited Activities (continued)					
e. Operation of vessels that strike or injure coral or seagrass; anchoring on live coral in depths less than 40'; exceeding 4 knots or creating wakes in designated areas; injuring or taking birds or marine mammals.	No incremental impact because commercial fishing already displaced by "no take" regulations.	No incremental impacts because recreational consumptive users already displaced by "no take" regulations.	No impact expected because dive operators already operate in this manner. No firms currently operate in these areas.	No impact.	No incremental impact since " no take" regulation displaces treasure salvaging.
f. Conduct of diving/ snorkeling without a dive flag.	Not applicable.	No incremental impact because recreational consumptive users are already displaced by "no take" regulation.	No impact expected because use of flags is already required by other Federal and State regulations. No firms currently operate in these areas.	Not applicable.	Not applicable.
g. Release of exotic species.	No impact because release of exotic species is already prohibited by other laws and there are no known aquaculture operations in the areas.	No impact because release of exotic species is already prohibited by other laws.	No impact because release of exotic species is already prohibited by other laws.	No impact because release of exotic species is already prohibited by other laws.	No incremental impact since " no take" regulation displaces treasure salvaging.

Table 13. Impacts on Small Businesses (continued)

Regulation	Industries Impacted				
	Commercial Fishing	Recreation Consumptive	Recreation Non-consumptive	Commercial Shipping	Treasure Salvors
	Boundary Alternative III: Preferred (continued)				
4. Boundary Expansion Areas: Additional Sanctuary-wide Regulations (continued)					
Prohibited Activities (continued)					
h. Damage or removal of markers.	No incremental impact because commercial fishing is already displaced by "no take" regulations.	No Incremental impact because recreational consumptive users are already displaced by "no take" regulations.	No incremental impact expected because such prohibitions already exist for markers placed by other governmental entities and the regulation only applies to Sanctuary markers. No firms currently operate in these areas.	No incremental impact expected because such prohibitions already exist for markers placed by other governmental entities and the regulation only applies to Sanctuary markers.	No incremental impact since " no take" regulation displaces treasure salvaging.
i. Movement of, removal of, injury to, or possession of Sanctuary historical resources.	Not applicable.	Not applicable.	Not applicable.	Not applicable.	No incremental impact since " no take" regulations displace treasure salvaging.
j. Take or possession of protected wildlife.	No impact because wildlife is already protected by other applicable law.	No impact because wildlife is already protected by other applicable law.	Not applicable.	Not applicable.	Not applicable.
k. Possession or use of explosives or electrical discharges (intent is to apply to take of marine species).	No incremental impact because commercial fishing is already displaced by "no take" regulations.	No incremental impact because recreational consumptive users are already displaced by "no take" regulations.	Not applicable.	Not applicable.	Not applicable.

Table 13. Impacts on Small Businesses (continued)

Regulation	Industries Impacted				
	Commercial Fishing	Recreation Consumptive	Recreation Non-consumptive	Commercial Shipping	Treasure Salvors
	Boundary Alternative III: Preferred (continued)				
4. Boundary Expansion Areas: Additional Sanctuary-wide Regulations (continued)					
Prohibited Activities (continued)					
l. Harvest or possession of marine life species (effect is to extend current State law into Federal waters).	No incremental impact because commercial fishing is already displaced by "no take" regulations. Currently there are no marine life collectors operating in these areas.	No incremental impact because recreational consumptive users are already displaced by "no take" regulations.	Not applicable.	Not applicable.	Not applicable.
m. Interference with law enforcement.	No incremental impact because commercial fishing is already displaced by "no take" regulations.	No incremental impact because recreational consumptive users are already displaced by "no take" regulations.	No impact expected because this provision is consistent with existing laws providing for penalties for interfering with law enforcement. No firms currently operate in these areas.	No impact expected because this provision is consistent with existing laws providing for penalties for interfering with law enforcement.	No incremental impact since " no take" regulations displace treasure salvaging.

Table 13. Impacts on Small Businesses (continued)

	Industries Impacted				
Regulation	**Commercial Fishing**	**Recreation Consumptive**	**Recreation Non-consumptive**	**Commercial Shipping**	**Treasure Salvors**
			Boundary Alternative IV		
1. No Take					
(a) Possessing, moving, harvesting, removing, taking, damaging, disturbing, breaking, cutting, spearing, or otherwise injuring any coral, marine invertebrate, fish, bottom formation, algae, seagrass or other living or dead organism, including shells, or attempting any of these activities. However, fish, invertebrates, and marine plants may be possessed aboard a vessel in the ecological reserve provided such resources can be shown not to have been harvested within, removed from, or taken within, the ecological reserve, as applicable, by being stowed in a cabin, locker, or similar storage area prior to entering and during transit through	**A. Maximum Potential Loss** 65 of the 105 to 110 commercial fishing operations are potentially impacted. Some operations are multi-species fisheries. 27 lobster, 14 shrimp, 16 king mackerel, and 42 reef fish operations potentially impacted directly. About $1.12 million in harvest revenue potentially lost or 16.45 % of the harvest revenue from the TERSA. On average, about $17,300 per fishing operation. Additionally, potential losses to 10 fish houses and other small businesses through the multiplier impact.	**A. Maximum Potential Loss** 10 of 12 charter boat operations operating within the TERSA would be potentially impacted. Direct business revenue would include 73.3% for diving for lobsters, 59% for spear fishing, and 10.5% for fishing. Across all three recreation consumptive activities, 28.7% of revenue would be potentially impacted and almost 41% of profits. On average, maximum potential losses are estimated to be about $37,380 of lost revenue and $14,500 of lost profits per operation. Additional potential losses to an unknown number of small firms through the multiplier impacts. Only a fraction	**A. Maximum Potential Loss** No losses. Potential gains to one charter boat dive operation providing services to non-consumptive divers. Indirect gains to several small businesses due to the multiplier impacts. Gains from improvements in quality of sites in terms of diversity, number and size of various sea life. Improvements in quality of experience leading to increase in demand for charter boat services and corresponding multiplier impacts on other small businesses. **B. Mitigating Factors, Off-setting Factors and Net Impact** No mitigating or offsetting factors. Net gains (see A above).	**A. Maximum Potential Loss** No impact. **B. Mitigating Factors, Off-setting Factors and Net Impact** No impact.	**A. Maximum Potential Loss** No expected impact. One permit for inventorying submerged cultural resources in Sanctuary waters was issued for the Tortugas area of the Sanctuary. There were no submerged cultural resources found. Currently, it is unknown whether there are any submerged cultural resources on Riley's Hump, located in Tortugas South. **B. Mitigating Factors, Off-setting Factors and Net Impact** No mitigating factors or offsetting factors. Sanctuary will not issue permits for treasure salvaging in the ecological reserve.

Table 13. Impacts on Small Businesses (continued)

	Industries Impacted				
Regulation	**Commercial Fishing**	**Recreation Consumptive**	**Recreation Non-consumptive**	**Commercial Shipping**	**Treasure Salvors**
		Boundary Alternative IV (continued)			
1. No Take (continued) such reserve, provided further that such vessel is in continuous transit through the ecological reserve. (b) Fishing by any means. (c) Touching living or dead coral, including but not limited to, standing on a living or dead coral formation.	**B. Mitigating Factors, Off-setting Factors and Net Impact** Relocation. For lobster fishing operations, the potential losses are not likely to occur because the State of Florida's trap reduction program and fishermen are knowledgeable of other fishing locations throughout the Sanctuary. For king mackerel operations, potential losses are not likely to occur because king mackerel is a pelagic species that is highly mobile and could be caught in other locations. For shrimp operations, losses are not likely to occur because shrimp caught in the proposed reserve are such a small percentage of total	of a percent of the total tourist/recreation business in Monroe County. **B. Mitigating Factors, Off-setting Factors and Net Impact** **Substitution. Under this alternative, about 73% of diving for lobsters and 72% of spearfishing would be displaced. The potential for substituting to alternative sites is greatly reduced compared with Alternatives II and III. The reason is that under this alternative all of the Tortugas Bank falls within this boundary alternative. Some substitution is possible, but the probability of crowding effects rises considerably for diving for lobsters and spearfishing. For fishing, substitution mitigating all the losses is still highly**			Since no submerged cultural resources were located on Tortugas Bank, no expected impact.

Table 13. Impacts on Small Businesses (continued)

	Industries Impacted				
Regulation	**Commercial Fishing**	**Recreation Consumptive**	**Recreation Non-consumptive**	**Commercial Shipping**	**Treasure Salvors**
			Boundary Alternative IV (continued)		
1. No Take (continued)					
	catch. For reef fish, the potential losses are likely to occur in the short term because reef fish stocks are overfished throughout the Sanctuary. Long-term Benefits from Replenishment. No expected benefits to king mackerel or shrimp operations. For lobster operations, expected net benefits from replenishment effect of ecological reserve. For reef fish operations, it is not clear whether the full 28 percent lost catch from displacement would be replaced from replenishment, but the	probable since only 6 percent of fishing activity would be displaced. This represents a relatively low amount of activity and given the wide distribution of this activity in the study area, crowding effects are still a low probability. Long-term Benefits from Replenishment Effect. For diving for lobsters and spearfishing, it is not clear whether there would be significant benefits offsite given that most of this activity currently takes place on the Tortugas Bank and none of the Bank is available for these activities. Not much is known about other areas that might benefit from the replenishment effect and where users could relocate to reap these benefits.			

Table 13. Impacts on Small Businesses (continued)

	Industries Impacted				
Regulation	**Commercial Fishing**	**Recreation Consumptive**	**Recreation Non-consumptive**	**Commercial Shipping**	**Treasure Salvors**
			Boundary Alternative IV (continued)		
1. No Take (continued)					
	costs of displacement would be mitigated and the losses to be less than the 28 percent reduction in the maximum loss case.	Whether the activities displaced could find alternative sites where both quantity and quality of activity could be maintained or enhanced seems less likely given the extent of displacement. For fishing, the small amount of displacement relative to the entire area plus the wide distribution of fishing activity still makes it highly likely that long-term benefits of replenishment will more than offset the potential losses from displacement with net benefits to this group. Net result is short term losses and low likelihood of long-term gains to small businesses that are directly and indirectly dependent on recreational consumptive use in the TERSA. For fishing, small amount of displacement not likely to result in short term losses and likely long-term gains.			

Table 13. Impacts on Small Businesses (continued)

	Industries Impacted				
Regulation	**Commercial Fishing**	**Recreation Consumptive**	**Recreation Non-consumptive**	**Commercial Shipping**	**Treasure Salvors**
			Boundary Alternative IV (continued)		
2. No Anchoring/Required Mooring Buoy Use/No Discharges or Deposits					
(a) Anchoring on coral. (b) Anchoring when mooring buoys or designated anchoring areas are available (c) Discharges or deposits except cooling water or engine exhaust.	No incremental impact since "no take" regulations already displaces all commercial fishing.	No incremental impact since recreational consumptive users are already displaced by "no take" regulations.	One charter operation that currently operates in Tortugas North potentially impacted. Mooring buoy use will constrain number and choice of available dive sites. It is unknown whether this will impact on future business of dive operators. Impact is dependent on the number and distribution (locations) of mooring buoys (to be determined). Prohibition on discharges or deposits results in no incremental impact.	No impact.	No incremental impact since treasure salvaging displaced by "no take" regulations.
3. No Access					
Alternative A: Apply existing ecological reserve regulations to Tortugas North and South.	No incremental impact. See regulations 1 and 2 above.	No incremental impact. See regulations 1 and 2 above.	No incremental impact. See regulations 1 and 2 above.	No incremental impact. See regulations 1 and 2 above.	No incremental impact since "no take" regulations displace treasure salvaging.

Table 13. Impacts on Small Businesses (continued)

	Industries Impacted				
Regulation	**Commercial Fishing**	**Recreation Consumptive**	**Recreation Non-consumptive**	**Commercial Shipping**	**Treasure Salvors**
	Boundary Alternative IV (continued)				
3. No Access (continued)					
Alternative B: Apply existing ecological reserve regulations to Tortugas North and South (as described in Alternative A). Prohibit anchoring in and control access to Tortugas South via permit and require call-in, call-out. Use of mooring buoys by vessels 100' or less in length.	No incremental impact. See regulations 1 and 2 above.	No incremental impact. See regulations 1 and 2 above.	No incremental impact. See regulations 1 and 2 above.	No impact.	No incremental impact since "no take" regulations displaces treasure salvaging.
Alternative C: Apply existing ecological reserve regulations to Tortugas North and South (as described in Alternative A). Prohibit anchoring in and control access to Tortugas North and South via permit and require call-in, call-out (as described in Alternative B). Use of mooring buoys by vessels 100' or less in length.	No incremental impact because commercial fishing is already displaced by "no take" regulations.	No incremental impact because recreational consumptive users are already displaced by "no take" regulations.	Currently one charter dive operator operates in Tortugas North, while none operate in the South. Minor amount of time cost to charter operations in reporting to Sanctuary staffer to obtain permit and to notify when entering and leaving ecological reserve.. The current operator does not have vessels over 100 feet in length. Time costs expected to be limited to less than 15 minutes to obtain permit and access permission per operation per visit to the reserve.	No impact.	No incremental impact since "no take" regulations displace treasure salvaging.

Table 13. Impacts on Small Businesses (continued)

Regulation	Industries Impacted				
	Commercial Fishing	Recreation Consumptive	Recreation Non-consumptive	Commercial Shipping	Treasure Salvors
	Boundary Alternative IV (continued)				
3. No Access (continued)					
Alternative D (Preferred): Apply existing ecological reserve regulations to Tortugas North and Tortugas South (as described in Alternative A). Prohibit anchoring in Tortugas North and South and control accesss to Tortugas North via permit and require call-in, call-out (as described in Alternative B). Restrict access to Tortugas South to research or educational activities only. Use of mooring buoys by vessels 100' or less in length.	No incremental impact since commercial fishing is already displaced by "no take" regulations.	No incremental impact since recreational consumptive users are already displaced by "no take" regulations.	Currently one dive operator operates in Tortugas North, none in Tortugas South. Minor time costs to the dive charter operator in reporting to Sanctuary staffer to obtain permit and to notify when entering and leaving ecoligcal reserve.. Time cost is expected to be less than 15 minutes per operation per visit to the reserve.	No impact.	No incremental impact since "no take" regulations displace treasure salvaging.
4. Boundary Expansion Areas: Additional Sanctuary-wide Regulations					
Prohibited Activities					
a. Mineral and hydrocarbon exploration, development and production.	No impact because the regulations only affect mineral and hydrocarbon firms (they are not small businesses).	No impact because the regulations only affect mineral and hydrocarbon firms (they are not small businesses).	No impact because the regulations only affect mineral and hydrocarbon firms (they are not small businesses).	No impact because the regulations only affect mineral and hydrocarbon firms (they are not small businesses).	No impact because the regulations only affect mineral and hydrocarbon firms (they are not small businesses).

Table 13. Impacts on Small Businesses (continued)

Regulation	Industries Impacted				
	Commercial Fishing	Recreation Consumptive	Recreation Non-consumptive	Commercial Shipping	Treasure Salvors
	Boundary Alternative IV (continued)				
4. Boundary Expansion Areas: Additional Sanctuary-wide Regulations (continued)					
Prohibited Activities (continued)					
b. Removal of, injury to, or possession of coral or live rock.	No impact because the commercial and personal taking of coral and live rock is currently illegal. Live rock aquaculture permits will not be issued and none are currently in existence.	No impact because the commercial and personal taking of coral and live rock is currently illegal.	Not applicable.	Not applicable.	Not applicable.
c. Alteration of, or construction on the seabed (exemptions are made for installation of nav aids & mooring buoys).	Not applicable.	Not applicable.	Not applicable.	Not applicable.	Not applicable.
d. Discharge or deposit of materials or other matter except cooling water or engine exhaust.	No impact. Other existing regulations already prohibit such discharges.	No impact. Other existing regulations already prohibit such discharges.	No impact. Other existing regulations already prohibit such discharges.	No impact. Other existing regulations already prohibit such discharges.	No incremental impact since " no take" regulations displace treasure salvaging.

Table 13. Impacts on Small Businesses (continued)

	Industries Impacted				
Regulation	**Commercial Fishing**	**Recreation Consumptive**	**Recreation Non-consumptive**	**Commercial Shipping**	**Treasure Salvors**
	Boundary Alternative IV (continued)				
4. Boundary Expansion Areas: Additional Sanctuary-wide Regulations (continued)					
Prohibited Activities (continued)					
e. Operation of vessels that strike or injure coral or seagrass; anchoring on live coral in depths less than 40'; exceeding 4 knots or creating wakes in designated areas; injuring or taking birds or marine mammals.	No incremental impact because commercial fishing already displaced by "no take" regulations.	No incremental impacts because recreational consumptive users already displaced by "no take" regulations.	No impact expected because dive operators already operate in this manner. No firms currently operate in these areas.	No impact.	No incremental impact since " no take" regulations displace treasure salvaging.
f. Conduct of diving/ snorkeling without a dive flag.	Not applicable.	No incremental impact because recreational consumptive users are already displaced by "no take" regulations.	No impact expected because use of flags is already required by other Federal and State regulations. No firms currently operate in these areas.	Not applicable.	Not applicable.
g. Release of exotic species.	No impact because release of exotic species is already prohibited by other laws and there are no known aquaculture operations in the areas.	No impact because release of exotic species is already prohibited by other laws.	No impact because release of exotic species is already prohibited by other laws.	No impact because release of exotic species is already prohibited by other laws.	No incremental impact since " no take" regulations displace treasure salvaging.

Table 13. Impacts on Small Businesses (continued)

Regulation	Industries Impacted				
	Commercial Fishing	Recreation Consumptive	Recreation Non-consumptive	Commercial Shipping	Treasure Salvors
	Boundary Alternative IV (continued)				
4. Boundary Expansion Areas: Additional Sanctuary-wide Regulations (continued)					
Prohibited Activities (continued)					
h. Damage or removal of markers.	No incremental impact because commercial fishing is already displaced by "no take" regulations.	No Incremental impact because recreational consumptive users are already displaced by "no take" regulations.	No incremental impact expected because such prohibitions already exist for markers placed by other governmental entities and the regulation only applies to Sanctuary markers. No firms currently operate in these areas.	No incremental impact expected because such prohibitions already exist for markers placed by other governmental entities and the regulation only applies to Sanctuary markers.	No incremental impact since " no take" regulations displace treasure salvaging.
i. Movement of, removal of, injury to, or possession of Sanctuary historical resources.	Not applicable.	Not applicable.	Not applicable.	Not applicable.	No incremental impact since " no take" regulations displace treasure salvaging.
j. Take of possession of protected wildlife.	No impact because wildlife is already protected by other applicable law.	No impact because wildlife is already protected by other applicable law.	Not applicable.	Not applicable.	Not applicable.
k. Possession or use of explosives or electrical discharges (intent is to apply to take of marine species).	No incremental impact because commercial fishing is already displaced by "no take" regulations.	No incremental impact because recreational consumptive users are already displaced by "no take" regulations.	Not applicable.	Not applicable.	Not applicable.

Table 13. Impacts on Small Businesses (continued)

Regulation	Industries Impacted				
	Commercial Fishing	Recreation Consumptive	Recreation Non-consumptive	Commercial Shipping	Treasure Salvors
	Boundary Alternative IV (continued)				
4. Boundary Expansion Areas: Additional Sanctuary-wide Regulations (continued)					
Prohibited Activities (continued)					
l. Harvest or possession of marine life species (effect is to extend current State law into Federal waters).	No incremental impact because commercial fishing is already displaced by "no take" regulations. Currently there are no marine life collectors operating in these areas.	No incremental impact because recreational consumptive users are already displaced by "no take" regulations.	Not applicable.	Not applicable.	Not applicable.
m. Interference with law enforcement.	No incremental impact because commercial fishing is already displaced by "no take" regulations.	No incremental impact because recreational consumptive users are already displaced by "no take" regulations.	No impact expected because this provision is consistent with existing laws providing for penalties for interfering with law enforcement. No firms currently operate in these areas.	No impact expected because this provision is consistent with existing laws providing for penalties for interfering with law enforcement.	No incremental impact since " no take" regulations displace treasure salvaging.

Table 13. Impacts on Small Businesses (continued)

	Industries Impacted				
Regulation	**Commercial Fishing**	**Recreation Consumptive**	**Recreation Non-consumptive**	**Commercial Shipping**	**Treasure Salvors**
			Boundary Alternative V		
1. No Take					
(a) Possessing, moving, harvesting, removing, taking, damaging, disturbing, breaking, cutting, spearing, or otherwise injuring any coral, marine invertebrate, fish, bottom formation, algae, seagrass or other living or dead organism, including shells, or attempting any of these activities. However, fish, invertebrates, and marine plants may be possessed aboard a vessel in the ecological reserve provided such resources can be shown not to have been harvested within, removed from, or taken within, the ecological reserve, as applicable, by being stowed in a cabin, locker, or similar storage area prior to entering and during transit through	**A. Maximum Potential Loss** 65 of the 105 to110 commercial fishing operations are potentially impacted. Some operations are multi-species fisheries. 27 lobster, 14 shrimp, 16 king mackerel, and 42 reef fish operations potentially impacted directly. About $1.22 million in harvest revenue potentially lost or 17.9 % of the harvest revenue from the TERSA. On average, about $18,843 per fishing operation. Additionally, potential losses to 10 fish houses and other small businesses through the multiplier impact.	**A. Maximum Potential Loss** 11 of 12 charter boat operations operating within the TERSA would be potentially impacted. Direct business revenue would include 86.66% for diving for lobsters, 69% for spear fishing, and 12.88% for fishing. Across all three recreation consumptive activities, 34% of revenue would be potentially impacted and about 48% of profits. On average, maximum potential losses are estimated to be about $40,248 of lost revenue and $15,668 of lost profits per operation. Additional potential losses to an unknown number of small firms through the multiplier impacts. Only a fraction	**A. Maximum Potential Loss** No losses. Potential gains to one charter boat dive operation providing services to non-consumptive divers. Indirect gains to several small businesses due to the multiplier impacts. Gains from improvements in quality of sites in terms of diversity, number and size of various sea life. Improvements in quality of experience leading to increase in demand for charter boat services and corresponding multiplier impacts on other small businesses. **B. Mitigating Factors, Off-setting Factors and Net Impact** No mitigating or offsetting factors. Net gains (see A above).	**A. Maximum Potential Loss** No impact. **B. Mitigating Factors, Off-setting Factors and Net Impact** No impact.	**A. Maximum Potential Loss** No expected impact. One permit for inventorying submerged cultural resources in Sanctuary waters was issued for the Tortugas area of the Sanctuary. There were no submerged cultural resources found. Currently, it is unknown whether there are any submerged cultural resources on Riley's Hump, located in Tortugas South. **B. Mitigating Factors, Off-setting Factors and Net Impact** No mitigating factors or offsetting factors. Sanctuary will not issue permits for treasure salvaging in the ecological reserve.

Table 13. Impacts on Small Businesses (continued)

	Industries Impacted				
Regulation	**Commercial Fishing**	**Recreation Consumptive**	**Recreation Non-consumptive**	**Commercial Shipping**	**Treasure Salvors**
Boundary Alternative V (continued)					
1. No Take (continued)					
such reserve, provided further that such vessel is in continuous transit through the ecological reserve. (b) Fishing by any means. (c) Touching living or dead coral, including but not limited to, standing on a living or dead coral formation.	**B. Mitigating Factors, Off-setting Factors and Net Impact** Crowding and Relocation. For lobster fishing operations, there is some potential for crowding costs. However, the potential losses are not likely lto occur because the State of Florida's trap reduction program and fishermen are knowledgeable of other fishing locations throughout the Sanctuary. For king mackerel operations, potential losses are not likely to occur because king mackerel is a pelagic species that is highly mobile and could be caught in other locations. For shrimp operations, losses are	of a percent of the total tourist/recreation business in Monroe County. **B. Mitigating Factors, Off-setting Factors and Net Impact** Substitution. This alternative displaces 87% of the diving for lobsters and 85% of the spearfishing. Substitution possibilities for these activities are extremely low given that this alternative eliminates access to the Tortugas Bank. Losses close to the maximum potential are more likely for these two activities. For fishing, mitigating all the losses through substitution is still highly probable since only 8% of the fishing activity would be displaced. This represents a low amount of activity and given the wide distribution of fishing activity throughout the study area, crowding effects are still a low probability.			Since no submerged cultural resources were located on Tortugas Bank, no expected impact.

Table 13. Impacts on Small Businesses (continued)

	Industries Impacted				
Regulation	**Commercial Fishing**	**Recreation Consumptive**	**Recreation Non-consumptive**	**Commercial Shipping**	**Treasure Salvors**
		Boundary Alternative V (continued)			
1. No Take (continued)					
	not likely to occur because shrimp caught in the proposed reserve are such a small percentage of total catch. For reef fish, the potential losses are likely to occur in the short term because reef fish stocks are overfished throughout the Sanctuary. Long-term Benefits from Replenishment. No expected benefits to king mackerel or shrimp operations. For lobster operations, expected net benefits from replenishment effect of	Long-term Benefits from Replenishment Effect. Although four of the five spawning sites identified in the western portion of the TERSA are within this boundary alternative, the displacement from the entire Tortugas Bank makes it highly unlikely that those diving for lobsters or spearfishing will benefit and will most likely suffer losses close to the maximum potential. For fishing, the stock effects or replenishment effect could be substantial. Whether the benefits would be large enough to offset displacement cannot be determined. But given the past experience with reserves, it is still somewhat likely that long-term benefits would offset			

Table 13. Impacts on Small Businesses (continued)

	Industries Impacted				
Regulation	**Commercial Fishing**	**Recreation Consumptive**	**Recreation Non-consumptive**	**Commercial Shipping**	**Treasure Salvors**
			Boundary Alternative V (continued)		
1. No Take (continued)					
	ecological reserve. For reef fish operations, it is not clear whether the full 29 percent lost catch from displacement would be replaced from replenishment, but the costs of displacement would be mitigated and the losses to be less than the 29 percent reduction in the maximum loss case.	displacement costs yielding net benefits to fishing. Net result is short term losses and long-term losses to small businesses that are directly and indirectly dependent on recreational diving for lobsters and spearfishing in the TERSA. Possibility of small short term losses to fishing, but long-term gains from replenishment effect.			

Table 13. Impacts on Small Businesses (continued)

	Industries Impacted				
Regulation	**Commercial Fishing**	**Recreation Consumptive**	**Recreation Non-consumptive**	**Commercial Shipping**	**Treasure Salvors**
Boundary Alternative V (continued)					
2. No Anchoring/Required Mooring Buoy Use/No Discharges or Deposits					
(a) Anchoring on coral. (b) Anchoring when mooring buoys or designated anchoring areas are available (c) Discharges or deposits except cooling water or engine exhaust.	No incremental impact since "no take" regulations already displace all commercial fishing.	No incremental impact since recreational consumptive users are already displaced by "no take" regulations.	One charter operation currently operating in Tortugas North potentially impacted. Mooring buoy use will constrain number and choice of available dive sites. It is unknown whether this will impact on future business of dive operators. Impact is dependent on the number and distribution (locations) of mooring buoys (to be determined). Prohibition against discharges or deposits results in no incremental impact.	No impact.	No incremental impact since treasure salvaging displaced by "no take" regulations.
3. No Access					
Alternative A: Apply existing ecological reserve regulations to Tortugas North and South.	No incremental impact. See regulations 1 and 2 above.	No incremental impact. See regulations 1 and 2 above.	No incremental impact. See regulations 1 and 2 above.	No incremental impact. See regulations 1 and 2 above.	No incremental impact since "no take" regulations displace treasure salvaging.

Table 13. Impacts on Small Businesses (continued)

	Industries Impacted				
Regulation	**Commercial Fishing**	**Recreation Consumptive**	**Recreation Non-consumptive**	**Commercial Shipping**	**Treasure Salvors**
	Boundary Alternative V (continued)				
3. No Access (continued)					
Alternative B: Apply existing ecological reserve regulations to Tortugas North and South (as described in Alternative A). Prohibit anchoring in and control access to Tortugas South via permit and require call-in, call-out. Use of mooring buoys by vessels 100' or less in length.	No incremental impact. See regulations 1 and 2 above.	No incremental impact. See regulations 1 and 2 above.	No incremental impact. See regulations 1 and 2 above.	No impact.	No incremental impact since "no take" regulations displace treasure salvaging.
Alternative C: Apply existing ecological reserve regulations to Tortugas North and South (as described in Alternative A). Prohibit anchoring in and control access to Tortugas North and South via permit and require call-in, call-out (as described in Alternative B). Use of mooring buoys by vessels 100' or less in length.	No incremental impact because commercial fishing is already displaced by "no take" regulations.	No incremental impact because recreational consumptive users are already displaced by "no take" regulations.	Currently one charter dive operator operates in Tortugas North, while none operate in the South. Minor amount of time cost to charter operations in reporting to Sanctuary staffer to obtain permit and to notify when entering and leaving ecological reserve. The current operator does not have vessels over 100 feet in length. Time costs expected to be limited to less than 15 minutes to obtain permit and access permission per operation per visit to the reserve.	No impact.	No incremental impact since "no take" regulations displace treasure salvaging.

Table 13. Impacts on Small Businesses (continued)

Regulation	Industries Impacted				
	Commercial Fishing	Recreation Consumptive	Recreation Non-consumptive	Commercial Shipping	Treasure Salvors
	Boundary Alternative V (continued)				
3. No Access (continued)					
Alternative D (Preferred): Apply existing ecological reserve regulations to Tortugas North and Tortugas South (as described in Alternative A). Prohibit anchoring in Tortugas North and South and control accesss to Tortugas North via permit and require call-in, call-out (as described in Alternative B). Restrict access to Tortugas South to research or educational activities only. Use of mooring buoys by vessels 100' or less in length.	No incremental impact since commercial fishing is already displaced by "no take" regulations.	No incremental impact since recreational consumptive users are already displaced by "no take" regulations.	Currently one dive operator operates in Tortugas North, none in Tortugas South. Minor time costs to the dive charter operator in reporting to Sanctuary staffer to obtain permit and to notify when entering and leaving ecological reserve. Time cost is expected to be less than 15 minutes per operation per visit to the reserve.	No impact.	No incremental impact since "no take" regulation displaces treasure salvaging.
4. Boundary Expansion Areas: Additional Sanctuary-wide Regulations					
Prohibited Activities					
a. Mineral and hydrocarbon exploration, development and production.	No impact because the regulations only affect mineral and hydrocarbon firms (they are not small businesses).	No impact because the regulations only affect mineral and hydrocarbon firms (they are not small businesses).	No impact because the regulations only affect mineral and hydrocarbon firms (they are not small businesses).	No impact because the regulations only affect mineral and hydrocarbon firms (they are not small businesses).	No impact because the regulations only affect mineral and hydrocarbon firms (they are not small businesses).

Table 13. Impacts on Small Businesses (continued)

Regulation	Industries Impacted				
	Commercial Fishing	Recreation Consumptive	Recreation Non-consumptive	Commercial Shipping	Treasure Salvors
	Boundary Alternative V (continued)				
4. Boundary Expansion Areas: Additional Sanctuary-wide Regulations (continued)					
Prohibited Activities (continued)					
b. Removal of, injury to, or possession of coral or live rock.	No impact because the commercial and personal taking of coral and live rock is currently illegal. Live rock aquaculture permits will not be issued and none are currently in existence.	No impact because the commercial and personal taking of coral and live rock is currently illegal.	Not applicable.	Not applicable.	Not applicable.
c. Alteration of, or construction on the seabed (exemptions are made for installation of nav aids & mooring buoys).	Not applicable.	Not applicable.	Not applicable.	Not applicable.	Not applicable.
d. Discharge or deposit of materials or other matter except cooling water or engine exhaust.	No impact. Other existing regulations already prohibit such discharges.	No impact. Other existing regulations already prohibit such discharges.	No impact. Other existing regulations already prohibit such discharges.	No impact. Other existing regulations already prohibit such discharges.	No incremental impact since " no take" regulations displace treasure salvaging.

Table 13. Impacts on Small Businesses (continued)

Regulation	Industries Impacted				
	Commercial Fishing	Recreation Consumptive	Recreation Non-consumptive	Commercial Shipping	Treasure Salvors
	Boundary Alternative V (continued)				
4. Boundary Expansion Areas: Additional Sanctuary-wide Regulations (continued)					
Prohibited Activities (continued)					
e. Operation of vessels that strike or injure coral or seagrass; anchoring on live coral in depths less than 40'; exceeding 4 knots or creating wakes in designated areas; injuring or taking birds or marine mammals.	No incremental impact because commercial fishing already displaced by "no take" regulations.	No incremental impacts because recreational consumptive users already displaced by "no take" regulations.	No impact expected because dive operators already operate in this manner. No firms currently operate in these areas.	No impact.	No incremental impact since " no take" regulations displace treasure salvaging.
f. Conduct of diving/ snorkeling without a dive flag.	Not applicable.	No incremental impact because recreational consumptive users are already displaced by "no take" regulations.	No impact expected because use of flags is already required by other Federal and State regulations. No firms currently operate in these areas.	Not applicable.	Not applicable.
g. Release of exotic species.	No impact because release of exotic species is already prohibited by other laws and there are no known aquaculture operations in the areas.	No impact because release of exotic species is already prohibited by other laws.	No impact because release of exotic species is already prohibited by other laws.	No impact because release of exotic species is already prohibited by other laws.	No incremental impact since " no take" regulations displace treasure salvaging.

Table 13. Impacts on Small Businesses (continued)

Regulation	Industries Impacted				
	Commercial Fishing	Recreation Consumptive	Recreation Non-consumptive	Commercial Shipping	Treasure Salvors
	Boundary Alternative V (continued)				
4. Boundary Expansion Areas: Additional Sanctuary-wide Regulations (continued)					
Prohibited Activities (continued)					
h. Damage or removal of markers.	No incremental impact because commercial fishing is already displaced by "no take" regulations.	No Incremental impact because recreational consumptive users are already displaced by "no take" regulations.	No incremental impact expected because such prohibitions already exist for markers placed by other governmental entities and the regulation only applies to Sanctuary markers. One firm currently operates in these areas.	No incremental impact expected because such prohibitions already exist for markers placed by other governmental entities and the regulation only applies to Sanctuary markers.	No incremental impact since " no take" regulations displace treasure salvaging.
i. Movement of, removal of, injury to, or possession of Sanctuary historical resources.	Not applicable.	Not applicable.	Not applicable.	Not applicable.	No incremental impact since " no take" regulations displace treasure salvaging.
j. Take or possession of protected wildlife.	No impact because wildlife is already protected by other applicable law.	No impact because wildlife is already protected by other applicable law.	Not applicable.	Not applicable.	Not applicable.
k. Possession or use of explosives or electrical discharges (intent is to apply to take of marine species).	No incremental impact because commercial fishing is already displaced by "no take" regulations.	No incremental impact because recreational consumptive users are already displaced by "no take" regulations.	Not applicable.	Not applicable.	Not applicable.

Table 13. Impacts on Small Businesses (continued)

	Industries Impacted				
Regulation	**Commercial Fishing**	**Recreation Consumptive**	**Recreation Non-consumptive**	**Commercial Shipping**	**Treasure Salvors**
	Boundary Alternative V (continued)				
4. Boundary Expansion Areas: Additional Sanctuary-wide Regulations (continued)					
Prohibited Activities (continued)					
l. Harvest or possession of marine life species (effect is to extend current State law into Federal waters).	No incremental impact because commercial fishing is already displaced by "no take" regulations. Currently there are no marine life collectors operating in these areas.	No incremental impact because recreational consumptive users are already displaced by "no take" regulations.	Not applicable.	Not applicable.	Not applicable.
m. Interference with law enforcement.	No incremental impact because commercial fishing is already displaced by "no take" regulations.	No incremental impact because recreational consumptive users are already displaced by "no take" regulations.	No impact expected because this provision is consistent with existing laws providing for penalties for interfering with law enforcement. One firm currently operates in these areas.	No impact expected because this provision is consistent with existing laws providing for penalties for interfering with law enforcement.	No incremental impact since " no take" regulations displace treasure salvaging.

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Selection of the Preferred Alternative

This section sets forth the Preferred Alternative and why it was selected as the Preferred Alternative.

Preferred Alternative

The Preferred Alternative is Boundary Alternative III (Figure 1) combined with Regulatory Alternative D.

General Rationale

Boundary Alternative III combined with Regulatory Alternative D has been selected as the Preferred Alternative because this combination achieves the objectives of all of the criteria listed below.

This Preferred Alternative is of sufficient size and imposes adequate protective measures to satisfy the selection criteria and to fulfill the goals and objectives of the FKNMSPA and the NMSA. Boundary Alternative III is consistent with the recommendations of the WG and SAC to NOAA and the State of Florida. While the WG and SAC recommended Regulatory Alternative A (application of the existing Sanctuary-wide and existing ecological reserve regulations), the more protective approach of Regulatory Alternative D is warranted because of the threat to coral reef resources posed by the anchoring of vessels, the threat to the sensitive resources of Tortugas South from non-consumptive activities, and the difficulty of enforcement in this remote area, particularly in Tortugas South. Extremely high coral cover and deep water in the Tortugas preclude anchoring without damaging coral.

The Preferred Regulatory Alternative in the DSEIS was Alternative C. The Preferred Regulatory Alternative in the FSEIS is Alternative D. Under Alternative D, Tortugas South will be accessible only for continuous transit and law enforcement or, pursuant to a sanctuary permit, for scientific research and educational purposes. This change was made because of comments received regarding the potential effects of non-consumptive activities, particularly non-consumptive diving. Alternative D will better protect resources in Tortugas South, such as the spawning aggregation areas, which are more sensitive to this activity than those in Tortugas North, and will enhance enforcement surveillance in this remote part of the Reserve. Leaving Tortugas North accessible to non-consumptive activities, including diving, will not only provide significant opportunities for resource appreciation and public education but will also allow the comparison of Tortugas North to Tortugas South over time to better understand and document the possible effects of non-consumptive diving in Tortugas North. The permit system for access to Tortugas North will provide information that will allow NOAA to determine the number of vessels and divers using the area and will assist in monitoring impacts.

The final regulations are revised from those proposed to make them consistent with Regulatory Alternative D. Also, the prohibition on fishing has been revised to prohibit all fishing in the Reserve without exception. This change was made in response to comments that the prohibition should be issued under the NMSA and that the exception clause that would have authorized fishing to the extent allowed under regulations issued pursuant to the Magnuson-Stevens Fishery Conservation and Management Act should be eliminated. Regulations issued under the Magnuson-Stevens Act must satisfy the requirements of that Act including the National Standards set forth in that Act. Sanctuary regulations including those governing fishing are issued under the NMSA. While some of the goals and objectives of the two Acts are similar, many of the goals and objectives of the two statutes are different.

Comparison of Alternatives

This section compares Boundary Alternatives II–V and Regulatory Alternatives A–D based on the selection criteria. Boundary Alternative I, the No-Action Alternative, is not compared because it would not be consistent with the goals of the FKNMSPA, the NMSA, the MP for the Sanctuary, and Executive Order 13089. Among other things, Part V of the FSEIS sets forth the environmental and socio-economic consequences of the No-Action Alternative. The selection criteria are: (1) protect ecosystem integrity; (2) protect biodiversity, including the maintenance or restoration of viable populations of native species; (3) enhance scientific understanding of marine ecosystems; (4) facilitate human uses to the extent consistent with meeting the other criteria; (5) minimize adverse socio-economic impacts to the extent consistent with meeting the other criteria; and (6) facilitate enforcement and compliance (Table 14). Subcriteria for and the goals and sources of each of the criteria are set forth in the table below. The criteria are consistent with the goals of the FKNMSPA, the NMSA, the MP, public scoping comments, design criteria developed by the Tortugas 2000 Working Group, Executive Order 13089 regarding Coral Reef Protection, the U.S. Coral Reef Task Force (CRTF) recommendations, and scientific literature on marine reserves. The criteria have been revised from those contained in the DSEIS based on comments received.

TABLE 14

Criteria	Objective	Rationale/Source
Protect ecosystem integrity. This includes the following sub-criteria: • Protect a wide range of contiguous habitats through deep water. • Maximize connectivity among habitats. • Protect unique coral formations and areas of high coral cover, including Sherwood Forest. • Provide adequate buffer areas. • Sustain ecological & evolutionary processes. • Protect against short and long-term environmental perturbations, and,	Choose an area and protection measures that protect a wide range of contiguous habitats, establish connectivity between those habitats, and protect unique structural formations.	FKNMSPA, NMSA, public comment, Working Group, CRTF, and literature

TABLE 14—Continued

Criteria	Objective	Rationale/Source
• Encompass an area that is large enough and sufficiently protected that, when combined with existing protections, maintains the Tortugas region's contribution to the Florida Keys' ecosystem.		
Protect biodiversity, including the maintenance or restoration of viable populations of native species. This includes the following sub-criteria: • Protect the full range of species. • Protect natural spawning, nursery, and permanent residence areas, including Riley's Hump. • Protect and enhance commercially and recreationally important fish species. • Protect species with specific habitat requirements. • Protect endangered, threatened, rare, or imperiled species. • Protect areas with physical oceanographic characteristics that will enhance larval dispersal. • Protect areas of high coral and fish diversity. • Protect areas of high productivity. • Protect foraging areas for seabird and endangered sea turtle populations, and, • Protect areas of high endemism.	Choose an area and protection measures that will protect areas of high biodiversity, known or reported spawning areas and habitats that support resident fish and other marine life.	Final Management Plan, public comment, Working Group, and literature
Enhance scientific understanding of marine ecosystems. This includes the following sub-criteria: • Provide a reference area to monitor the effects of both consumptive and non-consumptive activities on ecosystem structure and processes, and, • Provide a reference area to discriminate between human-caused and natural changes in the Florida Keys' marine ecosystem.	Choose an area and protection measures that will facilitate the monitoring of anthropogenic impacts and the evaluation of the efficacy of the ecological reserve for protecting coral reef health and biodiversity.	FKNMSPA, NMSA, public comment, Working Group, CRTF, and literature
Facilitate human uses to the extent consistent with the other criteria	Choose an area and protection measures that will allow uses and provide a range of habitats to observe and study, consistent with the attainment of the other objectives.	FKNMSPA, NMSA, Final Management Plan, public comment, Working Group, and literature
Minimize adverse socio-economic impacts to the extent consistent with the other criteria.	Choose an area and protection measures that meet the objectives of the other criteria but that do not unduly impact users.	FKNMSPA, NMSA, public comment, and Working Group
Facilitate enforcement and compliance	Choose an area and protection measures that facilitate enforcement of the ecological reserve and encourage compliance by users.	Working Group and literature

Protect ecosystem integrity. Boundary Alternative II does not encompass enough range of habitat or area to adequately protect the integrity of the ecosystem. Boundary Alternative II does not adequately protect the full range of habitats and species found in the Tortugas area. The unique and ancient coral formations of Sherwood Forest are not part of this alternative. Boundary Alternative II does not include contiguous habitats nor is connectivity between habitats maximized. Boundary Alternative II does not provide a reasonable buffer area for coral reef features. Alternative II includes no deep water habitats greater than approximately 200 feet. By not having two reserve components, Alternative II offers no insurance against the effects of a catastrophic event (*e.g.,* cold weather, low salinity) that could potentially damage resources of the area. Alternative II is not large enough to sustain local or regional ecological or evolutionary processes. Boundary Alternatives III, IV and V, when combined with existing protections in the region, are sufficient to protect ecosystem integrity in the Tortugas and that region's contribution to the Florida Keys ecosystem. Boundary Alternatives III–V include two replicate components that help to ensure against the effects of catastrophic events. Boundary Alternative III includes a sufficient range of essential habitats for many species life stages and includes adequate buffers. The increased area of Boundary Alternatives IV and V has negligible increased benefit to protecting ecosystem integrity compared to Alternative III. Boundary Alternative V does not capture additional significant habitat to the west of the

Tortugas Bank and does not preserve the critical deep water habitat south of Riley's Hump. Regulatory Alternative A would not adequately protect ecosystem integrity because of the threat to coral reef resources by anchoring. Regulatory Alternative B would not adequately protect ecosystem integrity in Tortugas North and the Sherwood Forest area because of the threat to coral reef resources by anchoring. Regulatory Alternative C adequately protects ecosystem integrity by prohibiting anchoring and controlling access to Tortugas North and South via an access permit. Regulatory Alternative D increases protection of ecosystem integrity over Alternative C by prohibiting access to Tortugas South except by permit for research or educational reasons. This will virtually eliminate human degradation and protect the ecological integrity of the Tortugas region.

Protect biodiversity, including the maintenance or restoration of viable populations of native species. Boundary Alternative II does not protect the high coral species diversity of Sherwood Forest or the unique fish species richness of Tortugas South. Boundary Alternative II protects only one of eight known fish spawning aggregations and does not include Riley's Hump, which is an area of high endemism and a critical source area for larvae. Sherwood Forest, an important permanent residence area for a variety of species and area of high productivity, is not part of Alternative II. Boundary Alternative III protects 5 of the 8 known fish spawning areas as well as approximately 87% of the known coral reef habitat and 76% of the known hardbottom habitat. Boundary Alternative III also protects the habitat of several commercially important fish species and several uncommon species found in the deep water regions of Tortugas South. Boundary Alternatives III, IV, and V protect the high coral diversity of Sherwood Forest and they protect Riley's Hump and the deep habitat around it which are a critical source of larvae for downstream areas of the Florida Keys. In addition, they help protect important foraging areas for seabirds and sea turtles. Boundary Alternative IV encompasses 7 of the 8 known fish spawning sites as well as 100% of the known coral and hardbottom habitat. Boundary Alternative V encompasses 7 of the 8 known fish spawning sites and would protect all of the known coral and hardbottom habitat. Alternative V's expansion of Tortugas North to the west would provide increased protection for some additional habitats and associated species. However, its reduction in size of Tortugas South would provide less protection for critical deep water habitats and thereby has the least protection for associated species such as golden crab and snowy grouper. Regulatory Alternative A would not adequately preserve biodiversity and maintain viable populations because of the threat to associated habitats of many species by anchoring and the lack of protection for high diversity areas such as Sherwood Forest and Riley's Hump. Regulatory Alternative B would not adequately preserve biodiversity and maintain viable populations in Tortugas North because of the threat to associated habitats of many species by anchoring. Regulatory Alternative C would preserve biodiversity by prohibiting habitat destruction from anchoring. However, Regulatory Alternatives A, B, and C would not protect the several natural fish spawning aggregations in Tortugas South from disturbance. Regulatory Alternative D would adequately preserve biodiversity and maintain viable populations by protecting critical habitat in Tortugas North and Tortugas South from anchor damage and by minimizing disturbance to natural spawning aggregations in Tortugas South.

Enhance scientific understanding of marine ecosystems. Given the absence of unexploited areas in the Tortugas region, Boundary Alternatives II–V would all serve to increase our scientific understanding of marine ecosystems and their response to management of consumptive and non-consumptive activities, including their recovery from fishing impacts. Boundary Alternatives II–V would also facilitate scientific understanding by providing a reference area to gauge the broader changes occurring in the Florida Keys marine ecosystem. Boundary Alternatives III–V offer the added scientific benefit of protecting Riley's Hump, which would add to our knowledge of effective reserve design regarding networks and energy flow between marine reserves. The inclusion of Tortugas South will also significantly add to our knowledge of the importance of the Tortugas region in sustaining the Florida Keys ecosystem. Boundary Alternatives IV and V encompass all of Tortugas Bank and would compromise the study of fishing effects because there would be no comparable habitat for use as a reference site. Regulatory Alternatives A, B, and C would provide for essentially the same level of scientific understanding. Regulatory Alternative D will facilitate the most scientific understanding of human effects on ecosystem processes because it would create a research/education-only area in the Tortugas which could serve as a reference site from which to gauge the impacts of non-consumptive activities.

Facilitate human uses to the extent consistent with the other criteria. All of the alternatives would serve well in enhancing opportunities for non-consumptive activities such as education, photography, underwater wilderness exploration, and ecotourism. Boundary Alternatives III–V provide enhanced opportunities over Boundary Alternative II because of the addition of Tortugas South and the expansion of Tortugas North to include the unique coral reef region known as Sherwood Forest. Regulatory Alternatives A, B, and C would provide the same non-consumptive opportunities. Though Regulatory Alternative D will prohibit all consumptive and non-consumptive activities in Tortugas South other than research and education, the disallowance of these activities will establish Tortugas South as a critical reference area by which any impacts of the non-consumptive activities occurring in Tortugas North may be assessed.

Minimize adverse socio-economic impacts to the extent consistent with the other criteria. As stated in Part V of the FSEIS, all users are considered to be small entities within the meaning of the Regulatory Flexibility Act. Boundary Alternatives I and II and Regulatory Alternatives A, B, and C would have less of an adverse impact on users than the Preferred Alternative (Boundary Alternative III coupled with Regulatory Alternative D). Boundary Alternatives IV and V would have a greater adverse impact on users than the Preferred Boundary Alternative. Boundary Alternative III has moderate impacts on users, mostly lobster fishermen and handline fishermen. Alternatives IV and V have significantly greater impacts because they include the southern half of Tortugas Bank, which is heavily utilized by both recreational and commercial users. Alternative III offers a compromise because it allows for continued consumptive use of the southern half of Tortugas Bank including trolling for pelagic fish species. Ignoring the potential of such effects as replenishment that would result in a net economic benefit, Regulatory Alternative A has significant adverse socio-economic effects on users. There are 12 recreational charter operations that would be affected by this alternative and approximately 110 commercial fishing operations. Regulatory Alternative A would not

provide a sufficient degree of protection to Tortugas resources. It would not protect coral reef resources from anchoring and from the possible effects of non-consumptive uses and would not provide the FKNMS with adequate notice to facilitate enforcement. Regulatory Alternative B would provide adequate protection from anchoring damage in Tortugas South and would provide adequate notification to FKNMS to facilitate enforcement there, but would not provide adequate protection to Tortugas North. It would also not protect the resources of Tortugas South from non-consumptive uses. Regulatory Alternative C would provide adequate protection from anchoring damage in Tortugas North and South and would provide adequate notification to FKNMS to facilitate enforcement with insignificant incremental costs to users. However, it would not protect the sensitive coral reef resources from the possible effects of non-consumptive uses. The Preferred Alternative (Boundary Alternative III/Regulatory Alternative D) could potentially impact, if one assumes no mitigating factors, 9 recreational charter users with total annual revenue losses of approximately $152,054, 64 commercial fishermen with total annual revenue losses of approximately $843,583, and 673 person days of recreational fishermen using private boats with a maximum potential loss of $53,392 in consumer's surplus. Though Regulatory Alternative D would prohibit use of Tortugas South except for continuous transit, for law enforcement purposes, or for research or education activities pursuant to a sanctuary permit, this alternative would provide an important reference area to facilitate the study of non-consumptive impacts in Tortugas North. Additionally, unlike in Tortugas North where a moderate amount of non-consumptive diving activities has been identified, little diving has been identified in Tortugas South and as such the socio-economic impacts of the more restrictive Regulatory Alternative D are not expected to be significant or substantial to this user group in Tortugas South.

Facilitate enforcement and compliance. Boundary Alternative II would be less likely to facilitate enforcement of and compliance by users of the ecological reserve due to its irregular boundary shape. Boundary Alternative III is the most likely to facilitate enforcement and compliance by users because the boundaries of Tortugas North and Tortugas South follow lines of latitude/longitude and share several of the existing boundaries and marked corners of the Dry Tortugas National Park. Boundary Alternatives IV and V would be less likely than Boundary Alternative III to facilitate compliance by users because the southern boundary of Tortugas North does not terminate at a marked corner of the Dry Tortugas National Park. Regulatory Alternative B would not adequately facilitate enforcement because it would not provide notice to FKNMS of the presence of users in the ecological reserve. Regulatory Alternative C adequately facilitates enforcement and compliance of Tortugas North but does not provide significant solutions for enforcing Tortugas South, the more remote portion of the ecological reserve. Regulatory Alternative D best facilitates enforcement and encourages compliance by limiting access to Tortugas South to continuous transit through the area with fishing gear stowed. Regulatory Alternative D will ease enforcement and provide additional environmental benefits by helping to control illegal spearfishing and lobster diving, as well as other illegal fishing and anchoring.

Paperwork Reduction Act

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a currently valid control number issued by the Office of Management and Budget (OMB).

This rule contains collection-of-information requirements subject to review and approval by OMB under the PRA. The only additional record keeping or reporting requirements are the permit and call-in, call-out requirements for the Reserve previously described in the Preamble under Final Regulations. There are two classes of users that will be affected by these requirements: commercial dive boat operators and private boaters. The type of skills necessary to request an access permit (if not requested by telephone) and to provide notification when entering or leaving the Reserve is the ability to use marine radio equipment. The public reporting burden for these requirements is estimated to be 10 minutes per application for a permit and 2 minutes per call-in or call-out. These collection-of-information requirements have been approved by OMB under OMB control number 0648–0418.

Collection-of-information requirements for certification of preexisting leases, licenses, permits, approvals, or other authorizations in National Marine Sanctuaries, have been approved under OMB control number 0648–0141. The regulations apply the certification requirement of § 922.168 to holders of preexisting leases, licenses, permits, approvals, or other authorizations, in the boundary expansion area. The estimated response time for this requirement is 30 minutes.

These response estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collections of information. Send comments regarding these burden estimates, or any other aspect of these data collections, including suggestions for reducing the burden, to NOAA and OMB (See **ADDRESSES**).

E.O. 13132: Federalism

Executive Order 13132 sets forth Fundamental Federalism Principles (section 2) to guide federal agencies in formulating and implementing policies that have federalism implications and Policymaking Criteria (section 3) to adhere to, to the extent permitted by law, when formulating and implementing policies that have federalism implications. Since these final regulations do not preempt State law, the requirements of section 4 and section 6 (c) of the Executive Order do not apply.

Federalism Summary Impact Statement

In 1998, NOAA convened a 25-member Working Group (WG) of the Sanctuary Advisory Council (SAC) composed of key stakeholder representatives, eight SAC members, and government agency representatives with resource management authority in the Tortugas area to recommend a preferred boundary alternative for an ecological reserve. The WG included government agency representatives from the Florida Marine Patrol, the Florida Department of Environmental Protection and the Florida Marine Fisheries Commission.

Over a 13 month period, the WG met five times and built up a knowledge base on the Tortugas region using scientific information provided by Sanctuary staff and experts, personal knowledge, knowledge passed on by their constituents, and anecdotal information. All of the WG meetings were facilitated to ensure timely discussion of relevant issues and help build consensus.

On June 15, 1999, a presentation on the WG's process and recommendation for an ecological reserve was given to

the SAC. The SAC included a member from Monroe County, and several representatives from the State of Florida attended SAC meetings to provide information and comment. The SAC voted unanimously to adopt the recommendation of the WG and forwarded it to NOAA and the State of Florida. County and State representatives were involved throughout the site selection process and development of regulatory recommendations, were present at all meetings and deliberations of the WG and SAC at which the proposal for an ecological was considered, and regularly communicated with NOAA.

NOAA adopted the recommendation of the SAC regarding the geographical area and the application of no-take regulations to the ecological reserve. NOAA held public hearings in conjunction with the State of Florida on the DSEIS and the proposed regulations and consulted with the State on the proposed boundary expansion, as required by section 303 of the National Marine Sanctuaries Act (NMSA), 16 U.S.C. 1431 *et seq.* In July 1999 and July 2000, NOAA provided to the Governor, Cabinet, and staff members a status report on the proposed ecological reserve.

The County and State also submitted comments to NOAA on the DSEIS/SMP and the proposed rule.

The Florida Fish and Wildlife Conservation Commission (FWC) was concerned that no limits were being placed on the level of non-consumptive diving that would be allowed. The FWC stated that non-consumptive diving results in some morbidity and mortality to coral reef habitat and asked that controls be placed on the number of divers and dive trips to assure minimal acceptable damage to the habitat. The FWC was also concerned over the adequacy of the enforcement resources. The FWC believes that the minimal enforcement resources needed to enforce the Reserve would be two vessels 50 feet or greater in length with a Lieutenant and two officers for each vessel. The FWC encourages NOAA to work with it to develop these enforcement resources in order to assure the success of the reserve.

The Final Regulations allow non-consumptive diving in Tortugas North but closes Tortugas South to all diving except for scientific research or educational purposes, pursuant to a valid sanctuary permit. This provides an appropriate degree of public access.

Prohibiting non-consumptive diving in Tortugas North is not needed to protect the resources or their ecosystem. One of the basic tenets of the FKNMSPA, the NMSA and indeed the Designation Document for the FKNMS, is to allow activities in the Sanctuary that do not cause an adverse effect on the resources or qualities of the Sanctuary, or that do not pose a threat of harm to users of the Sanctuary. However, the resources of Tortugas South, particularly the spawning aggregation areas, are unique and warrant the additional protection of prohibiting diving. Enforcement surveillance in this remote part of the Reserve will be facilitated by prohibiting all activities in Tortugas South except for continuous transit, law enforcement, and, pursuant to a sanctuary permit, scientific research and educational activities. Additionally, prohibiting diving in Tortugas South will provide a baseline to gauge the effects of non-consumptive activities on the resources in Tortugas North.

Tortugas North is less remote and protection and conservation can be more easily afforded to it than to Tortugas South. Allowing non-consumptive diving in Tortugas North that is carefully monitored will provide significant educational and resource appreciation benefits. Further, prohibiting non-consumptive diving in Tortugas North would unnecessarily increase adverse socio-economic impacts on charter dive operators without providing corresponding resource protection. The permit system for Tortugas North will allow the level of diving activity to be monitored, and combined with the reference of Tortugas South, will allow the effects of non-consumptive diving on resources in Tortugas North to be determined.

The SMP commits substantial enforcement resources for the Reserve. As set forth in the Enforcement Action Plan as supplemented by the SMP, one of the goals of Sanctuary management is to gain the highest level of compliance by the public who enter and visit the Reserve. This compliance can be achieved through several management actions including education and outreach and on-the-water presence of Sanctuary staff in programs such as Team OCEAN, where Sanctuary information is distributed along the waterfront or boat to boat by Sanctuary staff and volunteers.

The most effective management action that can be used to achieve compliance to Sanctuary regulations is an effective law enforcement program. Currently, the primary enforcement of Sanctuary regulations is accomplished through an enforcement agreement between NOAA/National Marine Sanctuary Program and the State of Florida Fish and Wildlife Conservation Commission. The enforcement efforts are consistent with the goals and objectives for enforcement described in the MP. The MP also calls for cross-deputization of other agency law enforcement personnel (e.g., National Park Service Rangers) to accomplish law enforcement responsibilities within the Sanctuary. This approach to enforcement continues to remain an option.

Prohibiting vessels from stopping within Tortugas South except pursuant to a valid sanctuary permit for scientific research or educational purposes will facilitate enforcement. This will make it possible to monitor vessel traffic remotely by radar and response will only be necessary when vessels without a permit stop within the reserve.

The permit system for Tortugas North will help Sanctuary managers monitor the level of visitor use in the reserve and facilitate enforcement efforts.

The success of the Reserve will depend to a large extent on the level of enforcement resources dedicated to the Reserve. Several enforcement options are presently available and are being evaluated for deployment in the Reserve. These options include:

- Installation and monitoring of a long-range radar unit at the Dry Tortugas National Park. This would allow remote monitoring of vessels entering and leaving the Reserve.
- Place two 82′ vessels into service for patrolling the Ecological Reserve.
- Cross-deputize and fund National Park Service Rangers to assist in enforcement in the Tortugas Ecological Reserve.

As set forth in the SMP, the law enforcement budget is as follows:

Personnel

Law Enforcement Officers (4–6) $50,000 per position
General Support $50,000

Vessels

82′ Patrol Vessels (2) No Cost—Agency Property Transfer

NOAA will work with the FWC and other enforcement agencies to develop the enforcement resources that are necessary to assure the success of the Reserve.

Monroe County commented that the socio-economic section of the DSEIS seems to have been inserted out of context. This rather lengthy section should be reduced to some simpler explanations, tables and conclusions, then attach the larger document as an appendix. NOAA has retained the socio-economic section in the main body of the FSEIS/SMP but has revised it to make it clearer.

Monroe County commented that the FSEIS should provide some additional

explanation concerning the table of benthic habitats in the DSEIS. It was not clear to the County whether the 59% of unmapped acreage is a less significant area within the overall total and, if so, that it should be noted. If it is not, the County believed that this area needs significant additional exploration.

The benthic habitats categorized in Table 1 of the FSEIS represent those identified as the result of one mapping project based on aerial photographs and limited groundtruthing in the Tortugas region. Extensive characterization of the benthic communities within Dry Tortugas National Park has been completed (Agassiz 1883, Davis 1982, and Jaap 1998). Also, scientific exploration of benthic habitats within the Tortugas Ecological Reserve area has occurred since the completion of the DSEIS (Miller, unpubl. data). However, NOAA agrees that additional mapping and exploration are needed to accurately assess the full extent of marine resources throughout the Tortugas region.

Monroe County commented that the FSEIS should include a table summarizing the regulatory alternatives. A table summarizing the regulatory alternatives has been added to the FSEIS.

Unfunded Mandates Reform Act of 1995

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

List of Subjects in 15 CFR Part 922

Administrative practice and procedure, Coastal zone, Education, Environmental protection, Marine resources, Penalties, Recreation and recreation areas, Reporting and recordkeeping requirements, Research.

Dated: January 8, 2001.

Margaret A. Davidson,

Acting Assistant Administrator for Ocean Services and Coastal Zone Management.

Accordingly, for the reasons set forth in the preamble, 15 CFR part 922 is amended as follows:

PART 922—NATIONAL MARINE SANCTUARY PROGRAM REGULATIONS

1. The authority citation for part 922 continues to read as follows:

Authority: 16 U.S.C. 1431 *et seq.*

2. Section 922.161 is revised to read as follows:

§ 922.161 Boundary.

The Sanctuary consists of an area of approximately 2900 square nautical miles (9,800 square kilometers) of coastal and ocean waters, and the submerged lands thereunder, surrounding the Florida Keys in Florida. Appendix I to this subpart sets forth the precise Sanctuary boundary.

3. In § 922.162, definitions for ''Length overall (LOA) or length,'' ''Stem,'' and ''Stern'' are added alphabetically as follows:

§ 922.162 Definitions.

* * * * *

Length overall (LOA) or *length* means, as used in § 922.167 with respect to a vessel, the horizontal distance, rounded to the nearest foot (with 0.5 ft and above rounded upward), between the foremost part of the stem and the aftermost part of the stern, excluding bowsprits, rudders, outboard motor brackets, and similar fittings or attachments.

* * * * *

Stem means the foremost part of a vessel, consisting of a section of timber or fiberglass, or cast, forged, or rolled metal, to which the sides of the vessel are united at the fore end, with the lower end united to the keel, and with the bowsprit, if one is present, resting on the upper end.

Stern means the aftermost part of the vessel.

* * * * *

4. In § 922.164, paragraphs (d)(1)(v), (d)(1)(vi), and (g) are revised, and paragraphs (d)(1)(viii) and (ix) are added to read as follows:

§ 922.164 Additional activity regulations by Sanctuary area.

* * * * *

(d) * * *

(1) * * *

(v) Anchoring in the Tortugas Ecological Reserve. In all other Ecological Reserves and Sanctuary Preservation Areas, placing any anchor in a way that allows the anchor or any portion of the anchor apparatus (including the anchor, chain or rope) to touch living or dead coral, or any attached living organism. When anchoring dive boats, the first diver down must inspect the anchor to ensure that it is not touching living or dead coral, and will not shift in such a way as to touch such coral or other attached organism. No further diving shall take place until the anchor is placed in accordance with these requirements.

(vi) Except in the Tortugas Ecological Reserve where mooring buoys must be used, anchoring instead of mooring when a mooring buoy is available or anchoring in other than a designated anchoring area when such areas have been designated and are available.

* * * * *

(viii) Except for passage without interruption through the area, for law enforcement purposes, or for purposes of monitoring pursuant to paragraph (d)(2) of this section: entering the Tortugas South area of the Tortugas Ecological Reserve; or entering the Tortugas North area of the Tortugas Ecological Reserve without a valid access permit issued pursuant to § 922.167 or entering or leaving the Tortugas North area with a valid access permit issued pursuant to § 922.167 without notifying FKNMS staff at the Dry Tortugas National Park office by telephone or radio no less than 30 minutes and no more than 6 hours, before entering and upon leaving the Tortugas Ecological Reserve.

(ix) Tying a vessel greater than 100 feet (30.48 meters) LOA, or tying more than one vessel (other than vessels carried on board a vessel) if the combined lengths would exceed 100 feet (30.48 meters) LOA, to a mooring buoy or to a vessel tied to a mooring buoy in the Tortugas Ecological Reserve.

* * * * *

(g) *Anchoring on Tortugas Bank.* Vessels 50 meters or greater in registered length, are prohibited from anchoring on the portion of Tortugas Bank within the Florida Keys National Marine Sanctuary west of the Dry Tortugas National Park that is outside of the Tortugas Ecological Reserve. The boundary of the area closed to anchoring by vessels 50 meters or greater in registered length is formed by connecting in succession the points at the following coordinates (based on the North American Datum of 1983):

(1) 24 deg. 32.00′ N 83 deg. 00.05′ W

(2) 24 deg. 37.00′ N 83 deg. 06.00′ W

(3) 24 deg. 39.00′ N 83 deg. 06.00′ W

(4) 24 deg. 39.00′ N 83 deg. 00.05′ W

(5) 24 deg. 32.00′ N 83 deg. 00.05′ W

5. Revise the heading of § 922.166 to read as follows:

§ 922.166 Permits other than for access to the Tortugas Ecological Reserve-application procedures and issuance criteria.

§ 922.167 [Redesignated as § 922.168]

6. Redesignate § 922.167 as § 922.168 and revise it to read as follows:

§ 922.168 Certification of preexisting leases, licenses, permits, approvals, other authorizations, or rights to conduct a prohibited activity.

(a) A person may conduct an activity prohibited by §§ 922.163 or 922.164 if such activity is specifically authorized by a valid Federal, State, or local lease, permit, license, approval, or other authorization in existence on July 1, 1997, or by any valid right of subsistence use or access in existence on July 1, 1997, provided that:

(1) The holder of such authorization or right notifies the Director, in writing, within 90 days of July 1, 1997, of the existence of such authorization or right and requests certification of such authorization or right; for the area added to the Sanctuary by the boundary expansion for the Tortugas Ecological Reserve, the holder of such authorization or right notifies the Director, in writing, within 90 days of the effective date of the boundary expansion, of the existence of such authorization or right and requests certification of such authorization or right.

(2) The holder complies with the other provisions of this § 922.168; and

(3) The holder complies with any terms and conditions on the exercise of such authorization or right imposed as a condition of certification, by the Director, to achieve the purposes for which the Sanctuary was designated.

(b) The holder of an authorization or right described in paragraph (a) of this section authorizing an activity prohibited by Secs. 922.163 or 922.164 may conduct the activity without being in violation of applicable provisions of Secs. 922.163 or 922.164, pending final agency action on his or her certification request, provided the holder is in compliance with this § 922.168.

(c) Any holder of an authorization or right described in paragraph (a) of this section may request the Director to issue a finding as to whether the activity for which the authorization has been issued, or the right given, is prohibited by Secs. 922.163 or 922.164, thus requiring certification under this section.

(d) Requests for findings or certifications should be addressed to the Director, Office of Ocean and Coastal Resource Management; ATTN: Sanctuary Superintendent, Florida Keys National Marine Sanctuary, P.O. Box 500368, Marathon, FL 33050. A copy of the lease, permit, license, approval, or other authorization must accompany the request.

(e) The Director may request additional information from the certification requester as he or she deems reasonably necessary to condition appropriately the exercise of the certified authorization or right to achieve the purposes for which the Sanctuary was designated. The information requested must be received by the Director within 45 days of the postmark date of the request. The Director may seek the views of any persons on the certification request.

(f) The Director may amend any certification made under this § 922.168 whenever additional information becomes available justifying such an amendment.

(g) Upon completion of review of the authorization or right and information received with respect thereto, the Director shall communicate, in writing, any decision on a certification request or any action taken with respect to any certification made under this § 922.168, in writing, to both the holder of the certified lease, permit, license, approval, other authorization, or right, and the issuing agency, and shall set forth the reason(s) for the decision or action taken.

(h) Any time limit prescribed in or established under this § 922.168 may be extended by the Director for good cause.

(i) The holder may appeal any action conditioning, amending, suspending, or revoking any certification in accordance with the procedures set forth in § 922.50.

(j) Any amendment, renewal, or extension made after July 1, 1997, to a lease, permit, license, approval, other authorization or right is subject to the provisions of § 922.49.

7. Add a new § 922.167 to read as follows:

§ 922.167 Permits for access to the Tortugas Ecological Reserve.

(a) A person may enter the Tortugas North area of the Tortugas Ecological Reserve other than for passage without interruption through the reserve, for law enforcement purposes, or for purposes of monitoring pursuant to paragraph (d)(2) of § 922.164 , if authorized by a valid access permit issued pursuant to § 922.167.

(b)(1) Access permits must be requested at least 72 hours but no longer than one month before the date the permit is desired to be effective. Access permits do not require written applications or the payment of any fee. Permits may be requested via telephone or radio by contacting FKNMS at any of the following numbers:

Key West office: telephone: (305) 292–0311

Marathon office: telephone: (305) 743–2437

(2) The following information must be provided, as applicable:

(i) Vessel name.

(ii) Name, address, and telephone number of owner and operator.

(iii) Name, address, and telephone number of applicant.

(iv) USCG documentation, state license, or registration number.

(v) Home port.

(vi) Length of vessel and propulsion type (*i.e.,* motor or sail).

(vii) Number of divers.

(viii) Requested effective date and duration of permit (2 weeks, maximum).

(c) The Sanctuary Superintendent will issue a permit to the owner or to the owner's representative for the vessel when all applicable information has been provided. The Sanctuary Superintendent will provide a permit number to the applicant and confirm the effective date and duration period of the permit. Written confirmation of permit issuance will be provided upon request.

8. Revise Appendices I, II, IV, V, VI, and VII to Subpart P of Part 922 to read as follows:

Appendix I to Subpart P of Part 922—Florida Keys National Marine Sanctuary Boundary Coordinates

(Appendix Based on North American Datum of 1983)

(1) The boundary of the Florida Keys National Marine Sanctuary—

(a) Begins at the northeasternmost point of Biscayne National Park located at approximately 25 degrees 39 minutes north latitude, 80 degrees 05 minutes west longitude, then runs eastward to the point at 25 degrees 39 minutes north latitude, 80 degrees 04 minutes west longitude; and

(b) Then runs southward and connects in succession the points at the following coordinates:

(i) 25 degrees 34 minutes north latitude, 80 degrees 04 minutes west longitude,

(ii) 25 degrees 28 minutes north latitude, 80 degrees 05 minutes west longitude, and

(iii) 25 degrees 21 minutes north latitude, 80 degrees 07 minutes west longitude;

(iv) 25 degrees 16 minutes north latitude, 80 degrees 08 minutes west longitude;

(c) Then runs southwesterly approximating the 300-foot isobath and connects in succession the points at the following coordinates:

(i) 25 degrees 07 minutes north latitude, 80 degrees 13 minutes west longitude,

(ii) 24 degrees 57 minutes north latitude, 80 degrees 21 minutes west longitude,

(iii) 24 degrees 39 minutes north latitude, 80 degrees 52 minutes west longitude,

(iv) 24 degrees 30 minutes north latitude, 81 degrees 23 minutes west longitude,

(v) 24 degrees 25 minutes north latitude, 81 degrees 50 minutes west longitude,

(vi) 24 degrees 22 minutes north latitude, 82 degrees 48 minutes west longitude,

(vii) 24 degrees 37 minutes north latitude, 83 degrees 06 minutes west longitude,

(viii) 24 degrees 46 minutes north latitude, 83 degrees 06 minutes west longitude,
(ix) 24 degrees 46 minutes north latitude, 82 degrees 54 minutes west longitude,
(x) 24 degrees 44 minutes north latitude, 81 degrees 55 minutes west longitude,
(xi) 24 degrees 51 minutes north latitude, 81 degrees 26 minutes west longitude, and
(xii) 24 degrees 55 minutes north latitude, 80 degrees 56 minutes west longitude;
(d) Then follows the boundary of Everglades National Park in a southerly then northeasterly direction through Florida Bay, Buttonwood Sound, Tarpon Basin, and Blackwater Sound;
(e) After Division Point, then departs from the boundary of Everglades National Park and follows the western shoreline of Manatee Bay, Barnes Sound, and Card Sound;
(f) then follows the southern boundary of Biscayne National Park to the southeasternmost point of Biscayne National Park; and
(g) then follows the eastern boundary of Biscayne National Park to the beginning point specified in paragraph (a).
(2) The shoreward boundary of the Florida Keys National Marine Sanctuary is the mean high-water mark except around the Dry Tortugas where the boundary is coterminous with that of the Dry Tortugas National Park, formed by connecting in succession the points at the following coordinates:
(a) 24 degrees 34 minutes 0 seconds north latitude, 82 degrees 54 minutes 0 seconds west longitude;
(b) 24 degrees 34 minutes 0 seconds north latitude, 82 degrees 58 minutes 0 second west longitude;
(c) 24 degrees 39 minutes 0 seconds north latitude, 82 degrees 58 minutes 0 seconds west longitude;
(d) 24 degrees 43 minutes 0 seconds north latitude, 82 degrees 54 minutes 0 seconds west longitude;
(e) 24 degrees 43 minutes 32 seconds north latitude, 82 degrees 52 minutes 0 seconds west longitude;
(f) 24 degrees 43 minutes 32 seconds north latitude, 82 degrees 48 minutes 0 seconds west longitude;
(g) 24 degrees 42 minutes 0 seconds north latitude, 82 degrees 46 minutes, 0 seconds west longitude;
(h) 24 degrees 40 minutes 0 seconds north latitude, 82 degrees 46 minutes 0 seconds west longitude;
(i) 24 degrees 37 minutes 0 seconds north latitude, 82 degrees 48 minutes 0 seconds west longitude; and
(j) 24 degrees 34 minutes 0 seconds north latitude, 82 degrees 54 minutes 0 seconds west longitude.
(3) The Florida Keys National Marine Sanctuary also includes the area located within the boundary formed by connecting in succession the points at the following coordinates:
(a) 24 degrees 33 minutes north latitude, 83 degrees 09 minutes west longitude,
(b) 24 degrees 33 minutes north latitude, 83 degrees 05 minutes west longitude, and
(c) 24 degrees 18 minutes north latitude, 83 degrees 05 minutes west longitude;
(d) 24 degrees 18 minutes north latitude, 83 degrees 09 minutes west longitude; and
(e) 24 degrees 33 minutes north latitude, 83 degrees 09 minutes west longitude.

Appendix II to Subpart P of Part 922—Existing Management Areas Boundary Coordinates

(1) The boundary of each of the Existing Management Areas is formed by connecting in succession the points at the following coordinates:

National Oceanic and Atmospheric Administration

KEY LARGO-MANAGEMENT AREA

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	25 deg.19′45″ N	80 deg.12′00″ W.
2	25 deg.16′02″ N	80 deg.08′07″ W.
3	25 deg.07′05″ N	80 deg.12′05″ W.
4	24 deg.58′03″ N	80 deg.19′08″ W.
5	25 deg.02′02″ N	80 deg.25′25″ W.
6	25 deg.19′45″ N	80 deg.12′00″ W.

LOOE KEY MANAGEMENT AREA

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.31′62″ N	81 deg.26′00″ W.
2	24 deg.33′57″ N	81 deg.26′00″ W.
3	24 deg.34′15″ N	81 deg.23′00″ W.
4	24 deg.32′20″ N	81 deg.23′00″ W.
5	24 deg.31′62″ N	81 deg.26′00″ W.

United States Fish and Wildlife Service

GREAT WHITE HERON NATIONAL WILDLIFE REFUGE

[Based on the North American Datum of 1983]

Point	Latitude	Longitude
1	24 deg.43.8′ N	81 deg.48.6′ W.
2	24 deg.43.8′ N	81 deg.37.2′ W.
3	24 deg.49.2′ N	81 deg.37.2′ W.
4	24 deg.49.2′ N	81 deg.19.8′ W.
5	24 deg.48.0′ N	81 deg.19.8′ W.
6	24 deg.48.0′ N	81 deg.14.4′ W.
7	24 deg.49.2′ N	81 deg.14.4′ W.
8	24 deg.49.2′ N	81 deg.08.4′ W.
9	24 deg.43.8′ N	81 deg.08.4′ W.
10	24 deg.43.8′ N	81 deg.14.4′ W.
11	24 deg.43.2′ N	81 deg.14.4′ W.

GREAT WHITE HERON NATIONAL WILDLIFE REFUGE—Continued

[Based on the North American Datum of 1983]

Point	Latitude	Longitude
12	24 deg.43.2′ N	81 deg.16.2′ W.
13	24 deg.42.6′ N	81 deg.16.2′ W.
14	24 deg.42.6′ N	81 deg.21.0′ W.
15	24 deg.41.4′ N	81 deg.21.0′ W.
16	24 deg.41.4′ N	81 deg.22.2′ W.
17	24 deg.43.2′ N	81 deg.22.2′ W.
18	24 deg.43.2′ N	81 deg.22.8′ W.
19	24 deg.43.8′ N	81 deg.22.8′ W.
20	24 deg.43.8′ N	81 deg.24.0′ W.
21	24 deg.43.2′ N	81 deg.24.0′ W.
22	24 deg.43.2′ N	81 deg.26.4′ W.
23	24 deg.43.8′ N	81 deg.26.4′ W.
24	24 deg.43.8′ N	81 deg.27.0′ W.
25	24 deg.43.2′ N	81 deg.27.0′ W.
26	24 deg.43.2′ N	81 deg.29.4′ W.
27	24 deg.42.6′ N	81 deg.29.4′ W.
28	24 deg.42.6′ N	81 deg.30.6′ W.
29	24 deg.41.4′ N	81 deg.30.6′ W.
30	24 deg.41.4′ N	81 deg.31.2′ W.
31	24 deg.40.8′ N	81 deg.31.2′ W.
32	24 deg.40.8′ N	81 deg.32.4′ W.
33	24 deg.41.4′ N	81 deg.32.4′ W.
34	24 deg.41.4′ N	81 deg.34.2′ W.
35	24 deg.40.8′ N	81 deg.34.2′ W.
36	24 deg.48.0′ N	81 deg.35.4′ W.
37	24 deg.39.6′ N	81 deg.35.4′ W.
38	24 deg.39.6′ N	81 deg.36.0′ W.
39	24 deg.39.0′ N	81 deg.36.0′ W.
40	24 deg.39.0′ N	81 deg.37.2′ W.
41	24 deg.37.8′ N	81 deg.37.2′ W.
42	24 deg.37.8′ N	81 deg.37.8′ W.
43	24 deg.37.2′ N	81 deg.37.8′ W.
44	24 deg.37.2′ N	81 deg.40.2′ W.
45	24 deg.36.0′ N	81 deg.40.2′ W.
46	24 deg.36.0′ N	81 deg.40.8′ W.
47	24 deg.35.4′ N	81 deg.40.8′ W.
48	24 deg.35.4′ N	81 deg.42.0′ W.
49	24 deg.36.0′ N	81 deg.42.0′ W.
50	24 deg.36.0′ N	81 deg.48.6′ W.
51	24 deg.43.8′ N	81 deg.48.6′ W.

KEY WEST NATIONAL WILDLIFE REFUGE

[Based on the North American Datum of 1983]

Point	Latitude	Longitude
1	24 deg.40.0′ N	81 deg.49.0′ W.
2	24 deg.40.0′ N	82 deg.10.0′ W.
3	24 deg.27.0′ N	82 deg.10.0′ W.
4	24 deg.27.0′ N	81 deg.49.0′ W.
5	24 deg.40.0′ N	81 deg.49.0′ W.

(2) When differential Global Positioning Systems data becomes available, these coordinates may be publication in the **Federal Register** to reflect the increased accuracy of such data.

Appendix IV to Subpart P of Part 922—Ecological Reserves Boundary

Coordinates

(1) The boundary of the Western Sambo Ecological Reserve is formed by connecting in succession the points at the following coordinates:

WESTERN SAMBO

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.33.70′ N	81 deg.40.80′ W.
2	24 deg.28.85′ N	81 deg.41.90′ W.

WESTERN SAMBO—Continued

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
3	24 deg.28.50′ N	81 deg.43.70′ W.
4	24 deg.33.50′ N	81 deg.43.10′ W.
5	24 deg.33.70′ N	81 deg.40.80′ W.

(2) The Tortugas Ecological Reserve consists of two discrete areas, Tortugas North and Tortugas South.
(3) The boundary of Tortugas North is formed by connecting in succession the points at the following coordinates:

TORTUGAS NORTH

Point	Latitude	Longitude
1	24 deg.46.00′ N	83 deg.06.00′ W.
2	24 deg.46.00′ N	82 deg.54.00′ W.
3	24 deg.45.80′ N	82 deg.48.00′ W.
4	24 deg.43.53′ N	82 deg.48.00′ W.
5	24 deg.43.53′ N	82 deg.52.00′ W.
6	24 deg.43.00′ N	82 deg.54.00′ W.
7	24 deg.39.00′ N	82 deg.58.00′ W.
8	24 deg.39.00′ N	83 deg.06.00′ W.
9	24 deg.46.00′ N	83 deg.06.00′ W.

(4) The boundary of Tortugas South is formed by connecting in succession the points at the following coordinates:

TORTUGAS SOUTH

Point	Latitude	Longitude
1	24 deg.33.00′ N	83 deg.09.00′ W.
2	24 deg.33.00′ N	83 deg.05.00′ W.
3	24 deg.18.00′ N	83 deg.05.00′ W.
4	24 deg.18.00′ N	83 deg.09.00′ W.
5	24 deg.33.00′ N	83 deg.09.00′ W.

Appendix V to Subpart P of Part 922—Sanctuary Preservation Areas Boundary Coordinates

The boundary of each of the Sanctuary Preservation Areas (SPAs) is formed by connecting in succession the points at the following coordinates:

ALLIGATOR REEF

[Based on differential Global Positioning Systems data]

Point	Latitute	Longitude
1	24 deg.50.98′ N	80 deg.36.84′ W.
2	24 deg.50.51′ N	80 deg.37.35′ W.
3	24 deg.50.81′ N	80 deg.37.63′ W.
4	24 deg.51.23′ N	80 deg.37.17′ W.
5	24 deg.50.98′ N	80 deg.36.84′ W.

Catch and release fishing by trolling only is allowed in this SPA.

CARYSFORT/SOUTH CARYSFORT REEF

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	25 deg.13.78′ N	80 deg.12.00′ W.
2	25 deg.12.03′ N	80 deg.12.98′ W.
3	25 deg.12.24′ N	80 deg.13.77′ W.
4	25 deg.14.13′ N	80 deg.12.78′ W.
5	25 deg.13.78′ N	80 deg.12.00′ W.

CHEECA ROCKS

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.54.42′ N	80 deg.36.91′ W.

CHEECA ROCKS—Continued

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
2	24 deg.54.25′ N	80 deg.36.77′ W.
3	24 deg.54.10′ N	80 deg.37.00′ W.
4	24 deg.54.22′ N	80 deg.37.15′ W.
5	24 deg.54.42′ N	80 deg.36.91′ W.

COFFINS PATCH

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.41.47′ N	80 deg.57.68′ W.
2	24 deg.41.12′ N	80 deg.57.53′ W.
3	24 deg.40.75′ N	80 deg.58.33′ W.
4	24 deg.41.06′ N	80 deg.58.48′ W.
5	24 deg.41.47′ N	80 deg.57.68′ W.

CONCH REEF

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.57.48′ N	80 deg.27.47′ W.
2	24 deg.57.34′ N	80 deg.27.26′ W.
3	24 deg.56.78′ N	80 deg.27.52′ W.
4	24 deg.56.96′ N	80 deg.27.73′ W.
5	24 deg.57.48′ N	80 deg.27.47′ W.

Catch and release fishing by trolling only is allowed in this SPA.

DAVIS REEF

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.55.61′ N	80 deg.30.27′ W.
2	24 deg.55.41′ N	80 deg.30.05′ W.
3	24 deg.55.11′ N	80 deg.30.35′ W.
4	24 deg.55.34′ N	80 deg.30.52′ W.
5	24 deg.55.61′ N	80 deg.30.27′ W.

DRY ROCKS

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	25 deg.07.59′ N	80 deg.17.91′ W.
2	25 deg.07.41′ N	80 deg.17.70′ W.
3	25 deg.07.25′ N	80 deg.17.82′ W.
4	25 deg.07.41′ N	80 deg.18.09′ W.
5	25 deg.07.59′ N	80 deg.17.91′ W.

GRECIAN ROCKS

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	25 deg.06.91′ N	80 deg.18.20′ W.
2	25 deg.06.67′ N	80 deg.18.06′ W.
3	25 deg.06.39′ N	80 deg.18.32′ W.
4	25 deg.06.42′ N	80 deg.18.48′ W.
5	25 deg.06.81′ N	80 deg.18.44′ W.
6	25 deg.06.91′ N	80 deg.18.20′ W.

EASTERN DRY ROCKS

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.27.92′ N	81 deg.50.55′ W.
2	24 deg.27.73′ N	81 deg.50.33′ W.
3	24 deg.27.47′ N	81 deg.50.80′ W.
4	24 deg.27.72′ N	81 deg.50.86′ W.
5	24 deg.27.92′ N	81 deg.50.55′ W.

THE ELBOW

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	25 deg.08.97′ N	80 deg.15.63′ W.
2	25 deg.08.95′ N	80 deg.15.22′ W.
3	25 deg.08.18′ N	80 deg.15.64′ W.
4	25 deg.08.50′ N	80 deg.16.07′ W.
5	25 deg.08.97′ N	80 deg.15.63′ W.

FRENCH REEF

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	25 deg.02.20′ N	80 deg.20.63′ W.
2	25 deg.01.81′ N	80 deg.21.02′ W.
3	25 deg.02.36′ N	80 deg.21.27′ W.
4	25 deg.02.20′ N	80 deg.20.63′ W.

HEN AND CHICKENS

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.56.38′ N	80 deg.32.86′ W.
2	24 deg.56.21′ N	80 deg.32.63′ W.
3	24 deg.55.86′ N	80 deg.32.95′ W.
4	24 deg.56.04′ N	80 deg.33.19′ W.
5	24 deg.56.38′ N	80 deg.32.86′ W.

LOOE KEY

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.33.24′ N	81 deg.24.03′ W.
2	24 deg.32.70′ N	81 deg.23.85′ W.
3	24 deg.32.52′ N	81 deg.24.70′ W.
4	24 deg.33.12′ N	81 deg.24.81′ W.
5	24 deg.33.24′ N	81 deg.24.03′ W.

MOLASSES REEF

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	25 deg.01.00′ N	80 deg.22.53′ W.
2	25 deg.01.06′ N	80 deg.21.84′ W.
3	25 deg.00.29′ N	80 deg.22.70′ W.
4	25 deg.00.72′ N	80 deg.22.83′ W.
5	25 deg.01.00′ N	80 deg.22.53′ W.

NEWFOUND HARBOR KEY

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.37.10′ N	81 deg.23.34′ W.
2	24 deg.36.85′ N	81 deg.23.28′ W.
3	24 deg.36.74′ N	81 deg.23.80′ W.
4	24 deg.37.00′ N	81 deg.23.86′ W.
5	24 deg.37.10′ N	81 deg.23.34′ W.

ROCK KEY

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.27.48′ N	81 deg.51.35′ W.
2	24 deg.27.30′ N	81 deg.51.15′ W.
3	24 deg.27.21′ N	81 deg.51.60′ W.
4	24 deg.27.45′ N	81 deg.51.65′ W.
5	24 deg.27.48′ N	81 deg.51.35′ W.

SAND KEY

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.27.58′ N	81 deg.52.29′ W.
2	24 deg.27.01′ N	81 deg.52.32′ W.
3	24 deg.27.02′ N	81 deg.52.95′ W.
4	24 deg.27.61′ N	81 deg.52.94′ W.
5	24 deg.27.58′ N	81 deg.52.29′ W.

Catch and release fishing by trolling only is allowed in this SPA.

SOMBRERO KEY

[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.37.91′ N	81 deg.06.78′ W.
2	24 deg.37.50′ N	81 deg.06.19′ W.
3	24 deg.37.25′ N	81 deg.06.89′ W.
4	24 deg.37.91′ N	81 deg.06.78′ W.

Catch and release fishing by trolling only is allowed in this SPA.

Appendix VI to Subpart P of Part 922—Special-Use Areas Boundary

Coordinates and Use Designations

The boundary of each of the Special-Use is formed by connecting in succession the points at the following coordinates:

CONCH REEF

(Research Only)—[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.56.83′ N	80 deg.27.26′ W.
2	24 deg.57.10′ N	80 deg.26.93′ W.
3	24 deg.56.99′ N	80 deg.27.42′ W.
4	24 deg.57.34′ N	80 deg.27.26′ W.
5	24 deg.56.83′ N	80 deg.27.26′ W.

EASTERN SAMBO

(Research Only)—[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.29.84′ N	81 deg.39.59′ W.
2	24 deg.29.55′ N	81 deg.39.35′ W.
3	24 deg.29.37′ N	81 deg.39.96′ W.

EASTERN SAMBO—Continued

(Research Only)—[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
4	24 deg.29.77′ N	81 deg.40.03′ W.
5	24 deg.29.84′ N	81 deg.39.59′ W.

LOOE KEY

(Research Only)—[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.34.17′ N	81 deg.23.01′ W.
2	24 deg.33.98′ N	81 deg.22.96′ W.
3	24 deg.33.84′ N	81 deg.23.60′ W.
4	24 deg.34.23′ N	81 deg.23.68′ W.
5	24 deg.34.17′ N	81 deg.23.01′ W.

TENNESSEE REEF

(Research Only)—[Based on differential Global Positioning Systems data]

Point	Latitude	Longitude
1	24 deg.44.77′ N	80 deg.47.12′ W.
2	24 deg.44.57′ N	80 deg.46.98′ W.
3	24 deg.44.68′ N	80 deg.46.59′ W.
4	24 deg.44.95′ N	80 deg.46.74′ W.
5	24 deg.44.77′ N	80 deg.47.12′ W.

Appendix VII to Subpart P of Part 922—Areas To Be Avoided Boundary

Coordinates

IN THE VICINITY OF THE FLORIDA KEYS

[Reference Charts: United States 11466, 27th Edition—September 1, 1990 and United States 11450, 4th Edition—August 11,1990]

Point	Latitude	Longitude
1	25 deg.45.00′ N	80 deg.06.10′ W.
2	25 deg.38.70′ N	80 deg.02.70′ W.
3	25 deg.22.00′ N	80 deg.03.00′ W.
4	25 deg.00.20′ N	80 deg.13.40′ W.
5	24 deg.37.90′ N	80 deg.47.30′ W.
6	24 deg.29.20′ N	81 deg.17.30′ W.
7	24 deg.22.30′ N	81 deg.43.17′ W.
8	24 deg.28.00′ N	81 deg.43.17′ W.
9	24 deg.28.70′ N	81 deg.43.50′ W.
10	24 deg.29.80′ N	81 deg.43.17′ W.
11	24 deg.33.10′ N	81 deg.35.15′ W.
12	24 deg.33.60′ N	81 deg.26.00′ W.
13	24 deg.38.20′ N	81 deg.07.00′ W.
14	24 deg.43.20′ N	80 deg.53.20′ W.
15	24 deg.46.10′ N	80 deg.46.15′ W.
16	24 deg.51.10′ N	80 deg.37.10′ W.
17	24 deg.57.50′ N	80 deg.27.50′ W.
18	25 deg.09.90′ N	80 deg.16.20′ W.
19	25 deg.24.00′ N	80 deg.09.10′ W.
20	25 deg.31.50′ N	80 deg.07.00′ W.
21	25 deg.39.70′ N	80 deg.06.85′ W.
22	25 deg.45.00′ N	80 deg.06.10′ W.

IN THE VICINITY OF KEY WEST HARBOR

[Reference Chart: United States 11434, 21st Edition—August 11, 1990]

Point	Latitude	Longitude
23	24 deg.27.95' N	81 deg.48.65' W.
24	24 deg.23.00' N	81 deg.53.50' W.
25	24 deg.26.60' N	81 deg.58.50' W.
26	24 deg.27.75' N	81 deg.55.70' W.

IN THE VICINITY OF KEY WEST HARBOR—Continued

[Reference Chart: United States 11434, 21st Edition—August 11, 1990]

Point	Latitude	Longitude
27	24 deg.29.35' N	81 deg.53.40' W.
28	24 deg.29.35' N	81 deg.50.00' W.
29	24 deg.27.95' N	81 deg.48.65' W.

AREA SURROUNDING THE MARQUESAS KEYS

[Reference Chart: United States 11434, 21st Edition—August 11, 1990]

Point	Latitude	Longitude
30	24 deg.26.60' N	81 deg.59.55' W.
31	24 deg.23.00' N	82 deg.03.50' W.
32	24 deg.23.60' N	82 deg.27.80' W.
33	24 deg.34.50' N	82 deg.37.50' W.
34	24 deg.43.00' N	82 deg.26.50' W.
35	24 deg.38.31' N	81 deg.54.06' W.
36	24 deg.37.91' N	81 deg.53.40' W.
37	24 deg.36.15' N	81 deg.51.78' W.
38	24 deg.34.40' N	81 deg.50.60' W.
39	24 deg.33.44' N	81 deg.49.73' W.
40	24 deg.31.20' N	81 deg.52.10' W.
41	24 deg.28.70' N	81 deg.56.80' W.
42	24 deg.26.60' N	81 deg.59.55' W.

AREA SURROUNDING THE DRY TORTUGAS ISLANDS

[Reference Chart: United States 11434, 21st Edition—August 11, 1990]

Point	Latitude	Longitude
43	24 deg.32.00' N	82 deg.53.50' W.
44	24 deg.32.00' N	83 deg.00.05' W.
45	24 deg.39.70' N	83 deg.00.05' W.
46	24 deg.45.60' N	82 deg.54.40' W.
47	24 deg.45.60' N	82 deg.47.02' W.
48	24 deg.42.80' N	82 deg.43.90' W.
49	24 deg.39.50' N	82 deg.43.90' W.
50	24 deg.35.60' N	82 deg.46.40' W.
51	24 deg.32.00' N	82 deg.53.50' W.

[FR Doc. 01–978 Filed 1–16–01; 8:45 am]

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Federal Register

Wednesday,
January 17, 2001

Part VI

Department of Education

34 CFR Part 361
State Vocational Rehabilitation Services Program; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Part 361

RIN 1820–AB50

State Vocational Rehabilitation Services Program

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the regulations governing the State Vocational Rehabilitation Services Program. These amendments implement changes to the Rehabilitation Act of 1973 made by the Rehabilitation Act Amendments of 1998 that were contained in Title IV of the Workforce Investment Act of 1998 (WIA), enacted on August 7, 1998, and as further amended in 1998 by technical amendments in the Reading Excellence Act and the Carl D. Perkins Vocational and Applied Technology Education Act Amendments of 1998 (hereinafter collectively referred to as the 1998 Amendments).

DATES: These regulations are effective February 16, 2001. However, affected parties do not have to comply with the information collection requirements in §§ 361.10, 361.12, 361.13, 361.14, 361.15, 361.16, 361.17, 361.18, 361.19, 361.20, 361.21, 361.22, 361.23, 361.24, 361.25, 361.26, 361.27, 361.28, 361.29, 361.30, 361.31, 361.32, 361.34, 361.35, 361.36, 361.37, 361.38, 361.40, 361.41, 361.46, 361.47, 361.48, 361.49, 361.50, 361.51, 361.52, 361.53, 361.54, 361.55, 361.57, 361.60 and 361.62 until the Department of Education publishes in the **Federal Register** the control numbers assigned by the Office of Management and Budget (OMB) to these information collection requirements. Publication of the control numbers notifies the public that OMB has approved these information collection requirements under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Beverlee Stafford, U.S. Department of Education, 400 Maryland Avenue, SW., room 3014, Mary E. Switzer Building, Washington, DC 20202–2531. Telephone (202) 205–8831. If you use a telecommunications device for the deaf (TDD), you may call (202) 205–5538.

Individuals with disabilities may obtain this document in an alternative format (*e.g.,* Braille, large print, audiotape, or computer diskette) on request to Katie Mincey, Director, Alternate Formats Center, U.S. Department of Education, 400 Maryland Avenue, SW., room 1000, Mary E. Switzer Building, Washington, DC 20202–2531. Telephone (202) 260–9895. If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: The State Vocational Rehabilitation Services Program (VR program) is authorized by Title I of the Rehabilitation Act of 1973, as amended (Act) (29 U.S.C. 701–744). The VR program provides support to each State to assist it in operating a statewide comprehensive, coordinated, effective, efficient, and accountable State program, as an integral part of a statewide workforce investment system, to assess, plan, develop, and provide vocational rehabilitation (VR) services for individuals with disabilities so that those individuals may prepare for and engage in gainful employment consistent with their strengths, priorities, concerns, abilities, capabilities, interests, and informed choice.

On February 28, 2000, we published a notice of proposed rulemaking (NPRM) for this part in the **Federal Register** (65 FR 10620). In the preamble to the NPRM, we discussed on pages 10620 through 10630 the major changes proposed to the regulations in 34 CFR part 361 as a result of the 1998 Amendments. These included the following:

- Streamlining the regulatory requirements pertaining to the State plan for the VR program by changing several State plan descriptions or assurances to program requirements that need not be addressed in the State plan. These proposed changes were intended to reduce the paperwork burden associated with the development of the State plan.
- Amending the regulations to reflect the responsibilities of the designated state unit (DSU or State unit) as a required partner in the One-Stop service delivery system (One-Stop system) established under Title I of the WIA, Pub. L. 105–22. For example, we proposed amending § 361.4 to include among the regulations applicable to the VR program the One-Stop system requirements in 20 CFR part 662 and the civil rights requirements in 29 CFR part 37. In addition to these changes and, as noted later, amending other sections of the current regulations to reflect requirements in WIA, we discuss in some detail in the preamble to the NPRM (65 FR 10620 and 10621) the relationship between the VR program, the One-Stop system in general, and persons with disabilities. We suggest that you refer to that discussion for additional guidance in coordinating between One-Stop system components.
- Amending § 361.5 to include a new definition of the term ''fair hearing board,'' a revised definition of ''physical or mental impairment,'' a new definition of the term ''qualified and impartial mediator,'' and several new statutory definitions found in WIA, including ''local workforce investment board,'' ''State workforce investment board,'' and ''Statewide workforce investment system.''
- Amending § 361.10 to require that each State submit its State plan for the VR program on the same date that it submits either a State plan under section 112 of WIA or a State unified plan under section 501 of that Act.
- Amending § 361.13 to expand the list of activities that are the responsibility of the DSU.
- Amending § 361.18(c) to require, as appropriate, DSUs to address in a written plan their retraining, recruitment, hiring, and other strategies to ensure that their personnel meet the statutory standards related to the comprehensive system of personnel development.
- Amending § 361.22 to reflect new statutory requirements that foster the transition of students from educational to VR services.
- Amending § 361.23 to reflect both the VR program's responsibilities as a partner of the One-Stop system under WIA and the requirements in the 1988 Amendments related to interagency coordination between the VR program and other components of the statewide workforce investment system under WIA.
- Amending § 361.26 to reflect the authority of States to use geographically earmarked funds without requesting a waiver of statewideness.
- Amending § 361.29 to guide States in developing a required comprehensive, forward-thinking plan for administering and improving their VR programs.
- Conforming § 361.30 solely to the requirement in the Act that DSUs provide VR services to eligible American Indians to the same extent as other significant populations of individuals with disabilities.
- Amending § 361.31 to conform to the requirement in the Act that the DSU establish cooperative agreements with private nonprofit VR service providers.
- Removing § 361.33 of the current regulations (regarding the use, assessment, and support of community rehabilitation programs) since these requirements are addressed in other

regulatory sections and reserving this section for future use.

• Amending § 361.35 to reflect the requirement in section 101(a)(18) of the Act that the State reserve a portion of its allotment under section 110 of the Act to further innovation and expansion of its VR program.

• Amending § 361.36 to incorporate the requirement in the 1998 Amendments that individuals who do not meet the State's order of selection criteria for receiving services be provided access to the DSU's information and referral system under § 361.37.

• Amending § 361.37 to reflect new requirements in the Act for referring individuals, including eligible individuals who do not meet the State's order of selection criteria for receiving services, to those components of the statewide workforce investment system best suited to meet an individual's employment needs.

• Amending § 361.42 to implement new requirements in the Act regarding presumptive eligibility for Social Security recipients and beneficiaries and the use of trial work experiences as part of the assessment for determining eligibility, to revise regulatory requirements concerning extended evaluations, and to identify the type of personnel who must conduct eligibility determinations.

• Amending § 361.45 to implement new requirements in the Act that expand an eligible individual's options for developing the Individualized Plan for Employment (IPE), enable individuals to receive technical assistance in developing their IPEs, specify the information that the DSU must provide to the eligible individual during IPE development, and detail applicable procedural requirements.

• Amending § 361.47 to require the States to determine, with input from the State Rehabilitation Councils, the type of documentation that they will maintain for each applicant and eligible individual to meet the content items that must be included in each individual's record of services.

• Amending § 361.52 to implement the expanded authority in the Act requiring that applicants and eligible individuals be able to exercise informed choice throughout the rehabilitation process.

• Amending § 361.53 to require interagency agreements between the DSU and other appropriate public entities to ensure that eligible individuals with disabilities receive, in a timely manner, necessary services to which each party to the agreement has an obligation, or the authority, to contribute.

• Amending § 361.54 to expand the list of VR services exempt from State financial needs tests to include interpreter services for individuals who are deaf or hard of hearing, reader services for individuals who are blind, and personal assistant services. Also, this section was amended to prohibit States from applying financial needs tests to individuals receiving Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI).

• Re-titling and Amending § 361.56 to better reflect the requirements that must be met before the State unit can close the record of services for an individual who has achieved an employment outcome.

• Amending § 361.57 to implement new requirements in the 1998 Amendments regarding mediation and administrative review of disputes regarding the provision of VR services to applicants or eligible individuals.

• Amending § 361.60 to reflect the elimination of statutory authority for the innovation and expansion grant program and to implement new statutory provisions regarding the use of geographically limited earmarked funds as part of the State's non-Federal share.

These final regulations contain several significant changes from the NPRM. We fully explain each of these changes in the Analysis of Comments and Changes in the appendix at the end of these final regulations.

Analysis of Comments and Changes

In response to our invitation in the NPRM, 109 parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM is published as an appendix at the end of these final regulations.

We discuss substantive issues under the sections of the regulations to which they pertain. Generally, we do not address technical and other minor changes—and suggested changes that the law does not authorize the Secretary to make.

National Education Goals

The eight National Education Goals focus the Nation's education reform efforts and provide a framework for improving teaching and learning.

These regulations address the National Education Goal that every adult American, including individuals with disabilities, will possess the knowledge and skills necessary to compete in a global economy and exercise the rights and responsibilities of citizenship.

Executive Order 12866

We have reviewed these final regulations in accordance with Executive Order 12866. Under the terms of the order, we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the final regulations are those resulting from statutory requirements and those we have determined to be necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of these final regulations, we have determined that the benefits of the final regulations justify the costs.

We also have determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

Summary of Potential Costs and Benefits

We discussed the potential costs and benefits of these final regulations in the preamble to the NPRM (65 FR 10630 and 10631) and throughout the section-by-section analysis (65 FR 10621 through 10630). Our analysis of potential costs and benefits generally remains the same as in the NPRM, although we include additional discussion of potential costs and benefits in the Appendix to these final regulations titled Analysis of Comments and Changes.

Intergovernmental Review

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Federalism

Executive Order 13132 requires us to ensure meaningful and timely input by State and local elected officials in the development of regulatory policies that have federalism implications. ''Federalism implications'' means 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.

These regulations implement various statutory changes to the State Vocational Rehabilitation Services Program. We do not believe that these regulations have federalism implications as defined in Executive Order 13132 or that they preempt State law. Accordingly, the Secretary has determined that these regulations do not contain policies that have federalism implications.

Assessment of Educational Impact

In the NPRM we requested comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Based on the response to the NPRM and our review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

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(Catalog of Federal Domestic Assistance Number: 84.126 State Vocational Rehabilitation Services Program)

List of Subjects in 34 CFR Part 361

Reporting and recordkeeping requirements, State-administered grant program—education, Vocational rehabilitation.

Dated: December 7, 2000.

Richard W. Riley,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary amends title 34 of the Code of Federal Regulations by revising part 361 to read as follows:

PART 361—STATE VOCATIONAL REHABILITATION SERVICES PROGRAM

Subpart A—General

Sec.
361.1 Purpose.
361.2 Eligibility for a grant.
361.3 Authorized activities.
361.4 Applicable regulations.
361.5 Applicable definitions.

Subpart B—State Plan and Other Requirements for Vocational Rehabilitation Services

361.10 Submission, approval, and disapproval of the State plan.
361.11 Withholding of funds.

Administration

361.12 Methods of administration.
361.13 State agency for administration.
361.14 Substitute State agency.
361.15 Local administration.
361.16 Establishment of an independent commission or a State Rehabilitation Council.
361.17 Requirements for a State Rehabilitation Council.
361.18 Comprehensive system of personnel development.
361.19 Affirmative action for individuals with disabilities.
361.20 Public participation requirements.
361.21 Consultations regarding the administration of the State plan.
361.22 Coordination with education officials.
361.23 Requirements related to the statewide workforce investment system.
361.24 Cooperation and coordination with other entities.
361.25 Statewideness.
361.26 Waiver of statewideness.
361.27 Shared funding and administration of joint programs.
361.28 Third-party cooperative arrangements involving funds from other public agencies.
361.29 Statewide assessment; annual estimates; annual State goals and priorities; strategies; and progress reports.
361.30 Services to American Indians.
361.31 Cooperative agreements with private nonprofit organizations.
361.32 Use of profitmaking organizations for on-the-job training in connection with selected projects.
361.33 [Reserved.]
361.34 Supported employment State plan supplement.
361.35 Innovation and expansion activities.
361.36 Ability to serve all eligible individuals; order of selection for services.
361.37 Information and referral services.
361.38 Protection, use, and release of personal information.
361.39 State-imposed requirements.
361.40 Reports.

Provision and Scope of Services

361.41 Processing referrals and applications.
361.42 Assessment for determining eligibility and priority for services.
361.43 Procedures for ineligibility determination.
361.44 Closure without eligibility determination.
361.45 Development of the individualized plan for employment.
361.46 Content of the individualized plan for employment.
361.47 Record of services.
361.48 Scope of vocational rehabilitation services for individuals with disabilities.
361.49 Scope of vocational rehabilitation services for groups of individuals with disabilities.
361.50 Written policies governing the provision of services for individuals with disabilities.
361.51 Standards for facilities and providers of services.
361.52 Informed choice.
361.53 Comparable services and benefits.
361.54 Participation of individuals in cost of services based on financial need.
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Subpart A—General

§ 361.1 Purpose.

Under the State Vocational Rehabilitation Services Program (Program), the Secretary provides grants to assist States in operating statewide comprehensive, coordinated, effective, efficient, and accountable programs, each of which is—

(a) An integral part of a statewide workforce investment system; and

(b) Designed to assess, plan, develop, and provide vocational rehabilitation

services for individuals with disabilities, consistent with their strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice, so that they may prepare for and engage in gainful employment.

(Authority: Section 100(a)(2) of the Act; 29 U.S.C. 720(a)(2))

§ 361.2 Eligibility for a grant.

Any State that submits to the Secretary a State plan that meets the requirements of section 101(a) of the Act and this part is eligible for a grant under this Program.

(Authority: Section 101(a) of the Act; 29 U.S.C. 721(a))

§ 361.3 Authorized activities.

The Secretary makes payments to a State to assist in—

(a) The costs of providing vocational rehabilitation services under the State plan; and

(b) Administrative costs under the State plan.

(Authority: Section 111(a)(1) of the Act; 29 U.S.C. 731(a)(1))

§ 361.4 Applicable regulations.

The following regulations apply to this Program:

(a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1) 34 CFR part 74 (Administration of Grants and Agreements with Institutions of Higher Education, Hospitals, and other Non-profit Organizations), with respect to subgrants to entities that are not State or local governments or Indian tribal organizations.

(2) 34 CFR part 76 (State-Administered Programs).

(3) 34 CFR part 77 (Definitions that Apply to Department Regulations).

(4) 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(5) 34 CFR part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments), except for § 80.24(a)(2).

(6) 34 CFR part 81 (General Education Provisions Act—Enforcement).

(7) 34 CFR part 82 (New Restrictions on Lobbying).

(8) 34 CFR part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

(9) 34 CFR part 86 (Drug and Alcohol Abuse Prevention).

(b) The regulations in this part 361.

(c) 20 CFR part 662 (Description of One-Stop Service Delivery System under Title I of the Workforce Investment Act of 1998).

(d) 29 CFR part 37, to the extent programs and activities are being conducted as part of the One-Stop service delivery system under section 121(b) of the Workforce Investment Act of 1998.

(Authority: Section 12(c) of the Act; 29 U.S.C. 709(c))

§ 361.5 Applicable definitions.

(a) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Department
EDGAR
Fiscal year
Nonprofit
Private
Public
Secretary

(b) *Other definitions.* The following definitions also apply to this part:

(1) *Act* means the Rehabilitation Act of 1973, as amended (29 U.S.C. 701 *et seq.*).

(2) *Administrative costs under the State plan* means expenditures incurred in the performance of administrative functions under the vocational rehabilitation program carried out under this part, including expenses related to program planning, development, monitoring, and evaluation, including, but not limited to, expenses for—

(i) Quality assurance;

(ii) Budgeting, accounting, financial management, information systems, and related data processing;

(iii) Providing information about the program to the public;

(iv) Technical assistance and support services to other State agencies, private nonprofit organizations, and businesses and industries, except for technical assistance and support services described in § 361.49(a)(4);

(v) The State Rehabilitation Council and other advisory committees;

(vi) Professional organization membership dues for designated State unit employees;

(vii) The removal of architectural barriers in State vocational rehabilitation agency offices and State-operated rehabilitation facilities;

(viii) Operating and maintaining designated State unit facilities, equipment, and grounds;

(ix) Supplies;

(x) Administration of the comprehensive system of personnel development described in § 361.18, including personnel administration, administration of affirmative action plans, and training and staff development;

(xi) Administrative salaries, including clerical and other support staff salaries, in support of these administrative functions;

(xii) Travel costs related to carrying out the program, other than travel costs related to the provision of services;

(xiii) Costs incurred in conducting reviews of determinations made by personnel of the designated State unit, including costs associated with mediation and impartial due process hearings under § 361.57; and

(xiv) Legal expenses required in the administration of the program.

(Authority: Section 7(1) of the Act; 29 U.S.C. 705(1))

(3) *American Indian* means an individual who is a member of an Indian tribe.

(Authority: Section 7(19)(A) of the Act; 29 U.S.C. 705(19)(A))

(4) *Applicant* means an individual who submits an application for vocational rehabilitation services in accordance with § 361.41(b)(2).

(Authority: Section 12(c) of the Act; 29 U.S.C. 709(c))

(5) *Appropriate modes of communication* means specialized aids and supports that enable an individual with a disability to comprehend and respond to information that is being communicated. Appropriate modes of communication include, but are not limited to, the use of interpreters, open and closed captioned videos, specialized telecommunications services and audio recordings, Brailled and large print materials, materials in electronic formats, augmentative communication devices, graphic presentations, and simple language materials.

(Authority: Section 12(c) of the Act; 29 U.S.C. 709(c))

(6) *Assessment for determining eligibility and vocational rehabilitation needs* means, as appropriate in each case—

(i)(A) A review of existing data—

(*1*) To determine if an individual is eligible for vocational rehabilitation services; and

(*2*) To assign priority for an order of selection described in § 361.36 in the States that use an order of selection; and

(B) To the extent necessary, the provision of appropriate assessment activities to obtain necessary additional data to make the eligibility determination and assignment;

(ii) To the extent additional data are necessary to make a determination of the employment outcomes and the nature and scope of vocational

rehabilitation services to be included in the individualized plan for employment of an eligible individual, a comprehensive assessment to determine the unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice, including the need for supported employment, of the eligible individual. This comprehensive assessment—

(A) Is limited to information that is necessary to identify the rehabilitation needs of the individual and to develop the individualized plan of employment of the eligible individual;

(B) Uses as a primary source of information, to the maximum extent possible and appropriate and in accordance with confidentiality requirements—

(*1*) Existing information obtained for the purposes of determining the eligibility of the individual and assigning priority for an order of selection described in § 361.36 for the individual; and

(*2*) Information that can be provided by the individual and, if appropriate, by the family of the individual;

(C) May include, to the degree needed to make such a determination, an assessment of the personality, interests, interpersonal skills, intelligence and related functional capacities, educational achievements, work experience, vocational aptitudes, personal and social adjustments, and employment opportunities of the individual and the medical, psychiatric, psychological, and other pertinent vocational, educational, cultural, social, recreational, and environmental factors that affect the employment and rehabilitation needs of the individual; and

(D) May include, to the degree needed, an appraisal of the patterns of work behavior of the individual and services needed for the individual to acquire occupational skills and to develop work attitudes, work habits, work tolerance, and social and behavior patterns necessary for successful job performance, including the use of work in real job situations to assess and develop the capacities of the individual to perform adequately in a work environment;

(iii) Referral, for the provision of rehabilitation technology services to the individual, to assess and develop the capacities of the individual to perform in a work environment; and

(iv) An exploration of the individual's abilities, capabilities, and capacity to perform in work situations, which must be assessed periodically during trial work experiences, including experiences in which the individual is provided appropriate supports and training.

(Authority: Section 7(2) of the Act; 29 U.S.C. 705(2))

(7) *Assistive technology device* means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of an individual with a disability.

(Authority: Section 7(3) of the Act; 29 U.S.C. 705(3))

(8) *Assistive technology service* means any service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device, including—

(i) The evaluation of the needs of an individual with a disability, including a functional evaluation of the individual in his or her customary environment;

(ii) Purchasing, leasing, or otherwise providing for the acquisition by an individual with a disability of an assistive technology device;

(iii) Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;

(iv) Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

(v) Training or technical assistance for an individual with a disability or, if appropriate, the family members, guardians, advocates, or authorized representatives of the individual; and

(vi) Training or technical assistance for professionals (including individuals providing education and rehabilitation services), employers, or others who provide services to, employ, or are otherwise substantially involved in the major life functions of individuals with disabilities, to the extent that training or technical assistance is necessary to the achievement of an employment outcome by an individual with a disability.

(Authority: Sections 7(4) and 12(c) of the Act; 29 U.S.C. 705(4) and 709(c))

(9) *Community rehabilitation program.*

(i) *Community rehabilitation program* means a program that provides directly or facilitates the provision of one or more of the following vocational rehabilitation services to individuals with disabilities to enable those individuals to maximize their opportunities for employment, including career advancement:

(A) Medical, psychiatric, psychological, social, and vocational services that are provided under one management.

(B) Testing, fitting, or training in the use of prosthetic and orthotic devices.

(C) Recreational therapy.

(D) Physical and occupational therapy.

(E) Speech, language, and hearing therapy.

(F) Psychiatric, psychological, and social services, including positive behavior management.

(G) Assessment for determining eligibility and vocational rehabilitation needs.

(H) Rehabilitation technology.

(I) Job development, placement, and retention services.

(J) Evaluation or control of specific disabilities.

(K) Orientation and mobility services for individuals who are blind.

(L) Extended employment.

(M) Psychosocial rehabilitation services.

(N) Supported employment services and extended services.

(O) Services to family members if necessary to enable the applicant or eligible individual to achieve an employment outcome.

(P) Personal assistance services.

(Q) Services similar to the services described in paragraphs (A) through (P) of this definition.

(ii) For the purposes of this definition, the word *program* means an agency, organization, or institution, or unit of an agency, organization, or institution, that provides directly or facilitates the provision of vocational rehabilitation services as one of its major functions.

(10) *Comparable services and benefits* means—

(i) Services and benefits that are—

(A) Provided or paid for, in whole or in part, by other Federal, State, or local public agencies, by health insurance, or by employee benefits;

(B) Available to the individual at the time needed to ensure the progress of the individual toward achieving the employment outcome in the individual's individualized plan for employment in accordance with § 361.53; and

(C) Commensurate to the services that the individual would otherwise receive from the designated State vocational rehabilitation agency.

(ii) For the purposes of this definition, comparable benefits do not include awards and scholarships based on merit.

(*Authority:* Sections 12(c) and 101(a)(8) of the Act; 29 U.S.C. 709(c) and 721(a)(8))

(11) *Competitive employment* means work—

(i) In the competitive labor market that is performed on a full-time or part-time basis in an integrated setting; and

(ii) For which an individual is compensated at or above the minimum wage, but not less than the customary wage and level of benefits paid by the employer for the same or similar work performed by individuals who are not disabled.

(*Authority:* Sections 7(11) and 12(c) of the Act; 29 U.S.C. 705(11) and 709(c))

(12) *Construction of a facility for a public or nonprofit community rehabilitation program* means—

(i) The acquisition of land in connection with the construction of a new building for a community rehabilitation program;

(ii) The construction of new buildings;

(iii) The acquisition of existing buildings;

(iv) The expansion, remodeling, alteration, or renovation of existing buildings;

(v) Architect's fees, site surveys, and soil investigation, if necessary, in connection with the construction project;

(vi) The acquisition of initial fixed or movable equipment of any new, newly acquired, newly expanded, newly remodeled, newly altered, or newly renovated buildings that are to be used for community rehabilitation program purposes; and

(vii) Other direct expenditures appropriate to the construction project, except costs of off-site improvements.

(*Authority:* Sections 7(6) and 12(c) of the Act; 29 U.S.C. 705(6) and 709(c))

(13) *Designated State agency* or *State agency* means the sole State agency, designated in accordance with § 361.13(a), to administer, or supervise the local administration of, the State plan for vocational rehabilitation services. The term includes the State agency for individuals who are blind, if designated as the sole State agency with respect to that part of the plan relating to the vocational rehabilitation of individuals who are blind.

(Authority: Sections 7(8)(A) and 101(a)(2)(A) of the Act; 29 U.S.C. 705(8)(A) and 721(a)(2)(A))

(14) *Designated State unit* or *State unit* means either—

(i) The State vocational rehabilitation bureau, division, or other organizational unit that is primarily concerned with vocational rehabilitation or vocational and other rehabilitation of individuals with disabilities and that is responsible for the administration of the vocational rehabilitation program of the State agency, as required under § 361.13(b); or

(ii) The State agency that is primarily concerned with vocational rehabilitation or vocational and other rehabilitation of individuals with disabilities.

(Authority: Sections 7(8)(B) and 101(a)(2)(B) of the Act; 29 U.S.C. 705(8)(B) and 721(a)(2)(B))

(15) *Eligible individual* means an applicant for vocational rehabilitation services who meets the eligibility requirements of § 361.42(a).

(Authority: Sections 7(20)(A) and 102(a)(1) of the Act; 29 U.S.C. 705(20)(A) and 722(a)(1))

(16) *Employment outcome* means, with respect to an individual, entering or retaining full-time or, if appropriate, part-time competitive employment in the integrated labor market to the greatest extent practicable; supported employment; or any other type of employment, including self-employment, telecommuting, or business ownership, that is consistent with an individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.

(Authority: Sections 7(11), 12(c), 100(a)(2), and 102(b)(3)(A) of the Act; 29 U.S.C. 705(11), 709(c), 720(a)(2), and 722(b)(3)(A))

(17) *Establishment, development, or improvement of a public or nonprofit community rehabilitation program* means—

(i) The establishment of a facility for a public or nonprofit community rehabilitation program as defined in paragraph (b)(18) of this section to provide vocational rehabilitation services to applicants or eligible individuals;

(ii) Staffing, if necessary to establish, develop, or improve a community rehabilitation program for the purpose of providing vocational rehabilitation services to applicants or eligible individuals, for a maximum period of 4 years, with Federal financial participation available at the applicable matching rate for the following levels of staffing costs:

(A) 100 percent of staffing costs for the first year.

(B) 75 percent of staffing costs for the second year.

(C) 60 percent of staffing costs for the third year.

(D) 45 percent of staffing costs for the fourth year; and

(iii) Other expenditures related to the establishment, development, or improvement of a community rehabilitation program that are necessary to make the program functional or increase its effectiveness in providing vocational rehabilitation services to applicants or eligible individuals, but are not ongoing operating expenses of the program.

(Authority: Sections 7(12) and 12(c) of the Act; 29 U.S.C. 705(12) and 709(c))

(18) *Establishment of a facility for a public or nonprofit community rehabilitation program* means—

(i) The acquisition of an existing building and, if necessary, the land in connection with the acquisition, if the building has been completed in all respects for at least 1 year prior to the date of acquisition and the Federal share of the cost of acquisition is not more than $300,000;

(ii) The remodeling or alteration of an existing building, provided the estimated cost of remodeling or alteration does not exceed the appraised value of the existing building;

(iii) The expansion of an existing building, provided that—

(A) The existing building is complete in all respects;

(B) The total size in square footage of the expanded building, notwithstanding the number of expansions, is not greater than twice the size of the existing building;

(C) The expansion is joined structurally to the existing building and does not constitute a separate building; and

(D) The costs of the expansion do not exceed the appraised value of the existing building;

(iv) Architect's fees, site survey, and soil investigation, if necessary in connection with the acquisition, remodeling, alteration, or expansion of an existing building; and

(v) The acquisition of fixed or movable equipment, including the costs of installation of the equipment, if necessary to establish, develop, or improve a community rehabilitation program.

(Authority: Sections 7(12) and 12(c) of the Act; 29 U.S.C. 705(12) and 709(c))

(19) *Extended employment* means work in a non-integrated or sheltered setting for a public or private nonprofit agency or organization that provides compensation in accordance with the Fair Labor Standards Act and any needed support services to an individual with a disability to enable the individual to continue to train or otherwise prepare for competitive employment, unless the individual through informed choice chooses to remain in extended employment.

(Authority: Section 12(c) of the Act; 29 U.S.C. 709(c))

(20) *Extended services* means ongoing support services and other appropriate services that are needed to support and

maintain an individual with a most significant disability in supported employment and that are provided by a State agency, a private nonprofit organization, employer, or any other appropriate resource, from funds other than funds received under this part and 34 CFR part 363 after an individual with a most significant disability has made the transition from support provided by the designated State unit.

(Authority: Sections 7(13) and 623 of the Act; 29 U.S.C. 705(13) and 795i)

(21) *Extreme medical risk* means a probability of substantially increasing functional impairment or death if medical services, including mental health services, are not provided expeditiously.

(Authority: Sections 12(c) and 101(a)(8)(A)(i)(III) of the Act; 29 U.S.C. 709(c) and 721(a)(8)(A)(i)(III))

(22) *Fair hearing board* means a committee, body, or group of persons established by a State prior to January 1, 1985 that—

(i) Is authorized under State law to review determinations made by personnel of the designated State unit that affect the provision of vocational rehabilitation services; and

(ii) Carries out the responsibilities of the impartial hearing officer in accordance with the requirements in § 361.57(j).

(Authority: Section 12(c) of the Act; 29 U.S.C. 709(c))

(23) *Family member,* for purposes of receiving vocational rehabilitation services in accordance with § 361.48(i), means an individual—

(i) Who either—

(A) Is a relative or guardian of an applicant or eligible individual; or

(B) Lives in the same household as an applicant or eligible individual;

(ii) Who has a substantial interest in the well-being of that individual; and

(iii) Whose receipt of vocational rehabilitation services is necessary to enable the applicant or eligible individual to achieve an employment outcome.

(Authority: Sections 12(c) and 103(a)(17) of the Act; 29 U.S.C. 709(c) and 723(a)(17))

(24) *Governor* means a chief executive officer of a State.

(Authority: Section 7(15) of the Act; 29 U.S.C. 705(15))

(25) *Impartial hearing officer.*

(i) *Impartial hearing officer* means an individual who—

(A) Is not an employee of a public agency (other than an administrative law judge, hearing examiner, or employee of an institution of higher education);

(B) Is not a member of the State Rehabilitation Council for the designated State unit;

(C) Has not been involved previously in the vocational rehabilitation of the applicant or eligible individual;

(D) Has knowledge of the delivery of vocational rehabilitation services, the State plan, and the Federal and State regulations governing the provision of services;

(E) Has received training with respect to the performance of official duties; and

(F) Has no personal, professional, or financial interest that would be in conflict with the objectivity of the individual.

(ii) An individual is not considered to be an employee of a public agency for the purposes of this definition solely because the individual is paid by the agency to serve as a hearing officer.

(Authority: Section 7(16) of the Act; 29 U.S.C. 705(16))

(26) *Indian tribe* means any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaskan native village or regional village corporation (as defined in or established pursuant to the Alaska Native Claims Settlement Act).

(Authority: Section 7(19)(B) of the Act; 29 U.S.C. 705(19)(B))

(27) *Individual who is blind* means a person who is blind within the meaning of applicable State law. (Authority: Section 12(c) of the Act; 29 U.S.C. 709(c))

(28) *Individual with a disability,* except as provided in § 361.5(b)(29), means an individual—

(i) Who has a physical or mental impairment;

(ii) Whose impairment constitutes or results in a substantial impediment to employment; and

(iii) Who can benefit in terms of an employment outcome from the provision of vocational rehabilitation services.

(Authority: Section 7(20)(A) of the Act; 29 U.S.C. 705(20)(A))

(29) *Individual with a disability,* for purposes of §§ 361.5(b)(14), 361.13(a), 361.13(b)(1), 361.17(a), (b), (c), and (j), 361.18(b), 361.19, 361.20, 361.23(b)(2), 361.29(a) and (d)(5), and 361.51(b), means an individual—

(i) Who has a physical or mental impairment that substantially limits one or more major life activities;

(ii) Who has a record of such an impairment; or

(iii) Who is regarded as having such an impairment.

(Authority: Section 7(20)(B) of the Act; 29 U.S.C. 705(20)(B))

(30) *Individual with a most significant disability* means an individual with a significant disability who meets the designated State unit's criteria for an individual with a most significant disability. These criteria must be consistent with the requirements in § 361.36(d)(1) and (2).

(Authority: Sections 7(21)(E)(i) and 101(a)(5)(C) of the Act; 29 U.S.C. 705(21)(E)(i) and 721(a)(5)(C))

(31) *Individual with a significant disability* means an individual with a disability—

(i) Who has a severe physical or mental impairment that seriously limits one or more functional capacities (such as mobility, communication, self-care, self-direction, interpersonal skills, work tolerance, or work skills) in terms of an employment outcome;

(ii) Whose vocational rehabilitation can be expected to require multiple vocational rehabilitation services over an extended period of time; and

(iii) Who has one or more physical or mental disabilities resulting from amputation, arthritis, autism, blindness, burn injury, cancer, cerebral palsy, cystic fibrosis, deafness, head injury, heart disease, hemiplegia, hemophilia, respiratory or pulmonary dysfunction, mental retardation, mental illness, multiple sclerosis, muscular dystrophy, musculo-skeletal disorders, neurological disorders (including stroke and epilepsy), spinal cord conditions (including paraplegia and quadriplegia), sickle cell anemia, specific learning disability, end-stage renal disease, or another disability or combination of disabilities determined on the basis of an assessment for determining eligibility and vocational rehabilitation needs to cause comparable substantial functional limitation.

(Authority: Section 7(21)(A) of the Act; 29 U.S.C. 705(21)(A))

(32) *Individual's representative* means any representative chosen by an applicant or eligible individual, as appropriate, including a parent, guardian, other family member, or advocate, unless a representative has been appointed by a court to represent the individual, in which case the court-appointed representative is the individual's representative.

(Authority: Sections 7(22) and 12(c) of the Act; 29 U.S.C. 705(22) and 709(c))

(33) *Integrated setting,*—

(i) With respect to the provision of services, means a setting typically found in the community in which applicants or eligible individuals interact with non-disabled individuals other than non-disabled individuals who are

providing services to those applicants or eligible individuals;

(ii) With respect to an employment outcome, means a setting typically found in the community in which applicants or eligible individuals interact with non-disabled individuals, other than non-disabled individuals who are providing services to those applicants or eligible individuals, to the same extent that non-disabled individuals in comparable positions interact with other persons.

(Authority: Section 12(c) of the Act; 29 U.S.C. 709(c))

(34) *Local workforce investment board* means a local workforce investment board established under section 117 of the Workforce Investment Act of 1998.

(Authority: Section 7(25) of the Act; 29 U.S.C. 705(25))

(35) *Maintenance* means monetary support provided to an individual for expenses, such as food, shelter, and clothing, that are in excess of the normal expenses of the individual and that are necessitated by the individual's participation in an assessment for determining eligibility and vocational rehabilitation needs or the individual's receipt of vocational rehabilitation services under an individualized plan for employment.

(Authority: Sections 12(c) and 103(a)(7) of the Act; 29 U.S.C. 709(c) and 723(a)(7))

(i) *Examples:* The following are examples of expenses that would meet the definition of maintenance. The examples are illustrative, do not address all possible circumstances, and are not intended to substitute for individual counselor judgment.

Example 1: The cost of a uniform or other suitable clothing that is required for an individual's job placement or job-seeking activities.

Example 2: The cost of short-term shelter that is required in order for an individual to participate in assessment activities or vocational training at a site that is not within commuting distance of an individual's home.

Example 3: The initial one-time costs, such as a security deposit or charges for the initiation of utilities, that are required in order for an individual to relocate for a job placement.

Example 4: The costs of an individual's participation in enrichment activities related to that individual's training program.

(ii) [Reserved]

(36) *Mediation* means the act or process of using an independent third party to act as a mediator, intermediary, or conciliator to assist persons or parties in settling differences or disputes prior to pursuing formal administrative or other legal remedies. Mediation under the program must be conducted in accordance with the requirements in § 361.57(d) by a qualified and impartial mediator as defined in § 361.5(b)(43).

(Authority: Section 12(c) of the Act; 29 U.S.C. 709(c))

(37) *Nonprofit,* with respect to a community rehabilitation program, means a community rehabilitation program carried out by a corporation or association, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual and the income of which is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986.

(Authority: Section 7(26) of the Act; 29 U.S.C. 705(26))

(38) *Ongoing support services,* as used in the definition of ''Supported employment''

(i) Means services that are—

(A) Needed to support and maintain an individual with a most significant disability in supported employment;

(B) Identified based on a determination by the designated State unit of the individual's need as specified in an individualized plan for employment; and

(C) Furnished by the designated State unit from the time of job placement until transition to extended services, unless post-employment services are provided following transition, and thereafter by one or more extended services providers throughout the individual's term of employment in a particular job placement or multiple placements if those placements are being provided under a program of transitional employment;

(ii) Must include an assessment of employment stability and provision of specific services or the coordination of services at or away from the worksite that are needed to maintain stability based on—

(A) At a minimum, twice-monthly monitoring at the worksite of each individual in supported employment; or

(B) If under specific circumstances, especially at the request of the individual, the individualized plan for employment provides for off-site monitoring, twice monthly meetings with the individual;

(iii) Consist of—

(A) Any particularized assessment supplementary to the comprehensive assessment of rehabilitation needs described in paragraph (b)(6)(ii) of this section;

(B) The provision of skilled job trainers who accompany the individual for intensive job skill training at the work site;

(C) Job development and training;

(D) Social skills training;

(E) Regular observation or supervision of the individual;

(F) Follow-up services including regular contact with the employers, the individuals, the parents, family members, guardians, advocates or authorized representatives of the individuals, and other suitable professional and informed advisors, in order to reinforce and stabilize the job placement;

(G) Facilitation of natural supports at the worksite;

(H) Any other service identified in the scope of vocational rehabilitation services for individuals, described in § 361.48; or

(I) Any service similar to the foregoing services.

(Authority: Sections 7(27) and 12(c) of the Act; 29 U.S.C. 705(27) and 709(c))

(39) *Personal assistance services* means a range of services provided by one or more persons designed to assist an individual with a disability to perform daily living activities on or off the job that the individual would typically perform without assistance if the individual did not have a disability. The services must be designed to increase the individual's control in life and ability to perform everyday activities on or off the job. The services must be necessary to the achievement of an employment outcome and may be provided only while the individual is receiving other vocational rehabilitation services. The services may include training in managing, supervising, and directing personal assistance services.

(Authority: Sections 7(28), 102(b)(3)(B)(i)(I), and 103(a)(9) of the Act; 29 U.S.C. 705(28), 722(b)(3)(B)(i)(I), and 723(a)(9))

(40) *Physical and mental restoration services* means—

(i) Corrective surgery or therapeutic treatment that is likely, within a reasonable period of time, to correct or modify substantially a stable or slowly progressive physical or mental impairment that constitutes a substantial impediment to employment;

(ii) Diagnosis of and treatment for mental or emotional disorders by qualified personnel in accordance with State licensure laws;

(iii) Dentistry;

(iv) Nursing services;

(v) Necessary hospitalization (either inpatient or outpatient care) in connection with surgery or treatment and clinic services;

(vi) Drugs and supplies;

(vii) Prosthetic and orthotic devices;

(viii) Eyeglasses and visual services, including visual training, and the

examination and services necessary for the prescription and provision of eyeglasses, contact lenses, microscopic lenses, telescopic lenses, and other special visual aids prescribed by personnel that are qualified in accordance with State licensure laws;

(ix) Podiatry;

(x) Physical therapy;

(xi) Occupational therapy;

(xii) Speech or hearing therapy;

(xiii) Mental health services;

(xiv) Treatment of either acute or chronic medical complications and emergencies that are associated with or arise out of the provision of physical and mental restoration services, or that are inherent in the condition under treatment;

(xv) Special services for the treatment of individuals with end-stage renal disease, including transplantation, dialysis, artificial kidneys, and supplies; and

(xvi) Other medical or medically related rehabilitation services.

(Authority: Sections 12(c) and 103(a)(6) of the Act; 29 U.S.C. 709(c) and 723(a)(6))

(41) *Physical or mental impairment* means—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculo-skeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; or

(ii) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(Authority: Sections 7(20)(A) and 12(c) of the Act; 29 U.S.C. 705(20)(A) and 709(c))

(42) *Post-employment services* means one or more of the services identified in § 361.48 that are provided subsequent to the achievement of an employment outcome and that are necessary for an individual to maintain, regain, or advance in employment, consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.

(Authority: Sections 12(c) and 103(a)(18) of the Act; 29 U.S.C. 709(c)) and 723(a)(18))

Note to paragraph (b)(42): Post-employment services are intended to ensure that the employment outcome remains consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice. These services are available to meet rehabilitation needs that do not require a complex and comprehensive provision of services and, thus, should be limited in scope and duration. If more comprehensive services are required, then a new rehabilitation effort should be considered. Post-employment services are to be provided under an amended individualized plan for employment; thus, a re-determination of eligibility is not required. The provision of post-employment services is subject to the same requirements in this part as the provision of any other vocational rehabilitation service. Post-employment services are available to assist an individual to maintain employment, *e.g.,* the individual's employment is jeopardized because of conflicts with supervisors or co-workers, and the individual needs mental health services and counseling to maintain the employment; to regain employment, *e.g.,* the individual's job is eliminated through reorganization and new placement services are needed; and to advance in employment, *e.g.,* the employment is no longer consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.

(43) *Qualified and impartial mediator.*

(i) *Qualified and impartial mediator* means an individual who—

(A) Is not an employee of a public agency (other than an administrative law judge, hearing examiner, employee of a State office of mediators, or employee of an institution of higher education);

(B) Is not a member of the State Rehabilitation Council for the designated State unit;

(C) Has not been involved previously in the vocational rehabilitation of the applicant or eligible individual;

(D) Is knowledgeable of the vocational rehabilitation program and the applicable Federal and State laws, regulations, and policies governing the provision of vocational rehabilitation services;

(E) Has been trained in effective mediation techniques consistent with any State-approved or -recognized certification, licensing, registration, or other requirements; and

(F) Has no personal, professional, or financial interest that would be in conflict with the objectivity of the individual during the mediation proceedings.

(ii) An individual serving as a mediator is not considered to be an employee of the designated State agency or designated State unit for the purposes of this definition solely because the individual is paid by the designated State agency or designated State unit to serve as a mediator.

(Authority: Sections 12(c) and 102(c)(4) of the Act; 29 U.S.C. 709(c) and 722(c)(4))

(44) *Rehabilitation engineering* means the systematic application of engineering sciences to design, develop, adapt, test, evaluate, apply, and distribute technological solutions to problems confronted by individuals with disabilities in functional areas, such as mobility, communications, hearing, vision, and cognition, and in activities associated with employment, independent living, education, and integration into the community.

(Authority: Section 7(12)(c) of the Act; 29 U.S.C. 709(c))

(45) *Rehabilitation technology* means the systematic application of technologies, engineering methodologies, or scientific principles to meet the needs of, and address the barriers confronted by, individuals with disabilities in areas that include education, rehabilitation, employment, transportation, independent living, and recreation. The term includes rehabilitation engineering, assistive technology devices, and assistive technology services.

(Authority: Section 7(30) of the Act; 29 U.S.C. 705(30))

(46) *Reservation* means a Federal or State Indian reservation, public domain Indian allotment, former Indian reservation in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act.

(Authority: Section 121(c) of the Act; 29 U.S.C. 741(c))

(47) *Sole local agency* means a unit or combination of units of general local government or one or more Indian tribes that has the sole responsibility under an agreement with, and the supervision of, the State agency to conduct a local or tribal vocational rehabilitation program, in accordance with the State plan.

(Authority: Section 7(24) of the Act; 29 U.S.C. 705(24))

(48) *State* means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(Authority: Section 7(32) of the Act; 29 U.S.C. 705(32))

(49) *State workforce investment board* means a State workforce investment board established under section 111 of the Workforce Investment Act of 1998.

(Authority: Section 7(33) of the Act; 29 U.S.C. 705(33))

(50) *Statewide workforce investment system* means a system described in

section 111(d)(2) of the Workforce Investment Act of 1998.

(Authority: Section 7(34) of the Act; 29 U.S.C. 705(34))

(51) *State plan* means the State plan for vocational rehabilitation services submitted under § 361.10.

(Authority: Sections 12(c) and 101 of the Act; 29 U.S.C. 709(c) and 721)

(52) *Substantial impediment to employment* means that a physical or mental impairment (in light of attendant medical, psychological, vocational, educational, communication, and other related factors) hinders an individual from preparing for, entering into, engaging in, or retaining employment consistent with the individual's abilities and capabilities.

(Authority: Sections 7(20)(A) and 12(c) of the Act; 29 U.S.C. 705(20)(A) and 709(c))

(53) *Supported employment* means—

(i) Competitive employment in an integrated setting, or employment in integrated work settings in which individuals are working toward competitive employment, consistent with the strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice of the individuals with ongoing support services for individuals with the most significant disabilities—

(A) For whom competitive employment has not traditionally occurred or for whom competitive employment has been interrupted or intermittent as a result of a significant disability; and

(B) Who, because of the nature and severity of their disabilities, need intensive supported employment services from the designated State unit and extended services after transition as described in paragraph (b)(20) of this section to perform this work; or

(ii) Transitional employment, as defined in paragraph (b)(54) of this section, for individuals with the most significant disabilities due to mental illness.

(Authority: Section 7(35) of the Act; 29 U.S.C. 705(35))

(54) *Supported employment services* means ongoing support services and other appropriate services needed to support and maintain an individual with a most significant disability in supported employment that are provided by the designated State unit—

(i) For a period of time not to exceed 18 months, unless under special circumstances the eligible individual and the rehabilitation counselor or coordinator jointly agree to extend the time to achieve the employment outcome identified in the individualized plan for employment; and

(ii) Following transition, as post-employment services that are unavailable from an extended services provider and that are necessary to maintain or regain the job placement or advance in employment.

(Authority: Sections 7(36) and 12(c) of the Act; 29 U.S.C. 705(36) and 709(c))

(55) *Transition services* means a coordinated set of activities for a student designed within an outcome-oriented process that promotes movement from school to post-school activities, including postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation. The coordinated set of activities must be based upon the individual student's needs, taking into account the student's preferences and interests, and must include instruction, community experiences, the development of employment and other post-school adult living objectives, and, if appropriate, acquisition of daily living skills and functional vocational evaluation. Transition services must promote or facilitate the achievement of the employment outcome identified in the student's individualized plan for employment.

(Authority: Section 7(37) and 103(a)(15) of the Act; 29 U.S.C. 705(37) and 723(a)(15))

(56) *Transitional employment,* as used in the definition of ''Supported employment,'' means a series of temporary job placements in competitive work in integrated settings with ongoing support services for individuals with the most significant disabilities due to mental illness. In transitional employment, the provision of ongoing support services must include continuing sequential job placements until job permanency is achieved.

(Authority: Sections 7(35)(B) and 12(c) of the Act; 29 U.S.C. 705(35)(B) and 709(c)

(57) *Transportation* means travel and related expenses that are necessary to enable an applicant or eligible individual to participate in a vocational rehabilitation service, including expenses for training in the use of public transportation vehicles and systems.

(Authority: 103(a)(8) of the Act; 29 U.S.C. 723(a)(8))

(i) *Examples:* The following are examples of expenses that would meet the definition of transportation. The examples are purely illustrative, do not address all possible circumstances, and are not intended to substitute for individual counselor judgment.

Example 1: Travel and related expenses for a personal care attendant or aide if the services of that person are necessary to enable the applicant or eligible individual to travel to participate in any vocational rehabilitation service.

Example 2: The purchase and repair of vehicles, including vans, but not the modification of these vehicles, as modification would be considered a rehabilitation technology service.

Example 3: Relocation expenses incurred by an eligible individual in connection with a job placement that is a significant distance from the eligible individual's current residence.

(ii) [Reserved]

(58) *Vocational rehabilitation services*—

(i) If provided to an individual, means those services listed in § 361.48; and

(ii) If provided for the benefit of groups of individuals, also means those services listed in § 361.49.

(Authority: Sections 7(38) and 103(a) and (b) of the Act; 29 U.S.C. 705(38), 723(a) and (b))

Subpart B—State Plan and Other Requirements for Vocational Rehabilitation Services

§ 361.10 Submission, approval, and disapproval of the State plan.

(a) *Purpose.* For a State to receive a grant under this part, the designated State agency must submit to the Secretary, and obtain approval of, a State plan that contains a description of the State's vocational rehabilitation services program, the plans and policies to be followed in carrying out the program, and other information requested by the Secretary, in accordance with the requirements of this part.

(b) *Separate part relating to the vocational rehabilitation of individuals who are blind.* If a separate State agency administers or supervises the administration of a separate part of the State plan relating to the vocational rehabilitation of individuals who are blind, that part of the State plan must separately conform to all requirements under this part that are applicable to a State plan.

(c) *State unified plan.* The State may choose to submit the State plan for vocational rehabilitation services as part of the State unified plan under section 501 of the Workforce Investment Act of 1998. The portion of the State unified plan that includes the State plan for vocational rehabilitation services must meet the State plan requirements in this part.

(d) *Public participation.* Prior to the adoption of any substantive policies or procedures governing the provision of vocational rehabilitation services under the State plan, including making any substantive amendment to those policies and procedures, the designated State agency must conduct public meetings throughout the State, in accordance with the requirements of § 361.20.

(e) *Duration.* The State plan remains in effect subject to the submission of modifications the State determines to be necessary or the Secretary may require based on a change in State policy, a change in Federal law, including regulations, an interpretation of the Act by a Federal court or the highest court of the State, or a finding by the Secretary of State noncompliance with the requirements of the Act or this part.

(f) *Submission of the State plan.* The State must submit the State plan for approval—

(1) To the Secretary on the same date that the State submits a State plan relating to the statewide workforce investment system under section 112 of the Workforce Investment Act of 1998;

(2) As part of the State unified plan submitted under section 501 of that Act; or

(3) To the Secretary on the same date that the State submits a State unified plan under section 501 of that Act that does not include the State plan under this part.

(g) *Annual submission.* (1) The State must submit to the Secretary for approval revisions to the State plan in accordance with paragraph (e) of this section and 34 CFR 76.140.

(2) The State must submit to the Secretary reports containing annual updates of the information required under §§ 361.18, 361.29, and 361.35 and any other updates of the information required under this part that are requested by the Secretary.

(3) The State is not required to submit policies, procedures, or descriptions required under this part that have been previously submitted to the Secretary and that demonstrate that the State meets the requirements of this part, including any policies, procedures, or descriptions submitted under this part that are in effect on August 6, 1998.

(h) *Approval.* The Secretary approves any State plan and any revisions to the State plan that conform to the requirements of this part and section 101(a) of the Act.

(i) *Disapproval.* The Secretary disapproves any State plan that does not conform to the requirements of this part and section 101(a) of the Act, in accordance with the following procedures:

(1) *Informal resolution.* Prior to disapproving any State plan, the Secretary attempts to resolve disputes informally with State officials.

(2) *Notice.* If, after reasonable effort has been made to resolve the dispute, no resolution has been reached, the Secretary provides notice to the State agency of the intention to disapprove the State plan and of the opportunity for a hearing.

(3) *State plan hearing.* If the State agency requests a hearing, the Secretary designates one or more individuals, either from the Department or elsewhere, not responsible for or connected with the administration of this Program, to conduct a hearing in accordance with the provisions of 34 CFR part 81, subpart A.

(4) *Initial decision.* The hearing officer issues an initial decision in accordance with 34 CFR 81.41.

(5) *Petition for review of an initial decision.* The State agency may seek the Secretary's review of the initial decision in accordance with 34 CFR part 81.

(6) *Review by the Secretary.* The Secretary reviews the initial decision in accordance with 34 CFR 81.43.

(7) *Final decision of the Department.* The final decision of the Department is made in accordance with 34 CFR 81.44.

(8) *Judicial review.* A State may appeal the Secretary's decision to disapprove the State plan by filing a petition for review with the United States Court of Appeals for the circuit in which the State is located, in accordance with section 107(d) of the Act.

(Authority: Sections 101(a) and (b), and 107(d) of the Act; 20 U.S.C. 1231g(a); and 29 U.S.C. 721(a) and (b), and 727(d))

§ 361.11 Withholding of funds.

(a) *Basis for withholding.* The Secretary may withhold or limit payments under section 111 or 622(a) of the Act, as provided by section 107(c) and (d) of the Act, if the Secretary determines that—

(1) The State plan, including the supported employment supplement, has been so changed that it no longer conforms with the requirements of this part or 34 CFR part 363; or

(2) In the administration of the State plan, there has been a failure to comply substantially with any provision of that plan or a program improvement plan established in accordance with section 106(b)(2) of the Act.

(b) *Informal resolution.* Prior to withholding or limiting payments in accordance with this section, the Secretary attempts to resolve disputed issues informally with State officials.

(c) *Notice.* If, after reasonable effort has been made to resolve the dispute, no resolution has been reached, the Secretary provides notice to the State agency of the intention to withhold or limit payments and of the opportunity for a hearing.

(d) *Withholding hearing.* If the State agency requests a hearing, the Secretary designates one or more individuals, either from the Department or elsewhere, not responsible for or connected with the administration of this Program, to conduct a hearing in accordance with the provisions of 34 CFR part 81, subpart A.

(e) *Initial decision.* The hearing officer issues an initial decision in accordance with 34 CFR 81.41.

(f) *Petition for review of an initial decision.* The State agency may seek the Secretary's review of the initial decision in accordance with 34 CFR 81.42.

(g) *Review by the Secretary.* The Secretary reviews the initial decision in accordance with 34 CFR 81.43.

(h) *Final decision of the Department.* The final decision of the Department is made in accordance with 34 CFR 81.44.

(i) *Judicial review.* A State may appeal the Secretary's decision to withhold or limit payments by filing a petition for review with the U.S. Court of Appeals for the circuit in which the State is located, in accordance with section 107(d) of the Act.

(Authority: Sections 101(b), 107(c), and 107(d) of the Act; 29 U.S.C. 721(b), 727(c)(1) and (2), and 727(d))

Administration

§ 361.12 Methods of administration.

The State plan must assure that the State agency, and the designated State unit if applicable, employs methods of administration found necessary by the Secretary for the proper and efficient administration of the plan and for carrying out all functions for which the State is responsible under the plan and this part. These methods must include procedures to ensure accurate data collection and financial accountability.

(Authority: Sections 101(a)(6) and (a)(10)(A) of the Act; 29 U.S.C. 721(a)(6) and (a)(10)(A))

§ 361.13 State agency for administration.

(a) *Designation of State agency.* The State plan must designate a State agency as the sole State agency to administer the State plan, or to supervise its administration in a political subdivision of the State by a sole local agency, in accordance with the following requirements:

(1) *General.* Except as provided in paragraphs (a)(2) and (3) of this section,

the State plan must provide that the designated State agency is one of the following types of agencies:

(i) A State agency that is primarily concerned with vocational rehabilitation or vocational and other rehabilitation of individuals with disabilities; or

(ii) A State agency that includes a vocational rehabilitation unit as provided in paragraph (b) of this section.

(2) *American Samoa.* In the case of American Samoa, the State plan must designate the Governor.

(3) *Designated State agency for individuals who are blind.* If a State commission or other agency that provides assistance or services to individuals who are blind is authorized under State law to provide vocational rehabilitation services to individuals who are blind, and this commission or agency is primarily concerned with vocational rehabilitation or includes a vocational rehabilitation unit as provided in paragraph (b) of this section, the State plan may designate that agency as the sole State agency to administer the part of the plan under which vocational rehabilitation services are provided for individuals who are blind or to supervise its administration in a political subdivision of the State by a sole local agency.

(b) *Designation of State unit.*

(1) If the designated State agency is not of the type specified in paragraph (a)(1)(i) of this section or if the designated State agency specified in paragraph (a)(3) of this section is not primarily concerned with vocational rehabilitation or vocational and other rehabilitation of individuals with disabilities, the State plan must assure that the agency (or each agency if two agencies are designated) includes a vocational rehabilitation bureau, division, or unit that—

(i) Is primarily concerned with vocational rehabilitation or vocational and other rehabilitation of individuals with disabilities and is responsible for the administration of the State agency's vocational rehabilitation program under the State plan;

(ii) Has a full-time director;

(iii) Has a staff, at least 90 percent of whom are employed full time on the rehabilitation work of the organizational unit; and

(iv) Is located at an organizational level and has an organizational status within the State agency comparable to that of other major organizational units of the agency.

(2) In the case of a State that has not designated a separate State agency for individuals who are blind, as provided for in paragraph (a)(3) of this section, the State may assign responsibility for the part of the plan under which vocational rehabilitation services are provided to individuals who are blind to one organizational unit of the designated State agency and may assign responsibility for the rest of the plan to another organizational unit of the designated State agency, with the provisions of paragraph (b)(1) of this section applying separately to each of these units.

(c) *Responsibility for administration.*

(1) At a minimum, the following activities are the responsibility of the designated State unit or the sole local agency under the supervision of the State unit:

(i) All decisions affecting eligibility for vocational rehabilitation services, the nature and scope of available services, and the provision of these services.

(ii) The determination to close the record of services of an individual who has achieved an employment outcome in accordance with § 361.56.

(iii) Policy formulation and implementation.

(iv) The allocation and expenditure of vocational rehabilitation funds.

(v) Participation as a partner in the One-Stop service delivery system under Title I of the Workforce Investment Act of 1998, in accordance with 20 CFR part 662.

(2) The responsibility for the functions described in paragraph (c)(1) of this section may not be delegated to any other agency or individual.

(Authority: Section 101(a)(2) of the Act; 29 U.S.C. 721(a)(2))

§ 361.14 Substitute State agency.

(a) *General provisions.*

(1) If the Secretary has withheld all funding from a State under § 361.11, the State may designate another agency to substitute for the designated State agency in carrying out the State's program of vocational rehabilitation services.

(2) Any public or nonprofit private organization or agency within the State or any political subdivision of the State is eligible to be a substitute agency.

(3) The substitute agency must submit a State plan that meets the requirements of this part.

(4) The Secretary makes no grant to a substitute agency until the Secretary approves its plan.

(b) *Substitute agency matching share.* The Secretary does not make any payment to a substitute agency unless it has provided assurances that it will contribute the same matching share as the State would have been required to contribute if the State agency were carrying out the vocational rehabilitation program.

(Authority: Section 107(c)(3) of the Act; 29 U.S.C. 727(c)(3))

§ 361.15 Local administration.

(a) If the State plan provides for the administration of the plan by a local agency, the designated State agency must—

(1) Ensure that each local agency is under the supervision of the designated State unit and is the sole local agency as defined in § 361.5(b)(47) that is responsible for the administration of the program within the political subdivision that it serves; and

(2) Develop methods that each local agency will use to administer the vocational rehabilitation program, in accordance with the State plan.

(b) A separate local agency serving individuals who are blind may administer that part of the plan relating to vocational rehabilitation of individuals who are blind, under the supervision of the designated State unit for individuals who are blind.

(Authority: Sections 7(24) and 101(a)(2)(A) of the Act; 29 U.S.C. 705(24) and 721(a)(2)(A))

§ 361.16 Establishment of an independent commission or a state rehabilitation council.

(a) *General requirement.* Except as provided in paragraph (b) of this section, the State plan must contain one of the following two assurances:

(1) An assurance that the designated State agency is an independent State commission that—

(i) Is responsible under State law for operating, or overseeing the operation of, the vocational rehabilitation program in the State and is primarily concerned with vocational rehabilitation or vocational and other rehabilitation services, in accordance with § 361.13(a)(1)(i);

(ii) Is consumer-controlled by persons who—

(A) Are individuals with physical or mental impairments that substantially limit major life activities; and

(B) Represent individuals with a broad range of disabilities, unless the designated State unit under the direction of the commission is the State agency for individuals who are blind;

(iii) Includes family members, advocates, or other representatives of individuals with mental impairments; and

(iv) Conducts the functions identified in § 361.17(h)(4).

(2) An assurance that—

(i) The State has established a State Rehabilitation Council (Council) that meets the requirements of § 361.17;

(ii) The designated State unit, in accordance with § 361.29, jointly develops, agrees to, and reviews annually State goals and priorities and jointly submits to the Secretary annual reports of progress with the Council;

(iii) The designated State unit regularly consults with the Council regarding the development, implementation, and revision of State policies and procedures of general applicability pertaining to the provision of vocational rehabilitation services;

(iv) The designated State unit transmits to the Council—

(A) All plans, reports, and other information required under this part to be submitted to the Secretary;

(B) All policies and information on all practices and procedures of general applicability provided to or used by rehabilitation personnel providing vocational rehabilitation services under this part; and

(C) Copies of due process hearing decisions issued under this part and transmitted in a manner to ensure that the identity of the participants in the hearings is kept confidential; and

(v) The State plan, and any revision to the State plan, includes a summary of input provided by the Council, including recommendations from the annual report of the Council, the review and analysis of consumer satisfaction described in § 361.17(h)(4), and other reports prepared by the Council, and the designated State unit's response to the input and recommendations, including explanations of reasons for rejecting any input or recommendation of the Council.

(b) *Exception for separate State agency for individuals who are blind.* In the case of a State that designates a separate State agency under § 361.13(a)(3) to administer the part of the State plan under which vocational rehabilitation services are provided to individuals who are blind, the State must either establish a separate State Rehabilitation Council for each agency that does not meet the requirements in paragraph (a)(1) of this section or establish one State Rehabilitation Council for both agencies if neither agency meets the requirements of paragraph (a)(1) of this section.

(Authority: Sections 101(a)(21) of the Act; 29 U.S.C. 721(a)(21))

§ 361.17 Requirements for a state rehabilitation council.

If the State has established a Council under § 361.16(a)(2) or (b), the Council must meet the following requirements:

(a) *Appointment.*

(1) The members of the Council must be appointed by the Governor or, in the case of a State that, under State law, vests authority for the administration of the activities carried out under this part in an entity other than the Governor (such as one or more houses of the State legislature or an independent board), the chief officer of that entity.

(2) The appointing authority must select members of the Council after soliciting recommendations from representatives of organizations representing a broad range of individuals with disabilities and organizations interested in individuals with disabilities. In selecting members, the appointing authority must consider, to the greatest extent practicable, the extent to which minority populations are represented on the Council.

(b) *Composition.*

(1) *General.* Except as provided in paragraph (b)(3) of this section, the Council must be composed of at least 15 members, including—

(i) At least one representative of the Statewide Independent Living Council, who must be the chairperson or other designee of the Statewide Independent Living Council;

(ii) At least one representative of a parent training and information center established pursuant to section 682(a) of the Individuals with Disabilities Education Act;

(iii) At least one representative of the Client Assistance Program established under 34 CFR part 370, who must be the director of or other individual recommended by the Client Assistance Program;

(iv) At least one qualified vocational rehabilitation counselor with knowledge of and experience with vocational rehabilitation programs who serves as an ex officio, nonvoting member of the Council if employed by the designated State agency;

(v) At least one representative of community rehabilitation program service providers;

(vi) Four representatives of business, industry, and labor;

(vii) Representatives of disability groups that include a cross section of—

(A) Individuals with physical, cognitive, sensory, and mental disabilities; and

(B) Representatives of individuals with disabilities who have difficulty representing themselves or are unable due to their disabilities to represent themselves;

(viii) Current or former applicants for, or recipients of, vocational rehabilitation services;

(ix) In a State in which one or more projects are carried out under section 121 of the Act (American Indian Vocational Rehabilitation Services), at least one representative of the directors of the projects;

(x) At least one representative of the State educational agency responsible for the public education of students with disabilities who are eligible to receive services under this part and part B of the Individuals with Disabilities Education Act;

(xi) At least one representative of the State workforce investment board; and

(xii) The director of the designated State unit as an ex officio, nonvoting member of the Council.

(2) *Employees of the designated State agency.* Employees of the designated State agency may serve only as nonvoting members of the Council. This provision does not apply to the representative appointed pursuant to paragraph (b)(1)(iii) of this section.

(3) *Composition of a separate Council for a separate State agency for individuals who are blind.* Except as provided in paragraph (b)(4) of this section, if the State establishes a separate Council for a separate State agency for individuals who are blind, that Council must—

(i) Conform with all of the composition requirements for a Council under paragraph (b)(1) of this section, except the requirements in paragraph (b)(1)(vii), unless the exception in paragraph (b)(4) of this section applies; and

(ii) Include—

(A) At least one representative of a disability advocacy group representing individuals who are blind; and

(B) At least one representative of an individual who is blind, has multiple disabilities, and has difficulty representing himself or herself or is unable due to disabilities to represent himself or herself.

(4) *Exception.* If State law in effect on October 29, 1992 requires a separate Council under paragraph (b)(3) of this section to have fewer than 15 members, the separate Council is in compliance with the composition requirements in paragraphs (b)(1)(vi) and (b)(1)(viii) of this section if it includes at least one representative who meets the requirements for each of those paragraphs.

(c) *Majority.*

(1) A majority of the Council members must be individuals with disabilities who meet the requirements of § 361.5(b)(29) and are not employed by the designated State unit.

(2) In the case of a separate Council established under § 361.16(b), a majority

of the Council members must be individuals who are blind and are not employed by the designated State unit.

(d) *Chairperson.* The chairperson must be—

(1) Selected by the members of the Council from among the voting members of the Council, subject to the veto power of the Governor; or

(2) In States in which the Governor does not have veto power pursuant to State law, the appointing authority described in paragraph (a)(1) of this section must designate a member of the Council to serve as the chairperson of the Council or must require the Council to designate a member to serve as chairperson.

(e) *Terms of appointment.*

(1) Each member of the Council must be appointed for a term of no more than 3 years, and each member of the Council, other than a representative identified in paragraph (b)(1)(iii) or (ix) of this section, may serve for no more than two consecutive full terms.

(2) A member appointed to fill a vacancy occurring prior to the end of the term for which the predecessor was appointed must be appointed for the remainder of the predecessor's term.

(3) The terms of service of the members initially appointed must be, as specified by the appointing authority as described in paragraph (a)(1) of this section, for varied numbers of years to ensure that terms expire on a staggered basis.

(f) *Vacancies.*

(1) A vacancy in the membership of the Council must be filled in the same manner as the original appointment, except the appointing authority as described in paragraph (a)(1) of this section may delegate the authority to fill that vacancy to the remaining members of the Council after making the original appointment.

(2) No vacancy affects the power of the remaining members to execute the duties of the Council.

(g) *Conflict of interest.* No member of the Council shall cast a vote on any matter that would provide direct financial benefit to the member or the member's organization or otherwise give the appearance of a conflict of interest under State law.

(h) *Functions.* The Council must, after consulting with the State workforce investment board—

(1) Review, analyze, and advise the designated State unit regarding the performance of the State unit's responsibilities under this part, particularly responsibilities related to—

(i) Eligibility, including order of selection;

(ii) The extent, scope, and effectiveness of services provided; and

(iii) Functions performed by State agencies that affect or potentially affect the ability of individuals with disabilities in achieving employment outcomes under this part;

(2) In partnership with the designated State unit—

(i) Develop, agree to, and review State goals and priorities in accordance with § 361.29(c); and

(ii) Evaluate the effectiveness of the vocational rehabilitation program and submit reports of progress to the Secretary in accordance with § 361.29(e);

(3) Advise the designated State agency and the designated State unit regarding activities carried out under this part and assist in the preparation of the State plan and amendments to the plan, applications, reports, needs assessments, and evaluations required by this part;

(4) To the extent feasible, conduct a review and analysis of the effectiveness of, and consumer satisfaction with—

(i) The functions performed by the designated State agency;

(ii) The vocational rehabilitation services provided by State agencies and other public and private entities responsible for providing vocational rehabilitation services to individuals with disabilities under the Act; and

(iii) The employment outcomes achieved by eligible individuals receiving services under this part, including the availability of health and other employment benefits in connection with those employment outcomes;

(5) Prepare and submit to the Governor and to the Secretary no later than 90 days after the end of the Federal fiscal year an annual report on the status of vocational rehabilitation programs operated within the State and make the report available to the public through appropriate modes of communication;

(6) To avoid duplication of efforts and enhance the number of individuals served, coordinate activities with the activities of other councils within the State, including the Statewide Independent Living Council established under 34 CFR part 364, the advisory panel established under section 612(a)(21) of the Individuals with Disabilities Education Act, the State Developmental Disabilities Planning Council described in section 124 of the Developmental Disabilities Assistance and Bill of Rights Act, the State mental health planning council established under section 1914(a) of the Public Health Service Act, and the State workforce investment board;

(7) Provide for coordination and the establishment of working relationships between the designated State agency and the Statewide Independent Living Council and centers for independent living within the State; and

(8) Perform other comparable functions, consistent with the purpose of this part, as the Council determines to be appropriate, that are comparable to the other functions performed by the Council.

(i) *Resources.*

(1) The Council, in conjunction with the designated State unit, must prepare a plan for the provision of resources, including staff and other personnel, that may be necessary and sufficient for the Council to carry out its functions under this part.

(2) The resource plan must, to the maximum extent possible, rely on the use of resources in existence during the period of implementation of the plan.

(3) Any disagreements between the designated State unit and the Council regarding the amount of resources necessary to carry out the functions of the Council must be resolved by the Governor, consistent with paragraphs (i)(1) and (2) of this section.

(4) The Council must, consistent with State law, supervise and evaluate the staff and personnel that are necessary to carry out its functions.

(5) Those staff and personnel that are assisting the Council in carrying out its functions may not be assigned duties by the designated State unit or any other agency or office of the State that would create a conflict of interest.

(j) *Meetings.* The Council must—

(1) Convene at least four meetings a year in locations determined by the Council to be necessary to conduct Council business. The meetings must be publicly announced, open, and accessible to the general public, including individuals with disabilities, unless there is a valid reason for an executive session; and

(2) Conduct forums or hearings, as appropriate, that are publicly announced, open, and accessible to the public, including individuals with disabilities.

(k) *Compensation.* Funds appropriated under Title I of the Act, except funds to carry out sections 112 and 121 of the Act, may be used to compensate and reimburse the expenses of Council members in accordance with section 105(g) of the Act.

(Authority: Section 105 of the Act; 29 U.S.C. 725)

§ 361.18 Comprehensive system of personnel development.

The State plan must describe the procedures and activities the State agency will undertake to establish and maintain a comprehensive system of personnel development designed to ensure an adequate supply of qualified rehabilitation personnel, including professionals and paraprofessionals, for the designated State unit. If the State agency has a State Rehabilitation Council, this description must, at a minimum, specify that the Council has an opportunity to review and comment on the development of plans, policies, and procedures necessary to meet the requirements of paragraphs (b) through (d) of this section. This description must also conform with the following requirements:

(a) *Data system on personnel and personnel development.* The State plan must describe the development and maintenance of a system by the State agency for collecting and analyzing on an annual basis data on qualified personnel needs and personnel development, in accordance with the following requirements:

(1) Data on qualified personnel needs must include—

(i) The number of personnel who are employed by the State agency in the provision of vocational rehabilitation services in relation to the number of individuals served, broken down by personnel category;

(ii) The number of personnel currently needed by the State agency to provide vocational rehabilitation services, broken down by personnel category; and

(iii) Projections of the number of personnel, broken down by personnel category, who will be needed by the State agency to provide vocational rehabilitation services in the State in 5 years based on projections of the number of individuals to be served, including individuals with significant disabilities, the number of personnel expected to retire or leave the field, and other relevant factors.

(2) Data on personnel development must include—

(i) A list of the institutions of higher education in the State that are preparing vocational rehabilitation professionals, by type of program;

(ii) The number of students enrolled at each of those institutions, broken down by type of program; and

(iii) The number of students who graduated during the prior year from each of those institutions with certification or licensure, or with the credentials for certification or licensure, broken down by the personnel category for which they have received, or have the credentials to receive, certification or licensure.

(b) *Plan for recruitment, preparation, and retention of qualified personnel.* The State plan must describe the development, updating, and implementation of a plan to address the current and projected needs for personnel who are qualified in accordance with paragraph (c) of this section. The plan must identify the personnel needs based on the data collection and analysis system described in paragraph (a) of this section and must provide for the coordination and facilitation of efforts between the designated State unit and institutions of higher education and professional associations to recruit, prepare, and retain personnel who are qualified in accordance with paragraph (c) of this section, including personnel from minority backgrounds and personnel who are individuals with disabilities.

(c) *Personnel standards.*

(1) The State plan must include the State agency's policies and describe the procedures the State agency will undertake to establish and maintain standards to ensure that all professional and paraprofessional personnel needed within the designated State unit to carry out this part are appropriately and adequately prepared and trained, including—

(i) Standards that are consistent with any national or State-approved or -recognized certification, licensing, or registration requirements, or, in the absence of these requirements, other comparable requirements (including State personnel requirements) that apply to the profession or discipline in which that category of personnel is providing vocational rehabilitation services; and

(ii) To the extent that existing standards are not based on the highest requirements in the State, the steps the State is currently taking and the steps the State plans to take to retrain or hire personnel to meet standards that are based on the highest requirements in the State, including measures to notify State unit personnel, the institutions of higher education identified under paragraph (a)(2)(i) of this section, and other public agencies of these steps and the timelines for taking each step. The steps taken by the State unit under this paragraph must be described in a written plan that includes—

(A) Specific strategies for retraining, recruiting, and hiring personnel;

(B) The specific time period by which all State unit personnel will meet the standards described in paragraph (c)(1)(i) of this section;

(C) Procedures for evaluating the State unit's progress in hiring or retraining personnel to meet applicable personnel standards within the time period established under paragraph (c)(1)(ii)(B) of this section; and

(D) In instances in which the State unit is unable to immediately hire new personnel who meet the requirements in paragraph (c)(1)(i) of this section, the initial minimum qualifications that the designated State unit will require of newly hired personnel and a plan for training those individuals to meet applicable requirements within the time period established under paragraph (c)(1)(ii)(B) of this section.

(2) As used in this section—

(i) *Highest requirements in the State applicable to that profession or discipline* means the highest entry-level academic degree needed for any national or State-approved or -recognized certification, licensing, registration, or, in the absence of these requirements, other comparable requirements that apply to that profession or discipline. The current requirements of all State statutes and regulations of other agencies in the State applicable to that profession or discipline must be considered and must be kept on file by the designated State unit and available to the public.

(ii) *Profession or discipline* means a specific occupational category, including any paraprofessional occupational category, that—

(A) Provides rehabilitation services to individuals with disabilities;

(B) Has been established or designated by the State unit; and

(C) Has a specified scope of responsibility.

(d) *Staff development.*

(1) The State plan must include the State agency's policies and describe the procedures and activities the State agency will undertake to ensure that all personnel employed by the State unit receive appropriate and adequate training, including a description of—

(i) A system of staff development for rehabilitation professionals and paraprofessionals within the State unit, particularly with respect to assessment, vocational counseling, job placement, and rehabilitation technology; and

(ii) Procedures for acquiring and disseminating to rehabilitation professionals and paraprofessionals within the designated State unit significant knowledge from research and other sources.

(2) The specific training areas for staff development must be based on the

needs of each State unit and may include, but are not limited to—

(i) Training regarding the Workforce Investment Act of 1998 and the amendments to the Rehabilitation Act of 1973 made by the Rehabilitation Act Amendments of 1998;

(ii) Training with respect to the requirements of the Americans with Disabilities Act, the Individuals with Disabilities Education Act, and Social Security work incentive programs, including programs under the Ticket to Work and Work Incentives Improvement Act of 1999, training to facilitate informed choice under this program, and training to improve the provision of services to culturally diverse populations; and

(iii) Activities related to—

(A) Recruitment and retention of qualified rehabilitation personnel;

(B) Succession planning; and

(C) Leadership development and capacity building.

(e) *Personnel to address individual communication needs.* The State plan must describe how the State unit—

(1) Includes among its personnel, or obtains the services of, individuals able to communicate in the native languages of applicants and eligible individuals who have limited English speaking ability; and

(2) Includes among its personnel, or obtains the services of, individuals able to communicate with applicants and eligible individuals in appropriate modes of communication.

(f) *Coordination with personnel development under the Individuals with Disabilities Education Act.* The State plan must describe the procedures and activities the State agency will undertake to coordinate its comprehensive system of personnel development under the Act with personnel development under the Individuals with Disabilities Education Act.

(Authority: Section 101(a)(7) of the Act; 29 U.S.C. 721(a)(7))

§ 361.19 Affirmative action for individuals with disabilities.

The State plan must assure that the State agency takes affirmative action to employ and advance in employment qualified individuals with disabilities covered under and on the same terms and conditions as stated in section 503 of the Act.

(Authority: Section 101(a)(6)(B) of the Act; 29 U.S.C. 721(a)(6)(B))

§ 361.20 Public participation requirements.

(a) *Conduct of public meetings.* The State plan must assure that prior to the adoption of any substantive policies or procedures governing the provision of vocational rehabilitation services under the State plan, including making any substantive amendments to the policies and procedures, the designated State agency conducts public meetings throughout the State to provide the public, including individuals with disabilities, an opportunity to comment on the policies or procedures.

(b) *Notice requirements.* The State plan must assure that the designated State agency, prior to conducting the public meetings, provides appropriate and sufficient notice throughout the State of the meetings in accordance with—

(1) State law governing public meetings; or

(2) In the absence of State law governing public meetings, procedures developed by the designated State agency in consultation with the State Rehabilitation Council.

(c) *Summary of input of the State Rehabilitation Council.* The State plan must provide a summary of the input of the State Rehabilitation Council, if the State agency has a Council, into the State plan and any amendment to the plan, in accordance with § 361.16(a)(2)(v).

(d) *Special consultation requirements.* The State plan must assure that the State agency actively consults with the director of the Client Assistance Program, the State Rehabilitation Council, if the State agency has a Council, and, as appropriate, Indian tribes, tribal organizations, and native Hawaiian organizations on its policies and procedures governing the provision of vocational rehabilitation services under the State plan.

(e) *Appropriate modes of communication.* The State unit must provide to the public, through appropriate modes of communication, notices of the public meetings, any materials furnished prior to or during the public meetings, and the policies and procedures governing the provision of vocational rehabilitation services under the State plan.

(Authority: Sections 101(a)(16)(A) and 105(c)(3) of the Act; 29 U.S.C. 721(a)(16)(A), and 725(c)(3))

§ 361.21 Consultations regarding the administration of the state plan.

The State plan must assure that, in connection with matters of general policy arising in the administration of the State plan, the designated State agency takes into account the views of—

(a) Individuals and groups of individuals who are recipients of vocational rehabilitation services or, as appropriate, the individuals' representatives;

(b) Personnel working in programs that provide vocational rehabilitation services to individuals with disabilities;

(c) Providers of vocational rehabilitation services to individuals with disabilities;

(d) The director of the Client Assistance Program; and

(e) The State Rehabilitation Council, if the State has a Council.

(Authority: Sections 101(a)(16)(B) of the Act; 29 U.S.C. 721(a)(16)(B))

§ 361.22 Coordination with education officials.

(a) *Plans, policies, and procedures.* (1) The State plan must contain plans, policies, and procedures for coordination between the designated State agency and education officials responsible for the public education of students with disabilities that are designed to facilitate the transition of students with disabilities from the receipt of educational services in school to the receipt of vocational rehabilitation services under the responsibility of the designated State agency.

(2) These plans, policies, and procedures in paragraph (a)(1) of this section must provide for the development and approval of an individualized plan for employment in accordance with § 361.45 as early as possible during the transition planning process but, at the latest, by the time each student determined to be eligible for vocational rehabilitation services leaves the school setting or, if the designated State unit is operating under an order of selection, before each eligible student able to be served under the order leaves the school setting.

(b) *Formal interagency agreement.* The State plan must include information on a formal interagency agreement with the State educational agency that, at a minimum, provides for—

(1) Consultation and technical assistance to assist educational agencies in planning for the transition of students with disabilities from school to post-school activities, including vocational rehabilitation services;

(2) Transition planning by personnel of the designated State agency and educational agency personnel for students with disabilities that facilitates the development and completion of their individualized education programs (IEPs) under section 614(d) of the Individuals with Disabilities Education Act;

(3) The roles and responsibilities, including financial responsibilities, of

each agency, including provisions for determining State lead agencies and qualified personnel responsible for transition services; and

(4) Procedures for outreach to and identification of students with disabilities who are in need of transition services. Outreach to these students should occur as early as possible during the transition planning process and must include, at a minimum, a description of the purpose of the vocational rehabilitation program, eligibility requirements, application procedures, and scope of services that may be provided to eligible individuals.

(Authority: Section 101(a)(11)(D) of the Act; 29 U.S.C. 721 (a)(11)(D))

§ 361.23 Requirements related to the statewide workforce investment system.

(a) *Responsibilities as a partner of the One-Stop service delivery system.* As a required partner in the One-Stop service delivery system (which is part of the statewide workforce investment system under Title I of the Workforce Investment Act of 1998), the designated State unit must carry out the following functions consistent with the Act, this part, Title I of the Workforce Investment Act of 1998, and the regulations in 20 CFR part 662:

(1) Make available to participants through the One-Stop service delivery system the core services (as described in 20 CFR 662.240) that are applicable to the Program administered by the designated State unit under this part.

(2) Use a portion of funds made available to the Program administered by the designated State unit under this part, consistent with the Act and this part, to—

(i) Create and maintain the One-Stop service delivery system; and

(ii) Provide core services (as described in 20 CFR 662.240).

(3) Enter into a memorandum of understanding (MOU) with the Local Workforce Investment Board under section 117 of the Workforce Investment Act of 1998 relating to the operation of the One-Stop service delivery system that meets the requirements of section 121(c) of the Workforce Investment Act and 20 CFR 662.300, including a description of services, how the cost of the identified services and operating costs of the system will be funded, and methods for referrals.

(4) Participate in the operation of the One-Stop service delivery system consistent with the terms of the MOU and the requirements of the Act and this part.

(5) Provide representation on the Local Workforce Investment Board under section 117 of the Workforce Investment Act of 1998.

(b) *Cooperative agreements with One-Stop partners.* (1) The State plan must assure that the designated State unit or the designated State agency enters into cooperative agreements with the other entities that are partners under the One-Stop service delivery system under Title I of the Workforce Investment Act of 1998 and replicates those agreements at the local level between individual offices of the designated State unit and local entities carrying out the One-Stop service delivery system or other activities through the statewide workforce investment system.

(2) Cooperative agreements developed under paragraph (b)(1) of this section may provide for—

(i) Intercomponent training and technical assistance regarding—

(A) The availability and benefits of, and information on eligibility standards for, vocational rehabilitation services; and

(B) The promotion of equal, effective and meaningful participation by individuals with disabilities in the One-Stop service delivery system and other workforce investment activities through the promotion of program accessibility consistent with the requirements of the Americans with Disabilities Act of 1990 and section 504 of the Act, the use of nondiscriminatory policies and procedures, and the provision of reasonable accommodations, auxiliary aids and services, and rehabilitation technology for individuals with disabilities;

(ii) The use of information and financial management systems that link all of the partners of the One-Stop service delivery system to one another and to other electronic networks, including nonvisual electronic networks, and that relate to subjects such as employment statistics, job vacancies, career planning, and workforce investment activities;

(iii) The use of customer service features such as common intake and referral procedures, customer databases, resource information, and human services hotlines;

(iv) The establishment of cooperative efforts with employers to facilitate job placement and carry out other activities that the designated State unit and the employers determine to be appropriate;

(v) The identification of staff roles, responsibilities, and available resources and specification of the financial responsibility of each partner of the One-Stop service delivery system with respect to providing and paying for necessary services, consistent with the requirements of the Act, this part, other Federal requirements, and State law; and

(vi) The specification of procedures for resolving disputes among partners of the One-Stop service delivery system.

(Authority: Section 101(a)(11)(A) of the Act; 29 U.S.C. 721(a)(11)(A); Sections 121 and 134 of the Workforce Investment Act of 1998; 29 U.S.C. 2841 and 2864)

§ 361.24 Cooperation and coordination with other entities.

(a) *Interagency cooperation.* The State plan must describe the designated State agency's cooperation with and use of the services and facilities of Federal, State, and local agencies and programs, including programs carried out by the Under Secretary for Rural Development of the Department of Agriculture and State use contracting programs, to the extent that those agencies and programs are not carrying out activities through the statewide workforce investment system.

(b) *Coordination with the Statewide Independent Living Council and independent living centers.* The State plan must assure that the designated State unit, the Statewide Independent Living Council established under 34 CFR part 364, and the independent living centers established under 34 CFR part 366 have developed working relationships and coordinate their activities.

(c) *Cooperative agreement with recipients of grants for services to American Indians.*

(1) *General.* In applicable cases, the State plan must assure that the designated State agency has entered into a formal cooperative agreement with each grant recipient in the State that receives funds under part C of the Act (American Indian Vocational Rehabilitation Services).

(2) *Contents of formal cooperative agreement.* The agreement required under paragraph (a)(1) of this section must describe strategies for collaboration and coordination in providing vocational rehabilitation services to American Indians who are individuals with disabilities, including—

(i) Strategies for interagency referral and information sharing that will assist in eligibility determinations and the development of individualized plans for employment;

(ii) Procedures for ensuring that American Indians who are individuals with disabilities and are living near a reservation or tribal service area are provided vocational rehabilitation services; and

(iii) Provisions for sharing resources in cooperative studies and assessments,

joint training activities, and other collaborative activities designed to improve the provision of services to American Indians who are individuals with disabilities.

(d) *Reciprocal referral services between two designated State units in the same State.* If there is a separate designated State unit for individuals who are blind, the two designated State units must establish reciprocal referral services, use each other's services and facilities to the extent feasible, jointly plan activities to improve services in the State for individuals with multiple impairments, including visual impairments, and otherwise cooperate to provide more effective services, including, if appropriate, entering into a written cooperative agreement.

(Authority: Sections 12(c) and 101(a)(11)(C), (E), and (F) of the Act; 29 U.S.C. 709(c) and 721(a)(11) (C), (E), and (F))

§ 361.25 Statewideness.

The State plan must assure that services provided under the State plan will be available in all political subdivisions of the State, unless a waiver of statewideness is requested and approved in accordance with § 361.26.

(Authority: Section 101(a)(4) of the Act; 29 U.S.C. 721(a)(4))

§ 361.26 Waiver of statewideness.

(a) *Availability.* The State unit may provide services in one or more political subdivisions of the State that increase services or expand the scope of services that are available statewide under the State plan if—

(1) The non-Federal share of the cost of these services is met from funds provided by a local public agency, including funds contributed to a local public agency by a private agency, organization, or individual;

(2) The services are likely to promote the vocational rehabilitation of substantially larger numbers of individuals with disabilities or of individuals with disabilities with particular types of impairments; and

(3) For purposes other than those specified in § 361.60(b)(3)(i) and consistent with the requirements in § 361.60(b)(3)(ii), the State includes in its State plan, and the Secretary approves, a waiver of the statewideness requirement, in accordance with the requirements of paragraph (b) of this section.

(b) *Request for waiver.* The request for a waiver of statewideness must—

(1) Identify the types of services to be provided;

(2) Contain a written assurance from the local public agency that it will make available to the State unit the non-Federal share of funds;

(3) Contain a written assurance that State unit approval will be obtained for each proposed service before it is put into effect; and

(4) Contain a written assurance that all other State plan requirements, including a State's order of selection requirements, will apply to all services approved under the waiver.

(Authority: Section 101(a)(4) of the Act; 29 U.S.C. 721(a)(4))

§ 361.27 Shared funding and administration of joint programs.

(a) If the State plan provides for the designated State agency to share funding and administrative responsibility with another State agency or local public agency to carry out a joint program to provide services to individuals with disabilities, the State must submit to the Secretary for approval a plan that describes its shared funding and administrative arrangement.

(b) The plan under paragraph (a) of this section must include—

(1) A description of the nature and scope of the joint program;

(2) The services to be provided under the joint program;

(3) The respective roles of each participating agency in the administration and provision of services; and

(4) The share of the costs to be assumed by each agency.

(c) If a proposed joint program does not comply with the statewideness requirement in § 361.25, the State unit must obtain a waiver of statewideness, in accordance with § 361.26.

(Authority: Section 101(a)(2)(A) of the Act; 29 U.S.C. 721(a)(2)(A))

§ 361.28 Third-party cooperative arrangements involving funds from other public agencies.

(a) The designated State unit may enter into a third-party cooperative arrangement for providing or administering vocational rehabilitation services with another State agency or a local public agency that is furnishing part or all of the non-Federal share, if the designated State unit ensures that—

(1) The services provided by the cooperating agency are not the customary or typical services provided by that agency but are new services that have a vocational rehabilitation focus or existing services that have been modified, adapted, expanded, or reconfigured to have a vocational rehabilitation focus;

(2) The services provided by the cooperating agency are only available to applicants for, or recipients of, services from the designated State unit;

(3) Program expenditures and staff providing services under the cooperative arrangement are under the administrative supervision of the designated State unit; and

(4) All State plan requirements, including a State's order of selection, will apply to all services provided under the cooperative program.

(b) If a third party cooperative agreement does not comply with the statewideness requirement in § 361.25, the State unit must obtain a waiver of statewideness, in accordance with § 361.26.

(Authority: Section 12(c) of the Act; 29 U.S.C. 709(c))

§ 361.29 Statewide assessment; annual estimates; annual State goals and priorities; strategies; and progress reports.

(a) *Comprehensive statewide assessment.* (1) The State plan must include—

(i) The results of a comprehensive, statewide assessment, jointly conducted by the designated State unit and the State Rehabilitation Council (if the State unit has a Council) every 3 years describing the rehabilitation needs of individuals with disabilities residing within the State, particularly the vocational rehabilitation services needs of—

(A) Individuals with the most significant disabilities, including their need for supported employment services;

(B) Individuals with disabilities who are minorities and individuals with disabilities who have been unserved or underserved by the vocational rehabilitation program carried out under this part; and

(C) Individuals with disabilities served through other components of the statewide workforce investment system as identified by those individuals and personnel assisting those individuals through the components of the system; and

(ii) An assessment of the need to establish, develop, or improve community rehabilitation programs within the State.

(2) The State plan must assure that the State will submit to the Secretary a report containing information regarding updates to the assessments under paragraph (a) of this section for any year in which the State updates the assessments.

(b) *Annual estimates.* The State plan must include, and must assure that the State will annually submit a report to the Secretary that includes, State estimates of—

(1) The number of individuals in the State who are eligible for services under this part;

(2) The number of eligible individuals who will receive services provided with funds provided under part B of Title I of the Act and under part B of Title VI of the Act, including, if the designated State agency uses an order of selection in accordance with § 361.36, estimates of the number of individuals to be served under each priority category within the order; and

(3) The costs of the services described in paragraph (b)(1) of this section, including, if the designated State agency uses an order of selection, the service costs for each priority category within the order.

(c) *Goals and priorities.*

(1) *In general.* The State plan must identify the goals and priorities of the State in carrying out the program.

(2) *Council.* The goals and priorities must be jointly developed, agreed to, reviewed annually, and, as necessary, revised by the designated State unit and the State Rehabilitation Council, if the State unit has a Council.

(3) *Submission.* The State plan must assure that the State will submit to the Secretary a report containing information regarding revisions in the goals and priorities for any year in which the State revises the goals and priorities.

(4) *Basis for goals and priorities.* The State goals and priorities must be based on an analysis of—

(i) The comprehensive statewide assessment described in paragraph (a) of this section, including any updates to the assessment;

(ii) The performance of the State on the standards and indicators established under section 106 of the Act; and

(iii) Other available information on the operation and the effectiveness of the vocational rehabilitation program carried out in the State, including any reports received from the State Rehabilitation Council under § 361.17(h) and the findings and recommendations from monitoring activities conducted under section 107 of the Act.

(5) *Service and outcome goals for categories in order of selection.* If the designated State agency uses an order of selection in accordance with § 361.36, the State plan must identify the State's service and outcome goals and the time within which these goals may be achieved for individuals in each priority category within the order.

(d)*Strategies.* The State plan must describe the strategies the State will use to address the needs identified in the assessment conducted under paragraph (a) of this section and achieve the goals and priorities identified in paragraph (c) of this section, including—

(1) The methods to be used to expand and improve services to individuals with disabilities, including how a broad range of assistive technology services and assistive technology devices will be provided to those individuals at each stage of the rehabilitation process and how those services and devices will be provided to individuals with disabilities on a statewide basis;

(2) Outreach procedures to identify and serve individuals with disabilities who are minorities and individuals with disabilities who have been unserved or underserved by the vocational rehabilitation program;

(3) As applicable, the plan of the State for establishing, developing, or improving community rehabilitation programs;

(4) Strategies to improve the performance of the State with respect to the evaluation standards and performance indicators established pursuant to section 106 of the Act; and

(5) Strategies for assisting other components of the statewide workforce investment system in assisting individuals with disabilities.

(e) *Evaluation and reports of progress.*

(1) The State plan must include—

(i) The results of an evaluation of the effectiveness of the vocational rehabilitation program; and

(ii) A joint report by the designated State unit and the State Rehabilitation Council, if the State unit has a Council, to the Secretary on the progress made in improving the effectiveness of the program from the previous year. This evaluation and joint report must include—

(A) An evaluation of the extent to which the goals and priorities identified in paragraph (c) of this section were achieved;

(B) A description of the strategies that contributed to the achievement of the goals and priorities;

(C) To the extent to which the goals and priorities were not achieved, a description of the factors that impeded that achievement; and

(D) An assessment of the performance of the State on the standards and indicators established pursuant to section 106 of the Act.

(2) The State plan must assure that the designated State unit and the State Rehabilitation Council, if the State unit has a Council, will jointly submit to the Secretary an annual report that contains the information described in paragraph (e)(1) of this section.

(Authority: Section 101(a)(15) of the Act; 29 U.S.C. 721(a)(15))

§ 361.30 Services to American Indians.

The State plan must assure that the designated State agency provides vocational rehabilitation services to American Indians who are individuals with disabilities residing in the State to the same extent as the designated State agency provides vocational rehabilitation services to other significant populations of individuals with disabilities residing in the State.

(Authority: Sections 101(a)(13) and 121(b)(3) of the Act; 29 U.S.C. 721(a)(13) and 741(b)(3))

§ 361.31 Cooperative agreements with private nonprofit organizations.

The State plan must describe the manner in which cooperative agreements with private nonprofit vocational rehabilitation service providers will be established.

(Authority: Sections 101(a)(24)(B); 29 U.S.C. 721(a)(24)(B))

§ 361.32 Use of profitmaking organizations for on-the-job training in connection with selected projects.

The State plan must assure that the designated State agency has the authority to enter into contracts with for-profit organizations for the purpose of providing, as vocational rehabilitation services, on-the-job training and related programs for individuals with disabilities under the Projects With Industry program, 34 CFR part 379, if the designated State agency has determined that for-profit agencies are better qualified to provide needed vocational rehabilitation services than nonprofit agencies and organizations.

(Authority: Section 101(a)(24)(A) of the Act; 29 U.S.C. 721(a)(24)(A))

§ 361.33 [Reserved]

§ 361.34 Supported employment State plan supplement.

(a) The State plan must assure that the State has an acceptable plan under 34 CFR part 363 that provides for the use of funds under that part to supplement funds under this part for the cost of services leading to supported employment.

(b) The supported employment plan, including any needed annual revisions, must be submitted as a supplement to the State plan submitted under this part.

(Authority: Sections 101(a)(22) and 625(a) of the Act; 29 U.S.C. 721(a)(22) and 795(k))

§ 361.35 Innovation and expansion activities.

(a) The State plan must assure that the State will reserve and use a portion of the funds allotted to the State under section 110 of the Act—

(1) For the development and implementation of innovative

approaches to expand and improve the provision of vocational rehabilitation services to individuals with disabilities, particularly individuals with the most significant disabilities, consistent with the findings of the comprehensive, statewide assessment of the rehabilitation needs of individuals with disabilities under § 361.29(a) and the State's goals and priorities under § 361.29(c); and

(2) To support the funding of—

(i) The State Rehabilitation Council, if the State has a Council, consistent with the resource plan identified in § 361.17(i); and

(ii) The Statewide Independent Living Council, consistent with the plan prepared under 34 CFR 364.21(i).

(b) The State plan must—

(1) Describe how the reserved funds will be used; and

(2) Include, on an annual basis, a report describing how the reserved funds were used during the preceding year.

(Authority: Section 101(a)(18) of the Act; 29 U.S.C. 721(a)(18))

§ 361.36 Ability to serve all eligible individuals; order of selection for services.

(a) *General provisions.*

(1) The designated State unit either must be able to provide the full range of services listed in section 103(a) of the Act and § 361.48, as appropriate, to all eligible individuals or, in the event that vocational rehabilitation services cannot be provided to all eligible individuals in the State who apply for the services, include in the State plan the order to be followed in selecting eligible individuals to be provided vocational rehabilitation services.

(2) The ability of the designated State unit to provide the full range of vocational rehabilitation services to all eligible individuals must be supported by a determination that satisfies the requirements of paragraph (b) or (c) of this section and a determination that, on the basis of the designated State unit's projected fiscal and personnel resources and its assessment of the rehabilitation needs of individuals with significant disabilities within the State, it can—

(i) Continue to provide services to all individuals currently receiving services;

(ii) Provide assessment services to all individuals expected to apply for services in the next fiscal year;

(iii) Provide services to all individuals who are expected to be determined eligible in the next fiscal year; and

(iv) Meet all program requirements.

(3) If the designated State unit is unable to provide the full range vocational rehabilitation services to all eligible individuals in the State who apply for the services, the State plan must—

(i) Show the order to be followed in selecting eligible individuals to be provided vocational rehabilitation services;

(ii) Provide a justification for the order of selection;

(iii) Identify service and outcome goals and the time within which the goals may be achieved for individuals in each priority category within the order, as required under § 361.29(c)(5); and

(iv) Assure that—

(A) In accordance with criteria established by the State for the order of selection, individuals with the most significant disabilities will be selected first for the provision of vocational rehabilitation services; and

(B) Individuals who do not meet the order of selection criteria will have access to services provided through the information and referral system established under § 361.37.

(b) *Basis for assurance that services can be provided to all eligible individuals.*

(1) For a designated State unit that determined, for the current fiscal year and the preceding fiscal year, that it is able to provide the full range of services, as appropriate, to all eligible individuals, the State unit, during the current fiscal and preceding fiscal year, must have in fact—

(i) Provided assessment services to all applicants and the full range of services, as appropriate, to all eligible individuals;

(ii) Made referral forms widely available throughout the State;

(iii) Conducted outreach efforts to identify and serve individuals with disabilities who have been unserved or underserved by the vocational rehabilitation system; and

(iv) Not delayed, through waiting lists or other means, determinations of eligibility, the development of individualized plans for employment for individuals determined eligible for vocational rehabilitation services, or the provision of services for eligible individuals for whom individualized plans for employment have been developed.

(2) For a designated State unit that was unable to provide the full range of services to all eligible individuals during the current or preceding fiscal year or that has not met the requirements in paragraph (b)(1) of this section, the determination that the designated State unit is able to provide the full range of vocational rehabilitation services to all eligible individuals in the next fiscal year must be based on—

(i) Circumstances that have changed that will allow the designated State unit to meet the requirements of paragraph (a)(2) of this section in the next fiscal year, including—

(A) An estimate of the number of and projected costs of serving, in the next fiscal year, individuals with existing individualized plans for employment;

(B) The projected number of individuals with disabilities who will apply for services and will be determined eligible in the next fiscal year and the projected costs of serving those individuals;

(C) The projected costs of administering the program in the next fiscal year, including, but not limited to, costs of staff salaries and benefits, outreach activities, and required statewide studies; and

(D) The projected revenues and projected number of qualified personnel for the program in the next fiscal year;

(ii) Comparable data, as relevant, for the current or preceding fiscal year, or for both years, of the costs listed in paragraphs (b)(2)(i)(A) through (C) of this section and the resources identified in paragraph (b)(2)(i)(D) of this section and an explanation of any projected increases or decreases in these costs and resources; and

(iii) A determination that the projected revenues and the projected number of qualified personnel for the program in the next fiscal year are adequate to cover the costs identified in paragraphs (b)(2)(i)(A) through (C) of this section to ensure the provision of the full range of services, as appropriate, to all eligible individuals.

(c) *Determining need for establishing and implementing an order of selection.*

(1) The designated State unit must determine, prior to the beginning of each fiscal year, whether to establish and implement an order of selection.

(2) If the designated State unit determines that it does not need to establish an order of selection, it must reevaluate this determination whenever changed circumstances during the course of a fiscal year, such as a decrease in its fiscal or personnel resources or an increase in its program costs, indicate that it may no longer be able to provide the full range of services, as appropriate, to all eligible individuals, as described in paragraph (a)(2) of this section.

(3) If a DSU establishes an order of selection, but determines that it does not need to implement that order at the beginning of the fiscal year, it must continue to meet the requirements of paragraph (a)(2) of this section, or it must implement the order of selection

by closing one or more priority categories.

(d) *Establishing an order of selection.*

(1) *Basis for order of selection.* An order of selection must be based on a refinement of the three criteria in the definition of ''individual with a significant disability'' in section 7(21)(A) of the Act and § 361.5(b)(31).

(2) *Factors that cannot be used in determining order of selection of eligible individuals.* An order of selection may not be based on any other factors, including—

(i) Any duration of residency requirement, provided the individual is present in the State;

(ii) Type of disability;

(iii) Age, gender, race, color, or national origin;

(iv) Source of referral;

(v) Type of expected employment outcome;

(vi) The need for specific services or anticipated cost of services required by an individual; or

(vii) The income level of an individual or an individual's family.

(e) *Administrative requirements.* In administering the order of selection, the designated State unit must—

(1) Implement the order of selection on a statewide basis;

(2) Notify all eligible individuals of the priority categories in a State's order of selection, their assignment to a particular category, and their right to appeal their category assignment;

(3) Continue to provide all needed services to any eligible individual who has begun to receive services under an individualized plan for employment prior to the effective date of the order of selection, irrespective of the severity of the individual's disability; and

(4) Ensure that its funding arrangements for providing services under the State plan, including third-party arrangements and awards under the establishment authority, are consistent with the order of selection. If any funding arrangements are inconsistent with the order of selection, the designated State unit must renegotiate these funding arrangements so that they are consistent with the order of selection.

(f) *State Rehabilitation Council.* The designated State unit must consult with the State Rehabilitation Council, if the State unit has a Council, regarding the—

(1) Need to establish an order of selection, including any reevaluation of the need under paragraph (c)(2) of this section;

(2) Priority categories of the particular order of selection;

(3) Criteria for determining individuals with the most significant disabilities; and

(4) Administration of the order of selection.

(Authority: Sections 12(d); 101(a)(5); 101(a)(12); 101(a)(15)(A), (B) and (C); 101(a)(21)(A)(ii); and 504(a) of the Act; 29 U.S.C. 709(d), 721(a)(5), 721(a)(12), 721(a)(15)(A), (B) and (C); 721(a)(21)(A)(ii), and 794(a))

§ 361.37 Information and referral services.

(a) *General provisions.* The State plan must assure that—

(1) The designated State agency will implement an information and referral system adequate to ensure that individuals with disabilities, including eligible individuals who do not meet the agency's order of selection criteria for receiving vocational rehabilitation services if the agency is operating on an order of selection, are provided accurate vocational rehabilitation information and guidance (which may include counseling and referral for job placement) using appropriate modes of communication to assist them in preparing for, securing, retaining, or regaining employment; and

(2) The designated State agency will refer individuals with disabilities to other appropriate Federal and State programs, including other components of the statewide workforce investment system.

(b) *Criteria for appropriate referrals.* In making the referrals identified in paragraph (a)(2) of this section, the designated State unit must—

(1) Refer the individual to Federal or State programs, including programs carried out by other components of the statewide workforce investment system, best suited to address the specific employment needs of an individual with a disability; and

(2) Provide the individual who is being referred—

(i) A notice of the referral by the designated State agency to the agency carrying out the program;

(ii) Information identifying a specific point of contact within the agency to which the individual is being referred; and

(iii) Information and advice regarding the most suitable services to assist the individual to prepare for, secure, retain, or regain employment.

(c) *Order of selection.* In providing the information and referral services under this section to eligible individuals who are not in the priority category or categories to receive vocational rehabilitation services under the State's order of selection, the State unit must identify, as part of its reporting under section 101(a)(10) of the Act and § 361.40, the number of eligible individuals who did not meet the agency's order of selection criteria for receiving vocational rehabilitation services and did receive information and referral services under this section.

(Authority: Sections 101(a)(5)(D) and (20) and 101(a)(10)(C)(ii) of the Act; 29 U.S.C. 721(a)(5)(D) and (20) and (a)(10)(C)(ii))

§ 361.38 Protection, use, and release of personal information.

(a) *General provisions.*

(1) The State agency and the State unit must adopt and implement written policies and procedures to safeguard the confidentiality of all personal information, including photographs and lists of names. These policies and procedures must ensure that—

(i) Specific safeguards are established to protect current and stored personal information;

(ii) All applicants and eligible individuals and, as appropriate, those individuals' representatives, service providers, cooperating agencies, and interested persons are informed through appropriate modes of communication of the confidentiality of personal information and the conditions for accessing and releasing this information;

(iii) All applicants or their representatives are informed about the State unit's need to collect personal information and the policies governing its use, including—

(A) Identification of the authority under which information is collected;

(B) Explanation of the principal purposes for which the State unit intends to use or release the information;

(C) Explanation of whether providing requested information to the State unit is mandatory or voluntary and the effects of not providing requested information;

(D) Identification of those situations in which the State unit requires or does not require informed written consent of the individual before information may be released; and

(E) Identification of other agencies to which information is routinely released;

(iv) An explanation of State policies and procedures affecting personal information will be provided to each individual in that individual's native language or through the appropriate mode of communication; and

(v) These policies and procedures provide no fewer protections for individuals than State laws and regulations.

(2) The State unit may establish reasonable fees to cover extraordinary costs of duplicating records or making extensive searches and must establish policies and procedures governing access to records.

(b) *State program use.* All personal information in the possession of the State agency or the designated State unit must be used only for the purposes directly connected with the administration of the vocational rehabilitation program. Information containing identifiable personal information may not be shared with advisory or other bodies that do not have official responsibility for administration of the program. In the administration of the program, the State unit may obtain personal information from service providers and cooperating agencies under assurances that the information may not be further divulged, except as provided under paragraphs (c), (d), and (e) of this section.

(c) *Release to applicants and eligible individuals.*

(1) Except as provided in paragraphs (c)(2) and (c)(3) of this section, if requested in writing by an applicant or eligible individual, the State unit must make all requested information in that individual's record of services accessible to and must release the information to the individual or the individual's representative in a timely manner.

(2) Medical, psychological, or other information that the State unit determines may be harmful to the individual may not be released directly to the individual, but must be provided to the individual through a third party chosen by the individual, which may include, among others, an advocate, a family member, or a qualified medical or mental health professional, unless a representative has been appointed by a court to represent the individual, in which case the information must be released to the court-appointed representative.

(3) If personal information has been obtained from another agency or organization, it may be released only by, or under the conditions established by, the other agency or organization.

(4) An applicant or eligible individual who believes that information in the individual's record of services is inaccurate or misleading may request that the designated State unit amend the information. If the information is not amended, the request for an amendment must be documented in the record of services, consistent with § 361.47(a)(12).

(d) *Release for audit, evaluation, and research.* Personal information may be released to an organization, agency, or individual engaged in audit, evaluation, or research only for purposes directly connected with the administration of the vocational rehabilitation program or for purposes that would significantly improve the quality of life for applicants and eligible individuals and only if the organization, agency, or individual assures that—

(1) The information will be used only for the purposes for which it is being provided;

(2) The information will be released only to persons officially connected with the audit, evaluation, or research;

(3) The information will not be released to the involved individual;

(4) The information will be managed in a manner to safeguard confidentiality; and

(5) The final product will not reveal any personal identifying information without the informed written consent of the involved individual or the individual's representative.

(e) *Release to other programs or authorities.*

(1) Upon receiving the informed written consent of the individual or, if appropriate, the individual's representative, the State unit may release personal information to another agency or organization for its program purposes only to the extent that the information may be released to the involved individual or the individual's representative and only to the extent that the other agency or organization demonstrates that the information requested is necessary for its program.

(2) Medical or psychological information that the State unit determines may be harmful to the individual may be released if the other agency or organization assures the State unit that the information will be used only for the purpose for which it is being provided and will not be further released to the individual.

(3) The State unit must release personal information if required by Federal law or regulations.

(4) The State unit must release personal information in response to investigations in connection with law enforcement, fraud, or abuse, unless expressly prohibited by Federal or State laws or regulations, and in response to an order issued by a judge, magistrate, or other authorized judicial officer.

(5) The State unit also may release personal information in order to protect the individual or others if the individual poses a threat to his or her safety or to the safety of others.

(Authority: Sections 12(c) and 101(a)(6)(A) of the Act; 29 U.S.C. 709(c) and 721(a)(6)(A))

§ 361.39 State-imposed requirements.

The designated State unit must, upon request, identify those regulations and policies relating to the administration or operation of its vocational rehabilitation program that are State-imposed, including any regulations or policy based on State interpretation of any Federal law, regulations, or guideline.

(Authority: Section 17 of the Act; 29 U.S.C. 714)

§ 361.40 Reports.

(a) The State plan must assure that the designated State agency will submit reports, including reports required under sections 13, 14, and 101(a)(10) of the Act—

(1) In the form and level of detail and at the time required by the Secretary regarding applicants for and eligible individuals receiving services under this part; and

(2) In a manner that provides a complete count (other than the information obtained through sampling consistent with section 101(a)(10)(E) of the Act) of the applicants and eligible individuals to—

(i) Permit the greatest possible cross-classification of data; and

(ii) Protect the confidentiality of the identity of each individual.

(b) The designated State agency must comply with any requirements necessary to ensure the accuracy and verification of those reports.

(Authority: Section 101(a)(10)(A) and (F) of the Act; 29 U.S.C. 721(a)(10)(A) and (F))

Provision and Scope of Services

§ 361.41 Processing referrals and applications.

(a) *Referrals.* The designated State unit must establish and implement standards for the prompt and equitable handling of referrals of individuals for vocational rehabilitation services, including referrals of individuals made through the One-Stop service delivery systems established under section 121 of the Workforce Investment Act of 1998. The standards must include timelines for making good faith efforts to inform these individuals of application requirements and to gather information necessary to initiate an assessment for determining eligibility and priority for services.

(b) *Applications.*

(1) Once an individual has submitted an application for vocational rehabilitation services, including applications made through common intake procedures in One-Stop centers established under section 121 of the Workforce Investment Act of 1998, an eligibility determination must be made within 60 days, unless—

(i) Exceptional and unforeseen circumstances beyond the control of the designated State unit preclude making an eligibility determination within 60 days and the designated State unit and

the individual agree to a specific extension of time; or

(ii) An exploration of the individual's abilities, capabilities, and capacity to perform in work situations is carried out in accordance with § 361.42(e) or, if appropriate, an extended evaluation is carried out in accordance with § 361.42(f).

(2) An individual is considered to have submitted an application when the individual or the individual's representative, as appropriate—

(i)(A) Has completed and signed an agency application form;

(B) Has completed a common intake application form in a One-Stop center requesting vocational rehabilitation services; or

(C) Has otherwise requested services from the designated State unit;

(ii) Has provided to the designated State unit information necessary to initiate an assessment to determine eligibility and priority for services; and

(iii) Is available to complete the assessment process.

(3) The designated State unit must ensure that its application forms are widely available throughout the State, particularly in the One-Stop centers established under section 121 of the Workforce Investment Act of 1998.

(Authority: Sections 101(a)(6)(A) and 102(a)(6) of the Act; 29 U.S.C. 721(a)(6)(A) and 722(a)(6))

§ 361.42 Assessment for determining eligibility and priority for services.

In order to determine whether an individual is eligible for vocational rehabilitation services and the individual's priority under an order of selection for services (if the State is operating under an order of selection), the designated State unit must conduct an assessment for determining eligibility and priority for services. The assessment must be conducted in the most integrated setting possible, consistent with the individual's needs and informed choice, and in accordance with the following provisions:

(a) *Eligibility requirements.*

(1) *Basic requirements.* The designated State unit's determination of an applicant's eligibility for vocational rehabilitation services must be based only on the following requirements:

(i) A determination by qualified personnel that the applicant has a physical or mental impairment.

(ii) A determination by qualified personnel that the applicant's physical or mental impairment constitutes or results in a substantial impediment to employment for the applicant.

(iii) A determination by a qualified vocational rehabilitation counselor employed by the designated State unit that the applicant requires vocational rehabilitation services to prepare for, secure, retain, or regain employment consistent with the applicant's unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.

(iv) A presumption, in accordance with paragraph (a)(2) of this section, that the applicant can benefit in terms of an employment outcome from the provision of vocational rehabilitation services.

(2) *Presumption of benefit.* The designated State unit must presume that an applicant who meets the eligibility requirements in paragraphs (a)(1)(i) and (ii) of this section can benefit in terms of an employment outcome unless it demonstrates, based on clear and convincing evidence, that the applicant is incapable of benefiting in terms of an employment outcome from vocational rehabilitation services due to the severity of the applicant's disability.

(3) *Presumption of eligibility for Social Security recipients and beneficiaries.*

(i) Any applicant who has been determined eligible for Social Security benefits under Title II or Title XVI of the Social Security Act is—

(A) Presumed eligible for vocational rehabilitation services under paragraphs (a)(1) and (2) of this section; and

(B) Considered an individual with a significant disability as defined in § 361.5(b)(31).

(ii) If an applicant for vocational rehabilitation services asserts that he or she is eligible for Social Security benefits under Title II or Title XVI of the Social Security Act (and, therefore, is presumed eligible for vocational rehabilitation services under paragraph (a)(3)(i)(A) of this section), but is unable to provide appropriate evidence, such as an award letter, to support that assertion, the State unit must verify the applicant's eligibility under Title II or Title XVI of the Social Security Act by contacting the Social Security Administration. This verification must be made within a reasonable period of time that enables the State unit to determine the applicant's eligibility for vocational rehabilitation services within 60 days of the individual submitting an application for services in accordance with § 361.41(b)(2).

(4) *Achievement of an employment outcome.* Any eligible individual, including an individual whose eligibility for vocational rehabilitation services is based on the individual being eligible for Social Security benefits under Title II or Title XVI of the Social Security Act, must intend to achieve an employment outcome that is consistent with the applicant's unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice.

(i) The State unit is responsible for informing individuals, through its application process for vocational rehabilitation services, that individuals who receive services under the program must intend to achieve an employment outcome.

(ii) The applicant's completion of the application process for vocational rehabilitation services is sufficient evidence of the individual's intent to achieve an employment outcome, and no additional demonstration on the part of the applicant is required for purposes of satisfying paragraph (a)(4) of this section.

(5) *Interpretation.* Nothing in this section, including paragraph (a)(3)(i), is to be construed to create an entitlement to any vocational rehabilitation service.

(b) *Interim determination of eligibility.*

(1) The designated State unit may initiate the provision of vocational rehabilitation services for an applicant on the basis of an interim determination of eligibility prior to the 60-day period described in § 361.41(b)(2).

(2) If a State chooses to make interim determinations of eligibility, the designated State unit must—

(i) Establish criteria and conditions for making those determinations;

(ii) Develop and implement procedures for making the determinations; and

(iii) Determine the scope of services that may be provided pending the final determination of eligibility.

(3) If a State elects to use an interim eligibility determination, the designated State unit must make a final determination of eligibility within 60 days of the individual submitting an application for services in accordance with § 361.41(b)(2).

(c) *Prohibited factors.*

(1) The State plan must assure that the State unit will not impose, as part of determining eligibility under this section, a duration of residence requirement that excludes from services any applicant who is present in the State.

(2) In making a determination of eligibility under this section, the designated State unit also must ensure that—

(i) No applicant or group of applicants is excluded or found ineligible solely on the basis of the type of disability; and

(ii) The eligibility requirements are applied without regard to the—

(A) Age, gender, race, color, or national origin of the applicant;

(B) Type of expected employment outcome;

(C) Source of referral for vocational rehabilitation services; and

(D) Particular service needs or anticipated cost of services required by an applicant or the income level of an applicant or applicant's family.

(d) *Review and assessment of data for eligibility determination.* Except as provided in paragraph (e) of this section, the designated State unit—

(1) Must base its determination of each of the basic eligibility requirements in paragraph (a) of this section on—

(i) A review and assessment of existing data, including counselor observations, education records, information provided by the individual or the individual's family, particularly information used by education officials, and determinations made by officials of other agencies; and

(ii) To the extent existing data do not describe the current functioning of the individual or are unavailable, insufficient, or inappropriate to make an eligibility determination, an assessment of additional data resulting from the provision of vocational rehabilitation services, including trial work experiences, assistive technology devices and services, personal assistance services, and any other support services that are necessary to determine whether an individual is eligible; and

(2) Must base its presumption under paragraph (a)(3)(i) of this section that an applicant who has been determined eligible for Social Security benefits under Title II or Title XVI of the Social Security Act satisfies each of the basic eligibility requirements in paragraph (a) of this section on determinations made by the Social Security Administration.

(e) *Trial work experiences for individuals with significant disabilities.*

(1) Prior to any determination that an individual with a disability is incapable of benefiting from vocational rehabilitation services in terms of an employment outcome because of the severity of that individual's disability, the designated State unit must conduct an exploration of the individual's abilities, capabilities, and capacity to perform in realistic work situations to determine whether or not there is clear and convincing evidence to support such a determination.

(2)(i) The designated State unit must develop a written plan to assess periodically the individual's abilities, capabilities, and capacity to perform in work situations through the use of trial work experiences, which must be provided in the most integrated setting possible, consistent with the informed choice and rehabilitation needs of the individual.

(ii) Trial work experiences include supported employment, on-the-job training, and other experiences using realistic work settings.

(iii) Trial work experiences must be of sufficient variety and over a sufficient period of time for the designated State unit to determine that—

(A) There is sufficient evidence to conclude that the individual can benefit from the provision of vocational rehabilitation services in terms of an employment outcome; or

(B) There is clear and convincing evidence that the individual is incapable of benefiting from vocational rehabilitation services in terms of an employment outcome due to the severity of the individual's disability.

(iv) The designated State unit must provide appropriate supports, including assistive technology devices and services and personal assistance services, to accommodate the rehabilitation needs of the individual during the trial work experiences.

(f) *Extended evaluation for certain individuals with significant disabilities.*

(1) Under limited circumstances if an individual cannot take advantage of trial work experiences or if options for trial work experiences have been exhausted before the State unit is able to make the determinations described in paragraph (e)(2)(iii) of this section, the designated State unit must conduct an extended evaluation to make these determinations.

(2) During the extended evaluation period, vocational rehabilitation services must be provided in the most integrated setting possible, consistent with the informed choice and rehabilitation needs of the individual.

(3) During the extended evaluation period, the designated State unit must develop a written plan for providing services necessary to make a determination under paragraph (e)(2)(iii) of this section.

(4) During the extended evaluation period, the designated State unit provides only those services that are necessary to make the determinations described in paragraph (e)(2)(iii) of this section and terminates extended evaluation services when the State unit is able to make the determinations.

(g) *Data for determination of priority for services under an order of selection.* If the designated State unit is operating under an order of selection for services, as provided in § 361.36, the State unit must base its priority assignments on—

(1) A review of the data that was developed under paragraphs (d) and (e) of this section to make the eligibility determination; and

(2) An assessment of additional data, to the extent necessary.

(Authority: Sections 7(2)(A), 7(2)(B)(ii)(I), 7(2)(C), 7(2)(D), 101(a)(12), 102(a)(1), 102(a)(2), 102(a)(3), 102(a)(4)(A), 102(a)(4)(B), 102(a)(4)(C), 103(a)(1), 103(a)(9), 103(a)(10) and 103(a)(14) of the Act; 29 U.S.C. 705(2)(A), 705(2)(B)(ii)(I), 705(2)(C), 705(2)(D), 721(a)(12), 722(a)(1), 722(a)(2), 722(a)(3), 722(a)(4)(A), 722(a)(4)(B), 722(a)(4)(C), 723(a)(1), 723(a)(9), 723(a)(10) and 723(a)(14))

Note to § 361.42: *Clear and convincing evidence* means that the designated State unit shall have a high degree of certainty before it can conclude that an individual is incapable of benefiting from services in terms of an employment outcome. The ''clear and convincing'' standard constitutes the highest standard used in our civil system of law and is to be individually applied on a case-by-case basis. The term *clear* means unequivocal. For example, the use of an intelligence test result alone would not constitute clear and convincing evidence. Clear and convincing evidence might include a description of assessments, including situational assessments and supported employment assessments, from service providers who have concluded that they would be unable to meet the individual's needs due to the severity of the individual's disability. The demonstration of ''clear and convincing evidence'' must include, if appropriate, a functional assessment of skill development activities, with any necessary supports (including assistive technology), in real life settings. (S. Rep. No. 357, 102d Cong., 2d. Sess. 37–38 (1992))

§ 361.43 Procedures for ineligibility determination.

If the State unit determines that an applicant is ineligible for vocational rehabilitation services or determines that an individual receiving services under an individualized plan for employment is no longer eligible for services, the State unit must—

(a) Make the determination only after providing an opportunity for full consultation with the individual or, as appropriate, with the individual's representative;

(b) Inform the individual in writing, supplemented as necessary by other appropriate modes of communication consistent with the informed choice of the individual, of the ineligibility determination, including the reasons for that determination, the requirements under this section, and the means by which the individual may express and seek remedy for any dissatisfaction, including the procedures for review of State unit personnel determinations in accordance with § 361.57;

(c) Provide the individual with a description of services available from a

client assistance program established under 34 CFR part 370 and information on how to contact that program;

(d) Refer the individual to other training or employment-related programs that are part of the One-Stop service delivery system under the Workforce Investment Act; and

(e) Review within 12 months and annually thereafter if requested by the individual or, if appropriate, by the individual's representative any ineligibility determination that is based on a finding that the individual is incapable of achieving an employment outcome. This review need not be conducted in situations in which the individual has refused it, the individual is no longer present in the State, the individual's whereabouts are unknown, or the individual's medical condition is rapidly progressive or terminal.

(Authority: Sections 102(a)(5) and 102(c) of the Act; 29 U.S.C. 722(a)(5) and 722(c))

§ 361.44 Closure without eligibility determination.

The designated State unit may not close an applicant's record of services prior to making an eligibility determination unless the applicant declines to participate in, or is unavailable to complete, an assessment for determining eligibility and priority for services, and the State unit has made a reasonable number of attempts to contact the applicant or, if appropriate, the applicant's representative to encourage the applicant's participation.

(Authority: Section 12(c) of the Act; 29 U.S.C. 709(c))

§ 361.45 Development of the individualized plan for employment.

(a) *General requirements.* The State plan must assure that—

(1) An individualized plan for employment (IPE) meeting the requirements of this section and § 361.46 is developed and implemented in a timely manner for each individual determined to be eligible for vocational rehabilitation services or, if the designated State unit is operating under an order of selection in accordance with § 361.36, for each eligible individual to whom the State unit is able to provide services; and

(2) Services will be provided in accordance with the provisions of the IPE.

(b) *Purpose.*

(1) The designated State unit must conduct an assessment for determining vocational rehabilitation needs, if appropriate, for each eligible individual or, if the State is operating under an order of selection, for each eligible individual to whom the State is able to provide services. The purpose of this assessment is to determine the employment outcome, and the nature and scope of vocational rehabilitation services to be included in the IPE.

(2) The IPE must—

(i) Be designed to achieve the specific employment outcome that is selected by the individual consistent with the individual's unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice; and

(ii) To the maximum extent appropriate, result in employment in an integrated setting.

(c) *Required information.* The State unit must provide the following information to each eligible individual or, as appropriate, the individual's representative, in writing and, if appropriate, in the native language or mode of communication of the individual or the individual's representative:

(1) *Options for developing an IPE.* Information on the available options for developing the IPE, including the option that an eligible individual or, as appropriate, the individual's representative may develop all or part of the IPE—

(i) Without assistance from the State unit or other entity; or

(ii) With assistance from—

(A) A qualified vocational rehabilitation counselor employed by the State unit;

(B) A qualified vocational rehabilitation counselor who is not employed by the State unit; or

(C) Resources other than those in paragraph (A) or (B) of this section.

(2) *Additional information.* Additional information to assist the eligible individual or, as appropriate, the individual's representative in developing the IPE, including—

(i) Information describing the full range of components that must be included in an IPE;

(ii) As appropriate to each eligible individual—

(A) An explanation of agency guidelines and criteria for determining an eligible individual's financial commitments under an IPE;

(B) Information on the availability of assistance in completing State unit forms required as part of the IPE; and

(C) Additional information that the eligible individual requests or the State unit determines to be necessary to the development of the IPE;

(iii) A description of the rights and remedies available to the individual, including, if appropriate, recourse to the processes described in § 361.57; and

(iv) A description of the availability of a client assistance program established under 34 CFR part 370 and information on how to contact the client assistance program.

(d) *Mandatory procedures.* The designated State unit must ensure that—

(1) The IPE is a written document prepared on forms provided by the State unit;

(2) The IPE is developed and implemented in a manner that gives eligible individuals the opportunity to exercise informed choice, consistent with § 361.52, in selecting—

(i) The employment outcome, including the employment setting;

(ii) The specific vocational rehabilitation services needed to achieve the employment outcome, including the settings in which services will be provided;

(iii) The entity or entities that will provide the vocational rehabilitation services; and

(iv) The methods available for procuring the services;

(3) The IPE is—

(i) Agreed to and signed by the eligible individual or, as appropriate, the individual's representative; and

(ii) Approved and signed by a qualified vocational rehabilitation counselor employed by the designated State unit;

(4) A copy of the IPE and a copy of any amendments to the IPE are provided to the eligible individual or, as appropriate, to the individual's representative, in writing and, if appropriate, in the native language or mode of communication of the individual or, as appropriate, the individual's representative;

(5) The IPE is reviewed at least annually by a qualified vocational rehabilitation counselor and the eligible individual or, as appropriate, the individual's representative to assess the eligible individual's progress in achieving the identified employment outcome;

(6) The IPE is amended, as necessary, by the individual or, as appropriate, the individual's representative, in collaboration with a representative of the State unit or a qualified vocational rehabilitation counselor (to the extent determined to be appropriate by the individual), if there are substantive changes in the employment outcome, the vocational rehabilitation services to be provided, or the providers of the vocational rehabilitation services;

(7) Amendments to the IPE do not take effect until agreed to and signed by the eligible individual or, as appropriate, the individual's representative and by a qualified vocational rehabilitation counselor

employed by the designated State unit; and

(8) An IPE for a student with a disability receiving special education services is developed—

(i) In consideration of the student's IEP; and

(ii) In accordance with the plans, policies, procedures, and terms of the interagency agreement required under § 361.22.

(e) *Standards for developing the IPE.* The designated State unit must establish and implement standards for the prompt development of IPEs for the individuals identified under paragraph (a) of this section, including timelines that take into consideration the needs of the individuals.

(f) *Data for preparing the IPE.*

(1) *Preparation without comprehensive assessment.* To the extent possible, the employment outcome and the nature and scope of rehabilitation services to be included in the individual's IPE must be determined based on the data used for the assessment of eligibility and priority for services under § 361.42.

(2) *Preparation based on comprehensive assessment.*

(i) If additional data are necessary to determine the employment outcome and the nature and scope of services to be included in the IPE of an eligible individual, the State unit must conduct a comprehensive assessment of the unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice, including the need for supported employment services, of the eligible individual, in the most integrated setting possible, consistent with the informed choice of the individual in accordance with the provisions of § 361.5(b)(6)(ii).

(ii) In preparing the comprehensive assessment, the State unit must use, to the maximum extent possible and appropriate and in accordance with confidentiality requirements, existing information that is current as of the date of the development of the IPE, including—

(A) Information available from other programs and providers, particularly information used by education officials and the Social Security Administration;

(B) Information provided by the individual and the individual's family; and

(C) Information obtained under the assessment for determining the individual's eligibility and vocational rehabilitation needs.

(Authority: Sections 7(2)(B), 101(a)(9), 102(b)(1), 102(b)(2), 102(c) and 103(a)(1); 29 U.S.C. 705(2)(B), 721(a)(9), 722(b)(1), 722(b)(2), 722(c) and 723(a)(1))

§ 361.46 Content of the individualized plan for employment.

(a) *Mandatory components.* Regardless of the approach in § 361.45(c)(1) that an eligible individual selects for purposes of developing the IPE, each IPE must include—

(1) A description of the specific employment outcome that is chosen by the eligible individual that—

(i) Is consistent with the individual's unique strengths, resources, priorities, concerns, abilities, capabilities, career interests, and informed choice; and

(ii) To the maximum extent appropriate, results in employment in an integrated setting;

(2) A description of the specific rehabilitation services under § 361.48 that are—

(i) Needed to achieve the employment outcome, including, as appropriate, the provision of assistive technology devices, assistive technology services, and personal assistance services, including training in the management of those services; and

(ii) Provided in the most integrated setting that is appropriate for the services involved and is consistent with the informed choice of the eligible individual;

(3) Timelines for the achievement of the employment outcome and for the initiation of services;

(4) A description of the entity or entities chosen by the eligible individual or, as appropriate, the individual's representative that will provide the vocational rehabilitation services and the methods used to procure those services;

(5) A description of the criteria that will be used to evaluate progress toward achievement of the employment outcome; and

(6) The terms and conditions of the IPE, including, as appropriate, information describing—

(i) The responsibilities of the designated State unit;

(ii) The responsibilities of the eligible individual, including—

(A) The responsibilities the individual will assume in relation to achieving the employment outcome;

(B) If applicable, the extent of the individual's participation in paying for the cost of services; and

(C) The responsibility of the individual with regard to applying for and securing comparable services and benefits as described in § 361.53; and

(iii) The responsibilities of other entities as the result of arrangements made pursuant to the comparable services or benefits requirements in § 361.53.

(b) *Supported employment requirements.* An IPE for an individual with a most significant disability for whom an employment outcome in a supported employment setting has been determined to be appropriate must—

(1) Specify the supported employment services to be provided by the designated State unit;

(2) Specify the expected extended services needed, which may include natural supports;

(3) Identify the source of extended services or, to the extent that it is not possible to identify the source of extended services at the time the IPE is developed, include a description of the basis for concluding that there is a reasonable expectation that those sources will become available;

(4) Provide for periodic monitoring to ensure that the individual is making satisfactory progress toward meeting the weekly work requirement established in the IPE by the time of transition to extended services;

(5) Provide for the coordination of services provided under an IPE with services provided under other individualized plans established under other Federal or State programs;

(6) To the extent that job skills training is provided, identify that the training will be provided on site; and

(7) Include placement in an integrated setting for the maximum number of hours possible based on the unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice of individuals with the most significant disabilities.

(c) *Post-employment services.* The IPE for each individual must contain, as determined to be necessary, statements concerning—

(1) The expected need for post-employment services prior to closing the record of services of an individual who has achieved an employment outcome;

(2) A description of the terms and conditions for the provision of any post-employment services; and

(3) If appropriate, a statement of how post-employment services will be provided or arranged through other entities as the result of arrangements made pursuant to the comparable services or benefits requirements in § 361.53.

(d) *Coordination of services for students with disabilities who are receiving special education services.* The IPE for a student with a disability who is receiving special education services must be coordinated with the

IEP for that individual in terms of the goals, objectives, and services identified in the IEP.

(Authority: Sections 101(a)(8), 101(a)(9), 102(b)(3), and 625(b)(6) of the Act; 29 U.S.C. 721(a)(8), 721(a)(9), 722(b)(3), and 795(k))

§ 361.47 Record of services.

(a) The designated State unit must maintain for each applicant and eligible individual a record of services that includes, to the extent pertinent, the following documentation:

(1) If an applicant has been determined to be an eligible individual, documentation supporting that determination in accordance with the requirements under § 361.42.

(2) If an applicant or eligible individual receiving services under an IPE has been determined to be ineligible, documentation supporting that determination in accordance with the requirements under § 361.43.

(3) Documentation that describes the justification for closing an applicant's or eligible individual's record of services if that closure is based on reasons other than ineligibility, including, as appropriate, documentation indicating that the State unit has satisfied the requirements in § 361.44.

(4) If an individual has been determined to be an individual with a significant disability or an individual with a most significant disability, documentation supporting that determination.

(5) If an individual with a significant disability requires an exploration of abilities, capabilities, and capacity to perform in realistic work situations through the use of trial work experiences or, as appropriate, an extended evaluation to determine whether the individual is an eligible individual, documentation supporting the need for, and the plan relating to, that exploration or, as appropriate, extended evaluation and documentation regarding the periodic assessments carried out during the trial work experiences or, as appropriate, the extended evaluation, in accordance with the requirements under § 361.42(e) and (f).

(6) The IPE, and any amendments to the IPE, consistent with the requirements under § 361.46.

(7) Documentation describing the extent to which the applicant or eligible individual exercised informed choice regarding the provision of assessment services and the extent to which the eligible individual exercised informed choice in the development of the IPE with respect to the selection of the specific employment outcome, the specific vocational rehabilitation services needed to achieve the employment outcome, the entity to provide the services, the employment setting, the settings in which the services will be provided, and the methods to procure the services.

(8) In the event that the IPE provides for services or an employment outcome in a non-integrated setting, a justification to support the non-integrated setting.

(9) In the event that an individual obtains competitive employment, verification that the individual is compensated at or above the minimum wage and that the individual's wage and level of benefits are not less than that customarily paid by the employer for the same or similar work performed by non-disabled individuals in accordance with § 361.5(b)(11)(ii).

(10) In the event that an individual obtains an employment outcome in an extended employment setting in a community rehabilitation program or any other employment under section 14(c) of the Fair Labor Standards Act, documentation of the results of the annual reviews required under § 361.55, the individual's input into those reviews, and the individual's or, if appropriate, the individual's representative's acknowledgement that those reviews were conducted.

(11) Documentation concerning any action or decision resulting from a request by an individual under § 361.57 for a review of determinations made by designated State unit personnel.

(12) In the event that an applicant or eligible individual requests under § 361.38(c)(4) that documentation in the record of services be amended and the documentation is not amended, documentation of the request.

(13) In the event an individual is referred to another program through the State unit's information and referral system under § 361.37, including other components of the statewide workforce investment system, documentation on the nature and scope of services provided by the designated State unit to the individual and on the referral itself, consistent with the requirements of § 361.37.

(14) In the event an individual's record of service is closed under § 361.56, documentation that demonstrates the services provided under the individual's IPE contributed to the achievement of the employment outcome.

(15) In the event an individual's record of service is closed under § 361.56, documentation verifying that the provisions of § 361.56 have been satisfied.

(b) The State unit, in consultation with the State Rehabilitation Council if the State has a Council, must determine the type of documentation that the State unit must maintain for each applicant and eligible individual in order to meet the requirements in paragraph (a) of this section.

(Authority: Sections 101(a)(6), (9), (14), (20) and 102(a), (b), and (d) of the Act; 29 U.S.C. 721(a)(6), (9), (14), (20) and 722(a),(b), and (d))

§ 361.48 Scope of vocational rehabilitation services for individuals with disabilities.

As appropriate to the vocational rehabilitation needs of each individual and consistent with each individual's informed choice, the designated State unit must ensure that the following vocational rehabilitation services are available to assist the individual with a disability in preparing for, securing, retaining, or regaining an employment outcome that is consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice:

(a) Assessment for determining eligibility and priority for services by qualified personnel, including, if appropriate, an assessment by personnel skilled in rehabilitation technology, in accordance with § 361.42.

(b) Assessment for determining vocational rehabilitation needs by qualified personnel, including, if appropriate, an assessment by personnel skilled in rehabilitation technology, in accordance with § 361.45.

(c) Vocational rehabilitation counseling and guidance, including information and support services to assist an individual in exercising informed choice in accordance with § 361.52.

(d) Referral and other services necessary to assist applicants and eligible individuals to secure needed services from other agencies, including other components of the statewide workforce investment system, in accordance with §§ 361.23, 361.24, and 361.37, and to advise those individuals about client assistance programs established under 34 CFR part 370.

(e) In accordance with the definition in § 361.5(b)(40), physical and mental restoration services, to the extent that financial support is not readily available from a source other than the designated State unit (such as through health insurance or a comparable service or benefit as defined in § 361.5(b)(10)).

(f) Vocational and other training services, including personal and vocational adjustment training, books, tools, and other training materials,

except that no training or training services in an institution of higher education (universities, colleges, community or junior colleges, vocational schools, technical institutes, or hospital schools of nursing) may be paid for with funds under this part unless maximum efforts have been made by the State unit and the individual to secure grant assistance in whole or in part from other sources to pay for that training.

(g) Maintenance, in accordance with the definition of that term in § 361.5(b)(35).

(h) Transportation in connection with the rendering of any vocational rehabilitation service and in accordance with the definition of that term in § 361.5(b)(57).

(i) Vocational rehabilitation services to family members, as defined in § 361.5(b)(23), of an applicant or eligible individual if necessary to enable the applicant or eligible individual to achieve an employment outcome.

(j) Interpreter services, including sign language and oral interpreter services, for individuals who are deaf or hard of hearing and tactile interpreting services for individuals who are deaf-blind provided by qualified personnel.

(k) Reader services, rehabilitation teaching services, and orientation and mobility services for individuals who are blind.

(l) Job-related services, including job search and placement assistance, job retention services, follow-up services, and follow-along services.

(m) Supported employment services in accordance with the definition of that term in § 361.5(b)(54).

(n) Personal assistance services in accordance with the definition of that term in § 361.5(b)(39).

(o) Post-employment services in accordance with the definition of that term in § 361.5(b)(42).

(p) Occupational licenses, tools, equipment, initial stocks, and supplies.

(q) Rehabilitation technology in accordance with the definition of that term in § 361.5(b)(45), including vehicular modification, telecommunications, sensory, and other technological aids and devices.

(r) Transition services in accordance with the definition of that term in § 361.5(b)(55).

(s) Technical assistance and other consultation services to conduct market analyses, develop business plans, and otherwise provide resources, to the extent those resources are authorized to be provided through the statewide workforce investment system, to eligible individuals who are pursuing self-employment or telecommuting or establishing a small business operation as an employment outcome.

(t) Other goods and services determined necessary for the individual with a disability to achieve an employment outcome.

(Authority: Section 103(a) of the Act; 29 U.S.C. 723(a))

§ 361.49 Scope of vocational rehabilitation services for groups of individuals with disabilities.

(a) The designated State unit may also provide for the following vocational rehabilitation services for the benefit of groups of individuals with disabilities:

(1) The establishment, development, or improvement of a public or other nonprofit community rehabilitation program that is used to provide vocational rehabilitation services that promote integration and competitive employment, including, under special circumstances, the construction of a facility for a public or nonprofit community rehabilitation program. Examples of ''special circumstances'' include the destruction by natural disaster of the only available center serving an area or a State determination that construction is necessary in a rural area because no other public agencies or private nonprofit organizations are currently able to provide vocational rehabilitation services to individuals.

(2) Telecommunications systems that have the potential for substantially improving vocational rehabilitation service delivery methods and developing appropriate programming to meet the particular needs of individuals with disabilities, including telephone, television, video description services, satellite, tactile-vibratory devices, and similar systems, as appropriate.

(3) Special services to provide nonvisual access to information for individuals who are blind, including the use of telecommunications, Braille, sound recordings, or other appropriate media; captioned television, films, or video cassettes for individuals who are deaf or hard of hearing; tactile materials for individuals who are deaf-blind; and other special services that provide information through tactile, vibratory, auditory, and visual media.

(4) Technical assistance and support services to businesses that are not subject to Title I of the Americans with Disabilities Act of 1990 and that are seeking to employ individuals with disabilities.

(5) In the case of any small business enterprise operated by individuals with significant disabilities under the supervision of the designated State unit, including enterprises established under the Randolph-Sheppard program, management services and supervision provided by the State unit along with the acquisition by the State unit of vending facilities or other equipment, initial stocks and supplies, and initial operating expenses, in accordance with the following requirements:

(i) ''Management services and supervision'' includes inspection, quality control, consultation, accounting, regulating, in-service training, and related services provided on a systematic basis to support and improve small business enterprises operated by individuals with significant disabilities. ''Management services and supervision'' may be provided throughout the operation of the small business enterprise.

(ii) ''Initial stocks and supplies'' includes those items necessary to the establishment of a new business enterprise during the initial establishment period, which may not exceed 6 months.

(iii) Costs of establishing a small business enterprise may include operational costs during the initial establishment period, which may not exceed 6 months.

(iv) If the designated State unit provides for these services, it must ensure that only individuals with significant disabilities will be selected to participate in this supervised program.

(v) If the designated State unit provides for these services and chooses to set aside funds from the proceeds of the operation of the small business enterprises, the State unit must maintain a description of the methods used in setting aside funds and the purposes for which funds are set aside. Funds may be used only for small business enterprises purposes, and benefits that are provided to operators from set-aside funds must be provided on an equitable basis.

(6) Other services that promise to contribute substantially to the rehabilitation of a group of individuals but that are not related directly to the individualized plan for employment of any one individual. Examples of those other services might include the purchase or lease of a bus to provide transportation to a group of applicants or eligible individuals or the purchase of equipment or instructional materials that would benefit a group of applicants or eligible individuals.

(7) Consultative and technical assistance services to assist educational agencies in planning for the transition of students with disabilities from school to post-school activities, including employment.

(b) If the designated State unit provides for vocational rehabilitation services for groups of individuals, it must—

(1) Develop and maintain written policies covering the nature and scope of each of the vocational rehabilitation services it provides and the criteria under which each service is provided; and

(2) Maintain information to ensure the proper and efficient administration of those services in the form and detail and at the time required by the Secretary, including the types of services provided, the costs of those services, and, to the extent feasible, estimates of the numbers of individuals benefiting from those services.

(Authority: Sections 12(c), 101(a)(6)(A), and 103(b) of the Act; 29 U.S.C. 709(c), 721(a)(6), and 723(b))

§ 361.50 Written policies governing the provision of services for individuals with disabilities.

(a) *Policies.* The State unit must develop and maintain written policies covering the nature and scope of each of the vocational rehabilitation services specified in § 361.48 and the criteria under which each service is provided. The policies must ensure that the provision of services is based on the rehabilitation needs of each individual as identified in that individual's IPE and is consistent with the individual's informed choice. The written policies may not establish any arbitrary limits on the nature and scope of vocational rehabilitation services to be provided to the individual to achieve an employment outcome. The policies must be developed in accordance with the following provisions:

(b) *Out-of-State services.*

(1) The State unit may establish a preference for in-State services, provided that the preference does not effectively deny an individual a necessary service. If the individual chooses an out-of-State service at a higher cost than an in-State service, if either service would meet the individual's rehabilitation needs, the designated State unit is not responsible for those costs in excess of the cost of the in-State service.

(2) The State unit may not establish policies that effectively prohibit the provision of out-of-State services.

(c) *Payment for services.*

(1) The State unit must establish and maintain written policies to govern the rates of payment for all purchased vocational rehabilitation services.

(2) The State unit may establish a fee schedule designed to ensure a reasonable cost to the program for each service, if the schedule is—

(i) Not so low as to effectively deny an individual a necessary service; and

(ii) Not absolute and permits exceptions so that individual needs can be addressed.

(3) The State unit may not place absolute dollar limits on specific service categories or on the total services provided to an individual.

(d) *Duration of services.*

(1) The State unit may establish reasonable time periods for the provision of services provided that the time periods are—

(i) Not so short as to effectively deny an individual a necessary service; and

(ii) Not absolute and permit exceptions so that individual needs can be addressed.

(2) The State unit may not establish absolute time limits on the provision of specific services or on the provision of services to an individual. The duration of each service needed by an individual must be determined on an individual basis and reflected in that individual's individualized plan for employment.

(e) *Authorization of services.* The State unit must establish policies related to the timely authorization of services, including any conditions under which verbal authorization can be given.

(Authority: Sections 12(c) and 101(a)(6) of the Act and 29 U.S.C. 709(c) and 721(a)(6))

§ 361.51 Standards for facilities and providers of services.

(a) *Accessibility of facilities.* The State plan must assure that any facility used in connection with the delivery of vocational rehabilitation services under this part meets program accessibility requirements consistent with the requirements, as applicable, of the Architectural Barriers Act of 1968, the Americans with Disabilities Act of 1990, section 504 of the Act, and the regulations implementing these laws.

(b) *Affirmative action.* The State plan must assure that community rehabilitation programs that receive assistance under part B of Title I of the Act take affirmative action to employ and advance in employment qualified individuals with disabilities covered under and on the same terms and conditions as in section 503 of the Act.

(c) *Special communication needs personnel.* The designated State unit must ensure that providers of vocational rehabilitation services are able to communicate—

(1) In the native language of applicants and eligible individuals who have limited English speaking ability; and

(2) By using appropriate modes of communication used by applicants and eligible individuals.

(Authority: Sections 12(c) and 101(a)(6)(B) and (C) of the Act; 29 U.S.C. 709(c) and 721(a)(6)(B) and (C))

§ 361.52 Informed choice.

(a) *General provision.* The State plan must assure that applicants and eligible individuals or, as appropriate, their representatives are provided information and support services to assist applicants and eligible individuals in exercising informed choice throughout the rehabilitation process consistent with the provisions of section 102(d) of the Act and the requirements of this section.

(b) *Written policies and procedures.* The designated State unit, in consultation with its State Rehabilitation Council, if it has a Council, must develop and implement written policies and procedures that enable an applicant or eligible individual to exercise informed choice throughout the vocational rehabilitation process. These policies and procedures must provide for—

(1) Informing each applicant and eligible individual (including students with disabilities who are making the transition from programs under the responsibility of an educational agency to programs under the responsibility of the designated State unit), through appropriate modes of communication, about the availability of and opportunities to exercise informed choice, including the availability of support services for individuals with cognitive or other disabilities who require assistance in exercising informed choice throughout the vocational rehabilitation process;

(2) Assisting applicants and eligible individuals in exercising informed choice in decisions related to the provision of assessment services;

(3) Developing and implementing flexible procurement policies and methods that facilitate the provision of vocational rehabilitation services and that afford eligible individuals meaningful choices among the methods used to procure vocational rehabilitation services;

(4) Assisting eligible individuals or, as appropriate, the individuals' representatives in acquiring information that enables them to exercise informed choice in the development of their IPEs with respect to the selection of the—

(i) Employment outcome;

(ii) Specific vocational rehabilitation services needed to achieve the employment outcome;

(iii) Entity that will provide the services;

(iv) Employment setting and the settings in which the services will be provided; and

(v) Methods available for procuring the services; and

(5) Ensuring that the availability and scope of informed choice is consistent with the obligations of the designated State agency under this part.

(c) *Information and assistance in the selection of vocational rehabilitation services and service providers.* In assisting an applicant and eligible individual in exercising informed choice during the assessment for determining eligibility and vocational rehabilitation needs and during development of the IPE, the designated State unit must provide the individual or the individual's representative, or assist the individual or the individual's representative in acquiring, information necessary to make an informed choice about the specific vocational rehabilitation services, including the providers of those services, that are needed to achieve the individual's employment outcome. This information must include, at a minimum, information relating to the—

(1) Cost, accessibility, and duration of potential services;

(2) Consumer satisfaction with those services to the extent that information relating to consumer satisfaction is available;

(3) Qualifications of potential service providers;

(4) Types of services offered by the potential providers;

(5) Degree to which services are provided in integrated settings; and

(6) Outcomes achieved by individuals working with service providers, to the extent that such information is available.

(d) *Methods or sources of information.* In providing or assisting the individual or the individual's representative in acquiring the information required under paragraph (c) of this section, the State unit may use, but is not limited to, the following methods or sources of information:

(1) Lists of services and service providers.

(2) Periodic consumer satisfaction surveys and reports.

(3) Referrals to other consumers, consumer groups, or disability advisory councils qualified to discuss the services or service providers.

(4) Relevant accreditation, certification, or other information relating to the qualifications of service providers.

(5) Opportunities for individuals to visit or experience various work and service provider settings.

(Authority: Sections 12(c), 101(a)(19); 102(b)(2)(B) and 102(d) of the Act; 29 U.S.C. 709(c), 721(a)(19); 722(b)(2)(B) and 722(d))

§ 361.53 Comparable services and benefits.

(a) *Determination of availability.* The State plan must assure that prior to providing any vocational rehabilitation services, except those services listed in paragraph (b) of this section, to an eligible individual, or to members of the individual's family, the State unit must determine whether comparable services and benefits, as defined in § 361.5(b)(10), exist under any other program and whether those services and benefits are available to the individual unless such a determination would interrupt or delay—

(1) The progress of the individual toward achieving the employment outcome identified in the individualized plan for employment;

(2) An immediate job placement; or

(3) The provision of vocational rehabilitation services to any individual who is determined to be at extreme medical risk, based on medical evidence provided by an appropriate qualified medical professional.

(b) *Exempt services.* The following vocational rehabilitation services described in § 361.48(a) are exempt from a determination of the availability of comparable services and benefits under paragraph (a) of this section:

(1) Assessment for determining eligibility and vocational rehabilitation needs.

(2) Counseling and guidance, including information and support services to assist an individual in exercising informed choice.

(3) Referral and other services to secure needed services from other agencies, including other components of the statewide workforce investment system, if those services are not available under this part.

(4) Job-related services, including job search and placement assistance, job retention services, follow-up services, and follow-along services.

(5) Rehabilitation technology, including telecommunications, sensory, and other technological aids and devices.

(6) Post-employment services consisting of the services listed under paragraphs (b)(1) through (5) of this section.

(c) *Provision of services.*

(1) If comparable services or benefits exist under any other program and are available to the individual at the time needed to ensure the progress of the individual toward achieving the employment outcome in the individual's IPE, the designated State unit must use those comparable services or benefits to meet, in whole or part, the costs of the vocational rehabilitation services.

(2) If comparable services or benefits exist under any other program, but are not available to the individual at the time needed to ensure the progress of the individual toward achieving the employment outcome in the individual's IPE, the designated State unit must provide vocational rehabilitation services until those comparable services and benefits become available.

(d) *Interagency coordination.*

(1) The State plan must assure that the Governor, in consultation with the entity in the State responsible for the vocational rehabilitation program and other appropriate agencies, will ensure that an interagency agreement or other mechanism for interagency coordination takes effect between the designated State vocational rehabilitation unit and any appropriate public entity, including the State entity responsible for administering the State medicaid program, a public institution of higher education, and a component of the statewide workforce investment system, to ensure the provision of vocational rehabilitation services (other than those services listed in paragraph (b) of this section) that are included in the IPE, including the provision of those vocational rehabilitation services during the pendency of any interagency dispute in accordance with the provisions of paragraph (d)(3)(iii) of this section.

(2) The Governor may meet the requirements of paragraph (d)(1) of this section through—

(i) A State statute or regulation;

(ii) A signed agreement between the respective officials of the public entities that clearly identifies the responsibilities of each public entity for the provision of the services; or

(iii) Another appropriate mechanism as determined by the designated State vocational rehabilitation unit.

(3) The interagency agreement or other mechanism for interagency coordination must include the following:

(i) *Agency financial responsibility.* An identification of, or description of a method for defining, the financial responsibility of the public entity for providing the vocational rehabilitation services other than those listed in paragraph (b) of this section and a provision stating the financial

responsibility of the public entity for providing those services.

(ii) *Conditions, terms, and procedures of reimbursement.* Information specifying the conditions, terms, and procedures under which the designated State unit must be reimbursed by the other public entities for providing vocational rehabilitation services based on the terms of the interagency agreement or other mechanism for interagency coordination.

(iii) *Interagency disputes.* Information specifying procedures for resolving interagency disputes under the interagency agreement or other mechanism for interagency coordination, including procedures under which the designated State unit may initiate proceedings to secure reimbursement from other public entities or otherwise implement the provisions of the agreement or mechanism.

(iv) *Procedures for coordination of services.* Information specifying policies and procedures for public entities to determine and identify interagency coordination responsibilities of each public entity to promote the coordination and timely delivery of vocational rehabilitation services other than those listed in paragraph (b) of this section.

(e) *Responsibilities under other law.*

(1) If a public entity (other than the designated State unit) is obligated under Federal law (such as the Americans with Disabilities Act, section 504 of the Act, or section 188 of the Workforce Investment Act) or State law, or assigned responsibility under State policy or an interagency agreement established under this section, to provide or pay for any services considered to be vocational rehabilitation services (*e.g.*, interpreter services under § 361.48(j)), other than those services listed in paragraph (b) of this section, the public entity must fulfill that obligation or responsibility through—

(i) The terms of the interagency agreement or other requirements of this section;

(ii) Providing or paying for the service directly or by contract; or

(iii) Other arrangement.

(2) If a public entity other than the designated State unit fails to provide or pay for vocational rehabilitation services for an eligible individual as established under this section, the designated State unit must provide or pay for those services to the individual and may claim reimbursement for the services from the public entity that failed to provide or pay for those services. The public entity must reimburse the designated State unit pursuant to the terms of the interagency agreement or other mechanism described in paragraph (d) of this section in accordance with the procedures established in the agreement or mechanism pursuant to paragraph (d)(3)(ii) of this section.

(Authority: Sections 12(c) and 101(a)(8) of the Act; 29 U.S.C. 709(c) and 721(a)(8))

§ 361.54 Participation of individuals in cost of services based on financial need.

(a) *No Federal requirement.* There is no Federal requirement that the financial need of individuals be considered in the provision of vocational rehabilitation services.

(b) *State unit requirements.*

(1) The State unit may choose to consider the financial need of eligible individuals or individuals who are receiving services through trial work experiences under § 361.42(e) or during an extended evaluation under § 361.42(f) for purposes of determining the extent of their participation in the costs of vocational rehabilitation services, other than those services identified in paragraph (b)(3) of this section.

(2) If the State unit chooses to consider financial need—

(i) It must maintain written policies—

(A) Explaining the method for determining the financial need of an eligible individual; and

(B) Specifying the types of vocational rehabilitation services for which the unit has established a financial needs test;

(ii) The policies must be applied uniformly to all individuals in similar circumstances;

(iii) The policies may require different levels of need for different geographic regions in the State, but must be applied uniformly to all individuals within each geographic region; and

(iv) The policies must ensure that the level of an individual's participation in the cost of vocational rehabilitation services is—

(A) Reasonable;

(B) Based on the individual's financial need, including consideration of any disability-related expenses paid by the individual; and

(C) Not so high as to effectively deny the individual a necessary service.

(3) The designated State unit may not apply a financial needs test, or require the financial participation of the individual—

(i) As a condition for furnishing the following vocational rehabilitation services:

(A) Assessment for determining eligibility and priority for services under § 361.48(a), except those non-assessment services that are provided to an individual with a significant disability during either an exploration of the individual's abilities, capabilities, and capacity to perform in work situations through the use of trial work experiences under § 361.42(e) or an extended evaluation under § 361.42(f).

(B) Assessment for determining vocational rehabilitation needs under § 361.48(b).

(C) Vocational rehabilitation counseling and guidance under § 361.48(c).

(D) Referral and other services under § 361.48(d).

(E) Job-related services under § 361.48(l).

(F) Personal assistance services under § 361.48(n).

(G) Any auxiliary aid or service (e.g., interpreter services under § 361.48(j), reader services under § 361.48(k)) that an individual with a disability requires under section 504 of the Act (29 U.S.C. 794) or the Americans with Disabilities Act (42 U.S.C. 12101, *et seq.*), or regulations implementing those laws, in order for the individual to participate in the VR program as authorized under this part; or

(ii) As a condition for furnishing any vocational rehabilitation service if the individual in need of the service has been determined eligible for Social Security benefits under Titles II or XVI of the Social Security Act.

(Authority: Section 12(c) of the Act; 29 U.S.C. 709(c))

§ 361.55 Annual review of individuals in extended employment or other employment under special certificate provisions of the Fair Labor Standards Act.

The State plan must assure that the designated State unit—

(a) Annually reviews and reevaluates the status of each individual with a disability served under the vocational rehabilitation program who has achieved an employment outcome either in an extended employment setting in a community rehabilitation program or in any other employment setting in which the individual is compensated in accordance with section 14(c) of the Fair Labor Standards Act for 2 years after the individual achieves the employment outcome (and thereafter if requested by the individual or, if appropriate, the individual's representative) to determine the interests, priorities, and needs of the individual with respect to competitive employment or training for competitive employment;

(b) Enables the individual or, if appropriate, the individual's

representative to provide input into the review and reevaluation and documents that input in the record of services, consistent with § 361.47(a)(10), with the individual's or, as appropriate, the individual's representative's signed acknowledgment that the review and reevaluation have been conducted; and

(c) Makes maximum efforts, including identifying and providing vocational rehabilitation services, reasonable accommodations, and other necessary support services, to assist the individuals identified in paragraph (a) of this section in engaging in competitive employment as defined in § 361.5(b)(11).

(Authority: Section 101(a)(14) of the Act; 29 U.S.C. 721(a)(14))

§ 361.56 Requirements for closing the record of services of an individual who has achieved an employment outcome.

The record of services of an individual who has achieved an employment outcome may be closed only if all of the following requirements are met:

(a) *Employment outcome achieved.* The individual has achieved the employment outcome that is described in the individual's IPE in accordance with § 361.46(a)(1) and is—

(1) Consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice; and (2) In the most integrated setting possible, consistent with the individual's informed choice.

(b) *Employment outcome maintained.* The individual has maintained the employment outcome for an appropriate period of time, but not less than 90 days, necessary to ensure the stability of the employment outcome, and the individual no longer needs vocational rehabilitation services.

(c) *Satisfactory outcome.* At the end of the appropriate period under paragraph (b) of this section, the individual and the qualified rehabilitation counselor employed by the designated State unit consider the employment outcome to be satisfactory and agree that the individual is performing well in the employment.

(d) *Post-employment services.* The individual is informed through appropriate modes of communication of the availability of post-employment services.

(Authority: Sections 12(c), 101(a)(6), and 106(a)(2) of the Act; 29 U.S.C. 711(c), 721(a)(6), and 726(a)(2))

§ 361.57 Review of determinations made by designated State unit personnel.

(a) *Procedures.* The designated State unit must develop and implement procedures to ensure that an applicant or eligible individual who is dissatisfied with any determination made by personnel of the designated State unit that affects the provision of vocational rehabilitation services may request, or, if appropriate, may request through the individual's representative, a timely review of that determination. The procedures must be in accordance with paragraphs (b) through (k) of this section:

(b) *General requirements.*

(1) *Notification.* Procedures established by the State unit under this section must provide an applicant or eligible individual or, as appropriate, the individual's representative notice of—

(i) The right to obtain review of State unit determinations that affect the provision of vocational rehabilitation services through an impartial due process hearing under paragraph (e) of this section;

(ii) The right to pursue mediation under paragraph (d) of this section with respect to determinations made by designated State unit personnel that affect the provision of vocational rehabilitation services to an applicant or eligible individual;

(iii) The names and addresses of individuals with whom requests for mediation or due process hearings may be filed;

(iv) The manner in which a mediator or impartial hearing officer may be selected consistent with the requirements of paragraphs (d) and (f) of this section; and

(v) The availability of the client assistance program, established under 34 CFR part 370, to assist the applicant or eligible individual during mediation sessions or impartial due process hearings.

(2) *Timing.* Notice described in paragraph (b)(1) of this section must be provided in writing—

(i) At the time the individual applies for vocational rehabilitation services under this part;

(ii) At the time the individual is assigned to a category in the State's order of selection, if the State has established an order of selection under § 361.36;

(iii) At the time the IPE is developed; and

(iv) Whenever vocational rehabilitation services for an individual are reduced, suspended, or terminated.

(3) *Evidence and representation.* Procedures established under this section must—

(i) Provide an applicant or eligible individual or, as appropriate, the individual's representative with an opportunity to submit during mediation sessions or due process hearings evidence and other information that supports the applicant's or eligible individual's position; and

(ii) Allow an applicant or eligible individual to be represented during mediation sessions or due process hearings by counsel or other advocate selected by the applicant or eligible individual.

(4) *Impact on provision of services.* The State unit may not institute a suspension, reduction, or termination of vocational rehabilitation services being provided to an applicant or eligible individual, including evaluation and assessment services and IPE development, pending a resolution through mediation, pending a decision by a hearing officer or reviewing official, or pending informal resolution under this section unless—

(i) The individual or, in appropriate cases, the individual's representative requests a suspension, reduction, or termination of services; or

(ii) The State agency has evidence that the services have been obtained through misrepresentation, fraud, collusion, or criminal conduct on the part of the individual or the individual's representative.

(5) *Ineligibility.* Applicants who are found ineligible for vocational rehabilitation services and previously eligible individuals who are determined to be no longer eligible for vocational rehabilitation services pursuant to § 361.43 are permitted to challenge the determinations of ineligibility under the procedures described in this section.

(c) *Informal dispute resolution.* The State unit may develop an informal process for resolving a request for review without conducting mediation or a formal hearing. A State's informal process must not be used to deny the right of an applicant or eligible individual to a hearing under paragraph (e) of this section or any other right provided under this part, including the right to pursue mediation under paragraph (d) of this section. If informal resolution under this paragraph or mediation under paragraph (d) of this section is not successful in resolving the dispute within the time period established under paragraph (e)(1) of this section, a formal hearing must be conducted within that same time period, unless the parties agree to a specific extension of time.

(d) *Mediation.*

(1) The State must establish and implement procedures, as required under paragraph (b)(1)(ii) of this section, to allow an applicant or eligible individual and the State unit to resolve disputes involving State unit determinations that affect the provision of vocational rehabilitation services through a mediation process that must be made available, at a minimum, whenever an applicant or eligible individual or, as appropriate, the individual's representative requests an impartial due process hearing under this section.

(2) Mediation procedures established by the State unit under paragraph (d) must ensure that—

(i) Participation in the mediation process is voluntary on the part of the applicant or eligible individual, as appropriate, and on the part of the State unit;

(ii) Use of the mediation process is not used to deny or delay the applicant's or eligible individual's right to pursue resolution of the dispute through an impartial hearing held within the time period specified in paragraph (e)(1) of this section or any other rights provided under this part. At any point during the mediation process, either party or the mediator may elect to terminate the mediation. In the event mediation is terminated, either party may pursue resolution through an impartial hearing;

(iii) The mediation process is conducted by a qualified and impartial mediator, as defined in § 361.5(b)(43), who must be selected from a list of qualified and impartial mediators maintained by the State—

(A) On a random basis;

(B) By agreement between the director of the designated State unit and the applicant or eligible individual or, as appropriate, the individual's representative; or

(C) In accordance with a procedure established in the State for assigning mediators, provided this procedure ensures the neutrality of the mediator assigned; and

(iv) Mediation sessions are scheduled and conducted in a timely manner and are held in a location and manner that is convenient to the parties to the dispute.

(3) Discussions that occur during the mediation process must be kept confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings, and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of the process.

(4) An agreement reached by the parties to the dispute in the mediation process must be described in a written mediation agreement that is developed by the parties with the assistance of the qualified and impartial mediator and signed by both parties. Copies of the agreement must be sent to both parties.

(5) The costs of the mediation process must be paid by the State. The State is not required to pay for any costs related to the representation of an applicant or eligible individual authorized under paragraph (b)(3)(ii) of this section.

(e) *Impartial due process hearings.* The State unit must establish and implement formal review procedures, as required under paragraph (b)(1)(i) of this section, that provide that—

(1) A hearing conducted by an impartial hearing officer, selected in accordance with paragraph (f) of this section, must be held within 60 days of an applicant's or eligible individual's request for review of a determination made by personnel of the State unit that affects the provision of vocational rehabilitation services to the individual, unless informal resolution or a mediation agreement is achieved prior to the 60th day or the parties agree to a specific extension of time;

(2) In addition to the rights described in paragraph (b)(3) of this section, the applicant or eligible individual or, if appropriate, the individual's representative must be given the opportunity to present witnesses during the hearing and to examine all witnesses and other relevant sources of information and evidence;

(3) The impartial hearing officer must—

(i) Make a decision based on the provisions of the approved State plan, the Act, Federal vocational rehabilitation regulations, and State regulations and policies that are consistent with Federal requirements; and

(ii) Provide to the individual or, if appropriate, the individual's representative and to the State unit a full written report of the findings and grounds for the decision within 30 days of the completion of the hearing; and

(4) The hearing officer's decision is final, except that a party may request an impartial review under paragraph (g)(1) of this section if the State has established procedures for that review, and a party involved in a hearing may bring a civil action under paragraph (i) of this section.

(f) *Selection of impartial hearing officers.* The impartial hearing officer for a particular case must be selected—

(1) From a list of qualified impartial hearing officers maintained by the State unit. Impartial hearing officers included on the list must be—

(i) Identified by the State unit if the State unit is an independent commission; or

(ii) Jointly identified by the State unit and the State Rehabilitation Council if the State has a Council; and

(2)(i) On a random basis; or

(ii) By agreement between the director of the designated State unit and the applicant or eligible individual or, as appropriate, the individual's representative.

(g) *Administrative review of hearing officer's decision.* The State may establish procedures to enable a party who is dissatisfied with the decision of the impartial hearing officer to seek an impartial administrative review of the decision under paragraph (e)(3) of this section in accordance with the following requirements:

(1) A request for administrative review under paragraph (g) of this section must be made within 20 days of the mailing of the impartial hearing officer's decision.

(2) Administrative review of the hearing officer's decision must be conducted by—

(i) The chief official of the designated State agency if the State has established both a designated State agency and a designated State unit under § 361.13(b); or

(ii) An official from the office of the Governor.

(3) The reviewing official described in paragraph (g)(2)(i) of this section—

(i) Provides both parties with an opportunity to submit additional evidence and information relevant to a final decision concerning the matter under review;

(ii) May not overturn or modify the hearing officer's decision, or any part of that decision, that supports the position of the applicant or eligible individual unless the reviewing official concludes, based on clear and convincing evidence, that the decision of the impartial hearing officer is clearly erroneous on the basis of being contrary to the approved State plan, the Act, Federal vocational rehabilitation regulations, or State regulations and policies that are consistent with Federal requirements;

(iii) Makes an independent, final decision following a review of the entire hearing record and provides the decision in writing, including a full report of the findings and the statutory, regulatory, or policy grounds for the decision, to the applicant or eligible individual or, as appropriate, the individual's representative and to the State unit within 30 days of the request

for administrative review under paragraph (g)(1) of this section; and

(iv) May not delegate the responsibility for making the final decision under paragraph (g) of this section to any officer or employee of the designated State unit.

(4) The reviewing official's decision under paragraph (g) of this section is final unless either party brings a civil action under paragraph (i) of this section.

(h) *Implementation of final decisions.* If a party brings a civil action under paragraph (h) of this section to challenge the final decision of a hearing officer under paragraph (e) of this section or to challenge the final decision of a State reviewing official under paragraph (g) of this section, the final decision of the hearing officer or State reviewing official must be implemented pending review by the court.

(i) *Civil action.*

(1) Any party who disagrees with the findings and decision of an impartial hearing officer under paragraph (e) of this section in a State that has not established administrative review procedures under paragraph (g) of this section and any party who disagrees with the findings and decision under paragraph (g)(3)(iii) of this section have a right to bring a civil action with respect to the matter in dispute. The action may be brought in any State court of competent jurisdiction or in a district court of the United States of competent jurisdiction without regard to the amount in controversy.

(2) In any action brought under paragraph (i) of this section, the court—

(i) Receives the records related to the impartial due process hearing and the records related to the administrative review process, if applicable;

(ii) Hears additional evidence at the request of a party; and

(iii) Basing its decision on the preponderance of the evidence, grants the relief that the court determines to be appropriate.

(j) *State fair hearing board.* A fair hearing board as defined in § 361.5(b)(22) is authorized to carry out the responsibilities of the impartial hearing officer under paragraph (e) of this section in accordance with the following criteria:

(1) The fair hearing board may conduct due process hearings either collectively or by assigning responsibility for conducting the hearing to one or more members of the fair hearing board.

(2) The final decision issued by the fair hearing board following a hearing under paragraph (j)(1) of this section must be made collectively by, or by a majority vote of, the fair hearing board.

(3) The provisions of paragraphs (b)(1), (2), and (3) of this section that relate to due process hearings and of paragraphs (e), (f), (g), and (h) of this section do not apply to fair hearing boards under this paragraph (j).

(k) *Data collection.*

(1) The director of the designated State unit must collect and submit, at a minimum, the following data to the Commissioner of the Rehabilitation Services Administration (RSA) for inclusion each year in the annual report to Congress under section 13 of the Act:

(i) A copy of the standards used by State reviewing officials for reviewing decisions made by impartial hearing officers under this section.

(ii) The number of mediations held, including the number of mediation agreements reached.

(iii) The number of hearings and reviews sought from impartial hearing officers and State reviewing officials, including the type of complaints and the issues involved.

(iv) The number of hearing officer decisions that were not reviewed by administrative reviewing officials.

(v) The number of hearing decisions that were reviewed by State reviewing officials and, based on these reviews, the number of hearing decisions that were—

(A) Sustained in favor of an applicant or eligible individual;

(B) Sustained in favor of the designated State unit;

(C) Reversed in whole or in part in favor of the applicant or eligible individual; and

(D) Reversed in whole or in part in favor of the State unit.

(2) The State unit director also must collect and submit to the Commissioner of RSA copies of all final decisions issued by impartial hearing officers under paragraph (e) of this section and by State review officials under paragraph (g) of this section.

(3) The confidentiality of records of applicants and eligible individuals maintained by the State unit may not preclude the access of the RSA Commissioner to those records for the purposes described in this section.

(Authority: Section 102(c) of the Act; 29 U.S.C. 722(c))

Subpart C—Financing of State Vocational Rehabilitation Programs

§ 361.60 Matching requirements.

(a) *Federal share.*

(1) *General.* Except as provided in paragraph (a)(2) of this section, the Federal share for expenditures made by the State under the State plan, including expenditures for the provision of vocational rehabilitation services and the administration of the State plan, is 78.7 percent.

(2) *Construction projects.* The Federal share for expenditures made for the construction of a facility for community rehabilitation program purposes may not be more than 50 percent of the total cost of the project.

(b) *Non-Federal share.*

(1) *General.* Except as provided in paragraph (b)(2) and (3) of this section, expenditures made under the State plan to meet the non-Federal share under this section must be consistent with the provisions of 34 CFR 80.24.

(2) *Third party in-kind contributions.* Third party in-kind contributions specified in 34 CFR 80.24(a)(2) may not be used to meet the non-Federal share under this section.

(3) *Contributions by private entities.* Expenditures made from contributions by private organizations, agencies, or individuals that are deposited in the account of the State agency or sole local agency in accordance with State law and that are earmarked, under a condition imposed by the contributor, may be used as part of the non-Federal share under this section if the funds are earmarked for—

(i) Meeting in whole or in part the State's share for establishing a community rehabilitation program or constructing a particular facility for community rehabilitation program purposes;

(ii) Particular geographic areas within the State for any purpose under the State plan, other than those described in paragraph (b)(3)(i) of this section, in accordance with the following criteria:

(A) Before funds that are earmarked for a particular geographic area may be used as part of the non-Federal share, the State must notify the Secretary that the State cannot provide the full non-Federal share without using these funds.

(B) Funds that are earmarked for a particular geographic area may be used as part of the non-Federal share without requesting a waiver of statewideness under § 361.26.

(C) Except as provided in paragraph (b)(3)(i) of this section, all Federal funds must be used on a statewide basis consistent with § 361.25, unless a waiver of statewideness is obtained under § 361.26; and

(iii) Any other purpose under the State plan, provided the expenditures do not benefit in any way the donor, an individual to whom the donor is related by blood or marriage or with whom the donor has a close personal relationship,

or an individual, entity, or organization with whom the donor shares a financial interest. The Secretary does not consider a donor's receipt from the State unit of a grant, subgrant, or contract with funds allotted under this part to be a benefit for the purposes of this paragraph if the grant, subgrant, or contract is awarded under the State's regular competitive procedures.

(Authority: Sections 7(14), 101(a)(3), 101(a)(4) and 104 of the Act; 29 U.S.C. 706(14), 721(a)(3), 721(a)(4) and 724))

Example for paragraph (b)(3): Contributions may be earmarked in accordance with § 361.60(b)(3)(iii) for providing particular services (*e.g.*, rehabilitation technology services); serving individuals with certain types of disabilities (*e.g.*, individuals who are blind), consistent with the State's order of selection, if applicable; providing services to special groups that State or Federal law permits to be targeted for services (*e.g.*, students with disabilities who are receiving special education services), consistent with the State's order of selection, if applicable; or carrying out particular types of administrative activities permissible under State law. Contributions also may be restricted to particular geographic areas to increase services or expand the scope of services that are available statewide under the State plan in accordance with the requirements in § 361.60(b)(3)(ii).

§ 361.61 Limitation on use of funds for construction expenditures.

No more than 10 percent of a State's allotment for any fiscal year under section 110 of the Act may be spent on the construction of facilities for community rehabilitation program purposes.

(Authority: Section 101(a)(17)(A) of the Act; 29 U.S.C. 721(a)(17)(A))

§ 361.62 Maintenance of effort requirements.

(a) *General requirements.*

(1) The Secretary reduces the amount otherwise payable to a State for a fiscal year by the amount by which the total expenditures from non-Federal sources under the State plan for the previous fiscal year were less than the total of those expenditures for the fiscal year 2 years prior to the previous fiscal year.

Example: For fiscal year 2001, a State's maintenance of effort level is based on the amount of its expenditures from non-Federal sources for fiscal year 1999. Thus, if the State's non-Federal expenditures in 2001 are less than they were in 1999, the State has a maintenance of effort deficit, and the Secretary reduces the State's allotment in 2002 by the amount of that deficit.

(2) If, at the time the Secretary makes a determination that a State has failed to meet its maintenance of effort requirements, it is too late for the Secretary to make a reduction in accordance with paragraph (a)(1) of this section, then the Secretary recovers the amount of the maintenance of effort deficit through audit disallowance.

(b) *Specific requirements for construction of facilities.* If the State provides for the construction of a facility for community rehabilitation program purposes, the amount of the State's share of expenditures for vocational rehabilitation services under the plan, other than for the construction of a facility for community rehabilitation program purposes or the establishment of a facility for community rehabilitation purposes, must be at least equal to the expenditures for those services for the second prior fiscal year. If a State fails to meet the requirements of this paragraph, the Secretary recovers the amount of the maintenance of effort deficit through audit disallowance.

(c) *Separate State agency for vocational rehabilitation services for individuals who are blind.* If there is a separate part of the State plan administered by a separate State agency to provide vocational rehabilitation services for individuals who are blind—

(1) Satisfaction of the maintenance of effort requirements under paragraphs (a) and (b) of this section are determined based on the total amount of a State's non-Federal expenditures under both parts of the State plan; and

(2) If a State fails to meet any maintenance of effort requirement, the Secretary reduces the amount otherwise payable to the State for that fiscal year under each part of the plan in direct relation to the amount by which expenditures from non-Federal sources under each part of the plan in the previous fiscal year were less than they were for that part of the plan for the fiscal year 2 years prior to the previous fiscal year.

(d) *Waiver or modification.*

(1) The Secretary may waive or modify the maintenance of effort requirement in paragraph (a)(1) of this section if the Secretary determines that a waiver or modification is necessary to permit the State to respond to exceptional or uncontrollable circumstances, such as a major natural disaster or a serious economic downturn, that—

(i) Cause significant unanticipated expenditures or reductions in revenue that result in a general reduction of programs within the State; or

(ii) Require the State to make substantial expenditures in the vocational rehabilitation program for long-term purposes due to the one-time costs associated with the construction of a facility for community rehabilitation program purposes, the establishment of a facility for community rehabilitation program purposes, or the acquisition of equipment.

(2) The Secretary may waive or modify the maintenance of effort requirement in paragraph (b) of this section or the 10 percent allotment limitation in § 361.61 if the Secretary determines that a waiver or modification is necessary to permit the State to respond to exceptional or uncontrollable circumstances, such as a major natural disaster, that result in significant destruction of existing facilities and require the State to make substantial expenditures for the construction of a facility for community rehabilitation program purposes or the establishment of a facility for community rehabilitation program purposes in order to provide vocational rehabilitation services.

(3) A written request for waiver or modification, including supporting justification, must be submitted to the Secretary as soon as the State determines that an exceptional or uncontrollable circumstance will prevent it from making its required expenditures from non-Federal sources.

(Authority: Sections 101(a)(17) and 111(a)(2) of the Act; 29 U.S.C. 721(a)(17) and 731(a)(2))

§ 361.63 Program income.

(a) *Definition.* For purposes of this section, *program income* means gross income received by the State that is directly generated by an activity supported under this part.

(b) *Sources.* Sources of program income include, but are not limited to, payments from the Social Security Administration for assisting Social Security beneficiaries and recipients to achieve employment outcomes, payments received from workers' compensation funds, fees for services to defray part or all of the costs of services provided to particular individuals, and income generated by a State-operated community rehabilitation program.

(c) *Use of program income.*

(1) Except as provided in paragraph (c)(2) of this section, program income, whenever earned, must be used for the provision of vocational rehabilitation services and the administration of the State plan. Program income is considered earned when it is received.

(2) Payments provided to a State from the Social Security Administration for assisting Social Security beneficiaries and recipients to achieve employment outcomes may also be used to carry out programs under part B of Title I of the Act (client assistance), part B of Title VI

of the Act (supported employment), and Title VII of the Act (independent living).

(3) The State is authorized to treat program income as—

(i) An addition to the grant funds to be used for additional allowable program expenditures, in accordance with 34 CFR 80.25(g)(2); or

(ii) A deduction from total allowable costs, in accordance with 34 CFR 80.25(g)(1).

(4) Program income cannot be used to meet the non-Federal share requirement under § 361.60.

(Authority: Section 108 of the Act; 29 U.S.C. 728; 34 CFR 80.25)

§ 361.64 Obligation of Federal funds and program income.

(a) Except as provided in paragraph (b) of this section, any Federal funds, including reallotted funds, that are appropriated for a fiscal year to carry out a program under this part that are not obligated by the State by the beginning of the succeeding fiscal year and any program income received during a fiscal year that is not obligated by the State by the beginning of the succeeding fiscal year remain available for obligation by the State during that succeeding fiscal year.

(b) Federal funds appropriated for a fiscal year remain available for obligation in the succeeding fiscal year only to the extent that the State met the matching requirement for those Federal funds by obligating, in accordance with 34 CFR 76.707, the non-Federal share in the fiscal year for which the funds were appropriated.

(Authority: Section 19 of the Act; 29 U.S.C. 716)

§ 361.65 Allotment and payment of Federal funds for vocational rehabilitation services.

(a) *Allotment.*

(1) The allotment of Federal funds for vocational rehabilitation services for each State is computed in accordance with the requirements of section 110 of the Act, and payments are made to the State on a quarterly basis, unless some other period is established by the Secretary.

(2) If the State plan designates one State agency to administer, or supervise the administration of, the part of the plan under which vocational rehabilitation services are provided for individuals who are blind and another State agency to administer the rest of the plan, the division of the State's allotment is a matter for State determination.

(b) *Reallotment.*

(1) The Secretary determines not later than 45 days before the end of a fiscal year which States, if any, will not use their full allotment.

(2) As soon as possible, but not later than the end of the fiscal year, the Secretary reallots these funds to other States that can use those additional funds during the current or subsequent fiscal year, provided the State can meet the matching requirement by obligating the non-Federal share of any reallotted funds in the fiscal year for which the funds were appropriated.

(3) Funds reallotted to another State are considered to be an increase in the recipient State's allotment for the fiscal year for which the funds were appropriated.

(Authority: Sections 110 and 111 of the Act; 29 U.S.C. 730 and 731)

Subpart D—[Reserved]

Subpart E—Evaluation Standards and Performance Indicators

§ 361.80 Purpose.

The purpose of this subpart is to establish evaluation standards and performance indicators for the Program.

(Authority: 29 U.S.C. 726(a))

§ 361.81 Applicable definitions.

In addition to those definitions in § 361.5(b), the following definitions apply to this subpart:

Average hourly earnings means the average per hour earnings in the week prior to exiting the vocational rehabilitation (VR) program of an eligible individual who has achieved a competitive employment outcome.

Business Enterprise Program (BEP) means an employment outcome in which an individual with a significant disability operates a vending facility or other small business under the management and supervision of a designated State unit (DSU). This term includes home industry, farming, and other enterprises.

Exit the VR program means that a DSU has closed the individual's record of VR services in one of the following categories:

(1) Ineligible for VR services.

(2) Received services under an individualized plan for employment (IPE) and achieved an employment outcome.

(3) Received services under an IPE but did not achieve an employment outcome.

(4) Eligible for VR services but did not receive services under an IPE.

General or combined DSU means a DSU that does not serve exclusively individuals with visual impairments or blindness.

Individuals from a minority background means individuals who report their race and ethnicity in any of the following categories: American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, or Hispanic or Latino.

Minimum wage means the higher of the rate specified in section 6(a)(1) of the Fair Labor Standards Act of 1938, 29 U.S.C. 206(a)(1), (i.e., the Federal minimum wage) or applicable State minimum wage law.

Non-minority individuals means individuals who report themselves exclusively as White, non-Hispanic.

Performance period is the reporting period during which a DSU's performance is measured. For Evaluation Standards 1 and 2, performance data must be aggregated and reported for each fiscal year beginning with fiscal year 1999. However, DSUs that exclusively serve individuals with visual impairments or blindness must report each year the aggregated data for the 2 previous years for Performance Indicators 1.1 through 1.6; the second year must coincide with the performance period for general or combined DSUs.

Primary indicators means Performance Indicators 1.3, 1.4, and 1.5, which are specifically designed to measure—

(1) The achievement of competitive, self-, or BEP employment with earnings equivalent to the minimum wage or higher, particularly by individuals with significant disabilities; and

(2) The ratio between the average hourly earnings of individuals who exit the VR program in competitive, self-, or BEP employment with earnings equivalent to the minimum wage or higher and the State's average hourly earnings for all employed individuals.

RSA–911 means the Case Service Report that is submitted annually by a DSU as approved by the Office of Management and Budget (OMB).

Self-employment means an employment outcome in which the individual works for profit or fee in his or her own business, farm, shop, or office, including sharecroppers.

Service rate means the result obtained by dividing the number of individuals who exit the VR program after receiving one or more services under an IPE during any reporting period by the total number of individuals who exit the VR program (as defined in this section) during that reporting period.

State's average hourly earnings means the average hourly earnings of all persons in the State in which the DSU is located.

(Authority: 29 U.S.C. 726(a))

§ 361.82 Evaluation standards.

(a) The Secretary establishes two evaluation standards to evaluate the performance of each DSU that receives funds under this part. The evaluation standards assist the Secretary and each DSU to evaluate a DSU's performance in serving individuals with disabilities under the VR program.

(b) A DSU must achieve successful performance on both evaluation standards during each performance period.

(c) The evaluation standards for the VR program are—

(1) *Evaluation Standard 1—Employment outcomes.* A DSU must assist any eligible individual, including an individual with a significant disability, to obtain, maintain, or regain high-quality employment.

(2) *Evaluation Standard 2—Equal access to services.* A DSU must ensure that individuals from minority backgrounds have equal access to VR services. (Approved by the Office of Management and Budget under control number 1820–0508.)

(Authority: 29 U.S.C. 726(a))

§ 361.84 Performance indicators.

(a) The performance indicators establish what constitutes minimum compliance with the evaluation standards.

(b) The performance indicators require a DSU to provide information on a variety of factors to enable the Secretary to measure compliance with the evaluation standards.

(c) The performance indicators are as follows:

(1) *Employment outcomes.*

(i) *Performance Indicator 1.1.* The number of individuals exiting the VR program who achieved an employment outcome during the current performance period compared to the number of individuals who exit the VR program after achieving an employment outcome during the previous performance period.

(ii) *Performance Indicator 1.2.* Of all individuals who exit the VR program after receiving services, the percentage who are determined to have achieved an employment outcome.

(iii) *Performance Indicator 1.3.* Of all individuals determined to have achieved an employment outcome, the percentage who exit the VR program in competitive, self-, or BEP employment with earnings equivalent to at least the minimum wage.

(iv) *Performance Indicator 1.4.* Of all individuals who exit the VR program in competitive, self-, or BEP employment with earnings equivalent to at least the minimum wage, the percentage who are individuals with significant disabilities.

(v) *Performance Indicator 1.5.* The average hourly earnings of all individuals who exit the VR program in competitive, self-, or BEP employment with earnings levels equivalent to at least the minimum wage as a ratio to the State's average hourly earnings for all individuals in the State who are employed (as derived from the Bureau of Labor Statistics report ''State Average Annual Pay'' for the most recent available year).

(vi) *Performance Indicator 1.6.* Of all individuals who exit the VR program in competitive, self-, or BEP employment with earnings equivalent to at least the minimum wage, the difference between the percentage who report their own income as the largest single source of economic support at the time they exit the VR program and the percentage who report their own income as the largest single source of support at the time they apply for VR services.

(2) *Equal access to services.*

(i) *Performance Indicator 2.1.* The service rate for all individuals with disabilities from minority backgrounds as a ratio to the service rate for all non-minority individuals with disabilities.

(Approved by the Office of Management and Budget under control number 1820–0508.)

(Authority: 29 U.S.C. 726(a))

§ 361.86 Performance levels.

(a) *General.*

(1) Paragraph (b) of this section establishes performance levels for—

(i) General or combined DSUs; and

(ii) DSUs serving exclusively individuals who are visually impaired or blind.

(2) The Secretary may establish, by regulations, new performance levels.

(b) *Performance levels for each performance indicator.*

(1)(i) The performance levels for Performance Indicators 1.1 through 1.6 are—

Performance indicator	Performance level by type of DSU	
	General/Combined	Blind
1.1	Equal or exceed previous performance period	Same.
1.2	55.8%	68.9%.
1.3	72.6%	35.4%.
1.4	62.4%	89.0%.
1.5	.52 (Ratio)	.59.
1.6	53.0 (Math. Difference)	30.4.

(ii) To achieve successful performance on Evaluation Standard 1 (Employment outcomes), a DSU must meet or exceed the performance levels established for four of the six performance indicators in the evaluation standard, including meeting or exceeding the performance levels for two of the three primary indicators (Performance Indicators 1.3, 1.4, and 1.5).

(2)(i) The performance level for Performance Indicator 2.1 is—

Performance indicator	Performance levels
2.1	.80 (Ratio).

(ii) To achieve successful performance on Evaluation Standard 2 (Equal access), DSUs must meet or exceed the performance level established for Performance Indicator 2.1 or meet the performance requirement in paragraph (2)(iii) of this section.

(iii) If a DSU's performance does not meet or exceed the performance level required for Performance Indicator 2.1, or if fewer than 100 individuals from a minority population have exited the VR program during the reporting period, the DSU must describe the policies it has adopted or will adopt and the steps it has taken or will take to ensure that individuals with disabilities from minority backgrounds have equal access to VR services.

(Authority: 29 U.S.C. 726(a))

§ 361.88 Reporting requirements.

(a) The Secretary requires that each DSU report within 60 days after the end of each fiscal year the extent to which the State is in compliance with the

evaluation standards and performance indicators and include in this report the following RSA–911 data:

(1) The number of individuals who exited the VR program in each closure category as specified in the definition of ''Exit the VR program'' under § 361.81.

(2) The number of individuals who exited the VR program in competitive, self-, or BEP employment with earnings at or above the minimum wage.

(3) The number of individuals with significant disabilities who exited the VR program in competitive, self-, or BEP employment with earnings at or above the minimum wage.

(4) The weekly earnings and hours worked of individuals who exited the VR program in competitive, self-, or BEP employment with earnings at or above the minimum wage.

(5) The number of individuals who exited the VR program in competitive, self-, or BEP employment with earnings at or above the minimum wage whose primary source of support at the time they applied for VR services was ''personal income.''

(6) The number of individuals who exited the VR program in competitive, self-, or BEP employment with earnings at or above the minimum wage whose primary source of support at closure was ''personal income.''

(7) The number of individuals exiting the VR program who are individuals from a minority background.

(8) The number of non-minority individuals exiting the VR program.

(9) The number of individuals from a minority background exiting the VR program after receiving services under an IPE.

(10) The number of non-minority individuals exiting the VR program after receiving services under an IPE.

(b) In lieu of the report required in paragraph (a) of this section, a DSU may submit its RSA–911 data on tape, diskette, or any alternative electronic format that is compatible with RSA's capability to process such an alternative, as long as the tape, diskette, or alternative electronic format includes the data that—

(1) Are required by paragraph (a)(1) through (10) of this section; and

(2) Meet the requirements of paragraph (c) of this section.

(c) Data reported by a DSU must be valid, accurate, and in a consistent format. If a DSU fails to submit data that are valid, accurate, and in a consistent format within the 60-day period, the DSU must develop a program improvement plan pursuant to § 361.89(a). (Approved by the Office of Management and Budget under control number 1820–0508.)

(Authority: 29 U.S.C. 726(b))

§ 361.89 Enforcement procedures.

(a) If a DSU fails to meet the established performance levels on both evaluation standards as required by § 361.82(b), the Secretary and the DSU must jointly develop a program improvement plan that outlines the specific actions to be taken by the DSU to improve program performance.

(b) In developing the program improvement plan, the Secretary considers all available data and information related to the DSU's performance.

(c) When a program improvement plan is in effect, review of the plan is conducted on a biannual basis. If necessary, the Secretary may request that a DSU make further revisions to the plan to improve performance. If the Secretary establishes new performance levels under § 361.86(a)(2), the Secretary and the DSU must jointly modify the program improvement plan based on the new performance levels. The Secretary continues reviews and requests revisions until the DSU sustains satisfactory performance based on the current performance levels over a period of more than 1 year.

(d) If the Secretary determines that a DSU with less than satisfactory performance has failed to enter into a program improvement plan or comply substantially with the terms and conditions of the program improvement plan, the Secretary, consistent with the procedures specified in § 361.11, reduces or makes no further payments to the DSU under this program until the DSU has met one of these two requirements or raised its subsequent performance to meet the current overall minimum satisfactory level on the compliance indicators.

(Approved by the Office of Management and Budget under control number 1820–0508.)

(Authority: 29 U.S.C. 726(b) and (c))

Appendix

Analysis of Comments and Changes

Note: The following appendix will not appear in the Code of Federal Regulations.

Section 361.4—Applicable Regulations

Comments: Several commenters requested clarification of proposed § 361.4(c) and (d) that made applicable to the VR program the regulations implementing the One-Stop system under Title I of the WIA. In particular, these commenters requested that the Secretary assure in this section that the regulations governing the One-Stop system do not conflict with the regulations in part 361 and that the One-Stop system requirements would not apply if conflicts between regulatory provisions arise.

Discussion: Proposed § 361.4(c) listed the regulations in 20 CFR part 662 (Description of One-Stop Service Delivery System under Title I of WIA) among the regulations applicable to the VR program. Similarly, proposed § 361.4(d) identified the civil rights protections under 29 CFR part 37 (Implementation of the Nondiscrimination and Equal Opportunity Provisions of WIA) as applicable to VR program activities that are conducted as part of the One-Stop system. Citing these parts of Federal regulations is intended solely as a means of notifying State units of their regulatory obligations as One-Stop system partners.

Moreover, both Title I of WIA and its implementing regulations specify that partner programs, such as the VR program, are to participate in applicable One-Stop system activities in a manner that is consistent with the Federal law authorizing the individual partner program (see e.g., section 121(b)(1)(A)(ii) of WIA; 20 CFR 662.230(d)). We interpret this requirement to mean that the DSU administering the VR program in the State must partner with the other components of the One-Stop system in accordance with the requirements of both Title I of the Rehabilitation Act of 1973 and these final regulations. Given that condition on One-Stop system participation, and the fact that these regulations generally govern State conduct, we do not consider it appropriate to include in the regulations the assurances sought by the commenters. However, we emphasize that we have worked closely with the U.S. Department of Labor to ensure that the One-Stop system regulations do not conflict with VR program requirements. Despite these efforts, we urge State units and others to inform us of any apparent conflicts between regulatory provisions that arise so that we, along with the Department of Labor, can address any inconsistencies that might remain.

Changes: None.

Section 361.5(b)—Applicable Definitions

• *General*

Comments: Several commenters asked that additional terms be defined in the final regulations. One commenter requested that a definition of ''informed choice'' be added to the regulations. Other commenters asked that separate definitions of the terms ''qualified vocational rehabilitation counselor'' and ''qualified vocational rehabilitation counselor employed by the designated State unit'' be included among the regulatory definitions. Finally, some commenters asked that ''rehabilitation engineering'' be defined in the final regulations since that term is used in the definition of ''rehabilitation technology,'' while others suggested that ''mediation'' be defined in the final regulations in order to clarify the scope of the mediation process.

Discussion: We do not believe it is necessary to define ''informed choice'' in the final regulations. Section 361.52 of both the proposed and final regulations, which tracks section 102(d) of the Act, enumerates the critical aspects of informed choice and reflects the statutory emphasis that individuals participating in the VR program must be able to exercise informed choice

throughout the entire rehabilitation process. That section of the regulations also retains additional choice-related provisions from the current regulations, including, in § 361.52(c), the types of information that must be provided for an individual to exercise choice in selecting VR services and service providers. Thus, § 361.52, as a whole, contains a comprehensive list of requirements intended to ensure that individuals are given meaningful choices, and the opportunity to exercise those choices, in each aspect of their rehabilitation, as the Act intends.

For further discussion of our decision to not define ''informed choice,'' please see the analysis of comments to § 361.52 in this appendix.

We agree that clarification is needed concerning the distinction between a ''qualified vocational rehabilitation counselor'' and a ''qualified vocational rehabilitation counselor employed by the DSU.'' However, we do not believe that defining these terms would provide the necessary clarification since States can readily determine which counselors they employ. Rather, we think it would be more helpful to further explain the differences between the functions that must be performed by DSU and non-DSU counselors. That discussion can be found in the analysis of comments received under § 361.45.

We agree that retaining the current regulatory definition of ''rehabilitation engineering'' would be beneficial.

Finally, the 1998 Amendments introduced mediation as another means for individuals and State units to resolve disputes regarding the provision of VR services. Although mediation is new to the VR program, it has been used for years in other programs as a less adversarial process for resolving disputes than formal due process hearings or court litigation. The NPRM provided guidance to States in developing their systems of mediation by defining the statutory term ''qualified and impartial mediator.'' However, we agree that defining ''mediation'' in the regulations would provide further clarification.

We believe it is important that the regulations give States sufficient flexibility to establish mediation procedures that best meet the needs of individuals with disabilities in the State and the needs of the State unit. At the same time, for efficiency purposes, we feel that the definition of ''mediation'' in the final regulations should allow for States to conduct mediations under the VR program in a manner that is consistent with those conducted by the State under similar programs. We believe that a definition that is based on relevant portions of the definition of ''mediation'' in the Federal regulations governing the Client Assistance Program (CAP) in 34 CFR 370.6(b) serves both of those purposes.

Changes: We have amended the proposed regulations to include definitions of the terms ''mediation'' and ''rehabilitation engineering.'' These definitions are located in § 361.5(b)(36) and (b)(44), respectively, meaning that other definitions in the proposed regulations have been renumbered in the final regulations.

• *Administrative costs under the State plan*

Comments: One commenter asked why the listing of costs in the proposed definition of ''administrative costs under the State plan'' was preceded by the term ''including'' rather than ''including, but not limited to,'' as in the current regulations. This same commenter also asked what is meant by ''support services'' to other entities, which was listed as an administrative cost under § 361.5(b)(2)(iv) of the proposed regulations.

Discussion: The proposed definition of ''administrative costs under the State plan,'' which tracks the definition in section 7(1) of the Act, does not differ substantively from the previous regulatory definition. However, because we interpret the statutory definition to allow for ''administrative costs'' other than those listed in the Act, we agree with the commenter that the definition should specify that the scope of administrative costs is not limited to the costs listed in the definition.

''Support services to other State agencies, private nonprofit organizations, and businesses and industries,'' which is referenced in section 7(1)(D) of the Act, as well as in § 361.5(b)(2)(iv), can include activities such as training the staff of the One-Stop system on disability issues, providing organizations with materials and advice on auxiliary aids and services and other accessibility issues, reviewing employers' workplace policies and hiring practices, and other activities that would facilitate and promote the employment of individuals with disabilities. The scope of support services that a State unit may provide would differ depending upon the circumstances in that State.

Changes: We have amended the definition of ''administrative costs under the State plan'' to clarify that the scope of administrative costs under the program includes, but is not limited to, the costs listed in the definition.

• *Appropriate modes of communication*

Comments: Several commenters requested that we amend the proposed definition of ''appropriate modes of communication'' to include additional communication modes that are available for individuals who are deaf or hard of hearing.

Discussion: The definition of ''appropriate modes of communication'' in the proposed regulations, which was the same as the previous regulatory definition, was not intended as a comprehensive list of communication modes used by persons with disabilities. Accordingly, the definition specified that the scope of appropriate modes was not limited to the identified examples and allowed for other modes as they are needed.

Changes: None.

• Assessment for determining eligibility and vocational rehabilitation needs

Comments: One commenter asked that this proposed definition be amended to ensure that the information used in assessing eligibility, order of selection category, and vocational rehabilitation needs of an individual with a disability is provided by professionals with expertise in the individual's disabling condition or conditions. This commenter also asked that we revise the proposed regulations to require that appropriate modes of communication are used in the course of conducting assessments.

Discussion: The points made by the commenter relate to important elements of the assessment process. However, we believe those points are sufficiently addressed by other requirements in the regulations. For example, § 361.42(a) of both the proposed and final regulations requires that determinations of eligibility be made by qualified personnel. Similarly, § 361.18(e) requires that the State unit be able to communicate with applicants, as well as eligible individuals, through appropriate modes of communication. Because these requirements apply to the State unit as it conducts assessments and fulfills its other functions, we do not consider it necessary to amend the proposed definition as the commenter requested.

Changes: None.

• *Comparable services and benefits*

Comments: One commenter asked that the proposed definition be revised to specifically exclude the personal resources of the eligible individual from the scope of ''comparable services and benefits'' that the State unit must use before expending program funds in support of VR services.

In addition, a number of commenters asked whether a ''ticket'' issued to an individual with a disability under the Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. 106–170 (TWWIIA) constitutes a comparable service or benefit. Several other commenters stated that a Plan for Achieving Self-Support (PASS) issued by the Social Security Administration (SSA) should not be treated as a comparable service or benefit.

Discussion: The proposed regulatory definition of comparable services and benefits—services and benefits that are provided or paid for by other Federal, State or local public agencies, by health insurance, or by employee benefits—did not include the eligible individual's personal resources. Nonetheless, an individual may be asked to participate in the costs of certain VR services to the extent that the State unit uses a financial needs test that is consistent with the requirements in § 361.54 of the regulations.

Because Social Security recipients with disabilities are issued ''tickets'' under TWWIIA in order to receive training and employment-related services from an employment network as defined in that act, we believe that the ticket constitutes a comparable service and benefit under the VR program. Thus, to the extent that a ticket holder is receiving services from another entity that is serving as that individual's employment network, the DSU need not expend VR program funds on services that are comparable to the services the individual is already receiving. On the other hand, if the individual initially chooses the DSU as its employment network under TWWIIA, or otherwise transfers his or her ticket to the DSU, then the individual would be served solely by the DSU, and the ticket would not be considered a comparable service and benefit.

On a related point, we note that DSUs must accept a ticket as sufficient evidence that the

ticket holder has a disability, is receiving Social Security benefits, and therefore is presumptively eligible under the VR program (see § 361.42(a)(3) of the final regulations).

Finally, we agree with the commenters' assertion that a PASS does not constitute a comparable service or benefit. Simply stated, a PASS is a mechanism made available to SSDI beneficiaries under the Social Security Act that enables its holder to conserve certain amounts of his or her own income or resources for purposes of supporting himself or herself in the future. Thus, because a PASS is not a source of support for VR services, we do not view it as a comparable benefit that the DSU can look to as an alternative to expending VR program funds.

Changes: None.

• *Competitive employment*

Comments: One commenter questioned the basis for the requirement that ''competitive employment'' be limited to employment outcomes in integrated settings. A second commenter asked that we broaden the definition of ''competitive employment'' in the proposed regulations to include employment under the Javits-Wagner-O'Day (JWOD) program if that employment is chosen by the eligible individual.

Discussion: The proposed definition of ''competitive employment'' was the same as that found in the previous regulations. Although the term is not defined in the Act, section 7(11), the statutory definition of ''employment outcome'' does refer to competitive employment in the integrated labor market. On that basis, and in light of the great emphasis that the Act places on maximizing the integration into society of persons with disabilities, it has been our longstanding policy to define ''competitive employment'' to mean employment in an integrated setting (at or above minimum wage). For further information on the integrated setting (and wage) components of the ''competitive employment'' definition, please refer to the relevant discussion in the preamble to the previous regulations (62 FR 6310 through 6311).

Whether an employment outcome meets the regulatory definition of ''competitive employment'' is to be determined on case-by-case basis. If a particular job, including a job secured under the JWOD program, is integrated (*i.e.,* the individual with a disability interacts with non-disabled persons to the same extent that non-disabled individuals in comparable positions interact with other persons; § 361.5(b)(33)(ii) of the final regulations) and the individual is compensated at or above the minimum wage (and not less than the customary wage and benefit level paid by the employer for the same or similar work performed by individuals who are not disabled; § 361.5(b)(11)(ii) of the final regulations), then that position would be considered competitive employment. In fact, we expect that many jobs secured under JWOD service contracts would meet these criteria. On the other hand, employment in a non-integrated setting such as a sheltered workshop would not qualify as competitive employment regardless of whether the position is obtained under a JWOD contract or another program or arrangement.

Changes: None.

• *Employment outcome*

Comments: A number of commenters recommended that we expand the definition of ''employment outcome'' in the proposed regulations (*i.e.*, entering or retaining full- or part-time competitive, supported, or other employment) to include ''advancing in'' appropriate employment. This change, the commenters believe, would encourage DSUs to look beyond entry-level employment options for eligible individuals.

Another commenter asked that we define ''part-time employment'' in the final regulations. This commenter expressed concern about DSUs expending resources on individuals who might work very few hours in the course of a week or a month.

Discussion: The chief purpose of the VR program is to assist eligible individuals with disabilities to achieve high-quality employment outcomes consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice. Because that standard is reflected in the definition of the term ''employment outcome,'' we believe that the regulations sufficiently support the commenters' point that individuals with disabilities who are currently employed should be able to receive VR services in order to advance in their careers.

Additionally, the availability of VR services for purposes of ''advancing in'' employment is addressed in other parts of the regulations. For example, § 361.46(a)(1)(i)) of the final regulations also specifies that the employment outcome identified in the individualized plan for employment, *i.e.*, the employment goal the individual must pursue with the assistance of the State unit, must be consistent with the individual's unique strengths, resources, priorities, concerns, abilities, capabilities, career interests, and informed choice. That section requires that States look beyond options in entry-level employment for VR program participants who are capable of more challenging work. Specifically, the eligible individual should be assisted in pursuing the job that reflects his or her strengths, resources, abilities, and other employment factors previously listed. We suggest that you consult Rehabilitation Services Administration (RSA) Policy Directive 97–04 for a more complete discussion of the scope and selection of employment outcomes for eligible individuals.

We have not defined ''part-time employment'' as used in the proposed definition of ''employment outcome.'' We note that most employers generally consider any job of less than 35 hours per week to be part-time. Yet, we do not believe that it would be appropriate to require a minimum number of hours for part-time work secured through the VR program.

Although we think that instances in which eligible individuals work only a handful of hours per week are limited, we do not want to discourage State units from serving potential part-time workers who, with the State unit's support, may increase their hours or even become employed full-time at a later date.

Changes: None.

• *Fair Hearing Board*

Comments: One commenter suggested modifying the proposed regulations to require a State's fair hearing board to include at least one individual with a disability.

Discussion: By defining ''fair hearing board'' in the proposed regulations, we intended to clarify past confusion about the scope of the fair hearing board exception to the due process requirements under section 102(c)(6)(A) of the Act. In particular, the proposed regulations specified in § 361.57(j) that for a State's pre-1985 fair hearing board to qualify under the exception, that board must be comprised of a group of persons that acts collectively when issuing final decisions to resolve disputes concerning the provision of VR services to applicants or eligible individuals.

These proposed requirements were intended to address instances in which some States had misinterpreted the exception as enabling a single administrative law judge or other official of a State office of hearing examiners to carry out hearings under § 361.57 without following the procedural requirements in that section. In response, we modeled the proposed definition after the actual State fair hearing board that served as the catalyst for the statutory exception in the 1986 Amendments to the Rehabilitation Act. Because those few States with hearing boards that qualify under the exception have long followed this authorized State process for resolving individual disputes under the VR program, we do not believe it is necessary or prudent to impose special membership requirements on those boards through regulations. We do, however, encourage the few fair hearing board States to consider qualified individuals with disabilities when vacancies on these boards arise.

Changes: None.

• *Maintenance*

Comments: Several commenters objected to the use of examples following this definition, stating that the information included in the examples should be placed in sub-regulatory guidance. Other commenters supported the use of the examples in the proposed regulations.

In addition, one commenter asked that we clarify the types of ''enrichment activities'' that would fall under the fourth example to the proposed definition, while another asked that we eliminate that example altogether.

Discussion: As we have stated in preambles to prior versions of the VR program regulations, we believe that the limited use of examples following the regulatory definition of ''maintenance'' is helpful in understanding the types of services that maintenance may include. The examples are purely illustrative and are not meant to limit or exclude other types of services that could be considered maintenance.

The fourth example to both the proposed and previous regulatory definition stated that maintenance can include the costs of an individual's ''participation in enrichment activities'' related to the individual's training. This example was added to the previous regulations in 1997 in response to the requests of public commenters who noted that some DSUs establish limits in

maintenance budgets that preclude individuals from participating in enrichment activities (*e.g.,* student trips, visits to museums, supplemental lectures, etc.) that are often important components of a student's training program. The ''enrichment'' example was intended to encourage DSUs to factor in these extra costs when developing an individualized plan for employment (IPE) for a student so that the individual can take advantage of supplemental enrichment activities as appropriate.

Changes: None.

• *Personal assistance services*

Comments: One commenter questioned the point at which a State unit can provide personal assistance services to an individual with a disability.

Discussion: The proposed definition, which was the same as that in the previous regulations, specified that ''personal assistance services'' (*i.e.,* services designed to assist persons with disabilities in daily living activities) must be necessary to the achievement of an employment outcome and may be provided only while the individual is receiving other VR services. As long as those conditions are met, personal assistance services, as defined in § 361.5(b)(39) of the regulations, can be made available at any stage in the VR process, including during the assessment for determining the individual's eligibility and priority for VR services.

Changes: None.

• *Physical and mental restoration services*

Comments: One commenter asked us to require that all services listed in the proposed definition of ''physical and mental restoration services'' be provided by personnel who are qualified in accordance with applicable State licensure laws. Another commenter asked that the definition in the final regulations specifically refer to ''assistive listening and alerting devices.'' Finally, one commenter asked that the regulations prohibit a State unit from providing physical or mental restoration services if other resources are available.

Discussion: The proposed regulations followed the scope of physical and mental restoration services specified in section 103(a)(6) of the Act, and we do not believe that it would be appropriate to apply, solely through regulations, State licensure requirements on the provision of additional restoration services. However, a State may, if it has not done so already, choose to establish licensure or other qualified personnel requirements for providers of physical and mental restoration services. Those States would need to address those requirements in its written policies on the nature and scope of services developed under § 361.50.

We do not believe it is necessary to list additional restoration services in the final regulatory definition. Additional medical or medically related services that an individual needs in order to achieve an employment outcome are authorized under § 361.5(b)(40)(xvi).

Similarly, the commenter's concerns about using other resources before expending VR funds in support of restoration services is fully addressed elsewhere in the regulations. Section 361.48(e) of both the proposed and final regulations, under which restoration services are authorized, specifies that those services can be made available only to the extent that financial support for the services is not available from other sources. The application of the more general comparable services and benefit requirements in § 361.53 produces the same result.

Changes: None.

• *Physical or mental impairment*

Comments: Several commenters questioned the proposed revision to the previous regulatory definition of ''physical or mental impairment'' to mirror the definition used in the regulations implementing section 504 of the Act (section 504) (34 CFR 104.3) and the Americans with Disabilities Act (ADA). The commenters stated that using the ADA or section 504 definition may create confusion, conflict with existing definitions in State law, and weaken the eligibility criteria of the VR program. Several other commenters supported the revised definition, stating that consistency across Federal disability laws leads to more effective administration of the VR and other programs.

Discussion: As noted in the preamble discussion of the changes to the definition of ''physical or mental impairment'' proposed in the NPRM (65 FR 10622), the revised definition does not impact on the employment-related eligibility criteria under the VR program. The changes to the definition in the previous regulations were proposed in an effort to make the VR program regulations more consistent with other Federal disability laws that define ''physical or mental impairment.'' We agree with those commenters who indicated that consistency with the definition used in the ADA and section 504 regulations increases efficiency and actually lessens confusion by eliminating the need to duplicate efforts in assessing whether an individual has an impairment. Again, the changes address only whether an impairment exists; eligibility for VR services remains dependent on whether an individual also satisfies the eligibility criteria that are focused on employment (*i.e.,* the impairment results in a substantial impediment to employment and the other criteria in § 361.42(a)).

Also, we do not believe that the proposed definition restricted the scope of physical or mental impairments that satisfied the previous regulatory definition or that the proposed definition conflicted with definitions of the same term in State law. If such a conflict exists, we ask that the State seek technical assistance from RSA in modifying its requirements in order to ensure that the State does not employ additional or more restrictive eligibility criteria for individuals to receive VR services as compared to the criteria specified in these final regulations.

Changes: None.

• *Post-employment services*

Comments: One commenter requested that the proposed regulations be modified to eliminate the availability of post-employment services for purposes of ''advancing'' in employment.

Discussion: Although the term ''post-employment services'' is not defined in the Act, section 103(a)(18) of the Act specifically authorizes post-employment services that are necessary to assist an individual with a disability to retain, regain, or *advance* in employment. The proposed definition, which followed the definition in the previous regulations, supported the use of post-employment services to enable persons to ''advance'' in employment. As in the previous regulations, the note that followed the proposed definition offered additional guidance regarding the provision of post-employment services.

Changes: None.

• *Qualified and impartial mediator*

Comments: We received many comments on the proposed definition of ''qualified and impartial mediator.'' First, several commenters stated that requiring mediators to be ''trained in effective mediation techniques consistent with any State-approved or -recognized certification, licensing, registration, or other requirements* * *'' establishes too restrictive a standard for mediators. Others sought additional guidance on how to implement this requirement if the State has not established applicable certification or other requirements. In addition, several commenters asked whether the prohibition on public agency employees serving as mediators under the proposed definition applies to those from a State Office of Dispute Resolution who conduct mediations across multiple State programs.

Aside from those issues, some commenters asked that we clarify whether a qualified and impartial mediator could also serve as an impartial hearing officer in resolving individual disputes that arise under the VR program. Other commenters voiced support for the proposed definition and for the emphasis given to mediation in the proposed regulations.

Discussion: In establishing the general guidelines that govern mediations, section 102(c)(4) of the Act requires that mediations be conducted by a ''qualified and impartial mediator who is trained in effective mediation techniques.'' We defined ''qualified and impartial mediator'' in the proposed regulations as a means of providing guidance to the States in identifying or training available mediators.

As indicated previously, we are aware that many States already use mediation to resolve disputes arising under other authorities (*e.g.,* the Individuals with Disabilities Education Act (IDEA) or family law statutes) and that education, experience, or other qualification standards for mediators may vary from State to State. Thus, the proposed requirement that mediators under the VR program be trained consistent with applicable certification or other requirements was intended to ensure that mediators of disputes arising under the VR program are sufficiently qualified and that the State unit is able to use its State's existing pool of qualified mediators.

We fully agree that mediators in a State Office of Dispute Resolution or other similar office should be able to conduct mediations under the VR program, and we have modified the proposed definition to accommodate that situation. This change is analogous to the provision that enables administrative law judges and hearing examiners in the State to

serve as impartial hearing officers even though those individuals are public employees (see the definition of ''impartial hearing officer'' in § 361.5(b)(25)).

In addition, although we believe that it is not generally the case, if there are no recognized credentialing or qualification standards for mediators in the State, then the Act and these final regulations require only that the State unit ensure that its mediators are trained in effective mediation techniques and meet the other components of the definition in § 361.5(b)(43).

It is critical that qualified and impartial mediators be neutral in facilitating the resolution of disputes regarding the provision of services to applicants or eligible individuals under the VR program. Therefore, we modeled the impartiality requirements in the proposed definition of ''qualified and impartial mediator'' after similar requirements in the previous definition of ''impartial hearing officer.'' Nevertheless, we realize that many States, particularly rural States with relatively small populations, have difficulty maintaining an appropriate pool of individuals to serve as hearing officers. It is not unusual in these or other States for hearing officers also to be trained as mediators, and we interpret the Act as allowing individuals to serve as both mediators and hearing officers under the VR program, provided they meet the applicable qualifications for each position. However, we also interpret the statutory requirement that mediators and hearing officers be impartial (see section 102(c)(4)(B)(iii) of the Act in reference to mediators and sections 7(16) and 102(c)(5) of the Act in reference to hearing officers) to preclude the same individual from serving as both mediator and hearing officer in the same case.

Changes: We have revised the definition of ''qualified and impartial mediator'' to allow employees of a State office of mediators or similar office to serve as qualified and impartial mediators under the VR program.

• *Substantial impediment to employment*

Comments: One commenter suggested that ''communication'' be listed among the attendant factors in the definition that could indicate the existence of a ''substantial impediment to employment,'' since communication plays a critical role in the individual's ability to function in the workplace. Other commenters requested that the proposed definition be revised to include examples of how the attendant medical factors are applied if medical measures are taken and result in mitigating functional limitations.

Discussion: We agree that communication competence is crucial to success in the workplace. Although the proposed and previous regulations stated explicitly that a ''substantial impediment to employment'' could be measured in terms of ''other factors,'' we agree that ''communication'' should be added to the specific factors listed in the final regulatory term.

We suspect that those commenters who suggested that the final regulations explain how attendant medical factors indicating the existence of a ''substantial impediment to employment'' are assessed if medical measures that mitigate functional limitations (also referred to as ''mitigating measures'') are taken are questioning the application to the VR program of recent Supreme Court case law interpreting the ADA. The relevant cases require that any mitigating measures (*e.g.,* medication) that an individual is using to lessen the effects of that person's impairment be taken into account in determining whether the individual has a disability under the ADA (*i.e.,* an impairment that substantially limits one or more major life activities).

It is not clear, however, that the Court's decisions apply to the VR program eligibility criterion that an individual's impairment constitutes a substantial impediment to employment, since that provision and ADA language in question are not identical. Moreover, the purpose of the ADA, which is a civil rights statute, differs from that of the VR program, which provides Federal funding to assist individuals with disabilities enter into employment. We are not aware of any instances in which States, based on these cases, have altered their processes for assessing an individual's eligibility for the VR program; nor would we encourage them to do so.

Changes: None.

• *Supported employment*

Comments: Some commenters requested clarification of what it means to be ''working toward competitive employment'' for purposes of meeting the definition of ''supported employment'' in the proposed regulations. These commenters also asked whether the fact that an individual in supported employment is working toward competitive employment affects the 18-month limit on supported employment services provided by the State unit.

Discussion: The 1998 Amendments expanded the prior statutory definition of ''supported employment'' (''competitive work in an integrated setting with ongoing supports'') to also include ''employment in integrated settings in which individuals are working toward competitive work'' in order to cover persons who are working in supported employment settings but are making less than the minimum wage. ''Competitive employment,'' which we have long viewed as synonymous with the term ''competitive work'' used in the supported employment definition, generally refers to employment that is performed in an integrated setting for which the individual is compensated at or above the minimum wage. Thus, as long as an individual receiving ongoing support services while working in an integrated setting is also progressing or moving toward the minimum wage level, then the individual's job is considered ''supported employment.'' We note, however, that an individual in supported employment working toward competitive employment would not be considered to have achieved a ''competitive employment'' outcome until the individual is earning at least the minimum wage consistent with the definition of ''competitive employment'' in § 361.5(b)(11).

We also note that the change to the statutory definition of ''supported employment'' does not affect the 18-month period for which the DSU can provide supported employment services. Once that 18 months has passed (and unless the special circumstances warrant an extension), ongoing services, if needed, must be provided by a provider of extended services (see § 361.5(b)(20) of the final regulations) regardless of whether the individual has yet to receive at least the minimum wage.

Changes: None.

• *Transportation*

Comments: Five commenters asked that the examples following the proposed definition of ''transportation'' be deleted. Another commenter supported specifically the example stating that the modification of a vehicle is a rehabilitation technology, rather than a transportation, service. Another commenter asked that we include in the final regulations specific authority for DSUs to pay for the repair and maintenance of vehicles.

Discussion: We have found that the examples following the previous regulatory definition of ''transportation,'' which were largely the same as those included in the proposed regulations, were helpful to State agency personnel, individuals with disabilities, and others in clarifying the scope of transportation services authorized under the VR program. As we have always maintained, these examples are purely illustrative and are not meant to provide a comprehensive set of allowable transportation services.

Thus, because other authorized ''transportation'' services exist, and should be considered in light of the needs of the individual, we do not believe it is necessary to specify additional transportation costs in the regulations. We do note, however, that the second example to the proposed definition identifies the ''purchase and repair'' of vehicles as an example of an authorized transportation expense. We view the vehicle ''repair and maintenance'' expense identified by the commenter as covered by that example and, therefore, authorized. We would also instruct each DSU to include in its written policies governing the nature and scope of services under § 361.50(a) any additional transportation expenses that the DSU generally provides.

Changes: None.

Section 361.10 Submission, Approval, and Disapproval of the State Plan

Comments: Commenters expressed concern that the proposed regulations would require the State unit to hold public meetings throughout the State prior to adopting any new substantive policy or procedure concerning the provision of VR services or substantively amending an existing service-related policy or procedure. Consequently, many commenters viewed the provision as both burdensome and costly. Some of these commenters suggested that the State unit be permitted to adopt new policies and procedures (and make any amendments to existing policies) initially in accordance with applicable State laws and later invite public comment and input on those additions or changes during the State's public meetings on the State plan. Other commenters sought clarification of what constituted a ''substantive'' policy, procedure, or amendment and asked who would determine whether a policy is ''substantive.''

Additional comments on this section of the proposed regulations reflected concerns about the different dates that govern the submission of the VR State plan. These commenters recommended that all States be required to submit updates and revisions to their State plans by the same date.

Discussion: Section 101(a)(16)(A) of the Act requires the State to hold public meetings prior to adopting policies or procedures governing the provision of services under the State plan. This requirement is essentially the same as the statutory requirements concerning public meetings that preceded the 1998 Amendments. Thus, we interpret the requirement in section 101(a)(16)(A) of the Act in the same manner as we have historically, i.e., the public is to be given the opportunity to comment on the State plan prior to the State unit adopting substantive policies and procedures (and any amendments thereto) governing the provision of vocational rehabilitation services under the plan. Typically, a State unit fulfills this requirement by taking comment on new policies during public meetings on State plan revisions and updates. Regardless of the timing of the State's public meetings, however, section 101(a)(16)(A) clearly requires that these meetings for receiving public input be held *prior* to States adopting new or revised policies affecting the provision of VR services. Implementing new policies in advance of the public meetings is not permitted.

We also note that section 101(a)(16)(B) of the Act and § 361.21 of both the previous and the proposed regulations required the designated State agency to consult with certain groups on matters of general policy arising in the administration of the State plan. In addition, a State unit that has a State Rehabilitation Council (Council), in accordance with section 101(a)(21)(A)(ii)(II) of the Act and § 361.16(a) of the regulations (again, both previous and proposed), must consult with the Council regarding the development, implementation, and revision of State policies and procedures of general applicability pertaining to the provision of vocational rehabilitation services. Each of the public comment or consultation requirements specified in the proposed regulations, and the resulting burden, was imposed by the Act, and each was intended to ensure that the State unit accounts for the diverse needs of its State's disability population before modifying its service-provision practices.

Nonetheless, in an effort to reduce the burden on the States, we incorporated into both the proposed and final regulations the term ''substantive'' to clarify that States need not hold public meetings on policy or procedural changes that are merely technical or do not affect the provision of VR services in any substantive manner. Longstanding RSA guidance (see PD–90–08 and PAC–90–05) provides additional information on the scope of this requirement. We note that the determination of whether a specific policy or procedure is sufficiently ''substantive'' to warrant public input is made by the State unit. Yet, we strongly urge State units to consult with their Councils in assessing whether proposed policy changes are ''substantive'' or in developing evaluative criteria for the State unit to use in making that assessment.

Section 101(a)(1)(A) of the Act requires the State to submit its State plan for the VR program on the same date that its submits its plan under section 112 of WIA. In addition, section 501 of WIA authorizes the State to submit a State unified plan in place of both a WIA section 112 plan and separate State plans for those WIA partner programs, including the VR program. We believe that in order to foster collaboration and cooperation between the VR program and other components of the One-Stop service delivery system, a State plan for the VR program that is not included in the State's unified plan should be submitted on the same date as that unified plan. That view is reflected in § 361.10(f)(3) of the proposed and the final regulations.

Changes: None

Section 361.16 Establishment of an Independent Commission or a State Rehabilitation Council

Comments: One commenter expressed concern that the proposed regulations failed to require the State unit to provide documents to the Council in alternative formats and in a timely manner. As a result, this commenter stated that Council members who are blind will not have sufficient opportunity to review and respond to information provided by the State unit.

Discussion: This section of the proposed regulations made only technical changes to the previous regulations in order to conform to statutory changes in the 1998 Amendments to the Act. We do not believe that a regulatory change to this provision is warranted based on the comment received. Providing information in appropriate formats to Council members with disabilities falls under the State unit's general responsibility under section 504(a) of the Act to not exclude, on the basis of disability, any individual from participating in programs or activities receiving Federal financial assistance. Moreover, Federal regulations at 34 CFR 104.4(b)(1)(vi) specify that a recipient's responsibility under section 504 of the Act extends to the participation of individuals with disabilities on advisory boards. Thus, as in many other instances in which it distributes written materials, the State unit must ensure that Council members who are blind or otherwise disabled are able to review information that the State unit transmits to the Council, as well as participate generally in Council activities.

Changes: None.

Section 361.17 Requirements for a State Rehabilitation Council

Comments: We received several comments regarding the composition requirements of the Council. One commenter requested clarification as to whether an entity that is a required member of the Council could select someone other than a member of that entity as its representative to the Council.

Several commenters suggested that the regulations specify that the ''nonvoting'' membership status of Council members who are employees of the designated State agency does not apply to the representative of the CAP. This change, the commenters assert, is necessary since the CAPs in some States are components of the designated State agency that administers the VR program. The commenters raised questions regarding the required Council membership of a representative of the directors of the American Indian VR services projects authorized under section 121 of the Act. Some of these commenters indicated that the Council should include members from each of the section 121 projects and that a single representative of all the directors could not adequately represent all American Indian VR service projects in the State. Other commenters described situations in which a section 121 project is ''headquartered'' in one State but has a service area that extends across State lines into another State and asked whether that project must be represented on the Council of each State that it serves.

One commenter questioned whether a Council member could be appointed to the State Workforce Investment Board (SWIB) under section 111 of WIA in order to satisfy the requirement in the proposed regulations that the Council include a member of the SWIB. This commenter stated that otherwise this requirement would be difficult to meet given the limited pool of persons interested in serving on the Council as evidenced by the difficulty Councils experience in filling vacancies as they occur.

Finally, we received several comments indicating that the proposed regulations failed to incorporate the new statutory requirement that the majority of members to a Council for a State agency for the blind must be individuals who are blind.

Discussion: Section 105(b) of the Act contains the membership requirements for the Council to ensure that various constituencies of the VR program have a voice in the conduct of the VR program in the State. Section 105(b)(3) requires that the Governor, after soliciting recommendations from organizations representing individuals with disabilities, appoint members to the Council in accordance with the membership criteria in section 105(b)(1) of the Act.

The question as to whether an entity can be represented on the Council by someone other than one of its own members or employees has been raised in the past. With few exceptions, the Council membership requirements in section 105(b)(1) of the Act state that a ''representative'' of an identified entity must serve on the Council. The Act does not require that the ''representative'' be an employee or member of the required entity. Thus, we interpret section 105(b) of the Act and § 361.17(b) of the regulations to allow an entity that is required to be represented on the Council to be represented by someone who is not an employee or member of that organization. Recommendations of appropriate representatives can be made by the organizations themselves, although final appointment authority rests with the Governor. Moreover, we would expect that such a Council member would be closely affiliated with and knowledgeable about the

organization or entity whose interests the individual is charged with representing.

We agree that the non-voting status of State agency or State unit employees under § 361.17(b)(2) of the proposed regulations does not apply to Council members representing the State's CAP pursuant to proposed § 361.17(b)(1)(iii).

Questions regarding Council representation of the section 121 project directors have been raised frequently since the passage of the 1998 Amendments to the Act. Moreover, the commenters' concerns as to whether one project director can sufficiently represent the interests of several independent projects serving different populations of American Indians have generated the most debate. Yet, the requirement in proposed § 361.17(b)(1)(ix) enabling one person to represent all section 121 project directors in the State came directly from section 105(b)(1)(ix) of the Act. This requirement appears to reflect an intent of Congress to minimize the burden on States and to ensure that the size of the Councils not be so large as to become unmanageable. Nevertheless, we urge the directors of section 121 projects in the same State to collaborate more extensively than they may have in the past and to work to ensure that their collective views are represented on the Council. We also note that neither the Act nor regulations prohibit the Governor from appointing to the Council more than one representative of the State's section 121 projects (or other groups) if warranted as long as the remaining composition requirements in the Act and regulations (*e.g.,* the requirement that a majority of Council members be individuals with disabilities) are met. As for section 121 projects that are ''headquartered'' in one State but serve those in another State, it is our understanding that to the extent this occurs, affected projects primarily serve American Indians with disabilities in the State in which the project is located and serve only a relatively small area in a neighboring State. We do not believe that the Council must include a representative of a section 121 project serving American Indians with disabilities in the State if that project is primarily located, and serves those, in another State. In that instance, § 361.17(b)(1)(ix) of the final regulations would apply only to the State in which the project is located. The Governor, however, always has the discretion to appoint to the Council a representative of an out-of-State project that also serves American Indians with disabilities in the Governor's State.

Since the time that the Council requirements came into effect, questions regarding whether the same individual can fulfill more than one role on the Council have been raised often. In response, we consistently have taken the position that an individual may represent only one entity on the Council even though that same individual may qualify under more than one of the composition requirements. We recognize that some States have difficulty maintaining a sufficient pool of qualified individuals to serve on statewide Councils and that the 1998 Amendments to the Act added three new required members to the Council. Nevertheless, section 105(b) of the Act establishes a minimum number of members for the Council, each of whom represents a specific component of the disability community. Because each member represents a different interest, sometimes one that is divergent from that of other members, we maintain that each organizational requirement must be met separately. Thus, a Council member who serves on the SWIB cannot represent both the SWIB and another organization on the Council.

We agree with the commenters who pointed out the discrepancy between the Act and the regulations regarding the membership requirements that apply to a Council for a separate State agency that administers the VR program for individuals who are blind. These commenters correctly noted that the proposed regulations did not specify, as does the statute, that the majority of members of these Councils must be individuals who are blind. This omission was inadvertent, and we agree that it needs to be corrected in the final regulations.

Changes: We have revised § 361.17(b)(2) of the proposed regulations to clarify that the CAP representative is, in all instances, a voting member of the Council. In addition, we have modified § 361.17(c) to reflect the requirement in section 105(b)(4)(B) of the Act that a majority of the members on a Council for a separate State agency for the blind must be individuals who are blind.

Section 361.18(c) Comprehensive System of Personnel Development—Personnel Standards

Comments: Some commenters expressed concern with the indication in the preamble to the NPRM that statewide ''multi-tiered'' personnel standards could be used by the State unit in establishing standards for its rehabilitation personnel. Other commenters suggested that the proposed regulations be revised to require that all rehabilitation counselors obtain a Master's degree consistent with the national certification standards for rehabilitation counselors.

In addition, a number of commenters sought waiver or ''grandfather'' provisions in the final regulations that would exempt current rehabilitation counselors and other professionals from the State's personnel standards. On a related point, some commenters asked whether currently employed rehabilitation counselors who do not meet the State unit's personnel standards can continue to serve as counselors while training to meet the standard.

Additionally, several commenters viewed the requirement in the proposed regulations that the State unit develop a written plan for retraining, recruiting, and hiring staff to meet applicable personnel standards as unduly burdensome. Other commenters supported this requirement and suggested that the written plan be developed with input from the Council.

Finally, several commenters suggested that RSA define the professional and paraprofessional disciplines for which a State unit must establish personnel standards, while others asked what standards the State unit should apply to professions or paraprofessions for which no certification or similar criteria exist.

Discussion: The preamble discussion in the NPRM concerning the ability of State units to use the same multi-tiered personnel standards as those applied by other State agencies to its rehabilitation staff was intended to clarify the level of flexibility the proposed regulations give State units in ensuring that its personnel are qualified within the meaning of the Act. Typically, multi-tiered certification systems require rehabilitation counselors to reach a certain academic level depending on the amount of experience the individual has had in that field. As we indicated in the NPRM (65 FR 10623), because the Act clearly allows State units to base their personnel standards on applicable State standards, it is permissible for a DSU to apply the multi-tiered counselor certification criteria of, for example, the State Workers' Compensation program to DSU counselors if the counselors of both agencies perform similar functions. The Act gives State units that discretion, and that same discretion also prohibits requiring by Federal regulations that all State unit counselors obtain a Master's degree consistent with the national rehabilitation counselor certification standards as sought by some commenters. Nonetheless, as we stressed in the preamble to the NPRM, we encourage each State unit to ensure that its personnel standards promote quality among its counselors and other staff, and we caution State units not to employ minimally qualified individuals by routinely substituting ''equivalent experience'' for higher-level degree criteria.

The Act does not authorize ''grandfathering'' or the waiving of personnel standards for current staff. Rather, section 101(a)(7)(B)(ii) of the Act compels the State unit, if its current personnel does not meet the ''highest requirements in the State'' (i.e., the highest entry-level academic degree needed for the applicable State or national certification, licensing, or registration requirements—*see* § 361.18(b)(2)(i) of the final regulations), to retrain existing staff, as well as recruit new employees, to meet the personnel standards applicable to each profession.

The written plan under § 361.18(c)(ii) that describes the retraining, recruitment, and other efforts of a State unit whose current personnel standards do not conform to the highest requirements in the State is based on the requirement in the Act that directs the State to provide this information in its State plan. More importantly, however, we believe that the limited components of the written plan (*e.g.,* retraining, recruiting, and hiring steps, timelines for those efforts, procedures for evaluating progress, etc.) are essential to ensuring that the State unit employs a fully qualified staff that is best able to meet the diverse needs of individuals with disabilities. Any burden associated with developing the plan, we believe, is caused by the intent of the Act. The narrow scope of required plan components is expected to provide States with a helpful framework for fulfilling their personnel development responsibilities and improving their service delivery capacity.

As we have stated in the past, we recognize the many constraints faced by State agencies in securing a fully qualified staff, not the least of which is the time that it takes to

retrain existing staff. Thus, current counselors who, pursuant to the State unit's plan under § 361.18(c)(1)(ii), are working toward applicable qualification standards can continue to perform their counselor functions. The Act establishes an expectation that rehabilitation counselors and other staff will become qualified consistent with the highest applicable personnel standards in the State. Accordingly, the requirements in the regulations are intended to ensure that the State unit can continue to serve persons with disabilities while it progresses as rapidly as possible toward the point at which all of its staff, both current and new hires, meet the highest qualifications that the State applies to their professions.

We also emphasize the importance of the role of the Council in the area of personnel development. Section 361.18(a) of the final regulations requires that the Council, if it exists, have an opportunity to review and comment on the development of all plans, policies, and procedures necessary to meet the State unit's obligations under the comprehensive system of personnel development (CSPD). As with each of the Council's functions, we view the Council's input into the development of the State unit's personnel policies, procedures, and standards as vital toward ensuring that those efforts result in a State unit workforce that is fully capable of meeting the training and employment needs of persons with disabilities in the State.

We decline to define the professional and paraprofessional disciplines for which a State unit must establish personnel standards, as some commenters requested. While a State unit must apply to its staff the highest personnel requirements that exist in the State and that apply to each profession, determining the types of professionals and paraprofessionals needed to effectively administer its VR program and establishing the scope of functions for each job are the responsibility of the State unit. It is the State unit that can best judge its staffing needs and establish staffing arrangements that meet the particular needs of that agency's service recipients. In the preamble to the NPRM, however, we did provide some guidance on the categories of professional and paraprofessional disciplines most closely associated with the VR program for which the State unit should give priority in developing both specific job criteria and appropriate qualification standards. Those professions include rehabilitation counselors, vocational evaluators, job coaches for individuals in supported employment or transitional employment, job development and job placement specialists, and personnel who provide medical or psychological services to individuals with disabilities.

As a final matter, we note that if there are no State or national licensing, certification, or registration requirements for a given profession established by the State unit, then both the Act and the final regulations require the State to use other ''comparable requirements'' (such as State personnel requirements) for that profession or discipline. The scope of these ''comparable requirements'' (*e.g.,* degree criteria, work experience, etc.) that are applied to jobs for which no licensing or similar requirements exist is left to the reasonable judgement of the State unit.

Changes: None.

Section 361.22 Coordination With Education Officials

Comments: Some commenters opposed the requirement in the proposed regulations that the State unit complete the IPE for students eligible for VR services before they leave school. These commenters stated, for example, that the proposed requirement would be impracticable for State units to fulfill, would lead to rashly formulated IPEs, or would exceed applicable statutory requirements. Other commenters supported requiring completion of the IPE before the student leaves school and viewed the requirement in the proposed regulations as essential if transition planning is to prove effective.

In addition, one commenter requested that the proposed regulations be revised to require that the formal interagency agreement between the State unit and educational agencies specify both the manner and the time in which State unit staff will participate in transition planning for students with disabilities. Another commenter suggested that each agreement include provisions for resolving disputes regarding the agencies' financial responsibilities in paying for transition services and for enabling students to retain assistive technology provided by schools that the student needs following transition.

Discussion: The proposed requirement that State units provide for the development and completion of the IPE before students who are eligible for VR services leave the school setting was carried over from the previous regulations. As we have indicated from the time the previous regulations were published in 1997, we believe that requiring IPE completion before eligible students with disabilities leave school is entirely consistent with the emphasis on transition in both the Act and its legislative history (see Senate Report 102–357). That emphasis was only heightened by the requirement in the 1998 Amendments that State units increase their participation in transition planning and related activities. More importantly, requiring the IPE to be in place before the student exits school is essential toward ensuring a smooth transition process, one in which students do not suffer unnecessary delays in services and can continue the progress toward employment that they began making while in school. In fact, it is in support of that effort that we have made two clarifications in these final regulations: (1) that designated State agencies should be involved in the transition planning process as early as possible; and (2) that the IPE must be ''approved'' (i.e., agreed to and signed by the individual and the DSU) prior to the student leaving school, as opposed to simply ''completed'' as stated in the proposed regulations.

We have determined it necessary to clarify in the final regulations steps that the designated State agency must take, at a minimum, when conducting the statutorily required outreach to students with disabilities. It is essential for the designated State agency to inform these students of the purpose of the VR program, the application procedures, the eligibility requirements, and the potential scope of services that may be available. This information should be provided as early as possible during the transition planning process in order to enable students with disabilities to make an informed choice on whether to apply for VR services while still in school.

We are not aware that State units have had great difficulty in completing IPEs for students. As before, the final regulations require that if the State is operating under an order of selection, only the IPEs of those students that the State unit can serve under the order must be developed before the student leaves school. Moreover, we believe that State units will be even better prepared to fulfill this requirement as they become more active in transition planning for special education and other students with disabilities (*e.g.,* those students receiving services pursuant to section 504 of the Act or the IDEA) and in generally coordinating with school officials.

We believe, as did some commenters, that the extent to which the State unit should be involved in transition planning for individual students with disabilities should be based on the needs of the student. However, we also believe that it is important for the designated State agency to participate actively throughout the transition planning process, not just when the student is nearing graduation. Early involvement by the designated State agency can be very beneficial in terms of assisting the student to make the transition from school to employment. For this reason, these final regulations clarify that the designated State agency should become involved in the transition planning process as early as possible. The designated State agency and the State education agency should negotiate more specific provisions, as part of their interagency agreement, to ensure that the students' needs are met in a timely manner. Congress clearly envisioned that that approach be followed in developing the terms of the State's interagency agreement (*see e.g.,* Conference Report 105–659, page 354). Also left to local discretion is the scope of components, other than those limited components specified in the Act and clarified previously, that should be included in the agreement. Some of the additional agreement items identified by commenters may be considered in that regard.

However, in response to the commenter's suggestion that each agreement should include provisions for resolving disputes in paying for transition services, we note that State units are authorized to pay for only transition services for students who have been determined eligible under the VR program and who have an approved IPE. Thus, as long as those criteria have been met, and the IPE specifies those transition services necessary for the successful implementation of the IPE, we anticipate that disputes of the type raised by the commenter will not be prevalent.

Changes: We have amended § 361.22(a) of the proposed regulations to clarify that the

IPE for a student determined to be eligible for vocational rehabilitation services must be developed and approved before the student leaves the school setting and as early as possible during the transition planning process. In addition, we have amended § 361.22(b)(4) of the proposed regulations to clarify information that must be provided by the designated State agency, at a minimum, when conducting outreach to students with disabilities, and we have clarified that outreach should begin as early as possible during the transition planning process.

Section 361.23 Requirements Related to the Statewide Workforce Investment System

Comments: We received a great many comments on this section of the proposed regulations that raise important policy issues and questions of interpretation that relate not only to the proposed regulations, but also to WIA and the regulations in 20 CFR part 662.

Most commenters requested more detail in the final regulations that elaborates on how the VR program is to fulfill the requirements in proposed § 361.23(a). For example, several commenters asked that we specify in the final regulations those core services under WIA that the VR program is expected to provide in accordance with proposed § 361.23(a)(1), while others asked that we explain which activities related to ''creating and maintaining'' the One-Stop system under § 361.23(a)(2) are allowable under the VR program.

Some of the commenters on this proposed section also urged us to identify in the final regulations certain restrictions in the Act (*e.g.,* the order of selection requirements under section 101(a)(5)) that may affect the extent to which State units can contribute to the cost of One-Stop system services or other One-Stop system activities. Of critical importance to the final regulations, most commenters stressed, is the need to address the responsibility of all WIA partner programs to serve individuals with disabilities.

Other commenters asked that we add to the One-Stop system responsibilities listed in proposed § 361.23(a) other items that are necessary for DSUs to effectively participate with other partner programs of the One-Stop system, including methods for allocating costs between programs, methods for ensuring proportionality between the partner's financial participation in the One-Stop system and the resulting benefits it receives, and methods for resolving disputes regarding funding that may arise between partner programs.

Several other commenters identified additional components that they suggested be included in the required cooperative agreements between the designated State agency and those entities administering other One-Stop system partner programs. In addition, some commenters asked whether the requirement that State units, through the cooperative agreements, promote participation by individuals with disabilities in the One-Stop system also requires that State units pay the cost of reasonable accommodations at the One-Stop system center or other locations.

Discussion: As we discussed at some length in the preamble to the NPRM (65 FR 10620, 10621, and 10624), we restated in § 361.23(a) of the proposed regulations the responsibilities of One-Stop system partners, including the VR program, that are described in the regulations implementing Title I of WIA (20 CFR part 662). That effort was intended solely to inform State units of the One-Stop system responsibilities to which they are subject under WIA. We also asked that commenters raise specific interpretive or policy questions related to these One-Stop system responsibilities so that we may address, through appropriate guidance, those most pressing matters that DSUs face as they participate in the One-Stop service delivery system. Most of the comments received on this section of the proposed regulations focus on those types of questions.

Although we anticipate addressing in future guidance materials, and in cooperation with other appropriate Federal agencies, the workforce policy questions posed by the commenters, we do note that many of the issues raised are impacted by a number of key One-Stop system principles embedded in WIA, its implementing regulations, and these final regulations.

First, participation by DSUs in the One-Stop system must be performed in a manner that is consistent with the legal requirements applicable to the VR program (*i.e.,* the Act and these final regulations). Thus, the DSUs' participation in the cost of core services or any other One-Stop system activities cannot, for example, result in expenditures for services to individuals who do not meet the priority for services in the order of selection under which a DSU is currently operating (although the DSU can participate, as appropriate, in the cost of intake and other expenditures that would normally be borne by the DSU prior to determining eligibility and the individual's priority category under the State's order of selection; see the discussion in the following section of this analysis of comments for further information on the relationship between order of selection requirements and participation in One-Stop system activities.) The fact that DSUs must comply with the Act and the VR program regulations in the course of participating in the One-Stop system, we believe, was made clear in the proposed regulations, as it is in Title I of WIA and the regulations implementing that title.

Compliance with the ADA and section 504 of the Act represents another key issue that directly impacts the One-Stop system. In sum, those laws obligate One-Stop system centers and their partners to make their services accessible to individuals with disabilities. Thus, we, along with the Department of Labor and many of the commenters, have emphasized that the legal responsibility for assisting persons with disabilities does not fall to the DSU alone. Consequently, individuals with disabilities are likely to receive services through a variety of arrangements (*e.g.,* through the One-Stop system center, through a combination of core services at the One-Stop system center and specialized VR services from the DSU, etc.) depending on the configuration and structure of the local One-Stop system. Nonetheless, because the universal access principles reflected in the ADA and section 504 relate to the responsibilities of non-DSU entities and because these final regulations establish requirements for designated State agencies and designated State units administering VR programs, we do not believe this section should be revised to address the application of the ADA and section 504 to the One-Stop system generally. Those responsibilities are fully addressed in WIA, particularly in section 188 of that act and its implementing regulations, 29 CFR part 37, which establish the civil rights protections that must be provided by the State and local workforce development systems.

Many of the commenters also raised important issues related to collaboration between the DSU and its One-Stop system partners. In response, we note that those issues can, and should, be addressed through the development of the memorandum of understanding (MOU) governing the operation of the One-Stop system referred to in § 361.23(a)(3) or through the cooperative agreements developed between these same parties under § 361.23(b). In fact, some of the suggested items, including the methods for funding One-Stop system costs among partner programs, are addressed in the regulations implementing title I of WIA (see MOU requirements in 20 CFR 662.300). Rather than specifying additional MOU or cooperative agreement components in these final regulations, we would urge DSUs and their One-Stop system partners to determine which components, other than those specified in the MOU requirements in 20 CFR part 662 and the agreement components in § 361.23(b) of these final regulations, would be most appropriate to address given State and local circumstances.

We do believe it is necessary, however, to clarify one technical item related to the cooperative agreement under § 361.23(b) that some commenters raised. The commenters appeared to interpret § 361.23(b)(2)(i)(B) as requiring DSUs to pay for reasonable accommodations, auxiliary aids, and other services for persons with disabilities participating in the One-Stop system. Yet, that proposed section, which comes directly from section 101(a)(11)(A)(i)(II) of the Act, states only that DSUs, in promoting meaningful participation by persons with disabilities in One-Stop system and other workforce investment activities through program accessibility, may provide training and technical assistance to its One-Stop system partners on how to provide reasonable accommodations and auxiliary aids and services. Neither the relevant statutory provision nor the proposed regulatory section questioned by commenters instructs DSUs to pay the costs of providing individuals with disabilities access to the One-Stop system. In fact, as previously noted, that responsibility falls to the One-Stop system pursuant to the ADA and section 504.

Changes: None.

Section 361.31 Cooperative Agreements With Private Nonprofit Organizations

Comments: None.

Discussion: We wish to clarify the relationship between these final regulations

and potential agreements that DSUs may enter into with employment networks authorized under the recently enacted TWWIIA. In particular, we note that neither the Act nor the regulations, including the requirement in section 101(a)(24)(B) of the Act and § 361.31 of the regulations that the DSU enter into cooperative agreements under the VR program with private nonprofit VR service providers, are intended to limit or prohibit the establishment of a fee-for-service or other reimbursement type agreement between DSUs and employment networks. Typically, fee-for-service arrangements enable private service providers to purchase from the DSU services that are needed by an individual with a disability who is not a VR program participant.

On a related note, we also emphasize that nothing in the Act or these regulations would affect the ability of a DSU to serve as an employment network as authorized under TWWIIA.

Changes: None.

Section 361.36 Ability To Serve All Eligible Individuals; Order of Selection for Services

Comments: One commenter suggested that this section of the proposed regulations be strengthened to ensure that States preserve resources and provide needed services to individuals with significant disabilities, particularly as the State unit becomes more closely linked to, and participates in, the One-Stop system under WIA.

Discussion: As we discussed in the previous section, we agree that the policy behind the order of selection requirements in the Act and regulations—to preserve the fiscal and personnel resources of the DSU so that those with the most significant disabilities can receive the full range of VR services that they need to become appropriately employed—must be safeguarded. However, we believe those safeguards are in place. As a required partner in the One-Stop system, the State unit must participate toward the development and maintenance of an effective One-Stop system at the local level. Moreover, Title I of WIA and the regulations implementing that title clearly condition that participation on compliance with the Rehabilitation Act and these regulations. Thus, the order of selection requirements in section 101(a)(5) of the Act and these regulations, or any other statutory or regulatory requirement applicable to the VR program, must be followed in the course of participating in One-Stop system activities. If the State is operating on an order of selection because it cannot serve all eligible individuals given its current level of VR program resources, then the State unit can pay only for services (i.e., services beyond intake and assessment that are necessary to determine whether an individual is eligible under the program and, if so, to determine the individual's priority category under the order of selection) for the individuals who qualify for services under that order, regardless of whether those services are provided within or apart from the One-Stop system center. The severity of an individual's disability or the cost of the individual's program of services can have no bearing on the scope of services the individual receives.

Changes: We have made one clarifying change to § 361.36(c) of the proposed regulations that was not based on public comment. This proposed section has been revised to clarify that a DSU that has developed but not implemented an order of selection must continue to provide the full range of services, as appropriate, to all eligible individuals.

Section 361.42 Assessment for Determining Eligibility and Priority for Services

Comments: Several commenters recommended requiring in this section of the final regulations a written assessment for determining eligibility and priority for services by a qualified VR counselor employed by the DSU, as a means of emphasizing the importance of the professional opinion of the VR counselor. These commenters also proposed that this written assessment be included with the information given to the eligible individual during IPE development.

Some commenters opposed the eligibility provisions stated in proposed § 361.42(a)(i) and (ii) (i.e., determinations by qualified personnel that the applicant has a physical or mental impairment and the impairment constitutes or results in a substantial impediment to employment) on the basis that neither provision required that the applicable determination be made by a qualified employee of the DSU. These commenters stated that all eligibility-related determinations should be made by the DSU.

Several commenters opposed § 361.42(a)(3) of the proposed regulations, which implemented the statutory requirements regarding presumptive VR program eligibility for individuals receiving SSI or SSDI under the Social Security Act. These commenters stated that a categorical presumption of eligibility for this group of individuals could be misconstrued as creating an entitlement to VR services, could lead to efforts to extend presumptive eligibility inappropriately to other groups with common characteristics, and may undermine the individualized nature of the VR program. Some of the commenters asserted that a presumption of eligibility should be able to be rebutted by a showing that an individual receiving SSI or SSDI does not meet one or more of the eligibility criteria. Other commenters suggested that presumptive eligibility for these individuals should apply to only those Social Security recipients or beneficiaries seeking to earn wages as opposed to those intending to become homemakers.

On the other hand, several commenters supported the proposed requirements regarding presumptive VR program eligibility for individuals receiving SSI or SSDI. Some noted that the relevant statutory provision, section 102(a)(3) of the Act, already has been effective in reducing the time expended on eligibility determinations, thereby allowing counselors and individuals to focus on IPE development and initiating needed services.

Many commenters opposed the manner in which the proposed regulations implemented the passage in section 102(a)(3)(ii) of the Act that states that Social Security recipients are presumed eligible under the VR program ''provided that the individual intends to achieve an employment outcome.'' Specifically, these commenters believed that completion of the application process, as described in the proposed regulations, is insufficient evidence of the individual's intent to achieve an employment outcome. They urged that the applicable paragraph in the proposed regulations be stricken on the basis that DSUs make eligibility-related decisions not only at the time of application but throughout the VR process.

Several commenters opposed authorizing DSUs, under § 361.42(b) of the proposed regulations, to make interim determinations of eligibility. Most of these commenters questioned the statutory authority for the proposed section or viewed the provision as unnecessary since all eligibility determinations must be completed within 60 days from the time the individual applies for VR services. On the other hand, many commenters supported the proposed interim eligibility authority and the fact that using it rests with the discretion of the DSU.

Several commenters supported proposed § 361.42(c)(1) that the DSU will not impose, as part of the eligibility determination process, a duration of residence requirement that excludes from services any applicant who is present in the State. Two commenters suggested that the proposed language more closely track the Act by applying the prohibition not only to applicants but to any individual who is present in the State. Other commenters supported retaining specific language stating that a requirement for an applicant to be present in the State cannot be used to circumvent an individual's choice of an out-of-State service provider.

We received many comments on proposed § 361.42(e), which implemented new statutory requirements regarding the use of trial work experiences as part of the process for determining eligibility for VR services. Several commenters responded to our request in the preamble to the NPRM that they identify examples of trial work experiences, other than supported employment and on-the-job training, that DSUs might employ. Suggestions included contract or production work in the individual's own home, internships, unpaid work experiences, on-the-job evaluations, job shadowing, structured volunteer experiences in real work settings, and community-based work assessments with supports, among others.

Many commenters suggested that the final regulations authorize a DSU to consider trial work that the individual performed previously, and that is documented, for purposes of meeting the requirement that it assess the individual's capacity to perform trial work before the individual is determined too severely disabled to achieve an employment outcome (and, therefore, ineligible). These commenters also recommended that the final regulations clarify that trial work experiences need not be used for all individuals with significant disabilities or in instances in which an individual's ability to achieve an employment outcome is not in question.

A number of commenters opposed the requirement in proposed § 361.42(e)(2)(i) that the DSU develop a written plan to assess the individual's capacity to perform in realistic

work settings. These commenters noted that the Act does not require a written plan and that the proposed provision could have the unintended effect of delaying services to the individual. Other commenters expressed concern that the trial work assessment for an individual appeared open-ended and, therefore, recommended that the regulations apply a specific time limit to the use of trial work for purposes of determining eligibility.

One commenter questioned the authority for the proposed regulatory requirement that DSUs provide appropriate supports, including assistive technology devices and services and personal assistance services, to accommodate the rehabilitation needs of an individual while performing trial work. In contrast, another commenter stated that it is vital for DSUs to provide the supports and assistive technology that are needed for an individual during the trial work period.

Several commenters recommended deleting proposed § 361.42(h), which authorized the continued use of extended evaluations in instances in which trial work experience options have been exhausted or cannot be used by the individual. These same commenters suggested that the 18-month time limit that applied to extended evaluation under the current regulations be applied to trial work experience options. Some of the commenters also questioned the authority for keeping the extended evaluation option in the regulations, while others suggested that since trial work experiences were available to most individuals with significant disabilities, the extended evaluation authority is no longer necessary or is inconsistent with the Act's preference for finding most applicants eligible for the VR program. In contrast, a number of commenters supported retaining the extended evaluation requirements.

Discussion: We agree that the professional opinion of the VR counselor is critical in assessing an individual's eligibility and priority for services. Both the Act and the regulations specify that qualified personnel must conduct assessments under the VR program. Although we suspect that most States develop written assessments, we do not think it is necessary to require by rulemaking that the assessment itself be in writing. Thus, State units may continue to require written eligibility assessments, or otherwise attest to an individual's eligibility and priority of service category under an existing order of selection, as they deem appropriate. We do note, however, that the DSU is required to document, in some fashion, support for determinations of eligibility as part of the record of services required under § 361.47 of the regulations. Whether that documentation is the assessment itself or some other combination of information, again, lies with the discretion of the DSU.

We believe that proposed § 361.42(a)(1)(i) and (ii) and the references to ''qualified personnel'' in each of the provisions are consistent with the Act. We interpret the requirements in section 103(a)(1) of the Act (requiring assessments for determining eligibility and rehabilitation to be conducted by ''qualified personnel'') and section 102(a)(6) of the Act (requiring eligibility determinations to be conducted by the designated State unit) the same as we have historically since neither statutory provision changed in the 1998 Amendments. Specifically, the Act authorizes qualified professionals, both DSU and non-DSU employees, to determine the existence of an impairment and to determine whether the impairment results in a substantial impediment to employment (*i.e.,* whether the first two eligibility criteria have been met.) The requirement in section 102(a)(4)(B) of the Act regarding the use of determinations made by officials of other agencies also supports this position. Assuming the DSU can confirm that a qualified professional has determined that the individual has met those criteria, the DSU counselor then assesses whether the individual requires VR services to obtain and retain work in the individual's chosen field that is appropriate to his or her abilities (*i.e.,* the third criterion of eligibility.) The individual is presumed to have met the fourth criterion—that the individual can benefit from VR services under § 361.42(a)(1)(iv). This framework, which we believe is required by the Act, is intended to ensure that the DSU controls the eligibility process at the same time that it facilitates more timely assessments that allow for existing information from other sources to be taken into account.

The 1998 Amendments specify that those who qualify for SSI or SSDI are presumed eligible for the VR program. As we discussed extensively in the preamble to NPRM (65 FR 10625 and 10626), we believe that this change was adopted in the 1998 Amendments to streamline eligibility and expedite necessary VR services for those Social Security recipients since each category of recipients already has met stringent disability criteria under the Social Security Act and clearly needs VR services in order to achieve appropriate employment. We do not believe that this presumption will be misconstrued as changing the nature of the VR program to a program under which individuals are entitled to services without pursuing a job. In fact, section 102(a)(3)(B) of the Act and § 361.42(a)(5) of these final regulations specify that nothing in the presumptive eligibility requirement creates an entitlement to VR services, meaning that individuals with disabilities are not automatically entitled to VR services but, rather, must expect to achieve an employment outcome as a result of receiving those services. The final regulations implement that expectation by ensuring that all applicants, including those receiving SSI or SSDI, are informed of the employment-related nature of the VR program during the application process.

We also disagree with the assertion that a categorical presumption of eligibility for individuals receiving SSI or SSDI will lead to categorical eligibility for other groups and undermine the individualized nature of the VR program. Prior to the 1998 Amendments, disabled SSI recipients were statutorily presumed to have a physical or mental impairment that constituted a substantial impediment to employment (*i.e.,* were presumed to have met the first two eligibility criteria in § 361.42(a)(1) of the regulations), as well as a severe disability. Section 102(a)(3) of the 1998 reauthorized Act expanded this presumption by giving presumptive VR program eligibility (*i.e.* a presumption that individuals meet all of the eligibility criteria under the VR program) to this same population. The presumption applies only to these persons and is not written to broadly cover other groups that do not qualify under the stringent disability-related criteria applied by the Social Security Administration. Also, the individualized nature of the VR program (*i.e.,* that services are provided under an IPE to meet an individual's rehabilitation needs and assist an individual to achieve an employment outcome) is unaffected by this requirement that only addresses eligibility for services.

As section 102(a)(3)(A)(ii) of the Act makes clear, a DSU can rebut the presumption that an SSI or SSDI recipient is eligible under the VR program if it can demonstrate by clear and convincing evidence that the individual is incapable of benefiting in terms of an employment outcome from VR services due to the severity of the individual's disability. In response to the commenter's contentions, we maintain that a presumption of eligibility can be rebutted only on this basis.

We also do not believe that presumptive eligibility for SSI or SSDI recipients should be restricted to those seeking certain types of employment outcomes. As we have long required, eligibility requirements are not to be applied with regard to the type of expected employment outcome that the applicant seeks (see § 361.42(c)(2)(ii)(B) of these final regulations). Thus, whether an individual seeks a self-employment, another wage-earning employment, a homemaker, or other outcome cannot be used as a factor in determining the individual's eligibility for VR services or affect the presumptive eligibility of an individual receiving SSI or SSDI.

We believe that completion of the application process after the DSU has informed the individual that he or she must seek an employment outcome to receive VR services is sufficient evidence that any individual, including SSI and SSDI recipients, ''intends to achieve an employment outcome,'' as section 102(a)(3)(ii) specifies. While we understand that some commenters are concerned that disabled Social Security recipients in particular will seek VR services without intending to work, we find that concern unfounded. We referred in the preamble to the NPRM to an obvious fact—that all applicants for VR services, not only those who qualify for SSI or SSDI, must intend to work to receive VR services. Thus, ensuring that the DSU explains the employment-related nature of the VR program as part of the application process ensures that applicants understand what is expected of them before participating in the program. Thus, the proposed regulatory method of ensuring an individual's intent to work fulfills an expectation that applies to all applicants for VR services and streamlines, rather than hinders, the eligibility process for SSI and SSDI recipients, as the Act intends.

Additionally, we disagree with the contention that an individual's intent to

achieve an employment outcome constitutes an additional eligibility-related criterion that must be applied throughout the VR process. Eligibility is assessed at the outset of the rehabilitation process, at a point when the final regulations require that the DSU apprise individuals of the nature of the program. As always, if an individual becomes too severely disabled to achieve an employment outcome (as supported by clear and convincing evidence) or, for whatever reason, stops participating in the VR program, then the DSU need not continue serving that individual. That approach applies no less to SSI recipients or SSDI beneficiaries than it does to any other participant in the VR program. Yet, as long as the individual continues to participate in the program, there exists a presumption that the individual intends to work.

We agree with those commenters who supported proposed § 361.42(b) that would allow DSUs to make interim determinations of eligibility for individuals who the DSU reasonably believes will be eligible for VR services at the end of the statutory 60-day period for making eligibility decisions. We emphasize that this provision is an option for DSUs to expedite further the delivery of services to individuals while the DSU awaits information to permit a final eligibility determination. DSUs are not required to implement provisions for interim determinations of eligibility.

We also agree with the commenters who stressed the importance of language in section 101(a)(12) of the Act that prohibits a State from establishing any residence requirement that excludes from services any individual who is present in the State. However, we believe that the proposed regulatory language sufficiently tracks the statutory requirement that was not changed by the 1998 Amendments. Again, we believe it is important to clarify, as explained in the Senate Committee Report on the Rehabilitation Act Amendments of 1998, that the requirement for an individual to be present in the State in order to be eligible to receive services should not be interpreted in any way to circumvent an individual's choice of an out-of-State provider (Senate Report 105–166, p. 13). The committee further stated that, with regard to out-of-State placements, the requirement that an individual be present in the State must be imposed at the time of the eligibility determination and may not be used as a means of denying the continuation of services that are being provided in an out-of-State setting.

As we explained more fully in the preamble to the NPRM (65 FR 10626 and 10627), the Act specifies that DSUs must explore an individual's abilities, capabilities, and capacity to perform in work settings through the use of trial work experiences before it can demonstrate that an individual is too severely disabled to benefit from VR services in terms of an employment outcome and, consequently, is ineligible under the program. We believe that this requirement establishes the fairest standard for assessing whether an individual with a significant disability is in fact capable of achieving employment. We also appreciate the trial work examples that commenters shared and note that these types of work options (*e.g.,* supported employment, on-the-job training, internships, job shadowing, structured volunteer experiences in real work settings, and community-based work assessments with appropriate supports) should be considered by others as they seek to expand the scope of trial work experiences available to applicants with significant disabilities. Nevertheless, we believe that § 361.42(e)(2)(ii) of the regulations is sufficiently broad to encompass each of these examples and that a change to that provision is not necessary.

In addition, we interpret the Act to clearly require DSUs to give individuals trial work experiences before deciding that an individual is ineligible under the VR program due to the severity of the individual's disability. Accordingly, a DSU cannot meet the requirement that it use trial work to assess eligibility by simply securing documentation that addresses the individual's success in performing work previously. Using documentation in that regard runs the risk of violating the scope of the mandate in section 102(a)(2)(B) of the Act, specifically that trial work options be sufficiently varied and take place over a sufficient period of time for the DSU to either conclude that the individual is eligible for VR services or (based on clear and convincing evidence) that the individual is incapable of benefiting from the provision of VR services in terms of an employment outcome. Given the State units' expertise in conducting assessments, and without knowing the validity of the documentation that exists or the circumstances that might have changed since the time the individual previously worked, we believe that it is appropriate to require that, before determining that an individual cannot benefit from VR services, the DSU give the individual a variety of trial work options regardless of the individual's past work history or assessments.

We do not believe that the written plan for providing trial work experiences as required in § 361.42(e)(2)(i) of the regulations is inconsistent with the Act or will cause delays in service delivery. On the contrary, we believe that requiring a written plan to assess an individual's abilities, capabilities, and capacities to perform in realistic work settings is a logical means of fulfilling the requirements in section 102(a)(2)(B) of the Act. The written plan will ensure that the assessment process is conducted in a deliberate and well-formulated manner, thus giving an individual a full opportunity to demonstrate his or her capabilities and enabling the DSU to accurately gauge whether the individual can achieve employment. Also, we feel that any burden or minor delay associated with developing the written plan is clearly justified given that the individual risks being found ineligible, and precluded from receiving services altogether, if trial work options are not well-planned and prove unsuccessful.

We recognize the concerns of those commenters who requested that time limits be included in the regulations to ensure that trial work opportunities do not extend beyond a reasonable length. Yet, we believe the timeframes that are the most reasonable and appropriate already were built into the proposed regulations. Specifically, § 361.42(e)(2)(iii) of the regulations requires that the DSU assess the individual's capacity to work in realistic work settings through the use of trial work experiences that are provided over a sufficient period of time for the DSU to determine either that the individual is eligible for VR services or that there exists clear and convincing evidence that the individual cannot benefit from VR services in terms of an employment outcome due to the severity of the individual's disability. Because trial work is intended to result in either a determination of eligibility or a determination of ineligibility that is sufficiently supported, trial work opportunities must be provided until the point that the DSU can reach one of these two conclusions. Thus, specific time periods that would serve to discontinue trial work requirements before the DSU has reached either result would serve to undermine the purpose behind those very same requirements.

We do not believe that the requirement in § 361.42(e)(2)(iv) of the regulations that the DSU provide individuals with appropriate support services, such as assistive technology devices and services and personal assistance services, during trial work falls beyond the scope of the Act. Section 102(a)(2)(B) of the Act states explicitly that trial work experiences are to be afforded ''with appropriate supports provided by the designated State unit.'' Clearly, assistive technology devices and services and personal assistance services are authorized services available to individuals pursuing employment, including supported employment, through the VR program (see *e.g.,* section 102(b)(3)(B)(i)(I) of the Act). Accordingly, we believe it is entirely appropriate to interpret the DSU's responsibility to provide ''necessary supports'' during the trial work period to cover these same services.

We also disagree that the authority concerning extended evaluations should be deleted in the final regulations. Although the Act clearly places a priority on using trial work experiences in the course of assessments, Congress recognized the need to allow for extended evaluations in those limited instances in which a real work test is impossible or the State unit has exhausted its trial work options without reaching a determination of eligibility. That point is reflected in the legislative history to the trial work provisions in the Act, specifically in Senate Report 105–166, pages 9 and 10.

Changes: None.

Section 361.45 Development of the Individualized Plan for Employment

Comments: Several commenters recommended that the final regulations clarify that the DSU is not required to pay for the costs of technical assistance in IPE development that is provided by sources other than DSU personnel. On the other hand, other commenters suggested that the DSU be required to pay for the costs of the technical assistance provided by non-DSU sources, asserting that such a requirement

would be consistent with the individual's opportunity to exercise informed choice in selecting DSU or non-DSU assistance for purposes of developing the individual's IPE.

Many commenters sought more explanatory information in the final regulations that details the role of the qualified VR counselor employed by the DSU in developing and approving the IPE and IPE amendments and in reviewing the IPE annually. These commenters indicated that the ''diminished role for the DSU counselor'' in the proposed regulations was inconsistent with the Act and other regulatory requirements. The commenters also stated that a DSU-employed counselor must conduct the required annual review of the IPE and assess the individual's progress toward achieving the identified employment outcome since the DSU is responsible for the proper delivery of services and the outcome of the individual's participation in the program. Other commenters suggested that we distinguish between the roles of the ''qualified vocational rehabilitation counselor'' and the ''qualified vocational rehabilitation counselor employed by the designated State unit'' by defining each term in the final regulations.

Some commenters suggested that this section of the proposed regulations be revised to prohibit VR counselors employed, or previously employed, by an agency or organization that may provide services under an individual's IPE from assisting the individual in developing the IPE. These commenters urged that a prohibition of this type be implemented in order to guard against conflicts of interest on the part of the counselor that could otherwise jeopardize the individual's ability to exercise informed choice in selecting services and service providers included in the IPE.

In addition, a number of commenters opposed § 361.45(e) of the proposed regulations, which required the DSU to establish and implement standards, including timelines, for the prompt development of IPEs. These commenters viewed this proposed section as beyond the scope of the Act. Other commenters recommended either requiring by regulations a specific time period governing IPE development and implementation (*e.g.,* 30 days from the date eligibility is determined) or defining the term ''timely'' as it applies to IPE development.

Discussion: Pursuant to section 102(b) of the Act and § 361.45(c) of the final regulations, the DSU must inform eligible individuals of the range of available options in obtaining assistance for purposes of developing the IPE (*e.g.,* developing the IPE with DSU assistance, with non-DSU assistance, or on one's own). Since IPE development assistance from non-DSU sources is authorized, the regulations do not prohibit the DSU from supporting the costs of that assistance. At the same time, however, we agree that the DSU need not pay the costs of assistance provided by non-DSU sources if it so chooses. Thus, it falls within the discretion of the DSU to determine whether, and under what circumstances, it will pay for technical assistance in IPE development from sources other than the DSU.

We believe that the proposed regulations accurately reflected the scope of functions that the Act reserves to the DSU, as well as the broad authority for non-DSU counselors to assist in the development and review of IPEs at the individual's discretion. As some commenters pointed out, a qualified VR counselor who is employed by the DSU must approve and sign the IPE and any amendments to the IPE (see section 102(b)(2)(C)(ii) and (b)(2)(E) of the Act). The proposed regulations followed the framework established by the Act, *i.e.,* by enabling individuals to receive assistance in IPE development from whichever source (if any) that they choose and ensuring that the DSU maintains final IPE approval authority as the Act requires. We do not believe that additional regulatory provisions in this area, including definitions, are needed.

While we note, as we did in the preamble to the NPRM, that the DSU also is responsible for ensuring that the individual's IPE is reviewed annually, we do not agree that that review must necessarily be conducted by a DSU counselor. As discussed in greater detail in the NPRM preamble (65 FR 10626 and 10627), Congress intended to distinguish between IPE functions that *must* be performed by a qualified VR counselor employed by the DSU and related functions that *may* be performed by a qualified VR counselor or other person who is not employed by the State unit. Thus, in addition to enabling individuals to secure assistance from outside the DSU in developing the IPE and IPE amendments, the DSU can meet its responsibility to ensure that the IPE is reviewed at least annually with the individual by conducting the review itself or, at the individual's discretion, by approving the results of a review appropriately conducted by a qualified VR counselor from outside the DSU.

At the same time, however, we do appreciate the commenters concerns regarding the potential conflicts of interest, including potential limits on the exercise of informed choice, that may arise if the counselor or other person assisting the individual in developing (or amending) the IPE is employed or otherwise affiliated with an organization that may provide services to the individual under that IPE. However, without information indicating whether that problem exists or the resulting effects that an existing problem has on participants in the program, we are not inclined to restrict, through these final regulations, the individual's choice of assistants in developing the IPE. Nonetheless, we emphasize that DSUs must ensure that individuals are given full opportunities to exercise informed choice in the selection of services and service providers consistent with the requirements of section 102(d) of the Act and § 361.52 of these final regulations. Accordingly, we would expect DSUs to address any situation, if it arises, in which it believes that a counselor employed by a service provider is unduly influencing an individual during IPE development to obtain services through that counselor's employer without providing the individual with sufficient choices.

We maintain that requirements in § 361.45(e) regarding DSU standards, including timelines, for the prompt development of IPEs are entirely consistent with the Act. In particular, section 101(a)(9) of the Act requires that the individual's IPE be developed and implemented ''in a timely manner'' subsequent to the determination of eligibility. In fact, both this regulatory requirement and the statutory provision on which it is based precede the 1998 Amendments. We continue to believe that the regulatory standards and timelines called for under § 361.45(e) of the regulations are necessary to guard against delays in service delivery that are, in turn, caused by delays in the IPE development process. We emphasize that DSUs need not meet this requirement by establishing an arbitrary time limit to apply to the development of all IPEs. Instead, State units are expected to develop general standards to guide the timely development of IPEs and, as part of those standards, flexible timelines that take into account the specific needs of the individual.

Changes: None.

Section 361.47 Record of Services

Comments: Some commenters generally supported the modifications to record of services requirements that we proposed in the NPRM. One commenter supported the new flexibility given to DSUs in determining the sources of documentation it will use to meet the required components of the record of services, but asked that RSA identify minimum documentation types in the final regulations. Several commenters opposed the expansion of the service record requirements beyond those in the previous regulations.

Several other commenters asked that we clarify the scope of § 361.47(a)(7) of the proposed regulations, which required documentation in the service record describing the extent to which the applicant or eligible individual exercised informed choice regarding assessment services and regarding the employment outcome, VR services, and other components of the IPE. Some commenters suggested that this proposed requirement be replaced by a provision requiring simply that the DSU document that the individual was provided an opportunity to exercise informed choice. Other commenters stated that it would be difficult to meet the proposed requirement in instances in which the DSU is not directly involved in the development of the IPE.

Many commenters opposed the newly proposed § 361.47(b), which would require that the DSU consult with the State Rehabilitation Council in determining the type of documentation that it will maintain for each applicant and eligible individual. These commenters believed that the proposed provision would expand the functions of the Council beyond those functions required by the Act. Due to the voluntary nature of the Council, the commenters asserted, it would be inappropriate to expect members of the Council to be involved in the DSU's day-to-day operations, including the setting of documentation requirements. Other commenters supported requiring the Council to be involved in establishing the DSU's documentation requirements.

Discussion: We revised § 361.47(a) of the previous regulations to identify minimum

documentation standards that will enable DSUs to demonstrate that certain service delivery requirements, as they apply to applicants and eligible individuals participating in the VR program, have been met. While we identified in this proposed section those critical service delivery requirements that must be documented, we sought to provide greater flexibility to DSUs in determining the manner in which they would comply (*i.e.,* determining the types of documentation each would use to comply) with the stated requirements. We believe that the proposed regulations provided that flexibility, while identifying only those requirements of the rehabilitation process that are most necessary to address in the record of services. Those proposed requirements that were not drawn from the previous regulations represented important aspects of the 1998 Amendments that we believe the DSU, and we, must monitor to ensure the proper implementation of the program.

In addition, we believe that § 361.47(a)(7) of the proposed regulations established an appropriate standard for DSUs to meet in documenting compliance with a most critical aspect of the VR program—giving individuals the opportunity to exercise informed choice throughout the rehabilitation process. Accordingly, we do not believe that a simple statement that the applicant or eligible individual was provided an opportunity to exercise informed choice reflects either the scope or the importance of the choice-related requirements in the Act. Among those requirements, section 102(d) of the Act and § 361.52 of the final regulations specify that applicants and eligible individuals must be given opportunities to exercise informed choice in selecting assessment services and in selecting an employment outcome, the VR services needed to achieve that outcome, the entities providing services, and the methods used to secure the services. Thus, given the emphasis accorded choice under the Act, we believe it is appropriate and prudent to require documentation describing the extent to which the applicant or eligible individual exercised informed choice in accordance with the Act's requirements. As for those instances in which an individual elects to develop an IPE without the DSU's assistance, we would expect the DSU to inform individuals about the availability and opportunities to exercise informed choice (as it is required to do under section 102(d)(1) of the Act), obtain information from the individual on the extent to which he or she exercised choice during IPE development, and supplement that information with additional information available to the DSU in order to meet the documentation requirement in § 361.47(a)(7).

As we stated in the preamble to the NPRM, we think it is necessary that the DSU consult with the Council, if it has a Council, in determining the type of documentation that the DSU will maintain in the record of services for each applicant and eligible individual. Section 101(a)(16)(B)(v) of the Act requires the State unit to take into account, in connection with matters of general policy arising in the administration of the State plan, the views of the Council and other specified groups. The document types that will comprise the records of services maintained by the DSU relate directly to the DSU's ability to demonstrate its compliance with important service provision requirements in the law, as well as its ability to justify its decisions (e.g., eligibility determinations) regarding the individual's participation under the VR program. We maintain, therefore, that the DSU's documentation standards for fulfilling the record of services requirements in this section of the regulations constitute a policy of general applicability on which the Council's input is required. Moreover, we do not believe that the consultation required under this section of the regulations expands the Council's functions beyond the scope of the statute, particularly the broad scope of review, analysis, and advisory functions carried out by the Council under section 105(c)(1) of the Act.

Changes: None.

Section 361.48 Scope of Vocational Rehabilitation Services for Individuals With Disabilities

Comments: Several commenters requested that we revise § 361.48(j) of the proposed regulations to more clearly describe the type of interpreter and other communication access services that are authorized under the program. Other commenters requested clarification regarding the scope of assistance for eligible individuals seeking self-employment, telecommuting, or business ownership outcomes that is authorized under proposed § 361.48(s). One of these commenters requested guidance on how these services relate to the entrepreneurial services available through the State workforce investment system.

Discussion: We agree with the suggestion that the scope of authorized interpreter services under proposed § 361.48(j) needs to be clarified in the final regulations. In particular, we believe that we need to clarify that sign language interpreter and oral interpreter services are authorized under that section.

Regarding § 361.48(s), we have received several inquiries, in addition to the noted comments, asking us to clarify the scope of resources that are authorized to be provided through the statewide workforce investment system in order to clarify the extent of the State unit's obligation under proposed § 361.48(s). This provision restates section 103(a)(13) of the Act.

Section 112 of Title I of WIA requires that each participating State submit to the Department of Labor a State plan that describes its statewide workforce investment system and the employment and training activities that it will support with WIA Title I funds. The specific employment and training activities included in the plan are determined individually by each State, depending on the needs and economic conditions in that State. Therefore, the scope of resources authorized under the VR program for self-employed persons, telecommuters, and small business owners will depend on the extent to which the State's workforce development system, as described in the State plan under section 112 of WIA, provides support to individuals pursuing that type of work. Given the variances in workforce investment systems across the States, we do not believe that it is practical to revise the language in proposed § 361.48(s) that aligned the resources authorized under the VR program with those that the State makes available under WIA.

Finally, we believe it is important to note that the list of authorized services in this section of the regulations is not exhaustive and that § 361.48(t) specifically authorizes ''other goods and services'' that the DSU and individual determine to be necessary for the individual to achieve an employment outcome.

Changes: We have revised § 361.48(j) of the proposed regulations by referring specifically to sign language interpreter and oral interpreter services as included within the scope of authorized services for individuals who are deaf or hard of hearing.

Section 361.50 Written Policies Governing the Provision of Services for Individuals With Disabilities

Comments: One commenter requested changes to § 361.50(b)(1) of the proposed regulations, which authorized States to establish preferences for in-State services under certain conditions. The commenter contends that this provision, which was included in the previous regulations, has been subject to misuse and misinterpretation. In response, the commenter suggests restricting DSU preferences for in-State services to instances in which the in-State service is equivalent to and likely to have the same results as an out-of-State service.

Discussion: Section 361.50(b)(1) authorizes a DSU to establish a preference for in-State services in instances in which necessary services are available both within and outside the State. The preference (*i.e.,* the State not taking responsibility for the costs of an out-of-State service that exceeds the costs of the same service provided in-State) is dependent on the in-State service meeting the individual's rehabilitation needs. For that reason, we believe that the provision establishes an appropriate standard, one that has the same effect as that of requiring equivalency between in-State and out-of-State services.

Changes: None.

Section 361.51 Standards for Facilities and Providers of Services

Comments: Many commenters expressed concern about the omission in the proposed regulations of the designated State unit's current regulatory responsibility to issue minimum standards for facilities and service providers. The commenters believed that omitting these requirements from the final regulations will have the effect of holding community providers and facilities to a lower standard than that which must be met by the State agency administering the VR program. The concern was that VR program participants receiving services from private providers would be adversely affected. These commenters encouraged us to maintain the current regulatory standards in the final regulations.

The commenters on this section were concerned mostly about the proposed

removal of the previous regulatory provisions requiring providers of vocational rehabilitation services to use qualified personnel. For example, one party stated that financial constraints on community facilities may reduce a facility's capacity to maintain the same qualified personnel standards that section 101(a)(7) of the Act imposes on State agencies; nevertheless, this commenter believed that regulatory requirements should be developed to ensure a reasonable level of professional qualifications at provider facilities. Other commenters stated that individuals who are blind or visually impaired in particular, and all individuals with disabilities generally, must be assured that private facilities and providers of services under the VR program have proper qualifications beyond native language skills and the ability to use appropriate modes of communication (two current standards that were retained in the proposed regulations). In addition, many of the commenters expressed concern that the proposed regulations, unlike the previous regulations, did not require VR service providers to have adequate and appropriate policies and procedures to prevent fraud, waste, and abuse.

Discussion: We had proposed to remove the regulatory requirements governing personnel and other standards for providers of VR services on the basis that the explicit statutory authority supporting those requirements was removed by the 1998 Amendments. Specifically, the 1998 Amendments removed provisions previously contained in section 12(e) of the Act that had required the Secretary to promulgate regulations pertaining to the selection of VR services and VR service providers. In accordance with the prior Act, § 361.51 of the previous regulations included procedures to prevent fraud, waste, and abuse among service providers and procedures to ensure that service providers complied with applicable standards, such as those related to qualified personnel. The requirements in § 361.51 of the proposed regulations that were retained from the previous regulations relating to the accessibility of facilities, affirmative action for qualified individuals with disabilities, and special communication needs personnel also were retained in the 1998 Amendments.

We have interpreted Congress' removal of standards governing personnel and fraud, waste, and abuse from the Act as intended to give States greater discretion in determining how best to ensure that service providers used by the DSU are capable of providing necessary VR services and meeting the needs of VR program participants. In other words, Congress determined that States could ensure the quality of personnel and administrative efficiency among the service providers it uses by following applicable State rules. We want to emphasize that removing this particular requirement from the final regulations does not absolve State units from ensuring that entities providing services under the VR program meet applicable State laws that impose personnel standards and other safeguards on parties providing services under State-administered programs. We believe that this responsibility of the DSU, as well as the DSU's general responsibilities under OMB Circular A–87 and the Education Department General Administrative Regulations (EDGAR) to administer the VR program and the expenditure of VR program funds efficiently and effectively, ensures that the removal of previous regulatory standards for service providers will not have an adverse impact on the program.

Changes: None.

Section 361.52 Informed Choice

Comments: As with proposed § 361.5(b) discussed previously, a number of commenters requested that we define the term ''informed choice'' in this section of the final regulations.

Another commenter suggested that this section of the proposed regulations be revised to ensure that participants in the VR program are able to exercise informed choice in selecting their vocational rehabilitation counselor. Specifically, the commenter suggested that participants, prior to selecting a counselor, be given a list of counselors in the local office of the State unit, a statement of the counselors' qualifications, and the opportunity to interview a number of counselors.

Other commenters suggested that DSUs make available to individuals information concerning the outcomes that individuals achieve in working with specific service providers. The commenters asked that this information be included in the scope of information that DSUs must provide individuals under § 361.52(c). Other commenters proposed revisions to § 361.52(d), which identifies sample methods or sources of information that the DSU may use to make available required information on services and service providers. Specifically, one commenter requested that DSUs make available to individuals information on nationwide services and service providers, as well as service-related information issued by national consumer groups.

Discussion: We have long been asked to define the term ''informed choice'' in regulations and have refrained on the basis that the current regulations establish appropriate guidelines governing the informed choice process, while leaving some discretion to DSUs, in conjunction with their Councils, if they have Councils, to determine how best to secure information and make that information available to participants so that they may exercise choice. The 1998 Amendments give even greater emphasis to informed choice, specifically in section 102(d), which identifies each of the stages at which choices must be given (essentially all stages of the rehabilitation process), requires the DSU to inform individuals about the availability of and the opportunity to exercise informed choice, and requires that the DSU assist individuals as is necessary so that they may make informed choices. We believe that this proposed section of the regulations sufficiently reflected the significant scope of the choice provisions in the Act and retained a number of key portions from the previous regulations that serve to guide DSUs in developing their choice-related policies. We again emphasize the crucial role that the Council must play in that regard.

Although we maintain that, at this point, defining ''informed choice'' in the regulations would not be appropriate, we have established additional guidance materials designed to facilitate the choice process, most notably as part of the RSA Monitoring Guide for FY 2000. We intend to develop additional policy directives that will also assist in that effort.

Section 361.45 of the regulations, which implements section 102(b)(1) of the Act, specifies the range of options available to individuals in securing assistance in developing their IPEs, including assistance provided by DSU or non-DSU counselors or from other sources. However, neither that provision nor the broad choice requirements in section 102(d) of the Act establish a basis for requiring DSUs to provide individuals with their choice of VR counselors. At the same time, we note that the Act and the final regulations do not prevent a State from giving individuals the opportunity to exercise informed choice in selecting counselors. RSA guidance to the States (Program Assistance Circular 88–03, dated June 7, 1988) underscores the importance of an effective counseling relationship between the applicant or eligible individual and the DSU counselor. Thus, we would urge DSUs, taking into account caseload levels and other staffing considerations, to assign counselors to individuals in a manner that they believe will result in a most effective match. Given the obvious effect that that match has on the successful rehabilitation of the individual, we also indicate in the guidance that, if an individual requests a change in counselor and the request is denied, the individual can appeal the determination through the DSU's due process procedures.

Section 361.52(c) of the proposed regulations listed the minimum scope of information that State units were required to provide to individuals, or assist the individual in acquiring, to enable the individual to make informed choices about the services, service providers, and outcome identified in the IPE. We agree with the commenter that the minimum information related to services and service providers specified in this section (e.g., cost, consumer satisfaction, qualifications, degree of integration, etc.) also should mention the types of outcomes that individuals have achieved in working with certain providers.

Section 361.52(d) identifies specific methods and sources of information that the DSU may use to provide individuals with sufficient information about services and service providers. Since this provision is not a comprehensive listing of methods and sources, we note that DSUs and individuals may use any other methods and sources of information that are available to enable the individual to exercise choice. We agree that participants and State units may benefit greatly by securing information from national consumer groups or other national organizations with specialized expertise in particular disabilities, rehabilitation methods, and services. In addition, methods involving experiences that participants may use to gain information about types of employment outcomes, services, and service providers may prove helpful. We encourage

DSUs to assist individuals in obtaining useful information from many other appropriate sources.

Changes: We have revised § 361.52(c) of the proposed regulations to clarify that information and assistance provided under that section also must assist individuals in exercising informed choice among assessment services. In addition, we have included service provider outcomes in the scope of information relating to the selection of vocational rehabilitation services and service providers. We have deleted the terms ''local'' and ''state and regional'' from § 361.52(d) and have added references to methods involving visiting or experiencing various settings to the list of potential methods or sources of obtaining information.

Section 361.53 Comparable Services and Benefits

Comments: One commenter expressed concern that the requirement in the proposed regulations that DSUs provide services to an individual while waiting for identified comparable services and benefits to become available may serve as a disincentive for individuals to pursue the alternative benefits or services at the appropriate time. The commenter recommended that DSUs be able to discontinue services if an individual refuses to pursue the comparable benefits or services.

Another commenter noted that the proposed regulations did not include the statutory exemption in section 101(a)(8)(A)(ii) of the Act that states that awards and scholarships based on merit are not considered comparable services and benefits under the program.

Discussion: Both section 102(b)(3)(E)(ii) of the Act and § 361.46(a)(6)(ii)(C)) of the regulations require that the IPE identify the individual's responsibilities with regard to applying for and securing comparable services and benefits. Thus, the law anticipates that State units and individuals will work out the extent of those responsibilities through the IPE development process. For that reason, we do not believe that § 361.53(c)(2), which is unchanged from the previous regulations, would create the disincentive envisioned by the commenter as long as the individual is fully apprised of, and is assisted in fulfilling, his or her responsibilities in securing other services once they become available.

We recognize that this section of the proposed regulations did not refer to the statutory exception to comparable services and benefits for scholarships and awards based on merit. However, this exemption is addressed in the definition of the term ''comparable services and benefits'' in § 361.5(b)(10). We think the exception is best addressed in the definition itself since it is the definition that specifies the scope of comparable services and benefits under the program.

Changes: None.

Section 361.54 Participation of Individuals in Cost of Services Based on Financial Need

Comments: Many commenters supported the proposed expansion of those services that would be exempt from State financial needs tests, meaning that individuals could not be required to contribute to the cost of those services. One commenter suggested that the proposed exemption of interpreter services, reader services, and personal assistance services from financial needs tests be limited to the provision of those services during the assessment phase of the VR process. Another commenter supporting the proposal asked that we also emphasize that the DSU still must seek and use comparable services and benefits to pay for exempted services.

In addition, in response to our request for comments on the appropriate scope of services that should be exempted from financial needs tests, a number of commenters requested that the proposed listing be expanded to specifically include assistive communication devices, rehabilitation engineering services, and other access-type services.

Other commenters strongly opposed the proposed expansion of the list of services exempted from financial needs tests under the prior regulations. Some of these commenters stated that the proposed expansion would undermine the DSU's longstanding option of considering the financial need of program participants and would weaken the DSU's ability to conserve VR program funds.

In addition, many commenters supported the proposed prohibition in the NPRM on applying financial needs tests to eligible individuals receiving SSI or SSDI. Other commenters supported prohibiting the application of financial needs tests only to individuals receiving SSI since SSI eligibility is based on the individual's financial need as opposed to SSDI beneficiaries who may have assets that they could contribute to the cost of vocational rehabilitation services.

A significant number of commenters opposed the proposed exemption of SSI recipients and SSDI beneficiaries from the DSU's financial needs assessments on the basis that DSUs often consider the resources of the individual's entire household, as opposed to those of the individual only, in determining the level of resources the individual must contribute to the program of VR services. While these commenters agreed that DSUs could disregard an individual's actual SSI or SSDI cash payment, the commenters recommended that DSUs be able to consider the overall financial status of the individual and the individual's household when assessing the individual's financial need under the VR program.

Discussion: In the NPRM, we proposed to expand the scope of services exempt from State financial needs tests under the prior regulations to include certain services (*i.e.,* interpreter, reader, and personal assistance services) needed to participate in the VR program, as well as any service needed by a recipient of SSI or SSDI.

The purpose of the proposal to exempt from State financial needs tests interpreter, reader, and personal assistance services was to ensure *access* to the VR program. As we discussed in the preamble to the NPRM (65 FR 10629), the additional services that we proposed excluding from State financial needs tests enable individuals to participate in training or employment-related services that they are seeking through the VR program. Typically, individuals do not apply, nor are they determined eligible, under the VR program solely to receive these access-type services. Rather, these services are provided in conjunction with employment and training services sought by the individual participating in the VR program. In fact, the distinguishing feature of these access services is that participation in the VR program is not possible without these services being afforded. Thus, placing an additional burden on the individual to participate in the cost of accessing the VR program, in our view, is inappropriate and contrary to both the purpose of the VR program and the principles in section of 504 of the Act and the ADA, which safeguard participation by persons with disabilities in federally funded (under section 504) or public (under the ADA) programs.

As many of the commenters pointed out, we realize that access-type services other than the three additional services that the NPRM would have exempted from financial needs tests (*i.e.,* interpreter, reader, and personal assistance services) clearly exist and that individuals might need those services in order to participate in the VR program. In light of the extensive public comment we received on that point, and the fact that the limited scope of exempted services in the proposed regulations would not ensure that persons with certain disabilities are able to participate in the VR program, we have modified the proposed regulations to more clearly reflect the DSU's responsibility to ensure that all persons with disabilities do not incur the disability-related costs of accessing the VR program. Specifically, the final regulations prohibit the application of State financial needs tests to the provision of any auxiliary aid or service that would be necessary under section 504 of the Act or the ADA in order for an individual with a disability to participate in the VR program. Thus, the final regulations, in effect, ensure that individuals are able to receive, at no additional cost to themselves, aids and services to which they are already entitled under section 504 or the ADA.

We note that interpreter and reader services—two services proposed to be exempt from financial needs tests in the NPRM—generally would be covered under the section 504- and ADA-based standard in the final regulations if those services are needed in order for the individual to access other VR services. In addition, the final regulations, like the NPRM, identify personal assistance services as a separate category of services exempt from financial needs tests. While personal assistance services, as defined in the VR program regulations, might not necessarily be provided by public programs under section 504 or the ADA, those services are often critical for individuals with significant disabilities to be able to access employment and training under the VR program. As we indicated in the preamble to the NPRM, we believe it is important to exempt these services from financial needs tests as well. We also believe that retaining from the NPRM the exemption for personal assistance services will remove a significant disincentive toward pursuing

employment for those with the most significant disabilities.

We also note, however, that the final regulations do not alter the State unit's responsibility to seek comparable services and benefits that can meet the individual's interpreter, reader, personal assistant, or other access needs. Nor does it affect entities outside of the DSU from meeting their responsibilities under section 504 of the Act, the ADA, or other laws. In fact, we expect that some of those entities are likely to be public agencies with which the State unit is required to enter into an interagency agreement in order for both parties to fulfill their responsibilities toward individuals with disabilities (see § 361.53(d) of the final regulations).

With regard to the proposed prohibition on applying financial needs tests to individuals who receive SSI or SSDI, we continue to believe that it is appropriate to exempt those persons from DSU financial needs tests given the Act's emphasis on streamlining access to VR services for disabled Social Security recipients. Moreover, as we discussed in the preamble to the NPRM (65 FR 10629), this change to the prior regulations facilitates the primary goal behind referring SSI recipients and SSDI beneficiaries to the VR program—supporting their efforts (and reducing disincentives) to pursue gainful employment and no longer require Social Security support.

Our rationale for exempting individuals receiving SSI benefits, or a combination of SSI and SSDI benefits, from State-imposed financial needs tests is further supported by the fact that these persons already have gone through a rigorous, federally mandated financial needs test that is typically more restrictive than those tests employed at the State level. To qualify for SSI, individual recipients must have very limited, if any, monthly income—individual or household—or other assets. These individuals generally live at or below the federally established poverty level. Consequently, SSI recipients clearly have a limited ability to contribute to the costs of VR services. Requiring these same persons to undergo an additional financial needs test at the State level would serve only to unnecessarily delay the provision of VR services.

On the other hand, the rationale behind exempting from DSU financial needs tests individuals receiving SSDI benefits alone is based on three critical points. First, SSA, as a matter of policy, has deemed it necessary to award SSDI beneficiaries monthly cash assistance due to their inability to work. While it is true that SSDI benefits are awarded on the basis of earnings and years worked as opposed to extreme financial need, SSA has determined that these individuals can no longer work due to their disabilities and, therefore, cannot earn income to support themselves or their families. SSDI payments are intended to cover a person's living expenses. Once a person achieves an employment outcome earning sufficient wages, as determined by SSA, the individual would be removed from the SSDI rolls.

Second, many State and Federal agencies currently are working to remove as many disincentives as possible for individuals with disabilities, including individuals with significant disabilities receiving Social Security benefits, to return to work. For example, Congress has adopted changes to Social Security laws not to penalize persons (*i.e.*, not to eliminate or reduce Social Security benefits, including health care coverage) for working since individual's wages are often insufficient to cover costly medical and other living expenses. Previously, many individuals with disabilities chose to remain on SSDI, at Federal expense, rather than risk losing health care coverage. Imposing a financial needs test on this same population that is seeking VR services in order to achieve an employment outcome, in effect, creates an additional disincentive to work and could adversely affect the results sought through the revised Social Security laws and other reforms.

Third, it is important to note that SSA reimburses State VR agencies for the costs incurred in serving an SSI or SSDI recipient when that individual achieves an employment outcome (*i.e.*, substantial gainful activity under Social Security laws) for a specified period of time. Thus, as far as those SSI and SSDI recipients who successfully achieve employment outcomes under the VR program are concerned, there is ultimately little financial burden on the DSU in serving these persons to justify transferring that burden to individuals.

Changes: We have amended the proposed regulations to exempt from DSU financial needs tests any service that constitutes an auxiliary aid or service afforded the individual under section 504 of the Act or the ADA in order for the individual to participate in the VR program.

Section 361.56 Requirements for Closing the Record of Services of an Individual Who Has Achieved an Employment Outcome

Comments: Several commenters expressed concern about proposed § 361.56(a), which required, as a condition of closing the individual's record of services, that the employment outcome achieved by the individual be the same as that described in the individual's IPE. These commenters viewed the provision as inappropriate since amending the IPE to specify a new employment outcome is not always possible, for example when the individual is unavailable to sign an amended IPE.

Other commenters questioned § 361.56(c) of the proposed regulations, which required an agreement between the individual and the DSU counselor that the employment outcome is satisfactory and that the individual is performing well in the employment before the DSU can close the individual's record of services. These commenters suggested that the proposed provision might lead to differences of opinion between the counselor and the individual as to whether the outcome is ''satisfactory'' and thus preclude the State unit from appropriately closing the service record.

Discussion: We agree that in very limited instances it may be impractical for the DSU and the individual, together, to amend the individual's IPE to reflect the ultimate employment outcome that the individual obtains while participating in the VR program. Yet, we believe that in most instances necessary amendments to the IPE can be accomplished since the DSU and the individual need not approve and sign the amended IPE simultaneously. Moreover, the required consistency between the IPE and the individual's outcome, in our view, is warranted in order to preserve the usefulness of the IPE development process.

With respect to the comments on proposed § 361.56(c), we note that this provision in the NPRM was substantially the same as the previous regulatory provision. In addition, we are not aware of any reported problems regarding the implementation of this provision through RSA monitoring activities, referrals to the Client Assistance Program, or due process hearings. More importantly, given that employee and counselor satisfaction is a critical factor toward assessing the stability of the individual's job, we believe that the provision should be retained in the final regulations.

Changes: None

Section 361.57 Review of Determinations Made by Designated State Unit Personnel

Comments: One commenter suggested revising § 361.57(a) of the proposed regulations to require the State unit to provide in writing all agency decisions that result in a suspension, termination, or denial of services. This commenter explained that requiring written notification of service denials would be consistent with procedural safeguards in other Federal programs.

We received several comments regarding proposed § 361.57(b), the general requirements governing State due process procedures. Specifically, commenters expressed dissatisfaction with proposed § 361.57(b)(3)(ii) regarding representation during mediation sessions and formal due process hearings. One commenter suggested revising that paragraph to exclude the use of attorneys during mediation and to require the use of attorneys during the formal hearing process. The commenter expressed concern that the use of attorneys during mediation would alter the informal nature of that process. Conversely, the commenter explained, individuals who are not represented by attorneys during the formal hearing are at a distinct disadvantage since the State unit, in general, is represented in hearings by an attorney.

At least one commenter questioned whether mediation should be voluntary on the part of the State unit. The commenter suggested revising proposed § 361.57(d)(2)(i) to require the State unit to participate in good faith in the mediation process whenever mediation is requested by the individual.

Commenters suggested that § 361.57(d)(2)(ii) of the proposed regulations be modified to allow the mediator, in addition to the parties to the mediation, to terminate the mediation process. The commenters stated that it is common practice to give mediators that authority.

A few commenters raised concerns about proposed § 361.57(d)(2)(iii), which governs the manner in which mediators are assigned to a particular case and lists of qualified and

impartial mediators are maintained. One commenter described the meticulous and thoughtful steps used in one State to assign the mediator who is most appropriate to each case. Another commenter suggested that the regulations require that the State unit and the Council agree to the list of mediators as they do for impartial hearing officers.

The final set of comments regarding the proposed mediation procedures pertain to the requirements governing mediation agreements under proposed § 361.57(d)(4). One commenter stated that mediators do not ''issue'' mediation agreements as that provision suggests. Several commenters urged us to make mediation agreements binding on all parties in order to create greater incentive to pursue mediation.

We received many comments regarding the requirement in proposed § 361.57(e)(1) that hearings generally be conducted within 45 days of an individual's request for review of a State unit decision that affects the provision of services to the individual. With one exception, all commenters indicated that it is overly burdensome to require the State unit to conduct informal reviews, mediation, and the formal hearing within the same 45-day period. Some suggested that the 45-day clock not begin until after an informal review and, if applicable, the mediation process are completed. Others suggested that the time period be extended by a certain number of days (e.g., 10 days) to allow for mediation to occur. Still others suggested that the regulations allow separate time periods for each phase of dispute resolution and that the time periods run consecutively.

Several commenters suggested that § 361.57(g)(3)(iii) of the proposed regulations be modified to eliminate the 30-day deadline by which a reviewing official must render a decision.

Finally, we received several comments asking that the final regulations include a time limit (e.g., 30 days) for the filing of civil actions under § 361.57(i) of the proposed regulations.

Discussion: The issue concerning requiring that all agency decisions that result in a suspension, termination, or denial of services be provided in writing has been brought to our attention many times since the adoption of the 1998 Amendments. Section 361.57(a) conforms to the statutory requirements in section 102(c) of the Act. The Act does not require a written decision in order for an individual to initiate an appeal under this section. An individual may appeal ''any determination.'' Therefore, we do not require designated State unit personnel to issue decisions pertaining to the provision of services in writing, but we encourage the use of written decisions whenever practicable.

With respect to the comments pertaining to legal representation, we share the concern that individuals sometimes are at a disadvantage if they are not represented by an attorney during the formal hearing process, especially if the designated State unit is represented by an attorney. However, we do not share the concern that attorneys used during the mediation process necessarily change the nature of mediation. Nonetheless, the proposed requirements regarding representation during the mediation and hearing stages reflect the broad authority in section 102(c)(3)(B) of the Act for individuals to select the representative of their choice.

The 1998 Amendments to the Act added mediation as a new method of resolving disputes between individuals and the State unit. Thus, it is not surprising that many commenters sought further clarification of the requirements in the proposed regulations that impact the States' implementation of mediation procedures.

Section 361.57(d)(2)(i) conforms to the statutory language of section 102(c)(4)(B)(i) of the Act, which requires that the DSU's mediation procedures ensure that the mediation process ''is voluntary on the part of the *parties*. . . . '' (emphasis added). Therefore, Congress intended the mediation process to be voluntary on the part of both parties rather than giving only the individual the discretion to participate in mediation as one commenter suggested. We also believe that allowing mediation to be voluntary on the part of both parties is necessary since mediation is successful only if both parties participate willingly in an effort to resolve their dispute. We do note, however, that the State unit's decision to agree to pursue mediation should be made on a case-by-case basis. It is neither appropriate nor consistent with the intent of the Act for a DSU to follow a general policy of never participating in mediation.

Our intent behind § 361.57(d)(2)(ii) of the proposed regulations was to ensure that either party may change its mind about participating in mediation, even after the mediation process has begun, and at that point pursue a due process hearing. We sought to ensure that individuals in particular are never locked into a less formal dispute resolution process that they believe to be futile. Consistent with this approach, we also agree with the suggestion that mediators should be allowed to terminate the mediation process and that amending the regulations to reflect that point would not alter the intended effect of this proposed section.

We proposed a process in § 361.57(d)(2)(iii) of the proposed regulations that is similar to that which the Act applies to the selection of impartial hearing officers. In particular, we sought to ensure the same neutrality on the part of the mediators that exists for hearing officers. However, we believe that States with established processes for assigning mediators to a case should be allowed to continue appointing mediators in that fashion, provided that the process used ensures neutrality.

In response to the comments on proposed § 361.57(d)(2)(iii) and the development of the State's list of available mediators, we note that section 102(c)(4)(C) of the Act does not require the State to develop the list of mediators through the joint efforts of the State unit and the Council. Many States have developed an ''Office of Dispute Resolution'' or similar office to handle all mediations across multiple State agencies. These offices typically employ mediators or contract with private mediators to conduct mediations involving State-administered programs. The proposed regulations were intended to give States as much flexibility as possible in establishing mediation policies and using existing mediation processes.

Many individuals representing CAPs and DSUs have urged us to interpret section 102(c)(4) of the Act to require that a mediation agreement be binding on all parties. We believe that, if the outcome of mediation (i.e., a mediation agreement) were binding, then conceivably neither party could pursue a formal hearing afterward. That type of restriction would be contrary to the scope of due process procedures that are available under the Act.

In light of the overwhelming support for extending the 45-day period for holding due process hearings under proposed § 361.57(e)(1), we agree that the period should be extended to 60 days in the final regulations. We do not believe that the time period should be extended any longer since section 102(c) of the Act clearly envisions a due process system that is timely, quick, and equitable.

We believe that the 30-day period for an appropriate official to review a hearing officer's decision under proposed § 361.57(g)(3)(iii) is reasonable. This is the same time period that applied to the review of hearing decisions by the State unit director under the previous regulations. Although State-level review of hearing decisions, if established by the State, now must be conducted by an official of an entity overseeing the DSU, we see no reason for modifying the current time period.

We consider it inappropriate for us to establish a time limit for the filing of civil actions in disputes arising under the VR program. The State's Rules of Civil Procedure or the Federal Rules of Civil Procedure, depending on the appropriate forum, dictate the applicable deadline for filing an action in civil court.

Changes: We have made the following modifications to proposed § 361.57(d): authorizing mediators to terminate mediations (§ 361.57(d)(2)(ii)); authorizing States with an established method of assigning mediators to use that process in assigning mediators for the VR program provided the process ensures neutrality on the part of mediators (§ 361.57(d)(2)(iii)); and, in adopting a technical but important revision suggested by some commenters, clarifying that mediators assist in developing rather than ''issue'' mediation agreements (§ 361.57(d)(4)). We also have modified proposed § 361.57(e)(1) to require that hearings be conducted within 60, rather than 45, days from the individual's request for review of a DSU decision.

Section 361.60 Matching Requirements

Comments: One commenter wrote in support of the proposed change in § 361.60(b)(3)(ii) that would authorize a State to use funds that are earmarked for a particular geographic area within the State as part of its non-Federal share without obtaining a waiver of statewideness if the State determines and informs the RSA Commissioner that it cannot provide the full amount of its non-Federal share without using the earmarked funds. This commenter indicated that the provision was needed

since many State legislatures appropriate most, but not all, of the funds needed to match the full amount of Federal funds available under the program.

Discussion: Although section 101(a)(4)(B) of the Act is intended to assist some States in meeting their matching obligations, we wish to reemphasize that statewideness requirements still apply to the Federal VR program funds that the State receives in return for contributing geographically limited earmarked funds to its non-Federal share. For further discussion of the effect of this change from the previous regulations, please refer to the preamble to the NPRM (65 FR 10630).

Changes: None.

Sections 361.80–361.89 Evaluation Standards and Performance Indicators

Comments: None.

Discussion: The Evaluation Standards and Performance Indicators for the VR program were published in the **Federal Register** on June 5, 2000 (65 FR 35792) and became effective on July 5, 2000. Because these performance measures are part of the regulations implementing the VR program (34 CFR 361), we have added the measures and their corresponding requirements to the final regulations in this publication. The Evaluation Standards and Performance Indicators are located in §§ 361.80 through 361.89 of Subpart E. For guidance in implementing the performance measures, we suggest you consult the preamble to the prior **Federal Register** publication of the measures (65 FR 35792).

Changes: We have amended the proposed regulations to include Subpart E, ''Evaluation Standards and Performance Indicators,'' and the corresponding provisions in §§ 361.80 through 361.89 that were previously published. The requirements in these sections are the same as those published in the **Federal Register** on June 5, 2000.

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Part VII

Department of Agriculture

Food and Nutrition Service

7 CFR Parts 272 and 273

Food Stamp Program; Personal Responsibility Provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996; Final Rule

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 272 and 273

RIN 0584–AC39

Food Stamp Program: Personal Responsibility Provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final Rule.

SUMMARY: This rule finalizes the proposed rule of the same name which was published December 17, 1999. It implements 13 provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). Upon implementation, this rule will: Prohibit an increase in food stamp benefits when a household's income is reduced because of either a penalty imposed under a Federal, State, or local means-tested public assistance program for failure to perform a required action or for an act of fraud; allow State agencies to disqualify an individual from participation in the Food Stamp Program (Program) if the individual is disqualified from another means-tested program for failure to perform an action required by that program; specify that State agencies may not apply a food stamp sanction to Program households for failure to ensure their minor children attend school, or if the adults do not have (or are not working toward attaining) a secondary school diploma or its equivalent; make individuals convicted of drug-related felonies ineligible for food stamps; make fleeing felons and probation and parole violators ineligible for food stamps; require States to provide households' addresses, Social Security Numbers, or photographs to law enforcement officers to assist them in locating fugitive felons or probation or parole violators; allow States to require food stamp recipients to cooperate with child support agencies as a condition of food stamp eligibility; allow states to disqualify individuals who are in arrears in court-ordered child support payments; double the penalties for violating Program requirements; permanently disqualify individuals convicted of trafficking in food stamp benefits of $500 or more; make individuals ineligible for 10 years if they misrepresent their identity or residence in order to receive multiple Program benefits; and limit the Program participation of most able-bodied adults without dependents to three months in a three-year period during times the individual is not working or participating in a work program.

DATES: *Effective Dates:* This rule is effective no later than April 2, 2001, except for the amendment to 7 CFR 272.2(d)(1)(xiii) which is effective August 1, 2001.

Implementation Date: State agencies must implement the provision in this final rule no later than August 1, 2001.

FOR FURTHER INFORMATION CONTACT: Margaret Werts Batko, Assistant Branch Chief, Certification Policy Branch, Program Development Division, Food and Nutrition Service (FNS), USDA, 3101 Park Center Drive, Alexandria, Virginia, 22302, (703) 305–2516. Her Internet address is: Margaret.Batko@FNS.USDA.GOV.

Executive Order 12866

This final rule has been determined to be economically significant and was reviewed by the Office of Management and Budget in conformance with Executive Order 12866.

SUPPLEMENTARY INFORMATION:

Executive Order 13132

Federalism Summary Impact Statement

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. FNS has considered the impact on State agencies. For the most part, this rule deals with changes required by law, and implemented by law in 1996. However, the Department has made discretionary changes to ensure client protections and access to the Program and to simply the administration of the requirements by the State agencies. These changes primarily affect food stamp recipients. The effects on State agencies are moderate. In some instances, the changes result in modest increases in administrative burdens. However, these changes are legislatively mandated and we have no discretion to minimize them. This rule is intended to have preemptive effect on any State law that conflicts with its provisions or that would otherwise impede its full implementation. Generally, PRWORA and other federal statutes required many of the changes made in this rule, and made most of them effective on enactment and all of them effective prior to the publication of this rule. FNS is not aware of any case where the discretionary provisions of the rule would preempt State law.

Prior Consultation With State Officials

Before drafting this rule, we received input from State agencies at various times. Because the Program is a State-administered, federally funded program, our regional offices have formal and informal discussions with State and local officials on an ongoing basis. These discussions involve implementation and policy issues. This arrangement allows State agencies to provide feedback that forms the basis for many discretionary decisions in this and other Program rules. In addition, FNS officials attend regional, national, and professional conferences to discuss issues and receive feedback from State officials at all levels. Lastly, the comments on the proposed rule from State officials were carefully considered in drafting this final rule. The nature of the concerns of the State and local officials who commented on the proposed rule, our position supporting the need to issue this final rule, and the extent to which the concerns expressed by the State and local officials have been met are discussed in detail in this preamble.

Executive Order 12372

The Food Stamp Program is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the final rule in 7 CFR part 3015, Subpart V and related Notice (48 FR 29115), this Program is excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Executive Order 12778

This final rule has been reviewed under Executive Order 12778, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full implementation. This rule is not intended to have retroactive effect unless so specified in the **DATES** paragraph of this preamble. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted.

Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612). Shirley R. Watkins, Under Secretary, Food, Nutrition, and Consumer Services, has certified that this rule will not have a significant economic impact on a substantial number of small entities. State and local welfare agencies will be the most affected to the extent that they administer the Program.

Paperwork Reduction Act

The information collection burden associated with the provisions in this rule concerning eligibility, certification, and continued eligibility of food stamp recipients is approved under OMB 0584–0064. The information collection burden associated with the request for a waiver under the food stamp time limit in 7 CFR 273.24 is approved under OMB No. 0584–0479. The information collection burden associated with provisions in this rule which affect the regulations at 7 CFR 273.16, the Demand Letter for Over Issuance, is approved under OMB 0584–0492. The information collection burden that is associated with the provisions in this rule which affect the regulations at 7 CFR 272.2, the State Plan of Operations, is approved under OMB 0584–0083.

Unfunded Mandate Reform Act of 1995 (UMRA) Title II of UMRA 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, FNS 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, or tribal governments in the aggregate, or to the private sector, of $100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires FNS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule.

This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, and tribal governments or the private sector of $100 million or more in any one year. This rule is, therefore, not subject to the requirements of sections 202 and 205 of the UMRA.

Civil Rights Impact Analysis

FNS has reviewed this final rule in accordance with the Department Regulation 4300–4, ''Civil Rights Impact Analysis,'' to identify and address any major civil rights impacts the proposed rule might have on minorities, women, and persons with disabilities. After a careful review of the rule's intent and provisions, and the characteristics of food stamp households and individual participants, FNS has determined that there is no way to soften their effect on any of the protected classes. FNS has no discretion in implementing many of these changes. The changes required to be implemented by law have been implemented.

All data available to FNS indicate that protected individuals have the same opportunity to participate in the Food Stamp Program as non-protected individuals. FNS specifically prohibits the State and local government agencies that administer the Program from engaging in actions that discriminate based on race, color, national origin, gender, age, disability, marital or family status. Regulations at 7 CFR 272.6 specifically state that ''State agencies shall not discriminate against any applicant or participant in any aspect of program administration, including, but not limited to, the certification of households, the issuance of coupons, the conduct of fair hearings, or the conduct of any other program service for reasons of age, race, color, sex, handicap, religious creed, national origin, or political beliefs. Discrimination in any aspect of program administration is prohibited by these regulations, the Food Stamp Act of 1977 (the Act), the Age Discrimination Act of 1975 (Pub. L. 94–135), the Rehabilitation Act of 1973 (Pub. L. 93–112, section 504), and title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d). Enforcement action may be brought under any applicable Federal law. Title VI complaints shall be processed in accord with 7 CFR part 15.'' Where State agencies have options, and they choose to implement a certain provision, they must implement it in such a way that it complies with the regulations at 7 CFR 272.6.

Regulatory Impact Analysis

Need for Action: On August 22, 1996 the President signed the PRWORA. This rule implements 13 provisions of the PRWORA. This rule (1) prohibits an increase in food stamp benefits when households' income is reduced because of a penalty imposed under a Federal, State, or local means-tested public assistance program for failure to perform a required action, (2) prohibits an increase in food stamp benefits when households' income is reduced because of an act of fraud under a Federal, State, or local means-tested public assistance program; (3) allows States to disqualify an individual from the Program if the individual is disqualified from another means-tested program for failure to perform an action required by that program; (4) clarifies that households who are receiving grants under a State's Temporary Assistance for Needy Families (TANF) Program and who are sanctioned because their minor children are not attending school, or if the adults do not have (or are not working toward attaining) a secondary school diploma or its equivalent, may not be sanctioned under the Program beyond those sanctions provided for in 7 CFR 273.11(k) and (l); (5) makes individuals convicted of drug-related felonies ineligible for food stamps; (6) makes fleeing felons and probation and parole violators ineligible for food stamps; (7) requires States to provide households' addresses, Social Security numbers, or photographs to law enforcement officers to assist them in locating fugitive felons or probation or parole violators; (8) allows states to require food stamp recipients to cooperate with child support agencies as a condition of food stamp eligibility; (9) allows states to disqualify individuals who are in arrears in court-ordered child support payments; (10) doubles the penalties for violating Program requirements; (11) permanently disqualifies individuals convicted of trafficking in food stamp benefits of $500 or more; (12) makes individuals ineligible for 10 years if they misrepresent their identity or residence in order to receive multiple food stamp benefits; and (13) limits the food stamp participation of most able-bodied adults without dependents (ABAWDs) to three months in a three-year period during times the individual is not working at least half-time or participating in a work program.

The changes in food stamp requirements made by the provisions in PRWORA addressed in this rule would reduce Program costs for fiscal year (FY) 1999–2003 by approximately $1.810 billion. For FY 1999–2003, the estimated yearly savings are (in millions) $525, $431, $348, $263, and $243, respectively. The majority of the savings are realized from Section 824 of PRWORA, time limited benefits for able-bodied adults without dependents. Smaller savings are realized from the following provisions: Section 819, comparable disqualifications; Section 822, cooperation with child support agencies; Section 823, disqualifications for child support arrears; and Section 829 and 911, no increase in benefits. The savings from the remaining provisions in the rule are negligible and, therefore, will not be discussed in this analysis.

Comparable Disqualifications—Section 819—This provision gives States the option to impose the same disqualification for food stamps as imposed on a household member for failure to take a required action under a Federal, State, or local law relating to a means-tested public assistance program. The rule provides that: (1) The

program has to be authorized by Federal, State, or local law; (2) that a Federal means-tested program includes public and general assistance as defined in 7 CFR 271.2; (3) the provision may be applied selectively to programs since it is an optional provision; (4) the provision only applies if the person is disqualified while receiving the other assistance and food stamps; (5) the provision does not apply to time-limited benefits, exceeding the family cap, failing to complete the application process on time or failing to reapply; or to purely procedural requirements such as submitting a form; (6) only a household member may be disqualified; (7) the penalty must run concurrently with the penalty in the other program, and for the duration of the penalty in the other program, but not to exceed one year without review; (8) A State must shorten the disqualification period when it becomes aware that the person is ineligible for means-tested public assistance for another reason during that time frame; (9) all of the resources and all but pro rata share of the income of the ineligible member must be counted in accordance with 7 CFR 273.11(c)(2); (10) the household rather than the State agency will have to initiate the action of adding a person back to the household; (11) a disqualification may be imposed in addition to allotment reductions under section 829 of PRWORA; and (12) States that elect to implement this provision must include it in the Plan of Operation.

This provision affects participants to the extent States choose to implement this provision and to the extent individuals are disqualified or sanctioned under another Federal means-tested program. We estimate that 3,000 participants will be disqualified from food stamp benefits due to this provision in FY 1999. We estimate that the FY 1999 cost savings from this provision will be $5 million and the five-year cost savings for FY 1999 through FY 2003 will be $25 million.

As a proxy for the number of individuals disqualified from other means-tested programs, we used Department of Health and Human Services' Administration for Children and Families data regarding the average number of people sanctioned monthly from the JOBS program in May 1994. More recent data were not available. There were almost 13,000 monthly first sanctions, 1,876 monthly second sanctions and 375 monthly third sanctions. First sanctions were assumed to result in instant compliance and therefore last zero months in duration. Second sanctions were assumed to have an average duration of three months and third sanctions were assumed to have an average duration of six months.

The savings estimate was calculated as the sum of the products of the number of individuals sanctioned, an estimated average food stamp benefit per person ($73.74) and the duration of the sanction [*e.g.* (12,999 cases of first sanctions) times ($73.74 times 12 months for yearly benefits) times 0 months of sanction; (1,876 cases of second sanctions) times ($73.74 times 12 months for yearly benefits) times 3 months of sanction; (375 cases of third sanctions) times ($73.74 times 12 months for yearly benefits) times 6 months of sanction)].

Because Section 819 is optional, the estimate was adjusted to account for the proportion of food stamp households in States choosing to exercise this provision. State option data were based on the May 1998 FNS report, State Food Stamp Policy Choices Under Welfare Reform: Findings of 1997 50-State Survey, indicating which States have adopted the optional provisions of PRWORA as of the end of calendar year 1997. Thirteen States reported having adopted this optional provision: Arizona, California, Idaho, Illinois, Kansas, Maine, Michigan, Mississippi, North Dakota, Ohio, South Dakota, Tennessee and Wyoming. According to 1998 food stamp quality control data, these thirteen States account for approximately 30 percent of all food stamp public assistance households. The savings estimate was, therefore, adjusted to reflect 30 percent uptake by States. The estimate of the number of individuals disqualified because of the section 819 provision equals the total unrounded savings divided by an estimated average food stamp benefit.

Cooperation with Child Support Agencies—Section 822 of PRWORA—This provision allows States to require cooperation with child support agencies as a condition of food stamp eligibility. The provision is optional and can be waived for the custodial parent for good cause but not for the non-custodial parent. The rule requires: (1) States to refer appropriate individuals to the agency funded under IV–D for a determination of cooperation; (2) State agencies to adopt the IV–A or IV–D agency's standards for good cause, (3) the disqualification is for the individual and not the entire household; (4) States that elect to implement this provision to include it in the Plan of Operation; and (5) States to count all of the resources and all but pro-rata share of the income of the disqualified individual.

This provision affects participants to the extent States choose to implement this provision and to the extent they are a custodial or non-custodial parent with child support responsibilities and do not cooperate with child support agencies.

Custodial Parents

Using the fiscal year 2001 budget baseline, we estimate that in FY 1999 approximately 4,000 custodial parents will be disqualified due to sanctions for noncompliance and 68,000 custodial parents will have their benefits slightly reduced due to compliance and increased child support income as a result of this provision. We estimate the FY 1999 cost savings for the custodial parents to be $15 million and the five-year cost savings for FY 1999 through FY 2003 to be $85 million.

Because food stamp households receiving public assistance are already mandated to cooperate with child support agencies, the impact of this provision is expected to be realized among food stamp-only custodial-parent households. Based on the February 1995 FNS report, Participation in the Child Support Enforcement Program Among Non-AFDC Food Stamp Households, food stamp-only custodial households with child support needs that are not cooperating with the child support agencies account for roughly 2.8 percent of all participating food stamp households. According to the report, the response of these custodial parents to this provision was assumed to fall into three categories: (1) Those that comply and receive higher child support payments; (2) those that do not comply and face sanctions, and; (3) those that opt to leave the Program rather than comply.

First, in the 1995 report, custodial parents choosing to comply with the provision were found to account for approximately 8.5 percent of food stamp benefits and were expected to experience a decline in food stamp benefits of 2.0 percent as a result of higher child support payments. Savings from this group was calculated as the proportion of total food stamp benefits contributed to this group (8.5 percent) times the expected decline of 2.0 percent (0.085 times 0.02 = .00170 or 0.17 percent).

Second, to estimate the cost for households which are sanctioned for noncompliance, the report indicated that food stamp-only custodial households accounted for 7.0 percent of all food stamp households, and that approximately 2.1 percent of such households would choose to be sanctioned rather than comply with the provision. The total number of participating households was calculated by dividing a participation projection

from the fiscal year 2001 budget baseline by the average household size from 1998 food stamp quality control data (2.4 persons). The monthly benefit reduction for those sanctioned and leaving food stamps rather than comply was estimated to be the difference between the maximum allotment for a family of four and the maximum allotment for a family of three (difference =$90). The savings for this group was calculated as the product of total households, the proportion which are food stamp-only custodial households (7.0 percent), the proportion choosing to be sanctioned rather than comply with the provision (2.1 percent), and the annual value of the sanction (e.g., in FY 1999, 7,276 households times 7 percent times 2.1 percent times $90 times 12 months).

Third, the 1995 report indicated that of food stamp-only custodial households, 3.8 percent were expected to leave the Program rather than comply with the provision. The estimate of savings from the group of custodial parents choosing to leave food stamps rather than comply was calculated as the product of the number of total food stamp households, the proportion which are food stamp-only custodial households (7.0 percent), the proportion choosing to leave food stamps rather than comply (3.8 percent), and the annual value of the household benefit lost (*e.g.,* in FY 1999, 7,276 households times 7 percent times 3.8 percent times $221 benefit per month times 12 months).

The three group impacts were summed and the estimate was adjusted pursuant to assumptions regarding the proportion of food stamp recipients in States choosing to adopt this optional provision—10 percent in FY 1997 and growing to 20 percent by FY 2003. State option data were based on the May 1998 FNS report, *State Food Stamp Policy Choices Under Welfare Reform: Findings of 1997 50-State Survey.* Seven States reported having adopted this optional provision as of the end of calendar year 1997: Idaho, Kansas, Maine, Michigan, Mississippi, Ohio and Wisconsin. According to 1998 food stamp quality control data, these seven States account for approximately 10 percent of applicable food stamp households.

The estimate of the number of custodial parents disqualified for food stamp benefits from this provision (4,000 people) was calculated as the total unrounded savings ($10.6 million) attributable to the second and third groups of custodial parents—those continuing to not cooperate with child support agencies—divided by the annual value of their sanction ($221 times 12 months).

The estimate of the number of custodial parents receiving reduced benefits as a result of complying with this provision and receiving increased child support income (68,000 persons) was calculated as the difference between the total number of custodial parents affected by the provision (71,000 persons) and those being disqualified for noncompliance (4,000 people) rounded to the nearest thousand. The total number of custodial parents affected was estimated as the total target population of the provision—2.8 percent of all households according to the 1995 report—times the projected number of participants from the FY 2001 budget baseline, times the State option phase-in assumptions.

Non-Custodial Parents

Using the fiscal year 2001 budget baseline, we estimate that approximately 4,000 non-custodial parents will be disqualified by this provision in FY 1999. We estimate the FY 1999 cost savings for non-custodial parents to be $5 million and the five-year cost savings for FY 1999 through FY 2003 to be $25 million.

Estimates of the savings attributable to the non-custodial parents in this provision are based on information from a 1995 report, *Non-custodial Fathers: Can They Afford to Pay More Child Support,* by Elaine Sorenson at the Urban Institute. Data on non-custodial parents is extremely limited and this was the best available information. The number of non-custodial parents not cooperating with child support was estimated to be more than 78,000 in 1990. This estimate was based on the reported 5.9 million fathers in 1990 who were not paying support, adjusted by 75 percent to account for those at low-income levels, times the proportion estimated to represent non-custodial fathers receiving food stamps who had no child support order—a proxy for non-cooperation (1.77 percent which is derived from the 1995 Urban Institute report) (5.9 million times 0.75 times 0.0177 = 78,323). The estimate of the number of non-custodial parents not cooperating with their child support agency was inflated by 1.5 percent annually to account for growth in the child support system. This inflation factor is consistent with information from the Department of Health and Human Services on the child support system. The savings were estimated as the product of the number of non-custodial parents not cooperating and an estimated average food stamp benefit per person ($72.29 per month times 88,891 persons times 12 months).

The savings estimate for non-custodial parents was adjusted for the proportion of households in States choosing to adopt this optional provision and assumptions regarding the percent of non-cooperating non-custodial parents States are able to identify and sanction. The State option assumptions were based on the May 1998 FNS report, State Food Stamp Policy Choices Under Welfare Reform: Findings of 1997 50-State Survey. Three States reported having adopted this provision at the end of calendar year 1997: Maine, Mississippi, and Wisconsin. According to 1998 quality control data, these three States account for roughly 5 percent of all applicable households. Therefore, the savings estimate in FY 1997 assumes only these States implement this child support provision, thereby affecting 5 percent of all households that could be subject to this provision, and further assumes a gradual expansion of the States selecting this option so that 10 percent of all households are subject to this provision by FY 2003. The estimate was adjusted further based on the assumption that, operating at maximum effectiveness, States would only be able to correctly identify and sanction 75 percent of applicable offenders.

The estimate of the number of non-custodial parents disqualified for food stamp benefits from this provision was calculated as the total unrounded savings from non-custodial parents ($3 million) divided by an estimated average annual food stamp benefit ($867.48 = $72.29 times 12 months).

Summing together the estimates for both custodial and non-custodial parents, we estimate that 8,000 people will be disqualified as a result of these provisions in FY 1999. 68,000 custodial parents will have benefits reduced due to higher amounts of child support income as a result of this provision. We estimate the FY 1999 cost savings to be $20 million and the five-year cost savings for FY 1999 through FY 2003 to be $110 million.

Disqualification for Child Support Arrears—Section 823—This provision allows States to disqualify individuals for any month during which they are delinquent in any court-ordered child support payment. This provision is optional. The rule requires that: (1) The disqualification apply to the individual and not the entire household; (2) if the State later discovers that an individual was delinquent in paying child support, the State shall determine disqualification and establish a claim for the month's benefits; (3) States that

elect to implement this provision must include it in the Plan of Operation; and, (4) the States must count all of the resources and all but a pro rata share of the income of disqualified individuals.

This provision affects participants to the extent States choose to implement this provision and to the extent they have court-ordered child support responsibilities and they are delinquent in their payments. We estimate that approximately 3,000 persons will be disqualified as a result of this provision in FY 1999. We estimate the FY 1999 cost savings to be $5 million and the five-year cost savings for FY 1999 through FY 2003 to be $25 million.

The estimate of savings for this provision was based on the 1995 report, Non-Custodial Fathers: Can They Afford to Pay More Child Support, by Elaine Sorenson at the Urban Institute. There were an estimated 825,000 custodial mothers participating in the child support system (in IV–D programs) with child support orders not receiving support in 1990. It was assumed that for every custodial mother with an order and without support, there was a non-custodial father in arrears. Estimating that almost 7 percent (the national average of 1 in 14 Americans receiving food stamps) of them were receiving food stamp benefits, it was calculated that in 1990 there were more than 56,000 non-custodial fathers receiving food stamps who were in arrears for court-ordered child support. This number was inflated by 1.5 percent per year to reflect growth in the child support system, consistent with information from the Department of Health and Human Services. The estimate of savings for this provision was based on an estimated average monthly benefit per person ($72.29). The total savings was calculated as the product of the number of non-custodial fathers in arrears for child support times the annual benefits they would lose due to disqualification (64,883 people times $72.29 per month times 12 months).

This product was adjusted for assumptions regarding the proportion of food stamp households in States choosing to implement this provision and the State's ability to identify and sanction the appropriate individuals. The State option assumptions were based on the May 1998 FNS report, State Food Stamp Choices Under Welfare Reform: Findings of 1997 50-State Survey, indicating that three States reported operating this provision at the end of 1997: Ohio, Oklahoma and Wisconsin. According to 1998 food stamp quality control data, these three States account for approximately 5 percent of all applicable households. The savings estimate was adjusted to reflect that 5 percent of the States would implement this provision in FY 1997, growing to 10 percent by FY 2003. The estimate was adjusted further based on the assumption that, operating at maximum effectiveness, States would only be able to correctly identify and sanction 75 percent of applicable offenders. In FY 1999, for example, the savings was calculated by taking the product of the 6 percent State phase-in and the assumption of 75 percent cooperation and multiplying it by the total savings. The estimate of the number of individuals disqualified for food stamp benefits from this provision was calculated as the total unrounded savings ($2.5 million) divided by an estimated average annual food stamp benefit ($867.48).

Able-Bodied Adults without Dependents—Section 824 of PRWORA—This provision limits the receipt of food stamps for certain able-bodied adults without dependents (ABAWDs) to 3-months in a 36 month period unless the individual is either working at least half-time or participating in an approved work or work training program for at least 20 hours per week. Individuals are exempt from the time limit if they are under 18 or 50 years or older, medically certified as physically or mentally unfit for employment, a parent or other household member with responsibility for a dependent child, or exempt from work registration under 6(d)(2) of the Act, or pregnant. Individuals can regain eligibility if they work 80 hours in a 30 day period, and they maintain eligibility as long as they are satisfying the work requirement. If individuals later lose their job, they can receive an additional 3 months of food stamps while not working. The additional 3 months must be consecutive, and begins on the date the individual notifies the State that he/she is no longer working. The Act allows waivers of the time limit for groups of individuals living in areas with an unemployment rate of more than 10 percent or where there are not a ''sufficient number of jobs to provide employment for the individuals.''

The rule: (1) Allows unpaid and work for in-kind services to count as ''work;'' (2) allows the State agency to determine good cause for missing work; (3) does not count partial months toward the 3 month limit; (4) makes verification of work hours mandatory; (5) makes participants report changes in work hours that bring the person below 20 hours a week; (6) counts all of the resources and all but a pro rata share of the income of the ineligible ABAWD as available to the household; (7) exempts individuals starting on their 50th birthday; (8) exempts all adults in a household where there is a child under 18; (9) prorates benefits back to the date the ''cure'' is complete for regaining eligibility (except in instances where individuals regain eligibility by doing workfare, at which point the benefits will be prorated back to the date of application); (10) requires States to submit unemployment data based on approved Bureau of Labor Statistics methodologies when applying for a waiver under the 10 percent criteria; (11) approves a waiver for a time period that bears some relationship to the documentation provided, but for no more than a year.

This provision affects participants to the extent they are able-bodied adults without dependents and to the extent they are not fulfilling the work requirement, exempt or covered by a waiver. The methodology used in this provision relies on current projections of participation in the Program and information on food stamp participants prior to PRWORA who match the ABAWD definition. We estimate that 345,000 individuals are subject to the time limit in FY 1999 due to this provision. We estimate that the FY 1999 cost savings from this provision will be $490 million. We estimate that the five-year cost savings for FY 1999 through FY 2003 will be $1.6 billion.

The caseload estimates were generated by identifying program participants in the 1996 food stamp quality control data who are likely to lose eligibility due to ABAWD work requirement provisions (those between the ages of 18 and 50 who have no dependents, are not disabled, who do not already have more earnings than that of a 20 hour-per week job, etc.). The size of this group of participants was then adjusted to reflect the decline in overall caseload between 1996 and 1999, resulting in a pool of just under 730,000 program participants who could have been considered to be subject to the ABAWD provisions in FY 1999. An adjustment was then made to account for the estimated number of ABAWDS who lived in waived areas and were exempt from the work requirement, which narrowed this pool down to approximately 523,000. An additional adjustment of just under 180,000 participants was then taken to account for persons who were able to retain eligibility through the Food Stamp Employment and Training (E&T) program. The estimated 345,000 participants who remain represent the final pool of ABAWDS in FY 99 who are expected to lose their eligibility due to the new work requirement. The cost

estimates for 1999 was then derived by first multiplying the 345,000 participants by the average monthly benefit for a single able-bodied Food Stamp recipient ($118), and then multiplying that amount by 12 to get the annual cost. Cost estimates for FY 2000–2003 also incorporated the expected decline in food stamp participation as well as the increased use of E&T funds to provide qualifying work opportunities.

Subsequent to the enactment of PRWORA, the Balanced Budget Act of 1997 and the Agricultural Research, Extension, and Education Reform Act of 1998 (AREERA) modified the ABAWD provisions of PRWORA. The Balanced Budget Act of 1997 increased funding to the Food Stamp Employment and Training Program to allow states to create qualifying work opportunities to help ABAWDs retain their Food Stamp eligibility, and permitted states to exempt up to 15 percent of their unwaived able-bodied caseload from the time limits. AREERA further modified the level of funding for Employment and Training Programs for ABAWDs. Taken together both of these laws will likely mitigate the effects of the ABAWD provisions of PRWORA. The effects of these more recent laws will be addressed in future rulemaking.

No increase for Penalties in other Programs—Section 829 and 911— Section 829 provides that if a household's benefits are reduced under a Federal, State, or local means-tested public assistance program for failure to perform a required action, the household may not receive an increased food stamp allotment as a result of the decrease in income due to the reduced public assistance payment. This applies to both intentional and unintentional failures to take a required action. In addition to not increasing allotments, States may reduce the Food Stamp allotment by up to 25 percent. The rule requires that: (1) Federal means-tested public assistance programs include public and general assistance as defined in 7 CFR 271.2; (2) ''reduced'' means denied, decreased, suspended, or terminated; (3) the penalty must be applied while the person is receiving other assistance; (4) it only applies if the other agency cooperates and it applies to overlapping provisions but runs concurrently; (5) States can prohibit an increase by several different means and reduce the allotment by up to 25 percent; (6) the whole household cannot be denied and the reduction cannot be more than 25 percent even if Title IV–A has a larger reduction; (7) States that elect to implement this 25 percent reduction must include it in the Plan of Operation; (8) the penalty will be for the same duration as the assistance penalty (but the State agency must review for appropriateness if the penalty is in effect after one year) and States must end the prohibition when it becomes aware that the person is ineligible for assistance in the other program for some other reason; and that the sanction goes with the person when they move within the State.

Section 911 prohibits an increase in food stamp benefits as the result of a decrease in Federal, State, or local means-tested assistance benefits because of fraud. The rule provides that this provision be treated the same as 829.

Participants will be affected by these provisions to the extent their benefits are reduced for failure to perform a required action or for fraud. The effect of the provisions also depends on the cooperation of other programs in notifying the food stamp agency. We estimate approximately 6,000 participants will be affected by these provisions. We estimate the FY 1999 cost saving to be $5 million and the five-year cost savings for FY 1999 through FY 2003 to be $40 million.

Food stamp savings from these provisions results from two sources: (1) A mandatory prohibition on increasing food stamp benefits when individuals receive lower benefits in other means-tested programs for failure to comply with a required action; and (2) an optional provision to decrease food stamp benefits by no more than 25 percent.

The estimate for savings from the mandatory prohibition on increasing benefits was based on the Department of Health and Human Services' Administration for Children and Families data regarding the average number of people sanctioned monthly from the JOBS program in May 1994. This serves as a proxy for the number of individuals that receive reduced benefits from a means-tested programs for failure to perform a required action or for fraud, and is the best available data. (Data on fraud in other programs is unavailable.) There were almost 13,000 monthly first sanctions, 1,876 monthly second sanctions and 375 monthly third sanctions. First sanctions were assumed to result in instant compliance and therefore last zero months in duration. This assumption is based on 1994 information from the Department of Health and Human Service, Administration on Children and Families (ACF). ACF does not have any more recent information. Second sanctions were assumed to have an average duration of three months and third sanctions were assumed to have an average duration of six months. The savings from the mandatory prohibition on increasing food stamp benefits was calculated as the sum of the products of the number of individuals sanctioned, the average AFDC benefit lost times the FSP benefit reduction rate of 30 percent, and the duration of the sanction. The average AFDC benefit reduction was taken from the average AFDC benefit per person reported in the 1996 Green Book and inflated over time. ((1,876 monthly second sanctions times 12 months times the 1999 estimated average AFDC benefit lost which equals $143 times 30 percent FSP benefit reduction times 3 months) plus (375 monthly third sanctions times 12 months times the average AFDC benefit lost which equals $143 times 30 percent FSP benefit reduction times 6 months))

The estimate for savings from the State option to decrease food stamp benefits by no more than 25 percent was based on an estimated average monthly food stamp benefit per person and the JOBS sanction data. The savings was calculated as the product of the number of individuals sanctioned, 25 percent of the average food stamp benefit per person and the duration of the sanction. This estimate was adjusted to account for the proportion of food stamp households in States expected to exercise this optional provision—10 percent in 1997 and growing to 20 percent by 2003. This was based on information provided in the May 1998 FNS report, *State Food Stamp Policy Choices Under Welfare Reform: Findings of 1997 50-State Survey.* Seven States reported having adopted this optional provision at the end of 1997: Connecticut, Iowa, Kentucky, Michigan, Mississippi, Montana and Tennessee. According to 1998 food stamp quality control data, these seven States account for approximately 10 percent of all food stamp cash assistance households.

The savings estimates for the mandatory and optional portions of the provisions were summed. The estimate of the number of individuals receiving a reduction in food stamp benefits due to these provisions was calculated as the total unrounded savings divided by an estimated average annual food stamp benefit. ((1,876 monthly second sanctions times 12 months times the average AFDC benefit lost which equals $143 times 30 percent Program benefit reduction times 3 months) plus (375 monthly third sanctions times 12 months times the average AFDC benefit lost which equals $143 times 30 percent Program benefit reduction times 6 months) plus the sum of (1,876 times 12 months times the average FSP benefit per AFDC household which equals

$259.96 times .25 reduction times 3 months) and (375 times the average Program benefit per AFDC household which equals $259.96 times .25 reduction times 6 months))

Background

On August 22, 1996, the President signed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104–193 (PRWORA). The PRWORA amended the Act by adding new Program eligibility requirements, increasing existing penalties for failure to comply with Program rules, and establishing a time limit for Program participation of three months in three years for able-bodied adults without children who are not working at least half time.

On December 17, 1999, we published a rule proposing to codify the personal responsibility provisions of PRWORA. The period for comment on the proposed rule ended February 17, 2000. We received comments from 28 State agencies, 37 advocate groups, 7 government entities, and 4 individuals. In this final rule, we will not address comments on provisions that are required by law and on which we have no discretion. We will not discuss comments that supported our proposals. We will not discuss comments that concerned merely technical corrections for inadvertent omissions, we have simply made the corrections. We will not discuss provisions on which we received no comments, and we will adopt these provisions as written. For a full understanding of the background of the provisions in this rule, see the proposed rulemaking, which was published in the **Federal Register** at 64 FR, 70920. With the exceptions noted above, in response to the comments made and for ease of reading we will discuss each provision and the comments made.

7 CFR 273.11—Action on Households with Special Circumstances

Ban on Increased Benefits for Failure To Take Required Action or Fraud—7 CFR 273.11(j)

Section 829 of PRWORA amended Section 8(d) of the Act, 7 U.S.C. 2017(d), to provide that, if the benefits of a household are reduced under a Federal, State, or local law relating to a means-tested public assistance program for the failure of a person to perform an action required under the law or program, then the household may not receive an increased food stamp allotment as the result of that decrease for the duration of the reduction. In addition, the State agency may reduce the household's food stamp allotment by not more than 25 percent. This provision applies when the act leading to the decrease in benefits was intentional or unintentional. If the reduction is the result of a failure to perform an action required under part A of title IV of the Social Security Act, 42 U.S.C. 601, *et seq.* (TANF), the State agency may use the rules and procedures that apply under part A of title IV to reduce the food stamp allotment.

Section 911 of PRWORA provides that if an individual's benefits under a Federal, State, or local law relating to a means-tested welfare or public assistance program are reduced because of an act of fraud by the individual under the law or program, the individual may not, for the duration of the reduction, receive increased food stamp benefits as a result of a decrease in income attributable to such reduction. Since cases of fraud generally involve a failure to take a required action in another program, we proposed to treat sections 829 and 911 similarly. We received no comments on this proposal. Therefore, in this rule we continue to treat sections 829 and 911 similarly in 7 CFR 273.11(j).

We proposed to modify 7 CFR 273.11(k) to provide that a ''means-tested public assistance program'' for purposes of the restriction imposed by Section 829 of PRWORA would include any public or assisted housing under Title I of the United States Housing Act of 1937, 42 U.S.C. 1437 *et seq.*, any State program funded under part A of Title IV of the Social Security Act, and any program for the aged, blind, or disabled under Titles I, X, XIV, or XVI of the Social Security Act, and State and local general assistance as defined in 7 CFR 271.2. Title XIX of the Social Security Act was not included because Medicaid benefits are not counted as income for food stamp purposes. A final rule published November 21, 2000, redesignated paragraph (k) as paragraph (j). Therefore in this final, the paragraph concerning no increase in benefits will be referred to as paragraph (j). All subsequent paragraphs in 273.11 will be redesignated accordingly.

All but one of the comments we received opposed the definition of means-tested public assistance program. Most of the commenters opposed the inclusion of any public or assisted housing under Title I of the United States Housing Act of 1937. Commenters pointed out that including housing in this definition is administratively burdensome and error prone. In addition, as with Medicaid, we have never counted housing as income, and therefore, we should not include it in this definition. Finally, State agencies would not be aware if a reduction in housing was caused by a failure to comply with that program.

Several commenters opposed the inclusion of Supplemental Security Income (SSI) in the definition of ''means-tested public assistance program.'' One commenter pointed out that historically it has been difficult to verify with the Social Security Agency (SSA) whether or not a person's SSI overpayment was the direct result of non-cooperation. Another commenter said that the SSA is not able to provide State agencies with this information because SSA considers all overpayments non-cooperation even if agency caused. For example, if the client reports a change, but the SSA does not act on the change timely or makes a computational error, the SSA would consider this non-cooperation.

Many commenters suggested that we restrict the definition of ''means-tested public assistance program'' to the current definitions of public assistance and general assistance found in 7 CFR 271.2. Some commenters suggested that we define ''means-tested public assistance programs'' as TANF only. One commenter suggested that we restrict the definition of ''means-tested public assistance program'' to TANF only, but allow State agencies the option of including general assistance in the definition.

Based on these comments, we have decided to modify the regulations at 7 CFR 273.11(j) to restrict the definition of ''means-tested public assistance programs'' to that of ''public assistance'' and ''general assistance'' as defined in 7 CFR 271.2. We decided not to adopt the one commenter's suggestion to modify the regulations further to give State agencies the option of including ''general assistance'' in the definition. General assistance is a means-tested State or local assistance program. We believe that not including it in the definition of ''means-tested assistance program'' would circumvent the law which specifically provides that this provision applies to '' * * * State or local means-tested programs.''

One commenter suggested we clarify that by ''assistance'' we mean ''cash assistance'' and not merely other benefits or services funded by TANF. While we agree, such non-cash benefits are not counted as income for food stamp purposes, and a reduction in these services due to failure to comply would not trigger an increase in food stamp benefits. Therefore, we do not believe that the regulations at 7 CFR 273.11(j) need to be clarified in this manner.

We proposed that the restriction imposed by section 829 of PRWORA only apply if assistance benefits are reduced for failure of a member of a household to perform a required action if the person was receiving assistance at the time the reduction was imposed. In other words, this provision would only apply to reductions imposed during the period benefits were originally authorized by the other program and to reductions imposed at the time of application for continued benefits if there is no break in participation, but not to reductions imposed at initial application. The majority of the commenters supported this proposal. Only three commenters opposed it. They suggested that the ban on increases apply to applicants of assistance programs as well as recipients. One commenter suggested that this be a State agency option. We are maintaining this provision as proposed at 7 CFR 273.11(j).

We proposed that if a reduction in the assistance benefits was in force at the time the individual applied for food stamps, the State agency would compute the benefits in a manner that would prevent a higher food stamp allotment as a result of the failure to take the required action. The majority of the commenters suggested that the ban on increases should only apply if the individual was receiving food stamps at the time he failed to take a required action in the other program. Several commenters said that the State agency cannot prevent an increase in food stamps if an individual is not receiving food stamps at the time he fails to perform a required action in the assistance program. In addition, several commenters stated that the State agency should advise individuals of the consequences of non-compliance in the assistance program before imposing a penalty in the Program. We agree with these comments. Therefore, we are modifying 7 CFR 273.11(j) to provide that the ban on increasing food stamps will only apply to individuals who are receiving food stamps at the time of the failure to perform a required action in a means-tested assistance program.

We proposed that this provision not apply to situations where individuals reach a time limit for benefits, have a child that is not eligible because of a family cap, or fail to comply with purely procedural requirements such as failure to submit a monthly report or failure to reapply for assistance. The majority of the commenters supported these proposals. One commenter opposed the exclusion of procedural requirements from those that would trigger a sanction because in many cases procedural requirements are in fact substantive. Several commenters suggested we clarify in the regulation what we consider ''procedural'' (which would not trigger a sanction) versus ''substantive'' (which would trigger a sanction). One commenter suggested we include an explicit definition of what is required for a public assistance sanction to trigger a disqualification under this provision. s

Since TANF policies vary substantially from State-to-State, and sometimes even within States, we are not confident that we could conclusively resolve this issue with a foolproof definition. However, based on these comments, we are clarifying the regulations at 7 CFR 273.11(j) to say that this provision does not apply to reaching a time limit for time-limited benefits, having a child that is not eligible because of a family cap, failing to reapply or complete the reapplication process for continued assistance under the other program, or failure to perform a purely procedural requirement. Further, in this section, we are providing the State agency with the flexibility to determine procedural versus substantive requirements within the following parameters: A procedural requirement, which would not trigger a food stamp sanction, is a step that an individual must take to continue receiving benefits in the program such as submitting a monthly report form or providing verification of circumstances. A substantive requirement, which would trigger a food stamp sanction, is a behavioral requirement designed to improve the well being of the recipient family, such as participating in job search activities or ensuring that children receive the proper vaccinations.

Several commenters suggested we clarify that the substantive action must be within the power of the individual in order to trigger a food stamp sanction. For example, an individual is required to attend parenting classes in order to continue receiving assistance. The individual is willing to take the class but the individual is unable to because the classes are full. We agree with this comment. Therefore, we are modifying 7 CFR 273.11(j) to provide that failing to perform an action because the individual is unable to perform, as opposed to refusing, shall not be considered failure to perform a required action.

One commenter suggested that the person not taking the required action must be a member of a certified food stamp household in order for the sanction to be imposed. In some instances, the TANF family unit and the food stamp household are not one and the same. If an individual who is not a member of the food stamp household (such as a roomer) fails to take a required action which precipitates a decrease in the TANF grant, the commenter believes the food stamp allotment should be allowed to rise. We agree with the commenter. Therefore, we are clarifying that in order for this provision to be effective, the individual must be a member of a food stamp household as defined in § 273.1, including ineligible household members such as students. If the individual is a non-household member, such as a roomer, a live-in attendant, or another individual who shares living quarters with the household but who does not purchase food and prepare meals together, this provision would not be effective.

Section 8(d)(1)(A) of the Act, as amended by section 829 of PRWORA, provides that the household may not receive an increase in food stamp benefits and section (8)(d)(1)(B) provides that State agencies may reduce the food stamp allotments by not more than 25 percent. Several commenters suggested we modify the regulations to provide that any percentage reduction in benefits should be calculated from the amount that the household would have received under the regular food stamp benefit formula, taking into account its actual (reduced) income. This would insure that the combination of preventing an increase and further reducing the food stamp allotments would not result in a household receiving an amount of food stamps that is more than 25 percent less than the amount the household would receive if the usual food stamp calculation formula were applied to the family's actual income. We agree with these commenters. Therefore, we are modifying the proposed regulations at 7 CFR 273.11(j) accordingly.

Section 829 of the PRWORA also amended section 8(d)(2) of the Act to provide that if benefits are reduced for a failure of an individual to perform an action required under a program under Title IV–A of the Social Security Act (TANF), the State agency may use the TANF rules and procedures to reduce the food stamp allotments. We interpreted the reference to use of TANF rules and procedures to apply only to procedural aspects such as budgeting and combined notices and hearings. A few commenters pointed out that budgeting procedures, such as use of prospective or retrospective budgeting, are substantive policies that could significantly change the scope and severity of the penalties. Since

budgeting rules can routinely determine whether someone is eligible in a month, and what benefits an individual receives, budgeting procedures should be considered substantive and should not be imported from TANF. State agencies are currently mandated to use TANF budgeting procedures when determining eligibility for food stamp households/TANF households. Current regulations at 7 CFR 273.21(a)(2) provide that State agencies must ''determine eligibility, either prospectively or retrospectively, on the same basis that it uses for its (TANF) program, unless it has been granted a waiver by FNS.'' Based on this, we are retaining the provision as written.

We proposed that the prohibition on increasing the food stamp allotment be for the duration of the reduction in the assistance program. At the same time we proposed that the maximum length of the food stamp sanction not exceed one year. Several commenters pointed out that there is a discrepancy between these two provisions. We believe that the prohibition on increasing benefits must be for the same months as the decrease in assistance to the extent possible, even if there is a break in participation. If the penalty in the other program is six months, then the food stamp sanction must be for the same six months, to the extent possible. We also believe that the prohibition on increasing food stamp benefits not be longer than a sanction for an Intentional Program Violation (IPV), and, therefore, we proposed that the prohibition not be longer than a year. The majority of the commenters supported the idea of a time limit on the penalty. Several suggested a shorter time frame, such as six months. Several suggested State agencies be allowed to set the time frame as long as it was less than one year. One commenter suggested the time frame for the sanction be the same as the food stamp certification period. A few commenters opposed the one-year limit because it was too short. These commenters suggested State agencies should be allowed to keep the food stamp sanction in place as long as the penalty in the other program is in effect and the assistance program remains open. The majority of the commenters supported the concept of a time limit. However, there was no consensus on how long that time limit should be. Our further legal review of the statutory authority resulted in a modification of the proposed rule. Therefore, we have provided that the sanction shall not exceed the sanction period in the other program. If at any time the State agency can no longer ascertain the amount of the reduction, then the State agency may terminate the food stamp sanction. If the sanction is still in effect at the end of one year, the State agency shall review the case to determine if the sanction continues to be appropriate. If, for example, the household is not receiving assistance, it would not be appropriate to continue the sanction. Sanctions extended beyond one year must be reviewed at least annually but may be ended by the State agency at any time. In the final rule at 7 CFR 273.11(j) we clarify that the ban on increasing food stamps is for the duration of the reduction in the assistance program. The State agencies may determine the length of the food stamp sanction providing it does not exceed the sanction in the other program, and does not exceed one year, without review.

We proposed that the State agency be allowed to shorten the prohibition on increasing benefits to less than one year if the individual becomes ineligible during the sanction period for some other reason. A few commenters suggested that State agencies be allowed to lift the sanction when the individual's case is closed in the other assistance program. Several commenters suggested that we require the State agencies to do this. Several commenters said that this would be administratively burdensome: how would the State agency know that the household was ineligible for some other reason since this isn't a reportable change? We agree that the individual should not be sanctioned when he is no longer eligible for the assistance program or when his case is closed. We believe the requirement to report a change in the amount of income will generally capture the instances when an individual whose assistance grant is reduced then becomes ineligible for another reason. However, we recognize that there are instances where food stamp reporting requirements won't capture this information. Therefore, we are modifying the regulations at 7 CFR 273.11(j) to provide that the State agency must lift the ban on increasing food stamp benefits when it becomes aware that the individual is ineligible during the sanction period for some other reason, or when his case is closed.

We proposed that if an individual fails to perform a required action in a State or local assistance program, and the individual moves within the State, the prohibition on increasing benefits goes with that person. We proposed that it be terminated if the person is ineligible for the assistance program for some other reason or if the individual moves out of State. We proposed that if an individual fails to perform a required action in a Federal program, and the individual moves, either interstate or intrastate, the State verify the status and continue the disqualification if appropriate. The majority of the commenters opposed tracking penalties, particularly from State-to-State because it is administratively burdensome and error prone. We agree with these comments. Therefore, we are removing the provision at 7 CFR 273.11(j) which requires tracking penalties from State-to-State. However, we believe if an individual moves intrastate, the State agency should be aware of penalties levied by Federal, State or local public assistance programs. Therefore, we are retaining the provision which provides if an individual moves within the State, the prohibition on increasing benefits shall be applied to the gaining household unless that person is ineligible for the assistance program for some other reason.

We proposed to remove the exception from 7 CFR 273.11(j) that the prohibition on increasing food stamp benefits did not apply in the case of individuals or households subject to the food stamp work sanction imposed pursuant to 7 CFR 273.7(g)(2). We believe the law allows the State agency to disqualify the individual for food stamp purposes and prohibit an increase in food stamps as the result of the reduction of assistance. We failed to mention in the preamble of the proposed rule that the law also permits the State agency to further reduce the food stamp allotment by up to 25 percent even if there is some overlap.

Several commenters opposed the proposal that the same conduct could be subject to multiple punishments. They pointed out that the subsequent penalty could be more severe than an IPV. One commenter suggested that the law did not authorize State agencies to ''pile on'' penalties, but gave them a choice among penalty systems. This commenter suggested that where both section 8(d) (no increase in benefits and or reduction by 25 percent) and section 6(i) (comparable disqualification), or section 6(d) (disqualification for failure to comply with TANF work requirements) of the Act apply to the same conduct, the household should receive the most severe of the penalties that apply in any given month, not the combined effect for them all, and the food stamp penalty should take precedence.

We consulted our legal authority and have determined that we do not have the discretion to limit the penalties the State agency may apply under sections 8(d) and sections 6(i) of the Act. The law clearly prohibits State agencies from increasing food stamp allotments and

gives them the option to further decrease the food stamp allotment by 25 percent. Separate and apart from these provisions, it gives them the option to disqualify individuals who are disqualified from a means-tested assistance program. There is no connection between the two penalties which can be construed as giving us the discretion to limit them. Therefore, we are not adopting the commenters' suggestions to limit the penalties by making only the most severe penalty apply. However, we urge the State agencies to carefully balance desires to support TANF policies with family food needs when choosing which optional provisions to apply.

We are retaining our proposal to remove the exception from 7 CFR 273.11(j) that the prohibition on increasing food stamp benefits did not apply in the case of individuals or households subject to the food stamp work sanction imposed pursuant to 7 CFR 273.7(g)(2). If an individual who is exempt from food stamp work registration is sanctioned under TANF for failing to comply with TANF work requirements, the individual must be disqualified from the Program. If we keep the exception in place, individual's food stamp benefits would rise in response to the decrease in income caused by the TANF sanction. One of the main thrusts of PRWORA was to help individuals become self sufficient by encouraging them to work if they are able. One of the main reasons behind these provisions (section 829 and 819 of PRWORA) was to support other programs' penalties. Individuals who fail to comply with a means-tested assistance program for any other reason and are subsequently disqualified from that program can be disqualified from the Program and have their food stamp benefits held constant. To make an exception for individuals who fail to comply with TANF work requirements is inconsistent with the spirit of the law. Therefore, we are removing the exception as proposed.

We emphasized in the preamble of the proposed rule that during the sanction the State agency must act on changes that would affect the household's benefits which are not related to the assistance violation. Several commenters pointed out that we left this out of the regulation language. This was an inadvertent error and we have corrected it in the final rule.

One commenter suggested that the rule should explicitly state that if the public assistance program determines that the reduction was not appropriate, any food stamps that the household was denied under this provision be restored. We agree that a household should not suffer if the public assistance program or the State agency administering the Program later determines that the reduction in the public assistance grant was not appropriate. At the same time, we cannot support the household's unduly benefiting. For example, if the public assistance program restores benefits, then the household would not be entitled to restored food stamp benefits. However, if the State agency chooses the option to further reduce the food stamp benefits by up to 25 percent and it is later determined that the reduction in the public assistance grant was inappropriate, then the household would be entitled to restored benefits. Currently, the regulations at 7 CFR 273.17 require the State agency to restore lost benefits if the loss was caused by an error by the State agency, an IPV which was reversed or if there is a statement elsewhere in the regulations specifically stating that the household is entitled to restoration of lost benefits. Instead of detailing all of these circumstances in the regulations, we have decided to modify 7 CFR 237.11(j) to provide that the State agency must restore lost benefits when necessary if it is later determined that the reduction in the public assistance program was not appropriate.

We proposed to revise 7 CFR 273.9(b)(5)(i) so that the total amount of welfare or public assistance, rather than the total amount minus the repayment amount, is counted as income for food stamps purposes when the overissuance in the PA program was caused by the household. The majority of the commenters opposed this proposal. Several commenters argued that this proposal is administratively complex and error prone. The State agency would have to contact the other program to determine if the overpayment was administrative or client caused. Several commenters argued that we should not assume all overpayments are the result of a failure to take a required action or even fraud, as many overpayments are either inadvertent household errors or errors caused by the program. Several commenters stated that this would result in a form of double jeopardy—we would count benefits as income in the usual manner, and again when they are recouped after the overpayment is found. A few commenters suggested we only count the amount of the repayment in the case of fraud. In light of these comments, we have decided not to make the proposed change at 7 CFR 273.9(b)(5)(i).

One commenter pointed out that we require State agencies to indicate in their State Plan of Operations if they are implementing optional provisions of this rule. However, we failed to require State agencies to indicate in their plans if they have chosen to implement the optional provision to reduce the food stamp allotments by up to 25 percent. This was an inadvertent error. We have modified 7 CFR 272.2 and 273.11(j) accordingly.

Comparable Disqualifications—7 CFR 273.11(k)

Section 819(a) of the PRWORA amended Section 6 of the Act, 7 U.S.C. 2015, to provide that if a disqualification is imposed on a member of a food stamp household for a failure of the member to perform an action required under a Federal, State, or local law relating to a means-tested public assistance program, the State agency may impose the same disqualification on the member of the household under the Food Stamp Program. In addition, the State agency may use the rules and procedures that apply under TANF to impose the same disqualification under the Food Stamp Program. Finally, after the disqualification period has expired, the member may apply for food stamp benefits and shall be treated as a new applicant.

We proposed to add a new section, 7 CFR 273.11(l) to codify this provision (now § 273.11(k)). Several of our proposals under this provision paralleled our proposals to implement section 829 and 911 of PRWORA at 7 CFR 273.11(j). For example, we proposed that neither of these provisions would apply to individuals who are initially applying for benefits from a means-tested assistance program. In general, the comments we received spoke to the parallel provisions. Where the provisions are similar we have discussed the comments and our rationale for our decisions in the previous discussion of section 829 and 911 of PRWORA, or 7 CFR 273.11(j). Therefore, we will not repeat the discussion here. However, we lay out our proposals and our decisions as they relate to this particular section. Where the provisions and our proposals differ, we provide a complete discussion of the provision, our proposal, the comments we received and our decision.

Parallel Provisions

(1) We proposed at 7 CFR 273.11(l) that the penalty applied only if an individual was receiving assistance at the time the disqualification was imposed by the other program and at the time of application for continued benefits if there was no break in participation. We proposed that this

provision would not apply if the person was disqualified upon initially applying for an assistance program. We are maintaining this provision as written at 7 CFR 273.11(k).

(2) We proposed at §273.11(l) that if an individual was disqualified from an assistance program and the disqualification was still in effect when he initially applies for food stamps, then the State agency may disqualify him from food stamps at the initial application. We have revised this provision at 7 CFR 271.11(k) to provide that the individual must be receiving food stamps at the time of the disqualification in the other program in order to be disqualified from food stamps.

(3) We proposed at 7 CFR 273.11(l) that this provision not apply to reaching a time limit for time-limited benefits or having a child that is not eligible because of a family cap. In addition, we proposed that this provision not apply to purely procedural requirements such as a failure to submit a monthly report or failure to reapply for assistance. We are clarifying the regulations at 7 CFR 273.11(k) to provide that this provision does not apply to: (1) Reaching a time limit for time-limited benefits, (2) having a child that is not eligible because of a family cap, (3) failing to reapply or complete the reapplication process for continued assistance under the other program, (4) failing to perform an action that the individual is unable to perform as opposed to refusing to perform, or, (5) failing to perform a purely procedural requirement. We are providing that the State agency has the flexibility to determine procedural versus substantive requirements within the following parameters: (1) A procedural requirement, which would not trigger a sanction, is a step that an individual must take to continue receiving benefits in the program such as submitting a monthly report form or providing verification of circumstances; and (2) a substantive requirement, which would trigger a sanction, is a behavioral requirement designed to improve the well-being of the recipient family, such as participating in job search activities or ensuring that children receive the proper vaccinations.

(4) We proposed that the food stamp disqualification period be limited to the same period of time as the disqualification in the assistance program, to the extent possible. We also proposed that the maximum length of the food stamp disqualification in these circumstances be no more than one year. We are retaining the provision that the disqualification be concurrent to the extent possible with the disqualification in the other program. We are also providing that the State agency may determine the length of the disqualification as long as it does not exceed the disqualification in the other program. If the sanction is still in effect at the end of one year, the State agency shall review the case to determine if the sanction continues to be appropriate. If, for example, the household is not receiving assistance, it would not be appropriate to continue the sanction. Sanctions extended beyond one year must be reviewed at least annually but may be ended by the State agency at any time.

(5) We proposed at 7 CFR 273.11(l) that the State agency be allowed to shorten the food stamp disqualification period if the person becomes ineligible to participate in the other program for some other reason during that one-year time period. We are modifying the regulations at 7 CFR 273.11(k) to provide that a State agency must lift the food stamp disqualification when it becomes aware that the individual is ineligible for assistance for some other reason.

(6) We are modifying 7 CFR 237.11(k) to provide that the State agency must restore lost benefits when necessary if it is later determined that the reduction in the public assistance grant was not appropriate.

Provisions Unique to 7 CFR 273.11(k)

We proposed at 7 CFR 273.11(l) that the assistance program under which the disqualification was imposed, has to be authorized by Federal, State or local law, but that the specific disqualification penalty does not have to be specified in the law. Several commenters argued that in order for a State to sanction an individual under this provision, the action, not just the program, should be explicitly required by law. One commenter argued that the action should be required under law or formal written policy. We believe that the law provides that the program not the action must be specified in the law. Therefore, in the final rule at § 273.11(k) we are retaining the provision as proposed.

We interpreted the term, ''means-tested public assistance program'' to include any public or assisted housing under Title I of the United States Housing Act of 1937; any State temporary assistance for needy families funded under part A of Title IV of the Social Security Act; and any program for the aged, blind, or disabled under Titles I, X, XIV, or XVI of the Social Security Act; Medicaid under Title XX of the Social Security Act; and State and local general assistance as defined in 7 CFR 271.2. The majority of the commenters opposed this provision for the same reasons they opposed this definition for Section 829 of PRWORA. In addition, they opposed the inclusion of Medicaid in this definition. They suggested that the definition be restricted to the definition of ''public assistance'' and ''general assistance'' as defined in the food stamp regulations. Based on these comments, and in the interest of consistency with section 7 CFR 273.11(j), we have decided to modify the regulations at 7 CFR 273.11(k) to restrict the definition of ''means-tested public assistance programs'' to that of ''public assistance'' and ''general assistance'' as defined in 7 CFR 271.2

Since the law makes the comparable disqualification provision a State option, we proposed to allow State agencies the discretion to apply this provision to some, but not all, means-tested public assistance programs. Further, we proposed to allow State agencies to choose which disqualifications within a specific program it wants to impose for food stamp purposes. The majority of the comments we received supported this provision. Only one commenter opposed the provision that allows the State agency to apply it selectively. Because the majority of the commenters supported these provisions, and we believe that allowing State choice would further Program goals, we are retaining them as written at 7 CFR 273.11(k).

We proposed that for food stamp purposes only the individual can be disqualified, rather than the whole household. The majority of the commenters supported this provision. Therefore, we are retaining it as written.

We proposed that when a household member is disqualified from food stamp eligibility under section 6(a)(2) of the Act, the State agency count all of the member's resources and either all or a pro rata share of the income and deductible expenses as available to the household. The majority of the comments opposed allowing the State agencies the option of counting all of the individual's income as available to the household. They argue that this is too punitive. They contend that if a State agency chose to count all of the income as available to the household, it would be imposing the same penalty as for an IPV and that penalties comparable to IPVs should come at the direction of Congress as it did in the cases of drug felons and immigrants ineligible under section 6(f) of the Act. We agree with these comments and, accordingly, we have decided to modify

the regulations at 7 CFR 273.11(k) to provide that the State agency must count all of the resources and all but a pro-rata share of the income of the disqualified member as available to the household in accordance with 7 CFR 273.11(c)(2).

School Attendance—7 CFR 273.11(l)

Section 103 of PRWORA amended Part A of Title IV of the Social Security Act, 42 U.S.C. 601, *et seq.*, to provide for block grants to States for TANF. The title of Section 404 of the amended Part A of Title IV is ''Use of Grants.'' Section 404(i) provides that a State to which a grant is made under section 403 shall not be prohibited from sanctioning a family that includes an adult who has received assistance under the Food Stamp Program, if such adult fails to ensure that the minor dependent children of such adult attend school as required by the law of the State in which the minor children reside. Section 404(j) provides that a State to which a grant is made under section 403 shall not be prohibited from sanctioning a family that includes an adult who is older than age 20 and younger than age 51 and who has received assistance under the Program, if such adult does not have, or is not working toward attaining, a secondary school diploma or its recognized equivalent unless such adult has been determined in the judgment of medical, psychiatric, or other appropriate professionals to lack the requisite capacity to successfully complete a course of study that would lead to a secondary school diploma or its recognized equivalent.

We interpreted these provisions to pertain to TANF sanctions only. We proposed that States may not apply a separate food stamp sanction to households based on sections 404(i) and (j). We included a reference to these provisions in 7 CFR 273.11, Action on Households with Special Circumstances. In addition, we proposed that if an individual was sanctioned under TANF, then the State agency must apply 7 CFR 273.11(j), prohibiting an increase in food stamp benefits as a result of a reduction in public assistance benefits, and it may apply 7 CFR 273.11(k), regarding comparable disqualifications. We also proposed that if a State agency elected the optional reduction, then it should include it in its State Plan of Operation. All of the comments we received supported our interpretation that these provisions applied to TANF sanctions only. One commenter stated that our regulations were unnecessarily long, and that a simple statement that these provisions do not provide independent authority for food stamp sanctions beyond any that may apply though sections 6(i) or 8(d) of the Act would be sufficient. One commenter questioned the necessity to include these provisions in the State Plan of Operation since they are already included under 7 CFR 273.11(j) and (k). We agree with both of these commenters. Therefore, we are combining these two provisions into a single provision at 7 CFR 273.11(l). We are providing that these provisions do not provide for a separate food stamp sanction beyond those that are provided for in 7 CFR 273.11(j) and (k). In addition, we are removing the requirement at 7 CFR 272.2 that State agencies include this in their State Plan of Operations. Finally, we are not including these individuals in the list of non-household members at 7 CFR 273.1(b).

Cooperation with Law-Enforcement Authorities—7 CFR 272.1(c)(1)(vii)

We proposed amending 7 CFR 272.1(c)(1) to implement section 837 of PRWORA which requires State agencies to disclose certain information regarding food stamp participants to law enforcement officers. Under proposed paragraph 7 CFR 272.1(c)(1)(vii), which essentially tracks the statutory language, a State agency, upon the written request (including the name of the household member) of a Federal, State, or local law enforcement officer, would be required to disclose the address, social security number and, if available, a photograph of any household member where the member is: (1) Fleeing to avoid prosecution, or custody or confinement after conviction, for a crime (or attempt to commit a crime) that, under the law of the place the member is fleeing, is a felony (or, in the case of New Jersey, a high misdemeanor); or (2) is violating a condition of probation or parole imposed under Federal or State law; or (3) has information that is necessary for the officer to conduct an official duty related to a member of the household who is fleeing to avoid prosecution or custody for a felony.

One commenter generally opposed the proposed provision based on the belief that it is unnecessary since State agencies are already free to cooperate with law enforcement agencies. Another commenter wanted to know if the State agency should withhold an eligibility determination if a law enforcement officer is seeking information regarding an applicant who may be fleeing from prosecution or custody for a felony or may have violated a condition of probation or parole. Other commenters requested clarification of some of the provisions in the proposed rule, specifically regarding information about a household member who is not a violator him or herself but who may have information regarding a violator. In response to these comments we are making the language of the final rule more specific. We are clarifying that a request from a law enforcement officer for information regarding a household member who may be fleeing to avoid prosecution or custody would not be sufficient to withhold an eligibility determination or to terminate the participation of such an individual. However, as provided by the amendment made by sections 115 and 821 of PRWORA (discussed below), documentation that the household member is, in fact, a fleeing felon, or is violating a condition of probation or parole, would be sufficient to terminate the eligibility or deny the application of the member. We are also clarifying that this provision authorizes law enforcement officers to obtain information regarding household members who, although not fleeing to avoid prosecution or custody themselves, have information regarding other members who are, in fact, fleeing felons. We are taking this opportunity to remind State agencies that this provision in no way requires them to collect photo IDs as a condition of eligibility. Though the regulations at 7 CFR 273.2(f) require State agencies to verify identity, they are very clear that any document which reasonably establishes the applicant's identity must be accepted. The State agency may not impose a requirement for a specific type of document such as a photo ID.

Finally, the rule notes that the State agency shall only disclose the information as is necessary to comply with a specific written request, which is authorized by the rule, of the law enforcement agency.

Verification of Criteria Related to the Commission of Crimes (Drug-related Felonies, Flight to Avoid Prosecution or Incarceration, and Violations of Parole or Probation)—7 CFR 273.2(f)(1)(ix)

Under section 115 of PROWRA, an individual convicted (under Federal or State law) of any offense which is classified as a felony by the law of the jurisdiction involved and which has as an element the possession, use, or distribution of a controlled substance (as defined in section 102(6) of the Controlled Substances Act, 21 U.S.C. 802(6)) is not eligible to participate in the Food Stamp Program unless the State agency through legislation elects to opt out of the disqualification provisions of the statute. Under section 6(k) of the Act, 7 U.S.C. 2015(k) as

amended by section 821 of PRWORA, individuals who are fleeing to avoid prosecution, or custody or confinement after conviction, for a crime classified as a felony under the law of the place from which the individual is fleeing, or violating a condition of probation or parole imposed under a Federal or State law are ineligible to participate in the Program. We proposed amending 7 CFR 273.2(f)(1) to require that each State agency establish a system or systems to verify the status of food stamp applicants/recipients to determine if they would be subject to disqualification under section 115 or section 821 of PRWORA. One commenter expressed general support of the rule as written. A number of commenters expressed strong opposition to this proposal indicating that establishment of a system of verification would result in a significant burden on affected State agencies. Several State agencies indicated that since access to existing databases containing criminal records is generally limited to law enforcement agencies, State agencies would not be able to utilize such databases to determine whether an applicant would be subject to disqualification under section 115 or 821, making verification extremely difficult since there is no current nationwide database which is accessible to State welfare agencies.

Based on their experience, a number of State agencies expressed the opinion that a statement on the application form requiring individuals subject to disqualification based on convictions for drug related felonies to identify themselves as such would be sufficient to identify those individuals for the purposes of the Program. In response to these comments, we are eliminating the requirement that State agencies establish systems to verify whether an applicant has been convicted of a drug-related felony. With respect to verification of other criminal activity such as flight to avoid prosecution or custody, or violation of a condition of probation or parole, we feel that, based on the comments, it would be impracticable to mandate the establishment of State systems to verify such activity. We also believe that in the overwhelming majority of cases as soon as a household member is identified by a law enforcement agency as an individual who is fleeing to avoid prosecution or custody for a felony, or has violated a condition of parole or probation, that individual would be taken into custody, and as such, would no longer be a member of a household eligible to participate in the program. Based on these factors the final rule will not include a provision mandating the establishment of systems to verify whether applicants are fleeing to avoid prosecution or custody, or have violated a condition of probation or parole.

Applicability of SSI Categorical Eligibility to Individuals Subject to Disqualification Under Section 115 of PRWORA—7 CFR 273.2(j)(2)(vii)

Since publication of the proposed rule, it has come to our attention that it will be necessary to address the issue of whether section 115 of PRWORA (disqualification based on a conviction of a drug-related felony) applies to individuals who are categorically eligible to participate in the Program based on their eligibility to participate in the Supplemental Security Income (SSI) Program. Under 7 CFR 273.2(j)(2), households in which all persons receive or are authorized to receive SSI are considered categorically eligible to participate in the Program. Under 7 CFR 273.2(j)(2)(vii)), certain individuals who are statutorily ineligible based on nonfinancial eligibility criteria shall not be considered as part of an otherwise categorically eligible household. We believe that individuals who are ineligible to participate in the Program as the result of the operation of section 115 of PRWORA are similarly situated since their ineligibility is the result of a statutory provision unrelated to financial eligibility. Accordingly, we are amending 7 CFR 273.2(j)(2)(vii) by adding a new subparagraph (D) which specifically provides that an individual who is ineligible under 7 CFR 273.11(m) by virtue of a conviction for a drug-related felony shall not be included in a categorically eligible household. Although 7 CFR 273.2(j) also confers food stamp categorical eligibility on persons who are authorized to receive assistance under the TANF Program, it is not necessary to address the applicability of disqualification under section 115 of PRWORA to potentially categorically eligible TANF recipients convicted of drug-related felonies since section 115 of PRWORA also prohibits individuals convicted of drug-related felonies from participating in the TANF Program.

Disqualification Based on the Conviction of a Drug-Related Felony—7 CFR 273.11(m) and 273.11(c)(1)

Under Section 115 of PRWORA, an individual convicted (under Federal or State law) of any offense which is classified as a felony by the law of the jurisdiction involved and which has as an element the possession, use, or distribution of a controlled substance (as defined in section 102(6) of the Controlled Substances Act) is not eligible to participate in the Program unless the State agency through legislation elects to opt out of the disqualification provisions of the statute. Three commenters requested that we clarify the effective date of this provision. Although we addressed this issue in the implementation section of the preamble of the proposed rule, we have revised the language of 7 CFR 273.11(m) in the final rule to expressly provide that the disqualification provision only applies to convictions for crimes occurring subsequent to August 22, 1996. Some commenters also expressed the opinion that counting the resources and income of a person disqualified based on a drug-related felony conviction was unduly punitive. We are retaining the provision in the proposed rule since it is based directly on the statute (section 115(b)(2) of PRWORA) with no agency discretion. One commenter wanted to know if a conviction for a drug-related felony occurring during the certification period should be considered a reportable change. We are not mandating that the conviction be a reportable change although we anticipate that State agencies would act to disqualify a household member who is convicted of a drug-related felony during the certification period if the household voluntary reports such a change or if it becomes otherwise known to the State agency. We also believe that in most cases a conviction for a drug-related felony (as opposed to a misdemeanor) would result in the incarceration of the household member resulting in a reportable change based on household composition since the individual convicted and subsequently incarcerated would no longer be a household member. One commenter suggested that the regulation provide more detail regarding the treatment of the disqualified member's income and resources. Although we feel that the current regulations (including the proposed changes adding convicted drug felons) at 7 CFR 273.11(c) provide sufficient detail regarding the treatment of the income and resources of certain disqualified household members and that an expanded description of the applicable procedures is unnecessary, we have added a cross-reference to 7 CFR 273.11(c)(1) at 273.11(m).

For general information, the following 19 States have either opted out or limited the disqualification time period: Louisiana, Oklahoma, Illinois, Michigan, Minnesota, Ohio, Wisconsin, New Hampshire, New York, Vermont,

New Jersey, North Carolina, Colorado, Iowa, Utah, Hawaii, Nevada, Oregon and Washington.

7 CFR 273.11(n)—Disqualification of Fleeing Felons and Probation/Parole Violators

Under section 821 of PRWORA, individuals who are fleeing to avoid prosecution, or custody or confinement after conviction, for a crime classified as a felony under the law of the place from which the individual is fleeing, or violating a condition of probation or parole imposed under a Federal or State law are ineligible to participate in the Program. One commenter expressed concern regarding the vagueness of the term, ''violating a condition of probation or parole''. Although we agree that the term is somewhat vague we do not believe that it would be possible to provide a definition with any specificity since conditions of probation or parole vary greatly among individuals. We also wish to note that, in most cases once a determination is made that an individual is violating a condition of probation or parole, the individual will be taken into custody and would be ineligible to participate in the Program on the basis that the individual is a resident of an institution rather than a member of the household. One commenter suggested that we clarify that once an individual is released from supervision he or she would no longer be considered in violation of a condition of probation or parole. We have considered the comment and have elected not to specifically address the issue in the regulatory language since we feel that the determination of whether an individual is considered to be violating a condition of parole or probation would be a determination of (State or Federal) courts and/or law enforcement authorities.

One commenter suggested we include a cross reference to 7 CFR 273.11(c)(1) regarding the treatment of income and resources of the ineligible member. We agree with the commenter and are making the change at § 273.11(n) to include the cross reference.

Cooperation With Child Support—7 CFR 273.11(o) and (p)

Section 822 of PRWORA amended section 6(l) of the Act (7 U.S.C. 2015(l)) to allow State agencies to disqualify a natural or adoptive parent or other individual (collectively referred to as ''the individual'') who is living with and exercising parental control over a child under the age of 18 if the custodial parent does not cooperate with the State agency administering the program established under Part D of Title IV of the Social Security Act (42 U.S.C. 651 *et seq.*,) (the State Child Support Agency) in establishing paternity and collecting support for the child and or the individual without good cause. The provision requires the Department, in consultation with the Department of Health and Human Services (DHHS), to develop standards for what will constitute ''good cause'' for refusal of a custodial parent to cooperate. Section 822 of PRWORA also amended Section 6 of the Act by adding subsection (m) to give State agencies the option to disqualify the non-custodial parent who refuses to cooperate with the State Child Support Agency in establishing the paternity of a child and providing support for the child.

One commenter suggested we define ''custodial parent'' versus ''non-custodial parent'' for purposes of these provisions. We agree that a definition is warranted. Therefore, for purposes of this provision, a custodial parent is one who lives with his or her child under the age of 18. A ''non-custodial parent'' is one who does not live with his or her child who is under the age of 18.

Several commenters suggested that we require the State agencies to notify applicants of the requirement to cooperate with the State Child Support Agency as a condition of eligibility. Without knowledge that a cooperation requirement exists and what will be required to comply, an individual cannot be expected to comply. We agree with these comments. Therefore, we are modifying both 7 CFR 273.11 (o) and (p) to require the State agency provide notification of this requirement in writing to applicants for initial benefits and for continued benefits.

Custodial Parent—7 CFR 273.11(o)

We proposed that the State agency make the cooperation and the good cause determination. Several commenters argued that we do not have the authority to determine if an individual is cooperating with the State Child Support Agency. A couple of commenters pointed out that the Social Security Act, as amended by section 5548 of Pub. L. 105–33, gives the State Child Support Agency the authority to make this determination. Section 454(29)(A) of the Social Security Act provides that the State Child Support Agency ''shall make the determination (and redetermination at appropriate intervals) as to whether an individual who has applied for or is receiving assistance under * * * the Food Stamp Program * * * is cooperating in good faith with the State in establishing the paternity of, or in establishing, modifying or enforcing a support order for, any child of the individual by providing the State Child Support agency with the name of, and such other information as the State Child Support agency may require with respect to, the non-custodial parent of the child, subject to good cause and other exceptions * * *.'' Furthermore, section 454(4)(A)(IV) of the Social Security Act provides that the State Child Support Agency ''* * * provide services relating to the establishment of paternity or the establishment, modification, or enforcement of child support obligations * * * with respect to each child for whom cooperation is required pursuant to section 2015(l)(1) of title 7 (the Food Stamp Program) * * *.'' One commenter suggested that our regulations simply clarify the process by which the State agency would be notified by the State Child Support Agency that the individual has failed to cooperate. Section 454(29)(E) provides that the IV–D agency must ''promptly notify the individuals and the State agency administering * * * the Food Stamp Program * * * of each determination, and if non-cooperation is determined, and the basis thereof * * *.''

When PRWORA was enacted in August of 1996, it did not include changes to the Social Security Act which addressed cooperation with the State Child Support Agency for food stamp recipients. However, the Balanced Budget Act of 1997 (Pub. L. 105–33) amended the Social Security Act to include references to the Food Stamp Program as detailed above. Subsequently, TANF has published final regulations implementing section 454 of the Social Security Act which also requires TANF applicants and recipients to cooperate with the State Child Support Agency as an eligibility requirement. Based on these developments, and on comments, we have decided to modify the proposed regulations at 7 CFR 273.11(o) to provide that if the State Agency chooses to implement this provision, it must refer the appropriate individuals to the State Child Support Agency.

The proposed definition of cooperation was based on wording used at the time by DHHS. We proposed that the individual must cooperate with the State agency in obtaining support by: (1) Establishing the paternity of a child born out of wedlock; (2) obtaining support payments for the child or the individual and the child; and (3) obtaining any other payments or property due the child or the individual and the child. We also proposed that the following actions be included in the definition: (1) Appearing at an office of

the State or local agency or the child support agency to provide verbal or written information; (2) appearing as a witness at judicial or other hearings or proceedings; (3) supplying information in establishing paternity; and (4) paying to the child support agency any support payments received from the absent father. We received a number of comments on our proposed definition. Several commenters suggested that we refer to the final TANF regulations as an example. Several other commenters suggested changes to the proposed language defining cooperation. However, because it is the State Child Support Agency that makes the cooperation determination, and the definition of cooperation is embedded in section 454(29) of the Social Security Act, we have decided that it is not necessary to detail in our regulations the definition of cooperation beyond what is provided for in section 822 of PRWORA. Therefore, in this final rule at 7 CFR 273.11(o), we are deleting our proposed definition of cooperation and replacing it with an abbreviated version which is based on section 822 of PRWORA and section 454(29) of the Social Security Act. We provide that the individual must cooperate with the State Child Support Agency in establishing paternity, and in establishing, modifying, or enforcing a support order with respect to the child in accordance with section 454(29) of the Social Security Act.

A few commenters suggested that, if an individual is already participating in TANF, Medicaid or the State Child Support program, the individual would already be deemed as cooperating for food stamp purposes. We believe this would simplify the administration of this provision. Therefore, we are modifying 7 CFR 273.11(o) to provide accordingly.

Several commenters suggested that since this is an optional provision we allow the State agencies to apply this provision selectively, e.g. to parents but not other individuals. One commenter suggested we give State agencies the option to limit this provision to those groups of people who the State agency decides that child support cooperation requirements are appropriate. One commenter suggested that we define ''other individual'' as a ''legally responsible adult.'' We believe that the State agency at a minimum should apply this provision to natural and adoptive parents. However, we agree that the State agency should have some latitude to apply this provision to those other individuals that it deems appropriate, whether or not those individuals are the ''legally responsible adults.'' Therefore, we are modifying the regulations at 7 CFR 273.11(o) to provide that if the State agency chooses to implement this provision it must apply it to all natural and adoptive parents and, at State option, it may apply it to other individuals. This information must be included in the State Plan of Operation as required at 7 CFR 272.2

We proposed to adopt DHHS' provisions concerning good cause exceptions. We listed the circumstances under which cooperation may be against the best interests of the child and would not be required. Again, we received a multitude of comments on this subject. The commenters either suggested we be less prescriptive and let the State agencies define good cause, or more prescriptive, but adjust the wording to encompass more situations which would be considered good cause. One commenter said we should allow the State agencies to recognize additional situations in which cooperation would be contrary to the best interests of the child. A few commenters suggested we have a less onerous burden of good cause. For example, the emotional or physical harm should not have to be to the extent that it ''reduces [the individual's] ability to care for the child adequately'' or that the ''emotional impairment * * * substantially affects the individual's functioning.'' Several commenters suggested that we go beyond that which is in the best interests of the child and take into consideration the best interests of the parent or other individual. Several commenters suggested that our good cause exemptions related to domestic violence are too narrowly drawn and would require the food stamp agencies to make impossible and dangerous judgments. Several commenters suggested we allow a good cause exemption based on the TANF exemption for victims of domestic violence. Finally, several commenters suggested that the inability to cooperate be considered good cause.

We have been advised by the DHHS that the definition and determination of good cause is left up to either the State Child Support Agency or the State TANF program. Based on the comments and our consultation with DHHS and in the interest of conforming to current TANF and Medicaid regulations, simplifying the administration of this provision, and reducing the potential for errors, we have decided to modify our regulations. Therefore, at 7 CFR 273.11(o) in this final rule, we provide that if a State agency chooses to implement this provision, it must, adopt the good cause criteria that its State TANF program or its State Child Support Agency uses, whichever agency defines good cause for non-cooperation. In addition, if those good cause provisions do not take into consideration the threat of domestic violence, State agencies must consider if cooperating with the State Child Support Agency would make it more difficult for individuals to escape domestic violence or unfairly penalize such individuals who are or have been victimized by such violence, or individuals who are at risk of further domestic violence. For purposes of this provision, the term ''domestic violence'' means the individual or child would be subject to physical acts that result in, or are threatened to result in, physical injury to the individual; sexual abuse; sexual activity involving a dependent child; being forced as the caretaker relative of a dependent child to engage in nonconsensual sexual acts or activities; threats of, or attempts at physical or sexual abuse; mental abuse; or neglect or deprivation of medical care.

Finally, we provide that the State agency may define additional good cause criteria in consultation with the State Child Support Enforcement Agency or the State TANF Program, whichever agency is appropriate, and identify the additional criteria in the State plan.

One commenter noted that good cause should address situations where a parent or caretaker may be willing but unable to pursue child support enforcement. For example, the parent or caretaker may lack information about the absent parent. Some custodial parents and other caretakers may simply not know the identity of a child's father. We agree with this commenter that there are instances where the individual cannot provide any information on the father. However, we believe this situation will be covered by the State Child Support or TANF agency's definition of good cause. As indicated above, the State agency must adopt the same criteria as the State Child Support or TANF agency uses for good cause. In the event that this situation is not covered by the State Child Support or TANF agency's definition of good cause, we urge State agencies to adopt the criteria that the inability to provide information about the father is considered good cause.

One commenter suggested that if the State TANF and Medicaid programs have already granted good cause then we should also do so for food stamp purposes. We agree with the commenter, especially since we are adopting the good cause provisions from

the State TANF program or the State Child Support Agency. Therefore, we are modifying the regulations at 7 CFR 273.11(p), to provide that if the State TANF program or State Child Support Agency has already established that the individual has good cause for non-cooperation, then the State agency must accept that for food stamp purposes. If the State TANF program or the State Child Support Agency determines that the individual does not have good cause for refusing to cooperate, then the State agency must determine if the individual meets the good cause criteria for domestic violence or for any additional criteria the State agency has identified.

We proposed that the individual provide evidence to corroborate the claim of good cause. We received several comments regarding our proposal. All of the comments opposed our requirements as being too burdensome. A few commenters suggested that individuals be permitted to substantiate claims with a sworn statement. One commenter suggested we broaden our definition of good cause so those individuals should not have to offer additional proof that these circumstances would make the pursuit of child support against the best interests of the child.

Again we consulted with our counterparts at DHHS. Based on the comments and our discussions with DHHS, we have decided that the State agency must adopt the corroboration standards mandated by either the State Child Support Agency or the State TANF program, whichever agency in the State defines and determines good cause. We believe this will simplify administration of this provision and provide consistency with TANF, Medicaid and the State Child Support Agency. Therefore, we provide accordingly in this final rule at 7 CFR 273.11(o).

We proposed that if the State agency determines that the custodial parent has not cooperated without good cause, then that individual (and not the entire household) would be ineligible to participate in the Program. We received no comments on this provision and are adopting it as final at 7 CFR 273.11(o).

We proposed that the disqualification period be over as soon as it is determined that the individual is cooperating with the State Child Support Agency. An integral aspect of this requirement is that the State agency must have procedures in place to re-qualify an individual once cooperation has been established. We solicited comments on systems already in use. We received none. Therefore, we are adopting these provisions as final.

We proposed that the State agency count all of the disqualified individual's resources, but to give State agencies the option to count all or all but a pro rata share of the individual's income as available to the household. The majority of the comments we received on these provisions opposed allowing the State agencies the option to count all of the income as available to the household. They believe this is too punitive and is not in the best interest of the children. We agree. Therefore, in this final rulemaking we are amending 7 CFR 273.11(c) and 7 CFR 273.11(o) to provide that all but a pro rata share of the ineligible member's income is counted as available to the household.

Section 6(l) of the Act prohibits the payment of a fee or other cost for services provided under a Part D of Title IV, the Child Support Enforcement Program. Subsequently, section 454(6) of the Social Security Act (42 U.S.C. 654(6)) has been amended to prohibit the State Child Support Agency from charging application fees for furnishing such services if cooperation is required from the Food Stamp Program. All the comments we received on this provision were supportive. We are adopting this provision as final.

We proposed that if a State agency exercises its option to permit the disqualification of an individual who refuses to cooperate without good cause, the option must be included in its State Plan of Operation. We received no comments on this provision. We are adopting this provision as final at 7 CFR 272.2.

We proposed that prior to making a final determination of good cause for refusing to cooperate, the State agency would afford the State Child Support Agency the opportunity to review and comment on the findings and the basis of the proposed determination and consider any recommendation from the State Child Support Agency. We received no comments on this proposal. However, we have since been advised that it may not be the State Child Support Agency that defines and determines good cause. It could be the TANF agency. Accordingly, we are modifying the language at 7 CFR 273.11(o) to specify that the State agency will afford the State Child Support Agency or the agency which administers the program funded under Part A of the Social Security Act the opportunity to review and comment on the findings.

We proposed that the State agency will not deny, delay or discontinue assistance pending a determination of good cause for refusal to cooperate if the applicant or recipient has complied with the requirements to furnish corroborative evidence and information. We received several comments suggesting that we clarify that the 30-day processing standards still apply pending this determination. We agree with these comments and are, therefore, modifying this provision accordingly at 7 CFR 273.11(p).

Noncustodial Parent—7 CFR 273.11(p)

Section 822 of PRWORA also amended section 6 of the Act by adding subsection (m) to give State agencies the option to disqualify the non-custodial parent who refuses to cooperate with the State Child Support Agency in establishing the paternity of a child and providing support for the child.

We proposed to adopt DHHS' definition of cooperation. We also proposed that the State agency make the determination as to whether or not the individual is refusing to cooperate with the State Child Support Agency. We proposed that refusal to cooperate occurs if: (1) The non-custodial parent refuses to appear for an interview; (2) refuses to furnish requested documentation; (3) refuses DNA testing; or (4) fails to make payments to the State Child Support Agency.

One commenter argued that pursuant to section 454(29)(A) of the Social Security Act (42 U.S.C. 654(29)(A)), as amended by section 5548 of Pub. L. 105–33, the State Child Support Agency ''shall make the determination (and redetermination at appropriate intervals) as to whether an individual who has applied or is receiving assistance under * * * the Food Stamp Program is cooperating in good faith * * *.'' This same commenter pointed out that this provision conflicts with section 6(l)(2) of the Food Stamp Act, 7 U.S.C. 2015(l)(2), which was added to the Act by section 822 of PRWORA which provides that the Secretary of Agriculture must, in consultation with the Secretary of Health and Human Services, '' * * * develop guidelines on what constitutes a refusal to cooperate * * * and that the '' * * * State agency shall develop procedures, using guidelines developed under (the preceding provision), for determining whether an individual is refusing to cooperate.'' Based on these two statutory provisions, this same commenter suggested that the State Child Support Agency make the determination of non-cooperation and that the food stamp State agency make the determination as to whether or not the non-cooperation constitutes a refusal to cooperate. We agree that this clear delineation of responsibilities better serves the program. Therefore, we

are modifying the regulations at 7 CFR 273.11(p) to provide that if the State agency implements this option, it must refer non-custodial parents of a child under the age of 18 to the State Child Support Agency. If the State Child Support Agency determines that the individual is not cooperating in good faith, it must notify the State agency of this determination and the basis of its determination. The State agency must then determine whether this non-cooperation constitutes a refusal to cooperate.

Based on this modification, we have determined that there is no need to define in the regulations what constitutes cooperation, only what constitutes refusal. We received several comments suggesting we clarify that the non-custodial parent can only be disqualified for refusing to cooperate, as opposed to failing or being unable to cooperate. Therefore, we have decided to modify the regulations at 7 CFR 273.11(p) by deleting the definition of cooperation, and replacing it with a definition of refusal. The State agency must determine that an individual's non-cooperation with the State Child Support Agency is a refusal to cooperate if the individual demonstrates an unwillingness to cooperate as opposed to an inability to cooperate.

We proposed that the individual and not the entire household would be ineligible to participate in the Program. The comments we received were supportive. We adopting it as final at 7 CFR 273.11(p).

We proposed that the State agency count all of the disqualified individual's resources as available to the household, but that it may choose to count all or all but a pro rata share of the ineligible member's income as available to the household. The majority of the comments we received opposed this proposal as being potentially too punitive to the non-custodial parent's household. They suggested that we require the State agency to count all but a pro rata share of the income as available to the household. We agree with these comments. We are modifying the regulations at 7 CFR 273.11(p) and 7 CFR 273.11(c)(2) accordingly.

We proposed that the disqualification period be over as soon as it is determined that the individual is cooperating with the State Child Support Agency. The State agency must have procedures in place to re-qualify an individual once cooperation has been established. We solicited comments on those systems already in use. We received none. We are adopting this provision as final at 7 CFR 273.11(p).

Section 6(l) of the Act prohibits the payment of a fee or other cost for services provided under a Part D, Title IV, Child Support Enforcement Program. In addition, section 654(6) of the Social Security Act prohibits the State Child Support Agency from charging application fees for furnishing such services if cooperation is required from the Food Stamp Program. We proposed to prohibit the charging of such fees or costs. The comments we received on this provision were supportive. We are adopting this provision as final at 7 CFR 273.11(p)

Section 6 of the Act, as amended by section 822 of PRWORA also requires the State agency to provide safeguards to restrict the use of information collected by the State agency to purposes for which the information is collected. We proposed the State agency should have flexibility to establish the specific safeguards. We received no comments on this provision. Accordingly, we are adopting it as final at 7 CFR 273.11(p).

We proposed that if a State agency opts to disqualify the non-custodial parent who refuses to cooperate, it include this policy in its State Plan of Operation. In addition, we proposed to add a new section 7 CFR 272.2(d)(1)(xiv) to require that the States that elect to implement this provision include these safeguards in their Plan of Operation. We received no comments on these proposals. We are adopting them as final at 273.2(d)(xiii).

Disqualification for Child Support Arrears—7 CFR 273.11(q)

Section 823 of PRWORA amended section 6 of the Act by adding subsection (n) (7 U.S.C. 2015(n)) to give State agencies the option to disqualify a member of any household during any month that the individual is delinquent in any payment due under a court order for the support of the individual's child. The provision also specifies that if a court is allowing the individual to delay payment or the individual is complying with a payment plan approved by a court or the State Child Support Agency, the individual will not be disqualified. We proposed that the disqualification apply to the offending individual and not the entire household.

We proposed that for any month for which it later discovers that the individual was delinquent and should have been disqualified, the State agency must establish a claim against the household. We received several comments on this provision, both for and against this procedure. Several commenters opposed the provision in general because it was too punitive and further hampered individuals' ability to become self-sufficient and productive. Several commenters opposed it because it was too administratively burdensome. Several commenters suggest that the State agency be allowed to disqualify the individual the month after the month it learns that the individual has been delinquent in child support payments. Others suggested that State agencies be allowed to establish a grace period of several months. For example, if an individual has not paid child support after four months, the individual should be disqualified until the individual starts to comply. One commenter said that since this is not a reportable change, we have no authority to set up a claim. Several commenters supported our proposal as the only way to remain faithful to the statute. The statute provides that a State agency may disqualify an individual ''* * * during any month the individual is delinquent in any payment * * * '' and, therefore, we have no option but to set up a claim. Our analysis has determined that we have no discretion to permit the State agencies to implement the provision any other way than the way we proposed. The law is very clear that the individual is to be disqualified the month that he is delinquent. Therefore, we are adopting the provision as proposed at 7 CFR 273.11(q).

A few commenters suggested that we provide a good cause exception for this provision. One commenter suggested that this provision should only apply when an individual refuses to pay as opposed to being unable to pay. The Statute does provide exceptions to this provision: (1) If the court is allowing the individual to delay payment, or (2) the individual is complying with a payment plan approved by a court or the State Child Support Agency. However, since this is a State agency option, we have decided to give State agencies the option to identify additional good cause exemptions. We are adopting the provision at 7 CFR 273.11(q) accordingly.

One commenter suggested that this provision only apply to non-custodial parents. We believe that there are situations in which a custodial parent is still obligated to pay child support. For example, the parents are separated, and the non-custodial parent is required to pay child support. During the separation, the non-custodial parent does not comply with the support order for one reason or another. Even if the parents reunite, the former non-custodial parent is still obligated to pay for the period of time the parents were separated. However, we also recognize that some State agencies might view this

as too punitive. Therefore, since this is a State agency option, we have decided to give State agencies the option to apply this provision to custodial or non-custodial parents.

We proposed that the State agency consider all of the disqualified individuals' resources, and at State agency option, either all or all but a pro rata share of the income as available to the household. All of the comments we received opposed this proposal as being too punitive to the household. Many of the commenters argued that if the State agency chose to count all of the income, the children in the household would suffer. We agree with these comments. Therefore, in this final rule at 7 CFR 237.11(q) and 7 CFR 273.11(c)(2) we are providing that if a State chooses this option, it must count all of the individuals' resources and all but a pro rata share of the income as available to the household.

We proposed that the State agency must disqualify the individual and not the whole household. All the comments we received on this provision were supportive. We are adopting the provision as proposed at 7 CFR 273.11(q).

7 CFR 273.16—Disqualification for Intentional Program Violation

The current regulations at 7 CFR 273.16 outline the procedures involved with Intentional Program Violations (IPVs) and IPV-related disqualifications. The proposed rule contained extensive revisions to this section of the regulations. These changes included the increased and additional IPV-related disqualification penalties brought about by sections 813, 814 and 820 of PRWORA. In addition, the proposed rule contained a change necessitated by a judicial decision on the imposition of disqualification periods. Clarification was also being provided in the proposed rule for a number of issues, including the definition of an IPV. Lastly, as part of an effort to streamline the regulatory requirements and to increase State agency flexibility in the area, the Department proposed to remove prescriptive language and some requirements in many discretionary areas concerning IPVs and the IPV disqualification process.

IPV Procedures and Rights of Individuals

With respect to this streamlining effort, the Department received numerous comments expressing concern about removing much of this prescriptive language. By doing so, according to the commenters, we are also omitting a number of protections necessary for ensuring fairness and due process for individuals facing the possibility of disqualification or criminal prosecution. The Department has found many of these arguments compelling. Although the Department believes the original goals of streamlining and increased State flexibility were worthy of the effort and may be revisited at some later date, we do not think such changes should come at the possible expense of the elimination of individuals' rights. Therefore, unless specifically addressed below, we are restoring in this final rule the language of the existing regulations as it pertained to discretionary areas concerning IPVs and the IPV disqualification process. Included in the restored language are such provisions as the Administrative Disqualification Hearing (ADH) and court referral process, notice requirements, waiver and consent forms, ADH decision format, and local level hearings. Finally, one commenter expressed concern that a significant number of innocent people, lacking adequate representation, are intimidated into signing ADH waivers. The commenter suggests that individuals may be threatened with criminal prosecution though the evidence against the individual is far from convincing. The Department in this preamble would like to clarify its position with respect to the use of false and/or misleading statements to obtain ADH waivers. While the Department believes strongly that those found guilty of IPVs should be removed from participation in the FSP, we would emphasize that the purpose of the FSP is to provide assistance to those in need. The use of investigative techniques that may lead to the disqualification of innocent participants is inconsistent with the intended purpose of the FSP. To this purpose, the current regulations provide for certain safeguards against intimidation, including a two-party review to ensure that evidence against an individual is sufficiently clear to merit an ADH before an ADH waiver is offered. The ADH waiver should not be used as a shortcut to the investigative process, but should only be offered after the investigation has yielded evidence adequate to bring before an ADH hearing official. Though the Department believes that no modification of the current regulations is necessary, we would emphasize our desire that these safeguards be observed.

Administrative Versus Criminal Pursuit—7 CFR 273.16(a)(1) and (e)(3)(iii)(H)

The Department received two comments in support of and four in opposition to our clarification that both an administrative disqualification hearing (ADH) and a criminal prosecution may be initiated simultaneously for the same offense. One of the opposing comments suggested that permitting simultaneous proceedings placed an enormous burden on individuals or their legal representatives to provide adequate representation in two separate proceedings. As a matter of fairness and to ensure that each individual has an appropriate opportunity to provide an adequate defense, the Department agrees with this argument and is clarifying in this final rule that both an ADH and a civil or criminal proceeding may be initiated by the State but not simultaneously. Further, the initiation of a civil or criminal proceeding is permitted regardless of the outcome of the ADH. This is not a change from our current policy as reflected in § 273.16(a) of this final rule.

Definition of an IPV—7 CFR 273.16(c)

The Department proposed updating this definition to provide a clarification on trafficking as well as to account for the improper acquisition and use of electronic benefit transfer (EBT) cards. One commenter suggested that we make the definition more consistent with section 6(b)(1) of the Act (7 U.S.C. 2035(b)(1)) by replacing ''*relating to* the use, presentation'' as it appears in the current regulations with ''*for the purpose of* using, presenting'' as it appears in the Act. We agree that this wording better reflects the appropriate intent and is reflected in Section 273.16(c) in this final rule.

PRWORA Section 813—Doubled Penalties for Violating FSP Rules

The proposed rule contained the provision in section 813 of PRWORA that increases the penalties twofold for the non-permanent offenses. Specifically, unless the offense falls under a specific category requiring a more stringent penalty, section 6(b)(1) of the Act (7 U.S.C. 2015(b)(1)) now requires that an individual be disqualified for one year for a first finding of IPV, and for two years for a second finding of IPV. The penalty for a third finding of IPV, permanent disqualification, remains the same. For convictions involving the trading of controlled substances for coupons, section 813 of PRWORA requires that an individual be disqualified for two years for the first offense.

The comments received by the Department concerning the doubling of the current disqualification penalties expressed general support. Since the

Department is retaining the structure of the current rule, these changes will be reflected in § 273.16(b) of the final rule.

PRWORA Section 814—Disqualification of Individuals Convicted of Trafficking $500 or More

The proposed rule included the provision in section 814 of PRWORA that permanently disqualifies individuals from FSP participation if they are convicted of a trafficking offense of $500 or more.

The statutory language provides for this penalty to take effect where there is an actual *conviction.* The proposed rule extended the applicability of this penalty to include signed disqualification consent agreements in connection with deferred adjudications. The Department received two comments objecting to this extension of penalties. Specifically, the commenters believed that since there is no actual determination of guilt, there is no actual conviction as required by section 6(b) of the amended Act. This is a valid point. Therefore, the final rule adds language to permanently disqualify individuals from FSP participation if they are convicted of a trafficking offense of $500 or more. The proposed language specifying that this penalty also applies to deferred adjudications does not appear in the final rule.

This change does not affect our current long-standing policy in 7 CFR 273.16(b)(9) that allows the penalties associated with trading coupons for firearms, ammunition, explosives or controlled substances to be imposed using agreements obtained in deferred adjudications. The basis for the difference between this policy and the new trafficking penalty is the different respective requirements in the Act. As discussed above, Section 6(b)(1)(iii)(IV) of the Act (7 U.S.C. 2025 (b)(1)(iii)(IV)) requires a *conviction* for the new PRWORA trafficking penalty. Conversely, the existing firearms, ammunition, explosives and controlled substances penalties requires only a court *finding* (rather than a conviction) (7 U.S.C. 2025 (b)(1)). Therefore, the current policy regarding these long-standing penalties remain unchanged.

A number of comments were received regarding the $500 trafficking benchmark associated with this penalty. The preamble to the proposed rule (64 FR 70933) specified that, if the cumulative amount of the related infractions making up the IPV is greater than $500, then the individual would be subject to the increased trafficking penalty. Three of the comments were from State agencies expressing that it would be difficult to track dollar amounts of individual convictions. This is not our intention. Aggregating involves the accumulation of dollar amounts for separate but related trafficking *offenses* leading up to the prosecution of a *single IPV.* All evidence necessary for the prosecution of a case, regardless of the number of offenses, should include the dollar amounts for each. It should then be relatively simple to aggregate these amounts to determine whether the total reaches the $500 benchmark for permanent disqualification. Comparing or aggregating individual conviction amounts are not necessary (or even appropriate) in these instances.

The Department also received one comment indicating that the aggregating of the dollar amounts of individual trafficking offenses to reach the threshold of $500 is unfair to affected individuals and households. The commenter suggested that Congress intended to severely punish the more serious offenders while allowing the lesser offenders to learn from their mistakes. Therefore, according to the commenter, individual trafficking incidents should not be combined. While the Department does not disagree with the suggested intent, we believe that the trafficking of $500 or more, whether in an single transaction or in aggregate, is a serious offense and is deserving of the more serious penalty. Further, permanent disqualification is applicable, as clarified above, in such cases only when referred to the court and a conviction is obtained. The final determination will thus belong to the court. The Department would also like to point out that those individuals that receive less than $500 per month in food stamp benefits would have to participate in multiple intentional violations to reach the $500 benchmark for permanent disqualification. Without aggregating, these same individuals, though they be chronic serious offenders, would never be subject to the penalty intended by Congress. Conversely, without aggregating, the Department would be in the position of unfairly holding only those that receive $500 or more per month in food stamp benefits potentially liable for the more severe penalty. However, even this latter group could avoid ever receiving a permanent disqualification by intentionally limiting trafficking transactions to $499 or less. The Department does not believe that this is what Congress intended and the requirement concerning aggregating will be retained in the final rule.

PRWORA Section 820—Ten Year Disqualification for Multiple Participation

The proposed rule included the provision in section 820 of PRWORA which amended section 6 of the Act by adding paragraph (j), 7 U.S.C. 2015 (j), to provided for a ten year disqualification for making a fraudulent statement or misrepresentation in order to receive multiple benefits simultaneously duplicate participation.

Two of the commenters expressed general support for this provision and for the criteria used in determining duplicate participation. Two additional commenters suggested that there must be a dollar loss before duplicate participation is considered to have occurred. The Department disagrees. The amendment made by section 120 applies by its terms to fraudulent statements or representations with respect to identity or place of residence in order to receive multiple benefits simultaneously. It is not specified that such statements or representations must be successful in order for the 10-year disqualification to apply. As long as there is sufficient evidence that the individual made such statements or representations, it is not necessary to establish a dollar loss. Unsuccessful attempts to commit fraud through duplicate participation should be dealt with in the same manner as successful attempts. To do otherwise would undermine the integrity of the Program. The final rule at § 273.16(b)(5) remains unchanged.

Finally, one respondent asked for clarification on whether continuing to receive benefits in one State after moving to a second constitutes duplicate participation. If so, which State should pursue the IPV and establish the claim: the State the individual moved from or the State the individual moved to. In such cases, the State where the individual resides should initiate the IPV investigation and establish the claim.

Applicability of PRWORA Disqualification Penalties

The proposed rule discussed whether these new PRWORA IPV disqualification penalties should be applied to all ADHs, court hearings, and similar proceedings held subsequent to enactment of the law (regardless of when the actual offense occurred) or only to those cases in which the actual offense occurred subsequent to State agency implementation of the new legislation. PRWORA set the date of enactment, August 22, 1996, as the effective date for these provisions of the

law. As a result, State agencies were permitted discretion as to whether the new or increased penalties should apply to offenses that occurred prior to State agency implementation of the new legislation. It was, therefore, impractical in the proposed rule for the Department to introduce standards on an issue for which action has already been taken.

The Department received two comments stating that offenses occurring prior to the date of enactment (August 22, 1996) should not trigger the new penalties. While we understand the commenters' position, the Department still believes that retroactively imposing new standards for an action that has already been taken would be an inappropriate burden to place on States. The final rule remains unchanged.

Another respondent asked the Department to specify which penalties apply when the offense occurs prior to August 22, 1996. Again, since State agencies have already used their discretion in implementing this provision, this will remain a State option and will not be regulated by the Department. We would add, however, that we expect that the penalties a State has decided to use in this circumstance, will be applied in all such cases.

Two respondents suggested that a second offense for the trafficking of a controlled substance that occurs after August 22, 1996 (the date of enactment of PRWORA) when the first offense occurred prior to that date should not trigger a permanent disqualification. While PRWORA required the doubling of the first offense for the trafficking of a controlled substance, the permanent disqualification for a second such offense existed prior to PRWORA. This provision was part of Section 13942 of the Mickey Leland Childhood Hunger Relief Act (Pub. L. 103–66). The Department already implemented this non-discretionary provision in regulations published on August 22, 1995 (60 FR 43513) and this provision is not changed in this final rule.

Imposition of Disqualification Penalties—7 CFR 273.16(a), (e), (f), (g) and (h)

In response to a lawsuit (*Garcia v. Concannon and Espy,* 67 F. 3d 256 (1995)), the Department proposed to require State agencies to impose a disqualification period for all IPV-related disqualifications as soon as administratively possible, regardless of eligibility. We received four comments supporting this change of policy. One commenter, however, believed that this change was too burdensome to implement since those that are no longer on the Program now need to have their disqualification periods tracked. We disagree. This policy adds no new requirements for State agencies, it actually eliminates one. State agencies have always been required to impose disqualifications immediately when the individual being disqualified remained otherwise eligible to participate in the Program. That will not change with this policy except that State agencies will no longer need to track pending disqualifications until the individual reapplies and is found eligible for benefits. The final rule retains the proposed provision. (See § 273.16(b)(13).)

ADH Timeframes

The current regulations at 7 CFR 273.16(e)(2) require that the State agency reach a decision and inform the individual within 90 days of the date the hearing is scheduled. The proposed rule required that the individual be notified within 180 days after the date of discovery of the suspected violation or within 60 days of the date of the hearing, whichever is sooner.

The Department received 12 comments opposing at least one aspect of this change. Most commenters thought 180 days was too short a period to properly develop evidence, build a case, hold the hearing and arrive at a decision. The commenters suggested retaining the current requirement of 90 days from the date of the initial notification to the individual. Given the general disagreement with the Department's proposal and support for retention of the current standard, we have decided to retain the existing 90-day standard as required in the current rule.

Local-Level ADHs

The proposed rule made clear our long-standing policy that either the affected individual or local agency must be given the opportunity to seek some form of an appellate review of a local-level decision. The Department received one comment disagreeing with this position. The commenter believed that State agencies should not be allowed to hold a second hearing on the same charge when the individual has already been ''cleared.'' We disagree. The Department believes that there are instances in which a State appeal would be appropriate. We also believe that State agencies will not abuse this authority and only reserve these appeals for those instances in which policy is clearly misapplied. The current language in the existing regulations is retained without change.

Reporting Requirements—7 CFR 273.16(i)

The Department received one comment seeking clarification whether the Department's reporting system for disqualifications, DRS, would accept the new IPV disqualification penalties. DRS will currently accept a disqualification penalty of any length. The system does contain edits that alert the user when a non-standard penalty has been submitted, but this in no way prevents the system from accepting the disqualification record. The penalty for duplicate participation and the more severe penalties for trafficking will also trigger an alert. FNS is currently exploring ways to avoid this latter circumstance. State agencies should contact their FNS regional DRS Coordinator if they need further assistance.

7 CFR 273.24—Time Limit for Able-Bodied Adults Without Dependents (ABAWDs)

Section 824 of PRWORA amended section 6 of the Act by adding a new subsection (o) 7 U.S.C. 2015(o) that limits the receipt of food stamps for certain able-bodied adults to three months in a three-year period unless the individual is working 20 hours per week or participating in a work program 20 hours per week, or is participating in a workfare program. Individuals can regain eligibility, and may receive an additional three months of food stamps while not working in certain circumstances. Amended section 6(o) includes some exceptions, and receiving food stamps while exempt does not count towards an individual's time limit. In recognition that it may be difficult for individuals to find work in depressed labor markets, the statute authorizes waivers for individuals in areas in which the unemployment rate is above ten percent, or where there is a lack of sufficient jobs.

We proposed to codify the time limit for ABAWDs at 7 CFR 273.25. However, on Friday, September 3, 1999, we published an interim final rule called The Food Stamp Provisions of the Balanced Budget Act of 1997. This rule implemented the changes to the Food Stamp Act brought about by the Balanced Budget Act of 1997, which included a provision allowing the State agencies to exempt from the time limit up to 15 percent of ''covered individuals.'' This provision was codified at 7 CFR 273.24. Because these two provisions are related, we have decided to merge the two. Therefore in this final rule, we have modified 7 CFR

273.24 to include the time limit for ABAWDs.

We proposed that for purposes of this provision, 20 hours a week equals 80 hours a month. The majority of the commenters supported this proposal. A few commenters suggested that weekly earnings which equal the minimum wage times 20 should be the equivalent of working 20 hours a week. The statute refers specifically to ''working 20 hours a week.'' In addition, it provides for an exception if an individual is exempt under section 6(d)(2) of the Act. One of the exemptions under section 6(d)(2) of the Act is if an individual's weekly earnings equal 30 times the minimum wage. We believe if Congress intended for 20 times the minimum wage to count as meeting the work requirement it would have specified so in the Act and not have referenced the section 6(d)(2) exemption. Therefore, we are not adopting the commenters' suggestion.

We proposed that for purposes of this provision unpaid work under standards established by the State agency, and work for in-kind services count as work. The majority of the commenters supported this proposal. Only one commenter opposed the provision as not consistent with the goal of self-sufficiency. Several commenters suggested that unpaid work be classified as comparable workfare so it would include worker protections and hour limitations. One commenter elaborated further saying this suggestion is consistent with congressional intent that persons working for no compensation other than the opportunity to receive food stamps should not be required to work more hours than the minimum wage divided into those benefits. Also, limiting the hours any individual recipient must volunteer would allow non-profits to create slots for more recipients. While we agree that individuals working for no compensation should not have to work more than their food stamp allotment divided by the minimum wage, we do not have the discretion to *require* State agencies to create a comparable workfare program in accordance with § 273.7(m)(10). We do encourage all State agencies to create comparable workfare programs in order to restrict the number of hours an individual has to work in a volunteer position in order not to be subject to the time limit. However, in those situations where State agencies do not have enough workfare slots or have not created a comparable workfare program, we believe individuals should have the opportunity to fulfill the work requirement by volunteering 20 hours a week averaged monthly. We also received several comments supporting this proposal. Therefore, we are adopting the provision as written at 7 CFR 273.24.

We proposed that work include unpaid work under standards established by the State agency. Several commenters suggested that we clarify in the regulations that the State agency may only set standards for verification of work, but they may not set standards for the work itself. One commenter pointed out that we allow in-kind work to count without referencing state-set standards and that we should allow the same for unpaid work. This same commenter stressed that any individual who can demonstrate that the individual is doing 20 hours of unpaid work a week, averaged monthly, should be able to receive food stamps. While we agree, we also believe that the State agency should have some control over unpaid work. We believe it should be able to require whatever verification it wants to in order to verify unpaid work. Therefore, we are modifying the regulation to provide that work means unpaid work, verified under standards set by the State agency.

Several commenters queried how the State agencies would determine the hourly value of in-kind work. One commenter suggested the State agencies be responsible for determining the value of in-kind work. We would like to reiterate that the State agency has to verify with the employer the number of hours an individual works, no matter what currency that individual is being paid in—money, commodities, or housing. If an individual is receiving housing in exchange for being the superintendent of the apartment complex, but the individual only works at that position 10 hours a week, then that individual is not fulfilling the work requirement, unless the total of all types of work and participation in work programs meet the 20 hours per week requirement. We believe we do not have to clarify the regulations any further.

A few commenters suggested counting all work experience programs as workfare programs. We do not have the discretion to do this. Workfare and work experience programs are two distinct programs governed by different provisions in the Act. Workfare is governed by section 20 of the Act, 7 U.S.C. 2029. Work experience programs are components of the Employment and Training Program (E&T Program) governed by section 6(d)(4) of the Act, 7 U.S.C. 2015(d)(4). Section 824 of PRWORA references both separately. Section 824 added paragraph (o) to section 6 of the Act to provide that the individual must participate and comply with a work program (which encompasses an E&T Program) 20 hours a week, or a workfare program under Section 20 of the Act. It does not reference an hourly requirement in the workfare program since everyone's workfare obligation is different. Therefore, we are not adopting the commenters' suggestion.

We proposed that someone who has missed work for good cause as determined by the State agency will be considered to be satisfying the work requirement if the absence from work is temporary and the individual retains the job. The majority of the commenters supported this provision. A few opposed it as administratively time consuming and error prone and feared that it would not be uniformly applied. A few commenters suggested we include in the regulations a non-exhaustive list of what constitutes good cause. We believe the State agencies are in a better position to define good cause for purposes of this provision. However, we also believe that the good cause provision for ABAWDS fulfilling the work requirements should parallel the good cause provisions for work registration and E&T Program requirements. Therefore, we are modifying the regulations at 7 CFR 273.24 to provide that good cause shall include circumstances beyond the member's control, such as, but not limited to, illness, illness of another household member requiring the presence of the member, a household emergency, or the unavailability of transportation.

A few commenters suggested that we extend this provision to workfare and employment and training (E&T). As mentioned above, the regulations at 7 CFR 273.7(i) already provide a good cause clause for work registration and E&T. We believe that putting it in the regulations at 7 CFR 273.24 would be redundant. Therefore, we are not adopting the commenter's suggestion.

We discussed in the preamble to the proposed regulation the merits of our proposal that a qualifying work program need not be an FNS E&T Program under 7 CFR 273.7(f). Section 6(o) only requires that a qualifying work program not be a job search or job search training program and that it meet standards approved by the Governor of the State. We proposed that we would not review plans for these programs, but cautioned State agencies to scrutinize these programs carefully so that they are not later determined through the quality control process to not meet the requirements of the statute. We received several comments voicing concern that this implied our quality control

reviewers would be reviewing the programs themselves to ensure that they meet standards set by the Governor. We want to clarify that as part of our oversight duties we may evaluate, through our management evaluation process, and not our quality control process, these programs to ensure that they meet the requirements of the statute.

We proposed that a qualifying work program may contain job search as a subsidiary component but that the job search activity must be less than half of the requirement. The majority of the commenters supported this proposal. One commenter opposed the proposal as being too restrictive because many E&T programs are made up of job search and job search training activities. One commenter suggested we modify the wording so the job search component be ''not more than half,'' that way the program could be 50 percent work and 50 percent job search. Section 824 of PRWORA specifically provides that participation in an E&T Program, OTHER THAN a job search or job search training program, would satisfy the work requirement. We acknowledge that prior to PRWORA the bulk of food stamp E&T Programs consisted of job search. We also acknowledge that job search and job search training are valuable aspects of the these programs. However, in amending Section 6 of the Act, Congress specifically prohibited E&T job search activities as fulfilling the work requirement. We decided to allow job search as a subsidiary component, but do not believe we have the discretion to allow it as an equal or dominant component. Therefore, we are not adopting the commenters' suggestions.

We proposed that an individual could combine work and participation in a work program to meet the 20 hours per week requirement. The majority of the commenters supported this proposal. One commenter suggested that we clarify in the regulations that time spent off-site preparing for E & T activities count towards meeting the requirements. This is up to the State agency. If the State Agency recognizes such activities for E & T purposes then the individual is fulfilling the work requirement.

We proposed that the State agencies have the option of how to measure and track the 36-month period. They may use a ''fixed'' or ''rolling'' 36-month ''clock.'' The majority of the commenters supported this proposal. A few commenters suggested that we allow State agencies to switch back and forth from fixed to rolling at any time. Several State agencies switched from a rolling period to a fixed period in December 1999, the end of the first 36-months. Several other State agencies switched once they had solved their potential ''Y2K'' computer problems. We believe that switching back and forth frequently could negatively affect recipients. However, we also believe State agencies are in the best position to determine how to measure and track this period of time and should have the flexibility to change tracking systems if they determine it is necessary. We urge State agencies to choose which method they are going to use by the implementation date of this rule. After such time, we provide in this final rule at 7 CFR 273.24 that once the implementation date of this rule has passed, State agencies must inform us if they switch tracking methods for this time period.

We proposed that partial months not count towards the 3-month time limit. The majority of the commenters supported this proposal. One commenter suggested that we clarify that prorated months will not count as opposed to not counting the month of application. Another commenter suggested we clarify the regulations by saying ''. . . after the first of the month.'' According to the regulations at 7 CFR 237.10, initial months' benefits are prorated from the date of application. This implies that, unless an individual applies on the first day of the issuance cycle, his benefits are prorated and are in effect for only part of the month, not the full month. While we believe our proposal that a countable month is one in which an individual receives a full month's benefit is clear, we will modify it to say that a countable month is one in which an individual receives a full month's benefit, and not benefits that are prorated in accordance to 7 CFR 273.10(a)(1)(ii).

We proposed that State agencies may opt to consider benefits erroneously received as having been received until they are repaid in full. Several of the commenters opposed the option of tracking benefits erroneously received as too complex. One commenter suggested that when determining the amount a client has to pay back on an overissuance, State agencies can exclude a month that was paid in error if that month was treated as a countable month for ABAWD purposes. A few commenters argued that benefits should count no matter what if they have been posted to an EBT account since the quality control system considers a case active and benefits received under this situation. One commenter suggested that State agencies be allowed to consider benefits to have been received unless or until it files a claim to recover the overissuance. The intent of this proposal was to give State agencies different options on how to treat benefits that are received in error. We believe that if an ABAWD receives benefits erroneously and then pays them back, that month should not be considered a countable month. Therefore, we are modifying the regulation to provide that State agencies must count benefits erroneously received as having been received for purposes of this provision, until the individual repays them in full.

We proposed that unreported work would ''erase'' a countable month. Only one commenter supported this proposal. The majority of the comments we received opposed it. They said it was complex, administratively burdensome and not consistent with income reporting requirements and regulations governing IPVs. One commenter said that it rewards a recipient who did not comply with the program requirement to report income. Another commenter argued that current rules state a household's benefit cannot be restored if the household fails to report the information and he questions why we should have different standards for ABAWDs. Another commenter said that as reinforcement to the reporting requirements the countable months should not be adjusted in this situation.

In light of these comments, we believe State agencies are in the best position to determine whether or not they should count an unreported job as ''work'' for purposes of this provision. We believe that if a State agency erases a countable month if it later determines the individual was in fact working in an unreported job, it will have acted within the law. However, we also realize from the comments that some State agencies would choose not to do this. Therefore, we are modifying the provision and giving State agencies the option to count unreported work as ''work'' for this provision.

We proposed at 7 CFR 273.2(f)(1)(xiv)(A) that State agencies must verify work hours for individuals subject to the time limit. Several commenters opposed mandating verification of work hours as overly prescriptive. One commenter suggested that the State agency only be required to verify that information if it is questionable. We understand that State agencies may see this requirement as burdensome. However, we believe it is necessary in order to ensure the proper implementation of a basic eligibility factor. Therefore, we are retaining this proposal as written.

We proposed at 7 CFR 273.12 that individuals be required to report if their work hours fell below 20 hours a week, averaged monthly. The majority of the commenters opposed this provision. They said it was complicated, burdensome, not family friendly, and in contrast to reporting simplification measures of the President's July 1999 Initiative. One commenter suggested that individuals be required to report if their work hours fell below 80 hours a month. We believe that in order to be faithful to the law, we must require individuals subject to the time limit to report if their hours fall below 20 hours a week averaged monthly, or as defined earlier, 80 hours a month. However, we also recognize that State agencies have different kinds of reporting systems for different types of households. We do not want to prescribe the type of reporting system a State agency must assign a potential ABAWD. However, we want to emphasize that State agencies are required to adhere to the statutory requirement of time-limited benefits for individuals who are not fulfilling the work requirement. Therefore, we are modifying the regulations to provide that individuals are required to report when their number of hours worked fall below 20 hours a week, averaged monthly (80 hours a month). Regardless of the type of reporting system the State agency assigns to potential ABAWDs, the State agency must adhere to the statutory requirements of time-limited benefits for individuals who are not fulfilling the work requirement.

We proposed at 7 CFR 273.2(f)(8) that the State agency must verify the countable months an individual has used in another State if there is an indication that the individual participated in another State. We also proposed that the State agency may accept the other State's assertion as to the number of countable months the individual has used in the other State. The majority of the comments we received opposed this provision. Commenters argued that this proposal is complex, especially since State agencies have different tracking systems for the 36-month clock. A few commenters argued that this would delay application processing. Several commenters said that until a national database exists, they should not be required to verify this information. Some commenters suggested State agencies only verify this information if questionable. Other commenters indicated that they should not rely on other States' assertions as to the number of countable months since in fair hearings and IPV challenges, State agencies must obtain copies of all relevant supportive materials. To be faithful to the statute, we believe we must require State agencies to verify the number of countable months an individual has participated in another State where there is an indication that the individual has participated in another State. Because commenters have expressed concern that this may delay the application, we are reminding State agencies at 7 CFR 273.2(f) that the normal processing standards of 7 CFR 273.2(g) apply. In addition, and in an attempt to simplify and hasten this verification process, we have decided to retain in the regulations the provision that the State may accept another State's assertion as to the number of countable months an individual has used in another State. The other State's assertion will be acceptable for quality control review purposes.

We proposed that all of the resources and all but a pro rata share of the income of the ineligible ABAWD would be counted as available to the household. We received wide variety of comments. Several commenters argued that this proposal was too harsh, especially in light of the fact the ineligible ABAWD would not have much money or resources anyway. They suggested that none of the income and none of the resources be considered as available to the household. Other commenters said this was too lenient, and that the State agency should count all of the income and resources as available to the household. Other commenters suggested that this should be a State agency option. Since this is a mandatory provision, we do not believe we may give the State agency an option as to how to treat the income and resources of the ineligible ABAWD, especially since we are now mandating how the State agency treat it for individuals ineligible under optional provisions, such as comparable disqualification, cooperation with child support agencies, and disqualification for child support arrears. In addition, we do not believe we should be punitive and require the State agencies to count all of the income and resources of the individual since he has failed to meet his responsibilities. Finally, we do not believe we should require the State agency to ignore the income and resources of these individuals, given that they have not ''complied'' with a food stamp eligibility requirement. Therefore, we have decided to retain the language as written at 7 CFR 273.24 and 7 CFR 273.(11)(c)(2) and provide that the State agency must count all of the resources and all but a pro rata share of the income as available to the household. We believe this is the most equitable treatment.

Exemptions

We proposed in accordance with the section 6(o)(3)(A) of the Act, that an individual is exempt from this requirement if he is under 18 or older than 50 years of age. A few commenters suggested we clarify that an individual becomes exempt on his or her 50th birthday, in accordance with current policy. We agree with this comment. Therefore we are clarifying in the regulations that an individual is exempt if he is under 18 or 50 years or older.

We proposed that an individual is medically certified as physically or mentally unfit for employment if he provides a statement from a physician or a licensed or certified psychologist that he is physically or mentally unfit for employment. Several commenters supported our proposal of not requiring individuals to meet a more stringent definition of ''disability.'' However, the majority of the commenters suggested that we let the eligibility worker certify the individual as physically or mentally unfit if the unfitness is obvious. A few commenters argued that it is too difficult and expensive for individuals to get a statement from a physician or a licensed or certified psychologist and that we allow a statement from a nurse, a nurse practitioner, or a designated staff member of the doctor's office to suffice. Several commenters suggested that we do away with this provision and rely solely on the regulations at 7 CFR 273.7(b). As explained in the preamble, we incorporated the ''unfit for employment'' exemption from 7 CFR 273.7(b) into the ABAWD provision except, in accordance with the statute, we required that for purposes of this provision, the medical certification be mandatory in all cases. However, our comment analysis has led us to believe that that this level of verification is not necessary. Therefore, we have decided to require a medical certification only in cases where the unfitness is not evident to the eligibility worker. In addition, we have decided that a statement from a nurse, nurse practitioner, designated representative at a doctor's office, social worker, or other medical personnel the State agency deems appropriate would suffice as a medical certification. We are modifying the regulations at 7 CFR 273.24 accordingly.

We proposed that an individual is exempt if the individual is a parent (natural, adoptive, or step) of a household member under the age of 18, or is living in a household where a member is under the age of 18. The majority of the commenters supported

this proposal. A few commenters opposed the proposal as defeating the purpose of welfare reform. A couple of commenters suggested that only one parent should be exempt, not both, and that all the other adults in the house should work. A few commenters suggested that we clarify that even if the individual who is under 18 is not eligible for food stamps, the individual's presence in the house exempts those adults who are living in the household. As discussed in the preamble to the proposed rule, we believe it is administratively burdensome, and in this day and age virtually impossible, for the State agency to determine who is ''responsible'' for a dependent child. We believe that in many cases, more than one adult has responsibility for a dependent child. Therefore, we are retaining the provision as written. However, we are clarifying in the regulations that even if the household member who is under 18 is not eligible for food stamps, the other individuals in the household are still exempt from the time limit.

All the other comments concerning the proposals on the exemptions were supportive. Therefore, we are retaining them as written.

Regaining Eligibility

We proposed that an individual can regain eligibility if the individual works 80 hours in a 30-day period. For purposes of this provision, we proposed that a 30-day period be any 30 consecutive days. We received only a few comments on this proposal. One commenter opposed this provision and suggested that the 30-day period immediately precede application. One commenter suggested we clarify in the regulations that the 30-day period need not immediately precede application. One commenter suggested that we modify the language so that an individual can regain eligibility if the individual works 80 hours in a calendar month. Our proposal basically mirrored the language of the law which provides that individuals can regain eligibility if they work 80 hours during a 30-day period. As discussed in the proposed rule, the statute does not require that the 30-day period be a calendar month, nor does it require that the 30-day period immediately precede the date of application. Therefore, in order to afford flexibility and be faithful to the statute, we are retaining the proposal as written.

We proposed that the State agency have the option to prorate benefits from the date the ''cure'' is complete or back to the date of application for individuals that complete the cure by working or participating in a work program. One commenter said that it is burdensome to keep the application open and pending until an applicant completes the cure. Two commenters suggested that we allow State agencies to determine eligibility prospectively. For example, if an individual applies and has a job lined up to start the next week, which guarantees him the number of hours necessary to regain eligibility, the State agency should be allowed to determine that he has completed the cure. We agree with these comments. Therefore, we are modifying the regulations to provide that the State agency also has the option to determine eligibility for ABAWD purposes prospectively.

We proposed in the preamble that there be no limit to the number of times an individual could regain eligibility by working 80 hours in a 30-day period. Two commenters supported this proposal as written. One of these commenters suggested we codify this in the regulations. One commenter said that this proposal is too burdensome to track. This same commenter suggested that once an individual has regained eligibility, the individual should be eligible at any time he is meeting the work requirement. The individual should not have to work another 80 hours to regain eligibility. We recognize the complexity of this provision. However, we believe that the proper reading of the law requires that an individual who has lost eligibility must regain it by working 80 hours in a 30-day period. We agree that this needs to be codified in the regulations. Therefore, we are modifying the regulations at 7 CFR 273.24 to provide that there is no limit on the number of times an individual may regain and then maintain eligibility by fulfilling the work requirement.

We proposed that the window of eligibility for the second three-month period start on the day the State agency learns that an individual has lost his job. Several commenters argued that this is very difficult to administer, especially if someone notifies the State agency in the middle of the month. These commenters suggested that the window of eligibility start the month after the month in which the individual notifies the State agency that he has lost his job. The regulations already provide for this. According to the regulations at 7 CFR 273.10, benefits are prorated back to the date of application. In addition, according to the regulations at the newly designated §273.24, partial months are not countable months for ABAWD purposes. The individual would be entitled to benefits back to the date of application, but the first or partial month would not count for ABAWD purposes. The individual would still be entitled to three full consecutive countable months. We believe the regulations at 7 CFR 273.24(e) are clear when they state, ''An individual * * * is eligible for three consecutive countable months (as defined in paragraph (b) of this section). * * *), emphasis added. Therefore, we are retaining the provision as written.

One commenter asked us to clarify if the ''window of opportunity'' opens whether or not an individual applies for benefits and if the State agency must take action if an individual does not apply for benefits. We believe in most cases, the State agency will be dealing with either current recipients or initial applicants. If an individual is a current food stamp recipient, the individual will notify the State agency in accordance with reporting requirements that the individual has lost his job and the window of eligibility starts then. Or, if the individual is a workfare participant, the State agency will become aware that the individual is no longer participating. However, if an individual is not a recipient, the individual probably will not notify the State agency that he has lost his job until he applies for benefits. At such time, the State agency must take action on the case. We believe it is very rare that a State agency is notified by a former recipient, or becomes aware that a former recipient is no longer employed, except at the time the former recipient is reapplying for benefits.

Several commenters disagreed with our proposal that when an individual ''forfeits'' the opportunity to use the three consecutive countable months (for example, due to a voluntary quit sanction), the individual may work another 80 hours in a 30-day period and regain eligibility again for the three consecutive countable months. These commenters argued that this is confusing and difficult to administer since the State agency does not track individuals' ''window of eligibility.'' One commenter suggested that if an individual is not eligible for the three consecutive countable months because of a sanction, the individual may not regain eligibility for another three month period. One commenter suggested we include language that limits eligibility for the additional three months to those who lose a job or placement through no fault of their own, thus eliminating the confusion that would result from trying to reconcile the relationship between the voluntary quit sanction period and the additional three months of eligibility. Another commenter suggested that if the individuals were ineligible to receive

benefits during those three months, they may ''bank'' the three months and then reapply for them once their sanction is over and not have to work 80 hours in a 30-day period again. We understand the tracking difficulties this provision implies. At the same time, we cannot ignore the fact that if an individual is under a sanction during the period the individual is eligible for benefits the three consecutive months, the individual does not ''receive'' food stamps. The language of the law states clearly that an ''individual shall not receive benefits pursuant to clause (i) for more than a single 3-month period in any 36-month period.'' In addition, the law provides that if an individual loses eligibility the individual must regain it by working 80 hours in a 30-day period. If an individual does not ''receive'' the benefits for which the individual is eligible due to a sanction, the individual may regain eligibility and ''receive'' them in the future. We do not believe we have the discretion to limit this provision as suggested by the commenters. Therefore, we are retaining the provision as written.

One commenter suggested that we clarify that anyone who has lost eligibility can requalify, not just individuals who are denied benefits. We agree with this comment and are modifying the regulations to provide that an individual denied eligibility under paragraph (b) of this section, or who does not reapply for benefits because the individual is not meeting the work requirements of 7 CFR 273.7, can regain eligibility.

This same commenter suggested we clarify in the regulations that an individual can re-qualify by becoming exempt. We believe the regulations are clear that if a person meets one of the exemption criteria the person is exempt, and does not have to fulfill the work requirement, including regaining eligibility. However, we have modified the regulations at 7 CFR 273.24 to provide that an individual can requalify by becoming exempt.

Waivers

Section 824 of PRWORA amended section 6(o)(4) of the Act to allow the Secretary, at the request of a State agency, to waive the time limit for any group of individuals if the Secretary determines that the area in which the individuals reside has an unemployment rate of over ten percent, or ''does not have a sufficient number of jobs to provide employment for the individuals.''

On December 3, 1996, we published guidance which contained basic procedures for applying for a waiver, identified data sources which could be used to substantiate requests, and described some approaches that could support a request based on ''lack of sufficient jobs.'' Because the guidance was extensive and detailed we proposed not to include it in the regulations. Instead, we proposed a general framework for waiver requests with the understanding that State agencies could submit requests with no limit on the supporting documentation, and every request would be weighed on its own individual merits. We received several comments suggesting we include all or some of the guidance in the regulations. Commenters argued that unless the guidance is incorporated into the regulations, a subsequent administration could abolish it without public comment. Based on these comments, we have decided to incorporate some of the more pertinent aspects of the guidance into the regulation. More specifically, we have modified the regulations at 7 CFR 273.24(f) to include a non-exhaustive list of the kinds of information a State agency may submit to support a claim of 10 percent unemployment or ''lack of sufficient jobs.'' For example, a State agency could provide evidence that an area has 10 percent unemployment if it has: (1) A recent 12 month average unemployment rate over 10 percent which indicates a period of sustained high unemployment rates; (2) a recent three month average unemployment rate over 10 percent which indicates an early signal of a labor market with high unemployment; or (3) an historical seasonal unemployment rate of over 10 percent. States may submit evidence of a lack of sufficient jobs by submitting data that the area: (1) Was designated as a Labor Surplus Area by the Department of Labor's Employment and Training Administration (ETA); (2) was determined by the Department of Labor's Unemployment Insurance Service as qualifying for extended unemployment benefits; (3) has a low and declining employment-to-population ratio; (4) has a lack of jobs in declining occupations or industries; or (5) has a 24 month average unemployment rate 20 percent above the national average for the same period.

To facilitate the waiver process, we have decided to incorporate into the regulations a paragraph describing three types of waiver requests we currently approve and will continue to approve based on clear quantitative standards. Specifically, we provide that we will approve a waiver if a State agency submits and we confirm (1) data from the BLS or the BLS cooperating agency that shows an area has a most recent 12 month average unemployment rate over 10 percent; (2) data from the BLS or the BLS cooperating agency that an area has a 24 month average unemployment rate that exceeds the national average by 20 percent for any 24-month period no earlier than the same period the ETA uses to designate LSAs for the current fiscal year; or (3) evidence that the area has been designated a Labor Surplus Area by the ETA for the current fiscal year.

We proposed that States seeking waivers for areas with unemployment rates higher than 10 percent be required to submit data that relies on standard Bureau of Labor Statistics (BLS) data or methods. We also proposed that, to the extent that a ''lack of sufficient jobs'' waiver is based on labor force and unemployment data, States be required to submit data that relies on standard BLS data or methods. Several commenters opposed the mandate that State agencies be restricted to this data. One commenter pointed out that some states have already obtained waivers based on adverse employment-to-population ratios using BLS employment data and Census Bureau population estimates, or academic studies showing particularly severe employment barriers. We should weigh these requests on their own merits and not dismiss them out of hand. Other commenters suggested we consider data from the Bureau of Indian Affairs.

As discussed in the preamble, established Federal policy requires Federal executive branch agencies to use the most recent National, State or local labor force and unemployment data from the BLS for all program purposes. This policy is contained in Statistical Policy Directive No. 11, issued by the Office of Federal Statistical Policy Standards, Office of Management and Budget. This policy ensures the standardization of collection methods and the accuracy of data used to administer Federal programs. Therefore, we have no choice but to require State agencies that are submitting requests based on unemployment rates to submit the most recent data acquired from BLS or its cooperating agency in the State. This includes requests under the ''lack of sufficient jobs'' criteria which are using unemployment data as supporting evidence (e.g. low or declining employment-to-population ratios, or unemployment 20 percent above the national average for more than two years). As discussed above, this does not preclude any State agency from submitting other data to prove ''lack of sufficient jobs'' such as an academic

study, designation of Labor Surplus Areas status, or data from the Bureau of Indian Affairs. Therefore, we are retaining the requirement as written.

We proposed that in areas for which the State certifies that data from BLS show an unemployment rate above 10 percent, the State may begin to operate the waiver at the time the waiver request is submitted, and that we would contact the State if the waiver needed to be modified. One commenter suggested that, in addition, we allow immediate implementation of waivers for areas where the Employment and Training Administration, U.S. Department of Labor (ETA), has designated such areas as Labor Surplus Areas (LSA), since our current policy defers to these designations in granting waivers. We agree with this comment. We are modifying the regulations at 7 CFR 273.24 accordingly.

We proposed that waivers would not be approved for more than one year. One commenter suggested we clarify that yearlong waivers are routinely available in order to reassure States that they will not be subject to more burdensome requirements. We agree with this comment. Therefore, we are modifying the regulations at 7 CFR 273.24 to provide that generally, we will approve waivers for one year. However, we reserve the right to approve waivers for a shorter period if the data is insufficient, or to approve waivers for longer periods if the reasons are compelling.

One commenter suggested we allow waivers to be granted retroactively at the request of a State agency where the data supports a waiver during the months in question. This commenter pointed out that it sometimes takes longer than anticipated for a State agency to get the necessary paperwork together and to get a waiver request cleared through the proper channels. States that know they have solid data in support of a waiver should be able to implement or continue implementing a waiver they are confident will be granted during these delays and while they await USDA's approval. We recognize that it may take time for the State agency to draft and clear its request, whether it be for an initial or extension requests. However, as already discussed above, States may begin operating a waiver immediately upon requesting one if it has data that indicates the area has a 12 month average unemployment rate above 10 percent or has been designated a LSA by the ETA. For all other requests, in the event a State agency submits a request to us in an untimely fashion due to circumstances beyond its control, we reserve the right to make a retroactive approval. However, we believe these decisions should be made on a case-by-case basis and not codified in regulations. We encourage State agencies to begin working on waiver requests (both initial and extensions) and submit them to us in a timely fashion, taking into consideration the amount of time it will take to get such a request cleared through the proper State channels, so that retroactive approval does not become an issue. We will continue to expedite the approval of these requests, and in those circumstances which warrant it, we will grant retroactive approval.

We proposed that State agencies have complete discretion to define the geographic areas covered by waivers so long as they provide data for the corresponding area. Most of the comments we received supported this proposal. We received one comment suggesting that State agencies may want to define areas that do not correspond with census tracts or the catchment areas of unemployment compensation offices, making a mismatch between data and areas. This commenter suggested we clarify in the regulations that this is permissible. For simplicity sake, we encourage States to define areas for which corresponding data exists. We believe this is very easily done, especially since unemployment data goes down to the census tract level. However, we also realize that there are situations where data does not correspond to already defined areas, such as Indian Reservations. In these situations, we suggest State agencies submit data that corresponds as closely to the area as possible. We will consider it and decide on a case-by-case basis whether or not to approve the request. In this final rule we are modifying the regulation at 7 CFR 273.24 to provide that if corresponding data does not exist, State agencies should submit data that corresponds as closely to the area as possible.

Implementation

This rule is effective no later than April 2, 2001, except for the amendment to 7 CFR 272.2(d)(1)(xiii) which is effective August 1, 2001. State agencies must implement the provisions in this final rule no later than August 1, 2001.

List of Subjects

7 CFR Part 272

Alaska, Civil rights, Food stamps, Grant programs-social programs, Reporting and recordkeeping requirements.

7 CFR Part 273

Administrative practice and procedures, Claims Food stamps, Grant programs-social programs, Penalties, Reporting and recordkeeping, Social security, Students.

Accordingly, 7 CFR parts 272 and 273 are amended as follows:

1. The authority citation for parts 272 and 273 continues to read as follows:

Authority: 7 U.S.C. 2011–2036.

PART 272—REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

2. In § 272.1, add paragraph (c)(1)(vii) and paragraph (g)(165) to read as follows.

§ 272.1 General terms and conditions.

* * * * *

(c) * * *

(1) * * *

(vii) Local, State or Federal law enforcement officers, upon written request, for the purpose of obtaining the address, social security number, and, if available, photograph of any household member, if the member is fleeing to avoid prosecution or custody for a crime, or an attempt to commit a crime, that would be classified as a felony (or in the State of New Jersey, a high misdemeanor), or is violating a condition of probation or parole imposed under a Federal or State law. The State agency shall not require a household to present photographic identification as a condition of eligibility and must accept any document that reasonably establishes the applicant's identity. The State agency shall also provide information regarding a household member, upon the written request of a law enforcement officer acting in his or her official capacity, where such member has information necessary for the apprehension or investigation of another member who is fleeing to avoid prosecution or custody for a felony, or has violated a condition of probation or parole. If a law enforcement officer provides documentation indicating that a household member is fleeing to avoid prosecution or custody for a felony, or has violated a condition of probation or parole, the State agency shall terminate the participation of the member. A request for information absent documentation would not be sufficient to terminate the member's participation. The State agency shall disclose only such information as is necessary to comply with a specific written request of a law enforcement agency authorized by this paragraph.

* * * * *

(g) * * *

(165) *Amendment No. 387*—This rule is effective no later than {insert the first day of the month 60 days after publication of the final rule, except for the amendment to 7 CFR 272.2(d)(1)(xiii) which is effective August 1, 2001. State agencies must implement the provisions in this final rule no later than August 1, 2001.

3. In § 272.2, new paragraph (d)(1)(xiii) is added to read as follows:

§ 272.2 Plan of operation.

* * * * *

(d) * * *

(1) * * *

(xiii) If the State agency chooses to implement the optional provisions specified in (273.11(k), (l), (o), (p), and (q) of this chapter, it must include in the Plan's attachment the options it selected, the guidelines it will use, and any good cause criteria under paragraph (o). For § 273.11(k) of this chapter, the State agency must identify which sanctions in the other programs this provision applies to. The State agency must also include in the plan a description of the safeguards it will use to restrict the use of information it collects in implementing the optional provision contained in § 273.11(p) of this chapter.

* * * * *

PART 273—CERTIFICATION OF ELIGIBLE HOUSEHOLDS

4. In § 273.1, new paragraphs (b)(7)(viii), (b)(7)(ix), (b)(7)(x), (b)(7)(xi), and (b)(7)(xii) are added to read as follows:

§ 273.1 Household concept.

* * * * *

(b) * * *

(7) * * *

(viii) Individuals who are ineligible under § 273.11(m) because of a drug-related felony conviction.

(ix) At State agency option, individuals who are disqualified in another assistance program in accordance with § 273.11(k).

(x) Individuals who are fleeing to avoid prosecution or custody for a crime, or an attempt to commit a crime, or who are violating a condition of probation or parole who are ineligible under § 273.11(n).

(xi) Individuals disqualified for failure to cooperate with child support enforcement agencies in accordance with § 273.11(o) or (p), or for being delinquent in any court-ordered child support obligation in accordance with § 273.11(q).

(xii) Persons ineligible under § 273.24, the time limit for able-bodied adults.

* * * * *

5. In § 273.2:

a. A new paragraph (f)(1)(xiv)is added.

b. Paragraph (f)(8)(i)(C) is redesignated as paragraph (f)(8)(i)(D), and a new paragraph (f)(8)(i)(C) is added.

c. Paragraph (j)(2)(vii)(D) is added.

The additions read as follows:

§ 273.2 Application processing.

* * * * *

(f) * * *

(1) * * *

(xiv) *Additional verification for able-bodied adults subject to the time limit.*

(A) *Hours worked.* For individuals subject to the food stamp time limit of § 273.24 who are satisfying the work requirement by working, by combining work and participation in a work program, or by participating in a work or workfare program that is not operated or supervised by the State agency, the individuals' work hours shall be verified.

(B) *Countable months in another state.* For individuals subject to the food stamp time limit of § 273.24, the State agency must verify the number of countable months (as defined in § 273.24(b)(1)) an individual has used in another State if there is an indication that the individual participated in that State. The normal processing standards of 7 CFR 273.2(g) apply. The State agency may accept another State agency's assertion as to the number of countable months an individual has used in another State.

* * * * *

(8) * * *

(i) * * *

(C) For individuals subject to the food stamp time limit of § 273.24 who are satisfying the work requirement by working, by combining work and participation in a work program, or by participating in a work program that is not operated or supervised by the State agency, the individuals' work hours shall be verified.

* * * * *

(j)* * *

(2) * * *

(vii)* * *

(D) Any member of that household is ineligible under § 273.11(m) by virtue of a conviction for a drug-related felony.

* * * * *

6. In § 273.11:

a. The introductory text of paragraph (c) is revised, and the heading and introductory text of paragraphs (c)(1) and (c)(2) are revised.

b. Paragraph (c)(4)(ii) is revised.

c. Paragraph (j) is revised.

d. Paragraphs (k), (l), (m), (n), (o), (p), and (q) are added.

The additions and revisions read as follows:

§ 273.11 Action on households with special circumstances.

* * * * *

(c) * * *

During the period of time that a household member cannot participate for the reasons addressed in this section, the eligibility and benefit level of any remaining household members shall be determined in accordance with the procedures outlined in this section.

(1) *Intentional Program violation, felony drug conviction, or fleeing felon disqualifications, and workfare or work requirement sanctions.* The eligibility and benefit level of any remaining household members of a household containing individuals determined ineligible because of a disqualification for an intentional Program violation, a felony drug conviction, their fleeing felon status, noncompliance with a work requirement of § 273.7, or imposition of a sanction while they were participating in a household disqualified because of failure to comply with workfare requirements shall be determined as follows:

* * * * *

(2) *SSN disqualifications, comparable disqualifications, child support disqualifications, and ineligible ABAWDs.* The eligibility and benefit level of any remaining household members of a household containing individuals determined to be ineligible for refusal to obtain or provide an SSN, for meeting the time limit for able-bodied adults without dependents or for being disqualified under paragraphs (k), (o), (p), or (q) of this section shall be determined as follows:

* * * * *

(4) * * *

(ii) *Disqualified or determined ineligible for reasons other than intentional Program violation.* If a household's benefits are reduced or terminated within the certification period for reasons other than an Intentional Program Violation disqualification, the State agency shall issue a notice of adverse action in accordance with § 273.13(a)(2) which informs the household of the ineligibility, the reason for the ineligibility, the eligibility and benefit level of the remaining members, and the action the household must take to end the ineligibility.

* * * * *

(j) *Reduction of public assistance benefits.* If the benefits of a household that is receiving public assistance are reduced under a Federal, State, or local

means-tested public assistance program because of the failure of a food stamp household member to perform an action required under the assistance program or for fraud, the State agency shall not increase the household's food stamp allotment as the result of the decrease in income. In addition to prohibiting an increase in food stamp benefits, the State agency may impose a penalty on the household that represents a percentage of the food stamp allotment that does not exceed 25 percent. The 25 percent reduction in food stamp benefits must be based on the amount of food stamp benefits the household should have received under the regular food stamp benefit formula, taking into account its actual (reduced) income. However, under no circumstances can the food stamp benefits be allowed to rise. Reaching a time limit for time-limited benefits, having a child that is not eligible because of a family cap, failing to reapply or complete the application process for continued assistance under the other program, failing to perform an action that the individual is unable to perform as opposed to refusing to perform, or failing to comply with a purely procedural requirement, shall not be considered a failure to perform an action required by an assistance program for purposes of this provision. A procedural requirement, which would not trigger a food stamp sanction, is a step that an individual must take to continue receiving benefits in the assistance program such as submitting a monthly report form or providing verification of circumstances. A substantive requirement, which would trigger a food stamp sanction, is a behavioral requirement in the assistance program designed to improve the well being of the recipient family, such as participating in job search activities. The State agency shall not apply this provision to individuals who fail to perform a required action at the time the individual initially applies for assistance. The State agency shall not increase food stamp benefits, and may reduce food stamp benefits only if the person is receiving such assistance at the time the reduction in assistance is imposed or the reduction in assistance is imposed at the time of application for continued assistance benefits if there is no break in participation. The individual must be certified for food stamps at the time of the failure to perform a required action for this provision to apply. Assistance benefits shall be considered reduced if they are decreased, suspended, or terminated.

(1) For purposes of this provision a Federal, State or local ''means-tested public assistance program'' shall mean public or general assistance as defined in § 271.2 of this chapter, and is referred to as ''assistance''. This provision must be applied to all applicable cases. If a State agency is not successful in obtaining the necessary cooperation from another Federal, State or local means-tested welfare or public assistance program to enable it to comply with the requirements of this provision, the State agency shall not be held responsible for noncompliance as long as the State agency has made a good faith effort to obtain the information. The State agency, rather than the household, shall be responsible for obtaining information about sanctions from other programs and changes in those sanctions.

(2) The prohibition on increasing food stamp benefits applies for the duration of the reduction in the assistance program. If at any time the State agency can no longer ascertain the amount of the reduction, then the State agency may terminate the food stamp sanction. However, the sanction may not exceed the sanction in the other program. If the sanction is still in effect at the end of one year, the State agency shall review the case to determine if the sanction continues to be appropriate. If, for example, the household is not receiving assistance, it would not be appropriate to continue the sanction. Sanctions extended beyond one year must be reviewed at least annually but may be ended by the State agency at any time. It shall be concurrent with the reduction in the other assistance program to the extent allowed by normal food stamp change processing and notice procedures.

(3) The State agency shall determine how to prevent an increase in food stamp benefits. Among other options, the State agency may increase the assistance grant by a flat percent, not to exceed 25 percent, for all households that fail to perform a required action in lieu of computing an individual amount or percentage for each affected household.

(4) If the allotment of a household is reduced under Title IV–A of the Social Security Act, the State agency may use the same procedures that apply under Title IV–A to prevent an increase in food stamp benefits as the result of the decrease in Title IV–A benefits. For example, the same budgeting procedures and combined notices and hearings may be used, but the food stamp allotment may not be reduced by more than 25 percent.

(5) The State agency must lift the ban on increasing food stamp benefits if it becomes aware that the person has become ineligible for the assistance program during the disqualification period for some other reason, or the person's assistance case is closed.

(6) If an individual moves within the State, the prohibition on increasing food stamp benefits shall be applied to the gaining household unless that person is ineligible for the assistance program for some other reason. If such individual moves to a new State the prohibition on increasing benefits shall not be applied.

(7) The State agency must restore lost benefits when necessary in accordance with § 273.17 if it is later determined that the reduction in the public assistance grant was not appropriate.

(8) The State agency must act on changes which are not related to the assistance violation and that would affect the household's benefits.

(9) The State agency must include in its State Plan of Operations any options it has selected in this paragraph (j).

(k) *Comparable disqualifications.* If a disqualification is imposed on a member of a household for failure to perform an action required under a Federal, State or local means-tested public assistance program, the State agency may impose the same disqualification on the member of the household under the Food Stamp Program. The program must be authorized by a Federal, State, or local law, but the provision itself does not have to be specified in the law. A State agency may choose to apply this provision to one or more of these programs, and it may select the types of disqualifications within a program that it wants to impose on food stamp recipients. The State agency shall be responsible for obtaining information about sanctions from other programs and changes in those sanctions.

(1) For purposes of this section Federal, State or local ''means-tested public assistance program'' shall mean public and general assistance as defined in § 271.2 of this chapter.

(2) The State agency shall not apply this provision to individuals who are disqualified at the time the individual initially applies for assistance benefits. It may apply the provision if the person was receiving such assistance at the time the disqualification in the assistance program was imposed and to disqualifications imposed at the time of application for continued assistance benefits if there is no break in participation with the following exceptions: Reaching a time limit for time-limited benefits, having a child that is not eligible because of a family

cap, failing to reapply or complete the application process for continued assistance, failing to perform an action that the individual is unable to perform as opposed to refusing to perform, and failing to perform purely procedural requirements, shall not be considered failures to perform an action required by an assistance program. A procedural requirement, which would not trigger a food stamp sanction, is a step that an individual must take to continue receiving benefits in the assistance program such as submitting a monthly report form or providing verification of circumstances. A substantive requirement, which would trigger a food stamp sanction, is a behavioral requirement in the assistance program designed to improve the well being of the recipient family, such as participating in job search activities. The individual must be receiving food stamps at the time of the disqualification in the assistance program to be disqualified from the Food Stamp Program under this provision.

(3) The State agency must stop the food stamp disqualification when it becomes aware that the person has become ineligible for assistance for some other reason, or the assistance case is closed.

(4) If a disqualification is imposed for a failure of an individual to perform an action required under a program under Title IV–A of the Social Security Act, the State may use the rules and procedures that apply under the Title IV–A program to impose the same disqualification under the Food Stamp Program.

(5) Only the individual who committed the violation in the assistance program may be disqualified for food stamp purposes even if the entire assistance unit is disqualified for Title IV–A purposes.

(6) A comparable disqualification for food stamp purposes shall be imposed concurrently with the disqualification in the assistance program to the extent allowed by normal food stamp processing times and notice requirements. The State agency may determine the length of the disqualification, providing that the disqualification does not exceed the disqualification in the other program. If the sanction is still in effect at the end of one year, the State agency shall review the case to determine if the sanction continues to be appropriate. If, for example, the household is not receiving assistance, if would not be appropriate to continue the sanction. Sanctions extended beyond one year must be reviewed at least annually but may be ended by the State agency at any time.

(7) If there is a pending disqualification for a food stamp violation and a pending comparable disqualification, they shall be imposed concurrently to the extent appropriate. For example, if the household is disqualified for June for a food stamp violation and an individual is disqualified for June and July for an assistance program violation, the whole household shall be disqualified for June and the individual shall be disqualified for July for food stamp purposes.

(8) The State agency must treat the income and resources of the disqualified individual in accordance with § 273.11(c)(2).

(9) After a disqualification period has expired, the person may apply for food stamp benefits and shall be treated as a new applicant or a new household member, except that a current disqualification based on a food stamp work requirement shall be considered in determining eligibility.

(10) A comparable food stamp disqualification may be imposed in addition to any coupon allotment reductions made in accordance with paragraph (j) of this section.

(11) State agencies shall state in their Plan of Operation if they have elected to apply comparable disqualifications, identify which sanctions in the other programs this provision applies to, and indicate the options and procedures allowed in paragraphs (k)(1), (k)(2), (k)(3), (k)(4), and (k)(10) of this section which they have selected.

(12) The State agency must act on changes which are not related to the assistance violation and that would affect the household's benefits.

(13) The State agency must restore lost benefits when necessary in accordance with 7 CFR 273.17 if it is later determined that the reduction in the public assistance grant was not appropriate.

(l) *School Attendance.* Section 404(i) of Part A of the Social Security Act, 42 U.S.C. 601, et seq., provides that any state receiving a TANF block grant cannot be prohibited from sanctioning a family that includes an adult who has received assistance financed with federal TANF dollars or provided from the food stamp program if such adult fails to ensure that the minor dependent children of such adult attend school as required by the law of the State in which the minor children reside. Section 404(j) of Part A of the Social Security Act, 42 U.S.C. 601, *et seq.*, provides that States shall not be prohibited from sanctioning a family that includes an adult who is older than 20 and younger than 51 and who has received assistance that is either financed with federal TANF funds or provided through the food stamp program if such adult does not have, or is not working toward attaining, a secondary school diploma or recognized equivalent. These provisions do not provide independent authority for food stamp sanctions beyond any that may apply through paragraphs (j) and (k) of this section.

(m) *Individuals convicted of drug-related felonies.* An individual convicted (under Federal or State law) of any offense which is classified as a felony by the law of the jurisdiction involved and which has as an element the possession, use, or distribution of a controlled substance (as defined in section 102(6) of the Controlled Substance Act, 21 U.S.C. 802(6)) shall not be considered an eligible household member unless the State legislature of the State where the individual is domiciled has enacted legislation exempting individuals domiciled in the State from the above exclusion. If the State legislature has enacted legislation limiting the period of disqualification, the period of ineligibility shall be equal to the length of the period provided under such legislation. Ineligibility under this provision is only limited to convictions based on behavior which occurred after August 22, 1996. The income and resources of individuals subject to disqualification under this paragraph (m) shall be treated in accordance with the procedures at paragraph (c)(1) of this section.

(n) *Fleeing felons and probation or parole violators.* Individuals who are fleeing to avoid prosecution or custody for a crime, or an attempt to commit a crime, that would be classified as a felony (or in the State of New Jersey, a high misdemeanor) or who are violating a condition of probation or parole under a Federal or State law shall not be considered eligible household members. The income and resources of the ineligible member shall be handled in accordance with (c)(1) of this section.

(o) *Custodial parent's cooperation with the State Child Support Agency.* For purposes of this provision, a custodial parent is a natural or adoptive parent who lives with his or her child, or other individual who is living with and exercises parental control over a child under the age of 18.

(1) *Option to disqualify custodial parent for failure to cooperate.* At the option of a State agency, subject to paragraphs (o)(2) and (o)(4) of this section, no natural or adoptive parent or, at State agency option, other individual (collectively referred to in

this paragraph (o) as ''the individual'') who is living with and exercising parental control over a child under the age of 18 who has an absent parent shall be eligible to participate in the Food Stamp Program unless the individual cooperates with the agency administering a State Child Support Enforcement Program established under Part D of Title IV of the Social Security Act (42 U.S.C. 651, *et seq.*), hereafter referred to as the State Child Support Agency.

(i) If the State agency chooses to implement paragraph (o)(1) of this section, it must notify all individuals of this requirement in writing at the time of application and reapplication for continued benefits.

(ii) If the State agency chooses to implement paragraph (o)(1) of this section, it must refer all appropriate individuals to the State Child Support Agency.

(iii) If the individual is receiving TANF or Medicaid, or assistance from the State Child Support Agency, and has already been determined to be cooperating, or has been determined to have good cause for not cooperating, then the State agency shall consider the individual to be cooperating for food stamp purposes.

(iv) The individual must cooperate with the State Child Support Agency in establishing paternity of the child, and in establishing, modifying, or enforcing a support order with respect to the child and the individual in accordance with section 454(29) of the Social Security Act (42 U.S.C. 654(29)).

(v) Pursuant to Section 454(29)(E) of the Social Security Act (42 U.S.C. 654(29)(E) the State Child Support Agency will notify the individual and the State agency whether or not it has determined that the individual is cooperating in good faith.

(2) *Claiming good cause for non-cooperation.* Prior to requiring cooperation under paragraph (o)(1) of this section, the State agency will notify the household in writing at initial application and at application for continued benefits of the right to good cause as an exception to the cooperation requirement and of all the requirements applicable to a good cause determination. Paragraph (o)(1) of this section shall not apply to the individual if good cause is found for refusing to cooperate, as determined by the State agency:

(i) *Circumstances under which cooperation may be ''against the best interests of the child.''* The individual's failure to cooperate is deemed to be for ''good cause'' if:

(A) The individual meets the good cause criteria established under the State program funded under Part A of Title IV or Part D of Title IV of the Social Security Act (42 U.S.C. 601, *et seq,* or 42 U.S.C. 651, *et seq.*) (whichever agency is authorized to define and determine good cause) for failing to cooperate with the State Child Support Agency; or

(B) Cooperating with the State Child Support Agency would make it more difficult for the individual to escape domestic violence or unfairly penalize the individual who is or has been victimized by such violence, or the individual who is at risk of further domestic violence. For purposes of this provision, the term ''domestic violence'' means the individual or child would be subject to physical acts that result in, or are threatened to result in, physical injury to the individual; sexual abuse; sexual activity involving a dependent child; being forced as the caretaker relative of a dependent child to engage in nonconsensual sexual acts or activities; threats of, or attempts at physical or sexual abuse; mental abuse; or neglect or deprivation of medical care.

(C) The individual meets any other good cause criteria identified by the State agency. These criteria will be defined in consultation with the Child Support Agency or TANF program, whichever is appropriate, and identified in the State plan according to § 272.2(d)(xiii).

(ii) *Proof of good cause claim.* (A) The State agency will accept as corroborative evidence the same evidence required by Part A of Title IV or Part D of Title IV of the Social Security Act (42 U.S.C. 601, *et seq.* or 42 U.S.C. 651, *et seq.*) to corroborate a claim of good cause.

(B) The State agency will make a good cause determination based on the corroborative evidence supplied by the individual only after it has examined the evidence and found that it actually verifies the good cause claim.

(iii) *Review by the State Child Support or TANF Agency.* Prior to making a final determination of good cause for refusing to cooperate, the State agency will afford the State Child Support Agency or the agency which administers the program funded under Part A of the Social Security Act the opportunity to review and comment on the findings and the basis for the proposed determination and consider any recommendation from the State Child Support or TANF Agency.

(iv) *Delayed finding of good cause.* The State agency will not deny, delay, or discontinue assistance pending a determination of good cause for refusal to cooperate if the applicant or recipient has complied with the requirements to furnish corroborative evidence and information. In such cases, the State agency must abide by the normal processing standards according to § 273.2(g).

(3) *Individual disqualification.* If the State agency has elected to implement this provision and determines that the individual has not cooperated without good cause, then that individual shall be ineligible to participate in the Food Stamp Program. The disqualification shall not apply to the entire household. The income and resources of the disqualified individual shall be handled in accordance with paragraph(c)(2) of this section.

(4) *Fees.* A State electing to implement this provision shall not require the payment of a fee or other cost for services provided under Part D of Title IV of the Social Security Act (42 U.S.C. 651, *et seq.*)

(5) *Terminating the Disqualification.* The period of disqualification ends once it has been determined that the individual is cooperating with the State Child Support Agency. The State agency must have procedures in place for re-qualifying such an individual.

(p) *Non-custodial parent's cooperation with child support agencies.* For purposes of this provision, a ''non-custodial parent'' is a putative or identified parent who does not live with his or her child who is under the age of 18.

(1) *Option to disqualify non-custodial parent for refusal to cooperate.* At the option of a State agency, subject to paragraphs (p)(2) and (p)(4) of this section, a putative or identified non-custodial parent of a child under the age of 18 (referred to in this subsection as ''the individual'') shall not be eligible to participate in the Food Stamp Program if the individual refuses to cooperate with the State agency administering the program established under Part D of Title IV of the Social Security Act (42 U.S.C. 651, *et seq.*), hereafter referred to as the State Child Support Agency, in establishing the paternity of the child (if the child is born out of wedlock); and in providing support for the child.

(i) If the State agency chooses to implement paragraph (p)(1) of this section, it must notify all individuals in writing of this requirement at the time of application and reapplication for continued benefits.

(ii) If the individual is receiving TANF, Medicaid, or assistance from the State Child Support Agency, and has already been determined to be cooperating, or has been determined to have good cause for not cooperating,

then the State agency shall consider the individual is cooperating for food stamp purposes.

(iii) If the State agency chooses to implement paragraph (p)(1) of this section, it must refer all appropriate individuals to the State Child Support Agency established under Part D of Title IV of the Social Security Act (42 U.S.C. 651, *et seq.*).

(iv) The individual must cooperate with the State Child Support Agency in establishing the paternity of the child (if the child is born out of wedlock), and in providing support for the child.

(v) Pursuant to Section 454(29)(E) of the Social Security Act (42 U.S.C. 654(29)(E)), the State Child Support Agency will notify the individual and the State agency whether or not it has determined that the individual is cooperating in good faith.

(2) *Determining refusal to cooperate.* If the State Child Support Agency determines that the individual is not cooperating in good faith, then the State agency will determine whether the non-cooperation constitutes a refusal to cooperate. Refusal to cooperate is when an individual has demonstrated an unwillingness to cooperate as opposed to an inability to cooperate.

(3) *Individual disqualification.* If the State agency determines that the non-custodial parent has refused to cooperate, then that individual shall be ineligible to participate in the Food Stamp Program. The disqualification shall not apply to the entire household. The income and resources of the disqualified individual shall be handled according to paragraph (c)(2) of this section.

(4) *Fees.* A State electing to implement this provision shall not require the payment of a fee or other cost for services provided under Part D of Title IV of the Social Security Act (42 U.S.C. 651, *et seq.*)

(5) *Privacy.* The State agency shall provide safeguards to restrict the use of information collected by a State agency administering the program established under Part D of Title IV of the Social Security Act (42 U.S.C. 651, *et seq.*) to purposes for which the information is collected.

(6) *Termination of disqualification.* The period of disqualification ends once it has been determined that the individual is cooperating with the child support agency. The State agency must have procedures in place for re-qualifying such an individual.

(q) *Disqualification for child support arrears.*

(1) *Option to disqualify.* At the option of a State agency, no individual shall be eligible to participate in the Food Stamp Program as a member of any household during any month that the individual is delinquent in any payment due under a court order for the support of a child of the individual. The State agency may opt to apply this provision to only non-custodial parents.

(2) *Exceptions.* A disqualification under paragraph (q)(1) of this section shall not apply if:

(i) A court is allowing the individual to delay payment;

(ii) The individual is complying with a payment plan approved by a court or the State agency designated under Part D of Title IV of the Social Security Act (42 U.S.C., 651 *et seq.*) to provide support of a child of the individual; or

(iii) The State agency determines the individual has good cause for non-support.

(3) *Individual disqualification.* If the State agency has elected to implement this provision and determines that the individual should be disqualified for child support arrears, then that individual shall be ineligible to participate in the Food Stamp Program. The disqualification shall not apply to the entire household. The income and resources of the disqualified individual shall be handled according to paragraph (c)(2) of this section.

(4) *Collecting claims.* State agencies shall initiate collection action as provided for in § 273.18 for any month a household member is disqualified for child support arrears by sending the household a written demand letter which informs the household of the amount owed, the reason for the claim and how the household may pay the claim. The household should also be informed as to the adjusted amount of income, resources, and deductible expenses of the remaining members of the household for the month(s) a member is disqualified for child support arrears.

7. In § 273.12, a new paragraph (a)(1)(viii) is added to read as follows:

§ 273.12 Reporting changes.

(a) * * *

(1) * * *

(viii) For able-bodied adults subject to the time limit of § 273.24, any changes in work hours that bring an individual below 20 hours per week, averaged monthly, as defined in § 273.24(a)(1)(i). An individual shall report this information in accordance with the reporting system for income to which he is subject.

* * * * *

8. In § 273.16

a. Remove the last sentence in paragraph (a)(1).

b. Revise paragraphs (b) and (c).

c. Revise paragraph (e)(8)(i).

d. Remove paragraph (e)(8)(iii) and redesignate paragraph (e)(8)(iv) as paragraph (e)(8)(iii).

e. Remove paragraph (f)(2)(iii) and redesignate paragraph (f)(2)(iv) as paragraph (f)(2)(iii).

f. Remove paragraph (g)(2)(ii) and redesignate paragraph (g)(2)(iii) as paragraph (g)(2)(ii).

g. Remove paragraph (h)(2)(ii) and redesignate paragraph (h)(2)(iii) as paragraph (h)(2)(ii).

The revisions read as follows:

§ 273.16 Disqualification for intentional Program violation.

* * * * *

(b) *Disqualification penalties.*

(1) Individuals found to have committed an intentional Program violation either through an administrative disqualification hearing or by a Federal, State or local court, or who have signed either a waiver of right to an administrative disqualification hearing or a disqualification consent agreement in cases referred for prosecution, shall be ineligible to participate in the Program:

(i) For a period of twelve months for the first intentional Program violation, except as provided under paragraphs (b)(2), (b)(3), (b)(4), and (b)(5) of this section;

(ii) For a period of twenty-four months upon the second occasion of any intentional Program violation, except as provided in paragraphs (b)(2), (b)(3), (b)(4), and (b)(5) of this section; and

(iii) Permanently for the third occasion of any intentional Program violation.

(2) Individuals found by a Federal, State or local court to have used or received benefits in a transaction involving the sale of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) shall be ineligible to participate in the Program:

(i) For a period of twenty four months upon the first occasion of such violation; and

(ii) Permanently upon the second occasion of such violation.

(3) Individuals found by a Federal, State or local court to have used or received benefits in a transaction involving the sale of firearms, ammunition or explosives shall be permanently ineligible to participate in the Program upon the first occasion of such violation.

(4) An individual convicted by a Federal, State or local court of having trafficked benefits for an aggregate amount of $500 or more shall be

permanently ineligible to participate in the Program upon the first occasion of such violation.

(5) Except as provided under paragraph (b)(1)(iii) of this section, an individual found to have made a fraudulent statement or representation with respect to the identity or place of residence of the individual in order to receive multiple food stamp benefits simultaneously shall be ineligible to participate in the Program for a period of 10 years.

(6) The penalties in paragraphs (b)(2) and (b)(3) of this section shall also apply in cases of deferred adjudication as described in paragraph (h) of this section, where the court makes a finding that the individual engaged in the conduct described in paragraph (b)(2) and (b)(3) of this section.

(7) If a court fails to impose a disqualification or a disqualification period for any intentional Program violation, the State agency shall impose the appropriate disqualification penalty specified in paragraphs (b)(1), (b)(2), (b)(3), (b)(4), and (b)(5) of this section unless it is contrary to the court order.

(8) One or more intentional Program violations which occurred prior to April 1, 1983 shall be considered as only one previous disqualification when determining the appropriate penalty to impose in a case under consideration.

(9) Regardless of when an action taken by an individual which caused an intentional Program violation occurred, the disqualification periods specified in paragraphs (b)(2) and (b)(3) of this section shall apply to any case in which the court makes the requisite finding on or after September 1, 1994.

(10) For the disqualification periods in paragraphs (b)(1), (b)(5) or (b)(6) of this section, if the offense occurred prior to the implementation of these penalties, the State agency may establish a policy of disqualifying these individuals in accordance with the disqualification periods in effect at the time of the offense. This policy must be consistently applied for all affected individuals.

(11) State agencies shall disqualify only the individual found to have committed the intentional Program violation, or who signed the waiver of the right to an administrative disqualification hearing or disqualification consent agreement in cases referred for prosecution, and not the entire household.

(12) Even though only the individual is disqualified, the household, as defined in § 273.1, is responsible for making restitution for the amount of any overpayment. All intentional Program violation claims must be established and collected in accordance with the procedures set forth in § 273.18.

(13) The individual must be notified in writing once it is determined that he/she is to be disqualified. The disqualification period shall begin no later than the second month which follows the date the individual receives written notice of the disqualification. The disqualification period must continue uninterrupted until completed regardless of the eligibility of the disqualified individual's household.

(c) *Definition of intentional Program violation.* Intentional Program violations shall consist of having intentionally:

(1) made a false or misleading statement, or misrepresented, concealed or withheld facts; or

(2) committed any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any State statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of coupons, authorization cards or reusable documents used as part of an automated benefit delivery system (access device).

* * * * *

(e) * * *

(8) * * *

(i) If the hearing authority rules that the individual has committed an intentional Program violation, the household member must be disqualified in accordance with the disqualification periods and procedures in paragraph (b) of this section. The same act of intentional Program violation repeated over a period of time must not be separated so that separate penalties can be imposed.

* * * * *

10. In § 273.24:

a. the section heading is revised.

b. paragraph (a) introductory text is revised.

c. paragraphs (a)(1) and (a)(2) are redesignated as paragraphs (a)(5) and (a)(6).

d. paragraphs (b), (c), (d), and (e) are redesignated as paragraphs (g), (h), (i) and (j).

e. the heading of the newly designated paragraph (g) is revised to read ''*15 percent exemptions.*''

f. paragraphs (a)(1) through (a)(4) and paragraphs (b) through (f) are added as follows.

§ 273.24 Time limit for able-bodied adults.

(a) *Definitions.* For purposes of the food stamp time limit, the terms below have the following meanings:

(1) *Fulfilling the work requirement* means:

(i) Working 20 hours per week, averaged monthly; for purposes of this provision, 20 hours a week averaged monthly means 80 hours a month;

(ii) Participating in and complying with the requirements of a work program 20 hours per week, as determined by the State agency;

(iii) Any combination of working and participating in a work program for a total of 20 hours per week, as determined by the State agency; or

(iv) Participating in and complying with a workfare program;

(2) *Working* means:

(i) Work in exchange for money;

(ii) Work in exchange for goods or services (''in kind'' work); or

(iii) Unpaid work, verified under standards established by the State agency.

(iv) Any combination of paragraphs (a)(2)(i), (a)(2)(ii) and (a)(2)(iii) of this section.

(3) *Work Program* means:

(i) A program under the Workforce Investment Act (Pub. L. 105–220);

(ii) A program under section 236 of the Trade Act of 1974 (19 U.S.C. 2296); or

(iii) An employment and training program, other than a job search or job search training program, operated or supervised by a State or political subdivision of a State that meets standards approved by the Governor of the State, including a program under § 273.7(f). Such a program may contain job search or job search training as a subsidiary component as long as such component is less than half the requirement.

(4) *Workfare program* means:

(i) A program under § 273.22; or

(ii) A comparable program established by a State or political subdivision of a State.

* * * * *

(b) *General Rule.* Individuals are not eligible to participate in the Food Stamp Program as a member of any household if the individual received food stamps for more than three countable months during any three-year period, except that individuals may be eligible for up to three additional countable months in accordance with paragraph (e) of this section.

(1) *Countable months.* Countable months are months during which an individual receives food stamps for the full benefit month while not:

(i) Exempt under paragraph (c) of this section;

(ii) Covered by a waiver under paragraph (f) of this section;

(iii) Fulfilling the work requirement as defined in paragraph (a)(1) of this section; or

(iv) Receiving benefits that are prorated in accordance with § 273.10.

(2) *Good cause.* As determined by the State agency, if an individual would have worked an average of 20 hours per week but missed some work for good cause, the individual shall be considered to have met the work requirement if the absence from work is temporary and the individual retains his or her job. Good cause shall include circumstances beyond the individual's control, such as, but not limited to, illness, illness of another household member requiring the presence of the member, a household emergency, or the unavailability of transportation.

(3) *Measuring the three-year period.* The State agency may measure and track the three-year period as it deems appropriate. The State agency may use either a ''fixed'' or ''rolling'' clock. If the State agency chooses to switch tracking methods it must inform FNS in writing. With respect to a State, the three-year period:

(i) Shall be measured and tracked consistently so that individuals who are similarly situated are treated the same; and

(ii) Shall not include any period before the earlier of November 22, 1996, or the date the State notified food stamp recipients of the application of Section 824 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub. L. 104–193).

(4) *Treatment of income and resources.* The income and resources of an individual made ineligible under this paragraph (b) shall be handled in accordance with § 273.11(c)(2).

(5) *Benefits received erroneously.* If an individual subject to this section receives food stamp benefits erroneously, the State agency shall consider the benefits to have been received for purposes of this provision unless or until the individual pays it back in full.

(6) *Verification.* Verification shall be in accordance with § 273.2(f)(1) and (f)(8).

(7) *Reporting.* A change in work hours below 20 hours per week, averaged monthly, is a reportable change in accordance with § 273.12(a)(1)(viii). Regardless of the type of reporting system the State agency assigns to potential ABAWDs, the State agency must adhere to the statutory requirements of time-limited benefits for individuals who are subject to the work requirement. The State agency may opt to consider work performed in a job that was not reported according to the requirements of § 273.12 ''work.''

(8) *Applicability of Food Stamp Act.* Nothing in this paragraph (b) shall make an individual eligible for food stamp benefits if the individual is not otherwise eligible for benefits under the other provisions of these regulations and the Food Stamp Act of 1977, as amended.

(c) *Exemptions.* An individual is exempt from the time limit if he or she is;

(1) Under 18 or 50 years of age or older;

(2) Determined by the State agency to be medically certified as physically or mentally unfit for employment. An individual is medically certified as physically or mentally unfit for employment if he or she:

(i) Is receiving temporary or permanent disability benefits issued by governmental or private sources;

(ii) Is obviously mentally or physically unfit for employment as determined by the State agency; or

(iii) If the unfitness is not obvious, provides a statement from a physician, physician's assistant, nurse, nurse practitioner, designated representative of the physician's office, a licensed or certified psychologist, a social worker, or any other medical personnel the State agency determines appropriate, that he or she is physically or mentally unfit for employment.

(3) Is a parent (natural, adoptive, or step) of a household member under age 18, even if the household member who is under 18 is not himself eligible for food stamps;

(4) Is residing in a household where a household member is under age 18, even if the household member who is under 18 is not himself eligible for food stamps;

(5) Is otherwise exempt from work requirements under section 6(d)(2) of the Food Stamp Act, as implemented in regulations at § 273.7(b); or

(6) Is pregnant.

(d) *Regaining eligibility.* (1) An individual denied eligibility under paragraph (b) of this section, or who did not reapply for benefits because he was not meeting the work requirements under paragraph (b) of this section, shall regain eligibility to participate in the Food Stamp Program if, as determined by the State agency, during any 30 consecutive days, he or she:

(i) Worked 80 or more hours;

(ii) Participated in and complied with the requirements of a work program for 80 or more hours;

(iii) Any combination of work and participation in a work program for a total of 80 hours; or participated in and complied with a workfare program; or

(iv) At State agency option, verifies that the he or she will meet one of the requirements in paragraphs (d)(1)(i), (d)(1)(ii), (d)(1)(iii), or (d)(1)(v) of this section, within the 30 days subsequent to application; or

(v) Becomes exempt.

(2) An individual regaining eligibility under paragraph (d)(1) of this section shall have benefits calculated as follows:

(i) For individuals regaining eligibility by working, participating in a work program, or combining hours worked and hours participating in a work program, the State agency may either prorate benefits from the day the 80 hours are completed or from the date of application, or

(ii) For individuals regaining eligibility by participating in a workfare program, and the workfare obligation is based on an estimated monthly allotment prorated back to the date of application, then the allotment issued must be prorated back to this date.

(3) There is no limit on how many times an individual may regain eligibility and subsequently maintain eligibility by meeting the work requirement.

(e) *Additional three-month eligibility.* An individual who regained eligibility under paragraph (d) of this section and who is no longer fulfilling the work requirement as defined in paragraph (a) of this section is eligible for a period of three consecutive countable months (as defined in paragraph (b) of this section), starting on the date the individual first notifies the State agency that he or she is no longer fulfilling the work requirement, unless the individual has been satisfying the work requirement by participating in a work or workfare program, in which case the period starts on the date the State agency notifies the individual that he or she is no longer meeting the work requirement. An individual shall not receive benefits under this paragraph (e) more than once in any three-year period.

(f) *Waivers.*

(1) *General.* On the request of a State agency, FNS may waive the time limit for a group of individuals in the State if we determine that the area in which the individuals reside:

(i) Has an unemployment rate of over 10 percent; or

(ii) Does not have a sufficient number of jobs to provide employment for the individuals.

(2) *Required data.* The State agency may submit whatever data it deems appropriate to support its request. However, to support waiver requests based on unemployment rates or labor force data, States must submit data that relies on standard Bureau of Labor Statistics (BLS) data or methods. A non-exhaustive list of the kinds of data a State agency may submit follows:

(i) To support a claim of unemployment over 10 percent, a State agency may submit evidence that an area has a recent 12 month average unemployment rate over 10 percent; a recent three month average unemployment rate over 10 percent; or an historical seasonal unemployment rate over 10 percent; or

(ii) To support a claim of lack of sufficient jobs, a State may submit evidence that an area: is designated as a Labor Surplus Area (LSA) by the Department of Labor's Employment and Training Administration (ETA); is determined by the Department of Labor's Unemployment Insurance Service as qualifying for extended unemployment benefits; has a low and declining employment-to-population ratio; has a lack of jobs in declining occupations or industries; is described in an academic study or other publications as an area where there are lack of jobs; has a 24-month average unemployment rate 20 percent above the national average for the same 24-month period. This 24-month period may not be any earlier than the same 24-month period the ETA uses to designate LSAs for the current fiscal year.

(3) *Waivers that are readily approvable.* FNS will approve State agency waivers where FNS confirms:

(i) Data from the BLS or the BLS cooperating agency that shows an area has a most recent 12 month average unemployment rate over 10 percent;

(ii) Evidence that the area has been designated a Labor Surplus Area by the ETA for the current fiscal year; or

(iii) Data from the BLS or the BLS cooperating agency that an area has a 24 month average unemployment rate that exceeds the national average by 20 percent for any 24-month period no earlier than the same period the ETA uses to designate LSAs for the current fiscal year.

(4) *Effective date of certain waivers.* In areas for which the State certifies that data from the BLS or the BLS cooperating agency show a most recent 12 month average unemployment rate over 10 percent; or the area has been designated as a Labor Surplus Area by the Department of Labor's Employment and Training Administration for the current fiscal year, the State may begin to operate the waiver at the time the waiver request is submitted. FNS will contact the State if the waiver must be modified.

(5) *Duration of waiver.* In general, waivers will be approved for one year. The duration of a waiver should bear some relationship to the documentation provided in support of the waiver request. FNS will consider approving waivers for up to one year based on documentation covering a shorter period, but the State agency must show that the basis for the waiver is not a seasonal or short term aberration. We reserve the right to approve waivers for a shorter period at the State agency's request or if the data is insufficient. We reserve the right to approve a waiver for a longer period if the reasons are compelling.

(6) *Areas covered by waivers.* States may define areas to be covered by waivers. We encourage State agencies to submit data and analyses that correspond to the defined area. If corresponding data does not exist, State agencies should submit data that corresponds as closely to the area as possible.

Dated: January 9, 2001.

Shirley R. Watkins,

Under Secretary, Food, Nutrition, and Consumer Services.

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Part VIII

Department of Energy

Office of Energy Efficiency and Renewable Energy

10 CFR Part 430

Energy Conservation Program for Consumer Products: Energy Conservation Standards for Water Heaters; Final Rule

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

10 CFR Part 430

[Docket Number EE–RM–97–900]

RIN 1904–AA76

Energy Conservation Program for Consumer Products: Energy Conservation Standards for Water Heaters

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy (DOE).

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE or Department) has determined that revised energy conservation standards for water heaters will result in significant conservation of energy, are technologically feasible, and are economically justified. On this basis, the Department is today amending the existing energy conservation standards for water heaters.

EFFECTIVE DATES: The effective date of this rule and standard is January 20, 2004.

ADDRESSES: You may read copies of the Technical Support Document (TSD) at the DOE Freedom of Information Reading Room, U.S. Department of Energy, Forrestal Building, 1000 Independence Avenue, S.W., Washington, DC. 20585, (202) 586–3142, between the hours of 9:00 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays. You may obtain copies of the TSD from the Codes and Standards Internet site at: http://www.eren.doe.gov/buildings/codes—standards/applbrf/waterheater.htm or from the U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Forrestal Building, Mail Station EE–41, 1000 Independence Avenue, S.W., Washington, D.C. 20585. (202) 586–9127.

FOR FURTHER INFORMATION CONTACT: Terry Logee, U.S. Department of Energy, EE–41, 1000 Independence Avenue, S.W., Washington, DC 20585–0121, (202) 586–9127, email: terry.logee@ee.doe.gov or Francine Pinto, Esq., U.S. Department of Energy, Office of General Counsel, GC–72, 1000 Independence Avenue, S.W., Washington, DC 20585, (202) 586–7432, email: francine.pinto@hq.doe.gov or Eugene Margolis, Deputy Assistant General Counsel, GC–72, at the same address, (202) 586–9507, email: eugene.margolis@hq.doe.gov.

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I. Introduction

The Energy Policy and Conservation Act, as amended (hereinafter referred to as EPCA or the Act), specifies that any new or amended energy conservation standard the Department of Energy (DOE) prescribes shall be designed to ''achieve the maximum improvement in energy efficiency * * * which the Secretary determines is technologically feasible and economically justified.'' Section 325(o)(2)(A), 42 U.S.C. 6295(o)(2)(A). Furthermore, the amended standard must ''result in significant conservation of energy.'' Section 325(o)(3)(B), 42 U.S.C. 6295(o)(3)(B).

In accordance with the statutory criteria discussed in this notice, DOE is amending the water heater energy efficiency standards, to go into effect on January 20, 2004.

A. Consumer Overview

The Table below summarizes the ''vital statistics'' of today's typical gas and electric water heater, as well as presenting the cost implications for the average consumer of water heaters after the 2004 water heater standards take effect.

VITAL STATISTICS OF TODAY'S TYPICAL WATER HEATERS

Current statistics	Gas	Electric
Average Price	$383	$380
Annual Utility Bill	$160	$256
Life Expectance	9 years	14 years
Energy Consumption	234 Therms/year	3,459 kWh/year
Statistics In Year 2004:		
Average New Water Heater Price*	$501	$486
Estimated Price Increase (Efficiency Only)	$58	$101
Annual Utility Bill Savings	$12.74	$13.05
Simple Payback Period	3.6 years	7.4 years
Average Net Saving Over Appliance Life	$30	$23
Energy Saving per Year	22 therms	188 kWh

*Includes expected price increases for non-energy efficiency regulations.

Currently, the average typical water heater costs, $380 for electric and $383 for gas. The average annual utility bill for an electric water heater is $256, while a gas water heater costs $160 a year to operate.

The water heater energy efficiency standards we are adopting today will have a positive impact on consumers. Consumers with electric water heaters would save $13.05 per year while those with natural gas water heaters would save about $12.74 per year on average. Of course these savings are not free, consumers will have to pay an average increase of $101 for electric and $58 for gas water heaters. Note that the total average increased cost for electric and gas water heaters are $105 and $118, respectively, due to the phase out of the current insulating foam blowing agent HCFC–141b and the compliance to resist ignition of flammable vapors on gas water heaters voluntarily agreed to between the manufacturers and the Consumer Product Safety Commission. The simple payback for cost increases due to efficiency standards is 7.4 years for electric and 3.6 years for gas water heaters. The lifetime owning cost or life-cycle costs are lower than life-cycle costs on current water heaters by $23 for electric and by $30 for gas water heaters.

The design improvements the Department considered are thicker insulation and heat traps on both gas and electric water heaters and an improved heat exchanger (flue baffle) on gas water heaters. These improvements result in a four percent increase in energy efficiency for electric and an eight percent increase in energy efficiency for gas water heaters. These kinds of improvements are already available on 26 percent of all water heater models. In energy terms, households with electric water heaters will save on average 188 kWh per year and households with gas water heaters will save 22 therms per year of natural gas or propane gas.

The benefits to the nation from this revised energy efficiency standard are also significant with energy savings of 4.6 quads of energy over 26 years. This is equivalent to the total energy consumption of all U.S. homes over a period of 2.8 months. By 2020, the standards will avoid the construction of nine 400 megawatt electric generating plants.

The amended standards in today's rule can be achieved by using HFC–134a, cyclopentane, or HFC–245fa as the blowing agent in the insulation. The 4.6 quads of energy savings will result in cumulative greenhouse gas emission reductions of 152 million metric tons (Mt) of carbon dioxide (CO_2) equivalent, or an amount equal to that produced by 3.9 million cars per year. Additionally, there will be a cumulative reduction of 273 thousand metric tons of nitrogen oxides (NO_X). In total, we estimate the national energy savings to have a positive net present value to American business and industry of $2.02 billion over 26 years.

B. Authority

Part B of Title III of the Energy Policy and Conservation Act, Pub. L. 94–163, as amended by the National Energy Conservation Policy Act, Pub. L. 95–619, the National Appliance Energy Conservation Act, Pub. L. 100–12, the National Appliance Energy Conservation Amendments of 1988, Pub. L. 100–357, and the Energy Policy Act of 1992, Pub. L. 102–486,[1] created the Energy Conservation Program for Consumer Products other than Automobiles. Water heaters are one of the consumer products subject to this program. Section 322(a)(4), 42 U.S.C. 6292(a)(4).

Under the Act, the program consists essentially of three parts: testing, labeling, and Federal energy conservation standards. The Department, with assistance from the National Institute of Standards and Technology (NIST), may amend or establish test procedures for each of the covered products. Section 323(b)(1)(A)–(B), 42 U.S.C. 6293(b)(1)(A)–(B). The test procedures measure the energy efficiency, energy use, or estimated annual operating cost of a covered product during a representative average use cycle or period of use. They must not be unduly burdensome to conduct. Section 323(b)(3), 42 U.S.C. 6929(b)(3). The water heater test procedure appears at Title 10 Code of Federal Regulations (CFR) Part 430, Subpart B, Appendix E.

The Federal Trade Commission (FTC) prescribes rules governing the labeling of covered products after DOE publishes test procedures. Section 324(a). At the present time, there are FTC rules requiring labels for water heaters.

The National Appliance Energy Conservation Act of 1987 prescribed Federal energy conservation standards for water heaters. Section 325(e). The Act provides that the Department shall determine whether amended standards to the existing requirements in Section 325(e) for water heaters are warranted, and issue a Final Rule. Such amendment shall apply to products manufactured three years on or after the date of this Final Rule. Section 325(e)(4)(A).

Any new or amended standard must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. Section 325(o)(2)(A), 42 U.S.C. 6295(o)(2)(A).

Section 325(o)(2)(B)(i), 42 U.S.C. 6295(o)(2)(B)(i) provides that before DOE determines whether a standard is economically justified, it must first ask for comments on a proposed standard. After reviewing comments on the proposal, DOE must determine that the benefits of the standard exceed its burdens, based, to the greatest extent practicable, on a weighing of the following seven factors:

(1) The economic impact of the standard on the manufacturers and on the consumers of the products subject to the standard;

(2) The savings in operating costs throughout the estimated average life of the covered product in the type (or class) compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the covered products which are likely to result from the imposition of the standard;

(3) The total projected amount of energy or water savings likely to result directly from the imposition of the standard;

(4) Any lessening of the utility or the performance of the covered products likely to result from the imposition of the standard;

(5) The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard;

(6) The need for national energy and water conservation; and

(7) Other factors the Secretary considers relevant.

In addition, Section 325(o)(2)(B)(iii), 42 U.S.C. 6295(o)(2)(b)(iii), establishes a rebuttable presumption of economic justification in instances where the Secretary determines that ''the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the energy, and as applicable, water, savings during the first year that the consumer will receive as a result of the standard, as calculated under the applicable test procedure. * * *'' The rebuttable presumption test is an

[1] Part B of Title III of the Energy Policy and Conservation Act, as amended by the National Energy Conservation Policy Act, the National Appliance Energy Conservation Act, the National Applicance Energy Conservation Amendments of 1988, and the Energy Policy Act of 1992 is referred to in this notice as the ''Act.'' Part B of title III is codified at 42 U.S.C. 6291 *et seq.* Part B of Title III of the Energy Polciy and Conservation Act, as amended by the National Energy Conservation Policy Act only, is referred to in this notice as the National Energy Conservation Policy Act.

alternative path to establishing economic justification.

Section 327 of the Act, 42 U.S.C. 6297, addresses the effect of Federal rules on State laws or regulations concerning testing, labeling, and standards. Generally, all such State laws or regulations are superseded by the Act, unless specifically exempted in Section 327. The Department can grant a waiver of preemption in accordance with the procedures and other provisions of Section 327(d) of the Act. 42 U.S.C. 6297(d).

C. Background

1. *Current Standards.* The existing water heater efficiency standards have been in effect since 1991. Energy efficiency is measured in terms of an energy factor (EF), which measures overall water heater efficiency and is determined by the DOE test procedure. 10 CFR, Part 430, Subpart B, Appendix E. The current water heater efficiency standards are as follows:

- Electric: EF = 0.93–(0.00132 x rated volume)
- Gas-fired: EF = 0.62–(0.0019 x rated volume)
- Oil-fired: EF = 0.59–(0.0019 x rated volume)

where rated volume is the water storage capacity of a water heater in gallons, as specified by the manufacturer.

2. *History of Previous Rulemakings.* On September 28, 1990, DOE published an Advance Notice of Proposed Rulemaking announcing the Department's intention to revise the existing water heater efficiency standard. 55 FR 39624 (September 28, 1990). On March 4, 1994, DOE proposed a rule to revise the energy conservation standards for water heaters, as well as a variety of other consumer products. 59 FR 10464 (March 4, 1994). On January 31, 1995, we published a determination that we would issue a revised notice of proposed rulemaking (NOPR) for water heaters. 60 FR 5880 (January 31, 1995).

The Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1996 included a moratorium on proposing or issuing Final Rules for appliance efficiency standards for the remainder of Fiscal Year 1996. *See* Pub. L. 104–134. During the moratorium, the Department examined the appliance standards program and how it was working. Congress advised DOE to correct the standards-setting process and to bring together stakeholders (such as manufacturers and environmentalists) for assistance. Therefore, we consulted with energy efficiency groups, manufacturers, trade associations, state agencies, utilities and other interested parties to provide input to the process used to develop appliance efficiency standards. As a result, on July 15, 1996, the Department published a Final Rule: Procedures for Consideration of New or Revised Energy Conservation Standards for Consumer Products (referred to as the Process Rule) 61 FR 36974 (July 15, 1996), codified at 10 CFR Part 430, Subpart C, Appendix A.

The Process Rule states that for products, such as water heaters, for which DOE issued a proposed rule prior to August 14, 1996, DOE will conduct a review to decide whether any of the analytical or procedural steps already completed should be repeated. 61 FR 36974, 36982 (July 15, 1996). DOE completed this review and decided to use the Process Rule, to the extent possible, in the development of the revised water heater standards.

We developed an analytical framework for the water heater standards rulemaking for our stakeholders, which we presented during a water heater workshop on June 24, 1997. The analytical framework described the different analyses (e.g., life-cycle costs (LCC), payback, and manufacturing impact analyses (MIA)) to be conducted, the method for conducting them, the use of new LCC and national energy savings (NES) spreadsheets, and the relationship between the various analyses.

We held a workshop on November 9 and 10, 1998, to share the preliminary analysis results. We discussed our methodology for analyzing national energy savings, environmental inputs, consumer sub-group impacts and impacts on utilities including fuel switching. There was also a presentation of the water heater insulation testing by NIST. On July 23, 1999 we held another workshop to present the full results of our engineering and economic analysis. We discussed the comments from the November 1998 workshop and changes we made in our analysis as a result of these comments. On April 28, 2000 we published the notice of proposed rulemaking to amend water heater energy efficiency standards. 65 FR 25042 (April 28, 2000). We held the hearing/workshop to discuss comments to the proposed rule on June 20, 2000.

II. General Discussion

A. Test Procedures

The Act does not allow DOE to set energy standards for a product unless there is a test procedure in place for that product. The Department published a test procedure on May 11, 1998, that revised the first-hour rating of storage-type water heaters, added a new rating for electric and gas-fired instantaneous water heaters and amended the definition of a heat pump water heater. 63 FR 25996 (May 11, 1998). This revision did not change the test method for determining energy efficiency standards.

No one has petitioned DOE indicating the Department's test procedures are inadequate for testing water heaters. Accordingly the Department considers the current Federal test procedures applicable and appropriate for today's Final Rule.[2]

B. Technological Feasibility

The Act requires the Department, in considering any new or amended standards, to consider those that ''shall be designed to achieve the maximum improvement in energy efficiency * * * which the Secretary determines is technologically feasible and economically justified.'' (Section 325 (o)(2)(A)). Accordingly, for each class of product considered in this rulemaking, a maximum technologically feasible (max tech) design option was identified and considered as discussed in the Proposed Rule. 65 FR 25042, 24045 (April 28, 2000).

However, DOE eliminated the heat pump water heater due to issues concerning the practicability to manufacture, install, and service on the scale necessary to serve the relevant market at the time of the effective date of the standard and product utility of these units. We eliminated heat pump water heaters after careful consideration of the current electric resistance and heat pump water heater markets and manufacturing technology, and after applying the factors to be considered in screening design options contained in the Process Rule. We also eliminated gas condensing water heaters because we determined they are not technologically feasible. 10 CFR 430, Subpart C, Appendix A(4)(a)(4) and (5)(b). There is a complete discussion of these conclusions in the proposed rule. 65 FR 25042, 25047–49 (April 28, 2000).

The Department has determined that the electric and gas water heaters considered in today's notice are technologically feasible as required by Section 325(o)(2)(A) of EPCA, as amended. There are some models of these water heaters in the market that

[2] In August and September 2000, DOE conducted a certification review of high efficiency electric water heaters at five manufacturers. Based on the review of these manufacturers' laboratory procedures, we believe some clarifications to the water heater test procedure may be needed. We are planning to join GAMA and the manufacturers in their water heater test program to determine what needs to be clarified in the water heater test procedure.

meet the new standard levels. Thus, the design options DOE considered are technologically feasible.

C. Lessening of Utility or Performance of Products

This factor is not easily quantified. However, DOE has considered the effect of thicker insulation which might result in smaller capacity water heaters to be used in small existing spaces which could cause a reduction in first hour rating. A loss of first hour rating would reduce consumer utility. The discussion in the comments on size constraints explains how DOE dealt with this issue. Furthermore, if a certain type of water heater would no longer fit in spaces that it was designed for, we have considered a new class of products. We have included a discussion on new product classes to address this.

1. *Size Constraints.* We addressed size constraints in the proposed rule by estimating approximately 32 percent of electric water heating households and 27 percent of gas water heating households would need to remove the closet door for water heaters with 3 inch thick insulation. Then, we added a cost adjustment of $160 to install new water heaters in these households. Several stakeholders have commented on our estimates of costs and the number of households affected.

The American Gas Association (AGA) requests that DOE address size constraints consistently across electric and gas water heaters. It requested DOE to include the costs shown in the Battelle report that addresses space constraints. (AGA, No. 150 at 5). The Gas Appliance Manufacturers Association (GAMA) supports the Battelle analysis. (GAMA, No. 160 at 4). Battelle provided detailed comments on space constraints associated with larger gas water heaters. Based on a survey of 15 companies, covering areas within 24 states, it determined a range of space impacts on costs and the percentages of homes affected. (Battelle, No. 127 at C–1 to C–5).

Southern Gas Association stated that a survey of its members revealed that 18 percent of single family homes would be unable to fit a 2 inch larger diameter water heater into the existing space. (Southern Gas Association, No. 152 at 4). Alagasco indicated that many of its customers are renters in mid to low-income brackets. The proposed gas water heaters would cause space constraints in many of these homes. (Alagasco, No. 152 at 2). The National Propane Gas Association and Atlanta Gas Light Co. stated that an increase in storage tank size will cause significant and costly installation problems in water heater replacements. (National Propane Gas Association, No. 165 at 2 and Atlanta Gas Light Co., No. 178 at 1). The Oregon Office of Energy (OOE) claims that after installing tens of thousands of high efficiency water heaters in the Pacific Northwest, physically larger tanks do not impose higher installation costs. Drip pans are sized for the larger tanks and water connections are almost universally made with flexible copper tubing that easily accommodates a wide range of tank heights and alignments. (OOE, No. 174 at 3).

To account for size constraints in our revised analysis, we assume space constraints would only apply in those cases where the water heater is installed in a conditioned space, e.g., not in a garage or an unconditioned basement or attic. We also assume this will only apply to small houses or apartments. Therefore, we have excluded houses or apartments with a floor area of more than 1000 square feet. These assumptions are not intended to accurately identify every individual household that would face space constraints when replacing their water heater. Rather this estimate should roughly identify the number of households affected. Since this is based on the Residential Energy Consumption Survey (RECS) '97 data, we have a representative national sample of households. We believe using the RECS '97 database and the assumptions above will give us the best estimate of the impacts of increased water heater size.

In its comments, Battelle also assumed a large fraction of closets are smaller than 22 × 22 inches. Discussions with installers report this is a rare occurrence; they come upon this situation approximately once per month. We also checked the areas served by the gas utilities in the Battelle survey. We found that although 24 states are represented, usually the area served by the utility covered only a very small part of the state. Therefore, we do not believe that this survey is really representative of the entire United States. Consequently, we did not add any extra costs for small closets for gas water heaters. We assumed extra costs for removing and replacing closet doors and door frames for 32 percent of households with electric and 27 percent of households with gas water heaters with 3 inch insulation. See Chapter 9 of the TSD.

In the proposed rule, DOE asked for comments or suggestions to minimize the effects of smaller tanks either by increasing the electric element size from 4.5 kW to 6 kW or by increasing the thermostat setpoint. Several stakeholders opposed larger electric elements. There were no comments on increasing the thermostat setpoint.

The Electric Power Research Institute (EPRI) claims using 6 kW elements is not an option for smaller tanks to provide the consumer utility of larger tanks since these elements are only used in commercial water heaters. They state that it is generally not possible to use 6 kW elements in ''residential'' water heaters because standard household wiring circuits usually used for water heaters cannot carry a 6 kW continuous load with sufficient safety margin as required by the National Electrical Code. (EPRI, No. 104 at 3). Dominion concurs with EPRI, and states further that there are currently only two models listed in the latest GAMA directory with elements above 4.5 kW, and none greater than 5.5 kW. (Dominion, No. 145 at 4). The National Rural Electric Cooperative Association (NRECA) also opposes the use of larger heating elements. (NRECA, No. 126 at 1–2). Southern Co. and Dominion claim that increased element size will increase peak electric demand on electric utilities and could require new wiring and circuit breakers or electric panels in homes. (Southern Co., No. 142 at 3 and Dominion, No.145 at 3).

We are not including 6 kW elements as a means of compensating for downsized electric water heaters in today's Final Rule. Instead, we have increased the thermostat setpoint to meet the load in those cases where the downsized water heater would be too small to meet the particular requirements of a RECS '97 home. In addition to increasing the thermostat setpoint, we added $106 for the costs of tempering valves and check valves for about fifteen percent of electric and eight percent of the gas water heaters where we had to increase the thermostat setpoint above 140°F. (Generally, water temperatures above 140°F have the potential to cause scalding.) The detailed computer algorithm we used to determine when a tempering valve is needed can be found in the TSD in Chapter 9.

2. *New Product Classes.* During the hearing and in the comments, several comments claimed that tabletop and lowboy water heaters would be unable to fit into existing spaces if their size increased substantially beyond current dimensions. These comments suggested DOE create separate product classes for these water heaters.

GAMA requests DOE to establish a separate product class for lowboy and tabletop water heaters and not to increase the efficiency standards for these products. GAMA states that

lowboy water heaters must be able to fit under a 36 inch high counter. Therefore, they are 34 inches high or shorter and have a jacket diameter less than 26 inches. GAMA defines tabletop water heaters as having typical dimensions of 36 inches high, 25 inches deep and 24 inches wide. Tabletop water heaters are designed to slide into a kitchen countertop space and provide additional countertop surface area. (GAMA, No. 160 at 4–5). Bradford White supports GAMA's request stating that elimination of these products will cost consumers substantial capital to convert and will impact the replacement market negatively. Lowboy electric models are limited to 34 inches in height and to 26 inches in diameter. (Bradford White, No.175 at 2 and No. 138 at 3). A.O. Smith also recommends a new product class for countertop-type (also known as tabletop) electric water heaters. (A.O. Smith, No.179 at 1). The American Council for an Energy-Efficient Economy (ACEEE) commented that it is not opposed to a new product class for tabletops and lowboys but recommended limiting these classes to a 30 gallon size. (ACEEE, No.170 at 7)

DOE has decided to establish a separate product class for tabletop water heaters due to strict size limitations for these products. However, we have concluded that lowboy water heaters do not have as stringent limitations on geometry as tabletop water heaters. For example, the diameter of the lowboys can be increased. We addressed these size constrained lowboy water heaters by adding extra installation costs, see Section II, General Discussion, Lessening of Utility or Performance of Products, ''Size Constraints'' in today's rule. GAMA data shows that lowboys make up 18 percent of the electric water heater market and that 38 percent of lowboy shipments are 30 gallon, 48 percent are 40 gallon, and 14 percent are 50 gallon tanks. (GAMA, No. 176 at 3).

In establishing classes of products and accounting for cost increases for a percentage of products which will require space modification, the Department does not believe any model of water heater will become unavailable as a result of thicker insulation. Therefore, DOE has eliminated any degradation of utility or performance in the products in today's Final Rule. In the application for tabletop water heaters, we established a new class with no change in standards because these models cannot be made any larger. In all other applications, we have determined from the GAMA directory, GAMA data on shipments, and from the RECS '97 data that sufficient types and sizes of water heaters exist in the market to satisfy any size constraints encountered.

D. Impact of Lessening of Competition

This factor seeks the views of the Attorney General to determine the potential impacts on competition resulting from the imposition of the proposed energy efficiency standards.

In order to assist the Attorney General in making such a determination, the Department provided the Attorney General with copies of the Proposed Rule and the Technical Support Document for review. In a letter responding to the Proposed Rule, the Department of Justice (DOJ) found only one area of concern regarding any lessening of competition. The area of concern involves the blowing agent for the foam insulation and the possibility that only one chemical, HFC–245fa, could be used and that it is a patented product with only one supplier. This situation led DOJ to conclude ''that the proposed standards could have an adverse affect on competition because water heater manufacturers may have to use an input that will be produced by only one source.'' (DOJ, No. 143 at 1). The DOJ letter is printed at the end of today's rule.

To reduce heat loss from the stored reservoir of hot water, water heaters must have insulation. The choice of insulation is critical to achieving high water heater efficiency at a reasonable cost and essentially all water heaters use foam insulation. A blowing agent is needed to produce the foam insulation and currently all manufacturers are using the chemical HCFC–141b. Unfortunately, HCFC–141b is an ozone depleting chemical and will be phased out in January, 2003. Therefore, the water heater industry, like all other industries that use this chemical, must find and use a replacement chemical.

Options for non-ozone depleting blowing agents include HFC–245fa, HFC–134a, carbon dioxide (CO_2)/Water, pentane/cyclopentane and HFC 365mfc, as well as potential blends, or combinations, of these blowing agents. The U.S. Environmental Protection Agency's (EPA) Clean Air Act guides the U.S. appliance industry on replacement of HCFC/CFC blowing agents. The EPA's Significant New Alternatives Program (SNAP) approves chemicals and technologies that can be used to replace ozone depleting chemicals. Of the options listed above, all except HFC–365mfc have been approved by the EPA/SNAP.

Initially, the appliance industry, including water heater manufacturers, had leaned toward adopting HFC–245fa, which performs similarly to HCFC–141b but at a much higher material cost. HFC–245fa has a lower manufacturing conversion cost than some of the other alternatives, such as pentane/cyclopentane. Given the likelihood HFC–245fa would be adopted by manufacturers, the Department used the performance characteristics and increased material and manufacturing costs associated with HFC–245fa to estimate the impact the new blowing agent would have on consumers and manufacturers. This was not to imply HFC–245fa was the only path to meeting the standard and DOE believes that at least three alternative blowing agents are available to use in meeting the standards adopted in today's Final Rule. See the following section for the analysis we used to support our conclusion.

1. *Increased Costs Due to a Single Source of Supply for HFC–245fa.* In addition to the Attorney General's letter on the anti-competitive effects of the proposed rule, we received several comments from stakeholders. They were concerned about cost increases due to a single source supplier for HFC–245fa and about the unavailability of the material until July, 2002 or later.

The AGA position is that DOE should only consider water blown foams for its analytical baseline and standard level analysis. AGA pointed out that the blowing agent HFC–245fa has not yet been demonstrated in manufacture of water heaters in the U.S. AGA claimed that, due to uncertainty in availability to manufacturers and a sole source U.S. supplier, DOE should consider only those blowing agents that are available and proven for water heater manufacture. (AGA, No. 150 at 5–7).

To address concerns about the performance of alternative blowing agents, we tested three sets of four electric water heaters with different foam insulations. The purpose of these tests was to compare the performance of the current foam insulation, HCFC–141b, with water blown and HFC–245fa blown foam insulation. The results of the NIST tests showed that water heaters insulated with HFC–245fa had the same energy factors as those insulated with HCFC–141b. Water heaters insulated with water blown foam insulation had energy factors about two percent lower than tanks insulated with HCFC–141b. We believe the results of these tests demonstrate that the blowing agents HFC–245fa and water can be used to insulate water heaters and that the insulation performance is the same with HFC–245fa and only slightly reduced with water blown foam. (Performance Testing of Alternative Blowing Agents for Foam

Insulation of Residential Water Heaters, Fanney et al., Proceedings of the AMC, 1999).

The DOJ urges DOE to account for the impact of a single source supplier on competition, and to consider altering the standard so manufacturers may meet the standard for all affected models using other blowing agents. DOJ further noted that some manufacturers have suggested that DOE underestimated the performance capabilities of alternative blowing agents. If this is true, manufacturers may in fact be able to comply with the proposed standard while using water-based blowing agents. (DOJ, No. 143 at 1–2).

Stepan is concerned that the proposed standards would require foam suppliers to use HFC–245fa as the blowing agent. This raises an issue about relying on a sole source supplier for an efficiency standard, since Honeywell maintains the exclusive North American rights to its manufacture and sale. (Stepan, No. 123 at 1–2). APGA claims the reliance on insulation technology licensed to a single company raises new issues and antitrust concerns and may be contrary to the statute. (APGA, No. 167 at 2).

To address these comments, we conducted additional engineering cost analyses with HFC–245fa, HFC–134a and cyclopentane as the blowing agent in the insulation. An April 7, 2000, Bayer press release states most appliance manufacturers in North America are considering either HFC–245fa or HFC–134a. Cyclopentane is not considered favorably because of the capital investment required to handle cyclopentane safely (cyclopentane is highly flammable). There are also high costs because the factory cannot produce water heaters while converting factory equipment to a cyclopentane system. However, appliance manufacturers are independently deciding which blowing agent to select. Switching to either HFC–245fa or HFC–134a involves capital costs. According to industry and Bayer research, HFC–245fa exhibits the best insulation value of the two blowing agents—roughly equal to HCFC–141b—though it is more costly per pound. HFC–134a demonstrates an insulation value approximately ten percent lower than HCFC–141b but has a lower per-pound cost than HFC–245fa.

We have examined, through the engineering analysis, the impact on product design and costs using two of the other blowing agent options, HFC–134a and cyclopentane, to achieve a similar energy factor as the proposed levels for HFC–245fa. See Table 1 below. We included the ten percent performance reduction for HFC–134a and an estimate of $7 per unit for the capitalization costs of cyclopentane in our engineering analyses. These analyses show that energy factors are the same for the three blowing agents. Costs for all design options are within a few dollars for HFC–245fa, HFC–134a and cyclopentane. While we have not examined every possible blowing agent option, we conclude that at least two additional options to HFC–245fa can be used to achieve similar performance for similar costs. The blowing agent performance characteristics and test results using HFC–245fa, HFC–134a and cyclopentane blown foam to evaluate design options can be found in Chapter 3.4.1 of the TSD.

Table 1 shows the trial standard levels, design options, energy factor and installed costs for the three alternative blowing agents, HFC–245fa, HFC–134a and cyclopentane. Note the energy factors are the same for all trial standard levels and all blowing agents. There are small differences in costs; HFC–245fa is the cheapest blowing agent, HFC–134a costs about $2/unit more than HFC–245fa, while cyclopentane is the most expensive blowing agent costing about $9 more per installed electric and $11 more per installed gas water heater.

TABLE 1.—ENGINEERING RESULTS FOR ALTERNATIVE BLOWING AGENTS

Trial standard level	Design options	Energy factor	Installed costs
HFC–245fa:			
1	Electric: Heat Traps + Tank Bottom Insulation	0.88	367.52
	Natural Gas: Heat Traps + Flue Baffles (78% RE) + 2 Inch Insulation	0.59	431.57
2	Electric: Heat Traps + Tank Bottom Insulation + 2 Inch Insulation	0.89	403.69
	Gas: Heat Traps + Flue Baffles (78% RE) + 2.5 Inch Insulation	0.60	456.79
3	Electric: Heat Traps + Tank Bottom Insulation + 2.5 Inch Insulation	0.90	440.69
	Gas: Heat Traps + Flue Baffles (78% RE) + 2 Inch Insulation	0.59	431.57
4	Electric: Heat Traps + 3 Inch Insulation + Plastic Tank	0.91	547.04
	Gas: Heat Traps + Flue Baffles (80% RE) + 3 Inch Insulation + Side Arm Heater + Plastic Tank + IID.	0.71	751.31
HFC–134a:			
1	Electric: Heat Traps + Tank Bottom Insulation	0.87	363.06
	Natural Gas: Heat Traps + Flue Baffles (78% RE) + 2 Inch Insulation	0.59	428.65
2	Electric: Heat Traps + Tank Bottom Insulation + 2 Inch Insulation	0.89	391.60
	Gas: Heat Traps + Flue Baffles (78% RE) + 2.5 Inch Insulation	0.60	454.39
3	Electric: Heat Traps + Tank Bottom Insulation + 2.5 Inch Insulation	0.90	428.01
	Gas: Heat Traps + Flue Baffles (78% RE) + 2 Inch Insulation	0.59	428.65
4	Electric: Heat Traps + 3 Inch Insulation + Plastic Tank	0.91	531.45
	Gas: Heat Traps + Flue Baffles (80% RE) + 3 Inch Insulation + Side Arm Heater + Plastic Tank + IID.	0.71	749.41
Cyclopentane:			
1	Electric: Heat Traps + Tank Bottom Insulation	0.88	368.11
	Natural Gas: Heat Traps + Flue Baffles (78% RE) + 2 Inch Insulation	0.59	432.14
2	Electric: Heat Traps + Tank Bottom Insulation + 2 Inch Insulation	0.89	394.70
	Gas: Heat Traps + Flue Baffles (78% RE) + 2.5 Inch Insulation	0.60	456.10
3	Electric: Heat Traps + Tank Bottom Insulation + 2.5 Inch Insulation	0.90	428.79
	Gas: Heat Traps + Flue Baffles (78% RE) + 2 Inch Insulation	0.59	432.14
4	Electric: Heat Traps + 3 Inch Insulation + Plastic Tank	0.91	529.79
	Gas: Heat Traps + Flue Baffles (80% RE) + 3 Inch Insulation + Side Arm Heater + Plastic Tank + IID.	0.72	749.25

2. *Availability of HFC–245fa.* Bradford White said it has given careful consideration to all of the options available for blowing agents. However, since HCFC–141b may be in limited supply early in 2002 because of facility phase-outs and with the uncertainty in availability of HFC–245fa, Bradford White has no alternative but to pursue water blown insulation. (Bradford White, No. 175 at 1–2). Stepan has concerns about the overall availability of HFC–245fa. (Stepan, No. 123 at 1–2).

Honeywell indicated that over six years and $30 million has been invested in the development of HFC–245a. Honeywell has received all the necessary U.S. regulatory approvals and is constructing a commercial manufacturing facility at its Geismar, Louisiana location. The facility is expected to be online by July 1, 2002. Honeywell expects ample capacity to be available to water heater manufacturers. (Honeywell, No. 114 at 2).

The OOE claims adequate quantities of HFC–245fa are available now for optimizing production processes. (OOE, No. 174 at 3). The ACEEE states DOE has previously decided, in the refrigerator standard rulemaking, that HFC–245fa will be available and can be an energy-efficient and cost effective blowing agent. DOE should make the same decision here. ACEEE suggests DOE provide for manufacturers to petition for relief if HFC–245fa does not become available. (ACEEE, No. 170 at 8). Southern Company also asks why DOE made no provisions for an alternative if the blowing agent does not become available. (Southern Company, No. 142 at 3).

DOE has investigated the issue of the availability of HFC–245fa. Announcements in The Advocate, a Baton Rouge, LA newspaper (May 11, 2000 and October 6, 2000), indicate that Honeywell is proceeding to secure the necessary permits to build the HFC–245fa plant. Furthermore, Vulcan Chemicals is also planning to build a plant in Geismar, LA to make pentachloropropane, one of the chemicals used in the manufacture of HFC–245fa. DOE concludes that HFC–245fa will be available as planned and therefore does not believe it needs to make any provision in today's rule in the event of HFC–245fa unavailability. If Honeywell does not build its plant or if the plant is delayed, DOE believes there are still three or more alternative blowing agents for water heater manufacturers to use, *i.e.,* water, cyclopentane, HFC–134a or blends of these three.

E. Economic Justification

As noted earlier, Section 325(o)(2)(B)(i) of the Act provides seven factors to be evaluated in determining whether an energy conservation standard is economically justified. Since there were significant comments from the June 20, 2000, hearing, and new data from RECS '97 and AEO 2000, DOE has developed a revised water heater analysis. Specific revisions to our analysis methods are discussed in Section III, Methodology.

F. Other Factors

This provision allows the Secretary of Energy, in determining whether a standard is economically justified, to consider any other factors that the Secretary deems to be relevant. Section 325(o)(2)(B)(i)(VI), 42 U.S.C. 6295(o)(2)(B)(i)(VI). The Secretary has decided that no other factors need to be considered in this rulemaking.

III. Methodology

DOE has made some minor changes to the engineering and LCC analysis for this Final Rule. We discuss these changes below in response to the comments on markup, the WATSIM computer model, blowing agents and blended fuel prices. Additionally, the household characteristics data used in the analysis were updated from the 1993 RECS data to the 1997 RECS data (except for oil-fired water heaters). We used the energy price projections from the AEO 2000 as well.

A. Engineering

DOE is continuing to use the WATSIM and TANK computer models in its analysis to evaluate the energy factor of water heaters with various design options. These models were discussed in the engineering methodology section of the proposed rule. 65 FR 25042, 25052–53 (April 28, 2000). We adjusted the manufacturers' costs and the installation costs to account for comments to the proposed rule. These changes resulted in reduced manufacturers' costs for gas water heaters and slightly higher retail costs for electric water heaters.

Further testing at NIST and reverse engineering of a water heater at the Lawrence Berkeley National Laboratory (LBNL) allowed DOE to fully validate WATSIM. These tests revealed that WATSIM and NIST results for the energy factor of a high efficiency electric water heater were the same. See the TSD, Chapter 8.2.4

1. *Water Heater Markup.* DOE's calculation of gas water heater markup was a major concern to stakeholders. There was wide spread criticism that the markup for gas water heaters we derived in the proposed rule was too low to support any manufacturer's production of that product.

The AGA claims DOE's approach to calculating markups has been roundly criticized by stakeholders throughout the development of the TSD and supporting analysis, and is unaware of any comments supporting DOE's analysis. AGA claims that DOE has provided no consistency checks for this and other markups to determine their validity, in spite of criticism it has received on its analytical results, and has failed to postulate a market mechanism or economic model to justify its numbers. Furthermore, AGA commented that manufactured cost and retail price are not independent random variables, and that DOE did not correlate its cost and price data. This resulted in 21 percent of the RECS '93 households being constrained to 0 markup. AGA believes DOE should adopt the Battelle markups. (AGA, No. 150 at 8–9). Laclede Gas claims DOE should not limit the markup algorithm to prevent negative markups. (Laclede Gas, No. 148 at 9).

To address the comments about correlating prices and costs, DOE has changed its LCC analysis to use correlated retail prices and manufacturer costs, *i.e.,* high prices correlate with high costs. This has eliminated the negative values of markup which occurred in the analysis for the proposed rule.

GAMA and Bradford White claim the markup for gas water heaters combines 4-inch flue model costs with 3-inch flue model prices. According to GAMA, using the DOE database and only 4-inch flue models, the markup increases from 1.22 to 1.5. (GAMA, No. 117 at 2–3 and Bradford White, No. 108 at 7). Dominion Virginia Power states that the DOE gas water heater base line assumes a 4 inch flue yet the typical 40 gallon gas water heater uses a 3 inch flue. (Dominion Virginia Power, No. 145 at 6).

We separated the retail prices for 3 inch and 4-inch flues on gas water heaters. We had our consultant estimate the incremental cost difference between manufacturing water heaters with 3 inch and 4 inch flues. We then subtracted this cost from the manufacturer cost supplied by GAMA for water heaters with 4 inch flues. Our analysis now accounts for these price and cost differences as recommended. Since the retail prices were not changed, this increased the markup on the baseline units in the LCC, as well as the markup applied to the various design options.

Southern Company and the Energy Market and Policy Analysis group claim

the price database is too limited for the type of analysis conducted by DOE. Specifically, Southern Company claims the database has a geographic bias, citing the high number of sample points from Washington and Oregon. It claims that over 23 percent of the sample points are from these two states, which represent slightly more than three percent of the U.S. population. Southern Company suggests using a combined markup for gas and electric water heaters. (Southern Company, No. 142 at 1–2 and Energy Market and Policy Analysis, No.151, at 5–6).

DOE's retail price database uses data points broadly distributed over the 10 Census regions of the U.S., and DOE does not believe the database has a geographic bias. Only 10.9 percent of the water heaters in the database are from the Pacific Region (see Table 5.3 in the TSD). The Department used a slightly higher proportion of water heaters from the northwest to ensure an adequate representation of high-efficiency units. DOE will not be using a combined markup, since each fuel type must be evaluated individually. The design option approach requires distinct costs for each fuel type.

Battelle estimated the cost of materials and labor for the design options under consideration and applied standard industry markup factors to determine the cost to the consumer. Battelle assumed standard industry markup factors were 1.5 for the manufacturer, 1.2 for the distributor, and 1.4 for the retailer. Thus, the overall markup factor is 2.52 (1.5 x 1.2 x 1.4 = 2.52). Therefore, to determine the cost to the consumer, the manufacturer's materials and labor costs for a design option are multiplied by 2.52.

To validate this standard approach for gas water heaters, Battelle conducted a tear down analysis on six water heaters varying in size among 30, 40, 50, and 75-gallon capacities. BDI Design for Manufacture software was used to catalog the components and estimate materials and labor costs for each water heater. The materials and labor costs for the 30, 40, 50, and 75-gallon baseline gas water heaters were $80.83, $86.06, $90.95, and $139.77, respectively. The 40-gallon gas water heater cost of $86.06 is in excellent agreement with the value of $87.51 supplied by GAMA to DOE. (Battelle, No. 106 at 1–2).

DOE compared its manufacturer markup to Battelle's standard markup factor. This is the total manufacturer cost divided by the sum of the materials and labor costs for 40 gallon gas-fired water heaters.

Battelle: $133.78/$86.06 = 1.55

DOE: $133.78/($75.07 + $10.74) = 1.56

Therefore the manufacturing markup is essentially identical.

The ACEEE claims the Battelle markups applied to the GAMA manufacturing costs yield incredibly high retail prices. ACEEE concludes the manufacturers' costs are too high and the markups may be too low on some water heaters. (ACEEE, No. 170 at 9). The OOE and the Northwest Power Planning Council (NWPPC) do not accept GAMA's manufacturing costs because the typical margins in the Pacific Northwest are $30–$40 for high efficiency water heaters. (OOE, No.174, at 2 and NWPPC, No.163, at 2).

In order to address the concerns about manufacturers' costs, DOE adjusted the higher range of the manufacturer's cost distribution, to match the average of the low range of the manufacturers' cost distribution. We also applied this correction to the incremental manufacturer costs for heat traps and increased insulation. We did this to bring manufacturers' costs in line with known appliance manufacturing costs, derived from publicly available SEC reports. It also ensures consistency within the data. Since the overall retail prices remain constant, the change eliminates the occurrences of unreasonably low markups on the baseline gas and electric water heaters. This reduced the average values of baseline costs for electric and gas water heaters by $9.55 and $6.22 respectively.

Battelle claims that when its baseline materials and labor costs were used in conjunction with the DOE database of retail water heater prices, the average overall markup factor for gas water heaters came out to be 2.44. This is in excellent agreement with the assumed standard markup factor of 2.52 stated previously. (Battelle, No. 106 at 1–2). Southern California Gas Co. agrees with Battelle's markup factor of 2.52. (Southern California Gas, No. 181, at 2). The American Public Gas Association (APGA) claims there is an obvious problem with the markup analysis. It suggests DOE approach this matter with real-world prices and manufacturers' costs. (APGA, No. 167 at 2).

In the DOE analysis, the overall markup factor consists of manufacturer markup and distributor/retailer markup. From the LCC analysis, we have an overall markup of 1.59 for gas and 1.94 for electric water heaters. These markups differ from the Battelle markups in an important respect. Battelle assumes that the water heater market is characterized by large distributors selling to retailers or plumbers. DOE has determined that less than 50 percent of the water heater market operates that way. Many water heaters are sold directly to retail by large cash and carry distributors or they are sold to builders or large plumbing companies by large distributors. Therefore, the standard markup factors are not correct for the residential water heater market.

2. *WATSIM Computer Model for Electric Water Heaters.* DOE received several comments about the WATSIM computer model for electric water heaters. Most comments stated that WATSIM does not predict the energy factor of electric water heaters accurately. Other comments asserted that DOE needed to test water heaters to compare actual performance to WATSIM predictions.

GAMA claims it has no confidence that WATSIM is properly predicting the energy factors resulting from the various insulation options. (GAMA, No.160 at 1–3). Dominion states that DOE should verify the accuracy of calculated energy factors for design options with results from commercially available products. (Dominion, No. 145 at 3). EPRI claims WATSIM can predict energy consumption of electric water heaters typically within 3–6 percent accuracy. For the type of analysis represented by DOE energy factor tests, the accuracy would typically be around the 3–4 percent range. (EPRI, No.104 at 1). Southern Company supports EPRI's remarks. (Southern Company, No. 142 at 2).

At the June 2, 1997, Water Heater Workshop, the Department sought comments on the selection of appropriate engineering models such as WATSIM and TANK to use in the Engineering Analysis. Most of the stakeholders' comments indicated no objections related to the use of the simulation models for the analysis. The following participants supported the use of WATSIM and TANK: C. Hiller (EPRI), J. Ranfone (AGA), J. Langmead (Water Heater Consortium), S. Nadel (ACEEE), R. Hemphill (Gas Technology Institute (GTI)). There were no comments that indicated WATSIM and TANK were incorrect to use.

Bradford White says DOE must test products to understand the actual performance of cavity increases and new blowing agents. (Bradford White, No.108 at 2–6). GAMA concurs, saying DOE has relied too heavily on computer modeling to establish insulation performance when actual testing of water heaters would have provided more precise results. GAMA further states that, ''DOE is expected to test water heaters to exclude the energy-saving benefits of design options when

the agency can do so at reasonable cost, rather then rely on computer modeling,'' 998 F. 2d 1041 (D.C. Cir. 1993). Bradford White further comments that DOE must test at least three storage capacities affected by the standard. (Bradford White, No.138 at 1).

We reviewed the court case that GAMA cited in its comments. The Court acknowledges that computer modeling is ''a useful and often essential tool for performing the 'Herculean labors''' imposed by Congress. *Gas Appliance Manufacturers Association* v. *Department of Energy*, 998 F. 2d 1041, 1045 (D.C. Cir. 1993). The Court also stated that when computer modeling is used, an agency must sufficiently explain the assumptions and methodology so that there is a rational connection between the factual inputs, modeling assumptions, modeling results and conclusions drawn from these results. *Id.* at 1046. (GAMA, No. 160 at 1)

DOE provided a detailed explanation of the model, its assumptions, and its results in the proposed rule and accompanying Technical Support document. In the proposed rule, we stated that comparisons of the WATSIM prediction to the NIST test result for an electric water heater with an efficiency at the level proposed was within 0.002 EF. 65 FR 25042, 25053 (April 28, 2000). The detailed description of the WATSIM model and the assumptions DOE used to model electric water heaters are provided in the TSD for the proposed rule in Chapter 8.2.4.1.

In response to these comments on the proposed rule, LBNL tore down (reverse engineered) one of the American Water Heater Company's (American) 0.93 EF products to assess what design options were used. In addition, NIST tested the two units of the American model that LBNL tore down. Using the reverse engineering data in the WATSIM model and comparing to the NIST test results, we obtained results from WATSIM that were within 0.006 EF of the NIST results. Therefore, WATSIM has been validated at the efficiency levels and with the types of design options that our analysis is using. See Chapter 8.2.4.1 in the TSD. Consequently, we believe WATSIM correctly predicts the efficiency of electric water heaters.

DOE did not rely on computer modeling alone to demonstrate the performance of higher efficiency electric water heaters. In the fall of 1999, NIST tested five higher efficiency electric water heaters, one model from each manufacturer. In the fall of 2000, NIST tested six tanks, a sample of two tanks of three models of electric water heaters. None of these models achieved their rated efficiency as shown in the GAMA directory. However, several of these models performed at or above the standard level adopted in today's rule. Therefore, at this time, and while we are still examining this issue, we have concluded that the WATSIM model correctly accounts for the maximum technically feasible design options for electric resistance water heaters and continue to use it, without modification for this rulemaking. Furthermore, we believe we have performed sufficient testing to demonstrate that the minimum efficiency levels can be met.

3. *Pipe Insulation.* In our proposed rule, the Department did not consider insulation on water heater inlet and outlet pipes. In recent visits to the five water heater manufacturers, we discovered that four manufacturers ship the tanks with pipe insulation for their high efficiency water heaters. The DOE water heater test procedure allows water heaters to be tested with pipe insulation if the manufacturer ships the tank with pipe insulation. To determine the impact of pipe insulation on our analysis, we modeled water heaters with and without pipe insulation in WATSIM. These results showed that pipe insulation in combination with heat traps improves the energy factor by 0.005 EF. We performed tests at NIST with and without pipe insulation on three different models of electric water heaters equipped with heat traps, and the average increase in the energy factor with pipe insulation was 0.007. Since both the WATSIM computer model and NIST testing indicate the effects of pipe insulation combined with heat traps is small, we have not included the effects of pipe insulation in our analysis. Furthermore, since pipe insulation must be applied during water heater installation, we are not sure how often it is used. Information from a small survey of installers indicated that about 50 percent do not install the pipe insulation.

4. *Blowing Agent Conductivity.* Stepan believes HFC–245fa may not achieve the energy performance results predicted in the proposed rule, and that water blown foams may actually exceed modeled predictions. Stepan claims it measured initial k-factors for water blown foam as low as 0.175 BTU/hr-°F-in. (Stepan, No. 123 at 2–3). The NWPPC suggests DOE recalculate the LCC using the water blown foam k-factors given at the workshop. (NWPPC, No. 163 at 3–4).

For cost information, Honeywell, the licensee to manufacture HFC–245fa in the U.S., provided estimates of HFC–245fa costs. For efficiency data, we used published laboratory measurements of physical parameters but we derated these conductivities by eleven percent to account for losses of insulation effectiveness due to the foaming process and modeling assumptions. In order to keep the baseline efficiency (those with HCFC–141b insulation) and the energy use characteristics of water heaters with HFC–245fa insulation the same, we modeled them with appropriately thicker insulation. We also increased the amount and cost of steel used for the water heater jacket in addition to adding the extra volume and cost of insulation.

5. *Analytic Baseline.* The current baseline is for water heaters insulated with HCFC–141b and without any design to prevent the ignition of flammable vapors on gas water heaters. In order to analyze separately the effects of energy efficiency standards from the effects of EPA actions to phase out the HCFC–141b blowing agent or of the CPSC actions to make gas water heaters more resistant to ignition of flammable vapors, DOE has developed an ''analytic baseline'' concept. This concept assumes that by 2003 and before the energy efficiency standards become effective, the actions of these other Federal agencies will have taken effect. To meet these other agency's requirements, manufacturers will have created new designs and made other changes to the production of water heaters. The cost estimates of these production and design changes are included in the analytic baseline. Several comments state that DOE should have included different designs or production changes in its analytic baseline. The analytic baseline is used in the engineering and LCC analyses.

APGA claims manufacturers would use heat traps to meet the baseline standards in 2003. Furthermore, the DOE analytic baseline overstates the value of raising the standard. (APGA, No. 21 at 2 and No. 167 at 2). AGA suggests DOE should only consider water blown foam for its analytical baseline. AGA suggests that manufacturers will use heat traps to add the 0.01 EF needed to meet the current standards with water blown insulation after 2003. (AGA, No. 150 at 5). GTI claims DOE has defined a virtual baseline water heater that makes it easier to justify added insulation. (GTI, No. 141 at 4). The Southern Gas Association's experience with noisy heat traps led them to discontinue using heat traps when installers began removing the heat traps during water heater installation. (Southern Gas Association, No. 152 at 3).

DOE does not believe heat traps would be the only design option manufacturers might use to meet the current standard when the HCFC

blowing agent is phased out. When asked, during the manufacturer interviews, none of the manufacturers indicated they were limited to heat traps as the only design option.

DOE also does not know what blowing agent any particular manufacturer would use. We believe that manufacturers will likely choose different blowing agents or use mixtures of blowing agents based on what they believe to be the best business decisions for them.

B. Life-Cycle Costs

As discussed in the proposed rule, DOE used new analytical tools in this rulemaking. We used a spreadsheet model to calculate LCC and payback. 65 FR 25042, 25059–64 (April 28, 2000). In the LCC spreadsheet model, we use Microsoft Excel for Windows 95, combined with Crystal Ball (a commercially available software program) so we can use actual distributions of input variables. The LCC outputs from this program are a range of LCCs and the fraction of the population that will benefit from energy efficiency standards.

1. *Blended Natural Gas and Propane Fuel Costs.* In the LCC analysis for the proposed rule, DOE used a gas price composed of approximately ten percent propane and 90 percent natural gas. Many gas utilities and a gas utility association objected to this approach.

AGA and GTI insist that we use natural gas costs when evaluating gas water heaters, not the blended fuel costs, because our blended fuel costs make natural gas prices ten percent higher. (AGA, No. 150 at 7 and GTI, No. 141 at 4). ACEEE claims a blended price is appropriate if the standard applies equally to both fuels. (ACEEE, No. 170 at 10). Dominion stated that a blended propane and natural gas price will artificially increase savings for natural gas equipment because propane has a higher price. (Dominion, No. 145 at 7).

DOE agrees that use of blended fuel costs is inappropriate when calculating gas water heater life-cycle-costs and national net present value, therefore, DOE has separated natural gas and propane water heaters and has considered each of these fuels separately in the LCC. To do this, DOE asked its consultant to develop a manufacturing cost for propane water heaters from the GAMA manufacturing cost data for natural gas water heaters. We estimated the retail price distribution for liquid petroleum gas water heaters from the manufacturers' costs and the markup for natural gas since there were not enough propane gas water heater prices in the price database.

During the time from the water heater hearing/workshop on the proposed rule until publication of this Final Rule, natural gas prices have risen dramatically for many consumers. DOE has investigated this increase to determine if these price increases might continue into the near future because increased gas prices would mean larger LCC savings and earlier paybacks for more energy efficient water heaters. The EIA has determined natural gas demand has increased in 2000 due to several factors including new gas-fired electric generators and new home construction. Natural gas prices will continue at higher levels than recent years but will return to more normal levels after the winter of 2000–2001 because the new gas wells should be in production by then. The AEO 2000 does not forecast any long term increase in gas prices.

2. *Percent of Consumers Benefitting from Standards.* EEI and Dominion claim the fraction of consumers benefitting from the standard level (74 percent for electric, 87 percent for natural gas) is too low for minimum efficiency standards. EEI and Dominion recommend DOE accept only those standard levels that will provide benefits to at least 90 percent of the population. (EEI, No.124 at 2 and Dominion, No. 145 at 2). Energy Market and Policy Analysis states that DOE overestimates the percentage of winners and underestimates the losers because it ignores some costs, uses high estimates of future electricity prices, and uses low discount rates. (Energy Market and Policy Analysis, No. 151 at 2).

Although ACEEE admits the two percent band of insignificance is arbitrary, it claims this is a very useful concept. ACEEE claims that life cycle costs probably must differ by $100 or $10/year before they are significant. (ACEEE, No. 170 at 11).

The Act requires the Department to consider life-cycle-cost as one of the seven factors in determining economic justification. In determining economic justification, the Secretary shall determine whether the benefits of a standard exceed the burdens. Life-cycle-cost is just one of the factors to be considered and there is no mathematical formula for weighing the benefits and burdens of the various factors. There are also no mathematical thresholds for life cycle cost as implied by EEI and the Energy Market and Policy Analysis. Furthermore, it can be argued that the Act, in requiring DOE to set national standards that maximize energy savings for appliances where there will obviously be regional differences in usage and energy costs, expected there would be some consumers with higher life cycle costs. Based on these arguments, the Department strongly disagrees with EEI and the Energy Market and Policy Analysis comments.

The Department has used the two percent band of insignificance as an indicator of the levels of LCC savings or costs where consumers could appreciate savings or suffer real loss. DOE uses the percent of households benefitting and the band of insignificance to help it weigh the LCC effects and in its consideration of the benefits and burdens of these amended standards.

C. Manufacturing Impact

We use the Government Regulatory Impact Model (GRIM) to determine the manufacturing impacts. The analysis methodology is discussed in the proposed rule and the TSD. 65 FR 25045, 25069–71 (April 28, 2000). The manufacturing impact analysis estimates the financial impact of standards on manufacturers, as well as the impacts on competition, employment, and manufacturing capacity. We used the GRIM spreadsheet model to perform an industry cash flow analysis.

D. Energy Savings and Net Present Value

DOE uses a variant of the Energy Information Administration (EIA)'s National Energy Modeling System, the National Energy Modeling System-Building Research and Standards, called NEMS-BRS, for the utility and environmental analyses, together with some scaling and interpolation calculations.[3] The NEMS-BRS permits the modeling of interactions among the various energy supply and demand sectors and the economy as a whole, so it produces a sophisticated picture of the effects of appliance standards. EEI claimed that DOE does not account for the effects of electricity deregulation in its analysis. (EEI, No. 124 at 2). The effects of deregulation are built into the NEMS-BRS 2000 model.

IV. Discussion of Comments

We received numerous comments from gas utilities and other gas

[3] For more information on NEMS, please refer to the National Energy Modeling System: An Overview 1998. DOE/EIA–0581 (98), February, 1998. DOE/EIA approves use of the name NEMS to describe only an official version of the model without any modification to code or data. Because our analysis entails some minor code modifications and the model is run under various policy scenarios that are variations on DOE/EIA assumptions, the name NEMS–BRS refers to the model as used here. BRs is DOE's Building Research and Standards office.

consumers, supporting the AGA position and the Battelle analyses. We appreciate these comments and we believe we have covered their concerns in our responses to the comments from the Gas Technology Institute (GTI; formerly GRI), AGA, Battelle, and others in our responses to comments on markups, venting, and size constraints.

A. Venting of Gas Water Heaters

Venting of gas water heaters has been an issue throughout the water heater rulemaking. In our proposed rule, we advocated a standard level that included an increase in the recovery efficiency (RE) to 78 percent from the current 76 percent. Most gas utilities and manufacturers are concerned about the reduction in the margin of safety regarding venting system corrosion with this two percent increase in RE. To make this discussion about venting easier to follow, we have separated the issue into the following subtopics: safety, the National Fuel Gas Code (NFGC) venting tables, Type B vent connectors, costs, and direct vent applications.

1. *Safety.* AGA believes DOE is incorrect in its analysis concerning venting systems for water heaters with RE above 76 percent. AGA states DOE can resolve this issue of vent system modification by one of the following:

- By fully accounting for the vent system costs as reflected in the Battelle analysis;
- By determining that the comments concerning venting integrity and safety beyond its current analysis approach are without merit; and
- By determining that safety concerns are insignificant or the expected benefits of the standard outweigh this safety consideration as required under the process rule.

AGA further requests DOE to explicitly state its determination and its underlying rationale if the second or third option is chosen. AGA reiterates its position that DOE should not promulgate a standard that subjects consumers to a potential increase in safety risk. (AGA, No. 150 at 3–5). AGA and the Atlanta Gas Light Co. believe that DOE has not considered the retail cash and carry market where needed vent system upgrades are unlikely to occur. (AGA, No 150 at 4 and Atlanta Gas Light Co., No. 178 at 2).

Alagasco stated that the ability of gas water heaters to deliver outstanding economy, performance and environmental benefits is dependent on adequate margins of error in critical subsystems like venting, gas piping, combustion air and clearances. The overall utility of gas water heating is a function of proper installation. (Alagasco, No. 162 at 1). The New England Gas Association and Atlanta Gas Light Co. believe increased gas water heater efficiency from improved flue loss efficiency can lead to increased condensation and chimney degradation. (New England Gas Association, No. 139 at 2–3 and Atlanta Gas Light Co., No. 178 at 2). The NYSEB, National Propane Gas Association, Atlanta Gas Light Co, and Southern California Gas Co. state that DOE's proposal reduces the margin of error for installations of gas water heaters in retrofits. The National Propane Gas Association adds that existing vent systems are more likely to develop condensate problems and vent failures. (NYSEB, No. 164 at 1, National Propane Gas Association, No. 165 at 2, Atlanta Gas Light Co., No. 178 at 1; and Southern California Gas Co., No. 181 at 2).

ACEEE and OOE claim that there should be no safety concern at 78 percent RE because the Talbert study for GTI found that a single walled vent connector is acceptable at flue-loss efficiencies (FLE) up to 80 percent and 78 percent RE is equivalent to 79.75 percent FLE. (ACEEE, No. 170 at 3 and OOE, No. 174 at 2).

DOE did not raise the RE enough to create a safety concern if the venting system is correctly installed. DOE used the data from the GTI reports to estimate the impacts of 78 percent RE gas water heaters on venting systems. At 78 percent RE the flue loss efficiency is still below 80 percent, the level at which condensation begins. Since the increased RE may reduce the margin of error, DOE's analysis accounts for the cost of Type B vent connectors in eleven percent of households and for chimney relining in eight percent of households. Type B vent connector is a double walled vent connector that reduces cooling of the flue gasses and is more corrosion resistant than steel vent pipe.

Additionally, the California Energy Commission (CEC) in its comments, provided data about the number of models of gas water heaters that have energy factors at 76 percent RE and above that would comply with the gas water heater standards in the proposed rule. (The CEC maintains its own database of gas water heaters.) There are 170 distinct models of gas water heaters in the CEC database. A distinct model is a ''discreet combination of manufacturer, input, volume, energy factor and recovery efficiency.'' Of these, 51 models or 30 percent of all distinct models have a RE of 76 or 77 percent. Furthermore, there are nearly an equal number of natural gas and propane gas water heaters in this category. (CEC, No. 171 at 3 and Attachment A). Since gas water heaters with a RE below 78 percent do not pose any safety threat and 30 percent of the models that can meet the standard are in this group, installers will have choices among lower RE models in those applications where there may be safety concerns. Therefore, DOE does not believe there is any application that will have a safety problem if the correct type of water heater and the proper installation procedures are followed.

2. *NFGC Venting Tables.* Bradford White claims the venting tables were developed around water heaters with a RE of approximately 75 percent. (Bradford White, No. 108 at 1–2). Southern Gas Association believes increasing RE to 78 percent would require retesting water heaters and rewriting the current venting tables because it claims the tables were based on 76 percent RE. (Southern Gas Association, No. 152 at 4). Battelle claims increasing RE to 78 percent will require a revision to the current venting tables. (Battelle, No. 127 at 26–27). GTI and Southern California Gas Company believe that DOE cannot make accurate cost estimates until venting codes are revised. (GTI, No. 141 at 3 and Southern California Gas Company, No. 181 at 2).

The NFGC does not limit its venting tables to any specific gas water heater recovery efficiency. The NFGC venting tables are based on specific conditions for each application such as water heater location and common venting with a furnace. We do agree with Battelle that the NFGC should revisit its venting tables and make whatever revisions are necessary to account for potential increases in recovery efficiencies. We also note that there are 37 models of gas water heaters with a recovery efficiency of 76 percent listed in the GAMA directory which can meet the standard levels adopted in today's rule. On that basis, we conclude there will be designs which can meet the new standard with 76 percent RE.

3. *Type B Vent Connectors.* GAMA and Bradford White claim each water heater manufacturer will change the installation instructions to require Type B vent connectors for all installations. Bradford White claims manufacturers will design to 80 percent RE in order to satisfy a 78 percent RE level. (GAMA, No. 117 at 2 and Bradford White, No. 108 at 1–2). Dominion claims DOE does not completely incorporate the additional cost for Type B vent connectors. (Dominion, No. 145 at 6). GTI states that DOE relied too heavily on data from an area of the country with atypical weather conditions. (GTI, No. 141 at 3) Battelle claims that increasing

RE to 78 percent will require Type B vent connectors in the 75 percent of installations that currently do not have them, which will add to the installed cost. (Battelle, No. 127 at 26–27) The New England Gas Association claims a majority of homes in New England are older with masonry chimneys which could require Type B vent connectors and chimney relining costing as much as $800. (New England Gas Association, No. 139 at 2–3).

ACEEE claims DOE overestimated the number of homes needing Type B vents at 78 percent RE because the AVISTA data applies to climates with 7000 heating degree days (HDDs) and the NFGC requires Type B vents in unconditioned spaces. (ACEEE, No. 170 at 2). The CEC summarizes its database of gas water heaters to show the number of models of gas water heaters with recovery efficiencies from 76 percent to 85 percent. There are 170 models which currently meet the standards. CEC also shows whether a vent connection modification or masonry chimney relining is needed. This data summary shows that a Type B vent connector is not needed until RE gets above 83 percent, and chimney relining is sometimes needed when RE gets above 78 percent. It is interesting to note there are 66 models or 39 percent of gas water heaters with recovery efficiencies at or below 78 percent which currently meet the standard and which do not need Type B vent connectors or chimney relining. (CEC, No. 171 at 3).

DOE does not agree manufacturers will specify that all installations with 78 percent RE gas water heaters will require Type B vent connectors. This is not current practice with gas water heaters with RE greater than 76 percent. Manufacturers have relied on the NFGC venting tables, and we believe they will continue to do so. We believe manufacturers should advise installers to use Type B vent connectors in climates where there are more than 5,000 HDD or some reasonably conservative level of heating degree days, and otherwise follow local codes and the NFGC requirements.

DOE uses HDD as an indicator for determining where venting systems may be subject to damage from the amount of time vent connectors may have condensate on their inside surfaces. This indicator considers both the effect of time and temperature. We use 5,000 HDD as a conservative approach since no incidence of vent system failures is associated with the installation of high efficiency gas water heaters in the Northwest, even in climates as cold as or colder than 7,000 HDD.

Given that there are 66 models of gas water heaters with RE at or below 78 percent, DOE believes a consumer has a choice between a lower RE and a higher RE with a Type B vent connector. At the lower RE, the consumer can continue to use a single wall vent connector whereas, at the higher RE levels, a consumer would be advised to use a Type B vent connector and/or chimney relining in those climate areas where condensation in the venting system is a concern.

4. *Vent System Costs.* AGA commented that DOE has underestimated the frequency of needed venting system upgrades. (AGA, No. 150 at 3). APGA claims DOE has underestimated venting costs. (APGA, No. 167 at 2). ACEEE claims DOE's cost for vent installations should not include a factor for the fraction of homes with gas water heaters. (ACEEE, No. 170 at 2).

DOE believes we have accounted for the installation costs associated with higher RE gas water heaters. We used installers' estimates to calculate the cost of installing Type-B vent connectors and to determine the cost to reline masonry chimneys. These estimates are slightly higher than the GTI estimates. Using information from comments and from an AGA survey in a GTI report, we estimated that eleven percent of households with gas-fired water heaters in regions with over 5,000 HDDs would need Type-B vent connectors for 78 percent RE gas-fired water heaters. (GRI–91/0298). DOE determined a cost of $134 for Type-B vent connectors based on the replacement market and installers' cost estimates for a typical installation. We also estimated that masonry chimney relining would cost $795 for eight percent of the households. This is nearly the same cost ($800) for chimney relining given by the New England Gas Association in its comments. See Appendix D–3 in the TSD.

DOE did not include a factor for the fraction of homes with gas water heaters in the vent installation cost calculation. The factor used in the vent installation cost calculation included the fraction of all homes with gas water heaters in the U.S. that are in the Northeast or Midwest. DOE was not double counting the number of gas water heaters as ACEEE states.

5. *Direct Vent Applications.* Dominion claims DOE does not account for the decreased vent length a 78 percent RE gas water heater will have for direct vent equipment. (Dominion, No. 145 at 6).

Dominion is correct; however, DOE notes this equipment accounts for less than two percent of the market. Only a small fraction of this market would be installed at the maximum length of vent allowed. This tiny fraction of the market could be served by a product that has not used the improved flue baffle to meet the standard or by a power vented unit.

B. Electric Water Heater Ratings

Issues concerning the efficiency ratings of electric water heaters with energy factors greater than 0.91 were raised in the workshops that the Department conducted prior to the proposed rule. Based on the Department's review of the GAMA certification test program, the Department noted the possibility that high efficiency electric water heaters, *i.e.,* with manufacturer rated energy factors greater than 0.91 EF, were overrated. Several stakeholders have requested that DOE take specific actions to avoid any future overrating.

ACEEE is concerned that manufacturers may be overrating electric water heaters and if this practice continues, some of the energy savings of the new standard will be lost. ACEEE stated that the apparent overrating affects not only the standards program, but also the efficacy of utility demand side management programs. (ACEEE, No. 170 at 1).

DOE has conducted a certification review of the five major water heater manufacturers and has found that there are incorrect energy factor ratings reported in the GAMA directory. All five major manufacturers use GAMA as their third party representative. Therefore, the GAMA directory contains manufacturers' certified ratings. We also found violations of DOE's record keeping requirements at several manufacturers. The Department has requested these manufacturers correct their ratings on these high efficiency electric water heaters, and the manufacturers have agreed. The corrected ratings will be published in the December, 2000 GAMA directory.

Some manufacturers' testing appears to show that some 50 gallon electric water heaters reach a 0.93 EF level. DOE acknowledges that recent tests of high efficiency electric water heaters at Intertek Testing Services (ITS) have shown several models with 0.92 or 0.93 EF. This testing was ordered by GAMA on a sample of four electric water heaters for each model. However, NIST has tested several of these models and has not been able to replicate the ITS test results.

Testing of 11 high efficiency electric water heaters at NIST has not demonstrated that electric water heaters can achieve a 0.93 EF. The difference

between efficiency ratings listed in the GAMA Directory and NIST measured efficiencies ranged from 0.012 EF to 0.052 EF for an average difference of 0.029 EF. In other words, the average of the 11 tanks NIST tested was nearly 0.03 EF below the rated values from the manufacturer. We are continuing to evaluate additional units and the testing performed to understand why the NIST and ITS test results do not agree.

There may be numerous reasons why we cannot confirm the higher ratings. There could be an improper application of the DOE test procedure due to differences in interpretation of the requirements or due to selection of a different option for making some of the measurements. There could be problems in the sampling procedures used by GAMA or the manufacturers to obtain their sample tanks for testing. (The test procedure requires tanks for testing be representative of production.) There could be some design improvements in some of these high efficiency models that DOE did not consider in its analysis. Therefore, at this time we cannot determine if the difference in our testing and the manufacturers' rating is real or not.

C. Measured vs. Rated Volume

CEC, NWPPC, and ACEEE commented that DOE should use the measured volume of water heaters because manufacturers, by using the rated volume, can gain a 0.01 EF improvement by maximizing the tolerances allowed by UL (+/−10 percent for electric) or by ANSI Z21.10.1 (+/−5 percent for gas). (CEC, No. 171 at 4–5; NWPPC, No. 163 at 3; and ACEEE, No. 170 at 16–17). GAMA referred to its July 18, 1994, comments on the 1994 proposed rule, where it addressed this same issue, and suggested that DOE should continue to use rated volume because that is the basis of the extant standards set by NAECA. (GAMA, No. 160 at 5).

EPCA, as amended, by the 1987 NAECA amendment, uses the rated volume as the coefficient in the standard levels. Our analysis uses the rated tank volume to determine the performance of the design options. Therefore, DOE will continue to use the rated volume in its water heater standards.

D. Effective Date of Standards

Several stakeholders have taken the position that the effective date of today's rule should be five years from its publication. EPCA prescribes efficiency standards for water heaters manufactured on or after January 1, 1990, and requires two subsequent rulemakings to consider amendments to the water heater efficiency standards. The statute provides in effect that any amendment to the standards that results from the first rulemaking shall be effective three years after publication. For the second rulemaking cycle, to amend the standards then in effect, the statute provides an effective date five years after publication.

GAMA claims today's Final Rule should be effective 5 years after publication. GAMA believes the three year lead-time for the effective date applies only to a Final Rule published by January 1, 1992. (GAMA, No.113 at 2). Southern Co. and Dominion state that NAECA requires a 5 year implementation time. Southern Co. also suggests that refrigerant availability will become more manageable with two additional years. (Southern Co., No. 142 at 3 and Dominion, No. 145 at 3). On the other hand, ACEEE asserts the first revision has a three year effective date and since today's rule is the first amended standard, the three year effective date applies. ACEEE states this is the way the NAECA revisions have been interpreted. (ACEEE, No. 170 at 10–11).

DOE interprets the language in EPCA at 42 U.S.C. 6295(e)(4)(A) to mean that, where the schedule specified in the statute for the two required rulemakings has not been met, the first amendment to the standards should be effective three years after publication, and the second amendment to the standards, five years after publication. We believe that this interpretation is the one most consistent with the statutory scheme. DOE has the authority and responsibility to complete the two cycles of rulemakings mandated by Congress in the statute. We recognize that DOE has failed to implement the rulemaking schedule in EPCA, but we see no reason why such failure would justify a departure from the time periods the statute contemplates for an amendment to the standards to become effective. We believe we are adhering to the statutory scheme by making the effective date of today's rule, the first amended standard, conform to the amount of time the statute designates for the effective date after publication of the final rule. As ACEEE pointed out at the public hearing on June 20, 2000, in all the rulemakings where DOE has missed dates, it has used such an approach. (Transcript, No. 120FF at 295–296).

Moreover, the statute contemplated that the original efficiency standards specified in EPCA could be in effect for only five years before an amended standard would take effect. To date, the original standards have been in effect for 11 years. By making today's new standards effective in three years, it will be 14 years, not 5 years, before amended standards become effective. A five-year effective date would lengthen this period to 16 years, further delaying the benefits new standards will provide to consumers and the nation. Furthermore, the water heater industry never had an expectation that the original standards would be in effect so long. The original standards will have been in place 9 years longer than envisioned by the statute. For these reasons as well, a three-year effective date for today's rule is more consistent with the statutory scheme than the five-year period advocated by some commenters.

Accordingly, today's rule will become effective three years after the date of publication as originally proposed.

E. Water Heater Models Affected

GAMA commented that if the proposed standard levels were adopted, few current models listed in the GAMA directory would survive, and only a small percentage of current residential water heater shipments meet the proposed levels. (GAMA, No. 160 at 5). GAMA stated that 26 percent of the current models of gas and electric water heaters can meet the proposed standard. This number drops to 18 percent if only 30, 40 and 50 gallon models are considered. (GAMA, No. 176 at 1). Dominion suggests DOE should identify existing equipment that will meet the revised standards and designs it uses. Additionally, Dominion claims DOE should evaluate these models and provide data verifying the achievability of the proposed minimum efficiency standards using design options identified for the recommended standard level. (Dominion, No.145 at 3). The CEC claims that, based on its directory of certified water heaters, of the 170 models of gas water heaters listed, 51 meet the proposed standard. (CEC, No. 171 at 2). DOE's review of the April, 2000 GAMA Directory shows 37 gas-fired water heater models that could meet the proposed standards.

DOE recognizes that standards will eliminate current manufacturers' offerings which would affect the individual firms and industry's net present value. These effects are captured in the Manufacturer Impact Analysis. Furthermore, DOE rejects Dominion's comment that the Department should identify technologies that can be used to meet the standard. The standard is a performance standard, not a design standard. DOE's analysis identified a path, with different insulation blowing agents, which could be used to meet the standard. However, DOE believes there

are a number of approaches individual manufacturers may elect to pursue to meet the standard. It is not up to the Department to mandate any one approach.

F. Instantaneous Water Heaters

Controlled Energy Corporation (Controlled Energy) claims instantaneous water heaters should not be included in the Final Rule without further analysis. (Controlled Energy, No. 125 at 1). The CEC claims NAECA clearly includes both storage and instantaneous water heaters, and DOE does not have any option to exempt this type of water heater since that would be equivalent to a reduction of energy efficiency. (CEC, No. 171 at 4). GAMA claims DOE should clearly state the proposed standards do not apply to instantaneous water heaters. GAMA claims the minimum energy factor for instantaneous water heaters has been inadvertently raised without any discussion or any analysis. Currently, instantaneous water heaters must meet a minimum of 0.62 EF. (GAMA, Transcript, No. 120 at 38 and 177–178.).

Since instantaneous water heaters make up a very small fraction of one percent of the water heater shipments, DOE did not include them in its analysis. Although the statutory definition includes instantaneous water heaters within the general definition of water heater, the statute does distinguish between storage and instantaneous water heaters based on input rate. The DOE regulations at 10 CFR 430 Subpart B, Appendix E(1.7), distinguish between the definition of storage water heaters and instantaneous gas water heaters by BTU input rates and storage capacity. However, EPCA, as amended, provides the same standards for instantaneous and storage water heaters. There is, moreover, a provision in EPCA, as amended, in Section 325(q), 42 U.S.C. 6295(q) for establishing a new class if the capacity or performance related features of a product justifies it. The volume ranges of storage water heaters are much larger and do not include the volumes of instantaneous water heaters as defined in DOE's regulation. Since DOE's current regulations use the capacity and input rate to define instantaneous water heaters, DOE is establishing a new class for instantaneous gas and electric water heaters and we will leave the standards at the current levels.

G. Fuel Switching

The New England Gas Association (NEGA) and Laclede Gas claim higher first costs for gas water heaters will encourage builders in new homes and consumers replacing gas water heaters to switch to electric water heaters. Laclede claims this is especially true when a consumer faces a $433 chimney relining cost. (NEGA, No. 139 at 3 and Laclede Gas, No. 148 at 3). AGA claims DOE needs to include a detailed analysis of fuel switching among gas and electric utilities in the environmental impacts analysis. (AGA, No. 150 at 10). OOE claims that the incremental costs for a 0.62 EF gas water heater are trivial compared to the costs of acquiring natural gas service where it does not exist, to buy a gas furnace, and in some cases to install a duct system where one does not exist. (OOE, No. 174 at 2).

The LCC analysis is one of the seven factors DOE is required by statute to consider when it makes its decision on standard levels. Included in the LCC analysis are the installed costs of electric and gas water heaters. These costs provide an indication of whether a particular standard level would cause fuel switching. Furthermore, in the NES, DOE estimates the shipments of each fuel type. These results are shown in Chapter 11 of the TSD. For example, DOE estimates that the standards adopted today will increase the total shipments of gas water heaters by 8 million and decrease the total shipments of electric water heaters by 7 million over the next 26 years. DOE has taken fuel switching into account in reaching its final decision. No further analysis is required.

V. Analytical Results and Conclusion

The choice of insulation blowing agent is critical to achieving high water heater efficiency at a reasonable cost. In the proposed rule, DOE based its analysis on HFC–245fa and water blown insulation. There were many comments from manufacturers, utilities and the DOJ that a standard based on HFC–245fa alone could be anti-competitive due to its single source of supply. There were also issues about venting system margin of error, size constraints for water heaters with thicker insulation, and the energy factor overrating of high efficiency electric water heaters. To determine whether there are alternative approaches to meet the standard level adopted by today's Final Rule, we evaluated two other blowing agents, HFC–134a and cyclopentane, that the proposed rule identified as potential alternatives for the HCFC–141.65 FR 25042, 25049–50 (April 28, 2000). This issue is briefly described in Section II, General Discussion, ''Impact of Lessening of Competition'' in today's rule.

We performed an engineering analysis on both of these alternative insulation blowing agents to determine if the standard could be met with these blowing agents and to estimate the relative manufacturer and consumer cost impacts. HFC–134a is a blowing agent that is less expensive per pound than HFC–245fa, but it also is ten percent less effective as an insulation material. Cyclopentane is a very inexpensive blowing agent, has similar insulation effectiveness to HFC–245fa, but it is flammable and would require expensive modifications to production facilities to meet the OSHA safety regulations. The engineering analyses for HFC–134a and cyclopentane show that water heater cost and performance is within two percent of the results for HFC–245fa. See Table 1 in Section II, General Discussion, ''Impact of Lessening of Competition.'' Therefore, DOE believes that manufacturers have a choice among at least three blowing agents, water, HFC–134a and cyclopentane. When designing products to meet the new standard, manufacturers will be faced with a range of choices to consider. For example, water heaters with cyclopentane-blown foam insulation have lower material costs, as compared to HFC–245fa, however, the capital investment is significantly greater. In this scenario, they may weigh the investment costs and material costs to determine the approach that is cost-effective for them. Similarly, they may weigh either HFC–245fa and HFC–134a with water-blown foam. The HFC-blown foams have higher material costs, compared to water, but better insulation performance. Alternatively, at the standard levels adopted today, some manufacturers may find a design using other blowing agents or blends of these materials to be more cost effective. In summary, DOE believes there are a number of insulation blowing agents to meet today's standards. Manufacturers will, DOE believes, weigh the cost and efficiency trade-offs, as well as other factors, in selecting the insulation blowing material to use.

A. Economic Impacts on Consumers

1. *Life-Cycle-Cost.* To evaluate the economic impact on consumers, we conducted an LCC analysis for gas and electric water heaters. We included data and information from comments pertaining to installation costs for size constraints on fourteen percent of electric water heaters. This accounts for extra costs that consumers in small apartments and homes may have to pay for water heaters with thicker insulation. We also included

information and costs for drip pans from the comments on gas water heaters. Table 2 shows the average LCC savings and percent of households benefitting for each of the trial standard levels for each fuel class. The average LCC savings for trial standard levels one, two and three are positive for gas-fired and electric water heaters with the HFC–245fa blowing agent. We do not show oil-fired water heaters because we are not making any revisions to the standards for that class.

Where LCC savings are positive for electric and gas-fired water heaters, the percent of households benefitting ranges from 59 percent to 90 percent for the trial standard levels analyzed. At trial standard level four, where the LCC savings are negative, 18–26 percent of households with electric or gas-fired water heaters will benefit.

TABLE 2.—LIFE-CYCLE-COST SAVINGS AND PERCENT BENEFITTING

[HFC–245fa blown insulation]

Trial standard level	Design options	Percent benefitting	Life-cycle cost savings ($)
1	Electric: Heat Traps + Tank Bottom Insulation	90	36
	Natural Gas: Heat Traps + Flue Baffles (78 % RE) + 2 Inch Insulation	78	30
	LP Gas: Heat Traps + Flue Baffles (78 % RE) + 2 Inch Insulation	89	97
2	Electric: Heat Traps + Tank Bottom Insulation + 2 Inch Insulation	68	32
	Natural Gas: Heat Traps + Flue Baffles (78 % RE) + 2.5 Inch Insulation	64	11
	LP Gas: Heat Traps + Flue Baffles (78 % RE) + 2.5 Inch Insulation	78	77
3	Electric: Heat Traps + Tank Bottom Insulation + 2.5 Inch Insulation	59	23
	Natural Gas: Heat Traps + Flue Baffles (78 % RE) + 2 Inch Insulation	78	30
	LP Gas: Heat Traps + Flue Baffles (78 % RE) + 2 Inch Insulation	89	97
4	Electric: Heat Traps + 3 Inch Insulation + Plastic Tank	26	−82
	Natural Gas: Heat Traps + Flue Baffles (80 % RE) + 3 Inch Insulation + Side Arm Heater + Plastic Tank + IID.	18	−244
	LP Gas: Heat Traps + Flue Baffles (80 % RE) + 3 Inch Insulation + Side Arm Heater + Plastic Tank + IID.	37	−122

Another LCC analysis we conducted is the Consumer Subgroup analysis. This analysis examines the economic impacts on different groups of consumers by estimating the average change in LCC and by calculating the fraction of households that would benefit. We analyzed the potential effect of standards for households with low income levels and for senior-only households, two consumer subgroups of interest identified by DOE and supported by stakeholders. We present the results of the analysis in Table 3.

TABLE 3.—CONSUMER SUBGROUP LCC SAVINGS AND PERCENT OF HOUSEHOLDS BENEFITTING

Product class	Trial standard level	Total sample Delta LCC		Low-income Delta LCC		Senior-only Delta LCC	
		Ave. (1998$)	Fraction of population benefitting (%)	Ave. (1998$)	Fraction of population benefitting (%)	Ave. (1998$)	Fraction of population benefitting (%)
Electric	1	36	90	35	90	39	92
	2	32	68	28	67	39	72
	3	23	59	7	54	33	64
	4	−82	26	−105	22	−60	31
Natural Gas	1	30	78	30	78	34	82
	2	11	64	−1	55	17	68
	3	30	78	30	78	34	82
	4	−244	18	−268	15	−194	20
LPG	1	97	89	110	93	108	92
	2	77	78	88	80	87	80
	3	97	89	110	93	108	92
	4	−122	37	−53	37	−34	38

The two consumer subgroups show a similar trend in average LCC savings and percent of sample households benefitting as the total sample of households. In the case of electric water heaters, the low income consumer group has less benefit at all trial standard levels than the total sample of households while the senior-only consumer group has greater benefit at all trial standard levels than the total sample of households. In households with natural gas-fired water heaters, low income households have the same benefit for trial standard levels 1 and 3 and less benefit for trial standard levels 2 and 4 than the total sample of households. The senior-only households with natural gas water heaters have greater benefits at all trial standard levels than the total sample of households. Both low income and senior-only households have greater benefits at all trial standard levels with propane gas.

We have noted the LCC savings for the senior-only subgroup are similar to those of the general population. Since the elderly use 30 percent less hot water on average than the general population, one would expect their costs to be lower, and as a result, the LCC effect to be different. However, the standby

losses of water heaters, which are not affected by hot water usage, are the same for the elderly and the general population. Therefore, since most of the design options considered affect standby losses and not water heating efficiency, we expect the distribution of LCC impacts for the elderly to be similar to the general population, which they were.

2. *Median Payback.* A part of the LCC analysis is the payback analysis. The LCC payback analysis considers all of the design option combinations for each fuel type and calculates a payback for each RECS household. We report the median payback from the distribution of paybacks for each trial standard level in Table 4. The median payback is the median number of years required to recover, in energy savings, the increased costs of the efficiency improvements.

TABLE 4.—MEDIAN AND TEST PROCEDURE PAYBACK (YEARS)

[HFC–245fa blown insulation]

Trial standard level	Design options	Median payback	Test procedure payback [1]
1	Electric: Heat Traps + Tank Bottom Insulation	2.9	1.5
	Natural Gas: Heat Traps + Flue Baffles (78 % RE) + 2 Inch Insulation	3.6	3.4
	LP Gas: Heat Traps + Flue Baffles (78 % RE) + 2 Inch Insulation	2.8	
2	Electric: Heat Traps + Tank Bottom Insulation + 2 Inch Insulation	6.5	3.7
	Natural Gas: Heat Traps + Flue Baffles (78 % RE) + 2.5 Inch Insulation	5.0	4.9
	LP Gas: Heat Traps + Flue Baffles (78 % RE) + 2.5 Inch Insulation	4.0	
3	Electric: Heat Traps + Tank Bottom Insulation + 2.5 Inch Insulation	7.4	5.2
	Natural Gas: Heat Traps + Flue Baffles (78 % RE) + 2 Inch Insulation	3.6	3.4
.			
	LP Gas: Heat Traps + Flue Baffles (78 % RE) + 2 Inch Insulation	2.8	
4	Electric: Heat Traps + 3 Inch Insulation + Plastic Tank	14.4	9.8
	Natural Gas: Heat Traps + Flue Baffles (80 % RE) + 3 Inch Insulation + Side Arm Heater + Plastic Tank + IID.	12.1	10.5
	LP Gas: Heat Traps + Flue Baffles (80 % RE) + 3 Inch Insulation + Side Arm Heater + Plastic Tank + IID ..	8.3	

[1]Electric—50 gallon; Gas—40 gallon

3. *Rebuttable Presumption.* The Act states that if the Department determines that the payback period is less than three years, as calculated with the DOE test procedure, there shall be a rebuttable presumption that such trial standard level is economically justified. In Table 4, we list the payback periods by fuel type (product class) and trial standard levels. The Act further states that if this three year payback is not met, this determination shall not be taken into consideration in deciding whether a standard is economically justified. Section 325(o)(2)(B)(iii), 42 U.S.C. 6295(o)(2)(B)(iii).

Only electric water heaters at trial standard level one satisfy the rebuttable presumption. Electric water heaters with heat traps and insulated tank bottoms have a 1.9 year payback calculated under the test procedure. There are no trial standard levels for natural gas water heaters that have a payback of three years or less.

4. *Economic Impact on Manufacturers.* We performed an MIA to determine the impact of standards on manufacturers. The complete analysis is in Chapter 13 of the TSD. In general, manufacturers stated they would be able to manufacture any of the design options with heat traps, thicker insulation, tank bottom insulation on electric and improved flue baffles on gas-fired water heaters. None of the manufacturers indicated they would leave the industry or go out of business as a result of standard levels that would require energy factors below plastic tanks or side-arm heaters (*i.e.,* trial standard levels one through three).

We conducted detailed interviews with four of the five major water heater manufacturers. (The fifth manufacturer declined to participate in our second interviews.) The five together supply more than 99 percent of the U.S. residential water heater market. The interviews provided valuable information used to evaluate the impacts of an amended standard on manufacturers' cash flows, manufacturing capacities and employment levels.

We analyzed the water heater industry using two business scenarios. The standards scenario represents the investments needed to meet the energy efficiency level of a trial standard level. The cumulative scenario includes the investments required for energy efficiency improvement, changes to a new blowing agent and the development and manufacture of a gas-fired water heater resistant to ignition of flammable vapors. Additionally, we examined the ability of manufacturers to recover the investments required for each of the scenarios and trial standard levels.

The potential value of the water heater industry, represented by the Industry Net Present Value (INPV) ($325 million in 1998 dollars), is directly related to the manufacturers' price to the dealer/distributor. Since all five of the major manufacturers produce both gas-fired and electric water heaters, the industry is highly competitive in terms of manufacturer's pricing. Manufacturer prices are expected to increase from the current average cost to the dealer/distributor of $157 to a range of $187–292 for trial standard levels one through four. Based on comments from the interviews, we assume manufacturers will raise prices enough to recover the costs of materials, labor and transportation and 75 percent of their investment. If manufacturers increased water heater distributor prices slightly more, from $0.13 for trial standard level one to $2.00 for trial standard level four, they would recover all of their investment. Table 5 shows the results of the cash flow analysis with these assumptions.

TABLE 5.—MANUFACTURER IMPACT ANALYSIS

Trial std level	INPV ($ millions)	Change in INPV		Investment required ($ millions)
		(%)	($ millions)	
Standard Scenario, HFC–245fa blown insulation				
Base Case	325	0	0	0
1	317	−3	−8	33
2	310	−5	−15	60
3	310	−5	−15	59
4	268	−18	−57	229
Cumulative Scenario, HFC–245fa blown insulation				
Base Case	325	0	0	0
1	288	−12	−37	149
2	281	−14	−44	176
3	281	−14	−44	176
4	239	−27	−86	345

From Table 5, we note energy efficiency standards could result in losses of industry net present value from about $8 million to $57 million (3–18%), while requiring investments of $33 million to $229 million. However, even if DOE did not revise energy efficiency standards, other Federal regulatory actions that will take effect on or before January 1, 2003, will result in a $29 million loss (9%) in industry NPV. This loss exceeds any of DOE's trial standard levels except level four. As required by the Process Rule, 10 CFR Part 430, Subpart C, Appendix A 10(g)(1), DOE considered the cumulative impacts of other Federal regulatory actions on the trial standard levels, including the phase out of HCFC–141b and the CPSC initiative to prevent the ignition of flammable vapors on gas-fired water heaters. These cumulative losses range from $37 million to 86 million. The investments to prevent ignition of flammable vapors and for new blowing agents are $116 million. The investments for cumulative regulations are potentially large given the current after tax profitability of the water heater industry, estimated to be $45 million (1998) on revenues of $1.5 billion.

Based on DOE's interviews, manufacturers expect little impact on manufacturing capacity and expect to meet future demand since the revised standards are not based on side-arm gas-fired water heaters and plastic tank electric units. Currently, the U.S. industry has far more manufacturing capacity than the domestic market can absorb. Manufacturers estimated the industry is operating at approximately 80 percent of total capacity. Due to the phase-out of HCFC–141b insulation blowing agent and a requirement for a gas-fired water heater resistant to ignition of flammable vapors, it is likely that nearly every product line would have to be redesigned, retested and re-certified. Several manufacturers indicated a preference to retool for new blowing agents, energy-efficiency standards and flammable vapor-resistant designs at the same time, to avoid redundant efforts and limit costs.

We also used the manufacturers' interviews to assess employment impacts due to an amended energy efficiency standard. Manufacturers expected the impact of new blowing agents and flammable vapor resistant designs on labor to be minimal, neither increasing nor reducing employment levels by more than a few employees. Since the revised efficiency levels do not require the adoption of side arm heaters or plastic tanks, manufacturers do not anticipate significant changes in employment levels or training requirements. Additionally, we believe market growth of 2.5 percent per year for new homes and modest productivity gains ensure current employment levels for the foreseeable future. In our analysis, yearly water heater shipments range from 9.7 million in 2000 to 19.2 in 2030. Furthermore, a replacement market that increases by about 1/10th of the new home market each year ensures future demand.

B. Significance of Energy Savings

The Act prohibits the Department from adopting a standard for a product if that standard would not result in ''significant'' energy savings. Section 325(o)(3)(B), 42 U.S.C. 6295(o)(3)(B). While the term ''significant'' is not defined in the Act, the U.S. Court of Appeals, in *Natural Resources Defense Council* v. *Herrington,* 768 F.2d 1355, 1373 (D.C. Cir. 1985), concluded that Congressional intent in using the word ''significant'' was to mean ''non-trivial.'' The energy savings for all of the trial standard levels considered in this rulemaking are non-trivial and therefore we consider them ''significant'' within the meaning of Section 325 of the Act.

1. *National Energy Savings.* To estimate the energy savings through the year 2030 due to amended standards, we compared the energy consumption of water heaters in the 2004 base case to the energy consumption of water heaters complying with the trial standard levels. DOE calculates these energy savings at the source using the NEMS–BRS distribution and generation losses. Table 6 shows these results for water heaters with HFC–245fa blown insulation.

TABLE 6.—SOURCE ENERGY SAVINGS WITH HFC–245FA BLOWN INSULATION (QUADS)

	Trial std 1	Trial std 2	Trial std 3	Trial std 4
Total quads saved	3.33	4.47	4.61	11.46
Total exajoules saved	3.51	4.72	4.86	12.09

All of the trial standard levels considered in this rulemaking have significant energy savings, ranging from 3.3 quads (3.5 Exajoules (EJ)) to 11.5 quads (12.1 EJ), depending on the trial standard level.

2. *National Net Present Value (NPV).* Additionally, we analyzed the economic impact on the nation to the year 2030. This is an NPV analysis using the AEO 2000 reference energy prices. Table 7 lists the NPV for HFC–245fa blown insulation. The NPV considers the combined discounted energy savings minus increased consumer costs of the four fuel types of equipment at a particular trial standard level. We base this calculation on all expenses and savings occurring between 2004 and 2030.

TABLE 7.—NATIONAL NET PRESENT VALUE

Trial standard level	NPV—HFC–245fa ($ billions)
1	1.20
2	−0.13
3	2.02
4	−24.94

The national NPV is positive for trial standard levels one and three and essentially 0 for trial standard level 2. In this analysis, a positive NPV means that the estimated energy savings are greater than the increased costs due to standards. Among the trial standard levels analyzed, trial standard level three has the highest NPV.

C. Lessening of Utility or Performance of Products

None of the trial standard levels reduces the performance of water heaters. Generally, the trial standard levels reduce heat losses and improve heat exchanger effectiveness. These changes improve energy and water heating performance and may increase the amount of water available in one hour, *i.e.,* the first hour rating.

However, to reduce heat losses, it may be necessary to use thicker insulation. At the trial standard level adopted in today's rule, DOE contemplates insulation thicknesses of 2–2.5 inches versus the 1–2 inches in common use today. This extra thickness of insulation will make water heaters larger and more difficult to squeeze into tight spaces when replacing a water heater. DOE added costs for tempering valves for a number of gas and electric water heaters where we believed there could be some loss of utility due to the need to downsize a water heater. Tempering valves allow the consumer to increase the setpoint, thus increasing the amount of cold water used to provide a comfortable and safe usable water temperature. The addition of cold water increases the first hour rating. Therefore, the consumer will not lose any utility or performance.

To eliminate the possibility of any water heater models becoming unavailable as a result of thicker insulation, we created a new class for tabletop water heaters based on the criteria in Section 325(q), 42 U.S.C. 6295(q) in the Act. These issues are discussed in Section II. General Discussion, ''Lessening of Utility or Performance of Products.''

D. Impact of Lessening of Competition

The Act directs the Department to consider any lessening of competition that is likely to result from standards. It further directs the Attorney General to determine the impact, if any, on competition likely to result from such standard and transmit such determination, not later than 60 days after the publication of a proposed rule to the Secretary, together with an analysis of the nature and extent of such impact. Section 325(o)(2)(B)(i)(V), 42 U.S.C. 6295(o)(2)(B)(i)(V).

In order to assist the Attorney General in making such a determination, the Department provided the Attorney General with copies of the Proposed Rule and the Technical Support Document for review. In a letter responding to the Proposed Rule, the Department of Justice (DOJ) found only one area of concern regarding any lessening of competition. The area of concern involves the blowing agent for the foam insulation and the possibility that only one blowing agent, HFC–245fa, could be used and that it is a patented product with only one supplier. This situation led DOJ to conclude ''that the proposed standards could have an adverse affect on competition because water heater manufacturers may have to use an input that will be produced by only one source.'' (DOJ, No. 143 at 1).

DOE examined other possible blowing agents and concluded that at least four blowing agents are available to use in meeting the standards adopted in today's Final Rule. Therefore, the Department concludes there will be little to no impact on competition. See Section II, General Discussion, ''Impact of Lessening of Competition'' for the complete discussion of this topic.

E. Need of the Nation to Save Energy and Net National Employment

1. *Environmental Impacts.* Enhanced energy efficiency improves the Nation's energy security, strengthens the economy and reduces the environmental impacts of energy production. The energy savings from water heater standards result in reduced emissions of CO_2 and NO_X and aids in addressing global climate change and reducing air pollution. At the standard levels analyzed, the actual cumulative emission reductions to 2030 range from 149–354 Mt for carbon equivalent, 175–459 thousand metric tons (kt) for NO_X, and −3 to −64 kt for SO_2. The large reductions in CO_2 and NO_X at all standard levels are a positive benefit to the nation. The small increases (negative reductions) in SO_2 are due to small increases in the number of oil-fired water heaters from our shipment forecasts. We show actual cumulative emissions savings from 2004–2030 in Table 8.

TABLE 8.—ACTUAL CUMULATIVE EMISSIONS REDUCTIONS THROUGH 2030

Emission	Trial std level 1	Trial std level 2	Trial std level 3	Trial std level 4
Carbon (Mt)	149	139	152	354

TABLE 8.—ACTUAL CUMULATIVE EMISSIONS REDUCTIONS THROUGH 2030—Continued

Emission	Trial std level 1	Trial std level 2	Trial std level 3	Trial std level 4
NO_X (kt)	175	215	273	459
SO_2 (kt)	** – 3	** – 11	** – 13	** – 64

** Results only include household SO_2 emissions reductions because SO_2 emissions from power plants are capped by clean air legislation. Thus, SO_2 emissions will only be negligibly affected by water heater standards.

The Department makes no effort to monetize the benefits of the actual emission reductions, but there may be time-related differences in the perceived value of the emissions depending on when they occur, as with monetized benefits that accumulate over time. Emission reductions that occur sooner are often more desirable than equivalent reductions that occur later. Like monetary benefits, the health, recreational and ecosystem benefits that result from emission reductions are often perceived to have a greater value if they occur sooner, rather than later. To the extent that the different trial standard levels have slightly different shipment distributions over time, some trial standard levels might have a slightly higher proportion of earlier emission reductions than another trial standard level.

To show the possible effect of the different timing patterns of the emissions, the Department is also presenting discounted emissions. We used the same seven percent discount rate for these calculations that we used for discounting monetized benefits. Since the discounted emission reductions in carbon shift slightly from trial standard level 3 to trial standard level 1, this indicates trial standard level 1 has a slight timing improvement in emission reductions. There is no similar shift in either the NO_X or SO_2 levels. We show the discounted cumulative emission savings from 2004–2030 in Table 9.

TABLE 9.—DISCOUNTED CUMULATIVE EMISSIONS REDUCTIONS THROUGH 2030

Emission	Trial std level 1	Trial std level 2	Trial std level 3	Trial std level 4
Carbon (Mt)	51	46	50	118
NO_X (kt)	53	67	90	131
SO_2 (kt)	** – 1	** – 3	** – 4	** – 17

** Results only include household SO_2 emissions reductions because SO_2 emissions from power plants are capped by clean air legislation. Thus, SO_2 emissions will only be negligibly affected by water heater standards.

2. *Net National Employment.* In the Process Rule, DOE committed to develop estimates of the employment impacts of revised standards in the economy in general. The standard adopted in today's rule will have a positive impact on employment. The results of the Department's analysis are shown in Chapter 15 of the TSD.

While both this input/output model and the direct use of Bureau of Labor Statistics (BLS) employment data suggest the revised water heater standards could increase the net demand for labor in the economy, the gains would most likely be very small relative to total national employment. For several reasons, however, even these modest benefits for national employment are in doubt:

- Unemployment is now at the lowest rate in 30 years. If unemployment remains very low during the period when the revised standards are put into effect, it is unlikely that the standards could result in any net increase in national employment levels.
- Neither the BLS data nor the input-output model used by DOE include the quality or wage level of the jobs. One reason that the demand for labor increases in the model may be that the jobs expected to be created pay less than the jobs being lost. The benefits from any potential employment gains would be reduced if job quality and pay are reduced.
- The net benefits from potential employment changes are a result of the estimated net present value of benefits or losses likely to result from the revised standards; it may not be appropriate to separately identify and consider any employment impacts beyond the calculation of net present value.

Taking into consideration these legitimate concerns regarding the interpretation and use of the employment impacts analysis, the Department concludes only that the proposed water heater standards are likely to produce employment benefits that are sufficient to offset fully any adverse impacts on employment in the water heater or energy industries.

F. Conclusion

1. *Comments on Standard Levels.* Several stakeholders made specific recommendations for standard levels during the workshops held prior to publication of the proposed rule or after publication of the proposed rule. We list these below to show the range of standard levels stakeholders believe are economically justified and technically feasible. In the formula for water heater standards, the letter ''V'' stands for rated volume as given in the statute.

The American Gas Association recommended EF =0.64—0.0019V for gas water heaters. (AGA, No. 110 at 2) ACEEE recommended EF =0.98—0.00132V for electric and EF =0.69—0.0019V for gas water heaters. (ACEEE, No. 71 at 9). The water heater manufacturer Bradford White recommended EF =0.94—0.0013V for electric, EF =0.65—0.0019V for gas and no change for oil-fired water heaters. (Bradford White, No. 108 at 7) The City of Palo Alto recommended EF =0.64—0.0019V for gas water heaters. (City of Palo Alto, No. 136 at 2) The Edison Electric Institute recommended EF =0.66—0.0019V for gas water heaters. (EEI, No. 105 at 3). The Electric Power Research Institute recommended EF =0.95—0.00132V for electric water heaters. (EPRI, No. 104 at 3). GAMA recommended EF =0.95—0.00132V for electric and EF =0.65—0.0019V for gas water heaters. (GAMA, No. 71 at 3 & 4). The Northwest Power Planning Council recommended EF =0.97—0.00132V for electric and EF =0.68—0.0019V for gas water heaters. (NWPPC, No. 163 at 4). The efficiency standards recommended in these comments are based on the

analysis for the proposed rule and other information available to these organizations making recommendations.

2. *Proposed Revised Standard.* Section 325(o)(2)(A), 42 U.S.C. 6295(o)(2)(A), of the Act specifies that any new or amended energy conservation standard for any type (or class) of covered product shall be designed to achieve the maximum improvement in energy efficiency which the Secretary determines is technologically feasible and economically justified. In determining whether a standard is economically justified, the Secretary must determine whether the benefits of the standard exceed its burdens. Section 325(o)(2)(B)(i), 42 U.S.C. 6295(o)(2)(B)(i). The amended standard must ''result in significant conservation of energy.'' Section 325(o)(2(B)(iii)(3)(B), 42 U.S.C. 6295(o)(B)(iii)(3)(B). The Secretary has eliminated the maximum technologically feasible levels for electric and gas-fired water heaters and has eliminated any revised standard levels for oil-fired water heaters based on the analysis in the proposed rule. All of the design options included in our analysis are technologically feasible since they are commercially available.

We consider the impacts of standards on gas and electric water heaters at each of four standard levels, beginning with the most efficient level, *i.e.,* standard level four. We then consider less efficient levels. Standard levels two and three are different combinations of efficiency levels for electric and gas water heater classes. For gas-fired water heaters, standard levels one and three are the same, though at lower efficiency than that found in standard level two. For electric water heaters, no standard levels are repeated and the efficiency of each succeeding standard level is higher. For oil fired water heaters, there are no changes from the current levels so this class is not shown but they were included in the analysis. By combining efficiency levels in this way, the Department is able to evaluate the impacts of different combinations of standard levels to make an informed decision on the merits of different efficiency combinations.

To aid the reader as we discuss the benefits or burdens of the trial standard levels we have included a summary of the analysis results in Table 10.

TABLE 10.—SUMMARY ANALYSIS RESULTS BASED ON HFC–245FA BLOWN INSULATION

	Trial Std 1	Trial Std 2	Trial Std 3	Trial Std 4
Total Quads Saved	3.	4.5	4.6	11.5
NPV ($Billion)	1.2	−0.1	2.0	−24.9
Emissions:				
Carbon Equivalent (Mt)	149	139	152	354
NO_X (kt)	175	215	273	459
SO_2 (kt)	**−3	**−11	**−13	**−64
Cumulative Change in INPV ($ Million)	−8	−15	−15	−57
Life Cycle Cost ($):				
Electric	36	32	23	−82
Natural Gas	30	11	30	−244
Propane Gas	97	77	97	−122

** Results only include household SO_2 emissions reductions because SO_2 emissions from power plants are capped by clean air legislation. Thus, SO_2 emissions will only be negligibly affected by possible water heater standards.

We first considered trial standard level four, the most efficient level for the two classes. Trial standard level four saves about 11.5 quads of energy, a significant amount. The emissions reductions of 354 Mt of carbon equivalent and 459 kt of NO_X are significant. There is a 64 kt increase in household emissions of SO_2 due to increased shipments of oil-fired water heaters. However, at this level, consumers experience negative LCC impacts. They would lose $82 with electric water heaters, $244 with natural gas water heaters and $122 with propane gas water heaters. Furthermore, the water heater industry would lose 27 percent of its value and the nation would have a loss in NPV of nearly $25 billion. The Department concludes the resulting energy savings and emission reductions at this level are outweighed by the negative economic impacts on the nation, consumers and manufacturers. Consequently, the Department concludes trial standard level four is not economically justified.

Next, we considered trial standard level three. This trial standard level saves about 4.6 quads of energy, a significant amount. The emissions reductions are significant: 152 Mt of carbon equivalent and 273 kt of NO_X. There is a 13 kt increase in household emissions of SO_2 due to a slight increase in shipments of oil-fired water heaters. The national NPV of trial standard level three is $2.0 billion from 2004–2030.

The economic benefits to consumers are significant. The average LCC savings for consumers with electric, natural gas and propane gas water heaters are $23, $30 and $97, respectively. In trial standard level three, 78 percent of households with natural gas-fired water heaters have LCC savings, for an average savings of $55, while 22 percent experience LCC losses, for an average loss of $54. In households with propane gas water heaters, the average LCC savings are $117 for 89 percent of the households while only eleven percent experience an average loss of $61. For households with electric water heaters, 59 percent have average LCC savings of $80, while 41 percent experience an average LCC loss of $59.

For electric water heaters, the analysis predicts that 41 percent of all consumers would experience no change or some net cost with more efficient electric water heaters. However, we believe that there are costs or savings near the point of zero change in LCC that consumers would be unable to distinguish in their yearly expenses. We have chosen ±2 percent of average baseline LCC as the band of no consumer impact. We believe this small percentage, regardless of the actual total LCC, is insignificant to the consumer because these LCC costs or savings are spread over monthly utility bills for the life of the water heater. By applying a two percent band of average LCC, we can clearly show the significant net savings and net costs associated with a trial standard level. This permits a more informed decision based on weighing the significant benefits and burdens in terms of consumer impact. The resulting ranges are shown in Figure 9.6.2 in the TSD.

We will use ±2 percent of baseline LCC to indicate no impact, positively or negatively, on consumers. Therefore, only fifteen percent of consumers with electric water heaters or twelve percent of consumers with natural gas water heaters or five percent of consumers with propane gas water heaters sustain any significant net costs under standard level 3. Similarly, 30 percent of consumers with electric water heaters or 52 percent of consumers with natural gas water heaters or 69 percent of consumers with propane gas water heaters have significant net savings.

Two percent of average baseline LCC equals $56 for electric water heaters. Over the average life of 14 years for an electric water heater, this is less than $4 per year. For consumers with natural gas and propane gas water heaters, two percent of average baseline LCC is $31 and $47, respectively. Over the average life of 9 years for gas water heaters, this is less than $4 per year for natural gas and less than $6 per year for propane gas. We believe this is a small amount in terms of yearly expenditures and will not adversely impact consumers' purchase decisions about water heaters, or their financial positions. Additionally, low-income and senior-only consumer subgroups exhibit similar distributions of costs and savings. A similar small percentage of low-income or senior only consumers are affected by higher costs.

The industry will lose about five percent ($15 million) of its INPV due to energy efficiency standards. These losses are more than balanced by NPV gains to the nation of $2.0 billion, or 135 times the industry losses. Industry losses for trial standard level three due to all Federal actions (CPSC, EPA and DOE) are fourteen percent of its INP, or $44 million. Even this level of losses is offset by gains to the nation that are 46 times the industry losses.[4] Based on the manufacturer interviews, DOE believes there will not be any plant closures or employee layoffs.

In determining the economic justification of trial standard level three, the Department has weighed the benefits of energy savings, reduced average consumer LCC, significant and positive NPV, and emissions reductions and the burdens of a loss in manufacturer net present value, and consumer LCC increases for some households. After carefully considering the results of the analysis, DOE has determined the benefits of trial standard level three outweigh its burdens and is economically justified. The Department also concludes trial standard level three saves a significant amount of energy and is technologically feasible.[5] Therefore, the Department today adopts amended energy conservation standards for water heaters at trial standard level three.

VI.Procedural Issues and Regulatory Reviews

A. Review Under the National Environmental Policy Act

In issuing the March 4, 1994, Proposed Rule for energy efficiency standards for eight products, one of which was water heaters, the Department prepared an Environmental Assessment (DOE/EA–0819) that was published within the TSD for that Proposed Rule. (DOE/EE–0009, November 1993). We found the environmental effects associated with various standard levels for water heaters, as well as the other seven products, to be not significant, and we published a Finding of No Significant Impact (FONSI). 59 FR 15868 (April 5, 1994).

In conducting the analysis for the Proposed Rule upon which today's Final Rule is based, the DOE evaluated several design options suggested in comments to the screening document. As a result, the energy savings estimates and resulting environmental effects from revised energy efficiency standards for water heaters in that analysis differ somewhat from those presented for water heaters in the 1994 Proposed Rule. Nevertheless, the environmental effects expected from today's Final Rule fall within the ranges of environmental impacts from the revised energy efficiency standards for water heaters that DOE found in the 1994 FONSI not to be significant.

B. Review Under Executive Order 12866, ''Regulatory Planning and Review's

The Department has determined today's regulatory action is an ''economically significant regulatory action'' under Executive Order 12866, ''Regulatory Planning and Review.'' 58 FR 51735 (October 4, 1993). Accordingly, today's action was subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget.

There were no substantive changes between the draft we submitted to OIRA and today's action. The draft and other documents we submitted to OIRA for review are a part of the rulemaking record and are available for public review in the Department's Freedom of Information Reading Room, 1000 Independence Avenue, SW, Washington, DC 20585, between the hours of 9:00 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays, telephone (202) 586–3142.

The proposed rule contained a summary of the Regulatory Impact Analysis (RIA), which focused on the major alternatives considered in arriving at the approach to improving the energy efficiency of consumer products. The reader is referred to the complete RIA, which is contained in the TSD, available as indicated at the beginning of this notice. It consists of: (1) a statement of the problem addressed by this regulation, and the mandate for government action; (2) a description and analysis of the feasible policy alternatives to this regulation; (3) a quantitative comparison of the impacts of the alternatives; and (4) the economic impact of the proposed standard.

The RIA calculates the effects of feasible policy alternatives to water heater energy efficiency standards, and provides a quantitative comparison of the impacts of the alternatives. We evaluate each alternative in terms of its ability to achieve significant energy savings at reasonable costs, and we compare it to the effectiveness of trial standard level 3 adopted by today's Final Rule.

We created the RIA using a series of regulatory scenarios (with various assumptions), which we used as input to the shipments model for water heaters. We used the results from the shipments model as inputs to the NES spreadsheet calculations.

DOE identified the following seven major policy alternatives for achieving consumer product energy efficiency. These alternatives include:

- No New Regulatory Action.
- Informational Action.
- Product Labeling.
- Consumer Education.
- Prescriptive Standards.
- Financial Incentives.

—Tax credits
—Rebates
—Low income and seniors subsidy

- Voluntary Energy Efficiency Targets (5 Years, 10 Years).
- Mass Government Purchases.

[4] As DOE has determined, the benefits of today's final rule outweigh the $15 million loss to the industry. To review the support for this determination, see the TSD at Chapters 12.5 and Table 12.1, 13.3.3.5 and Table 13.8, 13.3.4, and 13.3.5.

[5] The final standard is based on insulation blown with HFC–245fa. We also compared the engineering cost and performance for two alternative blowing agents, HFC–134a and cyclopentane. All three blowing agents are EPA–SNAP approved but there are concerns about availability and a single source supplier with HFC–245fa. However, since engineering results are within two percent of HFC–245fa, we conclude that the use of either of these alternative blowing agents would not change our decision.

• The Proposed Approach (Performance Standards).

We have evaluated each alternative in terms of its ability to achieve significant energy savings at reasonable costs (Table 11), and have compared it to the effectiveness of this Final Rule.

TABLE 11.—ALTERNATIVES CONSIDERED

Policy alternatives	NPV $ in billions	Energy savings quads
Consumer Product Labeling	−$0.003	0.08
Consumer Education	0.40	0.49
Prescriptive Standards	0.99	0.74
Consumer Tax Credits	0.18	0.14
Consumer Rebates High Efficiency	0.18	0.14
Consumer Rebates Heat Pump	0.85	0.50
Low Income and Seniors Subsidy	0.05	0.37
Manufacturer Tax Credits	0.04	0.03
Voluntary Efficiency Target (5 year delay)	0.92	2.8
Voluntary Efficiency Target (10 year delay)	0.47	2.1
Mass Government Purchases	0.01	0.06
Performance Standards	2.0	4.6

NPV = Net Present Value (2003–2030, in billion 1998 $) (does not include government expenses)
Savings = Energy Savings (Source Quads)

For a complete discussion of the assumptions used to develop the alternative regulatory impacts, see the proposed rule. 65 FR 25042, 25080–25081 (April 28, 2000). All of these alternatives must be gauged against the performance standards in this Final Rule. The results in Table 11 above show that none of the alternative regulatory approaches meet or exceed the estimated national cost and energy savings from revised energy efficiency standards. Additionally, several of the alternatives would require new enabling legislation, since authority to carry out those alternatives does not exist presently.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612 requires an assessment of the impact of regulations on small businesses. The Small Business Administration's definition for a small business in the water heater industry is one that employs 500 or fewer employees.

The water heater industry is characterized by five firms accounting for nearly 99 percent of sales. Smaller businesses and firms, which make specialty water heaters and supply niche markets, share one percent of the market. We are aware of three small firms: Bock Water Heaters, Heat Transfer Products, and Vaughn.

Of the three small firms, Bock manufactures oil-fired water heaters that have not been affected by this rule. Therefore, Bock will not suffer any adverse impacts due to the rule. The other two firms, Heat Transfer and Vaughn, both make electric water heaters that are affected by this rule. In the GAMA directory, these firms only list electric water heaters that meet or exceed the standard level in this rule. Although the rule raises the standard level enough to impact their niche market for high efficiency electric water heaters, these manufacturers also manufacture very long life products that incorporate other features which will help them preserve their niche market. The Department has taken this into consideration in this rulemaking.

The Department prepared a manufacturing impact analysis that it shared with all the water heater manufacturers. The smaller manufacturers did not choose to discuss the impacts of the trial standard levels on their firms.

In view of the information discussed above, the Department has determined and hereby certifies pursuant to Section 605(b) of the Regulatory Flexibility Act that, for this particular industry, the standard levels in today's Final Rule will not ''have a significant economic impact on a substantial number of small entities,'' and it is not necessary to prepare a regulatory flexibility analysis.

D. Review Under the Paperwork Reduction Act

No new information or record keeping requirements are imposed by this rulemaking that would require Office of Management and Budget clearance under the Paperwork Reduction Act. 44 U.S.C. 3501 *et seq.*

E. Review Under Executive Order 12988, ''Civil Justice Reform''

With respect to the review of existing regulations and the promulgation of new regulations, Section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction.

With regard to the review required by Section 3(a), Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in Section 3(a) and Section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE reviewed today's Final Rule under the standards of Section 3 of the Executive Order and determined that, to the extent permitted by law, the final regulations meet the relevant standards.

F. ''Takings'' Assessment Review

The Department has determined pursuant to Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property

Rights,'' 53 FR 8859 (March 18, 1988) that this regulation would not result in any takings that might require compensation under the Fifth Amendment to the United States Constitution.

G. Review Under Executive Order 13132, '' Federalism''

Executive Order 13132, 64 FR 43255 (August 4, 1999) requires agencies 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 are 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 Executive Order 13132, DOE may not issue a regulation that has federalism implications, that imposes substantial direct costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the State and local governments, or DOE consults with State and local officials early in the process of developing the proposed regulation. DOE also may not issue a regulation that has federalism implications and that preempts State law unless it consults with State and local officials early in the process of developing the proposed regulations.

The statutory authority under which this Final Rule is being promulgated specifically addresses the effect of Federal rules on State laws or regulations concerning testing, labeling and standards. Section 327 of EPCA, as amended, 42 U.S.C. 6297. Generally all such State laws or regulations are superceded by EPCA, unless specifically exempted in Section 327. The Department can grant a waiver of preemption in accordance with the procedures and other provisions of Section 327(d) of the Act, as amended. 42 U.S.C. 6297(d). States can file petitions for exemption from preemption with the Secretary and have their request reviewed on a case-by-case basis.

DOE has examined today's Final Rule and has determined that although revised water heater standards would preempt State laws in this area, they would not have a substantial direct effect 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. No further action is required by Executive Order 13132.

H. Review Under the Unfunded Mandates Reform Act of 1995

With respect to a proposed regulatory action that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year, Section 202(a) of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531 *et seq.*, requires a Federal agency to publish a written statement concerning estimates of the resulting costs, benefits and other effects on the national economy. 2 U.S.C. 1532(a), (b). UMRA also requires each Federal agency to develop an effective process to permit timely input by state, local, and tribal governments on a proposed significant intergovernmental mandate. The Department's consultation process is described in a notice published in the **Federal Register**. 62 FR 12820 (March 18, 1997). Today's Final Rule may impose expenditures of $100 million or more in a year in the private sector. It does not contain a Federal intergovernmental mandate.

Section 202 of UMRA authorizes an agency to respond to the content requirements of UMRA in any other statement or analysis that accompanies this Final Rule. 2 U.S.C. 1532(c). The content requirements of Section 202(b) of UMRA relevant to the private sector mandate substantially overlap the economic analysis requirements that apply under Section 325(o) of EPCA, as amended, and Executive Order 12866. The Supplementary Information section of the Notice of Final Rulemaking and the analysis contained in the ''Regulatory Impact Analysis'' section of the TSD for this Final Rule respond to those requirements.

DOE is obligated by Section 205 of UMRA, 2 U.S.C. 1535, to identify and consider a reasonable number of regulatory alternatives before promulgating a rule for which a written statement under Section 202 is required. From those alternatives, DOE must select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule, unless DOE publishes an explanation of why a different alternative is selected or the selection of such an alternative is inconsistent with law. As required by Section 325(o) of EPCA, as amended, 42 U.S.C. 6295(o), today's Final Rule establishes energy conservation standards for water heaters that are designed to achieve the maximum improvement in energy efficiency that DOE has determined is both technologically feasible and economically justified. A full discussion of the alternatives considered by DOE is presented in the ''Regulatory Impact Analysis'' section of the TSD for this Final Rule.

I. Review Under the Treasury and General Government Appropriations Act of 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. No. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule or policy that may affect family well-being. Today's Final Rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

J. Review Under the Plain Language Directives

Section 1(b)(12) of Executive Order 12866 requires that each agency draft its regulations so that they are simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty. Similarly, the Presidential memorandum directs the heads of executive departments and agencies to use plain language in all proposed and Final Rulemaking documents published in the **Federal Register**.63 FR 31883 (June 1, 1998).

Today's rule uses the following general techniques to abide by Section 1(b)(12) of Executive Order 12866 and the Presidential memorandum. 63 FR 31883 (June 1, 1998):

- Organization of the material to serve the needs of the readers (stakeholders).
- Use of common, everyday words.
- Shorter sentences and sections.

K. Congressional Notification

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of today's Final Rule prior to the effective date set forth at the outset of this notice. DOE also will submit the supporting analyses to the Comptroller General (GAO) and make them available to each House of Congress. The report will state that it has been determined that the rule is a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Energy conservation, Household appliances.

Issued in Washington, DC, on December 26, 2000.

Dan Reicher,

Assistant Secretary, Energy Efficiency and Renewable Energy.

For the reasons set forth in the preamble, Part 430 of Title 10, Code of Federal Regulations, is amended as set forth below.

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

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

Authority: 42 U.S.C. 6291–6309, 28 U.S.C. 2461 note.

2. Section 430, Appendix E to Subpart B of Part 430 is amended in Section 1 by adding paragraph 1.16 to read as follows:

Appendix E to subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Water Heaters

1. Definitions

* * * * *

1.16 *Tabletop water heater* means a water heater in a rectangular box enclosure designed to slide into a kitchen countertop space with typical dimensions of 36 inches high, 25 inches deep and 24 inches wide.

* * * * *

3. Section 430.32(d) of subpart C is amended by revising paragraph (d) to read as follows:

§ 430.32 Energy and water conservation standards and effective dates.

* * * * *

(d) *Water heaters.*

The energy factor of water heaters shall not be less than the following for products manufactured on or after the indicated dates.

Product class	Energy factor as of January 1, 1990	Energy factor as of of April 15, 1991	Energy factor as of January 20, 2004
1. Gas-fired Water Heater	0.62 − (.0019 × Rated Storage Volume in gallons).	0.62 − (.0019 × Rated Storage Volume in gallons).	0.67 − (0.0019 × Rated Storage Volume in gallons).
2. Oil-fired Water Heater	0.59 − (.0019 × Rated Storage Volume in gallons).	0.59 − (.0019 × rated Storage Volume in gallons).	0.59 − (0.0019 × Rated Storage Volume in gallons).
3. Electric Water Heater	0.95 − (0.00132 × Rated Storage Volume in gallons).	0.93 − (0.00132 × Rated Storage Volume in gallons.	0.97 − (0.00132 × Rated Storage Volume in gallons).
4. Tabletop Water Heater	0.95 − (0.00132 × Rated Storage Volume in gallons).	0.93 − (0.00132 × Rated Storage Volume in gallons).	0.93 − (0.00132 × Rated Storage Volume in gallons).
5. Instantaneous Gas-fire Water Heater.	0.62 − (0.0019 × Rated Storage Volume in gallons).	0.62 − (0.0019 × Rated Storage Volume in gallons).	0.62 − (0.0019 × Rated Storage Volume in gallons).
6. Instantaneous Electric Water Heater.	0.95 − (0.00132 × Rated Storage Volume in gallons).	0.93 − (0.00132 × Rated Storage Volume in gallons).	0.93 − (0.00132 × Rated Storage Volume in gallons).

Note: The Rated Storage Volume equals the water storage capacity of a water heater, in gallons, as specified by the manufacturer.

* * * * *

Appendix

[The following letter from the Department of Justice will not appear in the Code of Federal Regulations.]

Department of Justice,
Antitrust Division, Joel I. Klein Assistant Attorney General
Main Justice Building, *950 Pennsylvania Avenue, NW, Washington, DC 20530–0001, (202) 514–2401/(202) 616–2645 (f), Antitrust@justice.usdoj.gov*

July 10, 2000.

Mary Anne Sullivan,
General Counsel, Department of Energy, Washington, DC 20585

Dear General Counsel Sullivan: I am responding to your May 10, 2000 letter seeking the views of the Attorney General about the potential impact on competition of the proposed energy efficiency standards for water heaters, Docket No. EE–RM–97–900. Your request was submitted pursuant to Section 325(o)(2)(B)(i) of the Energy Policy and Conservation Act, 42 U.S.C. 6291, 6295, which requires the Attorney General to make a determination of the impact of any lessening of competition that is likely to result from the imposition of proposed energy efficiency standards. The Attorney General's responsibility for responding to requests from other departments about the effect of a program on competition has been delegated to the Assistant Attorney General for the Antitrust Division in 28 CFR 0.40 (g).

We have reviewed the proposed standards, the supplementary information published in the **Federal Register** notice, the Technical Support Document, and information from water heater manufacturers, their suppliers, and other interested parties. The Antitrust Division has concluded that the proposed standards could have an adverse effect on competition because water heater manufacturers may have to use an input that will be produced by only one source. We do not anticipate that the proposed standard will affect competition among water heater manufacturers. Rather, competition to provide heater manufacturers with blowing agents could be adversely affected, with resulting cost increases to consumers.

In the analysis of the proposed standard that the Department of Energy published in the **Federal Register**, the only design options for affected electric water heaters that meet the DOE's proposed standard require use of HFC–245fa as a blowing agent for insulation. Insulation is an essential part of a water heater, and HFC–245fa is a patented product that has only one supplier. DOE's published analysis further concludes that gas-fired water heaters have design options that would eliminate the need for HFC–245fa, but at significant added costs.

Water heater manufacturers have objected to the proposed standard on the grounds that their need to rely on a sole source will make them vulnerable to supply disruptions and monopoly pricing. Based on the analysis that DOE published, the concerns of water heater manufacturers regarding HFC–245fa, and our interviews with industry participants, the Antitrust Division has concluded that competition could be adversely affected by the adoption of the proposed standard.[1] The Department urges the Department of Energy to take into account this impact on competition in determining its final energy efficiency standard for water heaters and to consider altering the standard so that manufacturers may meet the standard for all affected models using blowing agents for insulation other than HFC–245fa without adding significantly to the costs of manufacturing water heaters.

Sincerely,

Joel I. Klein

[FR Doc. 01–1081 Filed 1–16–01; 8:45 am]

BILLING CODE 6450–01–P

[1] We note that some manufacturers have suggested that DOE underestimated the performance capabilities of alternative blowing agents. If these suggestions prove correct, water heater manufacturers may in fact be able to comply with the proposed standard for more models, while using water-based blowing agents. We also note that it's possible that manufacturers may in fact be able to engineer design options using water-based blowing agents with a greater performance capability or lower cost than they now anticipate.

Federal Register

Wednesday,

January 17, 2001

Part IX

Environmental Protection Agency

40 CFR Part 372

Lead and Lead Compounds; Lowering of Reporting Thresholds; Community Right-to-Know Toxic Chemical Release Reporting; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 372

[OPPTS–400140D; FRL–6722–4]

RIN 2070-AD38

Lead and Lead Compounds; Lowering of Reporting Thresholds; Community Right-to-Know Toxic Chemical Release Reporting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is lowering the reporting thresholds for lead and lead compounds which are subject to reporting under section 313 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) and section 6607 of the Pollution Prevention Act of 1990 (PPA). The reporting thresholds are being lowered to 100 pounds. The lower reporting thresholds apply to lead and all lead compounds except for lead contained in stainless steel, brass, and bronze alloys. EPA is taking these actions pursuant to its authority under EPCRA section 313(f)(2) to revise reporting thresholds. Today's actions also include modifications to certain reporting exemptions and requirements for lead and lead compounds.

DATES: This rule shall take effect on February 16, 2001; with the first reports at the lower thresholds due on or before July 1, 2002, for the 2001 calendar year.

FOR FURTHER INFORMATION CONTACT: For technical information on this final rule contact: Daniel R. Bushman, Petitions Coordinator, Environmental Protection Agency, Mail Code 2844, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number 202-260-3882, e-mail address: bushman.daniel@epa.gov. For general information on EPCRA section 313, contact the Emergency Planning and Community Right-to-Know Hotline, Environmental Protection Agency, Mail Code 5101, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Toll free: 1-800-535-0202, in Virginia and Alaska: 703-412-9877 or Toll free TDD: 1-800-553-7672. Information concerning this action is also available on EPA's Web site at http://www.epa.gov/tri.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this notice apply to me?

You may be potentially affected by this action if you manufacture, process, or otherwise use lead or lead compounds. Potentially affected categories and entities may include, but are not limited to:

Category	Examples of Potentially Affected Entities
Industry	SIC major group codes 10 (except 1011, 1081, and 1094), 12 (except 1241); or 20 through 39; or industry codes 4911 (limited to facilities that combust coal and/or oil for the purpose of generating power for distribution in commerce); or 4931 (limited to facilities that combust coal and/or oil for the purpose of generating power for distribution in commerce); or 4939 (limited to facilities that combust coal and/or oil for the purpose of generating power for distribution in commerce); or 4953 (limited to facilities regulated under the Resource Conservation and Recovery Act, subtitle C, 42 U.S.C. section 6921 *et seq.*); or 5169; or 5171; or 7389 (limited to facilities primarily engaged in solvent recovery services on a contract or fee basis)
Federal Government	Federal facilities

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 the table could also be affected. To determine whether your facility would be affected by this action, you should carefully examine the applicability criteria in part 372 subpart B of Title 40 of the Code of Federal Regulations. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding of **FOR FURTHER INFORMATION CONTACT** section.

B. How can I get additional information or copies of this document or other support documents?

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

2. *In person*. The Agency has established an official record for this action under docket control number OPPTS–400140. 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 TSCA Nonconfidential Information Center, North East Mall Rm. B-607, Waterside Mall, 401 M St., SW., Washington, DC. The Center is open from noon to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number of the Center is (202) 260-7099.

II. What is EPA's Statutory Authority for Taking These Actions?

EPA is finalizing these actions under sections 313(f)(2), 313(g), 313(h), and 328 of EPCRA, 42 U.S.C. 11023(f)(2), 11023(g), 11023(h), and 11048; and section 6607 of PPA, 42 U.S.C. 13106. Section 313 of EPCRA requires certain facilities manufacturing, processing, or otherwise using a listed toxic chemical in amounts above reporting threshold levels, to report certain facility specific information about such chemicals, including the annual releases and other quantities entering each environmental medium. These reports must be filed by July 1 of each year for the previous calendar year. Such facilities also must report recycling and other waste management data and source reduction activities for such chemicals, pursuant to section 6607 of PPA.

A. What is EPA's Statutory Authority To Lower EPCRA Reporting Thresholds?

EPA is finalizing these actions pursuant to its authority under EPCRA section 313(f)(2) to revise reporting thresholds. EPCRA section 313

establishes default reporting thresholds, which are set forth in section 313(f)(1). Section 313(f)(2), however, provides that EPA:

> may establish a threshold amount for a toxic chemical different from the amount established by paragraph (1). Such revised threshold shall obtain reporting on a substantial majority of total releases of the chemical at all facilities subject to the requirements of this section. The amounts established by EPA may, at the Administrator's discretion, be based on classes of chemicals or categories of facilities.

This provision provides EPA with broad, but not unlimited, authority to establish thresholds for particular chemicals, classes of chemicals, or categories of facilities, and commits to EPA's discretion the determination that a different threshold is warranted. Congress also committed the determination of the levels at which to establish any alternate thresholds to EPA's discretion, requiring only that any ''revised threshold shall obtain reporting on a substantial majority of total releases of the chemical at all facilities subject to the requirements'' of section 313. 42 U.S.C. 11023(f)(2).

For purposes of determining what constitutes a ''substantial majority of total releases,'' EPA interprets the language in section 313(f)(2), ''facilities subject to the requirements of [section 313],'' to refer to those facilities that fall within the category of facilities described by sections 313 (a) and (b), i.e., the facilities currently reporting. Subsection (a) lays out the general requirement that ''the owner or operator of facilities subject to the requirements of this section shall'' file a report under EPCRA section 313. Subsection (b) then defines the facilities subject to the requirements of this section:

> [t]he requirements of this section shall apply to owners and operators of facilities that have 10 or more full-time employees and that are in Standard Industrial Classification Codes 20-39, . . . and that manufactured, processed, or otherwise used a toxic chemical listed under subsection (c) of this section in excess of the quantity of that toxic chemical established under subsection (f) of this section during the calendar year for which a toxic chemical release form is required under this section.

Thus, in revising the reporting thresholds, EPA must ensure that, under the new thresholds, a substantial majority of releases currently being reported will continue to be reported. No further prerequisites for exercising this authority appears in the statute.

B. What is EPA's Statutory Authority for Making Modifications to Other EPCRA section 313 Reporting Requirements?

Today's actions also include modifications to certain reporting exemptions and requirements for lead and lead compounds. Congress granted EPA rulemaking authority to allow the Agency to fully implement the statute. EPCRA section 328 provides that the ''Administrator may prescribe such regulations as may be necessary to carry out this chapter'' (28 U.S.C. 11048).

III. Background Information

A. What is the General Background for this Action?

Under EPCRA section 313, Congress set the initial parameters of the Toxics Release Inventory (TRI), but also gave EPA clear authority to modify reporting in various ways, including authority to change the toxic chemicals subject to reporting, the facilities required to report, and the threshold quantities that trigger reporting. By providing this authority, Congress recognized that the TRI program would need to evolve to meet the needs of a better informed public and to refine existing information. EPA has, therefore, undertaken a number of actions to expand and enhance TRI. These actions include expanding the number of reportable toxic chemicals by adding 286 toxic chemicals and chemical categories to the EPCRA section 313 list in 1994. Further, a new category of facilities was added to EPCRA section 313 on August 3, 1993, through Executive Order 12856, which requires Federal facilities meeting threshold requirements to file annual EPCRA section 313 reports. In addition, in 1997 EPA expanded the number of private sector facilities that are required to report under EPCRA section 313 by adding seven new industrial groups to the list of covered facilities. At the same time, EPA has sought to reduce the burden of EPCRA section 313 reporting by actions such as delisting chemicals it has determined do not meet the statutory listing criteria and establishing an alternate reporting threshold of 1 million pounds for facilities with 500 pounds or less of production-related releases and other wastes. Facilities meeting the requirements of this alternate threshold may file a certification statement (Form A) instead of reporting on the standard EPCRA section 313 form, the Form R.

On October 29, 1999 (64 FR 58666), EPA finalized enhanced reporting requirements that focused on a unique group of toxic chemicals that persist and bioaccumulate in the environment. These chemicals are commonly referred to as persistent bioaccumulative toxic chemicals or PBT chemicals. Until that action, with the exception of the alternate threshold certification on Form A, EPA had not altered the statutory reporting threshold for any listed chemicals. However, as the TRI program has evolved over time and as communities identify areas of special concern, thresholds and other aspects of the EPCRA section 313 reporting requirements may need to be modified to assure the collection and dissemination of relevant, topical information and data. Toxic chemicals that persist and bioaccumulate are of particular concern because they remain in the environment for significant periods of time and concentrate in the organisms exposed to them. The October 29, 1999, PBT chemical final rule set forth criteria to be used by the EPCRA section 313 program for evaluating whether a listed toxic chemical persists or bioaccumulates in the environment. EPA has evaluated lead and lead compounds using these criteria, and has concluded that lead and lead compounds are PBT chemicals. Thus, as with the PBT chemical final rule, today's action further increases the utility of TRI to the public by lowering the reporting thresholds for lead and lead compounds. Lowering the reporting thresholds for lead and lead compounds will ensure that the public has important information on the quantities of these chemicals released or otherwise managed as waste, that would not be reported under the 10,000 and 25,000 pound/year thresholds that apply to most other listed toxic chemicals.

B. What Outreach Has EPA Conducted?

EPA has engaged in a comprehensive outreach effort relating to this action. This outreach served to inform interested parties, including industries and small businesses affected by the rule, state regulatory officials, environmental organizations, labor unions, community groups, and the general public of EPA's intention to lower the applicable EPCRA section 313 reporting thresholds for lead and lead compounds. EPA held three public meetings (in Los Angeles, CA (November 30, 1999); Chicago, IL (December 2, 1999); and Washington, DC (December 14, 1999)) during the comment period for the proposal. Participants included a range of industry representatives, trade associations (representing both small and large businesses), law firms representing industry groups, environmental groups, the general public, plus other groups and organizations. For state and tribal governments, EPA attended the regularly-held public meetings of the Forum on State and Tribal Toxics

Action (FOSTTA) to discuss the proposed rule. EPA also received substantial public comment on the proposed rule, to which EPA is responding in this Final Rule and the Response to Comments document (Ref. 1). In response to the strong interest in the proposed rule, and to allow more individuals and groups to submit their comments, EPA extended the public comment period. The comment period was first extended from September 17 to November 1, 1999 (at 64 FR 51091, September 21, 1999) (FRL–6382–9) and then again from November 1 to December 16, 1999 (at 64 FR 58370, October 29, 1999) (FRL–6391–8) to allow commenters time to supplement or revise their comments in light of the decisions made in the final PBT chemical rulemaking (64 FR 58666). Additional information regarding EPA's outreach may be found in supporting documents included in the public version of the official record.

IV. Summary of Proposal

A. What Persistence and Environmental Fate Data were Presented for Lead and Lead Compounds?

A chemical's persistence refers to the length of time the chemical can exist in the environment before being destroyed (i.e., transformed) by natural processes. The environmental media for which persistence is measured or estimated include air, water, soil, and sediment; however, water is the medium for which persistence values are most frequently available. It is important to distinguish between persistence in a single medium (air, water, soil, or sediment) and overall environmental persistence. Persistence in an individual medium is controlled by transport of the chemical to other media, as well as transformation to other chemical species. Persistence in the environment as a whole is a distinct concept. It is based on the observations that the environment behaves as a set of interconnected media, and that a chemical substance released to the environment will become distributed in these media in accordance with the chemical's intrinsic (physical/chemical) properties and reactivity. For overall persistence, only irreversible transformation contributes to net loss of a chemical substance.

Although metals and metal compounds, including lead and lead compounds, may be converted from the metal to a metal compound or from one metal compound to another in the environment, the metal cannot be destroyed. Thus, metals are obviously persistent in the environment in some form. The form of the metal that exists in the environment depends on its environmental fate. Environmental fate refers to the ultimate result of physical, chemical, and biological processes acting upon a metal or metal compound once it is released into the environment. The environmental fate determines the extent to which the metal or the metal from a metal compound will be available for exposure to organisms once released into the environment. The environmental fate of a metal or metal compound varies depending on the environmental conditions and the physical/chemical properties of the metal in question.

The information summarized in the proposed rule for the environmental fate of lead in each environmental medium represented the key elements influencing the transport, transformation, and bioavailability of lead in air, soil, water and sediments. This information, as well as a more extensive review of the existing data on the environmental fate of lead are contained in *The Environmental Fate of Lead and Lead Compounds* (Ref. 2) and in the references contained therein. Based on this information, EPA concluded that processes commonly observed in the environment can result in the release of available (ionic) lead where it can be bioaccumulated by organisms. These processes may occur in soil and aquatic environments with low pH and low levels of clay and organic matter. Under these conditions, the solubility of lead is enhanced and if there are no sorbing surfaces and colloids, lead ion can remain in solution for a sufficient period to be taken up by biota. Lead sorption to soil organic matter has been shown to be pH dependent. Decreasing pH can lead to increasing concentrations of lead in soil water; while increasing pH can lead to decreasing concentrations of lead in soil water.

The Agency's analysis of the environmental fate of lead and lead compounds showed that under many environmental conditions lead is available to express its toxicity and to bioaccumulate. In the EPCRA section 313 program, the issue of the environmental availability of metals from metal compounds is broader than just its implications for whether a chemical is a PBT. The issue of both the environmental availability and bioavailability has been addressed for EPCRA section 313 chemical assessments through EPA's policy and guidance concerning petitions to delist individual members of the metal compound categories listed under EPCRA section 313 (May 23, 1991, 56 FR 23703). This policy states that if the metal in a metal compound cannot become available as a result of biotic or abiotic processes then the metal will not be available to express its toxicity. If the intact metal compound is not toxic and the metal is not available from the metal compound then such a chemical is a potential candidate for delisting from the EPCRA section 313 list of toxic chemicals. EPA developed this petition policy specifically to address such circumstances.

B. What Aquatic Bioaccumulation Data was Presented for Lead and Lead Compounds?

Bioaccumulation is a general term that is used to describe the process by which organisms may accumulate chemical substances in their bodies. The term bioaccumulation refers to uptake of chemicals by organisms both directly from water and through their diet (Ref. 3). EPA has defined bioaccumulation as the net accumulation of a substance by an organism as a result of uptake from all environmental sources (60 FR 15366). The nondietary accumulation of chemicals in aquatic organisms is referred to as bioconcentration, and may be described as the process through which a chemical is distributed between the organism and environment based on the chemical's properties, environmental conditions, and biological factors such as an organism's ability to metabolize the chemical (Ref. 4). EPA has defined bioconcentration as the net accumulation of a substance by an aquatic organism as a result of uptake directly from the ambient water through gill membranes or other external body surfaces (60 FR 15366). A chemical's potential to bioaccumulate can be quantified by measuring or predicting the chemical's bioaccumulation factor (BAF). EPA has defined the BAF as the ratio of a substance's concentration in tissue of an aquatic organism to its concentration in the ambient water, in situations where both the organism and its food are exposed and the ratio does not change substantially over time (60 FR 15366). A chemical's potential to bioaccumulate can also be quantified by measuring or predicting the chemical's bioconcentration factor (BCF). EPA has defined the BCF as the ratio of a substance's concentration in tissue of an aquatic organism to its concentration in the ambient water, in situations where the organism is exposed through water only and the ratio does not change substantially over time (60 FR 15366).

A review of the ecotoxicological literature indicates that bioconcentration values of lead and certain lead compounds (lead salts) in aquatic plants and animals are often

above a bioconcentration/ bioaccumulation factor of 1,000 and in some species at or greater than 5,000. Lead is bioaccumulated by aquatic organisms such as plants, bacteria, invertebrates, and fish. The principle form that is believed to be accumulated is divalent lead (i.e., lead in its plus 2 oxidation state (Pb +2)). It has been shown that fish held in water at a pH of 6.0 accumulate three times as much lead as fish held in water at a pH of 7.5 (Ref. 5), thus as pH decreases the availability of divalent lead increases. Older organisms usually have the highest body burdens, and lead accumulates in bony tissues to the greatest extent.

The bioaccumulation data reviewed concerning the extent (magnitude) of lead bioaccumulation found to occur in many aquatic plants and animals and the lead bioconcentration factors (BCF) determined or measured from laboratory studies conducted for certain durations using BCF test methods, can be found in the bioaccumulation support document (Ref. 6). Concentrations of lead monitored in various organisms were determined by comparing concentrations in the environment (water) with concentrations measured in the organisms. In general, bioconcentration values for four freshwater invertebrate species ranged from 499 to 1,700 (Ref. 7). BCFs for two species of freshwater fish were much lower, 42 and 45. However, certain fish tissues have much higher BCF values, e.g., the BCF value for the intestinal lipids in rainbow trout were as high as 17,300. Freshwater phytoplankton and both marine and freshwater algae accumulate or concentrate lead to very high levels (e.g., greater than 10,000x). BCF values for marine bivalve organisms were as high as 4,985 for blue mussels. Eastern oysters also had BCF values greater than 1,000. These data indicate that many of the BCF values and measured environmental concentration factors for lead are above 1,000 with several species having BCF or observed concentration factors at or above 5,000. The references cited for blue mussels include a range of values, the upper end of which is essentially 5,000 (i.e., 4,985). There are also a few fish tissues that have BCFs greater than 10,000, though most of the available fish data are below 5,000.

C. What Human Bioaccumulation Data was Presented for Lead and Lead Compounds?

There is a great deal of information available on the bioaccumulation of lead in humans and the effects that such accumulation can have (Refs. 8, 9, 10, and 11). The bioaccumulation of lead in humans is well documented. Although lead has no known biological function in humans, it is readily absorbed through the gut and can be absorbed by inhalation and, to some extent by dermal contact. Absorption of lead can occur as a result of exposure to air-borne forms of lead, as well as ingestion or contact with contaminated soil and dust. Children and developing fetuses are known to absorb lead more readily than adults and to excrete it at a lower total rate. These findings are especially significant since young children are most susceptible to the adverse effects associated with lead exposure. Lead absorption varies from very low levels (e.g., 5%) up to essentially 100%. Lead absorption appears to be linked to particle size, the chemical composition, and other factors (Refs. 12 and 13). Long-lasting impacts on intelligence, motor control, hearing, and neurobehavioral development of children have been documented at levels of lead that are not associated with clinical intoxication and were once thought to be safe. An analysis of human blood-lead level data collected from the most recent publicly available National Health and Nutrition Examination Surveys (see Ref. 9), showed that approximately 4.4% of the nation's children aged 1–5 years have blood-lead concentrations at or above 10 micrograms per deciliter (mg/ dL), which is the current action level established by the Centers for Disease Control. While this is a significant improvement over the 88% of children who had blood lead levels above this threshold in 1976, before the phase-out of lead in gasoline, it is still cause for concern because it indicates that nearly 900,000 children aged 1–5 have unacceptably high blood-lead levels.

Once lead is absorbed in the body, it is primarily distributed to the blood, soft tissues (kidney, bone marrow, liver, and brain) and to the mineralizing tissue (bones and teeth). In one study it was shown that in adults, following a single dose of lead, one-half of the lead absorbed from the original exposure remained in the blood for approximately 25 days after exposure, in soft tissues for about 40 days, and in bone for more than 25 years (Ref. 14). Once in the bone, lead can re-enter the blood and soft tissues. Under certain circumstances, such as pregnancy and lactation, lead can more readily re-enter blood and soft tissues. Thus, accumulation of lead in bone can serve to maintain elevated blood lead levels years after exposure. The total amount of lead in long-term bone retention can approach 200 mg for adult males 60–70 years old (and even higher with occupational exposure). For adults, up to 94% of the total amount of lead in the body is contained in the bones and teeth but for children only about 73% is stored in their bones. While the increase in bone lead level across childhood may appear modest, the total accumulation rate is actually 80-fold. The increase is 80-fold because children undergo a 40-fold increase in skeletal mass. While lead absorption rates are influenced by several parameters, including route of exposure, chemical speciation, the physical/chemical characteristics of the lead and the exposure medium, as well as the age and physiological states of the exposed individual, there is substantial documentation that a significant amount of lead can be absorbed and accumulated in humans. Such absorbed and accumulated lead can cause significant deleterious health effects, particularly in children.

D. What Proposed Conclusions did EPA Reach from Its Proposal Review of the Available Data on Lead and Lead Compounds?

EPA's review of the available information on lead and lead compounds led EPA to conclude that lead and lead compounds are highly persistent and at the least, bioaccumulative. The persistence of lead in the environment is not in question since, as a metal, lead cannot be destroyed in the environment. With respect to whether lead or lead compounds released to the environment will result in lead that is available, the data indicate that under many environmental conditions lead does become available. The conclusion that lead is available in the environment is confirmed by the data on the bioaccumulation of lead in aquatic organisms and in humans as a result of environmental exposures. As for lead's bioaccumulation potential, lead has been shown to bioaccumulate in laboratory studies, has been found to bioaccumulate in organisms observed in the environment, and has been found to bioaccumulate in humans. EPA noted in its proposal that these data indicate that many of the BCF values and measured environmental concentration factors for lead are above 1,000 with several species having BCF or observed concentration factors at or above 5,000. The references cited for blue mussels include a range of values, the upper end of which is essentially 5,000 (i.e., 4,985). In addition, EPA explained that ''[t]he bioaccumulation and persistence of lead in humans is well documented'' and requested comment on how such

data should be regarded in classifying lead and lead compounds as highly bioaccumulative.

A high concern for the bioaccumulation potential for chemicals with BCF values above 1,000 is consistent with the discussion of BCF values in the proposed rule on PBT chemicals (January 5, 1999, 64 FR 688). In addition, there is considerable information on the accumulation of lead in humans, including children, who are the most susceptible to the toxic effects of lead. The data on lead's persistence and availability in the environment, the observed high bioaccumulation values in aquatic organisms, and lead's ability to accumulate in humans, provided the basis for EPA preliminarily concluding that lead and lead compounds are highly persistent and highly bioaccumulative.

E. What Changes to the Reporting Thresholds did EPA Propose for Lead and Lead Compounds?

In evaluating potential lower reporting thresholds for lead and lead compounds, EPA considered not only their persistence and bioaccumulation properties and the purposes of EPCRA section 313, but also the potential burden that might be imposed on the regulated community. Because PBT chemicals, including lead and lead compounds, persist and bioaccumulate in the environment, they have the potential to pose greater exposure to humans and the environment over a longer period of time. The nature of PBT chemicals, including lead and lead compounds, indicates that small quantities of such chemicals are of concern, which provides strong support for setting lower reporting thresholds than the current section 313 thresholds of 10,000 and 25,000 pounds. For determining how low reporting thresholds should be set for PBT chemicals, including lead and lead compounds, EPA adopted a two-tiered approach. Thus, EPA made a distinction between persistent bioaccumulative toxic chemicals and that subset of PBT chemicals that are highly persistent and highly bioaccumulative by setting lower reporting thresholds based on two levels of concern. As explained in the final PBT rule and in the proposed lead rule, this approach identifies as PBT chemicals those that are persistent (i.e., with half-lifes of at least 2 months) and those that are bioaccumulative (i.e., based on aquatic studies showing BAF/BCF values of at least 1,000 and/or human data showing evidence of bioaccumulation). Further, as also explained in the PBT rule and the proposed lead rule, highly PBT chemicals are identified as those that are highly persistent (i.e., with half-lifes of 6 months or greater) and those that are highly bioaccumulative (e.g., BAF/BCF values of 5,000 or greater). EPA preliminarily concluded that lead and lead compounds to be highly persistent and highly bioaccumulative toxic chemicals.

In determining the appropriate reporting thresholds to propose for lead and lead compounds, EPA started with the premise that low or very low reporting thresholds may be appropriate for these chemicals based on their persistence and bioaccumulation potentials only. EPA then considered the burden that would be imposed by lower reporting thresholds and the distribution of reporting across covered facilities. Using this approach and considering the factors described above and the purposes of EPCRA section 313, EPA proposed to lower the manufacture, process, and otherwise use thresholds to 10 pounds for lead and lead compounds. For purposes of section 313 reporting, threshold determinations for chemical categories, including lead compounds, are based on the total of all toxic chemicals in the category (see 40 CFR 372.25(d)).

F. What Other Reporting Issues Did EPA Consider for Lead and Lead Compounds?

1. *De minimis exemption*. In 1988, EPA promulgated the *de minimis* exemption because: (1) The Agency believed that facilities newly covered by EPCRA section 313 would have limited access to information regarding low concentrations of toxic chemicals in mixtures that are imported, processed, otherwise used or manufactured as impurities; (2) the Agency did not believe that these low concentrations would result in quantities that would significantly contribute to threshold determinations and release calculations at the facility (53 FR 4509, February 16, 1988); and (3) the exemption was consistent with information required by the Occupational Safety and Health Administration's (OSHA) Hazard Communication Standard (HCS). However, given that: (1) Covered facilities currently have several sources of information available to them regarding the concentration of PBT chemicals in mixtures; (2) even minimal releases of persistent bioaccumulative toxic chemicals may result in significant adverse effects and can reasonably be expected to significantly contribute to exceeding the proposed lower thresholds; and (3) the concentration levels chosen, in part, to be consistent with the OSHA HCS are inappropriately high for PBT chemicals, EPA's original rationale for the *de minimis* exemption does not apply to PBT chemicals. EPA therefore proposed to eliminate the *de minimis* exemption for lead and lead compounds based on their status as PBT chemicals. EPA did not propose, however, to modify the applicability of the *de minimis* exemption to the supplier notification requirements (40 CFR 372.45(d)(1)) because the Agency believed there was sufficient information available.

2. *Use of the Alternative threshold and Form A*. EPA stated its belief that use of the existing alternate threshold and reportable quantity for Form A would be inconsistent with the intent of expanded reporting for PBT chemicals such as lead and lead compounds. The general information provided in the Form A on the quantities of the chemical that the facility manages as waste is insufficient for conducting analyses on PBT chemicals and would be virtually useless for communities interested in assessing risk from releases and other waste management of PBT chemicals. EPA, therefore, proposed excluding lead and lead compounds from the alternate threshold of 1 million pounds.

3. *Proposed changes to the use of range reporting*. EPA stated its belief that use of ranges could misrepresent data accuracy for lead and lead compounds because the low or the high end range numbers may not really be that close to the estimated value, even taking into account any inherent error in reporting (i.e., errors in measurements and developing estimates). EPA believed this uncertainty would severely limit the applicability of release information where the majority of a facility's releases are within the amounts eligible for range reporting. Given EPA's belief that the large uncertainty that would be part of these data would severely limit their utility, EPA proposed to eliminate range reporting for lead and lead compounds.

4. *Proposed changes to the use of the half-pound rule and whole numbers*. EPA currently allows facilities to report whole numbers and to round releases of 0.5 pound or less to zero when reporting on EPCRA section 313 listed chemicals not designated as PBT chemicals in the October 29, 1999 final rule. EPA explained its concern that the combination of requiring the reporting of whole numbers and allowing rounding to zero would result in a significant number of facilities reporting their releases of lead and lead compounds as zero. EPA, therefore, proposed that all releases or other waste management quantities greater than 1/10

of a pound of lead and lead compounds be reported, provided that the appropriate activity threshold has been exceeded.

5. *Proposed exemption for the reporting of lead in certain alloys.* In the proposal, EPA proposed to defer making a final decision on lower reporting thresholds for lead contained in stainless steel, brass, and bronze alloys until the Agency could complete an ongoing scientific review of issues pertinent to the reporting of these types of alloys. This would result in no changes to the reporting requirements for lead contained in stainless steel, brass, and bronze alloys until EPA makes a final determination on whether there should be any changes to the reporting requirements for lead and other metals contained in these three types of alloys. EPA, therefore, proposed to include a qualifier to the listing for lead in 40 CFR 372.28. This qualifier would read ''this lower threshold does not apply to lead when contained in a stainless steel, brass, or bronze alloy.''

V. Summary of the Final Rule

A. What Threshold Has EPA Established for Lead and Lead Compounds?

EPA is finalizing manufacture, process, and otherwise use thresholds of 100 pounds for lead and lead compounds, with the first reports at this lower threshold due on or before July 1, 2002, for the 2001 calendar year. This lower reporting threshold does not apply to lead contained in stainless steel, brass, and bronze alloys nor do any of the other changes discussed below in Unit V.B. However, lead contained in stainless steel, brass, and bronze alloys remains reportable under the 25,000 pound manufacture and process reporting threshold and the 10,000 pound otherwise use reporting threshold.

B. What Exemptions and Other Reporting Issues is EPA Addressing for Lead and Lead Compounds?

EPA is eliminating the *de minimis* exemption for lead and lead compounds. However, this action will not affect the applicability of the *de minimis* exemption to the supplier notification requirements (40 CFR 372.45(d)(1)). In today's action, EPA is also excluding lead and lead compounds from eligibility for the alternate threshold of 1 million pounds and eliminating range reporting for on-site releases and transfers off-site for further waste management for lead and lead compounds. This will not affect the applicability of the range reporting of the maximum amount on-site as required by EPCRA section 313(g). EPA proposed to require reporting of all releases and other waste management quantities greater than 1/10 of a pound of lead and lead compounds. Also, EPA proposed that releases and other waste management quantities would continue to be reported to two significant digits. In addition, EPA proposed that for quantities of 10 pounds or greater, only whole numbers would be required to be reported. After reviewing all the comments on this issue, EPA is providing additional guidance on the level of precision at which facilities should report their releases and other waste management quantities of lead and lead compounds. Facilities should still report releases and other waste management quantities greater than 0.1 pound provided the accuracy and the underlying data on which the estimate is based supports this level of precision. Rather than reporting in whole numbers and to two significant digits, if a facility's release or other waste management estimates support reporting an amount that is more precise than whole numbers and two significant digits, then the facility should report that more precise amount. The Agency believes that, particularly for PBT chemicals such as lead and lead compounds, facilities may be able to calculate their estimates of releases and other waste management quantities to 1/10 of a pound and believes that such guidance is consistent with the reporting requirements of sections 313(g) and (h).

VI. Summary of Public Comments and EPA Responses

A. How is EPA Responding to Comments Relating to Generic Issues?

EPA received numerous comments relating to the generic issues raised and resolved in the first rulemaking on PBT chemicals, published on October 29, 1999 (64 FR 58666); for example, whether the Agency should select lower thresholds based on a risk assessment. Some commenters merely reiterate comments raised in the previous rulemaking. Other commenters rephrase, in terms of lead and lead compounds, comments that have been previously submitted on these generic issues, without presenting additional information or concerns specific to lead and lead compounds.

In its proposal to lower the thresholds for lead and lead compounds, EPA explicitly limited its request for comments to issues specific to lead and lead compounds, such as whether lead and lead compounds meet the EPCRA section 313 persistence and bioaccumulation criteria articulated in the PBT rule and proposed lead rule, and whether lead and lead compounds present such unique technical or policy issues that they merit different treatment than that established for either the class of PBT chemicals or the subset of highly persistent and highly bioaccumulative toxic chemicals (see 64 FR 42224 and 58666). Notwithstanding that EPA extended the comment period on this rulemaking to allow for an additional 48 days following publication of the final PBT chemical rule, commenters failed to present issues or information that persuades the Agency to revisit the decisions made with respect to generic issues in the PBT chemical rule, or that provides any basis for treating lead and lead compounds separately from how the Agency generally approachs PBT chemicals within the EPCRA section 313 program.

To the extent that commenters provide comments on the generic issues that were specific to lead and lead compounds, these comments are addressed in this preamble and in the Response to Comments (RTC) document for this final rule (Ref. 1). For responses to those comments on the generic issues that were not specific to lead and lead compounds the reader is referred to the PBT chemical final rule (64 FR 58666) and the associated Response to Comments document (Ref. 15). The remainder of this Unit contains responses to major comments on the issues of the EPCRA section 313 reporting thresholds for lead and lead compounds, the technical information regarding the persistence and bioaccumulation potential of lead and lead compounds, and the alloys reporting limitation for lead. Responses to major comments on EPA's economics analysis (Ref. 16) and regulatory assessment determinations are contained in Units VII and IX respectively. Additional responses to comments not addressed in this preamble are contained in the RTC document for this final rule (Ref. 1).

B. What Comments did EPA Receive on its Statutory Authority to Lower Reporting Thresholds for Lead and Lead Compounds?

Several commenters allege that under EPA's interpretation of EPCRA section 313(f)(2), Congress did not provide an ''intelligible principle'' for determining whether or how much to lower a statutory threshold, thereby rendering this provision unconstitutional as an improperly broad delegation of legislative power. The commenters raise several points in support of this contention; several commenters cite

EPA's statement in the proposal that ''Congress provided no prerequisites to the exercise of EPA's authority to lower [EPCRA section 313] thresholds'' to demonstrate that EPA does not have the authority to lower the thresholds without violating the non-delegation doctrine. Other commenters support this allegation merely by reference to the fact that EPCRA section 313(f)(2) does not prohibit the Agency from establishing a threshold of ''0.'' Another commenter contends that the unconstitutional delegation of authority is even more striking than it was in section 109(b)(1) of the Clean Air Act, which at least provided the Agency with the direction to set standards ''requisite to protect the public health'' and ''with an adequate margin of safety.'' EPCRA, the commenter states, sets forth no standard for establishing reduced reporting thresholds. To support their assertions, several of these commenters specifically cite the decision in *American Trucking Association v. EPA*, 175 F.3d 1027 (D.C. Circuit, 1999) *cert. granted sub nom. Browner v. American Trucking Association*, 120 S.Ct 2003 (US May 22, 2000)(No. 99–1247).

EPA disagrees. As a preliminary matter, EPA disagrees with the interpretation of the non-delegation doctrine articulated in *American Trucking*, and has appealed that decision to the Supreme Court. Nonetheless, EPA believes that Congress has provided an ''intelligible principle'' sufficient for the delegation of authority contained in EPCRA section 313(f)(2).

The commenters appear to have fundamentally misunderstood EPA's explanation of its rationale for selecting the specific thresholds adopted in the final PBT chemical rule, and the implications these actions had for the selection of the thresholds for lead and lead compounds. As part of the discussion in the final PBT chemical rule, EPA noted that for several reasons, it was establishing ''two sets of revised thresholds based on two classes of PBT chemicals,'' and stated its intention that ''the revised thresholds establish a set of categories that would be generally applicable to future designated PBT chemicals.'' (64 FR 58689). Thus, the selection of the specific threshold for lead and lead compounds is governed by the analyses laid out in EPA's preamble to the final PBT chemical rule and in the proposed lead rule. See also EPA's rationale for the specific threshold chosen for lead and lead compounds, *infra* at Unit VI.E. Under this construct, taking into account the aquatic and human data available.

In the preamble to the final PBT chemical rule, and the associated Response to Comments Document (Ref. 15) , EPA described at length the process by which it distilled Congressional guidance from various sources, such as the language and legislative history of EPCRA sections 313(f)(2) and (h), to guide its exercise of discretion in lowering the thresholds. See (e.g., (64 FR 58687–692). Specifically, EPA explained:

EPA relied on the language of EPCRA sections 313(f)(2) and (h), and the legislative history, to elicit the following principles to guide its exercise of discretion in lowering the thresholds, and in selecting the specific thresholds: (1) The purposes of EPCRA section 313; (2) the ''verifiable, historical data'' that convinces EPA of the need to lower the thresholds; (3) the chemical properties shared by the members of the class of toxic chemicals for which EPA is lowering the thresholds (i.e., the degree of persistence and bioaccumulation); and (4) the reporting burden imposed by revised thresholds to the extent that such consideration would not deny the public significant information from a range of covered industry sectors. Further, EPA believes that in the language of EPCRA § 313, and its legislative history, Congress provided direction on the appropriate weight to allocate to each of these considerations in implementing EPCRA section 313(f)(2). These considerations underlay the entire process by which EPA determined the appropriate thresholds. But the Agency's choice of revised thresholds was governed, and ultimately constrained, by EPCRA section 313's overriding purpose, which is to provide government agencies, researchers, and local communities, with a comprehensive picture of toxic chemical releases and potential exposures to humans and ecosystems. Id. at 58687.

EPA also disagrees with the analyses on which the commenters rely to support their assertions that Congress provided no intelligible principle to guide EPA's delegated authority under EPCRA section 313(f)(2). Whether the legislative guidance offered sufficiently constrains the discretion delegated to the Agency under EPCRA section 313(f)(2) must be evaluated against the actual ''power to roam'' that this provision confers on EPA. *Michigan v. EPA*, 213 F.3d 663, 680-81 (D.C. Cir. 2000). As discussed in Unit II.A., as EPA interprets the requirements in section 313(f)(2), the standard operates as an effective constraint when the Agency increases the thresholds, but as a practical matter, cannot provide the same level of constraint when the Agency decreases the thresholds. However, as previously explained, EPA relied on this standard to elicit factors to guide its exercise of discretion. See, 64 FR 58687–692.

But the mere fact that Congress provided neither explicit prerequisites in section 313(f)(2) to the Agency's determination that a lower threshold is warranted, nor a standard whose plain language effectively constrains EPA's discretion in selecting the appropriate lower threshold, does not necessarily render this provision unconstitutional. The issue is whether Congress granted the Agency too much discretion to *modify* the statutory thresholds—not merely whether Congress provided a standard to significantly constrain the Agency's discretion in lowering the thresholds. See *Michigan v. EPA*, 213 F.3d at 680; *International Union v. OSHA*, 37 F.3d 665 (D.C. Cir. 1994). Examination of the former issue demonstrates that in section 313(f)(2), EPA's ''power to roam'' is relatively narrow.

In section 313(f), Congress established thresholds as a baseline, and delegated authority to EPA to modify them provided that the ''revised thresholds shall obtain reporting on a substantial majority of total releases of the chemical at all facilities subject to the requirements of this subsection.'' As previously explained, EPA interprets this to require that any revised threshold obtain reporting on a substantial majority of the total releases reported by facilities reporting under the existing, baseline thresholds. See, Unit II.A. *supra*, and 64 FR 58673–676. This standard effectively constrains EPA's ability to increase the thresholds, and thereby deprive government agencies, researchers, and local communities of information that would provide them with a comprehensive picture of toxic chemical releases and potential exposures to humans and ecosystems, contrary to EPCRA section 313's overriding purpose. The discretion exercised in this rule is EPA's discretion to establish thresholds between 0 and 10,000 pounds or 25,000 pounds; this can hardly be characterized as an ''immense power to roam.''

Moreover, the impact of any revised threshold is distinctly limited, which courts have recognized as a relevant factor in evaluating the degree of authority that Congress delegates to an Agency. See, e.g., *Michigan*, 2000 WL 180,650 (''a mass of cases in courts had upheld delegations of effectively standardless discretion, and distinguished them precisely on the ground of the narrower scope within which the agencies could deploy that discretion''); *American Trucking*, 175

F.3d at 1037 (''The standards in question affect the whole economy, requiring a more precise delegation than would otherwise be the case'' (citations omitted)). Here, that means within the context of all of the other prerequisites Congress established for TRI reporting, and of the other relevant statutory provisions constraining the Agency's ability to modify those requirements. Irrespective of the modified threshold, a facility must still employ more than ten full-time employees; its primary SIC code must fall within one of the listed SIC codes; and it must be manufacturing, processing, or otherwise using one (or more) of the currently listed chemicals. 42 U.S.C. § 11023 (b). And far from granting EPA unfettered discretion to expand these requirements, Congress selectively granted EPA carefully qualified authority to adjust individual parameters. For example, section 313(l) explicitly limits the Agency's authority to modify the reporting frequency, ''. . . but the Administrator may not modify the frequency to be any more often than annually.'' Similarly, Congress included no authority to amend the generally applicable employee threshold; thus facilities with fewer than ten employees are not subject to reporting under subsection 313(b)(1). In section 313(g)(2), Congress also specifically restricted the Agency's ability to require industry to collect data to report under TRI: ''Nothing in [EPCRA section 313] requires the monitoring or measurement of the quantities, concentration, or frequency of any toxic chemical released into the environment . . .'' Accordingly, the scope within which EPA may deploy its discretion under EPCRA section 313(f)(2) is fairly narrow, and its impact limited.

In light of the above, EPA does not believe that the mere fact that the Agency is authorized to potentially select a threshold of ''0,'' necessarily renders section 313(f)(2) unconstitutional. The issue underlying the non-delegation doctrine, as the DC Circuit has explained is ''to make sure that the regulatory principles as applied have their origin in a judgement of the legislature,'' not whether Congress authorized the Agency to establish extremely low thresholds. *International Union* v. *OSHA*, 37 F.3d at 669 (citations omitted). Nor does the fact that Congress did not require the Agency to make specific findings to determine it was appropriate to increase or decrease section 313 reporting thresholds, necessarily demonstrate that Congress failed to provide the Agency with adequate guidance in delegating its authority under section 313(f)(2).

One commenter further alleged that the Agency has failed to identify an intelligible principle ''to channel its application of these factors,'' quoting, *American Trucking Association v. EPA*. Another commenter asserts that EPA's reliance on the general purposes of EPCRA is insufficient, stating that ''general purposes or factors cannot substitute for the constitutionally required ''intelligible principle'' by which to identify a stopping point'' when setting levels or thresholds.

As noted above, the Supreme Court has granted EPA's request to review *American Trucking*. Nonetheless, EPA disagrees that EPCRA section 313(f)(2) falls afoul of the non-delegation doctrine, even as interpreted and applied in that case. As summarized above, in the preamble to the final PBT chemical rule, EPA identified and explained its application of the ''intelligible principle'' that Congress provided along with the delegation of authority in EPCRA section 313(f)(2). See, 64 FR 58687–692.

EPA also disagrees that its reliance on EPCRA section 313's general purposes to discern EPCRA section 313's overriding purpose, and thereby its intelligible principle, is insufficient. The DC Circuit upheld a broad delegation of legislative authority to OSHA based on the Agency's demonstration of legislative guidance found in the Act's ''overriding purposes.'' There, the Court noted

> Were the six itemized criteria the full statement of OSHA's interpretation of its statutory mandate, we might have to vacate the rule, because the agency might still have too much freedom to ''roam between the rigor of section 6(b)(5) standards and the laxity of unidentified alternatives. International Union I, 938 F.2d at 1317. **But OSHA has gone on to infer from various sections—that the Act's ''overriding purpose'' is ''to provide a high degree of employee protection.''** 58 FR 16, 614/3–15/1. Thus the Agency reads the Act to require it, once it has identified a ''significant'' safety risk to enact a safety standard that provides ''a high degree of worker protection.''Id. at 16, 615/1. It is not permitted to ''do nothing at all'', as we had earlier suggested. Id. (quoting International Union I, 938 F.2d at 1317). **Rather, OSHA reads the Act to permit it to deviate only modestly from the stringency required by section 6(b)(5) for health standards. Accordingly, as construed by OSHA, the Act guides its choice of safety standards enough to satisfy the demands of the nondelegation doctrine**. (citations omitted). *International Union v. OSHA*, 37 F.3d at 669 (emphasis added).

The Court also explained that the underlying purpose of non-delegation doctrine is ''to make sure that the regulatory principles as applied have their origin in a judgement of the legislature.'' Id. (citations omitted). EPA believes that its application of EPCRA section 313(f)(2) in this rule, as well as in the PBT rule, similarly satisfy the demands of the nondelegation doctrine.

C. What Science Issues Were Raised by Commenters on the Persistence and Bioaccumulation Criteria?

Several commenters contend that the criteria articulated in the PBT chemical rule to characterize the persistence and bioaccumulation of toxic chemicals should not be applied to metals because the development of the persistence and bioaccumulation criteria (as discussed in the PBT chemical rulemaking, see 64 FR 688–729) was based largely on data pertaining to organic substances. Thus they contend it is inappropriate to use these criteria to determine whether inorganic substances, including inorganic metal compounds, should be classified as PBT chemicals.

The Agency disagrees with the commenters' statement that the PBT rule framework developed by EPA to assess the persistence and bioaccumulation of EPCRA section 313 listed toxic chemicals was designed only for organic substances and is being incorrectly applied to metals. The development of EPA's framework to assess persistence and bioaccumulation is described in detail in the PBT chemical rulemaking (see 64 FR 688–729) and in the proposed lead rule. This framework was not developed to assess only whether organic chemicals are persistent and/or bioaccumulative, but to assess whether *any* chemical substance is persistent and/or bioaccumulative, including metals and metal compounds. EPA notes that the public had the opportunity to comment on the applicability of the PBT rule criteria to metals in the PBT chemical rulemaking. Furthermore, in the PBT chemical rulemaking, the Agency applied these criteria to mercury and mercury compounds—a metal and metal compounds category. EPA also provided notice in the proposed PBT chemical rulemaking that it was continuing to evaluate the bioaccumulation data for lead and lead compounds, and for cobalt and cobalt compounds—also metals (64 FR 717). EPA made clear the PBT rule criteria were developed to apply to metals and metal compounds, as well as organic compounds and, in fact, has applied the criteria to metals and metal compounds in a previous notice and comment rulemaking. With respect to the half-life and BCF/BAF criteria, scientifically these criteria are quite applicable to metals. Finally in the

lead proposed rule, EPA identified an additional factor for use in determining whether a chemical is, at the least, bioaccumlative. EPA explained that there is clear and convincing evidence that lead is bioaccumulative in humans. However, EPA requested comment on how such human data should be considered in determining whether a chemical should be classified in that subset of PBT chemicals that are highly bioaccumulative. Commenters argue that the human data should not be used to classify lead as bioaccumulative because the quantities of lead that might be reported, they believe, would not reduce human exposures to lead that are of concern. As explained elsewhere, EPA does not believe that human data showing the bioaccumulation nature of lead in humans should be ignored in any assessment of lead's bioaccumulation potential simply on the theory that the level of lead to which humans are exposed and the levels observed in humans may not correlate to the additional information on land release collected under this rule.

Persistence, bioaccumulation, and toxicity are three distinct, independent characteristics. Although in the PBT chemical rulemaking the experimental evidence used to derive the environmental half-life, BAF and BCF criteria were obtained largely from studies that involved organic substances, this does not preclude the application of these criteria to inorganic substances such as metals and metal compounds (including lead and lead compounds). The basis for the concern and reason for lowering thresholds is based on the ability of the chemical, whether it is an organic chemical or a metal compound, to persist and bioaccumulate. The Agency believes that these criteria should and must be applicable to *all* chemical substances, including metals and metal compounds. EPA provided a detailed response to the issue of metals as PBT chemicals in the PBT chemical rulemaking. Persistence and bioaccumulation are not dependent upon whether a substance contains carbon (i.e., is organic). Substances that are inorganic can persist and bioaccumulate. The underlying molecular properties that determine whether a substance can persist and bioaccumulate are fundamentally the same for organic chemicals as they are for inorganic chemicals, including metals and metal compounds. These properties, as with most chemical and biological properties of a substance, are more dependent on the electronic and steric characteristics of the atoms comprising a substance, the specific arrangement of the atoms within the substance's molecular structure and, with regard to bioaccumulation, the pharmacokinetics of the substance within the exposed organism and the sensitivity of the organism to the substance.

In addition, it is scientifically valid to establish generic criteria that are applicable to all substances provided that the endpoint or purpose for which the criteria are being established provides a common thread that is not dependent upon the unique elements comprising any given substance. For example, it would be legitimate to establish a category based on a type of arsenic toxicity and include within that category any substance that contains arsenic and exhibits that toxicity regardless of whether individual substances are organic or inorganic. In fact, it is common practice for scientific organizations and regulatory agencies to use generic criteria of this type. One example is the criteria established by the National Toxicology Program (NTP) for characterizing chemical carcinogens. The NTP is required by law to establish a list of all substances which either are known to cause cancer in humans, or may reasonably be anticipated to cause cancer in humans. A criterion used by the NTP to characterize chemicals as known or possible human carcinogens include, among others, tumor incidences in humans or experimental animals. While the vast majority of substances reviewed and tested by the NTP for carcinogenicity are organic substances, and the criterion established by NTP was based largely from toxicological observations pertaining to organic substances, the criterion used by the NTP is the same for inorganic substances as it is for organic substances. The NTP does not use different criteria when evaluating inorganic substances. This is because the ability of a substance to cause cancer is not dependent upon whether the substance is organic. In fact, NTP's current list of substances that are known to be human carcinogens contains both inorganic (including metallic) and organic substances. The carcinogenicity of all of these substances were characterized by the same generic criterion. A detailed discussion of the criteria used by the NTP is available (Ref. 17).

1.*What comments did EPA receive on the persistence of metals and metal compounds*? EPA defines a chemical's persistence as the length of time the chemical can exist in the environment before being destroyed by natural processes. Numerous commenters suggested that EPA adopt a different definition of persistence for metals and metal compounds. They assert that the definition of persistence as applied to metals and metal compounds should include the transformation of individual metal compounds in the environment. As discussed in detail in the following response to comments on this issue, EPA believes that these factors are irrelevant to the persistence of metals and metal compounds in the environment. The factors that the commenters contend should be considered are those which address the conversion of one metal compound to another, which is irrelevant in determining whether metal compounds are persistent. While these are factors which control the transformation of one metal compound to another compound of the same metal, they are not factors which result in the destruction of the metal. There are no environmental factors which can or will result in the destruction of the metal.

Some commenters disagree with EPA's definition of persistence. They contend that the definition of persistence should be based on the availability of the metal in various environments and the length of time the metal is retained in an organism. One of these commenters stated that ''persistence is the length of time an element or compound is available to and/or is retained in an organism or an ecological community, and that the mobility of metals [such as lead] deposited in soils or aquatic sediments becomes an important question when discussing persistence, since they are not persistent in biota unless they reach those environmental compartments and are cleared more slowly than they accumulate.''

EPA disagrees with the commenter's definition of persistence. In the PBT chemical rulemaking (64 FR 58666), EPA adopted a policy for use in classifying a toxic chemical as persistent under EPCRA section 313. In the proposed rule to lower the reporting thresholds of lead and lead compounds (64 FR 42222), EPA used this same policy to determine whether lead and lead compounds are persistent. Most of these comments address the issue of persistence generically rather than specifically to lead and lead compounds. EPA responded to these generic issues in the PBT chemical rulemaking (64 FR 58676) and in sections 2a–f of the associated Response to Comments document (Ref. 15). EPA is discussing these issues here as background for the individual issues specific to lead and lead compounds in order to assist in understanding EPA's responses. Persistence is the length of

time a chemical can exist in the environment before being destroyed by natural processes (64 FR 698 and 64 FR 42227). The environmental media for which persistence is measured or estimated include air, water, soil, and sediment. It is important to distinguish between persistence in a single medium (air, water, soil or sediment) and overall environmental persistence. Persistence in an individual medium is controlled by transport of the chemical to other media. Persistence in the environment as a whole, however, is a distinct concept. It is based on observations that the environment behaves as a set of interconnected media, and that a chemical substance released to the environment will become distributed in these media in accordance with the chemical's intrinsic properties and reactivity. For overall persistence, only irreversible transformation contributes to net loss of a chemical substance. With regard to metals, although metals and metal compounds, such as lead and lead compounds, may be converted from the metal to a metal compound or from one metal compound to another in the environment, the metal itself cannot be destroyed. A metal by its very nature cannot be destroyed and, therefore, is persistent in the environment as the metal or a metal compound.

The primary purpose of the persistence criterion is to establish how long a chemical substance will remain in the environment. The greater the length of time a substance persists in the environment, the greater is the potential for all forms of life to be exposed to the substance. Persistence is not limited to the duration of time a chemical is present in an organism and EPA does not believe it would be appropriate to incorporate this concept into its definition of persistence. It should be noted that, unlike the commenter's definition of persistence, EPA's definition of persistence does not specifically address the longevity of a substance in an organism. Persistence of a substance in the environment as a whole, or even in a particular environmental medium, is fundamentally unrelated to the substance's biological persistence (i.e., length of time a chemical exists in an organism before being destroyed or excreted). Although there are a few factors (physicochemical factors; e.g., water solubility, reactivity) that have a similar influence on environmental persistence as they do on the biological persistence of a substance, there are a number of other factors that influence biological persistence but not environmental persistence. These other factors are organism specific, and are related to the anatomical and physiological characteristics of the organism. The Agency believes its environmental persistence criterion should not be extended to include biological persistence because the factors that influence the two persistence types are largely unrelated. Biological persistence in a given organism does not provide any information as to how long a substance will remain in the environment, and therefore is not relevant to the definition of persistence for EPCRA section 313.

One commenter claims that there is a serious flaw in the Agency's reasoning in characterizing all elements, including metals, as being persistent. Specifically, this commenter claims that this reasoning implies that because elements are non-destructible, then any compounds that contain a particular element is also non-destructible. The commenter acknowledges that EPA makes the statement in the proposed lead rule that ''specific metal compounds may or may not be persistent, depending on the form of the metal and environmental conditions, but the elemental metal itself obviously meets the definition of persistence.'' The commenter claims that this statement begs the questions as to why EPA is not evaluating specific metal compounds when the Agency acknowledges that metal compounds differ in their ''persistence'' and also differ substantially with respect to toxicity and bioaccumulative potential. The commenter states that the above quoted statement could just as easily read ''. . . specific *carbon* compounds may or may not be persistent, depending on the form of *carbon* and environmental conditions, but the elemental *carbon* itself obviously meets the definition of persistence.'' The commenter asserts that, according to EPA, this would mean that all organic compounds are persistent because they contain carbon and carbon is persistent. The commenter states that the Agency does not adopt such reasoning regarding elemental carbon because it would render the PBT chemical assessment methodology useless as an assessment tool. The commenter recommends that the Agency not apply the persistence assessment methodology to metals for the same reasons.

Another commenter believes that EPA's criteria for persistence as it applies to characterizing the persistence of metals is unfair. Specifically, this commenter interprets EPA's persistence assessment methodology as saying ''. . . since any metal is persistent in the environment by definition, every compound of that metal is evaluated and regulated by EPA like the parent metal, even if there are no data on that compound's persistence, even if the persistence in the environmental medium of its concern is very short, and even if that compound's bioavailability is insignificant.''

The Agency believes that both of these commenters have misinterpreted the PBT assessment methodology EPA applied to lead and lead compounds.

With respect to the commenter who questioned why EPA is not evaluating the persistence of compounds individually, EPA disagrees that it is either scientifically required, or necessary for purposes of EPCRA section 313, to evaluate the persistence of each lead compound individually. lead compounds are listed under EPCRA section 313 as a category; this means that all of the individual chemical compounds share common chemical characteristics, such that it is scientifically reasonable to conclude that lead compounds exhibit common toxicological properties/exhibit similar toxicity. For lead compounds, as for all metal compounds listed in an EPCRA section 313 metals category, the relevant common chemical property is the metal, because the toxic constituent is the metal itself, and this is what defines the category. Thus, in evaluating the persistence of lead compounds as an EPCRA section 313 chemical category, the relevant issue for purposes of EPCRA section 313 is the persistence of lead rather than the persistence of the other chemical constituents of the compounds in the category.

Similarly, EPA believes that this commenter's analogy to carbon and organic compounds is misguided. Organic compounds differ significantly from metal compounds in that the presence of carbon in a compound is not a controlling feature in the way that a metal contained in a metal compound is controlling. For example inorganic arsenic compounds are classified as known human carcinogens (Ref. 18). The toxicity is specific to the fact that the compounds contain arsenic and not to the other parts of the arsenic compounds. This is not the case with all groups of carbon compounds. For example, classes of organic chemicals that contain oxygen such as ketones, alcohols, ethers, and carboxylic acids exhibit significantly different physical and chemical properties and toxic effects. This is due to the differing arrangement of the carbon and oxygen within the compound. Even chemicals within the same class of organic chemicals, e.g., ketones, may not exhibit the same toxicity or similar physical

chemical properties. Further, while one arsenic compound will be converted in the environment or *in vivo*, it will not be converted into a substance that does not contain arsenic. In the environment or *in vivo* degradation of one member of a group of organic chemicals, e.g., ketones, carboxylic acids, will not consistently be converted into another chemical of the same class. They will often be converted into a different class of organic chemical.

Thus, while the Agency agrees that elemental carbon is persistent, the Agency would not conclude that all organic substances are persistent simply because they contain carbon. This is because the toxic effects of organic compounds are attributable to the structure of the compounds and *not* the carbon contained in the compounds. Thus EPA would not list a chemical category consisting of carbon and all carbon containing compounds, nor would it make a determination using the PBT assessment methodology that such compounds are PBT chemicals because they contain carbon. The same is true for any other element that is not toxic.

This approach is consistent with the Agency's approach to listing chemical categories, where, in the absence of data on a particular member of the category, EPA adds a chemical category, such as a metal compound category, based on their common chemical characteristics, and without demonstrating separately that each individual member of the category meets the section 313(d)(2) criteria. The D.C. Circuit specifically upheld this approach with respect to listing categories, finding that EPA's action was reasonable (*Troy v. Browner*, 120 F.3d 277, 288-89 (D.C. Cir. 1997).

In addition, the commenters imply that in using the PBT rule assessment methodology EPA would conclude that all metals and their compounds are persistent and bioaccumulative, and therefore the Agency would require that all metals and their compounds that are listed on the EPCRA section 313 list of toxic chemicals have reduced reporting thresholds. The Agency would like to emphasize that while all metals persist, many metals and their compounds would not be characterized by EPA as bioaccumulative and toxic. For a listed toxic chemical to be considered a PBT chemical, the toxic chemical must be sufficiently persistent and sufficiently bioaccumulative.

Several commenters disagree with the Agency's rationale for characterizing all metals as being persistent, and believe that the issue of persistence has little or no relevance to metals.

The Agency disagrees with the commenters' statement that the issue of persistence has little or no relevance to metals. EPA believes that persistence is relevant to the hazard potential of metals such as lead for the same reason persistence is relevant to the hazard potential of organic chemicals: for a chemical that persists in the environment, there is a greater potential for exposure and, therefore, a greater potential for the chemical to cause toxicity in an exposed organism or individual. However, in this rulemaking the Agency did not rely on the property of persistence by itself in lowering reporting thresholds for lead and lead compounds, nor does persistence alone necessarily mean that a substance is or can be a hazard to human health and the environment. As stated above, to be classified as a PBT chemical, a chemical must: (1) Be an EPCRA section 313 listed toxic chemical; (2) be sufficiently persistent; and (3) be sufficiently bioaccumulative. In this rulemaking EPA is addressing lead and lead compounds which are EPCRA section 313 listed toxic chemicals and is also considering the bioaccumulation potential of these chemicals.

One of the commenters believes that metals do not necessarily persist, and that the definition of persistence in relation to metals should be qualified to mean how long a metal can remain in a particular form or species (e.g., oxidation state). This commenter also recommends that the Agency should examine data pertaining to certain properties of metals to assess persistence in accordance with this definition, and to allow for the identification of those metals and metal species which are the most/least resistant to change and which are the most or least bioavailable. The properties raised by the commenters include: transformation/dissolution, oxidation, corrosion, sulfide binding, and first hydrolysis constant.

EPA agrees with the commenter's statement that metals, including lead, can exist as different species and compounds. These different species pertain to the oxidation states or, more specifically, the number of electrons missing from the outer orbital of the metal atom. Lead, for example, can exist in a neutral species, Pb^0 (no electrons are missing from the outer electron orbital of the lead nucleus), or as lead compounds in one of two oxidation states: Pb^{+2} or Pb^{+4} (2 and 4 electrons are missing from the outer electron orbital, respectively). As stated in the proposed rule, these species can convert from one to another under certain, commonly encountered environmental conditions. See also Unit VI.C.5. of this preamble. While there may be a conversion from one lead compound to another lead compound or to metallic lead, or from metallic lead to a lead compound (either in the Pb^{+2} or Pb^{+4} oxidation states), there is no possible conversion either in the environment or *in vivo* that will convert (or degrade) metallic lead or any lead compound into a substance that does not contain lead. Any conversion will always result in the presence of lead or a compound that contains lead. Conversion of a metal atom from one oxidation state to another does not change the number of protons in the nucleus of the atom and, therefore, does not change the metal into another metal or element. In the case of lead, each species of lead (Pb^0, Pb^{+2}, and Pb^{+4}) **is still lead** because each contain the same number of protons (82) within their nuclei (See Refs. 19 and 20).

EPA disagrees with the commenter's assertion that the Agency consider transformation/dissolution, oxidation, corrosion, sulfide binding, and first hydrolysis constant in determining whether metal compounds are persistent. These are factors which address the conversion of one metal compound to another, which is irrelevant in determining whether metal compounds are persistent. While these are factors which control the transformation of one metal compound to another compound of the same metal, they are not factors which result in the destruction of the metal. There are no environmental factors which can or will result in the destruction of the metal. Therefore, EPA believes that the commenter's definition of persistence is not an appropriate alternative to EPA's definition.

One commenter who agrees with EPA's definition of persistence and, in particular the Agency's characterization of lead as being persistent states that the persistency of lead poses a significant threat to human health and the environment because this property allows lead to remain in the environment without being broken down by natural processes. This commenter disagrees with other commenters who claim that metals are not persistent or that persistence of toxic metals should not be of concern. This commenter believes that persistence enables a substance like lead to travel through ecosystems and through different media and, as such, threatens human health and the environment far beyond the geographic vicinity of the source from which it has been released.

The Agency agrees with the commenter's statement that lead is persistent. The Agency also agrees that

the persistence property of a substance contributes to the ability of the substance to be distributed through ecosystems and through different media to areas beyond the geographic vicinity from where the substance entered the environment. The property of persistence, however, pertains to longevity of a substance, and does not bestow an ability for the substance to partition throughout environmental media. However, the opportunity for exposure to a substance that is capable of partitioning throughout environmental media may be greater if the substance is also persistent, since the substance will remain in the environment for a longer period than a substance that is not persistent

2. *What comments did EPA receive on the availability and bioavailability of metal compounds*? Commenters suggest that EPA consider environmental availability (which they term ''bioavailability'') in lieu of bioaccumulation. Many of these commenters assert that unless a metal compound is readily available in the environment, it will not be bioavailable or bioaccumulate. Some attempt to take a risk-based approach to metals and metal compounds in the environment by arguing that when environmental availability is considered, metals and metal compounds will not be present at levels high enough to cause adverse effects.

As discussed in detail below, the level of environmental availability or bioavailability is not a surrogate for bioaccumulation. Even metal compounds that have limited availability or bioavailability can bioaccumulate. The extent of environmental availability or bioavailability will not affect whether bioaccumulation will occur. For example, lead from a sparing soluble compound and lead from a readily soluble compound will both bioaccumulate. This is in contrast to the commenters' implication that only the lead from the readily soluble lead compound will bioaccumulate. Further as discussed below, the presence of a soluble metal compound is not the only factor, or in many cases the determining factor, that controls the potential for the metal compound to bioaccumulate. A metal compound may undergo various transformations in the environment resulting in a different metal compound which has a much higher availability and/or bioavailability. While metals and metal compounds need to be environmentally available and/or bioavailable as a prerequisite to bioaccumulation, there is not a quantitative relationship between environmental availability and/or bioavailability and the degree of bioaccumulation. Therefore, EPA believes that availability and bioavailability are not appropriate substitutes for bioaccumulation.

Further, requiring a particular level environmental availability would effectively be establishing a risk-based approach to lowering thresholds which EPA believes is inappropriate for the following reasons. The availability of lead in the environment will vary depending upon environmental conditions. Choosing one level of environmental availability and applying that individually to each metal compound is neither practical nor scientifically supportable because: (1) As discussed above environmental availability is not necessarily reflective of bioavailability; and (2) the environmental availability of a metal compound depends upon local environmental conditions. There is no ''best'' or adequately representative set of national environmental conditions. Further, the TRI program is primarily a hazard based program. Risks that may be acceptable at the national level may not be acceptable at a regional or local level.

EPA considers availability in the environment and bioavailability for metal and metal compounds for purposes of bioaccumulation only to determine whether it is impossible for the metal and metal compounds to bioaccumulate, i.e., a compound that is both environmentally and biologically inert cannot bioaccumulate. EPA believes that there are data that indicate that lead and lead compounds are available in the environment, are bioavailable, and bioaccumulate, e.g., data in humans and fish advisories. However, several commenters contended at public meetings on EPA's PBT chemical rulemaking that metals and metal compounds, such as lead and lead compounds, are not available in the environment and thus, cannot bioaccumulate. To address these comments, EPA chose to conduct an environmental fate assessment to describe the environmental availability of lead and lead compounds. Qualitative environmental fate assessments are generally part of a hazard assessment for a chemical. The qualitative environmental fate assessment for lead and lead compounds, however, was not developed, nor was it intended, to be part of an exposure assessment or risk assessment.

Several commenters claim that EPA should consider bioavailability in its assessment of metals and metal compounds, such as lead and lead compounds. These commenters contend that not all metal compounds and lead compounds in particular are bioavailable. According to the commenters, unless a compound is in a form that is bioavailable, it will present little risk to human health and the environment. One commenter made the following statement:

> Because of metals' natural persistence, the weight of scientific opinion holds that bioavailability is a more appropriate criterion for assessing the environmental and health hazards associated with metals. While toxicity is obviously a relevant measure for assessing the hazard posed by a substance, the substance must be available for uptake [bioavailable] before it can exhibit an adverse effect. Bioavailability varies significantly among different species of metals, including lead compounds, and also is influenced by environmental media. Bioavailability can only occur if soluble metal compounds are released. Thus, the rate at which metals transform to soluble/bioavailable species is critical for hazard identification. Simply stated, the natural persistence of metals with toxic properties poses no special hazard if those metals generally are present in environmental media in forms that cannot be taken up by plants and animals.

Other commenters expressed similar views. These commenters believe that the availability of lead from lead compounds differs among lead compounds, and that lead is unavailable from certain lead compounds. Therefore, in the opinion of the commenters, lead compounds from which lead is not available and/or bioavailable cannot be PBT chemicals, and should not be included in this rulemaking.

The Agency disagrees with the commenters assertions that: (1) EPA did not consider bioavailability of lead in its assessment of lead and lead compounds as bioaccumulative substances; and (2) that bioavailability is only possible for released soluble metal compounds.

The basis for the Agency's disagreement with these comments concerns the commenters use of the terms ''availability'' and ''bioavailability'', which differs significantly from EPA's definition of these terms. The commenters are using the term bioavailability interchangeably with availability, when in fact these two terms have totally different meanings and cannot be used interchangeably. In addition, the commenters have incorrectly concluded that: (1) If lead is not available in the environment, it is not bioavailable and will not bioaccumulate or cause toxicity; (2) lead is only bioavailable when in its ionic oxidation state; and (3) only those lead compounds that are water soluble as released are bioavailable. To respond to

these comments, the Agency needs to first clarify the distinction between ''availability'' of a metal, and ''bioavailability'' of a metal or metal compound, and the factors that influence availability and bioavailability of a metal or metal compound.

Availability of a metal is the extent to which a metal, in either its neutral (MG^0) or ionic (MG^{+x}) oxidation state, can reach a state of atomic disaggregation. Inorganic metal compounds that are water soluble will completely dissociate in aqueous media, liberating the metal in its ionic oxidation state. In aqueous solution the metal atoms of the molecules of these substances are completely disaggregated from the rest of their molecular constituents. In this disaggregated state the metal is completely available. Water solubility is not a prerequisite, however, for a metal to become available from a metal compound. In the environment a metal can become available from organometallic substances or inorganic metal compounds that are poorly soluble in water, by undergoing environmental transformations that cause the metal atoms to dissagregate and become available. Environmental transformations that cause metals to become available are summarized below, and discussed in greater detail in Unit V.A. of the proposed lead rule (64 FR 42227-42228), and in *The Environmental Fate of Lead and Lead Compounds* (Ref. 2).

The extent to which a metal can become available from a metal compound in environmental media is dependent upon: (1) The physicochemical properties of the metal and the metal compound; (2) the structural characteristics of the metal compound; and (3) environmental factors, including, but not limited to: presence of aerobic or anaerobic bacteria, pH, moisture content, and organic matter content of soil or sediments. Some or all of these environmental factors can vary between specific terrestrial or aquatic environments. For different compounds that contain the same metal, the relative availability of the metal from each compound can vary within the same terrestrial or aquatic environment. It is also true that the availability of a metal from the same metal compound can vary between specific terrestrial or aquatic environments. Some metal compounds are more susceptible to environmental transformations and subsequent release of the metal than are other metal compounds.

Bioavailability is the extent to which a substance is absorbed by an organism, and distributed to an area(s) within the organism. This is important because the substance can then exert a toxic effect or accumulate. As with availability, the physicochemical and structural characteristics of a substance play an important role in determining whether the substance is bioavailable and the extent to which it is bioavailable. Unlike availability, however, whether a substance is bioavailable and the extent to which it is bioavailable in a given organism also depends upon the anatomy and physiology of the organism, the route of exposure, and the pharmacokinetics of the substance in the organism (i.e., the extent to which the substance is or can be absorbed by the organism from the exposure site, its distribution and metabolism within the organism, and its excretion from the organism). It is important to stress that bioavailability does not by itself mean that a substance is a hazard to human health or the environment. A substance that has 100% bioavailability does not pose a hazard to human health or the environment if it is not intrinsically toxic. Conversely, for substances that are intrinsically toxic it is not necessary for the substance to be 100% bioavailable to cause toxicity. Depending upon the extent of exposure, toxic potency, and the nature of the toxic effect, even substances that have low bioavailability can still pose a hazard to human health or the environment. Similarly, a substance does not have to have 100% bioavailability in order for it to bioaccumulate. For some compounds, even very limited bioavailability (that is a very small percentage is bioavailable) can result in concern if it is bioaccumulated. Lead and lead compounds are one example. Polychlorinated biphenyls (PCBs) are another (64 FR 706).

Absorption of a substance is a critical component of its bioavailability. Absorption is the movement of a chemical substance from its site of exposure on a terrestrial or aquatic life form into its systemic circulation (bloodstream) or, in the case of unicellular organisms such as algae, inside the cell comprising the organism. In any case, absorption of a substance from any exposure site involves its passage across the biological membranes that compose the exposure site. Chemicals can cross a cell membrane by several mechanisms. These are: (1) Passive permeation (diffusion) through the membrane; (2) passive transport through membrane channels or pores; (3) active transport; facilitated transport; or (4) phagocytosis (also pinocytosis and endocytosis) (Ref. 21). Whether a substance can or will be absorbed, and the degree to which it can be absorbed depends largely upon the physicochemical properties of the substance, the anatomical makeup of the exposed organism and the site of exposure (Ref. 21). Substances released to the environment that are not absorbable by terrestrial or aquatic species may be transformed in the environment to metabolites that are absorbable and, hence, bioavailable.

An important point to stress regarding the bioavailability of metals is that availability of a metal is **not** a prerequisite for its bioavailability. Metals can be bioavailable in either their neutral (MG^0) or ionic (MG^{+x}) oxidation states; or as part of an intact inorganic or organic compound. When in ionic oxidation states many metals are generally absorbed by active transport processes. Here, cellular membrane-bound proteins carry the metal across the cell membrane and into the cell. While it would seem that most metal ions are sufficiently small and water soluble to simply pass through membrane channels, their hydrated ionic radii are usually too large to permit their passage by this mechanism. Metals in their neutral or ionic oxidation states may be taken up by organisms by phagocytic processes as well. Organometallic substances are substances in which the metal is bonded to carbon-containing substituents. These substances can be absorbed intact by passive diffusion. The absorption of poorly water soluble inorganic metallic substances can occur via phagocytosis, or by other mechanisms. In terrestrial or aquatic life forms that have digestive systems that secrete strong acids, a poorly water soluble inorganic metallic substance or a metal in its neutral oxidation state can react (following oral exposure to the substance) with the acid to form a water soluble salt of the metal. Under these circumstances the metal is made available within the digestive system, and is absorbed in its ionic oxidation state. See Refs. 21, 22, 23, and 24.

The distribution, metabolism, and rate of excretion of a metal or metal compound depends upon the nature of the metal or metal compound, and the anatomy, physiology and genetic makeup of the organism. Metals absorbed in their neutral or ionic oxidation state be excreted unchanged or react with endogenous substances to form a metal compound *in vivo*. Organometallic substances are typically more lipid soluble than is the metal in its neutral or ionic oxidation state, and can be distributed more readily to areas of the organism that otherwise may be

poorly accessible by the metal in its neutral or ionic oxidation state. Organometallic substances may also undergo metabolic transformations *in vivo* in which the metal is liberated from its organic constituents. The same is true for inorganic metallic substances absorbed intact. See Refs. 24, 25, and 26.

Generally the ionic oxidation states of metals are the most available and, for many life forms, the most bioavailable. For aquatic species the bioavailability of a metal is expected to be greater from those metal compounds in which the metal is readily available in aquatic environments than from metal compounds or complexes in which the metal is not readily available in aquatic environments. This is because the metal is in a completely disaggregated state and dissolved in the aqueous media of the aquatic environment, which favors uptake of the metal by aquatic organisms since they are typically immersed in the aqueous media. However, aquatic species can also absorb intact metal compounds (e.g., organometallic substances). Thus, metals may be bioavailable from metal compounds or metal complexes even where the metal is not available in aquatic environments. Many aquatic organisms such as mussels, clams, and oysters, for example, consume as food organic materials suspended in aqueous media. These molluscs use short, hairlike locomotory organelles (cilia) to take in suspended organic materials from the water. Water currents sweep the suspended organic materials into the open shells, where they become fastened to a film of mucus. The cilia sweep the mucus to the mouth of the mussel. Soft, fingerlike organs push the mucus and organic materials into the mouth of the mussel, where it is taken in and digested. As stated by EPA in the proposed rule regarding lead and lead compounds, and by many commenters, lead dissolved in aqueous media may be removed from solution through sorption to suspended organic matter. Although no longer available, the lead in these suspended complexes may still be *bioavailable* in aquatic life forms that consume solid organic materials as food. Another example is that fish can absorb organometallic substances (intact) via passive diffusion through their gill membranes. See Refs. 24, 27, and 28.

The availability of a metal from the *same* metal compound may vary in different terrestrial or aquatic locations. Differences in environmental conditions lead to differences in the environmental fate of the compound in different environments. In an aquatic environment that contains metal ions of the same metal, the bioavailability of the metal in different aquatic species may vary even though the availability of the metal to each species is the same (i.e., the concentration of the metal in its ionic oxidation state is the same throughout the aquatic environment). These differences in bioavailability in different aquatic species are due to the differences in anatomy, physiology, and pharmacokinetic differences among the species. For different compounds that contain the same metal, the bioavailability of the metal ion in a given organism within a particular terrestrial or aquatic location may vary among different compounds. For a given organism, differences in bioavailability of a metal among compounds that contain the metal may be ascribed to differences in the physicochemical properties of the metal compounds and pharmacokinetic differences.

As mentioned above, metals or metal compounds released to the environment from anthropogenic sources are affected by prevailing environmental conditions, meaning broadly the wide variety of physical, chemical and biological processes that act upon them. These processes collectively determine the metal compounds in which the metal can exist in the environment. Lead can enter the environment as available or bioavailable compounds, or as compounds that are not available or bioavailable. However, lead that enters the environment as compounds that are not available or bioavailable can be converted in the environment to compounds that are available or bioavailable. As mentioned above, the ionic oxidation states of metals are generally the most available and, for many organisms, the most bioavailable. Hence, environmental factors that affect the availability of a metal may indirectly affect the bioavailability of metal. It is therefore important to consider those factors that influence the availability of a metal in the environment, when assessing physical or biological properties of the metal. However, as also discussed above, availability of a metal is not a prerequisite for its bioavailability. Interconversion of inorganic metal compounds can be quite rapid and as a result the metal compound in which the metal is released may not be the predominant metal compound post-release. Availability of a metal from an organometallic compound or insoluble inorganic compound is affected by many factors and its determination is complex, but many of the more important variables are discussed below for lead. A detailed discussion of the environmental fate of lead, that is illustrative of many of the more important environmental variables that affect availability and bioavailability of metals in general is provided in Unit V.A. of the proposed rule (64 FR 42227-42228), in *The Environmental Fate of Lead and Lead Compounds* (Ref. 2), and below.

In some instances, after deposition in the soil environment, lead may bind strongly by mechanisms such as the formation of insoluble complexes with organic material, clay minerals, phosphate, and iron-manganese oxides common in many soils. However, some of the lead in the soil environment (0.2 to 1%) may be water soluble. The extent of sorption appears to increase with increasing pH. Under acidic conditions, levels of lead in soil water can increase significantly. (The solubility of lead increases linearly in the pH range of 6 to 3.) Cation exchange capacity (CEC, related to soil clay content) and pH also influence the capacity of soil to immobilize lead. Using organic chelation as a model, the total capacity of soil to immobilize lead can be predicted by a linear relationship equation. Using this model to predict saturation capacity from CEC and pH it can be shown that a decrease in pH from 5.5 to 4.0 will reduce estimated soil capacity 1.5 times, thereby increasing the concentration of available lead in soil water (Ref. 2).

A number of field studies demonstrate the enhanced mobility of lead in soils under a range of environmental conditions. In all of these studies variables including pH, soil organic matter content and the chemical species of lead present played a significant role in increasing soil lead mobility. Limited data also indicate that organo lead compounds may be converted into water-soluble lead compounds in soil. Degradation products of tetramethyl and tetraethyl lead, the trialkyl lead oxides, are expected to be significantly more mobile in soils than the parent compounds (Ref. 2).

Levels of soluble lead in surface waters depend on the pH of the water and the dissolved salt content. Equilibrium calculations show that at a pH greater than 5.4 the total solubility of lead is approximately 30 micrograms per liter (µg/L) in hard water and approximately 500 µg/L in soft water. In soft water, sulfate ions limit the lead concentration in solution through the formation of lead sulfate. The lead carbonates limit lead in solution at a pH greater than 5.4 (Ref. 29). Concentrations as high as 330 µg/L could be stable in water at a pH near 6.5 and an alkalinity of about 25 milligrams (mg) bicarbonate ion per liter. Water

having these properties is common in runoff areas of New York state and New England.

Lead also forms complexes with organic matter in water. The organic matter includes humic and fulvic acids that are the primary complexing agents in soils and widely distributed in surface waters. The presence of fulvic acid in water has been shown to increase the rate of solution of lead sulfide 10 to 60 times (Refs. 30 and 31). At pH levels near neutral (i.e., about 7.0), soluble lead-fulvic acid complexes are present in solution. As pH levels increase, the complexes are partially decomposed, and lead hydroxide and carbonate are precipitated.

At neutral pH lead generally moves from the dissolved to the particulate form with ultimate deposition in sediments. There is evidence that in anaerobic sediments, lead can undergo biological or chemical methylation. This process could result in the remobilization and reintroduction of transformed lead into the water column where it could be available for uptake by biota, and volatilization to the atmosphere. However, tetramethyl lead may be degraded in aerobic water before reaching the atmosphere.

It can be concluded that many processes commonly observed in the environment result in the release of lead ion, which is available and bioavailable lead. These processes may occur in soil and aquatic environments with low pH and low levels of organic matter. Under these conditions, the solubility of lead is enhanced and in the absence of sorbing surfaces and colloids, lead ion can remain in solution for a sufficient period to be taken up by biota. Lead sorption to soil organic matter has been shown to be pH dependent. A decrease in soil pH can cause sorbed lead to desorb, and increase lead availability in soil water.

A few commenters contend that bioavailability is only possible for released soluble metal compounds. This position is incorrect: EPA has concluded that metal compounds, including lead compounds, that are released as metal compounds that are not soluble or bioavailable may be converted in the environment into metal compounds that are available or bioavailable. Furthermore, as discussed above, a metal compound may not be soluble, but may, nonetheless, be bioavailable.

Several commenters contend that EPA should consider each member of a metal compounds category (such as lead compounds) individually because the availability will vary from metal compound to metal compound within a category and some metal compounds will not be available at all.

EPA disagrees. As discussed above in Unit VI.C.1. with respect to evaluating persistence for metal compound categories, the Agency believes that it is reasonable to evaluate metal compound categories, such as lead compounds, as a category rather than individually. Moreover, in the case of lead compounds, the bioavailability of a lead compound is not necessarily dependant upon the availability of lead from the compound. That is, the parent lead compound may be bioavailable as is or, if not itself bioavailable, could be converted in the environment into a compound that is bioavailable or from which lead is bioavailable. As EPA has discussed elsewhere in this preamble, the environmental fate assessment indicates that there are many conditions under which lead from lead compounds can become available in the environment. Further, most lead compounds provide bioavailable lead when ingested. In addition, regardless of the relative environmental availability of lead from one lead compound to another, the lead compounds all add to the environmental loading of lead. Thus, even if under the same environmental conditions the lead from compound A is 10 times less available than the lead from compound B, compound A would introduce the same amount of available lead if its releases are 10 times greater. If lead compounds are evaluated individually based on relative environmental availability then the additive effect of the loading of lead from these compounds would be ignored.

Two commenters criticize EPA for not using the latest tools for assessing the availability of metals, including those tools in which the Agency was or is involved with developing. These commenters mention several Agency efforts that pertain to availability and the assessment of metals. These include the Environmental Sediment Guidelines and the Biotic Ligand Model development for the Water Quality Criteria.

The environmental processes that determine the complexation, speciation, and ultimately the availability of lead in the environment have been considered and addressed elsewhere in this preamble. In conducting its assessment of the availability of lead in the environment, EPA reviewed the available documentation on both the simultaneously extracted metals/acid volatile sulfide (SEM/AVS) methodology and the Biotic Ligand Model (BLM). EPA believes that the SEM/AVS methodology as applied to the Environmental Sediment Guidelines, and the BLM as applied to water quality criteria show great promise for use in conducting *site-specific* assessments of those metals for which it has been validated. However, to date neither the SEM/AVS methodology nor the BLM have been validated for lead, nor have the substantive technical comments provided by the EPA Science Advisory Board been incorporated into these approaches. In addition, EPA does not believe that a means currently exists to incorporate these methodologies into the technical analysis supporting a *nationally* applied regulation such as this rulemaking. While at this stage of their development these methods may be useful in site-specific assessments, they cannot be applied to support national Agency programs such as the TRI Program because of the variability in environmental conditions throughout the United States. On the other hand, the PBT methodology, as used by EPA in the characterization of lead as a PBT chemical, can be used to provide technical support to national regulatory programs such as the TRI Program because this methodology incorporates the environmental processes that determine the complexation, speciation, and the availability of lead in the environment, but does not require site-specific input. EPA believes that the PBT model is an appropriate methodology for assessing the persistence of metals, including lead.

3. *What comments did EPA receive on the bioaccumulation of metals and metal compounds?* Numerous commenters suggest that for metals and metal compounds bioaccumulation is not a relevant endpoint of concern. They contend that for metals and metal compounds: (1) Bioaccumulation is mitigated by environmental factors; (2) that metals and metals compounds are often essential nutrients and thus organisms have developed mechanisms to control their accumulation; (3) that BCF values for metals are dependent upon the concentration of the metal; and (4) that metals do not bioaccumulate at the concentration levels associated with toxicity. As discussed in detail in the following comment responses, EPA does not believe that any of the issues raised by the commenters call into question EPA's scientific and policy reasons for considering bioaccumulation for lead and lead compounds. Not all metals are essential nutrients and even those that are can be accumulated to unsafe levels. In particular, lead is not an essential nutrient. While some metal BCF values

vary with metal concentration this does not change the fact that the metals do bioaccumulate. In addition, bioaccumulation does not need to occur at concentrations that cause toxicity to be of concern, and in fact testing of bioaccumulation should not be conducted at concentrations that are detrimental to the test organism. Moreover, where there is extensive human data showing significant bioaccumulation of a listed toxic chemical, such as here, the bioaccumlation of the metal is obviously of concern. Therefore, EPA believes that bioaccumulation potential is a relevant endpoint of concern for metals, especially for lead and lead compounds.

Several commenters contend that the extent to which a metal bioaccumulates in aquatic organisms is dependent upon the metal's concentration in the aqueous habitat of the organism. Specifically, this commenter states that the BAF or BCF of a substance is inversely related to its concentration in the surrounding aqueous medium: that is, BAFs and BCFs become larger as the external concentration of the substance decreases. Thus, according to the commenter, because a metal's BCF or BAF value in a given aquatic organism will vary depending upon concentration, a single BAF or BCF value cannot be used to define whether a metal bioaccumulates. In effect the commenter is disagreeing with EPA's definition of BCF and BAF since the definitions do not require that all concentrations of the chemical result in the same BCF or BAF.

The Agency is in general agreement with the commenters' position that for a substance that bioaccumulates in aquatic species the degree to which it does so (i.e., the BAF and BCF of the substance) is related in part to the external concentration of the substance. The Agency also believes, however, that external concentration is not the only factor that influences bioaccumulation. As discussed previously, the propensity of a substance to bioaccumulate in a species depends largely upon the pharmacokinetics of the substance in that species. For further discussion on pharmacokinetics and bioavailability and bioconcentration see Unit VI.C.2.

In addition, the Agency believes that when analyzing test data, the conclusion that bioaccumulation decreases as external concentration of a substance increases may be erroneous. It is quite possible that as the concentration of the test substance is increased, biochemical changes that are precursor events to toxicity are initiated. While the increased concentration may not be sufficient to cause death to the organism, the initiation of the precursor events may cause a stasis in cell growth or function, and interfere with the organism's ability to absorb the metal. In a species where this is the case, it would therefore incorrectly appear that the bioaccumulation of the metal decreases as external concentrations increase. Thus, the Agency is in general agreement with the commenter's position that, for a substance that bioaccumulates in aquatic species, the degree to which it does so is related to the external concentration of the substance. The Agency, however, does not agree that the relationship for metal is always truly inversely related: i.e., that as external concentration increases bioaccumulation decreases. This is not a general phenomenon for all metals and metal compounds in all organisms as suggested by the commenter.

When discussing BCF and BAF values, distinction needs to be made between BAF or BCF values that are measured in a laboratory from those that are measured in an actual environmental setting. The Agency's definition of BCF and BAF (64 FR 42229) pertain to determinations of BAF and BCF under controlled experimental conditions where exposure of the aquatic species to the chemical is kept relatively constant (i.e., external concentration of the substance remains relatively constant). Thus, assays performed in laboratories to determine BAFs and BCFs are conducted under controlled conditions, and any sources of variability in conditions are minimized or eliminated. In a laboratory assay the test concentration is usually set at some percentage below the acute LC_{50} (the concentration lethal to 50% of the test organisms following acute exposure); often $\frac{1}{10}$ of the LC_{50} of the metal is used. While there is no reason BCF tests cannot be conducted at other concentrations of the test chemical, it would serve no scientific purpose to use concentrations at which the test organism becomes stressed or dies before the test assay is completed or before the organism has the opportunity to bioaccumulate the test chemical. In an actual environmental setting, however, conditions can be variable. No commenter to this rule provided scientific data showing that these BCF values would not be found in the environment. Consequently, EPA believes that appropriately conducted bioaccumulation tests conducted at even at one concentration of lead are valid indicators of the potential for lead to bioaccumulate.

Two commenters claim that EPA dismisses the notion that bioavailable metals are often intentionally bioaccumulated as beneficial nutrients or are otherwise safely metabolized by plants and animals through biological mechanisms. One of the commenters states that while metals can bioaccumulate, the manner and rate at which they do so varies based upon the nutritional needs of the organism, external concentration of the metal, and speciation of the metal. The commenter also states that the bioaccumulation of metals is fundamentally different than the process by which organic compounds bioaccumulate.

EPA acknowledges that some metals are nutrients in some organisms, including humans, or are otherwise necessary for the subsistence of organisms. Thus, some metals need to be bioaccumulated by the organism. Clearly, such metals need to be bioavailable in the organisms that require these metals. As discussed in greater detail elsewhere in this document and as alluded to by one of the commenters, in many organisms the absorption or uptake of metals across cell membranes involves active (i.e., energy-requiring) processes, whereas absorption or uptake of organic substances is usually the result of passive diffusion across cell membranes. Active transport processes give the organism some ability to regulate the uptake of metals. It is also important to note that active transport across cell membranes is not the only means by which a metal can be absorbed. Organometallic substances, for example, are often absorbed by passive diffusion. Metals and metal containing substances may also be taken up by organisms through phagocytic processes. In addition, as one of the commenters states, metal speciation and concentration are factors that can influence uptake of metals into an organism.

While active transport processes are involved with the uptake of metals needed by the organisms, these processes do not always discriminate those metals that are needed by the organism from those metals that are harmful to the organism. Thus, organisms also have the ability to take up or absorb metals that are not nutrients and that are not necessary for subsistence. Thus, the processes that organisms use to absorb or take up needed metals do not necessarily prohibit or protect them from taking up toxic metals. In addition, even needed metals can be toxic to the organism if over exposure occurs. It is well established that metals that are not needed by an organism can be taken up by the organism, and bioaccumulated by the organism. lead and mercury, for

example, are not known to be essential metals in any species. Yet the uptake and bioaccumulation of these metals by organisms, including humans, is well established. EPA has therefore determined, insofar as commenters are suggesting that EPA consider the nutrient value of metals in this rulemaking, that such comments are irrelevant because lead has no known nutritive value to any species. The results of the studies investigating the bioconcentration of lead and lead compounds in aquatic organisms summarized in Table 1 (64 FR 42230) of the proposed lead rule and the table in Reference 10 of the proposed rule show that lead is taken up and bioaccumulated by many different aquatic organisms. Also, as discussed in Unit VI.D.3., EPA's fish advisory data base demonstrates that many species of fish and shellfish from various aquatic environments in different regions of the country contain lead (see http://fish.rti.org) indicating that fish and shellfish bioaccumulate lead under realistic environmental conditions.

Two commenters stated that bioaccumulation of metals does not necessarily indicate the presence of, or a potential for adverse effects. At the outset, EPA stresses that lead and lead compounds are EPCRA section 313 listed toxic chemicals. Therefore, as stated in the proposed rule and elsewhere in this preamble, the toxicity of lead and lead compounds is not at issue in this rulemaking. These commenters state that bioaccumulation of a substance is not an indicator of hazard, and should not be used as a hazard assessment criterion.

The Agency agrees that the ability of a substance to bioaccumulate does not by itself necessarily indicate the presence of, or potential for adverse effects. The Agency believes, however, that the concept of bioaccumulation is relevant to the hazard characterization of metals for the same reasons that it is relevant to the hazard characterization of organic substances: that low-level or sub-toxic exposures to a toxic substance that bioaccumulates could eventually lead to exposures of concern in the organism that bioaccumulates it or increased exposure potential for predator species. The Agency would also like to emphasize that while bioaccumulation of lead in a given aquatic organism may not necessarily be toxic to the organism, the accumulated lead may serve as a source of lead exposure and toxicity to predator species, including humans.

Thus, the high bioaccumulation potential of lead, an EPCRA section 313 listed toxic chemical, within an organism is anticipated to contribute a greater total body burden relative to a chemical with lower bioaccumulation potential, thereby increasing any toxicity to the organism. High bioaccumulation also increases lead exposure to other organisms that are predators of the organism that has accumulated the lead.

4.*What comments did EPA receive on the relationship of its persistence and bioaccumulation criteria to international criteria?* Two commenters claim that numerous international organizations such as the Organization for Economic Cooperation and Development (OECD) have approached the classification of PBT chemicals in a manner that calls into question EPA's use of persistence and bioaccumulation criteria for accurately identifying the human and environmental health hazards of metals. One of the commenters claims that the OECD Advisory Group on Harmonization of Classification and Labeling (which includes EPA participants) has made the following conclusion: ''...For inorganic compounds and metals, the concept of degradability as applied to organic compounds has limited or no meaning. Rather, the substance may be transformed by normal environmental processes to either increase or decrease the bioavailability of the toxic species.'' The commenter recommends that EPA reconsider its characterization of lead as a PBT chemical because, in the opinion of the commenter, there is a lack of scientific support for assessing a metal's PBT characteristics to determine its potential hazard to human health and the environment.

The Agency believes the commenter has misunderstood OECD's position on the applicability of general PBT criteria to metals. The quote is taken from the OECD document entitled *Harmonized Integrated Hazard Classification System for Human Health and Environmental Effects of Chemical Substances.* (Ref. 32) The pronouncements on metals are contained in paragraphs 22 and 23 of that document. Paragraph 22 reads as follows:

For inorganic compounds and metals, the concept of degradability as applied to organic compounds has limited or no meaning. Rather the substance may be transformed by normal environmental processes to either increase or decrease the bioavailability of the toxic species. Equally, the use of bioaccumulation data should be treated with care. Specific guidance will be [but has not yet been] provided on how these data for such materials may be used in meeting the requirements of the classification criteria.

By ''degradability as applied to organic compounds'' OECD means molecular degradation, most often by microbial degradation and/or hydrolysis or other abiotic processes, to progressively simpler organic chemical structures, leading eventually to inorganic substances like carbon dioxide and water. It is important to note that paragraph 22 does not in any way suggest that metals are not persistent. Moreover, it does not suggest that OECD hazard classification criteria cannot be applied to metals, only that ''care'' (e.g., professional judgment) is required in the interpretation of data relative to the classification criteria. In fact, EPA agrees that in order for a metal to bioaccumulate in an organism it must either be environmentally available or bioavailable. In response to the allegations that lead is not environmentally available, as part of the proposed rule, the Agency analyzed information on the environmental fate of lead, and, as noted above, determined that lead has the potential to become available from lead compounds under commonly encountered environmental conditions. In addition, as explained in Unit VI.D.3, EPA determined that lead and lead compounds are bioavailable. Therefore, the Agency's assessment of lead as a PBT chemical is consistent with the OECD's intent.

EPA does not interpret the above quote to indicate that OECD's position is that its or any PBT chemical criteria are not applicable to lead. As the commenter correctly states, EPA is a member of the OECD Advisory Group on Harmonization of Classification and Labeling. OECD does not recommend that metals and metal compounds be *excluded* from consideration as PBT chemicals, as the commenter implies. More specifically, OECD has not concluded that metals and metal compounds have no potential to bioaccumulate because they are never released as bioavailable compounds; or cannot be converted to bioavailable compounds under any foreseeable circumstances. On the contrary, EPA believes that the preceding language indicates that OECD's position is that any substance judged to be potentially bioavailable, whether organic or inorganic, should not be excluded as a candidate from some form of regulatory action. As discussed in Units VI.C.2. and VI.D.1., it is realistic to expect that, in general, released metals such as lead can encounter conditions in which they are (or can become) available at levels sufficient to bioaccumulate. Therefore, the Agency's use of the PBT criteria in its assessment of lead is consistent with

OECD's position on the general applicability of PBT criteria to metals.

5. *What comments did EPA receive on its metals policy?* Some commenters contend that EPA should not consider all members of the lead compounds category to be PBT chemicals because availability and bioavailability of the lead portion will vary among the compounds. These commenters further state that the toxicity can only be evaluated on a compound-by-compound basis and is dependent on bioavailability.

Members within the lead compounds category listed on the EPCRA section 313 list of toxic chemicals have a common moiety that bestows toxicity, i.e., lead. Consequently, it is reasonable to anticipate that once released into the environment: (1)The metal moiety in each member of the category will become available as a result of abiotic and/or biotic processes or (2) each member of the category will either be bioavailable or will convert into a compound that is bioavailable. For example, different inorganic lead compounds that are released into acidic surface waters will result in the formation of similar soluble inorganic lead compounds. Variation in the level of availability or bioavailability does not negate the consistency of effect across the members of the category.

EPA would like to remind the commenters that a mechanism already exists under EPCRA section 313 to address concerns for any metal compound for which the data show that the metal can never become available. Thus, the issue of availability, which is broader than the issue of a compound's potential to bioaccumulate, was addressed previously for EPCRA section 313 chemical assessments through EPA's policy and guidance concerning petitions to delist individual members of the metal compound categories listed under EPCRA section 313 (May 23, 1991, 56 FR 23703). If a petitioner has information demonstrating that a particular lead compound does not cause toxicity as the intact lead compound, and will not cause lead to be available in the environment to express its toxicity, they can submit a petition pursuant to EPCRA section 313(e)(1) to delete that specific lead compound from the EPCRA section 313 list of toxic chemicals. Under the metals policy EPA considers whether the metal from a metal compound can ever become bioavailable under abiotic or biotic conditions. An assessment of the availability and bioavailability of a lead compound would include processes such as: hydrolysis at various pHs; solubilization in the environment at various pHs; photolysis; aerobic transformations (both abiotic and biotic); anaerobic transformations (both abiotic and biotic); bioavailability when the compound is ingested (solubilization in and/or absorption from the gastrointestinal tract and solubilization in various organs); and bioavailability when the material is inhaled (solubilization in and/or absorption from lungs, especially taking into account the likelihood that the compound will lodge in the lungs and be converted a soluble compound by the lung's defense mechanism).

If the commenters have information demonstrating that a particular lead compound does not cause toxicity as the intact lead compound, and will not cause lead to be available in the environment to express the toxicity of the metal, the commenters can submit a petition pursuant to EPCRA section 313(e)(1) to delete that specific lead compound from the EPCRA section 313 list of toxic chemicals. EPA would address such a petition in accordance with the Agency's longstanding stated policy and guidance concerning petitions to delist individual members of the metal compounds categories (May 23, 1991, 56 FR 23703).

6. *What comments did EPA receive that pertain to natural vs. industrially produced lead and lead compounds?* Some commenters contend that natural forms of lead, as opposed to industrially produced lead compounds, should not be classified as PBT chemicals. Other commenters state that because lead occurs naturally, industrial activities involving lead do not change the total amount of lead in the earth: these activities only affect the form and location of the lead in the environment. These commenters believe that the forms of lead that are produced by industrial activity tend to be more hazardous and should be regulated more strictly than the natural forms, such as trace amounts of lead in natural minerals.

EPA disagrees that natural lead compounds should be treated differently than industrially produced lead compounds. While the comment was made specifically for lead it is general to all metals and metal compounds. Both naturally occurring and industrially produced lead and lead compounds, meet the persistence and bioaccumulation criteria. EPA's analysis of the environmental fate of lead demonstrates that it is reasonable to anticipate that under environmental conditions lead can become available from lead compounds, and that whether lead or lead compounds are obtained naturally or produced industrially does not change the potential for availability of lead. Whether a chemical comes directly from the ground or from a manufacturing plant will not affect whether the chemical is toxic, persistent, and bioaccumulative. These are the result of the inherent properties of the chemical, not from their origin (all other things being equal).

The Agency recognizes that lead and certain lead compounds occur naturally. EPA agrees that industrial activities involving lead do not change the total amount of lead in the earth, and that industrial activities involving lead only affect the type of lead compound and its location in the environment. The Agency believes, however, that while industrial activities do not increase the total quantity of lead in the earth, industrial activities transport lead and lead compounds from one environment to another environment in which the likelihood of exposure to lead in aquatic and terrestrial species, and humans is increased. As discussed in the PBT rulemaking (64 FR 688-729), environmental conditions can vary greatly among geographic locations, even those that are in close proximity to one another. There may be certain geographical areas in which the environmental conditions are such that lead availability from a naturally occurring lead compound may be equal to or greater than that from an industrially produced lead compound.

D. What Comments Did EPA Receive Concerning the Persistence and Bioaccumulation of Lead and Lead Compounds?

In the proposed rule to lower the thresholds of lead and lead compounds, EPA discussed its scientific basis for preliminarily characterizing lead and all lead compounds as highly persistent and highly bioaccumulative. To summarize, the data on lead's persistence in the environment, the observed high bioaccumulation values in aquatic organisms, and lead's ability to accumulate in humans were the basis for EPA's preliminary conclusion that lead and lead compounds are highly persistent and highly bioaccumulative. EPA has also evaluated the bioavailability of lead and lead compounds and has concluded that lead is bioavailable. In the proposed rule the Agency specifically requested public comment on its discussion of the scientific information concerning: (1) The fate, transport and availability of lead in the environment and how this information should be considered in classifying lead as a PBT chemical (Unit V.A.); (2) the bioaccumulation of lead in aquatic organisms, and how this

information should be evaluated in assessing the bioaccumulative potential of lead and lead compounds (Unit V.B.); (3) the bioaccumulation of lead in humans, and how this information should be considered in classifying lead and lead compounds as highly bioaccumulative (Unit V.C.); and (4) abiotic factors (e.g. soil chemistry; pH; water hardness; presence of organic matter in aqueous media) that can diminish the bioavailability of lead in aquatic species.

The Agency received many comments regarding EPA's technical basis for preliminarily characterizing lead and lead compounds as highly persistent, and highly bioaccumulative. These comments were extensively reviewed and considered by the Agency in finalizing the rule. While some of the commenters agreed with the Agency's characterization of lead and lead compounds as highly persistent and highly bioaccumulative, the majority of the commenters disagreed. Most of the comments were similar in content, and pertained to general or specific issues dealing with persistence, bioaccumulation and toxicity, as well as EPA's use of persistence and bioaccumulation data pertaining to lead and lead compounds in characterizing these chemicals as PBT substances. Lead and lead compounds are included on the EPCRA section 313 list of toxic chemicals. EPA is not responding to comments on the toxicity of lead and lead compounds, because their inclusion on the EPCRA section 313 list of toxic chemicals is not at issue in this rulemaking. After consideration of all comments submitted in response to the proposed lead rule, EPA concludes that lead is highly persistent and, at the least, bioaccumulative and defers its determination as to whether lead is highly bioaccumulative. An explanation for EPA's conclusion that lead is at least bioaccumulative is provided below. The basis for EPA's conclusion that lead is highly persistent is provided elsewhere.

In the PBT chemical rulemaking, EPA described bioaccumulation as ''the process by which organisms may accumulate chemical substances in their bodies'' (64 FR 703) and defined the term as the ''net accumulation of a substance by an organism as a result of uptake from all environmental sources.'' (64 FR 703) EPA has a concern for those toxic chemicals that are bioaccumulative and a particular concern for that subset of PBT chemicals that are highly bioaccumulative.

There are extensive, high quality human data (64 FR at 42230-31) that clearly indicate that lead and lead compounds bioaccumulate in humans, i.e., humans accumulate lead as a result of uptake from environmental sources. These data include bioaccumulation data on a number of subpopulations of humans, such as children, pregnant women, postmenopausal women, and men. Therefore, these human data support EPA's conclusion, as discussed below, that lead and lead compounds are bioaccumulative. EPA believes that these data would tend to support a finding that lead is also highly bioaccumulative because (1) the data are human data and (2) these data conclusively demonstrate that lead bioaccumulates in humans. EPA believes that these two factors are relevant to a determination that lead and lead compounds are highly bioaccumulative because human data are generally more compelling than animal data, particularly where there are multiple, high quality studies on a broad range of individuals. Thus, these data are sufficiently conclusive that there is no question that lead and lead compounds bioaccumulate in humans.

While evaluation of these data might affect EPA's conclusion as to whether lead and lead compounds are highly bioaccumulative, EPA recognizes that it did not clearly articulate in the proposed rule how human data would be used to distinguish between bioaccumulative and highly bioaccumulative chemicals. Because of this, EPA is deferring at this time the classification of lead and lead compounds as highly bioaccumulative solely on the basis of the extensive human data.

A number of industry commenters have contended that BCFs and BAFs measured for metals (including lead), and in particular essential elements, are not representative of the potential of these substances to bioaccumulate. They claim that the variability of the measured BCFs/BAFs with changing water concentration of the chemical makes it difficult to determine the most representative BCF/BAF value for a particular species. Specifically, these commenters contend that there is an inverse relationship between the measured BCF/BAF values and water concentration. Some commenters assert that only the values measured at higher water concentrations should be used, i.e., the lower BCF/BAF values. Other commenters contend that BCFs and BAFs are not meaningful measures for the bioaccumulation of metals and, therefore, cannot be used.

EPA disagrees that this is the best characterization of the bioaccumulation data for metals, including lead, in aquatic species. While this type of relationship may exist for some species and/or some metals, for other species and/or metals other relationships are observed: (1) Constant BCFs/BAFs with increasing water concentration; (2) increasing BCFs/BAFs with increasing water concentration; and (3) varying BCFs/BAFs values with constant water concentration.

EPA disagrees that the BCF/BAF data cannot be used to determine the potential for lead, which is not an essential element, to bioaccumulate. EPA recognizes that some data suggest that the relationship between bioaccumulation and water concentration of lead could be characterized as inverse for some organisms, such as fish, algae, and phytoplankton. Such a characterization, however, is incorrect for invertebrates such as snails and bivalves because there is little variation in BCF value with changing water concentration for these species. Further, EPA does not believe that even where the data suggest an inverse relationship, this precludes the use of BCFs and BAFs in assessing the bioaccumulative potential of lead. EPA notes that even for some species in which an inverse relationship is suggested (e.g., algae and phytoplankton), if EPA were to use the BCF or BAF at the highest water concentration measured (i.e., the lowest measured BCF/BAF value) the BCF/BAF values remain over 5,000.

EPA has determined that the data on oysters, snails, algae, phytoplankton, and blue mussels, as well as the human data, clearly support a conclusion that lead and lead compounds are bioaccumulative, and also believes that this information tends to support a finding that lead is highly bioaccumulative. However, during the public comment period and during inter-Agency review, questions were raised challenging the sufficiency of the data to support the conclusion that lead and lead compounds are highly bioaccumulative. Before determining whether lead and lead compounds are highly bioaccumulative, EPA believes that it would be appropriate to seek external scientific peer review from its Science Advisory Board, and EPA intends to do so. The external peer review would address the question of whether lead and lead compounds should be classified as highly bioaccumulative. The external peer review would address the issue of how lead and other, as yet unclassified, metals such as cadmium, should be evaluated using the PBT chemical framework, including which types of data (and which species) are most suitable for these determinations. After

the completion of the external scientific peer review, EPA will consider and take appropriate action, which could include characterizing lead and lead compounds as highly bioaccumulative and lowering the reporting thresholds for lead and lead compounds to 10 pounds. Therefore, at this time, EPA concludes that lead is, at the least, bioaccumulative and defers its determination as to whether lead is highly bioaccumulative until further review.

1. *What comments did EPA receive on the environmental fate of lead and lead compounds?* In the lead proposed rule (64 FR 42227) the Agency provided a qualitative environmental fate assessment of lead and lead compounds. Qualitative environmental fate assessments are generally part of a hazard assessment for a chemical. The qualitative environmental fate assessment was not developed, nor was it intended, to be part of an exposure assessment or risk assessment.

An environmental fate assessment for a metal and metal compounds, such as lead and lead compounds, describes the physical, chemical, and biological processes acting upon the metal and metal compound in the environment and the result of these processes. The environmental fate of a metal or metal compound varies depending on the environmental conditions and the physical/chemical properties of the metal in question.

The Agency received many comments on its assessment of the environmental fate of lead and lead compounds and the influence of environmental fate on the environmental availability of lead and lead compounds. Commenters contend that normal environmental processes control the availability of lead and lead compounds in water, soil and sediments and concluded that under most environmental conditions lead from lead and lead compounds would not be available for uptake by organisms due to processes including the pH dependent formation and precipitation of insoluble lead compounds in surface waters, and sorption of lead to organic matter and inorganic constituents in soil, surface waters and sediments.

EPA disagrees with these commenters and concludes that processes commonly observed in the environment can result in the formation of available lead where it can be bioaccumulated by organisms. EPA believes that these processes may occur in soil environments with low pH and low levels of clay and organic matter. Lead sorption to soils has been shown to be pH dependent. Decreasing pH can result in increasing concentrations of lead in soil water with greater availability for uptake by biota. In acidic aquatic environments, low levels of suspended solids and dissolved organic matter can result in increased levels of lead ion in solution where it can be taken up by biota.

One commenter believes that the environmental fate data that EPA used and cites in the proposed rule falls short of what is necessary for a scientifically valid approach to assessing the transformation, specification, and availability of lead in the environment. The commenter argues that the data cited by EPA indicate that very little of the lead released to the environment is likely to be present in a ''bioavailable form'' (i.e., EPA concluded that less than 1% of lead in soil may be water soluble).

EPA disagrees with the commenter's characterization of EPA's assessment of the environmental fate of lead and lead compounds. EPA asserts that it used reliable data from a variety of credible sources in concluding that lead can be available for uptake by organisms in the environment and that lead is environmentally available. EPA refers the commenter to the discussions of the transformation, speciation, availability and bioavailability of lead in the environment provided in *The Environmental Fate of Lead and Lead Compounds* (Ref. 2) and elsewhere in the RTC document for this final rule (Ref. 1). EPA disagrees with the commenter's interpretation of the statement ''EPA concludes that less than 1% of lead in soil may be water soluble'' to mean or indicate that very little of the lead released into the environment is likely to be present in a ''bioavailable form''. Simple water solubility is **not** a prerequisite for a metal to become available from a metal compound. It is well established that certain environmental conditions can increase the solubility of a metal compound. Further, as discussed in Unit VI.C.2. of this preamble and in the RTC document (Ref. 1), availability of a metal is not a prerequisite for its bioavailability. Metals may be bioavailable from metal compounds or metal complexes that are not water soluble or in which the metal is not otherwise available. A classic example that illustrates these points are the well documented incidents of childrens' exposure to lead from consumption of soil that contains lead. While less than 1% of lead in soil is typically present as a lead compound that is water soluble (i.e., more than 99% is present as lead compounds that are water insoluble or bound to soils), the lead in soils is still bioavailable in humans.

EPA has concluded that lead released to the environment, whether under conditions where it is available or not, can reasonably be expected to be bioavailable in organisms. EPA's statement ''that less than 1% of lead in soil may be water soluble'' should not be interpreted to mean that the levels of lead in soils that is available are inconsequential or negligible. On the contrary, because exposure to even low levels of lead are expected to result in its bioaccumulation in many organisms, these levels are still of concern. It should be noted that if 1 percent of soil lead is soluble (i.e., available), this would mean that levels as high as 200 parts per billion (ppb) could be found in soil water (lead is present in many soils at 20 parts per million (Ref. 2) and one percent of this is 200 ppb.)

One commenter believes that the bioavailability of lead and lead compounds is only prevalent in those situations in which an organism would be exposed to continuous, localized influxes of lead compounds, such as near a lead smelter or a highway. The commenter believes that the proximity to sources of lead, such as smelters or highways (influenced by use of leaded fuels), is a prerequisite to high concentrations of the metal in the environment, and thus its potential to bioaccumulate. The commenter cites studies that provide data that show high levels of lead in waters and soils that are in close proximity to sources of lead releases (e.g., smelters, vehicular exhaust), and bioaccumulated lead in freshwater algae, invertebrates, and fish collected near industrialized areas, ponds with high numbers of lead shot, urban areas, lead mines and tailings ponds. The commenter states that although lead may be considered ubiquitous in the environment, its ecological impacts would appear to be significantly influenced by the proximity to sources of lead releases and the public should be aware of this. While the commenter used the term bioavailability, based on the context of the comment, EPA believes the commenter used the term interchangeably with the term environmental availability.

While the concentrations of lead in the environment are more likely to be higher in areas that are in close proximity to facilities that manufacture, process, or otherwise use lead and/or lead compounds, EPA disagrees with the commenter's contention that the availability of lead is only possible in such areas. EPA does not agree with the commenter's position that in order to be exposed to lead an organism needs to be in close proximity to points where lead

is released into the environment. As discussed in Unit V.A. of the proposed rule (64 FR 42227), and in *The Environmental Fate of Lead and Lead Compounds* (Ref. 2) many factors influence the mobility and disposition of lead in the environment. Under many environmental conditions lead may become mobile rather than remain stationary. Depending upon prevailing conditions and the method of environmental release, lead may travel within environmental media to areas that are not in close proximity to the point of release. Hence, EPA believes that the presence of lead in the environment, and therewith its availability, is not confined to the areas where lead is released from anthropogenic sources. In addition, any release of lead is important to local communities, because of lead's persistence and bioaccumulative properties. Although EPA disagrees with the commenter's conclusions, the commenter's statement that the ecological impacts of lead are influenced by the nearness to a source of release still provides support for the actions that EPA is taking in this rulemaking.

a. What comments did EPA receive on the abiotic factors that may affect the environmental availability of lead? Several commenters stated that EPA either did not, or should have considered speciation, transformation and bioavailability in its assessment of the persistence of lead and lead compounds. Some of the commenters contend that in most environments lead is either not available or is transformed into forms that are less available. A number of the commenters claimed that the environmental conditions in which lead is mobile or available are rare.

EPA disagrees with the commenters claim that the Agency did not consider speciation, transformation and bioavailability in its characterization of lead and lead compounds as PBT chemicals. As discussed in detail in: Unit V. of the proposed lead rule (64 FR 42222–42243); in *The Environmental Fate of Lead and Lead Compounds* (Ref. 2); elsewhere in this preamble; and in the RTC document (Ref. 1), EPA performed a comprehensive assessment of the environmental fate of lead. The environmental fate assessment embodied an analysis of the environmental variables that affect speciation, transformation, and the availability of lead. These environmental variables include: pH; redox conditions; water hardness; dissolved organic carbon content; and soil properties including cation exchange capacity, organic carbon content, iron and manganese oxide and phosphorus content. As discussed in Unit VI.D.3., EPA has evaluated the bioavailability of lead and lead compounds and has concluded that lead is bioavailable. From its analysis of the environmental fate of lead, EPA concluded that environmental conditions exist in the United States in which lead may become available or that can increase the availability of lead, even from compounds in which lead, as released into the environment, is not available. From its analysis of the bioavailability of lead, EPA concluded that lead is bioavailable in many aquatic species, and in humans. EPA also concluded that lead compounds that are not available or bioavailable as released may be converted to lead compounds that are available or bioavailable. Thus, after an evaluation of the available data, EPA has determined that the weight of scientific evidence indicates that it is reasonable to conclude that lead in the environment will be available and/or bioavailable from lead and lead compounds.

EPA disagrees with the commenters who claim that the environmental conditions in which lead is mobile or available for uptake are rare. As detailed in Unit VI.C. of this preamble and in the RTC document (Ref. 1), EPA conducted several analyses of large databases containing information on the properties of rivers, streams, lakes, and soils in the United States, with a focus on the properties known to contribute to the availability of lead. Acidity is a particularly important determinant of lead availability: acid conditions (pH < 7) increase lead availability. In water, the solubility and, hence, availability of lead increases linearly as acidity is increased (i.e., from pH 6 to 3). EPA determined that waters of sufficient acidity to favor lead availability, especially in the Mid-Atlantic region of the United States, are not rare. In fact, estimates indicated that almost 11,000 kilometers of streams could have a pH of < 5.5. In addition, as detailed elsewhere is this document, a query of EPA's STORET water quality database indicated that in 1998 pH values of between 5.5 and 5.1 were found in 52 watersheds in the United States. Finally, the commenter asserts that acidic soils in which lead is likely to be available are rare. EPA's analysis of the database of the Soil Survey Laboratory, National Soil Survey Center, discussed in Units VI.C.1. and VI.D.1. of this preamble, found more than 10,000 surface soil samples with low cation exchange capacity and pH values of less than 5.5.

One commenter supports EPA's concern for cross media transport of chemicals, but believes that it is misleading for EPA to imply that lead is predisposed to find the medium in which it will be transformed into forms that have the ''greatest bioavailability (in) man''. The commenter agrees that lead cannot be destroyed but, equates this attribute to most elements on the periodic table.

The commenter incorrectly asserts that EPA suggested that lead and lead compounds are released only to, or preferentially partitions to, those environments that are most favorable to enhancing availability or bioavailability of lead. EPA disagrees with the commenter. EPA has not made the claim that lead and lead compounds are released only into those environments where conditions are most favorable to the formation of the most soluble lead compounds. In EPA's discussion of the environmental fate of lead and lead compounds, EPA assessed the availability of the lead and lead compounds under a variety of conditions in water, sediments and soil. As discussed elsewhere, EPA believes that there are many environmental conditions in which lead and lead compounds will be available and/or bioavailable.

b. What comments did EPA receive on the availability of lead in surface waters and sediments. One commenter stated that there are many studies that indicate that lead does not persist in soluble and bioavailable forms in aquatic environments. The commenter cited work reported by May and McKinney (Ref. 33) which, according to the commenter, has shown that the majority of lead entering natural waters will be precipitated to sediments as carbonates or hydroxides (i.e., will be unavailable). The commenter states that even in acidic lake waters, ''which according to EPA's own reports are rare'', lead can precipitate out of the water, and cites work by White and Driscoll (Ref. 34) to support this position. Another commenter states that there is strong evidence to suggest that under conditions where organic material is present in the water column of an aquatic environment, the organic material will act to reduce the amount of potentially soluble and bioavailable lead. The commenter believes that the wide distribution of organic matter suggests that the potential for the reduction of soluble lead by complexation with organic material is high.

EPA disagrees with the argument that soluble and/or bioavailable lead compounds are irreversibly transformed into insoluble and un-bioavailable lead compounds. EPA discusses below and

elsewhere that many lead compounds that form as a result of conditions in the aquatic environment (e.g., lead-organic matter complexes, inorganic precipitates, carbonates and hydroxides) are not necessarily permanently sequestered as a non-available lead compound, but are subject to processes that can result in their release back into solution. A review of the discussion of the fate of lead in natural waters in May and McKinney (Ref. 33) revealed a single sentence that says: ''Upon entering natural waters, most lead is precipitated to the sediment bed as carbonates and hydroxides.'' While this statement is true for some surface waters in the United States, EPA has concluded for the reasons discussed below and elsewhere in this preamble and in the RTC document (Ref. 1) that lead solubility is greater and precipitation as carbonate and hydroxide is less in acidic waters with low hardness.

White and Driscoll (Ref. 34) observed temporal and spatial variations in the concentration and transport of lead in the acidic Darts Lake in the Adirondacks of New York. Deposition of particulate lead was strongly correlated with aluminum and organic carbon deposition. Increasing metals deposition was observed during periods of increasing pH. The flux of lead into the lake was related to stream hydrology, pH and lead concentration. Stream pH varied seasonally, with a steady pH of 5.1 until spring snowmelt, where pH levels dropped to a minimum of 4.8 in April/May. Increases in pH occurred throughout the summer reaching a maximum of 5.4 in August. High flow periods in the fall and spring were marked by increases in the concentration of dissolved lead in the inlet and outlet streams. Lead flux to and from the lake was greatest during spring and fall periods of high lead concentrations, elevated water discharge, and low pH. The authors explain that even in acidic lake water containing a variety of particle types, oxides and organic films may determine the surface properties of suspended particulate matter. The solid matrix in the lake was probably composed of inorganic hydrous oxides (coatings) and adsorbed or coprecipitated organic matter. The interaction of lead with this matrix appears to be pH sensitive. Changes in pH may affect lead partitioning between the solid and solution through a number of possible mechanisms: matrix formation/dissolution, sorption/desorption of organic complexes and inorganic complexes, and hydrogen ion exchange reactions.

Contrary to the commenter's interpretation, EPA believes that the study by White and Driscoll (Ref. 34) provides evidence that even in the presence of dissolved organic carbon, soluble lead may be present in the water column of acidic waters, possibly through a process of sedimentation and decomposition of organic matter and/or dissolution of redox sensitive hydrous oxides.

Two commenters contend that the majority of lead entering aquatic systems will be removed from solution and become bound to sediments and/or suspended particulate matter. They believe that the lead that partitions to sediments is not expected to be readily bioavailable. The commenters contend that the availability of lead in sediments is controlled by several physicochemical factors including pH, organic carbon (particulate and dissolved), iron and manganese oxyhydroxides, and sulfides. In aerobic sediments, the main factors that drive the formation of insoluble lead are particulate organic carbon and iron/manganese oxyhydroxides. In anaerobic sediments, which represent the overwhelming majority of sediments, acid-volatile sulfides (AVS) are the main binding factor.

The commenter contends that if the concentration of AVS is greater than that of lead that is simultaneously extracted from the sediments, the lead will not be environmentally available. Further they state that EPA is currently considering using this concept to derive national sediment quality criteria for lead and other metals such as zinc, cadmium, and copper. In addition, the commenter contends that although events such as storms or dredging may cause a re-suspension of sediments (thus temporarily changing the physicochemical properties of the sediment), several studies have shown that these events do not have a large impact on the binding of metals such as lead to the sediments, and found that no significant release of lead occurred from dredged sediments being suspended in waters. The commenters claim that other studies have shown only a small portion of metals are released from sediment due to re-suspension and oxidation of the sediments.

EPA agrees that the environmental processes that determine the complexation, speciation, and ultimately the availability of lead in the environment should be considered in its present analysis and asserts that these have been considered. EPA believes that the AVS methodology shows great promise for use in conducting *site-specific* assessments of metals for which it has been validated. To date, the AVS methodology has not been validated for lead, nor have the generally favorable, albeit substantive technical comments provided by the EPA Science Advisory Board been incorporated into the methodology. Finally, EPA does not believe that a means currently exists to incorporate the AVS methodology into the technical analysis supporting a *nationally* applied regulation such as this rule.

EPA disagrees with the commenter's conclusions regarding sediment-bound metals, and the commenter's inference that once lead becomes bound to sediments it is no longer available. EPA has found that several researchers have investigated the impact of the oxidation of sediment constituents on the release of sediment-bound metals and found that metal availability can increase under these conditions. For example, Zhuang et al. (Ref. 35) found that the aeration of sediment resulted in the rapid oxidation of a major binding constituent, acid-volatile sulfide. In experiments conducted over a 1 month duration, the concentration of cadmium increased 200-400 percent. The oxidation of AVS occurred rapidly with a concomitant decrease in pH, and the release of cadmium from the solid to the liquid phase continued for approximately 2 weeks. The authors noted that aeration of sediments results in only a portion of the associated cadmium, and presumably other toxic metals, being released to water. Sedimentary iron and manganese are transformed to their oxyhydroxides by the oxidation of sulfide. Following the formation of iron and manganese oxyhydroxide, the binding of cadmium is transferred towards these solid phases. Approximately 50% of the cadmium bound in sediments is associated with the extractable iron and manganese components of the sediment following aeration. In addition, oxidation of the sulfidic phase releases other metals that compete with cadmium for available binding sites. EPA believes that it is important to note the following from the authors' conclusions:

Prediction of biological availability of metals in sediments based on the relationship between metal and AVS concentrations may be underestimated if the sediment is subject to aeration.

Thus, experimental data exist that indicate that cadmium, and presumably other toxic metals including lead, bound to sediments can become available. The data also suggest that contrary to what the commenter believes, the AVS methodology does not always provide an accurate estimate of lead availability

when certain, realistic environmental conditions exist.

Other studies demonstrated the availability of lead in aquatic environments. Mahoney et al. (Ref. 36) examined the partitioning of metals, including lead, to organic carbon in 14 different freshwater sediment samples. The metal sorption due to acid volatile sulfide was subtracted from the total sorbed metal to determine the metal bound to other sediment phases (primarily organic carbon). The results indicated that organic carbon partition coefficients for lead were reduced by a factor of 10 with a decrease in pH from pH 7 to pH 6. The authors fit the sorption data to the Langmuir model. The results were consistent with a surface complexation model where binding sites are occupied by either protons (H^+) or metal ions. At lower pHs, the protons compete favorably for the sites, whereas at higher pHs where protons are fewer in number, free metal is removed from solution by organic carbon sorption. This study illustrates that in sediment water systems at pH values in the physiological range, lead can be available for uptake by organisms even in the presence of organic carbon.

Another commenter states organic matter, using as an example humic acids, present in freshwater and marine sediments and in the aqueous phases are capable of complexing variable amounts of metals. The commenter states that most lead entering natural waters is sorbed onto organic ligands and precipitated as insoluble complexes to the sediments as lead carbonate and hydroxide (Ref. 37). The commenter also states that the lead from these complexes may be mobilized and released back into the water column, but only when the pH is decreased suddenly or the ionic composition of the water changes. The commenter claims that both natural soluble organics (e.g., dicarboxylic and amino acids) and synthetic soluble organics (e.g., ethylene diaminetetraacectic acid (EDTA)) act as chelators (i.e., sequestering agents) of lead, and reduce the toxicity of heavy metals such as lead because chelated forms of metals are less toxic than their free, non-complexed forms. The commenter cites work by Canterford and Canterford (1980), which shows that EDTA reduced the toxicity of lead to the diatom, *Ditylum brightwellii.*

EPA believes that the data in Eisler (Ref. 37) cited by the commenter supports EPA's contention that lead can be available in the sediment/water environment under low pH conditions. EPA has discussed the role of organic matter and pH in decreasing the availability of lead and lead compounds in the aquatic environment elsewhere in this preamble (see also Ref. 2). EPA recognizes the important role of organic matter and pH on the availability of lead and lead compounds in the aquatic environment and the effect of pH on the sorptive behavior of organic matter. However, EPA has commented elsewhere that waters with low organic matter and low pH are widely distributed throughout the United States. EPA believes that lead can be available in such environments. In addition, while EPA believes that lead sorbed onto organic matter may be temporarily unavailable, EPA does not agree that lead sorbed onto organic matter is no longer *bioavailable.* Many aquatic species (e.g., mussels, fish) consume orally as part of their diet organic matter in their environment. Lead sorbed to organic matter may be bioavailable in organisms that consume the organic matter. The same holds true for terrestrial species. Lead sorbed to soils, for example, is bioavailable in humans (See Unit VI.D.2. of this preamble).

c. What comments did EPA receive on the availability of lead in soils. One commenter claims that EPA's data on the fate of lead in terrestrial environments do not support the Agency's conclusion that lead is expected to be bioavailable when in terrestrial environments. The commenter states that EPA fails to provide information about the probability of the natural occurrence of the conditions that could result in the formation of soluble/bioavailable lead species.

EPA believes that soils possessing properties that are conducive to the increased mobility of lead are by no means uncommon. In order to determine the extent to which soil samples collected across the United States possess such properties, EPA conducted a query of the database of the Soil Survey Laboratory (SSL), National Soil Survey Center. The database currently contains analytical data for more than 20,000 pedons of U. S. soils and about 1,100 pedons from other countries. Most of the data were obtained over the last 40 years. Of these, about 75 percent are less than 20 years old. Coverage is for all 50 states, Puerto Rico, Virgin Islands, Trust Territories, and some foreign nations. The search was designed to identify soils with a pH of less than 5.5 and a cation exchange capacity (CEC) of less than 10 milliequivalents (meq) /100 grams. The results of this search identified more than **10,000** samples that meet the criteria.

Many investigators have studied the speciation, mobility, and availability of lead in soils. The EPA concludes from this body of work that although lead binds to many soils, under many natural environmental conditions it will, or at least can be expected to be available for uptake by organisms. Reddy, et al. (Ref. 38) studied the speciation of lead in water extracts from soil samples from the Powder River Basin in Wyoming. Dissolved concentrations of lead were found to be 0.003 to 0.046 mg/L. Chemical speciation indicated that at near neutral pH, dissolved metal concentration in soil water extracts was dominated by dissolved organic carbon-metal complexes. At low pH, dissolved metal concentration in soil water extracts was dominated by free ionic oxidation states, (e.g., Pb^{+2}). The results suggest that as soil pH decreased, the availability and mobility of lead ions increased due to the lead compound in which the metal is present in soil solutions. Wang and Benoit (Ref. 39) investigated the mechanisms controlling the mobility of lead in soils of a northern hardwood forest ecosystem. The authors observed that about 50% of total filtrate lead (passing through a 0.45 um filter) was found to be in the colloidal form below the soil surface organic layer. Colloidal lead concentrations in deeper horizons were less than 10% of the concentrations in the surface layer. Less than 10% of the dissolved lead was found to be complexed to organic substances. A calculated distribution of inorganic lead species indicated that at the pH of the soil solutions tested (4.0 to 4.7), free, dissolved ionic Pb^{+2} dominated and other complexes and ligands were negligible. Low pH resulted in Pb^{+2} desorption from soil solids. However, because both colloidal and dissolved lead were effectively removed during transport down the soil profile, mobilized lead from the surface organic layer was retained in lower soil horizons. Although this study suggests that under the conditions investigated, lead does not migrate to an appreciable extent through the soil profile, EPA believes it gives a strong indication that lead may be available in the acidic organic surface horizon.

The effects of redox potential and pH on the solubility of lead in contaminated soil were investigated by Chuan et al. (Ref. 40). Lead was sparingly soluble at pH 8.0 and more soluble at pH 5.0; solubility increased considerably at pH 3.3. At the same pH, solubility increased as the redox potential decreased. However the effect of pH was more significant than redox

potential. It was proposed that lead in soil was primarily adsorbed to iron-manganese (Fe-Mn) oxyhydroxides and the pH dependent adsorption and dissolution of the Fe-Mn oxyhydroxides under reducing conditions controlled the solubility of lead in soil. EPA believes that the indication of increased lead solubility at pH 5 suggests that in many soils lead could be available for uptake by organisms.

Murray *et al.* (Ref. 41) analyzed the distribution of lead in surface and subsurface soils at an outdoor shooting range in southeastern Michigan that had been in operation for 50 years. It was found that the distribution of lead in the subsurface corresponded to that in the surface soil horizon, suggesting that lead was mobilizing and migrating downward through the vadose zone. Mobilization of lead appeared to be occurring despite the clay-rich nature of the soils, and was thought to be due to the transformation of metallic lead into soluble lead carbonate and lead sulfate. Both compounds were found in crust material coating shot pellets found below a depth of about 5 cm at the site, thus implying a reaction between the metallic lead and the soil. The evidence of the apparent mobility of lead under conditions thought to decrease mobility further indicates that lead is available for uptake in soils.

Laperche *et al.* (Ref. 42) studied the use of soil phosphorous amendments as a means of reducing the availability of lead in contaminated soils. In this study soil contaminated with lead was treated with natural and synthetic phosphorous, and the bioavailability of lead in plants was determined in plant uptake studies with sudax (*Sorghum bicolor*). The lead content in the shoot tissue decreased as the quantity of added phosphorous increased, due to the formation of insoluble lead phosphate compound pyromorphite. However, lead and phosphorus contents in the roots increased as the quantity of added phosphorus increased. The formation of pyromorphite on root surfaces was also observed. It is important to note that in the absence of phosphorous amendments, lead content in the shoot was 170 mg lead/kg dry weight, whereas with the most effective phosphorus treatment, lead content in the shoot was 3 mg lead/kg dry weight. This strongly suggests that in soils with low phosphorus content, lead can be available for uptake by plants.

One commenter believes EPA does not adequately address the important role of cation exchange capacity of soils as it relates to the availability of lead and lead compounds. The commenter states that at pHs of 5 to 9, clays possess surfaces that are predominantly negative and to which charge-compensating cations are adsorbed. The commenter claims that these cations are not permanently bound to the clays and are being exchanged by other cations, including heavy metals such as lead, copper, and cadmium.

EPA has discussed the effects of pH and cation exchange capacity on the availability of lead in soils in Unit VI.C.2. of this preamble and in the RTC document (Ref. 1). EPA recognizes the important role of cation exchange capacity of soils in the availability of lead and lead compounds, and the effect of pH on the sorptive behavior of clays. The cation exchange capacity of soils is related to the clay content of the soil. Soils with low clay content and low cation exchange capacity are common and widely distributed. EPA has concluded that lead can be available in such soils.

A commenter summarized research results published by Zimdahl and Skogerboe (Ref. 43), and stated that the research showed that soils have a strong capacity to immobilize lead, and that lead tends to become associated with the organic fraction of soil particles. The commenter states that the authors concluded that this sorption is less likely to be affected by low pH (acidification) than would acid ion precipitates (carbonates, phosphates, sulfates, chlorides). The commenter also claims that these investigators concluded that plant uptake studies strongly support their conclusions about the immobilization of lead and its sorption to organic matter in the soil.

EPA reviewed the publication by Zimdahl and Skogerboe (Ref. 43). In the discussion section of this publication the authors provide the following overview regarding the behavior of lead in soils:

> * * * the movement of lead in the soil profile and its ultimate fate may be determined by one or more of several processes. These depend largely on the dissolution of the lead particles in the ground water. The lead dissolved may be leached through the soil profile if it remains in a soluble form. It may be immobilized by soil microorganisms, precipitation, sorption or ion-exchange interaction with soil entities (e.g., clays) or fixation by materials such as organic matter. It may also be taken up by plants, thereby entering the food chain. ... The significance of this possibility is reflected in the demonstrated toxicity of lead to corn, beans, lettuce, and radishes in lower concentrations in slightly acidic soil. These and other studies suggest that lead in soil can reach the soil plant root interface and be taken up by plants.

In their investigation of the factors controlling the mobility of lead in soils the authors developed a correlation function based on the soil properties determined to be most strongly correlated with soil immobilization of lead (pH and cation exchange capacity). Precipitation by carbonate and sorption by hydrous metal oxides appeared to be of secondary importance. They concluded that lead will be twice as mobile (i.e., available) in soil with a pH of 4.1 and a CEC of 13 meq/100 g as in a soil with a pH of 6.8 and a CEC of meq/100 g. EPA believes the findings of Zimdahl and Skogerboe do not conflict with EPA's environmental fate analysis of lead and lead compounds. EPA agrees that the authors determined that some soils have the capacity to decrease the mobility of lead, but equally as important, the study provided a means to estimate the effect that a soil's properties can have on decreasing its capacity to immobilize lead, thereby increasing availability.

One commenter disagrees with the contention of other commenters that lead and lead compounds should not be considered persistent because when released to the soils they will not be bioavailable. The commenter asserts that because metals released into the environment do not always immediately become bound to particles, nor do they remain bound given pH and other changes, and because metals bound to soil particles are ingested by young children, there are strong reasons to be concerned solely about the persistence of toxic metals.

EPA agrees with the commenter that lead released to the environment may not become immediately bound and that there are environmental conditions that will increase the availability of lead in soils. One example is the effect of pH on lead compounds. For example, lead when part of a compound which has low solubility at neutral to basic pH will be converted into soluble compounds when subject to acid mine drainage. The soluble lead compounds will be mobile and may travel through the environment. When these compounds experience higher pH their mobility will decrease and the availability will decrease. However, the availability in many cases will be greater than in the original lead compound. The lead may be part of a lead compound (e.g., carbonate) in which it is much more available than in the original lead compound, even if the pH is the same because the lead will be part of a different molecule and this molecule will react to the environment differently than the original lead compound.

Another commenter contended that EPA should have used the Multimedia Equilibrium Criterion (EQC) model to

estimate overall environmental persistence and partitioning of lead. The commenter stated that in the PBT chemical rulemaking, the Agency discussed how it used this model to evaluate the overall environmental persistence of toxic chemicals subject to the proposal (64 FR 702–703). The commenter believes that the EQC model is ideally suited to model the environmental partitioning and persistence of lead.

The commenter is correct in stating that EPA used the EQC model to evaluate persistence and partitioning of toxic chemicals described in the PBT chemical rulemaking. EPA did not use the EQC model for metals in the PBT chemical rulemaking. EPA agrees that the EQC model is a valuable tool for determining the multimedia fate and transport of chemicals in the environment. As described in the PBT chemical rulemaking, however, the EQC model was only used to model environmental persistence and partitioning of organic chemicals, and not of metals. In the PBT chemical rulemaking, EPA based its determination of whether a toxic chemical is persistent based on half-lifes for specific media. For organic chemicals EPA used the EQC model to determine if it were possible that a toxic chemical that is persistent in one medium significantly partitions to another medium in which the toxic chemical rapidly degrades thus providing an overall environmental half-life less than the established criteria. The commenter is also correct in stating that the Agency did not use the EQC model to evaluate the environmental persistence and partitioning of lead and lead compounds. As EPA explained in both the PBT chemical rulemaking and the proposed lead rule, metals are persistent because the metal cannot be destroyed. While the EQC model can be used to model the partitioning of a metal and its compounds from one medium to another medium in the environment, it does not model the destruction of the metal because that *cannot* occur.

The Agency would like to point out, however, that Mackay et al. (Ref. 44) used lead as an example of a ''class 2'' (nonvolatile) substance for an EQC model run. Because lead is classified as a ''class 2'' chemical, the EQC model treats volatilization of lead from water to air and from soil to air as negligible. Mackay used an infinitely long degradation half-life for lead (i.e., lead is persistent and is not destroyed). When an infinitely long degradation half life is used (as was used by Mackay, et al. for lead in all media) only non-destructive removal processes such as loss from the air compartment by deposition of airborne particles to soil and water, soil runoff, advection in sediment (loss from the model environment by burial of sediment-bound lead), and transport of sediment bound lead particles out of the model environment are important. The overall environmental persistence of lead estimated by the model reflects the time necessary for lead to be physically transported from the model environment, not destroyed. Thus the model, in essence, provides information on the partitioning and movement of lead, but inevitably indicates that lead will be persistent in all media.

The EQC level III modeling results for lead showed the importance of deposition from the air compartment to soil and water, at a rate that exceeds the advection rate (rate of non-destructive transport out of the model environment). The main removal mechanism according to the model was advection (burial) in sediment, followed by soil runoff and advection in water. The buildup of the chemical in the model environment was about 1.7×10^{10} kg and its overall persistence was 5.6×10^{6} hours (634 years), which is essentially infinite duration. In addition, at steady state the model predicted that lead concentration in the water compartment of the model environment would be 4.27 ug/L. For lead the important transport parameters are those controlling atmospheric deposition and sediment-water exchange. EPA believes that, considering the results above and the discussion of the availability of lead in water, soil and sediments provided elsewhere in these responses to comments, the use of the EQC model would not have provided any information counter to EPA's position that lead and lead compounds are PBT chemicals. Thus, even if EPA had used the EQC model to estimate the environmental persistence and fate of lead, EPA would have drawn the same conclusions stated in the proposed rule. In addition, the Agency would like to emphasize that as discussed in the PBT chemical rulemaking the EQC model was only used as a secondary means to evaluate persistence and partitioning of organic chemical substances, and that unless all of the data inputs to the model were reliable it would not be used by the Agency to override persistence data from individual media.

2.*What comments did EPA receive on the bioaccumulation data for lead and lead compounds?* Some commenters contend that EPA failed to consider the results of more recent studies that indicate that the accumulation of lead in aquatic organisms is low and that the concentrations of lead found in the environment are lower than previously measured. Commenters also questioned the relevance of laboratory bioaccumulation studies on lead to the bioaccumulation of lead under environmental conditions claiming that under ''realistic conditions'' lead does not bioaccumulate significantly in organisms. As discussed in detail in this section, none of these issues change EPA's conclusions about the validity of the data. With regard to the results of more recent studies, these studies do not provide information that changes EPA's conclusions that lead and lead compounds are bioaccumulative. EPA also believes that the laboratory bioaccumulation studies for lead are relevant to the potential for lead to bioaccumulate, which is confirmed by the observed bioaccumulation of lead in the environment.

As discussed in Unit VI.B. of this preamble, bioaccumulation is a general term that is used to describe the process by which organisms may accumulate chemical substances in their bodies. The propensity of a substance to bioaccumulate in a species depends largely upon the pharmacokinetics of the substance in that species. That is, the extent to which a substance can bioaccumulate in an organism depends upon: (1) Whether the organism can absorb the substance; (2) the extent to which the substance is distributed and metabolized within the organism; and (3) how readily the organism can excrete the substance. The pharmacokinetics of a substance, and therefore the propensity for it to bioaccumulate, can (and often does) vary greatly among different species, even among species within the same trophic level. This is because species differ in their anatomy, physiology, and genetic makeup. These are important variables that govern the propensity for a substance to bioaccumulate, in addition to the substance's physicochemical and other properties. It is well established that a given substance can have different BAF (or BCF) values in different species. Data presented in Table 1 of the proposed rule (64 FR 42230) indicates that lead has different BAF (or BCF) values in different species.

In the proposed lead rule EPA preliminarily concluded that lead and lead compounds are highly bioaccumulative based upon the Agency's review of the bioaccumulation data for lead and lead compounds in aquatic species and in humans. Those who commented on EPA's assessment of the bioaccumulative properties of lead

and lead compounds commented on the aquatic data used by EPA and did not comment on or refute the extensive data in humans. A number of commenters disagreed with the scientific basis that EPA used to support the use of bioaccumulation measurements for lead and lead compounds because they believe EPA's scientific basis: does not use relevant data; is insufficient; does not have a sound scientific foundation; or does not present a balanced view of the scientific literature. Other commenters address the issue of bioaccumulation generically, rather than specifically to lead and lead compounds. EPA responded to the generic issues in the earlier PBT chemical rulemaking (64 FR 58676) and in the associated Response to Comments document (Ref. 15). However, EPA is discussing some general issues here as background for the more specific issues related to lead and lead compounds in order to facilitate EPA's responses. Further, while some commenters agree that lead and lead compounds bioaccumulate, they contend that they are not highly bioaccumulative. A discussion of both the aquatic data and the human data used by EPA, and the issues raised by commenters on EPA's use of these data are provided below. As discussed earlier, after having reviewed and considered all the comments, EPA is finalizing this rule with a finding that lead and lead compounds are bioaccumulative, and is deferring its original conclusion that lead is highly bioaccumulative.

a. What comments did EPA receive on the aquatic bioaccumulation data for lead? Aquatic species have their own unique roles in ecosystems and are important for the subsistence of other species, including consumer and predator species. Thus, the propensity of lead to bioaccumulate in aquatic species is of concern. Among other things, aquatic species comprise components of the food chain that lead to humans. For example, green algae are primary producers in aquatic ecosystems in that, through photosynthesis, they produce oxygen and synthesize carbohydrates and other foodstuffs (Ref. 45). These substances are used by consumer species which in turn serve as the food source for predator species, including fish. Fish in turn, serve as a food source for wild mammals, birds, and man. The survival of a number of terrestrial species, including humans, is at least partially dependent upon aquatic organisms. The Agency for the purposes of EPCRA section 313 believes all aquatic organisms to be equally relevant when evaluating properties of chemicals to aquatic life forms: i.e., an alga is viewed just as important as an oyster or a fish.

EPA's scientific assessment of lead and lead compounds is based upon relevant data and has a sound scientific foundation. EPA believes that the scientific basis that the Agency used to support its conclusion that lead and lead compounds bioaccumulate in aquatic species is more than sufficient, and presents a balanced view of the scientific literature. The effects of lead and lead compounds on aquatic and terrestrial organisms has been studied extensively since the mid-1920s. A particularly active period for lead research was during the 1970s and 1980s, when dozens of studies were completed. In fact lead was one of the first chemicals extensively tested and monitored in water pollution and water quality studies. Thus, there are a plethora of studies available that investigated the environmental fate, availability, bioconcentration and bioaccumulation of lead and lead compounds. The Agency believes that these studies are relevant to an assessment of lead as a PBT substance, and many of these were reviewed by the Agency for the proposed rule. Each study reviewed by EPA in the development of this rule involving bioconcentration or bioaccumulation testing, was initially assessed by the Agency for quality. Not unexpectedly, the studies were found to vary in quality and test results to the subject organisms. Studies that were found to be most consistent with OPPT test guidelines were deemed valid and selected for use in the assessment. These studies covered a variety of different test species.

The results of EPA's assessment of the bioaccumulation of lead and lead compounds in aquatic organisms are summarized in Table 1 of the proposed rule and in references therein (64 FR 42230). As can be seen from Table 1, the BCF values from these studies range from 390 to over 12,000, additional information on BCF values for lead and lead compounds are contained in EPA's support document (Ref. 6). For a number of aquatic organisms that include: freshwater invertebrates such as mollusks, insects, and daphnid crustaceans; freshwater algae and phytoplankton; marine mollusks, a crustacean, and algae, lead and lead compounds bioconcentrate to levels above the baseline BCF criterion of 1,000 and, for some organisms, at or above 5,000. These values are viewed by the Agency as indicators of the potential for increased exposure due to significant bioaccumulation that could occur in other organisms in the environment that have not been tested. Based on these data EPA concludes that lead and lead compounds are bioaccumulative, and believes that these data tend to support a finding of highly bioaccumulative.

Where a range of lead BCF values was available for a specific organism, EPA evaluated the scientific validity of the studies reporting BCF values and relied upon those studies that were valid and scientifically sound. If valid BCF values meeting, or surpassing, the bioaccumulation criterion used by EPA in this rulemaking (i.e., BCF or BAF values greater than 1000) were identified for a species, EPA relied on these values as evidence that lead meets the EPCRA section 313 bioaccumulation criterion. Although some species may have a range of reported BCF values, in some cases crossing the bioaccumulation criterion, a study reporting a lower value does not invalidate scientifically sound studies reporting higher values.

The results of the majority of the studies that investigated the bioaccumulation of lead and lead compounds are in general agreement. Thus, although EPA did not review every published lead study as part of its assessment for the proposed rule, the scientific data EPA used to support its assessment of lead and lead compounds were valid, represented the majority of all available data on lead, and provided a representative sample of the available knowledge on lead.

One commenter notes EPA's definitions of BAF and BCF on page 42229 of the proposed lead rule. EPA defines BAF as ''the ratio of a substance's concentration in tissue of an aquatic organism to its concentration in the ambient water, in situations where both the organism and its food are exposed and the ratio does not change substantially over time.'' EPA defines BCF as ''the ratio of a substance's concentration in tissue of an aquatic organism to its concentration in the ambient water, in situations where the organism is exposed through water only and the ratio does not change substantially over time.'' The commenter questions the portions of EPA's definitions of BCFs and BAFs that state that the ratios do not change substantially over time (64 FR 42229). Specifically, the commenter claims that ''such ratios have little scientific relevance in themselves.'' The commenter states that available data indicate that the lead BCF may not be a constant for different exposures, species or trophic levels.

EPA agrees with the commenter's statement that a BCF may not be

constant for different species or trophic levels. The Agency also agrees with the commenter's statement that the BAF and BCF of a substance measured in the same species can vary with the level of exposure (the concentration of the substance in ambient water). The Agency, however, believes the commenter has misunderstood the portions of its definitions of BCFs and BAFs that state that the ''ratios do not change substantially over time'' (64 FR 42229). The definitions of these terms pertain to determinations of BAF and BCF under controlled experimental conditions or field studies, where exposure of the aquatic species to the chemical is kept relatively constant. The phrase ''ratios do not change substantially over time'' does not refer to different experiments conducted at different concentrations of the test chemical. Thus, the fact that lead BCF values may not be constant for different exposures, species or trophic levels does not mean that lead does not bioaccumulate.

A number of commenters claim that EPA disregarded scientific data or did not use current scientific evidence in its assessment of the aquatic bioaccumulation potential of lead and lead compounds. Most of these commenters point out that EPA based its assessment of lead and lead compounds on studies published no later than the 1980s. These commenters are concerned that the studies EPA used are ''out-of-date''; flawed; were not conducted using modern day analytical techniques; and assert that the data provided in these studies should not have been used by EPA in its assessment. These commenters also claim that environmental studies pertaining to lead and lead compounds published in the 1990s indicate that lead and lead compounds are not persistent or bioaccumulative in aquatic species.

While some commenters criticize the Agency for basing its assessment on the studies referenced in the **Federal Register** notice and in the technical support document entitled *Bioaccumulation/Bioconcentration Assessment for Lead and Lead Compounds* (Ref. 6), none of these commenters provide persuasive criticism of the studies used by EPA, or of a particular data point from a study used by EPA. In many cases it is not clear from their comments specifically which studies and data these commenters feel are untrustworthy. It is difficult, therefore, for EPA to provide specific responses to these commenters. In addition, although many of the commenters claim that EPA did not use current scientific evidence, very few of the commenters provide citations to specific studies that contain more current or more recent scientific data. The Agency recognizes that it did not use results from studies published during the 1990's in its assessment of lead and lead compounds. EPA disagrees with the commenters, however, that the studies used in its analysis are ''out-of-date'', or that the data are not sufficiently current such that they should not have been used in the assessment. As with all studies used by EPA, the studies EPA used in its assessment of lead and lead compounds were initially reviewed by EPA for scientific credibility, and found to be scientifically valid. Many of the current methods used for biological analyses and conducting ecotoxicity tests are essentially the same as those used in the studies cited by EPA in the proposed rule. In addition, on a more general level, the Agency does not believe that the quality of a study should be judged by the year it was published, or that the results of a more recently published study necessarily has greater scientific validity than a similar study published earlier. The Agency maintains its longstanding position that when conducting a scientific assessment it is scientifically unacceptable to discriminate between study results by the age of the study: the selection of studies for any scientific assessment must be based on scientific merit.

While the Agency did not rely on the specific results from the additional studies referenced and discussed by one commenter to assess the bioaccumulation of lead and lead compounds in developing the proposed rule, the studies published in the 1990s which were referenced by the commenters provide no significant additional information beyond the studies used by EPA in the proposed rule, nor do the results from these studies lead EPA to reconsider the characterization of lead and lead compounds as bioaccumulative.

One commenter claims that more recent aquatic bioaccumulation studies indicate that previously reported concentrations of metals in environmental waters are erroneously high due to sample contamination (i.e., that earlier studies on the concentration of lead in the environment over estimated the actual concentrations of lead in the environment). The commenter believes that this means that previously reported BAF and BCF values would appear lower than if the concentrations of lead had not been overestimated. The commenter states that because of the earlier ''erroneous Pb measurements in water'', researchers used higher lead levels in their bioaccumulation studies than they otherwise would have used. The commenter states that no experiments have been conducted at levels close to the actual lead concentrations in ''natural waters.'' The commenter also stated that no data exists on actual lead concentrations for waters associated with highly contaminated sites where the results of the experiments conducted at concentrations above natural waters might apply. The commenter states that recent studies use lead concentrations 3 to 6 orders of magnitude above actual background lead concentrations and that although the data cited by EPA are from studies much closer to levels in natural waters they are still 2 to 4 orders of magnitude greater than typical values of lead in natural waters. According to the commenter this caused higher levels of lead to occur in the organism than would be observed under ''actual concentrations of Pb in natural waters.'' The commenter tries to invalidate the concerns for bioaccumulation by claiming that, even though the BAFs/BCFs used by EPA are high, the absolute amount of lead that would bioaccumulate in organisms is low and does not pose a risk.

EPA disagrees with the commenter's argument that only BAF or BCF values measured at ''actual concentrations of Pb in natural waters'' are relevant to the bioaccumulation potential of lead and lead compounds. At its foundation the commenter's argument is flawed because under EPCRA section 313 the Agency is collecting data on releases of lead and lead compounds to the environment which are expected to raise lead concentrations above natural background levels. BCF studies that used lead concentrations above natural background levels are valid since they demonstrate that lead can bioaccumulate at lead concentrations that may result from industrial releases. Thus the fact that the experiments on bioaccumulation were conducted at lead levels in excess of those found in ''natural waters'' does not, in itself, invalidate the results of those studies. As noted in Unit VI.C.3., testing guidelines for bioaccumulation do not state that chemicals should be tested at natural background concentrations, only that the concentrations should be below a level that is detrimental to the test organism. Therefore, even if better data had been available on the background concentrations of lead that does not mean that bioaccumulation studies would have been conducted at those

concentrations. In addition, the commenter admits that higher bioaccumulation values would have been reported in earlier studies if better data on the concentration of lead in the water had been available. EPA fails to see how even higher bioaccumulation values undermine EPA's determination that lead and lead compounds are bioaccumulative. EPCRA section 313 is not a risk-based program, and the Agency is not required to demonstrate a specific risk in order to classify a substance as a PBT chemical. The EPCRA section 313 bioaccumulation criteria does not include a requirement that a chemical must bioaccumulate to some specific absolute amount within an organism in order to meet the criteria. Therefore, EPA disagrees that lead has not been shown to bioaccumulate to a level sufficient for inclusion as a PBT chemical. Even if such evidence were needed, it is available. EPA's database of Fish and Wildlife Advisories (http://fish.rti.org) contains 26 advisories for various fish and shellfish, see Unit VI.D.3. This indicates that lead and lead compounds can and do bioaccumulate in aquatic organisms to absolute levels that are of concern for human consumption.

Furthermore, the commenter's contention that previously reported lead concentrations in ambient waters may be erroneously high only serves to support the conclusion that lead and lead compounds are at least bioaccumulative. The commenter agrees that if the previously reported lead concentrations in ambient waters are in fact erroneously high, then the previously reported BAF and BCF values for lead and other metals are erroneously low (because the BAF and BCF values are determined by dividing tissue lead concentrations by environmental water concentrations). Thus, if the commenter's claim about the water concentrations is true, then the propensity for lead and lead compounds to bioaccumulate in aquatic species is actually greater than originally estimated. Based on the commenter's concern for the validity of the water concentrations and the BAF and BCF values reported for lead and lead compounds, EPA re-reviewed the studies it used in its original assessment of lead and lead compounds. EPA is satisfied that the lead water concentrations, BCF values, and BAF values reported in these studies are valid. However, as noted above, EPA is deferring on a final conclusion regarding the classification of lead as highly bioaccumulative based on the data in these studies, and is concluding in this rule that lead is bioaccumulative.

Two commenters contend that the extent to which a metal such as lead bioaccumulates is dependent upon its concentration in the aqueous habitat of the organism. The commenters state that in most cases where bioaccumulation was noted, the organisms were exposed to artificially elevated lead concentrations in laboratory settings, often where abiotic factors were manipulated to increase lead availability.

The Agency agrees that environmental transformations and the uptake of lead by biota are highly variable and complex. However, these variabilities and complexities can be minimized by testing in the laboratory using a valid method. As discussed in the proposed rule, valid laboratory BCF tests have shown that lead and lead compounds have BCF values in some species well over 1,000. In some of the lead assays, several of the tested species (e.g., mollusks, algae) have very high BAF or BCF values, i.e., 5,000 or greater, indicating that these organisms accumulate or concentrate lead to high levels and eliminate lead very slowly. Thus, in organisms such as these, it would seem logical that the BAF or BCF values obtained at different test chemical concentrations would probably not vary by much. Further, based on its assessment of lead and lead compounds the Agency has concluded that external concentration is only one of several factors that govern the propensity for these substances to bioaccumulate in a given species. As discussed in more detail Unit VI.C.3, pharmacokinetic factors are operative as well.

EPA does not believe that bioaccumulation of lead was documented mostly in cases where the concentrations of lead in the surrounding water were artificially elevated in laboratory settings. This was not the case, for example, in the freshwater and marine algal field studies where BAF or BCF values above 10,000 were documented in actual aquatic environments and the lead levels were not artificially controlled. In addition, the fish advisories discussed in Unit VI.D.3. were based on concerns for lead levels in fish and other species that did not occur as a result of artificially elevated lead concentrations in laboratory settings.

One commenter states that EPA's contention that relatively small releases of lead and lead compounds have the potential to bioaccumulate and cause significant adverse environmental impacts is not supported by the scientific literature. Another commenter stated that the preponderance of evidence shows that only under very limited conditions will lead and lead compounds be available to bioaccumulate and cause toxic impacts to ecosystems.

EPA disagrees. As discussed elsewhere in this document, there are many studies that show that there are several environmental factors (e.g., pH range of 3 to 6; soils that have low cation exchange capacity; low soil organic matter content) that increase the availability of lead and that, either individually or in combination, commonly exist throughout many geographical locations within the United States. However, even if the conditions under which lead is available were very limited this would not mean that lead would not bioaccumulate. Also, because lead and lead compounds are EPCRA section 313 listed toxic chemicals that EPA has determined are persistent and bioaccumulative, even small releases of lead and lead compounds into the environment persist and have the potential to bioaccumulate and cause significant adverse environmental impacts. Further, EPA notes the data on the bioaccumulation of lead and lead compounds in human (see Unit VI.D.2.b.) and the fish advisories for lead (see Unit VI.D.3.).

b. What comments did EPA receive on the human bioaccumulation data for lead and lead compounds? In Unit V.C. (pages 42230–42231) of the proposed rule, EPA provides a brief summary of available data on the pharmacokinetics of lead in humans. As stated in the proposed rule, EPA concluded that there is a substantial amount of evidence that shows that humans bioaccumulate lead. Unlike the assessment as to whether lead bioaccumulates in aquatic species, which was based on lead bioaccumulation factor (BAF) and bioconcentration factor (BCF) values measured in aquatic species in laboratory or field studies, the assessment of whether lead bioaccumulates in humans cannot be based on an analysis of BAF or BCF values because such values are not available for humans. The assessment of whether lead bioaccumulates in humans was based on the Agency's review of the references cited in Unit V.C. of the proposed rule, which provide a substantial amount of data and information regarding exposure of humans to lead, and the pharmacokinetics of lead in humans. From its review of these references, EPA concluded that humans, particularly

children, bioaccumulate lead to a significant degree. The propensity of lead to bioaccumulate in humans is known to result in toxicity to humans, especially infants and children. While the EPCRA section 313 PBT chemical criteria does not require that toxicity must occur in the same species in which the substance bioaccumulates, or result from bioaccumulation of the substance, those chemicals that persist in the environment, bioaccumulate in humans, and are toxic to humans are particularly problematic in regard to human health. The following information on the accumulation of lead in humans is discussed in the references cited in the proposed rule (Refs. 8, 10, 11, 14, and 25).

Exposure of the general population to lead occurs primarily via the oral and inhalation routes, and data show that in humans lead is absorbed from the gastrointestinal tract and the lung. Absorption of lead from the gastrointestinal tract varies with age. Adults absorb approximately 10% of orally ingested lead, and usually retain less than 5% of what is absorbed. Children absorb up to 40% of ingested lead, and retain more than 5% of the absorbed quantity. Infants retain over 30% of the quantity absorbed following oral exposure. Research indicates that the differences in the extent to which lead is absorbed orally between adults and infants and children may be due to the increased need for calcium in infants and children. In infants, children, and adults, a transport mechanism is involved with the absorption of calcium from the gastrointestinal tract. Infants and children, because they are growing rapidly, utilize calcium for bone formation and growth. Dietary needs for calcium are therefore higher in infants and children than in adults and, consequently, calcium is more efficiently absorbed orally by infants and children than it is by adults. Evidence indicates that lead may be competing with calcium for the transport mechanism involved with absorption of calcium, which could explain why lead is absorbed from the gastrointestinal tract more efficiently in infants and children than it is in adults.

Following inhalation exposure, lead is well absorbed from the lung by all human subpopulations. About 90% of lead particles in ambient air that are deposited in the lung are small enough to be retained within the lung. Lead retained within the lung is essentially completely absorbed from the lung.

In humans, lead is known to bioaccumulate in bone. Following absorption, lead is distributed initially to the blood and soft tissues (especially the kidney, liver and bone marrow). The biological half-life of lead in blood is generally from 1 to 2 months. Some of the lead in the blood is excreted, predominately in the urine. The extent and rate of excretion is limited, however. Eventually, lead that is not excreted is redistributed from the blood to teeth and bone. Once in bone, the biological half-life of lead can extend beyond 20 years. Following daily exposure to lead, a steady state blood level of lead is achieved after about six months. (A steady state in blood lead is reached when the daily intake of lead approximates the amounts excreted in the urine and partitioned to bone.) Once steady state is reached, the blood level of lead remains essentially constant. However, because the rate and extent of urinary excretion of lead is limited, the concentration of lead in bone tends to continue to increase even though daily exposure remains constant. Also, if the amount of daily intake should increase, the time to accumulate higher levels of lead in the blood and soft tissues shortens disproportionately since renal excretion and deposition into bone occurs too slowly to prevent an accumulation in the blood and soft tissue.

The fraction of lead in bone increases with age from about 70% of total body lead in childhood to as high as 95% of the total body lead during old age. While lead bioaccumulates in bone, lead in bone can remobilize back to the blood. The extent to which lead in bone remobilizes to blood and other tissues is related to conditions that involve calcium resorption from bone. Any conditions that cause calcium to be resorbed from bone into the systemic circulation or other soft tissue will cause lead to resorb from bone. These conditions include: advanced age; osteoporosis; pregnancy; and lactation. Hence, lead stored in bone from exposures that occurred years, even decades, earlier may serve as an internal source of lead exposure later in life. lead previously accumulated in bone may contribute as much as 50% of blood lead.

Lead in maternal blood can enter the fetus. Lead in fetal tissue is proportional to maternal blood concentration. Inorganic lead (i.e., Pb^{0}, Pb^{+2}, Pb^{+4}) does not readily cross the blood brain barrier, and therefore only a small amount of inorganic lead accumulates in the brains of adult humans. Once in the central nervous system, however, lead accumulates in gray matter. The highest concentrations are in the hippocampus, followed by the cerebellum, cerebral cortex, and medulla. Fetuses, infants and children less than 4 years of age are more predisposed to accumulate inorganic lead in the brain than are adults because in these subpopulations the blood brain barrier is not completely formed. In addition to the ability of infants and children to absorb lead more efficiently from the gastrointestinal tract than adults, it is well established that infants and children are also more sensitive and susceptible than are adults to the neurotoxic effects caused by lead. Mobilization of lead from bone into the blood is of particular concern during pregnancy or lactation.

Based on EPA's findings that in humans lead bioaccumulates in bone, that the concentration of lead in bone tends to continue to increase over the course of a lifetime, and that lead stored in bone from exposures that occurred previously may serve as an internal source of lead exposure later in life, EPA has concluded that lead significantly bioaccumulates in humans. In the proposed rule EPA asked for public comment on the scientific information concerning the bioaccumulation of lead in humans, and how this information should be considered in classifying lead and lead compounds as highly bioaccumulative. Several organizations or individuals provided comments to EPA's request, however none of these comments addressed the scientific information presented by EPA concerning the bioaccumulation of lead in humans, or how this information should be considered in classifying lead and lead compounds as bioaccumulative much less as highly bioaccumulative. While EPA believes that it could have reached a determination of bioaccumulative based on the human data alone, EPA concludes that lead and lead compounds are clearly and properly categorized as bioaccumulative based on the aquatic and human data. EPA further believes that these data would tend to support a finding of highly bioaccumulative.

c. What other general comments did EPA receive on the bioaccumulation of lead? One commenter claimed that EPA's reasoning that lead bioaccumulates is based on many variables, and is not realistic. This commenter refers to EPA's frequent use of the words ''may'' or ''can'' throughout the proposal: ''EPA believes that processes * * * can result in the release of bioavailable (ionic) lead where it can be bioaccumulated by organisms. These processes may occur in soil and aquatic environments with low pH and low levels of clay and organic matter.''

The Agency disagrees with this commenter. As described above, EPA's characterization of lead as a highly bioaccumulative substance is based on the Agency's scientific assessment. Also, EPA's use of words such as ''may'' or ''can'' is justifiable. EPA's TRI program is a national program and is not limited to specific locations or regions of the country. As discussed in detail in the proposed rule and elsewhere in this document, environmental conditions have a direct influence on the availability of lead and, hence, an indirect influence on the bioavailability and bioaccumulation of lead in aquatic organisms. Environmental conditions vary substantially across the United States and hence the availability of lead in the environment is likely to vary accordingly. To encompass the fact that environmental conditions vary, and that this rulemaking decision will be implemented at the national level, EPA believes its use of words such as ''can'' or ''may'' in the proposed lead rule is an accurate characterization of the scientific data. Despite the variations in environmental conditions EPA has concluded that there are many conditions in the United States where lead is available to bioaccumulate. In addition, lead is bioavailable even under environmental conditions where the lead ion may not be readily available in the environment.

Further, there are sufficient experimental data in aquatic organisms, fish advisories, and extensive data in humans, all of which indicate that lead and lead compounds *do bioaccumulate*. Thus, EPA disagrees with the comment that the Agency's conclusion that lead bioaccumulates is unrealistic. To the contrary, EPA has concluded that the available evidence indicates that lead and lead compounds will bioaccumulate in many actual environments.

Several commenters state that there are numerous literature citations that show that lead does not biomagnify in aquatic food chains, and, in experimental trophic chains lead accumulated in decreasing concentration from the lowest to the highest trophic levels. One commenter concludes that bioaccumulation is not relevant unless lead is transferred up the food chain to humans, and that a concept more meaningful than BCF is needed to evaluate the potential risk from lead to public health from ingestion of fish.

EPA disagrees with the commenter's conclusion that bioaccumulation is not relevant unless lead is transferred up the food chain to humans and that BCFs [and BAFs] are not meaningful. ''Transfer up the food chain'' is really a biomagnification concern which EPA addressed in the final PBT chemical rule (64 FR 58682) and associated Response to Comment document (Ref. 15, section 2.d), stating that such a process is not relevant to the issue of whether a chemical bioaccumulates. Bioaccumulation is a concern for the organism that bioaccumulates it and any organism that eats such organisms. While available data may indicate that lead does not biomagnify, this has no bearing on the characterization of lead as a bioaccumulative substance because biomagnification is not required in order to have a concern for a chemical that bioaccumulates. While EPA does not have to make such a connection, the commenters' own information provides evidence of a transfer up the food chain. The commenter stated that about 60% of the lead in phytoplankton is assimilated by mussels and that mussels have high BCF values. EPA identified phytoplankton as having high bioaccumulation values so there is the potential for movement of lead in the food chain based on this information. In addition, EPA's database of Fish and Wildlife Advisories (http://fish.rti.org) contains 26 advisories for various aquatic organisms including shellfish.

3. What comments did EPA receive on the bioavailability of lead. Contrary to some commenters' claims that EPA did not consider relevant data regarding bioavailability, EPA emphasizes that the Agency **did** consider the bioavailability of lead in its evaluation of lead and lead compounds. In addition to the principles described above in Unit VI.C.2. that address the availability and bioavailability of metals, EPA also relied on empirical data regarding the availability and bioavailability of lead. EPA refers specifically to the test data cited in the proposed rule and in the references to the proposed rule that clearly show that lead is bioavailable (Table 1 of the proposed rule (64 FR 42230), and references therein). The fact that lead is detectable in the tissues of snails, algae, plankton, rainbow trouts, blue mussels, oysters, and lobsters exposed to lead provides compelling scientific evidence that lead is bioavailable in these species.

In addition to these test data, EPA examined its public National Listing of Fish and Wildlife Advisories database (see http://fish.rti.org/) to see whether lead has been detected in fish under actual environmental conditions. The individual states have the primary responsibility for protecting residents from the health risks of consuming contaminated noncommercially caught fish and wildlife. Individual counties monitor local fish and wildlife for the presence of chemical contaminants, including lead. Fish consumption advisories warn the public that high concentrations of chemical contaminants have been found or are suspected in fish from local waters and that consumption of these fish may pose health risks. The advisories may recommend to limit or avoid consumption of specific fish species, or to limit or avoid consumption of fish from specific water bodies. It is important to emphasize that while a single advisory has one geographic location (e.g., a portion of a river or lake), it can contain information about several fish species (e.g., carp, largemouth bass, shrimp), several pollutants (e.g., mercury and PCBs), and several ''populations'' (e.g., no consumption for at risk subpopulations such as pregnant women and/or restricted consumption for general populations). There are 26 reports that show that lead is or has been detected in different aquatic species located in various areas within the United States. The fact that lead is detected in fish shows that lead is bioavailable in fish under actual and varying environmental conditions. Being within the purview of state and local governments, there is some variation in fish advisory policies and procedures across the United States. Thus, not all counties monitor fish and wildlife for chemical contaminants, and some counties may not monitor for lead contamination. Therefore, there may be additional geographical locations within the United States, not listed in the National Listing of Fish and Wildlife Advisories database, where the fish are contaminated with lead.

Some commenters state that EPA should evaluate each individual member of the lead compounds category on a case-by-case basis because the availability of lead from lead compounds differs among lead compounds and lead is unavailable from certain lead compounds. As explained in Unit VI.C.1., the Agency has concluded that there is a scientific basis for evaluating lead compounds as a category rather than individually because the bioavailability of a lead compound is not necessarily dependent upon the availability of lead from the compound. That is, the parent lead compound may be bioavailable as is or, if not itself bioavailable, could be converted in the environment into a another lead compound that is bioavailable or from which lead is bioavailable. As discussed in Unit VI.D.1, EPA's environmental fate assessment indicates that there are

many conditions under which lead from lead compounds can become available in the environment. Further, most lead compounds provide bioavailable lead when ingested. Thus, after an evaluation of the available data, EPA has determined that the weight of scientific evidence indicates that it is reasonable to conclude, based upon similarities between the compounds, that lead in the environment will be available and/or bioavailable from all lead compounds.

In addition, regardless of the relative environmental availability of lead from one lead compound to another, the lead compounds all add to the environmental loading of lead. Thus, even if under the same environmental conditions the lead from compound A is 10 times less available than the lead from compound B, compound A would introduce the same amount of available lead if its releases are 10 times greater. If lead compounds are evaluated individually based on relative environmental availability then the additive effect of the loading of lead from these compounds would be ignored.

E. What Comments Did EPA Receive on Its Proposed Threshold for Lead and Lead Compounds?

EPA received a range of comments on the thresholds proposed for lead and lead compounds similar to those it received on the thresholds proposed for the PBT chemicals in its earlier rulemaking. Many commenters contended that EPA should not consider burden in choosing thresholds. They believe that EPA should set a threshold of 1 pound for lead because it was proposed as falling within the subset of PBT chemicals that are both highly persistent and highly bioaccumulative. Numerous commenters believe that the threshold for reporting should be zero. Other commenters believe that burden should have been a greater consideration in EPA's choice of reporting thresholds. Many of these commenters also stated that EPA should set thresholds based on some percentage of releases that would be reported.

With few exceptions, the comments EPA received failed to take into account the analyses EPA laid out in the final PBT chemical rule. As explained in the preamble to that rule, the analyses in that rulemaking relied on the characteristics and policy considerations surrounding PBT chemicals in general. The analyses were not dependant on the specific chemical properties of the particular, individual chemicals addressed in that rulemaking, but were tied more closely to the overall characteristics of PBT chemicals generally. For example, as part of the explanation for the Agency's decision to establish two categories of thresholds an order of magnitude apart, EPA noted:

> EPA then considered the relative degree of persistence and bioaccumulation between the two classes of chemicals. EPA wanted to establish two sets of revised thresholds with the same approximate relationship to each other, as the relative exposure potentials of PBT chemicals to that subset of highly persistent and highly bioaccumulative PBT chemicals. Simply stated, chemicals with half-lifes of 6 months or greater and a BAF/BCF of 5,000 or greater have a higher exposure potential than chemicals with half-lifes of 2 months or greater and a BAF/BCF of 1,000 or greater. However, although, as discussed below, EPA could establish a qualitative relationship, the Agency could not reliably quantify the relative exposure potential across the board for all of the members of both classes. Therefore, in attempting to translate the qualitative exposure potential of PBT chemicals to that subset of PBT chemicals that are highly persistent and highly bioaccumulative into a qualitative *threshold* relationship, EPA considered both the attributes of these chemicals and factors specific to thresholds. 64 FR 58690.

And as EPA also explicitly noted in the preamble, EPA established the revised thresholds with the intention that they would be generally applicable to future members of the two PBT categories. See 64 FR 58691. Thus, absent some strong technical or policy concern to the contrary-a topic on which the public would have the opportunity to present information and otherwise provide comments—the revised thresholds were anticipated to be applicable to future candidate PBT chemicals. EPA requested commenters to submit such technical and policy concerns in its proposed rule for lead and lead compounds. See 64 FR 42224. This, the commenters have failed to do. In addition, in the proposed lead rule, EPA identified an additional factor for use in determining whether a chemical is, at the least, bioaccumulative. EPA explained that there is clear and convincing evidence that lead is bioaccumulative in humans. EPA also requested comment on the human data and on how such data should be considered in determining whether a chemical should be classified in that subset of PBT chemicals that are highly bioaccumulative. Therefore, consistent with the factors laid out in its previous rulemaking, and with its determination that lead and lead compounds are highly persistent and bioaccumulative toxic chemicals, EPA is setting the thresholds for lead and lead compounds at 100 pounds. As discussed elsewhere, following its review of the comments, EPA is deferring on its proposal to classify lead and lead compounds as highly bioaccumulative.

Consistent with EPA's approach to revise thresholds for PBT chemicals, EPA began with the premise that for lead and lead compounds, assuming no unique circumstances, a threshold of either 100 or 10 pounds would be warranted. The choice of threshold was dependent on whether the data indicated that lead and lead compounds were PBT chemicals, or fell within the subset of highly persistent and highly bioaccumulative toxic chemicals. In this rulemaking EPA has concluded, through application of PBT criteria as discussed in the PBT final rule and the proposed lead rule, that lead and lead compounds are highly persistent and bioaccumulative. At this time, EPA is deferring on a final conclusion as to whether lead and lead compounds are highly bioaccumulative, and is deferring on whether lead and lead compounds are appropriately classified in that subset of toxic chemicals that are highly persistent and highly bioaccumulative. Thus, based on EPA's conclusions, a 100 pound threshold for lead and lead compounds is warranted.

EPA has considered the same factors for lead and lead compounds that it had considered for the individual PBT chemicals included in its previous rulemaking. To determine whether the additional reporting burden associated with lowering the thresholds for lead and lead compounds presented any unique concerns, and to ensure that the 100 pound threshold would capture significant information from a range of covered industry sources, EPA analyzed the number of reports that would be submitted by each industry sector for the following potential thresholds: 1 pound, 10 pounds, 100 pounds, and 1,000 pounds.

EPA's analysis confirmed that 100 pound threshold achieves the appropriate balance of the various factors laid out in the preamble to the final PBT rule. EPA therefore finds that establishing the threshold at 100 pounds will not be unduly burdensome, and ensures that the resulting reporting will provide the public with information from a range of covered industry sectors, and that the information will contribute significantly to providing the public with a comprehensive picture of toxic chemical releases and potential exposures to humans and ecosystems.

F. What Comments Did EPA Receive on Its Proposed Treatment of Lead Contained in Stainless Steel, Brass, and Bronze Alloys?

The commenters on this issue generally agree with EPA's proposed limitation on the reporting of lead contained in stainless steel, brass, and bronze alloys, but felt that it should be expanded. Some commenters suggest that all alloys should be included, while others cited various types of alloys that they believed should also be included, e.g., aluminum, copper, zinc, tin, iron, all steels, carbon and low alloy steels, leaded steel, and galvanized and drawn steel wire. Some commenters also suggest that other metals be included in a broader alloy reporting exemption and that the exemption should be for all reporting, not just for the lower reporting thresholds. Some commenters claim that EPA's reasoning in drafting the alloys exemption is that lead incorporated into an alloy does not pose the same hazard as unincorporated lead, is not bioavailable, does not exert toxic effects, is not available for exposure, and that this reasoning holds true for lead contained in other alloys. Commenters also contend that alloys have significantly different bioavailability, bioaccumulation, and toxicity characteristics than other forms of metals, and thus should be treated separately. Some comments state that an alloys exemption would enhance the ability of TRI to provide meaningful information to the public regarding the risk associated with the release and handling of toxic materials. Several commenters requested an exemption for the use of lead and lead compounds in wire soldering operations. Some commenters state that lead contained in primary aluminum and aluminum alloys is incidental and that the concentrations are significantly lower than that found in stainless steel, bronze and brass alloys, which intentionally contain lead, and therefore lead in aluminum alloys should not be regulated any more stringently than those alloys. One commenter states that EPA failed to demonstrate that lead is bioavailable in any metal alloy and illegitimately provided a preferential exemption only to certain metal alloys. The commenter contends that EPA has failed to show any rational basis for excluding other metal alloys from such an exemption and that limiting the exemption to stainless steel, brass, and bronze alloys is arbitrary and capricious and should be expanded to all, metal alloys, including aluminum alloys.

EPA does not believe that it currently has any information that would support a decision to extend to other types of alloys, its deferral of a decision on a lower threshold for lead when contained in stainless steel, brass, and bronze alloys. EPA's proposed deferral was based on the fact that it is currently evaluating a previously submitted petition, as well as comments received in response to previous petition denials, that requested the Agency to revise the EPCRA section 313 reporting requirements for certain metals contained in stainless steel, brass, and bronze alloys. Contrary to the commenter's allegations, EPA has not determined that lead is neither toxic nor bioavailable when contained in these or any other alloys. Nor did EPA imply that lead or other metals contained in these or any other alloys are less hazardous than metals not contained in alloys, or that lead or other metals cannot exert toxic effects, or that lead or other metals are not available for exposure when contained in an alloy. Rather, the deferral is simply based on the fact that for stainless steel, brass, and bronze alloys, EPA is currently reviewing whether there should be any reporting changes. In light of that review, EPA has decided to maintain the status quo for lead when contained in these alloys until the review is complete.

Lead is an EPCRA section 313 listed toxic chemical, and lead contained in all alloys are therefore subject to the EPCRA section 313 reporting requirements. As discussed above, EPA did not illegitimately provide a preferential exemption only to stainless steel, brass, and bronze alloys. EPA is merely maintaining the status quo with respect to the alloys that are the subject of the pending review. Other alloys are not part of that review. Because the commenters have submitted no information or data that would allow the Agency to conclude that lead in all other alloys are similarly situated, in light of its scientific findings in this rule with respect to lead and lead compounds, EPA has no basis for extending its deferral.

With respect to the request for an exemption for lead soldering, EPA does not believe that the commenter's allegation that lead may not be released during these processes, such as wire soldering, provides an adequate basis for excluding that activity from threshold determinations and release reporting requirements. Under EPCRA section 313, whether an activity must be counted towards an EPCRA section 313 reporting threshold is based on whether the activities fall within the definition of manufacturing, processing, or otherwise use, not on whether the activity actually, or potentially, results in releases. Additionally, because even low amounts of releases are of concern for PBT chemicals like lead and lead compounds, it is not appropriate to exclude a reportable activity merely because releases from that activity may be relatively low.

In addition, this rulemaking is specific to lead and is not the appropriate forum to address the issue of limitations or exemptions for other metals contained in these or other alloys; nor was comment on such issues requested in the proposed rule. EPA will be issuing a report on its review of the data for stainless steel, brass, and bronze alloys and will be asking for comments on the report.

The comment that an alloys exemption would enhance the ability of TRI to provide meaningful information to the public regarding the risk associated with the release and handling of toxic materials is not relevant to the issue of whether or not there should be reporting changes for any alloys. As EPA has previously discussed (64 FR 58592), EPCRA section 313 is a hazard-based program, not a risk-based program. As such, EPCRA section 313 does not directly provide any risk information to its users, but rather provides basic release and other waste management information on chemicals that meet the criteria in EPCRA section 313(d)(2). Congress established these criteria as the sole standard for listing decisions. Therefore, any final determination on whether there should be changes to the reporting of alloys will be based on whether the alloys meet the criteria of EPCRA section 313(d)(2).

One commenter stated that EPA's limitation on the reporting of lead contained in alloys should apply to all alloys to be consistent with that proposed for cobalt and vanadium in the January 1999 proposal for other PBT chemicals.

EPA disagrees that it must extend its deferral to all lead alloys to be consistent with its past actions on cobalt and vanadium. With respect to cobalt, in the October 29, 1999 final PBT chemical rule (64 FR 58666), EPA only changed the reporting requirements for vanadium not cobalt. Regarding vanadium, the original vanadium listing contained the qualifier ''fume or dust;'' thus the status quo was that unless the vanadium alloy was converted to a fume or dust form, the vanadium in any alloy was not reportable. In the October 29, 1999 final rule, EPA added all forms of vanadium, except vanadium contained in alloys, to the list of TRI chemicals. EPA deferred its decision to add vanadium contained in alloys until it

had resolved the pending petition. EPA explained its decision as follows: ''At this time, while EPA is in the process of a scientific review of the issues pertinent to alloys, the Agency is not prepared to make a final determination on whether vanadium in vanadium alloys meet the EPCRA section 313(d)(2) toxicity criteria'' (64 FR 58711).

At the time EPA made its determination with respect to vanadium, EPA chose not to add vanadium contained in any alloys to the EPCRA section 313 list of toxic chemicals. This decision excluded from a listing decision more than just the three classes of alloys specifically addressed in the alloys project out of concern that the project could be expanded to similar alloys. However, at the time of the lead proposal, EPA identified a potential concern with proposing a similarly broad deferral for lead since lead is used in many types of alloys that are not similar to stainless steel, brass, and bronze alloys. Because these other alloys, such as lead solder, are not being reviewed, and are currently subject to reporting under EPCRA section 313, EPA believes that the Agency has no basis to defer lowering thresholds for these other alloys. In light of the Agency's conclusions with respect to lead, EPA will review its October 29, 1999, vanadium decision and determine whether vanadium contained in alloys, other than the three classes of alloys currently under review by the Agency, should be added to the EPCRA section 313 list of toxic chemicals.

None of the commenters who supported a limitation for lead in other alloys submitted any data on which the Agency could rely to create such a limitation, or to extend the alloys review to encompass lead when contained in alloys other than stainless steel, brass, or bronze. As explained above, EPA believes that it has no basis to defer lowering thresholds for other alloys that are not currently being reviewed. If the commenter has data to support a revision to the reporting requirements for lead when contained in alloys other than stainless steel, brass, and bronze the commenter can submit it as part of a petition to delist lead contained in such alloys from the EPCRA section 313 list of toxic chemicals.

One commenter contends that EPA has exempted steel, brass and bronze alloys from reporting for lead with the implication being that these alloys do not yield sufficient lead to be a significant risk. The commenter stated that there are many products containing trace amounts of lead which are at least as stable as bronze or steel alloys. The commenter contends that EPA provides no explanation for why these other products were not also provided an exemption and that EPA sets forth an artificial and unfair distinction. The commenter cites colored plastics, vinyl siding, ceramics, paints and inks as examples of products that do not leach lead in sufficient quantity to pose a risk to the community. The commenter contends that there is an assumption implicit in the proposed rule, that steel alloys containing lead are sufficiently safe and non-toxic to avoid reporting under the TRI, while all other forms of lead, lead compounds and thousands of products which may contain trace quantities of lead and lead compounds are not and that this is unsubstantiated in the record for this rulemaking.

EPA is not providing an ''exemption'' to lead contained in stainless steel, brass and bronze alloys. As EPA discussed in other responses in these section, EPA is merely deferring a final decision on lowering thresholds for lead contained in these alloys until the scientific review of the alloys petition is complete. EPA has made no determination, implicit or otherwise, that lead contained in any alloy is safe, non-toxic, or without significant risk. Lead contained in other non-alloy products is currently reportable and since these other non-alloys are not part of the review of stainless steel, brass, and bronze alloys EPA did not include any similar deferral for these other products. With regard to these other lead containing products, if the commenter has data that indicate that the lead contained in these products cannot become available through any abiotic or biotic processes, then they may wish to provide these data in a petition to have the lead in such products delisted from the EPCRA section 313 listed toxic chemicals. In addition, under certain conditions, some of the products mentioned by the commenter (such as vinyl siding, colored plastics, and ceramics) may be eligible for the article exemption (see 40 CFR § 372.38 (b)) and thus would not be subject to reporting in any case.

Two commenters requested that lead and lead compounds contained in glass, ceramic enamels, and ceramicware be excluded from reporting. One commenter stated that EPA's limitation on the reporting of lead in stainless steel, brass, and bronze alloys, is apparently justified because alloys have significantly lower potential for bioavailability, bioaccumulation, and toxicity than other forms of metals and are less likely to affect organisms than non-alloy forms of metals and that these compounds are extremely stable and virtually unable to interact with organisms. The commenter contends that ceramic enamels share similar properties with alloys and that the way that they are manufactured and used results in little or no releases or exposures. The commenter stated that these enamels are as insoluble as possible and bind the lead compounds in such a way that their use in glazing and decorating ceramicware or glass would strictly limit the potential exposure of the community to releases from a glazing or decorating process.

As discussed in detail in the responses contained in the previous section, EPA has not determined that lead is neither toxic nor bioavailable when contained in these or any other alloys. Nor did EPA imply that lead or other metals contained in these or any other alloys are less hazardous than metals not contained in alloys, or that lead or other metals cannot exert toxic effects, or lead or other metals are not available for exposure. EPA is merely deferring a final decision on lead contained in these alloys until the Agency completes it current review of the alloys petition. The commenter has provided no data to support expanding its alloys review to these materials so the basis for the deferral for lead in certain alloys does not apply to these other materials. If the commenter has data to support such an extension, then they may wish to provide this data in a petition to have the lead in such products delisted from the EPCRA section 313 listed toxic chemicals. In addition, under certain conditions, glass and ceramic products may be eligible for the article exemption (see 40 CFR § 372.38 (b)) and thus would not be subject to reporting in any case.

VII. What Are the Results of EPA's Economic Analysis?

EPA has prepared an economic analysis of this action, which is contained in a document entitled *Economic Analysis of the Final Rule to Modify Reporting of Lead and Lead Compounds Under EPCRA Section 313* (Ref. 46). This document is available in the public version of the official record for this rulemaking. The analysis assesses the costs, benefits, and associated impacts of the rule, including potential effects on small entities. The major findings of the analysis are briefly summarized here including responses to some of the major comments EPA received.

A. What Is the Need for the Rule?

Federal regulations exist, in part, to address significant market failures.

Markets fail to achieve socially efficient outcomes when differences exist between market values and social values. Two causes of market failure are externalities and information asymmetries. In the case of negative externalities, the actions of one economic entity impose costs on parties that are ''external'' to any market transaction. For example, a facility may release toxic chemicals without accounting for the consequences to other parties, such as the surrounding community, and the facility's decisions will fail to reflect those costs. The market may also fail to efficiently allocate resources in cases where consumers lack information. For example, where information is insufficient regarding toxic releases, individuals' choices regarding where to live and work may not be the same as if they had more complete information. Since firms ordinarily have little or no incentive to provide information on their releases and other waste management activities involving toxic chemicals, the market fails to allocate society's resources in the most efficient manner.

This action is intended to address the market failures arising from private choices about lead and lead compounds that have societal costs, and the market failures created by the limited information available to the public about the release and other waste management activities involving lead and lead compounds. Through the collection and distribution of facility-specific data on toxic chemicals, TRI overcomes firms' lack of incentive to provide certain information, and thereby serves to inform the public of releases and other waste management of lead and lead compounds. This information enables individuals to make choices that enhance their overall well-being. Choices made by a more informed public, including consumers, corporate lenders, and communities, may lead firms to internalize into their business decisions at least some of the costs to society relating to their releases and other waste management activities involving lead and lead compounds. In addition, by helping to identify areas of concern, set priorities and monitor trends, TRI data can also be used to make more informed decisions regarding the design of more efficient regulations and voluntary programs, which also moves society towards an optimal allocation of resources.

Certain facilities currently report TRI data on lead and lead compounds under the existing 10,000 and 25,000 pound reporting thresholds. In 1998, EPA received TRI data on the release and other waste management of over a billion pounds of lead and lead compounds from approximately 1,900 facilities. EPA believes that there are many additional facilities that do not currently report lead and lead compounds to TRI because they do not exceed current reporting thresholds for lead and lead compounds, and/or because the lead-containing materials they handle are currently covered by the *de minimis* exemption. EPA is not able to estimate the total multi-media releases or other waste management quantities from these additional facilities without additional TRI reporting. Since even small amounts or concentrations of lead and lead compounds are of concern, EPA believes that there is a need for reporting from these additional facilities.

If EPA were not to take this action, the market failure (and the associated social costs) resulting from the limited information on the release and disposition of lead and lead compounds would continue. EPA believes that today's action will improve the scope of multi-media data on releases and other waste management of lead and lead compounds. This, in turn, will provide information to the public, empower communities to play a meaningful role in environmental decision-making, and improve the quality of environmental decision-making by government officials. In addition, this action will serve to generate information that reporting facilities themselves may find useful in such areas as highlighting opportunities to reduce chemical use or release and thereby lower costs of production and/or waste management. EPA believes that these are sound rationales for lowering reporting thresholds for lead and lead compounds.

B. What are the Potential Costs of this Action?

This action will result in the expenditure of resources that, in the absence of the regulation, could be used for other purposes. The cost of the rule is the value of these resources in their best alternative use. Most of the costs of the rule will result from requirements on industry. Approximately 9,800 facilities are expected to submit additional Form R reports on an annual basis as a result of this action. The estimated composition of this reporting, by industry, is shown in Table 1. This table also displays the estimated costs for this action, which includes costs of compliance determination for all potentially affected facilities, and rule familiarization, report completion, and mailing/recordkeeping for facilities that are expected to file additional reports. Aggregate industry costs in the first year for the selected alternative are estimated to be $80 million; in subsequent years they are estimated to be $40 million per year. Industry costs are lower after the first year because facilities will be familiar with the reporting requirements, and many will be able to satisfy reporting requirements by updating or modifying information from the previous year's report. EPA is expected to expend $1.2 million in the first year, and $775,000 in subsequent years for programmatic, compliance assistance, and enforcement activities as a result of the rule.

TABLE 1. SUMMARY OF ESTIMATED ADDITIONAL REPORTING BY INDUSTRY

SIC Code—Industry	Estimated Number of Additional Reports	Estimated Industry Costs (thousand $ per year)	
		First Yr.	Sub. Yr.
10—Metal Mining	127	$756	$459
12—Coal Mining	314	$1,782	$1,163
20—Food	291	$2,857	$1,380
21—Tobacco	29	$170	$106
22—Textiles	184	$1,359	$761

TABLE 1. SUMMARY OF ESTIMATED ADDITIONAL REPORTING BY INDUSTRY—Continued

SIC Code—Industry	Estimated Number of Additional Reports	Estimated Industry Costs (thousand $ per year)	
		First Yr.	Sub. Yr.
23—Apparel	16	$1,339	$371
24—Lumber	107	$1,998	$744
25—Furniture	60	$958	$377
26—Paper	211	$1,938	$894
27—Printing	41	$2,646	$755
28—Chemicals	497	$3,327	$1,968
29—Petroleum	95	$589	$364
30—Plastics	84	$1,685	$613
31—Leather	18	$185	$87
32—Stone/Clay/Glass	186	$1,889	$898
33—Primary Metals	1,945	$11,931	$7,049
34—Fabricated Metals	267	$3,865	$1,577
35—Machinery	53	$3,083	$892
36—Electrical Equipment	3,501	$25,957	$12,737
37—Transportation Equipment	347	$2,462	$1,409
38—Measure./Photo.	7	$723	$197
39—Miscellaneous	58	$1,103	$380
4911/4931/4939—Electric Utilities	574	$3,025	$2,069
4953—Refuse Systems	107	$561	$385
5169—Chemical Wholesale	0	$299	$75
5171—Bulk Petroleum	616	$3,539	$2,293
7389—Solvent Recovery Services	78	$417	$283
Total	9,813	$80,441	$40,287

A number of commenters contend that EPA's analysis of affected industry sectors for the proposed rule failed to include sectors that would be affected by the rule. These commenters suggest that the following industries would be affected by the rule: metalworkers; glaziers; lead crystal glassware manufacturers; animal feed producers; metal platers; brass and copper fabricators; stained glass manufacturers; organ makers and manufacturers of other musical instruments; dye makers and manufacturers of dye-containing products including businesses in the leather, garment, and textile industries; pigments and coatings companies; metal finishers; medical and dental equipment manufacturers; makers of sporting and recreational equipment; precision metal components, mirrors, stabilizers, fertilizer; and numerous ceramic decorative art manufacturers and studios; art pottery and art pottery supply firms; ink formulators; print shops; product painting/coating/refinishing businesses; and packaging or packaging coating firms, and other businesses that use or manufacture materials that contain small amounts of lead.

In the economic analysis for the proposed rule (Ref. 16), EPA estimated the additional TRI reporting that would be expected from a number of industry groups that are subject to EPCRA section 313 at four lower reporting thresholds considered for lead and lead compounds. EPA also identified other industry groups, which are also subject to EPCRA section 313, but for which EPA lacked sufficient information to generate quantitative estimates of additional reporting. In the proposed rule, and in a subsequent notice announcing public meetings, EPA solicited additional information to allow EPA to quantify the number of additional reports in all industry groups that are subject to EPCRA section 313. In response, EPA received comments that varied greatly in detail and utility for making quantitative estimates of additional reporting.

In some cases, in addition to asserting that an industry sector would be affected by the rule, commenters also provided detailed information on the activity in the industry sector associated with lead or lead compounds, the

amount or concentration of lead associated with industrial materials, the lead usage per employee, the prevalence of the lead-related activity within the industry, or other information that allowed EPA to confirm the potential for additional reporting in that industry at the various proposed lower reporting thresholds. This information, in conjunction with additional research and industry contacts, allowed EPA to revise or generate estimates for many of the additional industry sectors that commenters identified. These sectors include galvanizers, stained glass manufacturers, metal finishers, animal feed producers, organ manufacturers, and other industry sectors described in Appendix A of the economic analysis of the final rule (Ref. 46).

In other cases, commenters asserted a potential impact on an industry without providing information that would allow EPA to confirm the potential for additional reporting as a result of the rule, or to make a quantitative estimate of additional reporting at any of the lower reporting threshold options that EPA considered. Table A-73 in the economic analysis of the final rule lists industries that may be affected by the rule, but for which existing data are inadequate to make a quantitative estimate of additional reporting.

EPA fully considered the information from the commenters on the potential for additional reporting from industries that were not identified in the economic analysis of the proposed rule, or for which EPA was unable to make quantitative estimates at the time of the proposal. As a result of the comments, EPA revised its estimates for a number of potentially affected industry groups. The revised estimates are described in Appendix A of the economic analysis of the final rule. While the estimates of additional reporting for some industry groups changed substantially as a result of the comments, the net effect on EPA's estimates of additional reporting was less pronounced because estimates for some industry sectors increased while others decreased. (Additional details are available in Appendix A of the economic analysis of the final rule.)

With regard to the potential for additional reporting, a number of commenters cite the following footnote to Table A-45 in Appendix A of the economic analysis of the proposed rule:

Zero facilities are predicted to report for lead due to natural gas combustion given the uncertainty regarding concentration data for lead in natural gas. Assuming available concentration data are accurate, an estimated 35,376 additional facilities would report at the proposed threshold.

The commenters note that this estimate for natural gas users would greatly increase the number of additional reports that EPA estimated for the proposed rule. Although one commenter notes that EPA explained that ''concentration data for natural gas are considered unreliable,'' the commenters ask that EPA explain why it chose to reject the available concentration data for lead in natural gas, but not the data it used for lead in other fuels.

The footnote cited by the commenters reflects EPA's assessment of the quality of available information on the presence of lead as a trace contaminant in natural gas at the time of proposal. Because of uncertainties about the presence or absence of lead as a trace contaminant in natural gas, EPA did not include any reporting due solely to natural gas combustion in its quantitative estimates of additional lead and lead compound reporting at the lower reporting threshold options.

For the economic analysis of the proposed rule, EPA consulted two references for information on lead in natural gas: *Locating and Estimating Air Emissions from Sources of Lead and Lead Compounds* (Ref. 47) and *Study of HAP Emissions from Electric Utility Steam Generating Units: Final Report to Congress* (Ref. 48). These references provided emission factors for lead from natural gas combustion based on a very limited number of observations. The observed emissions of lead do not necessarily indicate that lead was present as a trace contaminant in natural gas. For example, the lead measured in emissions from natural gas combustion may have originated from lead-containing oil residues in combined-cycle combustion units. In this case, the effect on additional reporting would have been captured in EPA's estimate of reporting due to lead levels in residual or distillate fuel oil. Due to this uncertainty about the origin of lead emissions from natural gas combustion, EPA estimated the potential number of additional reports based on the lead emission factor for natural gas, but did not include these reports in the quantitative estimate of additional reporting at the lower reporting threshold options. For other fuels, EPA was able to locate typical concentration values for lead contained in those fuels a trace contaminant. Therefore, for fuels other than natural gas, EPA included estimates of additional reporting due to fuel combustion at the lower reporting threshold options.

As a result of public comments on this issue, EPA sought additional information to verify if lead is found as a contaminant in natural gas. EPA located a report that characterizes the presence of hazardous air pollutants in natural gas (Ref. 49). According to this report, lead was not detected at a detection limit of 0.9 micrograms per cubic meter of natural gas. Assuming, as an illustrative example, that lead was present at the detection limit concentration, the facility at the 90th percentile of manufacturing facilities using natural gas would only have a lead throughput of 0.05 lbs per year based on natural gas throughput data presented in the economic analysis of the final rule. Because the currently available data reviewed by EPA on trace levels of lead and lead compounds in natural gas indicate that very few, if any, facilities would be affected by any of the lower reporting threshold options as a result of natural gas combustion, EPA has estimated in the economic analysis of the final rule that no additional reports on lead and lead compounds will be submitted solely as a result of natural gas combustion.

Commenters assert that EPA underestimated the burden associated with the proposed rule because they believe that EPA's estimates of burden consider only those facilities expected to file reports under the proposed lower reporting thresholds. The commenters state that many facilities will be affected by the rule because they will have to make threshold determinations, even though they will not exceed the reporting threshold. The commenters contend that these facilities will incur the unit costs that EPA has quantified in the *Economic Analysis* for compliance determination and rule familiarization. The commenters contend that because the proposed thresholds are very low and material use varies from year to year, these determinations would occur annually, not just in the first year.

In estimating the cost of the rule, EPA considered facilities that make threshold determinations but do not exceed the reporting threshold. EPA estimated the costs to facilities of determining whether a report must be filed for lead and/or lead compounds as part of ''compliance determination.'' EPA agrees that a compliance determination will be made annually at all facilities with 10 or more employees that are in SIC codes subject to reporting under EPCRA section 313, and the economic analysis of the rule reflects this.

Compliance determination should occur annually at all facilities with 10 or more employees that are in SIC codes subject to reporting under EPCRA section 313. In this respect, compliance

determination for lead and lead compounds is similar to compliance determination for all other EPCRA section 313 chemicals. However, lead and lead compounds are a small part of the list of over 600 EPCRA section 313 chemicals. Therefore, it is reasonable to expect that the typical *incremental* compliance determination costs specifically for lead and lead compounds at a lower reporting threshold would be less than current compliance determination costs for the entire list of EPCRA section 313 chemicals.

Compliance determination costs are described in Chapter 4 of the economic analysis. The economic analysis of the final rule estimates that compliance determination for the changes in TRI reporting will take an average of 1.6 hours in the first year of reporting and 0.4 hours in subsequent years. These estimates are incremental to the time currently required each year for compliance determination for other EPCRA section 313 chemicals. The lower burden hour estimate for subsequent years reflects the decline in burden hours after the necessary inputs to the threshold calculation are identified at each facility.

EPA does not agree that facilities will incur ''rule familiarization'' costs after the first year of reporting, especially if these facilities do not exceed any applicable reporting thresholds. Rule familiarization is related to the time that facilities spend learning how to fill out the reporting form. Once a facility determines that a report is not required, the subsequent costs of reporting (rule familiarization, report completion, and mailing/recordkeeping) are not incurred. Facilities are expected to incur costs of rule familiarization only if they are reporting under EPCRA section 313 for the first time. At a minimum, rule familiarization involves reading the instructions to the *Toxic Chemical Release Inventory Reporting Form R*, however, it may also involve consulting EPA guidance documents, attending a training course, and/or calling the EPCRA technical hotline. In subsequent years, staff are already familiar with the requirements that apply to their facility, apart from any minor changes to interpretive guidance that may occur in the intervening year.

C. What are the Potential Benefits of this Proposal?

In enacting EPCRA and PPA, Congress recognized the significant benefits of providing the public with information on toxic chemical releases and other waste management practices. EPCRA section 313 has empowered the Federal government, State governments, industry, environmental groups and the general public to participate in an informed dialogue about the environmental impacts of toxic chemicals in the United States. EPCRA section 313's publicly available data base provides quantitative information on toxic chemical releases and other waste management practices. Since the TRI program's inception in 1987, the public, government, and the regulated community have had the ability to understand the magnitude of chemical releases in the United States and to assess the need to reduce the uses and releases of toxic chemicals. TRI enables all interested parties to establish credible baselines, to set realistic goals for environmental progress over time, and to measure progress in meeting these goals over time. The TRI system is a neutral yardstick by which progress can be measured by all stakeholders.

The information reported under EPCRA section 313 increases knowledge of the amount of toxic chemicals released to the environment and the potential pathways of exposure, improving scientific understanding of the health and environmental risks of toxic chemicals; allows the public to make informed decisions on where to work and live; enhances the ability of corporate leaders and purchasers to more accurately gauge a facility's potential environmental liabilities; provides reporting facilities with information that can be used to save money as well as reduce emissions; and assists Federal, State, and local authorities in making better decisions on acceptable levels of toxic chemicals in the environment.

There are two types of benefits associated with reporting under EPCRA section 313: those resulting from the actions required by the rule (such as reporting and recordkeeping), and those derived from follow-on activities that are not required by the rule. Benefits of activities required by the rule include the value of improved knowledge about the release and waste management of toxic chemicals, which leads to improvements in understanding, awareness and decision-making. It is expected that this rule will generate such benefits by providing readily accessible information that otherwise would not be available to the public. The rule will benefit ongoing research efforts to understand the risks posed by lead and lead compounds and to evaluate policy strategies that address those risks.

The second type of benefit derives from changes in behavior that may result from the information reported under EPCRA section 313. These changes in behavior, including reductions in releases of and changes in the waste management practices for toxic chemicals may yield health and environmental benefits. These changes in behavior come at some cost, and the net benefits of the follow-on activities are the difference between the benefits of decreased chemical releases and transfers and the costs of the actions needed to achieve the decreases.

Commenters point out that EPA has not quantified the benefits of the proposed rule. The commenters assert that not quantifying the benefits of the rule severely inhibits the public's ability to evaluate and comment upon this proposed rule.

EPA notes that the state of knowledge about the economics of information is not highly developed. Because of the inherent uncertainty in the subsequent chain of events following TRI reporting, EPA has not attempted to predict the exact changes in behavior that result from the information, or the resultant monetized benefits. EPA does not believe that there are adequate methodologies to make reasonable monetary estimates of either the benefits of the activities required by the proposed rule, or the follow-on activities. The economic analysis of the proposed rule, however, does provide a qualitative discussion along with illustrative examples of how the proposed rule will improve the availability of information on lead and lead compounds. EPA described how consumers, industry, the financial and business community, academics, environmental groups, communities, and the media are expected to use the results of TRI reporting on lead and lead compounds. Based on the number and variety of comments, it appears that this information was adequate to allow the public to evaluate and comment on the benefits of the proposed rule.

A number of commenters request that EPA quantify the releases expected to be captured by the proposed rule and address whether a substantial majority of lead and lead compounds releases are already captured by current TRI reporting. Other commenters state that EPA cannot estimate the quantity of lead and lead compounds that are released or transferred without the additional data that would be collected by the rule. These commenters assert that estimates about releases or transfers would be ''fundamentally flawed'' due to a reliance on unsupported assumptions about facility operations, not on actual data. The commenters note that while it is possible to estimate how many facilities might be impacted

by having to report a particular substance, estimating quantities at a particular facility is extremely difficult because of differences in operations even among facilities in a narrowly-defined four-digit SIC code. The commenters express a concern that any release estimate made by EPA of an ''average'' facility is likely to be highly inaccurate and biased toward known sources of lead releases, and that those communities with large numbers of facilities with small releases would be adversely affected by this approach.

EPA agrees with the commenters who describe the practical difficulties in making reasonable, reliable estimates of the quantity of lead and lead compounds that are released or transferred without the additional reporting data that would be collected by the rule. EPA has not estimated the total national releases to all media for this rule (and in previous TRI rules) because EPA believes that there is insufficient information on the numerous processes and associated waste management techniques in the affected sectors to generate a comprehensive release estimate.

Existing data do not support estimates of releases and other waste management activities to multiple environmental media from the full range of facilities that may be affected by the rule because most of the data required for the analysis would only be available after the rule is in place. For the affected industry sectors, up-to-date multi-media release estimates for facilities that would be affected by the rule do not exist. Even where release estimates are available for an industry sector, most are derived from national activity levels and emission factors rather than from facility-level information. To the extent that release estimates are available, they tend to cover only a single medium such as air. EPA does not believe that there is sufficient information to make reasonable predictions of the multi-media releases and other waste management information that will be reported as a result of EPCRA section 313 rulemakings.

Historical attempts to estimate the releases expected to be reported to TRI prior to actual reporting have been imprecise to the point of being misleading, particularly in respect to estimates of releases per report or per facility. EPA notes that there were various reports and studies about air emissions of toxic chemicals prior to TRI, but the collection of facility-level data showed that actual releases were much different from what had been anticipated. EPA has not seen any evidence to indicate that the TRI releases that will be reported as a result of the this action can be predicted any more accurately now than the quantities reported as a result of the original TRI rule could have been predicted prior to 1987.

Aside from the general issue of uncertainty in the estimates of aggregate releases, predictions of releases per facility or per report (or dollars of reporting cost per pound of releases) are likely to be misleading due to the biases built into the estimates. The predicted number of reports (and thus costs) is generally an overestimate, since EPA's economic analyses use conservative estimates to avoid underestimating true costs. On the other hand, predictions of releases will tend to underestimate emissions, because while there may be information available on releases of some chemicals from some sectors, such estimates will not include other sources where releases are not identified until more detailed data (such as TRI data) are collected. Combining the two sets of estimates compounds the problem. Since estimated pounds of releases are underestimated and reports are overestimated, pounds per report are biased significantly downward. Likewise, estimates of dollars of reporting cost per pound of releases (which varies as the inverse of pounds per report) will be biased significantly upward.

EPA does not believe that inaccurate or incomplete estimates of releases and other waste management activities would aid the decision-making process for the rule. Therefore, EPA has not estimated the releases and other waste management activities that would be reported as a result of the rule.

Commenters assert that the cost of the rule would outweigh the benefits because the proposed 10 pound reporting threshold for lead and lead compounds will not capture ''significant'' amounts of releases, while substantially burdening thousands of facilities.

Although the reporting threshold for lead and lead compounds in this action is 100 pounds, EPA does not agree with the comment. The commenters do not define what constitutes ''significant'' amounts of releases of lead and lead compounds. Absent this definition, it is unclear what amount of unreported releases the commenters believe would justify the cost of additional reporting. The implication of the comment is that there is minimal benefit to any reporting that does not constitute a large proportion of total national releases. EPA does not agree. EPA notes that the inherent persistence, bioaccumulation, and toxicity of lead and lead compounds create concern about human health and environmental effects in even the smallest amounts or concentrations. EPA believes that information on small amounts of lead or lead compounds (either in absolute or relative terms) is important. Even if a single facility or industry is not responsible for a high percentage of total national loadings, the releases from that facility or industry may still be of concern to the public. The percentage of total national releases that an individual facility or industry represents does not reflect the potential human health and environmental effects of even small amounts of lead and lead compounds, especially when multiple facilities release lead and lead compounds that persist and bioaccumulate. EPA also believes that focusing exclusively on releases ignores the value of other data elements on TRI reporting form, such as quantities of waste otherwise managed on-site and transferred for off-site management and qualitative information on source reduction activities.

Aside from the issue of whether comprehensive release estimates for such a rulemaking can reliably be predicted, EPA notes that pounds of releases and other waste management activities (even if known) are not a reasonable proxy for the benefits of the information being provided. This is because the benefits of an informational regulation are not systematically related to the magnitude of the data elements being reported. For example, automobile manufacturers are required to provide information about fuel economy on the stickers for new cars. Assuming that the quantity reported is a direct measure of the value of the information would lead to the mistaken conclusion that there is 100 percent difference in the benefit of requiring the information to be provided on a car that gets 15 miles per gallon compared to another car that gets 30 miles per gallon. To use another example, nutritional labels are required on food packages. Assuming that the benefits of information provision are linearly related to the quantity that is reported would yield the conclusion that if one product has 6 grams of fat per serving and another has 2 grams, the benefit of the nutritional labeling requirement are three times higher for the former than the latter.

One of the central purposes of TRI data is to inform the public about releases and other waste management of EPCRA section 313 listed toxic chemicals in their community and nationally so that the public can form its own conclusions about risks. The amount of releases and other waste

management activities that a community may find relevant or useful will vary depending on numerous factors specific to that community, such as the toxicity of the various chemicals, potential exposure to these toxic chemicals, and the number of other facilities in the area that release EPCRA section 313 listed toxic chemicals. Section 313(h) of EPCRA states that the data are ''to inform persons about releases and other waste management activities of toxic chemicals to the environment; to assist governmental agencies, researchers, and other persons in the conduct of research and data gathering; to aid in the development of appropriate regulations, guidelines, and standards; and for other similar purposes.'' Pounds of releases and other waste management activities reported does not measure how the data perform these functions, and thus is not a measure of benefits. EPA disagrees with the implicit assumption by commenters that the benefits of information from different facilities is strictly and systematically related to the quantity reported as being released. Finally, EPA notes that while the proposed reporting threshold for lead and lead compounds was 10 pounds, the final rule (and associated economic analysis) reflect a reporting threshold of 100 pounds. This further reduces the relevance of the comment.

D. What are the Potential Impacts of This Action on Small Entities?

In accordance with the Regulatory Flexibility Act (RFA) and the Agency's longstanding policy of always considering whether there may be a potential for adverse impacts on small entities, the Agency has evaluated the potential impacts of this rule on small entities.

This rule may affect both small businesses and small governments. No small non-profit organizations are expected to be affected by the rule. For the purpose of its small entity impact analysis for the final rule, EPA defined a small business using the small business size standards established by the Small Business Administration (SBA) at 13 CFR part 121. [On October 1, 2000, the new SBA size standards for small businesses based on the North American Industry Classification System (NAICS) took effect (65 FR 30836, May 15, 2000). These replaced the previous size standards established under the Standard Industrial Classification (SIC) system. EPA has concluded that the conversion to the new classification system will have no substantive impact on the conclusions of the Agency's small entity impact analysis for this action (Ref. 53)]. EPA defined small governments using the RFA definition of jurisdictions with a population of less than 50,000. EPA analyzed the potential cost impact of the rule on small businesses and governments separately in order to obtain the most accurate assessment for each. EPA then aggregated the analyses for the purpose of determining whether it could certify that the rule will not have a ''significant economic impact on a substantial number of small entities.'' RFA section 605(b) provides an exemption from the requirement to prepare a regulatory flexibility analysis for a rule where an agency makes and supports this certification statement. EPA believes that the statutory test for certifying a rule and the statutory consequences of not certifying a rule all indicate that certification determinations should be based on an aggregated analysis of the rule's impact on all of the small entities subject to it.

Only those small entities that are expected to submit at least one report are considered to be ''affected'' for the purpose of the small entity analysis, although EPA recognizes that other small entities will conduct compliance determinations under lower thresholds. The number of affected entities will be smaller than the number of affected facilities, because many entities operate more than one facility. Potential small entity impacts were calculated for both the first year of reporting and subsequent years. First year costs are typically higher than continuing costs because firms must familiarize themselves with the requirements. Once firms have become familiar with how the reporting requirements apply to their operations, costs fall. EPA believes that subsequent year impacts present the best measure to judge the impact on small entities because these continuing costs are more representative of the costs firms face to comply with the rule.

The incremental burden of the additional reporting at the facility level is low. This burden is associated with labor that will be expended by facility staff to conduct the reporting activities to file one TRI report. By statutory requirement, the smallest possible facility that could be affected by this action must have the equivalent of at least 10 full-time employees. On a yearly basis, this means that there are at least 20,000 labor hours expended at the smallest potentially affected facility (10 FTEs x 50 wks/year/employee x 40 hours/wk = 20,000 labor hours/year). EPA estimates that typical reporting burdens as a result of this rule will be up to 110 hours per facility (in the first year of reporting for a first-time TRI reporter), and that in subsequent years typical reporting burden will be approximately 50 hours. Based on these reporting burdens, the average impact of TRI reporting ranges from 0.25 to 0.55 percent of available labor hours for the *smallest* facility affected by this rule. The impact would be even less for facilities with more than 10 full-time employees, or for facilities that take less than the average time to report.

EPA examined annual compliance costs as a percentage of annual company sales to assess the potential impacts of this rule on small businesses. Based on its estimates of additional reporting as a result of the rule, the Agency estimates that approximately 5,700 businesses will be affected by the rule, and that approximately 4,100 of these businesses are classified as ''small'' based on the applicable SBA size standards. EPA estimates that fewer than 250 small businesses (approximately 5% of all affected small businesses) will bear annual costs between 1–3% of annual revenues in the first reporting year, and that no small businesses will bear annual costs above 1% of annual revenues in subsequent reporting years. These results are not significantly different from those derived in the economic analysis of the proposed rule; the main difference is a ''non-zero'' result for the number of small businesses predicted to experience an annual cost impact above 1% of annual revenues in the first year of reporting. These estimates, and their derivation, are described in the economic analysis of the final rule (Ref. 46).

A number of commenters submitted comments on EPA's methodology for assessing small entity impacts in the economic analysis of the proposed rule. One commenter asserts that the Agency's analysis of potential impacts of the proposed rule on small business is lacking because it does not examine the large number of industrial sectors that may be affected by this reporting requirement. The commenter states that EPA's findings about the widespread and persistent nature of lead in the environment are not in accord with the ''very limited effort'' to identify affected sectors (especially small business sectors).

EPA disagrees with the commenter's characterization of the effort made to identify affected sectors. In the economic analysis for the proposed rule, EPA made quantitative estimates of the number of additional TRI reports that would be expected at four lower reporting thresholds for lead and lead compounds from industry groups that are subject to EPCRA section 313 and for which EPA could locate the information necessary to make

quantitative estimates of facility level lead usage. EPA also identified a number of industry groups which are also subject to EPCRA section 313, but for which EPA lacked data on lead throughput to generate quantitative estimates of additional reporting.

In the proposed rule, and in a subsequent notice announcing public meetings, EPA solicited additional information to allow EPA to quantify the number of additional reports in all industry groups that are subject to EPCRA section 313. EPA fully considered information from the commenters on the potential for additional reporting from industries that were not identified in the economic analysis of the proposed rule, or for which EPA was unable to make quantitative estimates at the time of the proposal. As a result of the comments, EPA revised its estimates for a number of potentially affected industry groups. The revised estimates are described in Appendix A of the economic analysis of the final rule. While the estimates for some industry groups changed substantially as a result of the comments, EPA's estimate of the total number of additional reports remained relatively stable. At a 100 pound reporting threshold for lead and lead compounds, EPA estimates that approximately 9,800 facilities will submit additional reports.

EPA's economic analysis of the proposed rule modeled the revenue characteristics of affected firms to evaluate the potential impact on small businesses. Commenters assert EPA's analysis produced biased results by combining manufacturing industries (SIC codes 20–39) that are unrelated in most aspects. Commenters assert that EPA made faulty assumptions by ''grouping together small business with large manufacturers.'' One commenter asserts that EPA's analysis considered the aggregate cost of the proposal to each industry group surveyed, ignoring individual businesses with costs above and below the aggregate value.

In the economic analysis of the proposed rule EPA modeled revenues for small firms with low, medium and high revenues in the manufacturing industries (i.e., SIC codes 20–39). EPA's RFA/SBREFA guidance states that ''In assessing the impact of a rule on small businesses, it may be appropriate to analyze the rule's impact on each kind of business separately, particularly where the rule may impose significantly higher costs on some kinds of businesses than on others'' (Ref. 50). However, there is no guidance as to the specific SIC code level that is appropriate (e.g., 2-digit vs. 3-digit vs. 4-digit vs. 5-digit, etc.). For the small entity analysis of the proposed rule, EPA analyzed impacts separately for the following ''kinds of businesses'': mining, manufacturing, electric utilities, commercial hazardous waste treatment, chemical and allied products-wholesale, petroleum bulk terminals, and solvent recovery services. EPA does not believe that this approach biased the results of the small entity impact analysis for the proposed rule.

EPA did not group small businesses together with large businesses in the manufacturing industry as the commenter asserts. EPA constructed separate revenue models for large firms and small firms. For small firms within each industry group, EPA compared typical reporting costs with the revenues available to small firms with low, medium, and high revenues. EPA's analysis was not based on an aggregate cost to each industry group, but rather on the cost to individual firms. For the economic analysis of the final rule, EPA developed revenue profiles at the 2-digit SIC code level (20, 21, 22, etc.) for small businesses within the manufacturing industries to provide for additional disaggregation. This approach was taken to address the comment that EPA would reach a different determination if impact estimates for the manufacturing SIC codes were presented at a greater level of disaggregation. Contrary to the comments on this issue, the disaggregated analysis does not change the ultimate conclusion about small entity impacts.

In the small entity impact analysis for the proposed rule, revenues of potentially affected small businesses were modeled using revenue data for small businesses that own or operate facilities that currently report to TRI on any chemical. EPA developed separate revenue profiles based on ''small'' current filers and ''large'' current filers. Within these profiles, EPA looked at companies with low, medium, and high revenues. Commenters contend that EPA's use of current TRI filers as a representative cohort for estimating the proposed rule's impacts on small businesses is flawed since current TRI filers may not be representative of facilities that report to TRI for the first time as a result of the rule. The commenters assert that facilities reporting as a result of this rule are very different in terms of size and revenues from their counterparts that currently use lead, or other EPCRA section 313 listed toxic chemicals, in amounts greater than 25,000 pounds. The commenters contend that current TRI filers are, for the most part, the largest members of their sectors with the highest revenues. As a result, the commenters contend that EPA underestimated the proposal's impact on small businesses. The commenters state a belief that an assessment of the rule's potential impact on small businesses should not be based upon its impact on current TRI filers. The commenters suggest an alternative methodology of assessing how the smallest facilities in each potentially impacted small business sector would be impacted by the proposed rule in order to make a SBREFA determination.

EPA disagrees that using small businesses that own current TRI filers as a representative cohort for estimating the proposed rule's impacts on small businesses is flawed methodology for assessing whether the rule would have a significant economic impact on a substantial number of small entities. First, it should be noted that current TRI filers span the range of employment, from companies with 10 employees to those with thousands of employees. As noted in the economic analysis for the proposed rule, almost 70 percent of current TRI reporters are small businesses. Therefore, small businesses have substantial representation in current TRI reporting. Second, additional reporting on lead and lead compounds will not be limited to small facilities, or to facilities filing their first TRI reports. Additional reporting on lead is expected to come from facilities with a mix of size characteristics, including large facilities that currently report other EPCRA section 313 chemicals but not lead. Third, current TRI filers in the manufacturing industries tend to be found in capital-intensive industries rather than in labor-intensive industries. Based on EPA's research, it appears that most facilities that file additional lead reports will also be from capital-intensive industries like the ones that predominate in current TRI reporting. Since additional lead reporting will come mainly from: (1) Current filers (who file on other chemicals) and (2) new filers in capital-intensive industries, EPA believes that it is valid to assume that first-time filers under this rule will be like current filers in terms of employment and revenue.

To evaluate the possibility that first-time TRI filers in the manufacturing sector would be so dissimilar to current TRI filers as to change EPA's small entity impact findings, EPA conducted a sensitivity analysis (Ref. 51) to estimate the potential impact on the smallest facilities in each potentially impacted small business sector for the proposed reporting threshold. This analysis estimated the average potential impact of the proposed rule on facilities

in various employment size classes within each of the twenty 2-digit manufacturing SIC codes (and certain 4-digit SIC codes). The analysis revealed that average potential impacts are higher for facilities with fewer employees and lower annual revenues, but the potential cost impact is still less than 1 percent of average annual revenues for every employment size class in every manufacturing SIC code.

Even information submitted to EPA by industry does not indicate that a substantial number of small businesses would have costs above 1% of annual revenues. In an informal survey conducted by the IPC the Association Connecting Electronics Industries, IPC asked its member companies in the printed wiring board industry to indicate if the proposed rule would result in regulatory costs exceeding 1% of annual revenues (Ref. 52). IPC received 300 responses, of which 260 were from self-identified small businesses. Of these 260, only 5 claimed that the proposed rule would impose costs greater than 1% of their annual revenues. This survey indicates that less than 2% of affected small businesses in this sector believe that they would experience an economic impact of greater than 1% of annual revenues as a result of the proposed rule. Furthermore, IPC's survey was based on the proposed reporting threshold of 10 pounds. This final rule incorporates a reporting threshold of 100 pounds, which will result in less regulatory impact to facilities in this sector.

To further address the issue of differing revenue characteristics between current and first-time TRI filers, EPA revised its method for modeling the revenues of affected small businesses. In the small entity impact analysis for the final rule, EPA modeled revenues of small first-time filers using revenue data for small businesses that own facilities that do not currently file TRI reports. EPA modeled revenues of small current filers using revenue data on small businesses that own current TRI-filing facilities. Contrary to the comments on this issue, using this method to model revenues does not change the ultimate conclusion about small entity impacts.

A commenter asserts that EPA's conclusion about the impact of the rule on small businesses was based on an erroneous assumption about the percentage of additional reports that would be received from new filers. The commenter asserts that EPA ''seriously'' underestimated the number of first-time filers to TRI that would result from the proposed rule. The commenter notes that approximately 10% of printed wiring board facilities currently report to TRI and few of the facilities report for lead, but that this proposal would trigger lead reporting for virtually all companies. In this industry, approximately 80% to 90% would have to report to the TRI for the first time. The commenter notes that EPA estimated that first-time filers under the rule would comprise only 38.3% of affected manufacturing facilities.

The estimate for first-time TRI filers cited by the commenter is an average for the entire manufacturing sector. For individual SIC codes within manufacturing (such as printed wiring boards), the percentage of first-time TRI filers may be higher or lower. For the economic analysis of the final rule, the estimate of first-time filers was revised based on an SIC code-by-SIC code approach that assumes current TRI filers will file the first additional reports in each SIC code, and that the remaining additional reports will be filed by facilities that are new to TRI reporting (i.e., first-time filers). Rather than using an average number of new filers for manufacturers as a class, this approach estimates the number of new filers at the 2-, 3-, or 4-digit SIC code level. Using the revised approach, the total estimated percentage of first-time filers increased to approximately 40% of all affected facilities, with substantial variation at the 2-digit SIC code level as indicated by the commenters. Therefore, EPA does not believe that the number of first-time filers was ''seriously'' underestimated in the economic analysis of the proposed rule.

In assessing the potential impact of the rule on small entities, EPA searched for situations in which the annual cost of reporting for a business would exceed a small fraction of annual revenues. Commenters assert that 1% of annual sales (one of the indicator values used by EPA) is not a good measure of impacts on small businesses. The commenters assert that the 1% metric is arbitrary and argue that it may not be a good measure of impact across different industry sectors. The commenters state that some industries may have profits that are only a few percent of total revenue, in which case, costs that are close to one percent of revenue would be a very large percent of profit, while other industries may have profits that are a much higher percent of revenue.

Contrary to the commenters' claim, EPA did justify its choice of revenue-based impact metric for assessing small entity impacts. As EPA stated at 64 FR 42238, ''EPA used annual compliance costs as a percentage of annual company sales to assess the potential impacts on small businesses of this proposed rule. EPA believes that this is a good measure of a firm's ability to afford the costs attributable to a regulatory requirement, because comparing compliance costs to revenues provides a reasonable indication of the magnitude of the regulatory burden relative to a commonly available measure of a company's business volume. Where regulatory costs represent a small fraction of a typical firm's revenue (for example, less than 1%, or not greater than 3%), EPA believes that the financial impacts of the regulation may be considered not significant.''

The commenters suggest that EPA should use profits as a measure of impact. EPA, however, believes that there are several advantages to the use of revenue data. The advantage of using revenue to measure impacts is that it is a stable, easily accessible, and easily understood measure which provides a basis for comparing this rule to other rules. Unlike profit information, the definition is consistent and not subject to the widely varying accounting definitions and interpretations of terms that affect ''profit'' measures. Another advantage is that revenue data, unlike profit data, are widely available. The proportion of firms for which revenue data are available generally greatly exceeds the proportion of firms for which profit data are available. Many information sources, including the Census of Manufactures, collect and publish revenue data but not profit data.

Furthermore, revenue data are easily understood. For example, if the impact of compliance costs on a firm is 1% of revenue, a firm would need to raise its prices 1% to cover the costs of the regulation. This is a clear, easy to understand measure that can help decision-makers determine whether additional measures to reduce the impact of a regulation are warranted. In addition, EPA has a long history of using the relationship between the annual cost of compliance with a regulation and total annual revenue of the firm to determine whether a regulation may have a significant economic impact on substantial number of small entities.

EPA believes that the revenue-based impact calculation used in the analysis of this rule is preferable to a profit-based calculation because it is simple to apply and based on readily available data, which allows consistent application of the methodology from rule to rule. Although the commenters suggest other metrics such as profit margins, they do not provide any indication of how this data could be obtained or what impact levels would indicate a ''significant'' impact. The commenters note that profit

margins are variable, but do not provide profit margin data for all affected industry sectors.

In addition to small businesses, the rule is also expected to affect certain small governments. To assess the potential impacts of the final rule on small governments, EPA used annual compliance costs as a percentage of annual government revenues to measure potential impacts. Similar to the methodology for small businesses, this measure was used because EPA believes it provides a reasonable indication of the magnitude of the regulatory burden relative to a government's ability to pay for the costs, and is based on readily available data. EPA estimates that 8 publicly owned electric utility facilities, operated by a total of 8 municipalities, may be affected by the rule. Of these, an estimated 7 are operated by small governments (i.e., those with populations under 50,000). It is estimated that none of these small governments will bear annual costs greater than 1% of annual government revenues in the first or subsequent reporting years. Therefore, the total number of small entities with impacts above 1% of revenues does not change when the results are aggregated for all small entities (i.e., small businesses, small governments, and small organizations) because only certain small businesses are expected to experience impacts above 1% of revenues in any year.

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IX. Regulatory Assessment Requirements

A. What is the Determination Under Executive Order 12866?

Under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993), it has been determined that this is a ''significant regulatory action''. This action was submitted to the Office of Management and Budget (OMB) for review, and any substantive changes made during that review have been documented in the public version of the official record.

EPA's cost-benefit analysis for the proposed rule was contained in a document entitled *Economic Analysis of the Proposed Rule to Modify Reporting of Lead and Lead Compounds Under EPCRA Section 313 (Ref. 16).* The economic analysis contains a quantitative estimate of the costs and a qualitative discussion of the benefits of the proposed rule. This document, and its supporting documentation, were included in the public docket for review and comment. EPA has prepared an economic analysis of the impact of this final rule, which is contained in a document entitled *Economic Analysis of the Final Rule to Modify Reporting of Lead and Lead Compounds under EPCRA Section 313* (Ref. 42). This document is available as part of the public version of the official record for this action, and is briefly summarized in Unit VII.

Commenters assert that the proposed rule did not meet Executive Order 12866 requirements to consider costs and benefits, including the alternative of not regulating. The commenters assert that the Agency has not given adequate consideration to the baseline option of existing TRI reporting thresholds of 25,000 and 10,000 pounds, under which EPA has received reporting on release and other waste management of over one billion pounds of lead and lead compounds per year. The commenters assert that the alternative of the current reporting thresholds of 25,000 and 10,000 pounds is generally not included in the text and tables of the preamble and Economic Analysis.

EPA did consider the option of not regulating, and addressed what would happen in the absence of this rule. As EPA noted in the **Federal Register** notice for the proposed rule, ''If EPA were not to take this proposed action to lower reporting thresholds, the market failure (and the associated social costs) resulting from the limited information on the release and disposition of lead and lead compounds would continue'' (64 FR 42237). The discussion of costs and benefits in the economic analysis and preamble are all relative to the baseline of not regulating beyond the current reporting thresholds for lead and lead compounds. Chapter 6 of the economic analysis of the proposed rule contains a discussion of current reporting on lead and lead compounds at existing reporting thresholds, as well as a discussion of information that would be collected as a result of the proposed rule. Furthermore, current TRI

reporting on lead and lead compounds was summarized in Tables A–3 and A–4 of the economic analysis of the proposed rule.

Commenters assert that EPA has not met requirements of Executive Order 12866 because EPA has not quantified benefits of the proposed rule and has not estimated the amount of releases expected to be reported.

EPA believes that the proposal is consistent with Executive Order 12866, because EPA proposed the regulation upon a reasoned determination that the benefits justify the costs. The commenters imply that EPA must quantify benefits to comply with Executive Order 12866. However, Executive Order 12866 recognizes that it may not be feasible to derive quantitative estimates of benefits in all cases. Section (1)(a) of Executive Order 12866 states that ''Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider.'' The Executive Order goes on to state in section (1)(b)(6) that ''Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.'' EPA's economic analysis has addressed the costs of the proposal in a quantified manner and the benefits in a qualitative manner. Because the state of knowledge about the economics of information is not highly developed, EPA has not attempted to quantify the benefits of the rule as monetized net benefits. EPA notes that Executive Order 12866 does not require that benefits be quantified for every regulation, or that agencies should predict the answers to a data collection (in this case, the ''per facility'' releases and other waste management of lead and lead compounds) prior to the actual collection of the data.

EPA notes that comparing the cost of the reporting to the quantity of releases that would be reported does not compare costs and benefits. Section 313(g) of EPCRA states that the data are intended to provide information to the Federal, State, and local governments and the public, including citizens of communities surrounding covered facilities, to inform persons about releases of toxic chemicals to the environment; to assist governmental agencies, researchers, and other persons in the conduct of research and data gathering; to aid in the development of appropriate regulations, guidelines, and standards; and for other similar purposes. The quantity of releases reported does not measure how well the data perform these functions, and thus releases are not a measure of benefits. The benefits of the rule include improvements in understanding, awareness, and decision making related to the provision of information. Even if reliable estimates of releases were possible, pounds of releases would not measure the value of the information provided. Improvements in understanding are not measured in pounds, nor are improvements in awareness or decision making.

While it is not possible to quantify the benefits of the rule with monetized estimates, EPA has qualitatively examined the benefits of the rule. Based on this review, EPA believes that the benefits provided by the information to be reported under this rule will significantly outweigh the costs. Upon review of this evidence, EPA has made a reasoned determination that the benefits of the regulation justify its costs. Therefore, EPA believes it has followed the principles and met the requirements of Executive Order 12866.

B. What is the Determination Under the Regulatory Flexibility Act?

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the EPA Administrator hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities. The factual basis for this determination is presented in the small entity impact analysis prepared as part of the *Economic Analysis* for this final rule (Ref. 46), which is discussed in detail in Unit VII. and contained in the public version of the official record for this rule. Further support for this determination can be found in the sensitivity analysis (Ref. 51) that was conducted to assess the analytical methods used in the small entity impact analysis of the proposed rule. Information relating to this determination has been provided to the Chief Counsel for Advocacy of the Small Business Administration, and is included in the public version of the official record for this rulemaking. The following is a brief summary of the Agency's factual basis for this certification.

For the purpose of analyzing potential impacts on small entities, EPA used the RFA definition of small entities in section 601(6) of the RFA. Under this section, small entities include small businesses, small governments, and small non-profit organizations. [On October 1, 2000, the SBA size standards for small businesses based on the North American Industry Classification System (NAICS) took effect (65 FR 30836, May 15, 2000). These replaced the previous size standards established under the Standard Industrial Classification (SIC) system. EPA has concluded that the conversion to the new classification system will have no substantive impact on the conclusions of the Agency's small entity impact analysis for this action (Ref. 53)]. EPA defined a small business using the small business size standards established by the Small Business Administration (SBA), which are generally based on the number of employees or annual sales/revenue a business in a particular industrial sector has. EPA defined small governments using the RFA definition of jurisdictions with a population of less than 50,000. No small non-profit organizations are expected to be affected by this final rule.

EPA estimates that approximately 4,100 small businesses will be affected by the rule. The incremental burden of the additional reporting at the facility level is associated with labor that will be expended by facility staff to conduct reporting activities. Based on typical reporting burdens of approximately 110 hours (in the first year of reporting for a first-time TRI reporter) and 50 hours in subsequent years, the impact of this action ranges from 0.25 to 0.55 percent of available labor hours for the smallest affected facility. The impact would be even less for facilities with more than 10 full-time employees, or for those that take less than the average amount of time to report.

EPA estimates that the final rule would have an annual cost impact between 1–3% of annual revenues on fewer than 250 small businesses (approximately 5% of all affected small businesses) in the first year only. After the first year of reporting, the annual cost impact as a percentage of annual revenues is estimated to be below 1% for all affected small entities.

Commenters assert that this rule will have significant impacts on small businesses, and that EPA improperly certified the proposed rule. The commenters assert that a Small Business Regulatory Enforcement Fairness Act (SBREFA) panel must be completed to determine the ''true'' impact of the proposed rule on small businesses.

EPA believes that its certification of the proposed rule as not having a significant economic impact on a substantial number of small entities was proper. In the **Federal Register** notice

for the proposed rule, EPA described a quantitative small entity impact analysis that EPA placed in the official version of the public record. The results of this analysis indicated that the proposed rule would not have a significant economic impact on a substantial number of small entities. Based on public comments, EPA revised this quantitative analysis and arrived at the same conclusion for the final rule. Furthermore, EPA notes that while the proposed reporting threshold for lead and lead compounds was 10 pounds, this final rule incorporates a reporting threshold of 100 pounds. This threshold further reduces the potential regulatory impact on small entities as indicated in the economic analysis of the final rule.

EPA does not agree with the comment that a SBREFA panel must be completed to determine whether this, or any, proposed rule will have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act (RFA) to require EPA to convene a Small Business Advocacy Review Panel for any proposed rule for which EPA is required to prepare an initial regulatory flexibility analysis (IRFA). The RFA requires that EPA prepare an IRFA for all rules for which EPA is required by statute to publish a notice of proposed rulemaking unless the agency certifies that the rule ''will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' The panel is an additional means for small entities to participate in the rulemaking process, but the certification provision of the RFA as amended by SBREFA indicates that panels are not appropriate for every rulemaking. The panel requirement only applies to proposed rules that the Agency ultimately determines will not be certified under the RFA.

Commenters also assert that EPA failed to provide a ''meaningful'' opportunity for small businesses to participate in the rulemaking process. The commenters asserted than that EPA did not conduct outreach to small businesses prior to the proposal, and that any outreach after rule proposal is inadequate and cannot remedy EPA's ''lack of outreach'' to small entities early in the regulatory development process. The commenters assert that ''EPA's failure to contact small business sectors early in the rulemaking process'' led to ''significant flaws'' in EPA's SBREFA determination because it failed to consider ''more than two dozen small business sectors that would be impacted by the proposed rule'' and failed to consider the significance of the impact on small businesses. Specifically the commenters mention printed circuit board manufacturers, metal finishers, foundries, and dentists as affected sectors. As a result, the commenters contend that the Agency did not comply with SBREFA, and violated the analytical and outreach requirements of the RFA. The commenters also contend that EPA did not comply with the Agency's own internal guidance related to RFA/SBREFA compliance. One commenter contends that EPA's failure to conduct appropriate outreach misled the Agency to certify that the rule has no significant impact on small business. Therefore, the commenter suggests that the EPA conduct additional outreach with small business, followed by a thorough SBREFA panel process. The commenter contends that outreach to small business would have revealed that the proposed rule affects more than ''two dozen small business sectors that the agency failed to consider.'' As one example, the commenter asserts that dentists would have to report because they accumulate lead in the form of used x-ray film backing that they store and recycle. The commenter also mentions metal finishing and the printed circuit board industry.

EPA complied with internal guidance and the requirements of the RFA as amended by SBREFA and conducted its analysis in accord with the Agency's internal guidance. EPA's actions provided a meaningful opportunity for small businesses to participate in the rulemaking process. EPA initially alerted the potentially affected community to EPA's intention to review lead and lead compounds for lower reporting thresholds in the proposed rule to lower the EPCRA section 313 reporting threshold for certain PBT chemicals that are subject to reporting under EPCRA section 313 (64 FR 688). That **Federal Register** notice stated that ''EPA is aware of additional available data that may indicate that lead and/or lead compounds meet the bioaccumulation criteria discussed in this proposed rule. EPA intends to review these additional data to determine if lead and/or lead compounds should be considered PBT chemicals and whether it would be appropriate to establish lower reporting thresholds for these chemicals'' (64 FR 717, January 5, 1999). As part of the PBT rulemaking process, EPA held three public meetings in San Francisco, CA; Chicago, IL; and Washington, DC. Numerous commenters on the PBT rule requested that EPA classify lead and lead compounds as PBT chemicals.

EPA published a notice of proposed rulemaking for lead and lead compounds on August 3, 1999. EPA requested comment on this rulemaking and provided an initial 45 day comment period. Subsequently, EPA extended the comment period twice for a total of 90 additional days. In addition, EPA held public meetings with special emphasis on potential small business impacts in Los Angeles, CA; Chicago, IL; and Washington, DC. EPA also met with representatives of small business trade organizations who expressed a desire for additional meetings.

EPA notes that a number of small businesses participated in the rulemaking process by attending public meetings and submitting comments on the proposed rule. EPA has considered these comments and updated its economic analysis with information provided by these commenters. EPA believes that these activities, along with the written public comment process, provided ample opportunities for small businesses to participate in the rulemaking process.

EPA does not agree that its rulemaking process led to significant flaws in EPA's certification that the proposed rule would not, if promulgated, have a significant economic impact on a substantial number of small businesses. EPA conducted an extensive economic analysis that included a quantitative small entity impact analysis. EPA made this analysis available as part of the public record for the rulemaking. The public comment process has provided an opportunity for small businesses to comment on this analysis, and to provide additional information to refine this analysis. Further, even though EPA extended the public comment period twice and held three public meetings, EPA did not receive additional information that would lead it to change its determination.

Although some commenters assert that EPA failed to identify certain potentially affected sectors leading to a flawed certification, EPA does not agree. EPA conducted an extensive economic analysis. Specifically, EPA did identify printed circuit board manufacturers, metal finishers, foundries, and other industries as potentially affected sectors in the economic analysis of the proposed rule. Dentists were not identified as potentially affected because they are not in a SIC code that is subject to TRI reporting. EPA cannot evaluate the accuracy of generic comments that assert EPA missed potentially affected industries when commenters do not identify these industries by name, or provide evidence to support the assertion for each additional identified industry. If EPA failed to identify certain sectors as

potentially affected, this a reflection of the lack of publicly available information on lead and lead compounds. The lack of publicly available information on lead and lead compounds speaks more to the need for the rule than to the quality of EPA's analysis.

In conclusion, EPA believes that it has followed the requirements of the RFA and that it has properly certified that the rule will not have a significant impact on a substantial number of small entities.

C. What is the Determination Under the Paperwork Reduction Act?

The information collection requirements contained in this final rule have been submitted to OMB under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), and in accordance with the procedures at 5 CFR 1320.11. OMB has approved the existing reporting and recordkeeping requirements for the EPA Toxic Chemical Release Inventory Form R (EPA Form No. 9350–1), supplier notification, and petitions under OMB Control No. 2070–0093 (EPA ICR No. 1363). EPA has prepared an amendment (EPA ICR No. 1363.11) to the existing Information Collection Request (ICR) to include the burden associated with lower reporting thresholds for lead and lead compounds. A copy may be obtained from Sandy Farmer, Office of Information Collections, U.S. Environmental Protection Agency (2137), 1200 Pennsylvania Ave., NW., Washington, DC 20460, by calling (202) 260–2740, or electronically by sending an e-mail message to ''farmer.sandy@epa.gov.''

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information subject to OMB approval under the PRA, unless a currently valid OMB control number is displayed. The OMB control numbers for EPA's regulations, after initial publication in the Federal Register, are maintained in a list at 40 CFR part 9. The information requirements contained in this final rule are not effective until OMB approves them.

EPCRA section 313 (42 U.S.C. 11023) requires owners or operators of certain facilities manufacturing, processing, or otherwise using any of over 600 listed toxic chemicals and chemical categories in excess of the applicable threshold quantities, and meeting certain requirements (i.e., at least 10 Full Time Employees or the equivalent), to report certain release and other waste management activities for such chemicals annually. Under PPA section 6607 (42 U.S.C. 13106), facilities must also provide information on recycling and other waste management data and source reduction activities. The regulations codifying the EPCRA section 313 reporting requirements appear at 40 CFR part 372. Respondents may designate the specific chemical identity of a substance as a trade secret, pursuant to EPCRA section 322 (42 U.S.C. 11042). Regulations codifying the trade secret provisions can be found at 40 CFR part 350. Under the rule, all facilities reporting to TRI on lead and lead compounds would have to use the EPA Toxic Chemical Release Inventory Form R (EPA Form No. 9350-1). OMB has approved the existing reporting and recordkeeping requirements related to Form R, supplier notification, and petitions under OMB Control No. 2070-0093 (EPA ICR No. 1363).

For Form R, EPA estimates the industry reporting burden for collecting this information (including recordkeeping) to average 74 hours per report in the first year (based on typical unit burden estimates for Form R completion and recordkeeping/mailing requirements), at an estimated cost of $5,079 per Form R. In subsequent years, the burden is estimated to average 52.1 hours per report, at an estimated cost of $3,557 per Form R. These estimates include the time needed to review instructions; search existing data sources; gather and maintain the data needed; complete and review the collection of information; and transmit or otherwise disclose the information. The actual burden on any specific facility may be different from this estimate depending on the complexity of the facility's operations and the profile of the releases at the facility.

This rule is estimated to result in additional reports from approximately 9,800 respondents. Of these, approximately 3,600 facilities are estimated to be reporting to TRI for the first time as a result of the rule, while the remainder are currently reporting facilities that will be submitting additional reports. The 9,800 respondents will each submit an additional Form R. This rule is estimated to result in a total burden of 1.2 million hours in the first year, and 0.6 million hours in subsequent years, at a total estimated industry cost of $80 million in the first year and $40 million in subsequent years. The existing ICR will be amended to add 790,000 burden hours (annual average burden for the first 3 years of ICR approval).

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. This includes, where applicable, 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. EPA's burden estimates for the rule take into account all of the above elements, considering that under section 313, no additional measurement or monitoring may be imposed for purposes of reporting.

A commenter asserts that EPA failed to meet Paperwork Reduction Act requirements because it has not provided Form R reporting instructions for the proposed changes to the TRI reporting requirements for lead and lead compounds. The commenter contends that the proposed rule requires significant changes in the information submitted by regulated industry sectors on the Form R. The commenter asserts that OMB's Information Collection Review Handbook requires that materials submitted for review under the Paperwork Reduction Act must be accompanied by the documents to be used in the collection of information (i.e., forms, schedules, questionnaires, handbook, manual, interview plan or guide, rule, regulation, or other document), and any other explanatory material to be given or sent to prospective respondents. The commenter asserts that the current Form R reporting instructions do not provide the guidance necessary for reporting lead and lead compounds at the lower reporting thresholds with elimination of exemptions such as the *de minimis* exemption and changed rules for reporting. The commenter asserts that EPA has not issued guidance regarding how to comply under the proposed lower reporting thresholds, indicated what its plans are for issuing such guidance, or allowed formal opportunity for stakeholders to review and comment.

EPA disagrees with the commenter. EPA did not propose significant changes in the types of information to be reported by industry. EPA proposed using the existing Form R for reports that would be required under the lower reporting threshold. Since EPA did not propose to amend the Form R, and the existing Form R was already approved

by OMB, EPA was not required to submit the Form R separately with the ICR amendment at the proposed rule stage. Nevertheless, the proposed ICR amendment that EPA submitted to OMB included a copy of the existing ICR approved by OMB, along with a copy of the Form R. The existing ICR also specifically describes all of the existing reporting elements on Form R.

EPA strongly disagrees with the suggestion that it has circumvented the notice and comment process. The preamble to the proposed rule, the economic analysis, and the proposed ICR amendment all specifically describe EPA's proposal to lower reporting thresholds, and to change the reporting requirements so as not to allow use of the *de minimis* exemption, range reporting or Form A for reports submitted under the lowered thresholds. The **Federal Register** provided public notice and specifically solicited public comments on the changes to reporting requirements and reporting instructions that were being considered, as well as on the Agency's associated burden estimates. The Agency provided a functional description of the changes in reporting that would result from his rule. Therefore, EPA was in compliance with the PRA and with OMB requirements.

D. What are the Determinations Under the Unfunded Mandates Reform Act and Executive Order 13084?

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4), EPA has determined that this action does not contain a ''Federal mandate'' that may result in expenditures of $100 million or more for the private sector in any 1 year, nor will it result in such expenditures for State, local, and tribal governments in the aggregate. The costs associated with this action are estimated in the economic analysis prepared for this final rule (Ref. 46), which is included in the public docket and summarized in Unit VII. of this preamble.

EPA has determined that it is not required to develop a small government agency plan as specified by section 203 of UMRA or to conduct prior consultation with State, local, or tribal governments under section 204 of UMRA, because the rule will not significantly or uniquely affect small governments and does not contain a significant Federal intergovernmental mandate.

Finally, EPA believes this rule complies with section 205(a) of UMRA. The objective of this rule is to expand the public benefits of the TRI program by exercising EPA's discretionary authority to lower reporting thresholds, thereby increasing the amount of information available to the public regarding the use, management, and disposition of listed toxic chemicals. In making additional information available through TRI, the Agency increases the utility of TRI data as an effective tool for empowering local communities, the public sector, industry, other agencies, and State and local governments to better evaluate risks to public health and the environment.

As described in Unit VI. of this preamble, EPA considered burden in the threshold selection. The rule also contains reporting requirements that will limit burden (e.g., reporting limitations for lead in certain alloys). In addition, existing burden-reducing measures (e.g., the laboratory exemption, and the otherwise use exemptions, which include the routine janitorial or facility grounds maintenance exemption, motor vehicle maintenance exemption, structural component exemption, intake air and water exemption and the personal use exemption) will apply to the facilities that file new reports as a result of this rule. EPA also will be assisting small entities subject to the rule, by such means as providing meetings, training, and compliance guides in the future, which also will ease the burdens of compliance. Many steps have been and will be taken to further reduce the burden associated with this rule, and to EPA's knowledge there is no available alternative to the rule that would obtain the equivalent information in a less burdensome manner. For all of these reasons, EPA believes the rule complies with UMRA section 205(a).

In addition, 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, entitled *Consultation and Coordination with Indian Tribal Governments* (63 FR 27655, May 19, 1998) do not apply to this rule.

E. What are the Determinations Under Executive Orders 12898 and 13045?

Pursuant to Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994), the Agency has considered environmental justice related issues with regard to the potential impacts of this action on environmental and health conditions in low-income populations and minority populations.

Since this is a significant regulatory action, additional OMB review is required under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). The Agency has, to the extent permitted by law and consistent with the agency's mission, identified and assessed the environmental health risks and safety risks that may disproportionately affect children.

By lowering the section 313 reporting thresholds for lead and lead compounds, EPA is providing communities across the United States (including low-income populations and minority populations) with access to data that may assist them in lowering exposures and consequently reducing chemical risks for themselves and their children. This information can also be used by government agencies and others to identify potential problems, set priorities, and take appropriate steps to reduce any potential risks to human health and the environment. Therefore, the informational benefits of the rule are expected to have a positive impact on the human health and environmental impacts of minority populations, low-income populations, and children.

F. What is the Determination under 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 implication'' 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 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 action is expected to have a limited impact on municipal governments that operate electric utilities that may be affected by this action. EPA estimates that there are only 13 publicly-owned electric utility facilities that are potentially affected by the rule. Of these 13 facilities, 8 are expected to file one additional report as a result of this action. Thus, the requirements of Section 6 of the Executive Order do not apply to this rule.

G. What are the Determinations under the National Technology Transfer and Advancement Act?

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless doing so would be inconsistent with applicable law or impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, etc.) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards, nor did EPA consider the use of any voluntary consensus standards. In general, EPCRA does not prescribe technical standards for threshold determinations or completion of EPCRA section 313 reports. EPCRA section 313(g)(2) states that ''In order to provide the information required under this section, the owner or operator of a facility may use readily available data (including monitoring data) collected pursuant to other provisions of law, or, where such data are not readily available, reasonable estimates of the amounts involved. Nothing in this section requires the monitoring or measurement of the quantities, concentration, or frequency of any toxic chemical released into the environment beyond that monitoring and measurement required under other provisions of law or regulation.''

H. What are the Requirements of the Congressional Review Act?

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**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 372

Environmental protection, Community right-to-know, Reporting and recordkeeping requirements, and Toxic chemicals.

Dated: January 8, 2001.

Carol M. Browner,

Administrator.

Therefore, 40 CFR part 372 is amended as follows:

PART 372—[AMENDED]

1. The authority citation for part 372 will continue to read as follows:

Authority: 42 U.S.C. 11023 and 11048.

2. In § 372.28 by adding one chemical to paragraph (a)(1) alphabetically and to paragraph (a)(2) by alphabetically adding one category to read as follows:

§ 372.28 Lower thresholds for chemicals of special concern.

(a) * * *

(1) * * *

Chemical Name	CAS No.	Reporting Threshold
* * * * * * *	*	*
Lead (this lower threshold does not apply to lead when contained in a stainless steel, brass or bronze alloy)	7439–92–1	100
* * * * * * *	*	*

(2) * * *

Category Name	Reporting Threshold
* * * * * * *	*
Lead Compounds	100
* * * * * * *	*

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[FR Doc. 01–1045 Filed 1–16–01; 8:45 am]

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Wednesday,

January 17, 2001

Part XII

Department of Agriculture
Department of Energy
Small Business Administration
National Aeronautics and Space Administration
Social Security Administration
Department of Commerce
Department of State
Agency for International Development
Department of Housing and Urban Development
Department of Justice
Department of Labor
Department of the Treasury
Department of Defense
Department of Education
Department of Veterans Affairs
Environmental Protection Agency
Department of Interior
Federal Emergency Management Agency
Department of Health and Human Services
National Science Foundation
National Foundation on the Arts and the Humanities
Corporation for National Community Service
Department of Transportation

Federal Financial Assistance Management Improvement Act of 1999; Notice

DEPARTMENT OF AGRICULTURE

DEPARTMENT OF ENERGY

SMALL BUSINESS ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

SOCIAL SECURITY ADMINISTRATION

DEPARTMENT OF COMMERCE

DEPARTMENT OF STATE

AGENCY FOR INTERNATIONAL DEVELOPMENT

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

DEPARTMENT OF JUSTICE

DEPARTMENT OF LABOR

DEPARTMENT OF THE TREASURY

DEPARTMENT OF DEFENSE

DEPARTMENT OF EDUCATION

DEPARTMENT OF VETERANS AFFAIRS

ENVIRONMENTAL PROTECTION AGENCY

DEPARTMENT OF THE INTERIOR

FEDERAL EMERGENCY MANAGEMENT AGENCY

DEPARTMENT OF HEALTH AND HUMAN SERVICES

NATIONAL SCIENCE FOUNDATION

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

DEPARTMENT OF TRANSPORTATION

Request for Comment; Interim/Draft Plan of Action To Implement Public Law 106–107, the Federal Financial Assistance Management Improvement Act of 1999

AGENCIES: Department of Agriculture, Department of Energy, Small Business Administration, National Aeronautics and Space Administration, Social Security Administration, Department of Commerce, Department of State, Agency for International Development, Department of Housing and Urban Development, Department of Justice, Department of Labor, Department of the Treasury, Department of Defense, Department of Education, Department of Veterans Affairs, Environmental Protection Agency, Department of the Interior, Federal Emergency Management Agency, Department of Health and Human Services, National Science Foundation, National Endowment for the Arts—National Foundation on the Arts and the Humanities, National Endowment for the Humanities—ional Foundation on the Arts and the Humanities, Institute of Museum and Library Services—National Foundation on the Arts and the Humanities, Corporation for National and Community Service, Department of Transportation.

ACTION: Notice; request for public comments

SUMMARY: This notice is a request for comments, intended to help the Federal agencies satisfy the provisions of Public Law 106–107, the Federal Financial Assistance Management Improvement Act of 1999 (henceforth ''the Act''), which requires each agency to develop and implement a plan that streamlines and simplifies the application, administrative, and reporting procedures for Federal financial assistance programs. The Act also requires the agencies to consult with representatives of non-Federal entities during the development and implementation of their plans.

This notice and interim/draft plan of action reflect the joint effort of the Federal grant-making agencies listed in Section X, below, to meet the requirements of the Act. The plan is being published for public comment in the **Federal Register** and on the Internet at the U.S. Chief Financial Officers Council's Grants Management Committee home page (http://www.financenet.gov/fed/cfo/grants/grants.htm), pursuant to Section 5 of the Act. One intent of the agencies is to use the information gathered through this notice to identify additional areas of the grant life cycle which lend themselves to common practices and implementation.

The Federal departments and agencies will refine this plan as the interagency, consultative effort identifies additional specific Federal Government actions needed to achieve the purposes of the Act. The initial plan will be submitted in May, 2001. As this plan evolves into more specific actions, the Federal agencies, after consultations with affected constituencies, will submit updated information to Congress in the annual implementation reports required by the Act.

Desired Focus of Comments

The participating agencies request your comments on the Federal grantmaking process and the objectives outlined in this plan, particularly on the following questions. To the maximum extent possible, please provide specific information in your responses. For example, the name of the Federal program or the number of a particular form. This information will assist the agencies in their efforts to reform these programs.

I. Application and Reporting Forms

A. Please identify application and reporting forms you believe could be improved or streamlined.

B. Please identify specific data elements on these forms that you believe could be eliminated or combined to reduce reporting burden while still providing the Federal agency enough information to manage the program.

C. What programs do you think could share common application and reporting forms that currently do not? Do not limit your response to programs within the same agency. For example, if there are programs administered by the Department of Agriculture and the Department of Health and Human Services that you believe should share common forms because they share a similar purpose, please identify them.

D. How do you obtain copies of the forms you need for your grant? Are they readily available over the Internet, or are they provided in materials you received from your awarding agency, such as a funding notice or handbook? What forms have been difficult to locate in updated formats?

II. Terms and Conditions

A. What terms and conditions are attached to your grants that you believe are not treated consistently from program to program, and across the various Federal agencies?

B. How would you suggest the agencies create more uniformity in these terms and conditions?

III. Payment Systems

A. What payment systems are you currently required to use to receive grant payments?

B. Which of these systems offer on-line services?

C. Does the use of multiple payment systems by Federal agencies cause a burden on your financial system?

IV. Audit Issues

A. What could the Federal agencies do to improve your understanding of the Single Audit process?

B. Have you used the Single Audit Clearinghouse to obtain information on subrecipient audits?

C. Do you believe that single audits provide appropriate audit coverage for your programs and the programs where you are a pass-through entity?

V. Electronic Processing

A. What electronic processing systems do you currently use for your Federal grants? Please note any systems you use due to Federal agency requirements, as well as any systems or technologies your organization uses for other activities.

B. What is the likelihood that your organization would utilize an on-line application or financial reporting system?

C. How can the agencies best prepare your organization for the future use of electronic processing option for your grants?

DATES: Comments in response to this notice must be received on or before March 19, 2001. Each Federal agency will submit an implementation plan to OMB and Congress before May 20, 2001 and report annually thereafter.

ADDRESSES: General comments on this notice, and those relating to more than one Federal agency, should be addressed to: Attn: PL 106–107 Comments, Department of Health and Human Services, 200 Independence Avenue, SW, Room 517–D, Washington, DC 20201. Comments may also be transmitted by E-mail (PL106107@os.dhhs.gov) or by fax, (202) 690–8772. Comments that are specific to a particular Federal agency or program should be directed to the agency's contact listed at the end of this notice.

FOR FURTHER INFORMATION CONTACT: For general questions regarding this notice, please contact Rodd Clay, Office of Grants Management, Department of Health and Human Services by E-mail (rclay@os.dhhs.gov) or phone at (202) 690–8723; for the hearing impaired only: TDD 202–690–6415. For agency-specific issues, please contact the agency's contact listed at the end of this notice. Additional information regarding the agencies' reform efforts may be found at the Chief Financial Officers (CFO) Council's Grants Management Committee home page (*http://www.financenet.gov/fed/cfo/grants/grants.htm*).

SUPPLEMENTARY INFORMATION:

I. Purpose

This interim/draft plan of action is being presented for public comment. It was developed jointly by the Federal grant-making agencies listed in Section X, below, to meet the requirements of the Financial Assistance Improvement Act of 1999 (Public Law 106–107, henceforth ''the Act''). It sets out broad goals and objectives; describes an ongoing, coordinated interagency effort to implement the Act in consultation with non-Federal entities; and details accomplishments in some areas. The Federal agencies will refine this plan as the interagency, consultative effort identifies additional specific Federal Government actions needed to achieve the purposes of the Act. As this plan evolves into more specific actions, the Federal agencies, after consultations with affected constituencies, will submit updated information to Congress in the annual implementation reports required by the Act. This plan and the comments received will help the agencies to meet the requirements of the Act.

II. Background

Federal programs providing financial assistance comprise a large and diverse enterprise with widely varying purposes and recipient communities. The Catalog of Federal Domestic Assistance lists hundreds of programs in more than 25 Federal grant-making agencies with approximately $300 billion in annual expenditures. The programs stimulate or support a wide variety of public purposes in areas such as health, social services, law enforcement, agriculture, housing, community and regional development, education and training, and research.

III. Statutory Requirement

In enacting Public Law 106–107, Congress expressed concern that some requirements related to the award and administration of Federal financial assistance may be duplicative, burdensome, or conflicting, thus impeding the cost-effective delivery of services. Congress further found that State, local, and tribal governments and private, nonprofit organizations must deal with increasingly complex problems that require the delivery and coordination of many kinds of services and result in complex grant administration. To address these concerns, the Act requires each Federal agency to develop and implement a plan, with the direction, coordination and assistance of the Director of the Office of Management and Budget (OMB), in consultation with representatives of non-Federal entities, that:

- Streamlines and simplifies the application, administrative, and reporting procedures for Federal financial assistance programs administered by the agency;
- Demonstrates active participation in an interagency process to:
  - —Streamline and simplify administrative procedures and reporting requirements for non-Federal entities receiving Federal financial assistance;
  - —Improve interagency and intergovernmental coordination of information collection and sharing of data pertaining to Federal programs providing financial assistance; and
  - —Improve the timeliness, completeness, and quality of information received by Federal agencies from financial assistance recipients;
- Demonstrates appropriate agency use, or plans for use, of a common application and reporting system that includes:
  - —A common application or set of common applications, whereby a non-Federal entity can apply for Federal financial assistance from multiple Federal programs that serve similar purposes and are administered by different Federal agencies;
  - —A common system, including electronic processes, whereby a non-Federal entity can apply for, manage, and report on the use of financial assistance funding from multiple Federal programs that serve similar purposes and are administered by different Federal agencies; and
  - —Uniform administrative rules for Federal financial assistance programs across different Federal agencies;
- Designates a lead agency official for carrying out the responsibilities of the agency under the Act;
- Allows applicants the option to electronically apply for, and report on the use of, funds from programs of the agency that provides financial assistance;
- Ensures that recipients of financial assistance provide timely, complete, and high quality information in response to Federal reporting requirements; and
- Establishes, in cooperation with recipients of financial assistance, specific annual goals and objectives to further the purposes of the Act and measure annual performance as part of

the agency's planning responsibilities under the Government Performance and Results Act of 1993 (Public Law 103–62).

IV. Goal

An appropriate interagency structure for accomplishing all aspects of this Act has been established, and the Federal agencies have agreed on a common goal: To maximize the effectiveness with which Federal financial assistance programs support the accomplishment of their purposes, consistent with good stewardship of public funds and accountability.

Several agencies have already undertaken efforts to identify common grant process flows and to streamline business practices. These agencies are continuing to work to identify and establish performance measures to effectively manage and track grantee use of funds. They have also been developing electronic systems for the entire grants life cycle which will support these efforts.

While there have been many studies, reports, and attempts at Federal financial assistance simplification in the past, a comprehensive, Government-wide review of this magnitude has not been undertaken since a standardization effort entitled, ''Federal Assistance Review'' was undertaken in 1969. That review, which took three years to complete, significantly reduced burdens on recipients and improved the uniformity among Federal agencies' assistance awards to governmental organizations. For example, it led to the issuance of OMB Circulars A–87 and A–102, which contain cost principles and uniform administrative requirements for awards to governmental organizations. It also resulted in a standard application: The Standard Form 424.

Similarly, the new interagency effort described in the next section of this plan is a multi-year effort. As it progresses, the Federal agencies will identify more specific goals, objectives and solutions, as the Act requires. Therefore, this plan is necessarily an interim/draft plan. It will evolve as the Federal agencies, in conjunction with their non-Federal partners, continue to identify problems to be addressed, devise ways to solve them, and specify the expected outcomes.

V. Process

A. Interagency Approach

Central to the development of the plan and its implementation is the active participation in an interagency process, with direction, coordination and assistance from OMB, in consultation with representatives of non-Federal entities. The Director of OMB charged the Grants Management Committee (''the Committee'') of the Chief Financial Officers (CFO) Council to perform most of the work required in coordinating the interagency, consultative effort to meet the objectives of the Act. The Committee is chaired by the Deputy Chief Financial Officer of the Department of Health and Human Services (HHS), which is assisting OMB as the lead agency for implementation of the Act. All Federal grant-making agencies are participating through the Committee, and therefore, are developing this coordinated and consistent implementation plan with respect to the requirements of the Act. The Committee established four streamlining and simplification work groups to conduct the effort, chaired by representatives of various agencies. It also created a General Policy and Oversight Team to examine crosscutting issues and to oversee the progress of the work groups. Serving as co-chair of this oversight team along with HHS, OMB directs, coordinates and assists the process, and addresses individual agency and other related problems. The four streamlining and simplification work groups are the Pre-Award, Post-Award, Audit Oversight, and Electronic Processing work groups.

B. Public Consultations

One cornerstone of the interagency effort is consultation with representatives of non-Federal entities that apply for and receive Federal financial assistance. The consultation process began soon after enactment of Public Law 106–107, when several individual agencies posted information about the Act on their home pages. The agencies asked for comments and suggestions about the Federal processes for providing financial assistance. As they received input, they shared it with officials in other Federal agencies.

The Grants Management Committee reinforced and expanded those early efforts in two ways. First, it created a central Web site for information about the interagency process in general and the four work groups more specifically. The Web site allows the public to electronically submit comments and suggestions directly to the work group members who need it, which gets the input to them more rapidly and efficiently. Secondly, through its General Policy and Oversight Team and with assistance of the work group chairs, the committee conducted five public consultation meetings with the major recipient constituencies-States, local governments, tribal governments, universities and nonprofit organizations that conduct research, and other nonprofit organizations.

The consultation meetings provided the work groups with a variety of insights on issues that need to be addressed in the Act's implementation. These included specific examples, by agency and by program, of areas requiring attention and, in some cases, concrete suggestions for improvement. The public comments at the consultation meetings raised several significant issues of a crosscutting nature, such as those related to Native American tribal entities and to rural access and infrastructure (described in Section VI. A. of this plan). They also raised issues related to the different phases of the financial assistance process—pre-award, post-award, and audit—as well as with the technology that will support the process.

Non-Federal organizations, in general, are concerned with the announcement of funding opportunities, including the availability of information, its clarity (*e.g.,* clear statements of eligibility), and the time allowed for application preparation and submission. They also indicated a need for greater commonality in award requirements across agencies, including more consistent reporting requirements in terms of both content and timing. While there is widespread support in the non-Federal constituencies for making the process less paper intensive and using the electronic option, the participants in some of these sessions reminded the Federal agencies of the real limitations (*e.g.,* personnel, equipment, and access) they face and the need to ensure that training and technical assistance are available.

Further information about these consultation meetings, including summaries of public comments, is available on the Committee's home page (*http://www.financenet.gov/fed/cfo/grants/grants.htm*). The work groups and individual Federal agencies will continue to consult with recipients throughout the interagency streamlining and simplification effort.

C. Prior and Ongoing Efforts

A second cornerstone of the interagency process is to build on what has already been done or is already underway. There were numerous streamlining and simplification initiatives underway before the enactment of Public Law 106–107, although not of the magnitude called for by the Act. Some affected a particular set of activities, such as research, or a particular agency's programs. An example is the Federal Demonstration

Partnership (FDP), an organization comprising 11 Federal awarding offices and 65 universities and nonprofit organizations, which already has made and is continuing to make more uniform these 11 Federal offices' applications, terms and conditions, and reporting requirements.

The Committee's work groups will build upon the results of groups like the FDP and prior or ongoing streamlining efforts of individual agencies and non-Federal entities. The work groups will use successful initiatives as models that may be expanded if they have broader applicability to more Federal agencies, to more Federal programs for other purposes, and to more of the many recipients of Federal grants and cooperative agreements.

In addition, the Committee has integrated several on-going Government-wide initiatives into its four new work groups, to increase the initiatives' priority and accelerate them. These include:

- The Interagency Committee on Debarment and Suspension which, with OMB's support, has been working to simplify and update the Government-wide common rule on debarment and suspension. The work of this committee has been integrated into the Pre-Award Work Group.
- The Committee's prior subcommittees that began the streamlining initiatives related to grantees' payments. One effort led to a policy decision, now being implemented, to consolidate numerous civilian agency payment systems into two systems (The Department of Defense will use the Defense Procurement Payment System). The efforts of the Committee's prior work have been incorporated into the Post-Award Work Group.
- The Interagency Electronic Grants Committee (IAEGC) that has established a standard transaction set for electronic submission of applications for grants and cooperative agreements, and is working toward a Government-wide system for applicant and recipient electronic business interactions with Federal awarding agencies. The IAEGC co-chairs are leading the Electronic Processing Work Group and electronic interagency grant coordination activities.
- The Single Audit Compliance Supplement Core group has been responsible for producing the annual update to the Compliance Supplement required by OMB Circular A–133. The group provides the information needed by auditors to guide them to the major compliance areas they should review in their single audit of Federal programs. The group ensures that compliance requirements are valid and up-to-date.

VI. Specific Projects

At the outset of the interagency, consultative process, the Committee identified specific projects for the General Policy and Oversight Team and the four work groups. As the effort progresses, the list of specific projects may be modified. The following paragraphs describe the projects being undertaken by each work group.

For most tasks, a goal is to have more uniform approaches across the many Federal agencies, at least when their programs have similar purposes. This involves three phases. The first phase is to establish what Federal agencies are doing today, as a baseline from which any improvements would be made. Data is being compiled from a number of sources, to help establish the scope of the undertakings and identify representative samples of Federal programs for detailed analysis. Input from applicants and recipients is being reviewed regarding the problems that they see with the way things are today.

The second phase of the effort is a critical assessment to determine which requirements and problems are candidates for elimination, streamlining or improvement. The groups must question the rationale for current requirements, particularly requirements that are not uniform across Federal agency programs with similar purposes and recipients.

The third and final phase is to assist OMB develop recommendations for the Committee and Congress.

A. General Policy and Oversight Team

The General Policy and Oversight Team is overseeing the progress of the work groups, and examining crosscutting issues and entitlement grant regulatory coverage. It is providing direction and assistance, and is coordinating interagency work groups' activities in their endeavors to improve the delivery of services to the public. A proposed budget has been developed based on an examination of resources available through the CFO Council to implement the Act.

One objective is to ensure that recipients provide timely, complete, and high quality information in response to Federal reporting requirements. Other objectives include streamlining and simplifying administrative requirements and procedures for Federal financial assistance programs; and improving the effectiveness and performance of programs by facilitating greater coordination among Federal agencies responsible for delivering services to the public, *e.g.,* to bring more coordination to the administrative process, particularly for similar programs.

In addition, this team will review and prioritize three areas of concern that arose during public consultation meetings with recipient communities. The team will consider these issues as tasks for possible expansion and/or assignment to one or more of the four work groups:

(1) Native American Tribal Entities

The objective of this task will be to study and address several issues unique to Native American tribal entities, such as developments under the Indian Self-Determination Act.

(2) Rural Access and Infrastructure

The objective of this task will be to examine problems related to access or infrastructure, as these problems affect the ability to participate in Federal financial assistance programs. For example, public comments highlighted that some rural and other participants encounter barriers due to communications infrastructure, including computers and high-speed transmission lines needed for optimal Internet access and electronic commerce with Federal agencies.

(3) Grantee Ombudsman

Due to the many issues raised by non-Federal grantees, the objective of this task would be to assess the extent to which requirements may be duplicative or unduly burdensome.

B. Pre-Award Work Group

The Pre-Award Work Group currently has three tasks: applications, terms and conditions, and debarment and suspension. The current plans for these projects are described in the following paragraphs.

To carry out the first two tasks, the work group created two subgroups based on recipient type. One subgroup will look at requirements for States, local and tribal governments, and nonprofit organizations participating in Federal programs for purposes other than research. The other subgroup will look at universities and nonprofit organizations that administer research awards. The work group's analysis of Federal funding data suggested that the two subcategories of nonprofit organizations are different sets of organizations. As the subgroups make progress on these two tasks, they may organize their work so as to recognize other types of recipients (*e.g.,* for-profit firms) and specific functions (*e.g.,* construction).

(1) Applications

The objective of this task is to streamline and simplify application or proposal requirements and procedures for Federal financial assistance programs administered by the agencies.

The focus is on the types of information that Federal agencies require applicants or proposers to submit as a prerequisite to obtaining Federal funds, whether in paper form or electronically. The intent is to achieve greater consistency in the requirements of the many Federal agencies, particularly where programs have similar purposes. The goal of this group is to propose a standard set of data elements for application forms or electronic transaction sets, which will address more common formats.

(2) Terms and Conditions

The objective of this task is to streamline and simplify Federal agencies' grant terms and conditions, through which agencies communicate post-award requirements to recipients. This task includes eliminating unnecessary requirements and unjustified differences among the various awarding agencies (*e.g.,* in the language used and the placement of various provisions within the award document). This task also includes developing a model or standard set of terms and conditions, as well as standard assurances of compliance with applicable national requirements.

(3) Debarment and Suspension

This task involves completion of ongoing work of the existing Interagency Committee on Debarment and Suspension to simplify and update the Government-wide common rule on nonprocurement debarment and suspension, which also contains the Government-wide regulation implementing the Drug-Free Workplace Act of 1988. The Committee is drafting the rule in plain language format to make it easier to understand and use. The updated rule will be published as a Notice of Proposed Rulemaking in the **Federal Register**, with an opportunity for the public to comment.

C. Post-Award Work Group

The Post-Award Work Group has five tasks: reporting, agencies' payment systems, cost principles, grant financial system requirements, and pooled payments. These tasks will be addressed primarily in subgroups, and are described in the following paragraphs.

(1) Reporting

The objective of the first task is to review, streamline and simplify reporting requirements and procedures for Federal grant and cooperative agreement programs administered by the agencies.

This includes the development of more standard reports, particularly among programs that serve similar purposes and are administered by different Federal agencies. The current work group focus is on the types of information that Federal agencies require a recipient to submit for like programs, whether in paper form or electronic, and establishing necessary data elements for common forms/transaction sets. One goal is to consolidate forms, including specialized OMB-approved forms for major Federal programs, and ensure that instructions are clear.

Another goal is to improve the effectiveness and performance of programs by facilitating greater coordination among Federal agencies responsible for delivering services to the public, particularly for similar programs.

(2) Agencies' Payment Systems

On June 16, 1998, the CFO Council approved a plan to have non-Defense agencies select either the HHS Payment Management System (PMS) or the Automated Standard Applications for Payments (ASAP) operated by the Treasury's Financial Management Service and the Federal Reserve Bank of Richmond for use in making payments to their grantees. The Department of Defense will use the Defense Procurement Payment System. The work group will continue to monitor agency progress in implementing this plan.

(3) Cost Principles

One objective is to establish uniform administrative rules for programs that cross agency lines. The goal in this area is to improve the consistent use of language and terminology in describing the requirements that are similar in the OMB cost principles (Circulars A–21, A–87 and A–122). Currently there are differences in language, interpretation, and description for many items that basically have the same requirements. More consistent use of language and terminology among the circulars will improve the relationship between grantees, the Federal agencies, and external auditors. Adding new restrictions or eliminating current ones, is not an objective.

In addition, the work group will review widely varying agency implementations of Circular A–110 and differing interpretations of Circulars A–102 and A–110, and other crosscutting regulations, are also being reviewed. However, revision of these circulars and the regulations themselves is not a current focus of the work group.

(4) Grant Financial System Requirements

The work group will monitor agency progress in implementing the Grant Financial System Requirements, the first functional requirements document issued for grant financial systems of the Federal Government. It is one of a series of functional system requirements documents published by the Joint Financial Management Improvement Program (JFMIP) on Federal financial management systems requirements.

The Federal Financial Management Improvement Act of 1996 mandated that agencies implement and maintain systems that comply substantially with Federal financial management systems requirements, applicable Federal accounting standards, and the U.S. Government Standard General Ledger (SGL) at the transaction level. This act codified JFMIP financial systems requirements as a key benchmark that agency systems must meet, in order to be substantially in compliance with systems requirements provisions.

This document is intended to identify financial system requirements necessary to support grants programs. It is intended to assist system analysts, system accountants, and others who design, develop, implement, operate, and maintain financial management systems.

(5) Pooled Payments

On May 1, 2000, an advance notice of proposed revision to Circular A–110, that would require Federal awarding agencies to offer recipients the option to request cash advances on a ''pooled'' basis, was published in the **Federal Register** (65 FR 25396). Comments were sought on the merits of pooled payment systems and grant-by-grant payment systems. In that all comments have been received and analyzed, it is the intent of this group to clarify differing positions on the issue and specify when pooling is applicable.

D. Audit Oversight Work Group

The Audit Oversight Work Group's task is to streamline and simplify audit-related requirements and services. The plans for this project include examining the services provided by the Federal Audit Clearinghouse (FAC) to determine where improvements can be made to reduce the burden on auditors and auditees in complying with OMB Circular A–133, and improving those FAC services.

The work group will suggest changes to the FAC procedures to improve the FAC's dissemination of audit information to the public and Federal agencies, its assistance to Federal cognizant and oversight agencies in obtaining OMB Circular A–133 data and reporting packages, and the FAC's services provided to assist OMB's oversight and assessment of Federal award audit requirements. The work group will also study ways to improve the FAC's home page, the outputs of the FAC, and methods to identify and follow-up on delinquent audits.

Additional goals include improving single audit coverage of critical areas identified by program officials; analyzing the adequacy of methods to assess and measure single audit quality (*e.g.,* quality control reviews) to support Federal agency reliance on single audits; providing general information on the process, responsibilities, and role of the FAC; updating the Data Collection Form (Form SF–SAC); providing annual updates to the Compliance Supplement; and producing an overview of the single audit process to better inform recipients and funding officials of the purposes and benefits of the single audit process and the FAC.

E. Electronic Processing Work Group

The Electronic Processing Work Group is chaired by the two co-chairs of the Interagency Electronic Grants Committee. Its task is to enable effective use of electronic commerce throughout the Federal financial assistance community, including a common application, administrative and reporting system, and information collection and sharing. This work group will assist and provide electronic solutions to the other work groups in their endeavors. Plans are described in the following paragraphs.

(1) Common Application, Administrative and Reporting System

One goal is to allow applicants the option to electronically apply for, and report on the use of funds. This includes the development and use of a common application, administrative and reporting system for funding from multiple programs administered by different Federal agencies.

These electronic options will be accomplished through the establishment of a comprehensive, one-stop Federal Gateway for electronic grants processing: the Federal Commons. Given adequate funding, the Federal Commons will be developed and supported as the common face for E-Commerce over the entire grants life cycle, offering both general information exchange and secure electronic transaction processing. The Federal Commons would allow each grantee to choose how it conducts business with the Federal government, *i.e.,* translate whatever technology the grantee uses to a single standard; provide electronic search capability; and possibly be housed at HHS.

Several pilots are underway. If successful, they will be developed as modules of the Federal Commons. The first of these is based on the FedBizOpps.Gov site (maintained by the General Services Administration) for posting procurement opportunities. A contractor will develop a parallel, but separate, system based on the **Federal Register** that will be Web searchable. In addition to their work on Transaction Set 194 and current activity broadening, as necessary, for the non-research community, they are beginning to develop data standards for reporting.

Short term plans for the electronic option include supporting work groups, continuing to pilot test, using successful pilots to develop modules, rolling-out modules when ready, and deploying the Federal Commons across agencies. Longer term plans include developing data standards for reporting, enhancing Federal Commons modules using products/end results of work groups, expanding use of the Federal Commons across agencies, and eliminating unnecessary categorical barriers which impede true streamlining efforts.

(2) Grantee Information Collection and Sharing

The second goal is to improve interagency and intergovernmental coordination of information collection, and sharing of uniform data pertaining to financial assistance programs. It applies to grant recipients, not recipients of services, and it must be consistent with privacy and confidentiality constraints.

This coordination and sharing would be accomplished through the Federal Commons, with the development of a single information release form that allows ''boiler-plate'' information (including certifications and assurances) to be shared across Federal programs, so that participating grantees need not repeat the same information for each grant and Federal agency. Electronic processes would be available for interactive dialogue and updating. The form could be filed once, easily pulled up, referenced, and updated.

VII. Accomplishments

The following is a list of accomplishments that have been or are expected to be completed by May, 2001, or for which there will be a short-term plan for resolution.

- State, local government, tribal government, research, and other nonprofit entity consultation meetings conducted;
- The Joint Financial Management Improvement Program (JFMIP) standards for grants/financial systems issued. These are standards for financial transactions that are part of any grants management information system;
- Federal Commons concept: a single common portal for secure E-Grants Business. Five initial pilots have been successfully completed and are in the process of integration testing with three Federal agencies—the User Registration, Account Administration, Organizational Profile, Professional Profile, and Application Status Checking modules;
- Data standards developed for grant application, organizational and professional profiles, and grant award (promulgated by the National Institute for Standards and Technology);
- Data dictionary developed for all grants transactions as a result of in-depth reviews by interagency teams of the data elements used for grants administration;
- Focus/forum for E-grants;
- Federal commons electronic user administration completed (includes organization profile and professional profile capability);
- Debarment and suspension regulatory action;
- Entitlement grant regulatory coverage;
- Civilian agency conversion to HHS/Treasury payment systems;
- Pooled payment issues clarified in **Federal Register**;
- Audit clearinghouse form (SF–SAC revised); and
- Audit compliance supplement update issued

VIII. Time Frames/Conclusion

This effort will continue toward the establishment of further specific annual goals and objectives, and an interim plan will be submitted to Congress by May 20, 2001. However, this is a work in progress and completion is expected to take up to five years. Implementation of most aspects is expected by 2002, and the electronic option is expected to be functional by 2003.

We recognize the tremendous importance of Federal financial assistance programs and the services they provide, and are strongly committed to the accomplishment of the objectives of the Act. We are committed to making improvements in the areas described, and continuing to develop additional specific annual goals and objectives.

Implementation can only be accomplished with full-time resources, so the CFO Council is working with OMB, the Chief Information Officers Council, and the Procurement Executives Council to secure the necessary funding for this multi-year effort.

IX. Potential Recommendations to Congress

Section 6 of the Act requires OMB to submit a report to Congress containing recommendations for changes in law to improve the effectiveness, performance, and coordination of Federal financial assistance programs. Therefore, a very important part of the interagency process described in Sections V and VI of this plan will be an assessment of the statutory impediments to accomplishing the streamlining and simplification that Public Law 106–107 intends. OMB will coordinate this assessment.

X. Individual Agency Commitments to the Interagency Process

The following agencies have jointly submitted the above-described plan for implementation of Public Law 106–107; are actively participating in the interagency process described in Sections V and VI of this plan; support the designation and use of the Federal Commons as the single portal for electronic business interactions with non-Federal entities related to grants award and administration; and will identify and address in their respective resource allocation processes the necessary agency resources, including both human and financial resources, to interconnect internal agency organizations and systems with the Federal Commons and otherwise implement this plan:

Department of Agriculture, Department of Energy, Small Business Administration, National Aeronautics and Space Administration, Social Security Administration, Department of Commerce, Department of State, Agency for International Development, Department of Housing and Urban Development, Department of Justice, Department of Labor, Department of the Treasury, Department of Defense, Department of Education, Department of Veterans Affairs, Environmental Protection Agency, Department of the Interior, Federal Emergency Management Agency, Department of Health and Human Services, National Science Foundation, National Endowment for the Arts—National Foundation on the Arts and the Humanities, National Endowment for the Humanities—National Foundation on the Arts and the Humanities, Institute of Museum and Library Services—National Foundation on the Arts and the Humanities, Corporation for National and Community Service, Department of Transportation.

XI. Lead Agency Officials

The following is a list of the participating agencies' designated lead agency official for carrying out the responsibilities of the agency under Section 5(a)(4) of the Act and, in some cases, additional contact information.

Department of Agriculture

Patricia Healy, Deputy Chief Financial Officer, 202–720–7407, phealy@cfo.usda.gov.

Department of Energy

Trudy Wood, Office of Procurement and Assistance Policy, Office of Procurement and Assistance Management, 202–586–5625, 202–586–0545 (Fax), trudy.wood@pr.doe.gov.

Small Business Administration

Sharon Gurley, Director, Office of Procurement and Grants Management, 202–205–6622, 202–205–6821 (Fax), sharon.gurley@sba.gov.

National Aeronautics and Space Administration

David Havrilla, Senior Systems Accountant, 202–358–2482, 202–359–2952 (Fax), dhavrill@nasa.gov.

Social Security Administration

Tom Staples, Deputy Chief Financial Officer, 410–965–3504, tom.staples@ssa.gov.

Department of Commerce

Elizabeth Dorfman, Acting Director, Office of the Executive Assistance Management, 202–482–3313, 202–482–3270 (Fax), Edorfman@doc.gov.

Department of State

Chris Flaggs, Director, Office of Financial Policy, Reporting and Analysis, 202–261–8625, 202–261–8622 (Fax), FlaggsCh@state.gov; and Lloyd W. Pratsch, Procurement Executive, Office of the Procurement Executive, 703–516–1680, 703–875–6155 (Fax), PratschLW@state.gov.

Agency for International Development

Kathleen O'Hara, Deputy Director, Office of Procurement, 202–712–4759, 202–216–3395 (Fax), KOHara@usaid.gov.

Department of Housing and Urban Development

Pamela Woodside, Director, Office of Systems Integration & Efficiency, Office of the Chief Information Officer, 202–708–0614 ext. 109, 202–708–3135 (Fax), pam__woodside@hud.gov; Barbara Dorf, Office of the Secretary, 202–708–0614 ext. 4637, barbara__dorf@hud.gov; Mailing Address: Regulations Division, Office of the General Counsel, Attn: Barbara Dorf, Room 10276, 451 7th Street, SW., Washington, DC 20410.

Department of Justice

Cynthia Schwimer, Comptroller, Office of Justice Programs, 202–307–3186, 202–514–9028 (Fax), cindy@ojp.usdoj.gov.

Department of Labor

Mark Wolkow, Systems Analyst, 202–693–6829, 202–693–6964 (Fax), wolkow-mark@dol.gov; and Phyllis McMeekin, Director, Departmental Procurement Policy, 202–219–9174, 202–219–9440 (Fax), mcmeekin-phyllis@dol.gov.

Department of the Treasury

Birdie McKay, Director, Program Compliance Division, Financial Management Service, 202–874–6925, 202–874–6965 (Fax), birdie.mckay@fms.treas.gov.

Sheryl Morrow, Director, Program Assistance Division, Financial Management Service, 202–874–6847, 202–874–6965 (Fax), sheryl.morrow@fms.treas.gov.

Department of Defense

Designated lead official: Director of Defense Research and Engineering.

Please send DOD-specific comments concerning this notice to: Mark Herbst, 703–696–0372, 703–696–0569 (Fax), herbstm@acq.osd.mil; and Ron Massengill, Financial Management Analyst, 703–602–0125, 703–602–0777 (Fax), massengr@osd.pentagon.mil.

Department of Education

Mark Carney, Deputy Chief Financial Officer, Office of the Chief Financial Officer, 202–401–3892, 202–401–2455 (Fax), mark__carney@ed.gov.

Department of Veterans Affairs

W. Todd Grams, Deputy CFO and Acting CFO, 202–273–5583, todd.grams@mail.va.gov.

Environmental Protection Agency

Bruce Feldman, Branch Chief, Grants Administration Division, 202–564–5308, 202–565–2469 (Fax), feldman.bruce@epa.gov.

William Kinser, Office of Grants and Debarment, Phone: 202–564–5378, Fax: 202–565–2470, kinser.william@epa.gov.

Department of the Interior

Ceceil Belong, Grants Policy Specialist, 202–208–3474, 202–208–

6301 (Fax), ceceil__belong@ios.doi.gov; and Monica Taylor, 202–219–0213, 202–208–6940 (Fax), monica__taylor@ios.doi.gov.

Federal Emergency Management Agency

Richard Goodman, Director, Grants and Acquisition Division, 202–646–4181, 202–646–3846 (Fax), Richard.Goodman@fema.gov.

Department of Health and Human Services

George Strader, Deputy Chief Financial Officer; and Rodd Clay, Office of Grants Management, 202–690–8723, 202–690–6415 (TDD, for the hearing impaired), 202–690–8772 (Fax), rclay@os.dhhs.gov.

National Science Foundation

Jean Feldman, Head, Policy Office, Office of Budget, Finance and Award Management, 703–292–8243, 703–292–9141 (Fax), jfeldman@nsf.gov; and Rick Noll, Head, Institutional Ledger Section, Division of Financial Management, 703–292–4458, 703–292–9005 (Fax), rnoll@nsf.gov.

National Endowment for the Arts

Nicki Jacobs, Director, Grants and Contracts Office, 202–682–5546, 202–682–5610 (Fax), jacobsn@arts.endow.gov.

National Endowment for the Humanities

David Wallace, Director, Grants Office, 202–606–8494, 202–606–8633 (Fax), dwallace@neh.gov.

Institute of Museum and Library Services

Rebecca Danvers, Director of Research and Technology, 202–606–2478, rdanvers@imls.gov.

Corporation for National and Community Service

Jim Phipps, Office of Grants Management, 202–606–5000 ext. 271, 202–565–2850 (Fax), mjphipps@cns.gov.

Quinton Lynch, Grants/Financial Analyst, Office of Grants Management, 202–606–5000 ext. 160, 202–565–2850 (Fax), qlynch@cns.gov.

Department of Transportation

Robert G. Taylor, Office of the Senior Procurement Executive, 202–366–4289, 202–366–7510 (Fax), PL106107@ost.dot.gov; and Richard Meehleib, Office of Budget and Finance, Federal Highway Administration, 202–366–2869, 202–366–7510 (Fax), PL106107@ost.dot.gov.

Mailing address for comments: Office of the Senior Procurement Executive, Attn: Pub. L. 106–107–DOT, Room 7101, M–60, U. S. Department of Transportation, 400 7th St SW., Washington, DC 20590.

XII. Agency Adoptions

As stated in the common agency commitments in Section X, above, the following agencies are participating in this notice:

Department of Agriculture

For the Department of Agriculture.
Dated: December 1, 2000.

Patricia Healy,

Deputy Chief Financial Officer.

Department of Energy

For the Department of Energy.
Dated: November 16, 2000.

James J. Cavanagh,

Acting Director, Office of Procurement and Assistant Management.

Small Business Administration

For the Small Business Administration.
Dated: November 21, 2000.

Thomas Dumaresq,

Assistant Administrator for Administration.

National Aeronautics and Space Administration

For the National Aeronautics and Space Administration.
Dated: November 17, 2000.

David Havrilla,

Senior Systems Accountant.

Social Security Administration

For the Social Security Administration.
Dated: November 28, 2000.

Tom Staples,

Deputy Chief Financial Officer.

Department of Commerce

For the Department of Commerce.
Dated: November 20, 2000.

Raul Perea-Henze,

Deputy Assistant Secretary for Administration.

Department of State

For the Department of State.
Dated: November 22, 2000.

Chris Flaggs,

Office of Financial Policy, Reporting and Analysis.

Agency for International Development

For the Agency for International Development.
Dated: November 15, 2000.

Richard Nygard,

Deputy Assistant Administrator for Management.

Department of Housing and Urban Development

Initiatives Specific to the Department of Housing and Urban Development

The Department of Housing and Urban Development (HUD) has taken a number of steps to streamline management of its grant programs. Highlights of this are discussed below.

A. Creation of A Departmental Grants Management System (DGMS)

HUD is in the process of creating a department-wide Internet based system for managing its grants. The system covers the entire life cycle of a grant, including application submission, review and evaluation of a submission, award and monitoring, and finally close-out and audit. HUD currently has a number of different systems that are used for managing grants, none of which provide coverage through the entire grant life cycle, or provide a means of capturing data from the various systems to create one picture of grants across the department. The purpose of DGMS is to have information on HUD grants in one place, at one time. This will allow HUD to better monitor grantees for compliance with existing regulations and assist in assessing performance of grantees against agreed-upon performance measures. DGMS will also enable HUD to accurately report performance against the goals in the Annual Business Operating Plan and the strategic plan. DGMS will have current and active information for timely submission of HUD's Annual Progress Report to Congress. For grantees, DGMS can be a useful planning tool for the allocation and management of local financial resources and staff. DGMS will also allow grantees to have accurate knowledge of status of all their grants with HUD. The creation of DGMS has been a collaborative effort involving all arms of HUD that are directly or indirectly involved in providing information and assistance to grantees and potential applicants, or managing grants. Below are some results achieved through the DGMS development process:

- One process for accepting grant applications for all formula grants and one process for accepting competitive grant applications.
- A single unified way to commit, de-commit, obligate, and de-obligate funds to a selected applicant, issue grant

awards, and issue grant amendments for all grant awards.

• Uniform elements for conducting risk assessments of grantees.

• Uniform monitoring module for assessing grantee performance over the life of the grant.

• Uniform method for grantees to identify the projects, activities they were undertaking as part of their grant programs. DGMS will include opportunity for grantees to include tasks but in consultation with grantees, it was determined to make tasks optional.

• Tracking of grant information as it was proposed in the application and as it was approved by HUD. DGMS will also track actual fund usage and accomplishments by activity.

• Tracking of draw downs and performance in completing projects and activities on time and within budget, plus or minus 10% of the approved program budget line items and have the ability to roll the activity items up into budget line items of salaries, fringe, travel, equipment, supplies, etc. for the entire grant. Grantees asked that DGMS use the accrual system to make it easier for accounting staff and auditors to track funds.

• Applicants/Grantees will enter information directly into DGMS to avoid errors or misunderstandings among grantees and HUD staff.

• Each program will have an administrator to set-up DGMS, including creation of parameters and checklists for applicants/grantees to use. This idea came from requests by grantees and public interest groups, as well as program staff.

• Interested parties wanting to get general grant program information or applications for assistance will be able to do so at HUD's home page (www.hud.gov).

• Program administrators will give access rights to staff and grantees, who will in turn give access rights to their staff and grantees.

• Tracking of funds down to an infinite levels of sub-recipients.

• A single process for close-out and audit of all HUD grants.

B. HUD's 2020 Management Reform Efforts

Over the past several years, HUD has been reforming its management and operational practices. As part of this effort, HUD examined the various processes used to manage its portfolio of grants, subsidies and contracts. Agency staff worked to streamline grant application processes, identified areas for streamlining and elimination of paperwork, and sought ways programs could better work together. Chief among examples of where HUD has successfully streamlined its processes is HUD's Consolidated Plan which combines four separate entitlement programs (CDBG, HOME, ESG, and HOPWA) into a single planning and application process that State and local governments can use to manage their HUD program dollars; the Continuum of Care Homeless Assistance Programs which consolidated the application and submission process for a variety of programs (Supportive Housing, Shelter Plus Care, Section 8 moderate Rehabilitation Single Room Occupancy); and the HOPE VI Revitalization program which includes demolition, revitalization, and Section 8 program funds into a single application. The Consolidated Plan won Harvard University's Innovations In Government Award in 1998; the Continuum of Care won this prestigious award in 1999; and HOPE VI in the year 2000.

The same effort that has gone into reforming HUD's programs is being used to reform HUD's management of its grant programs. Using a collaborative re-engineering process, HUD is currently working in Legal Joint Application Design sessions with the Office of General Counsel on streamlining application forms, developing common grant award documents, and standardized terms and conditions for formula and competitive grant awards.

C. Notice of Funding Availability (NOFA)

HUD now publishes all its competitive grant NOFAs at one time in a ''SuperNOFA.'' Grant funding opportunities were previously announced at various times during the year, and often had varying policies and requirements for applications. With the SuperNOFA, HUD has established standardized policies and language for the following:

• Deadlines and acceptance of applications for competitive grants.

• Submission procedures for all applications.

• Basic criteria for rating and ranking applications—Capacity of the Applicant and Organizational Staff to Perform the Work; Need/Extent of the Problem; Soundness of Approach; Leveraging Resources; and Comprehensiveness and Coordination.

• Encouragement of applicants to participate in HUD policy initiatives.

• Eligibility based on program statutory and regulatory requirements.

• Threshold requirement for compliance with Fair Housing and Civil Rights Laws.

• Threshold requirements for compliance with the Americans With Disabilities Act of 1990, and if applicable, compliance with Section 3 of the Housing and Urban Development Act of 1968 for providing economic opportunities for Low and Very-Low Income Persons; and Affirmatively Furthering Fair Housing.

• Application of requirements under the Uniform Relocation Assistance and Real Property Acquisition Act of 1970, as amended, and the governmentwide rule in 49 CFR part 24.

• Use of Standard Forms in the application submission.

• Applicability of environmental requirements under 24 CFR part 50 and part 58.

• Applicability of OMB Circulars and provided information on how to obtain copies.

• Bonus Points in Rating Applications.

• Grant negotiations.

• Correction of Deficient Applications.

• Adjustments to Funding.

• Prohibitions on Lobbying.

• Requirements for documentation and public access under Section 102 of the HUD Reform Act of 1989 and the regulations codified in 24 CFR part 4, Subpart A in a uniform manner.

• Application forms that apply to all applications, in addition to program specific forms.

For the Department of Housing and Urban Development.

Gloria R. Parker,

Chief Information Officer.

Department of Justice

For the Department of Justice.
Dated: November 17, 2000.

Stephen R. Colgate,

Assistant Attorney General for Administration.

Department of Labor

For the Department of Labor.
Dated: November 20, 2000.

Ken Bresnahan,

Chief Financial Officer.

Department of the Treasury

For the Department of the Treasury.
Dated: November 16, 2000.

Paul Gist,

Director of Asset Management Directorate.

Department of Defense

For the Department of Defense.

Dated: November 30, 2000.

Patricia L. Toppings,

Alternate Office of the Secretary of Defense Federal Register Liaison Officer.

Department of Education.

For the Department of Education.

Dated: November 20, 2000.

Thomas P. Skelly,

Acting Chief Financial Officer.

Department of Veterans Affairs

For the Department of Veterans Affairs.

W. Todd Grams,

Deputy Chief Financial Officer and Acting Chief Financial Officer.

Environmental Protection Agency

For the Environmental Protection Agency.

Dated: November 17, 2000.

Marty Monell,

Director, Grants Administration Division.

Department of the Interior

For the Department of the Interior.

Dated: November 14, 2000.

Debra E. Sonderman,

Director, Office of Acquisition and Property Management.

Federal Emergency Management Agency.

For the Federal Emergency Management Agency.

Dated: November 13, 2000.

Richard Goodman,

Director, Grants and Acquisition Division.

Department of Health and Human Services

For the Department of Health and Human Services.

Dated: November 22, 2000.

Terrence J. Tychan,

Deputy Assistant Secretary for Grants and Acquisition Management.

National Science Foundation

For the National Science Foundation.

Dated: November 17, 2000.

Lawrence Rudolph,

General Counsel.

National Foundation on the Arts and the Humanities

For the National Endowment for the Arts.

Dated: November 17, 2000.

Laurence Baden,

Deputy Chairman for Management and Budget.

For the National Endowment for the Humanities.

Dated: November 20, 2000.

John Roberts,

Deputy Chairman.

Institute of Museum and Library Services

For the Institute of Museum and Library Services.

Dated: December 6, 2000.

Rebecca Danvers,

Director of Research and Technology.

Corporation for National and Community Service

For the Corporation for National and Community Service.

Dated: November 16, 2000.

Anthony Musick,

Chief Financial Officer.

Department of Transportation

For the Department of Transportation.

David K. Kleinberg,

Deputy Chief Financial Officer.

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Federal Register

Wednesday,
January 17, 2001

Part XIII

Department of Labor

Office of the Secretary

Civil Rights Center; Enforcement of Title VI of the Civil Rights Act of 1964; Policy Guidance on the Prohibition Against National Origin Discrimination as it Affects Persons With Limited English Proficiency; Notice

DEPARTMENT OF LABOR

Office of the Secretary

Civil Rights Center; Enforcement of Title VI of the Civil Rights Act of 1964; Policy Guidance on the Prohibition Against National Origin Discrimination As It Affects Persons With Limited English Proficiency

AGENCY: Office of the Secretary, Labor.

ACTION: Notice of policy guidance with request for comment.

SUMMARY: The United States Department of Labor (DOL) is publishing policy guidance on Title VI's prohibition against national origin discrimination as it affects limited English proficient persons.

DATES: This guidance is effective immediately. Comments must be submitted on or before March 19, 2001. DOL will review all comments and will determine what modifications to the policy guidance, if any, are necessary.

ADDRESSES: Interested persons should submit written comments to Ms. Annabelle T. Lockhart, Director, Civil Rights Center, U.S. Department of Labor, 200 Constitution Ave., NW., Room N–4123, Washington, DC 20210; Comments may also be submitted by e-mail at: lockhart-annabelle@dol.gov.

FOR FURTHER INFORMATION CONTACT: Annabelle Lockhart or Naomi Barry at the Civil Rights Center, U.S. Department of Labor, 200 Constitution Ave., NW., Room N–4123, Washington, DC 20210. Telephone 202–219–7026; TDD: 202–693–6516. Arrangements to receive the policy guidance in an alternative format may be made by contacting the named individuals.

SUPPLEMENTARY INFORMATION: Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, *et seq.* and its implementing regulations provide that no person shall be subjected to discrimination on the basis of race, color, or national origin under any program or activity that receives federal financial assistance.

The purpose of this policy guidance is to clarify the responsibilities of recipients of federal financial assistance (''recipients'') from the U.S. Department of Labor (DOL), and assist them in fulfilling their responsibilities to limited English proficient (LEP) persons, pursuant to Title VI of the Civil Rights Act of 1964 and implementing regulations. The policy guidance reiterates DOL's longstanding position that in order to avoid discrimination against LEP persons on the grounds of national origin, recipients must take reasonable steps to ensure that such persons receive the language assistance necessary to afford them meaningful access to the programs, services, and information those recipients provide, free of charge. The text of the complete guidance document appears below.

Signed at Washington, D.C. this 11th of January 2001.

Alexis M. Herman,

Secretary of Labor.

Equal Opportunity Guidance Memorandum

January 3, 2001.

To: Recipients of Federal Financial Assistance from the United States Department of Labor

From: Annabelle T. Lockhart, Director, Civil Rights Center, Department of Labor

Subject: Prohibition Against National Origin Discrimination As It Affects Persons With Limited English Proficiency

Purpose

Pursuant to Executive Order 13166, entitled ''Improving Access to Services for Persons with Limited English Proficiency,'' issued by President Clinton on August 11, 2000, the U.S. Department of Labor's Civil Rights Center (''CRC'') issues this memorandum, which addresses linguistic or language access, to offer guidance with respect to the responsibilities of recipients of federal financial assistance (''recipients'') from the Department of Labor (''DOL'') in serving persons of limited English proficiency (''LEP''), pursuant to the requirements of Title VI of the Civil Rights Act of 1964 (''Title VI'') and section 188 of the Workforce Investment Act of 1998 (''section 188''). This policy guidance does not create new obligations but, rather, clarifies standards consistent with case law and well-established legal principles developed under Title VI. The CRC provides substantial technical assistance to recipients, and will continue to be available to provide such assistance to any recipient seeking to ensure that it operates an effective language assistance program.

Background

English is the predominant language of the United States. According to the 1990 Census (the most recent data available), English is spoken by 95 percent of U.S. residents. Of those U.S. residents who speak languages other than English at home, the 1990 Census reports that 57 percent above the age of four speak English ''well to very well.''

The United States is also, however, home to millions of national origin minority individuals who are ''limited English proficient,'' including immigrants, some children of immigrants born in the United States, and other non-English speakers born in the United States, including some Native Americans. National statistics on the LEP population demonstrate that Spanish is the primary language for which assistance may be needed. Many recipients of DOL financial assistance have already implemented processes to improve services for Spanish speakers. However, other nationally significant language groups exist, including those that speak Chinese, French, Italian, German, Vietnamese, Laotian, and Khmer (Cambodian). Moreover, depending on the region of the country, countless other language groups may require assistance to access meaningful government assistance. Because of language differences and the inability to speak or understand English, LEP persons are often excluded from programs and activities, experience delays or denials of services, or receive assistance and services based on inaccurate or incomplete information. Such exclusions, delays or denials may constitute discrimination on the basis of national origin, in violation of Title VI and section 188.

In the course of its enforcement activities, CRC has found that persons who lack proficiency in English are unable to obtain basic knowledge on how to access various benefits and services for which they may be eligible, such as Unemployment Insurance, Job Corps, or other DOL funded employment programs and activities. For example, many intake interviewers and other front line employees who interact with LEP individuals are neither bilingual nor trained in how to properly serve LEP persons. As a result, LEP applicants are often either turned away, forced to wait for substantial periods of time, forced to find their own interpreter who is not often qualified to interpret, or forced to make repeated visits to the recipient's program offices until interpreters are available to provide assistance.

Some employment benefits, services, and job training providers have sought to bridge the language gap by encouraging language minority clients to provide their own interpreters as an alternative to the recipient's use of qualified bilingual employees or interpreters. Persons of limited English proficiency must sometimes rely on their minor children to interpret for them during visits to an employment services or job training facility. Alternatively, these clients may be required to call upon neighbors or even

strangers they encounter at the recipients' program offices to act as interpreters or translators.

These practices have severe drawbacks and may violate Title VI and Section 188. In each case, the impediments to effective communication and adequate service are formidable. The LEP client's untrained ''interpreter'' is often unable to understand the concepts or official terminology s/he is being asked to interpret or translate. Even if the interpreter possesses the necessary language and comprehension skills, his or her mere presence may obstruct the flow of confidential information to the recipient. This is because the LEP client would naturally be reluctant to disclose or discuss intimate details of personal and family life in front of his or her child or a complete stranger who has no formal training or obligation to observe confidentiality.

When these types of circumstances are encountered, the level and quality of employment benefits, services, and job training available to persons of limited English proficiency stand in stark conflict to Title VI and section 188's promise of equal access to federally assisted programs and activities. Services denied, delayed or provided under adverse circumstances have serious consequences for a LEP person and may constitute discrimination on the basis of national origin in violation of Title VI and section 188. Accommodation of these language differences through the provision of effective language assistance will promote compliance with Title VI and section 188.

Although CRC's enforcement authority derives from Title VI and section 188, the duty of recipients to ensure that LEP persons can meaningfully access programs and services flows from a host of additional sources, including federal and state laws and regulations. In addition, the duty to provide appropriate language assistance to LEP individuals is not limited to the employment benefits, services, and job training context. Numerous federal laws require the provision of language assistance to LEP individuals seeking to access critical services and activities. For instance, the Voting Rights Act bans English-only elections in certain circumstances and outlines specific measures that must be taken to ensure that language minorities can participate in elections. *See* 42 U.S.C. 1973 b(f)(1). Similarly, the Food Stamp Act of 1977 requires states to provide translation and interpretation assistance to LEP persons under certain circumstances. *See* 42 U.S.C. 2020(e) (1) and (2). These and other provisions reflect the sound judgment that providers of critical services and benefits bear the responsibility for ensuring that LEP individuals can meaningfully access their programs and services.

This policy guidance is consistent with the Department of Justice (''DOJ'') LEP Guidance, which addresses the application of Title VI's prohibition against national origin discrimination when information is provided in English to LEP persons.[1] It is also consistent with a government-wide Title VI regulation issued by DOJ in 1976, ''Coordination of Enforcement of Nondiscrimination in Federally Assisted Programs,'' 28 CFR part 42, subpart F, that addresses the circumstances in which recipients must provide translation assistance to LEP persons.[2]

Legal Authority

Introduction

CRC has conducted investigations and reviews involving language differences that impede the access of LEP persons to employment benefits, services, and job training in programs and activities that are financially assisted by DOL. Where the failure to accommodate language differences discriminates on the basis of national origin, CRC has required recipients to provide appropriate language assistance to LEP persons. For instance, CRC has entered into voluntary compliance agreements that require recipients who operate employment benefits, services, and job training programs or activities to ensure that there are bilingual employees or language interpreters to meet the needs of LEP persons seeking services. CRC has also required these recipients to provide written materials and post notices in languages other than English. The legal authority for CRC's enforcement actions is Title VI and Section 188, the implementing regulations, and a consistent body of case law.

[1] The DOJ LEP Guidance was issued August 11, 2000. (65 FR 50123, August 16, 2000.)

[2] The DOJ coordination regulations at 28 CFR 42.405(d)(1) provide that ''[w]here a significant number or proportion of the population eligible to be served or likely to be directly affected by a federally assisted program needs service or information in a language other than English in order effectively to be informed of or to participate in the program, the recipient shall take reasonable steps, considering the scope of the program and the size and concentration of such population, to provide information in appropriate languages to such persons. This requirement applies with regard to written materials of the type which is ordinarily distributed to the public.''

Statute and Regulations

Section 601 of Title VI, 42 U.S.C. 2000d *et seq.* states: ''No person in the United States shall on the grounds of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.''

Department of Labor Regulations implementing Title VI, provide in part at 29 CFR 31.3 (b):

(1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on the grounds of race, color or national origin:

(i) Deny an individual any service, financial aid, or other benefit provided under the program;

(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program * * *;

(2) A recipient, in determining the types of services, financial aid or other benefits, or facilities that will be provided under any such program, or the class of individuals to whom, or the situations in which such services, financial aid or other benefits, or facilities will be provided * * * *may not directly, or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination, because of their race, color or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color or national origin (emphasis added) * * *.*

Section 188 of the Workforce Investment Act adopts the same prohibition against national origin discrimination that is found in Title VI: ''No individual shall be excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in the administration of or in connection with any such program because of race, color, national origin, sex, religion, disability, political affiliation or belief, citizenship, or age.''

Regulations implementing the nondiscrimination and equal opportunity provisions of section 188 of the Workforce Investment Act of 1998, speak specifically to national origin discrimination and language access at 29 CFR 37.35:

(a) A significant number or proportion of the population eligible to be served, or likely to be directly affected, by a WIA Title I-financially assisted program or activity may need services or information in a language other than English in order to be effectively informed about, or able to participate in, the program or activity. Where such a significant

number or proportion exists, a recipient must take the following actions:

(1) Consider:

(i) The scope of the program or activity; and

(ii) The size and concentration of the population that needs services or information in a language other than English; and

(2) Based on those considerations, take reasonable steps to provide services and information in appropriate languages. This information must include the initial and continuing notice required under §§ 37.29 and 37.30, and all information that is communicated under § 37.34.

(b) In circumstances other than those describe in paragraph (a) of this section, a recipient should nonetheless make reasonable efforts to meet the particularized language needs of limited-English speaking individuals who seek services or information from the recipient.

Title VI and the Department of Labor regulations implementing Title VI published at 29 CFR part 31 apply to any program or activity receiving federal financial assistance from the Department of Labor. Some programs and activities receiving federal financial assistance from the Department of Labor are covered only under Title VI and the Department of Labor's Title VI regulations (*e.g.,* programs receiving assistance through the Mine Safety and Health Act and the Occupational Safety and Health Act).

Some programs and activities receiving Department of Labor financial assistance, i.e., those that receive financial assistance under Title I of WIA, are covered under both the DOL Title VI regulations and the section 188 implementing regulations. The regulation at 29 CFR 37.3 states that compliance with the regulations in 29 CFR part 37 will satisfy obligations of the recipient to comply with 29 CFR part 31.

The section 188 implementing regulations found in 29 CFR part 37 apply to any program or activity receiving financial assistance under Title I of WIA. In addition, the section 188 implementing regulations apply to programs and activities that are part of the One-Stop delivery system and that are operated by One-Stop partners listed in section 121(b) of WIA, to the extent that the programs and activities are being conducted as part of the One-Stop delivery system. Some One-Stop programs and activities receive federal financial assistance from other federal agencies (*e.g.,* Department of Education and Department of Housing and Urban Development). For purposes of the regulations in 29 CFR Part 37, however, ''One-Stop partners,'' as defined in section 121(b) of WIA, are treated as ''recipients,'' and are subject to the nondiscrimination requirements to the extent that they participate in the One-Stop delivery system. Some programs and activities that are part of the One-Stop delivery system and that receive financial assistance from a federal grantmaking agency other than the Department of Labor are covered under the Section 188 implementing regulations, but not under DOL's Title VI regulations. However, these programs and activities are subject to the Title VI regulations of a federal grantmaking agency other than the Department of Labor.

Although the regulatory language differs, the obligations of recipients to ensure accessibility by LEP persons to DOL financially assisted programs and activities are the same under Title VI and section 188. Accordingly, the CRC will apply the same standards in determining compliance with these obligations.

State and local laws may provide additional obligations to serve LEP individuals, but such laws cannot compel recipients of federal financial assistance to violate Title VI. For instance, given our constitutional structure, state or local ''English-only'' laws do not relieve an entity that receives federal funding from its responsibilities under federal anti-discrimination laws. Entities in states and localities with ''English-only'' laws are certainly not required to accept federal funding—but if they do, they have to comply with Title VI, including its prohibition against national origin discrimination by recipients of federal assistance. Failing to make federally assisted programs and activities accessible to individuals who are LEP will, in certain circumstances, violate Title VI.

Case Law

Extensive case law affirms the obligation of recipients of Federal financial assistance to ensure that LEP persons can meaningfully access Federally-assisted programs and activities.

The U.S. Supreme Court, in *Lau* v. *Nichols,* 414 U.S. 563 (1974), recognized that recipients of federal financial assistance have an affirmative responsibility, pursuant to Title VI, to provide LEP persons with meaningful opportunities to participate in public programs and activities. In *Lau* v. *Nichols,* the Supreme Court ruled that a public school system's failure to provide English language instruction to students of Chinese ancestry who did not speak English denied the students meaningful opportunities to participate in a public educational program in violation of Title VI. In providing the same services to the LEP students as it did for English proficient students—an education provided solely in English—the Supreme Court observed that ''it seems obvious that the Chinese-speaking minority received fewer benefits than the English-speaking majority from respondent's school system which denies them a meaningful opportunity to participate in the educational program. * * *'' Courts have applied the doctrine articulated in *Lau* both inside and outside the education context, including in cases involving driver's license tests and material relating to unemployment benefits.

As early as 1926, the Supreme Court recognized that language rules were often discriminatory. In *Yu Cong Eng et al.* v. *Trinidad, Collector of Internal Revenue,* 271 U.S. 500 (1926), the Supreme Court found that a Philippine Bookkeeping Act that prohibited the keeping of accounts in languages other than English, Spanish and Philippine dialects violated the Philippine Bill of Rights that Congress had patterned after the U.S. Constitution. The Court found that the Act deprived Chinese merchants, who were unable to read, write or understand the required languages, of liberty and property without due process.

In *Gutierrez* v. *Municipal Court of S.E. Judicial District,* 838 F.2d 1031,1039 (9th Cir. 1988), vacated as moot, 490 U.S. 1016 (1989), the court recognized that requiring the use of English only is often used to mask national origin discrimination. Citing McArthur, ''Worried About Something Else,'' 60 Int'l J. Soc. Language, 87, 90–91 (1986), the court stated that because language and accents are identifying characteristics, rules that have a negative effect on bilingual persons, individuals with accents, or non-English speakers may be mere pretexts for intentional national origin discrimination.

Another case that noted the link between language and national origin discrimination is *Garcia* v. *Gloor,* 618 F.2d 264 (5th Cir. 1980) *cert. denied,* 449 U.S. 1113 (1981). The court found that on the facts before it a workplace English-only rule did not discriminate on the basis of national origin since the complaining employees were bilingual. However, the court stated that ''to a person who speaks only one tongue or to a person who has difficulty using another language other than the one spoken in his home, language might well be an immutable characteristic like skin color, sex or place of birth.'' *Id.* At 269.

Again, in the employment context, the Court in *Pabon* v. *Levine,* 70 FRD 674 (S.D.N.Y. 1976), found that the plaintiffs, who challenged the state's failure to provide unemployment insurance information in languages other than English, properly raised a claim under Title VI.

Most recently, the Eleventh Circuit in *Sandoval* v. *Hagan,* 197 F. 3d 484 (11th Cir. 1999), *cert. granted sub. Nom., Alexander* v. *Sandoval,* 147 L. Ed. 2d 1051 (U.S. Sept. 26, 2000) (No. 99–1908) (accepting case to address whether or not there is a private right of action under Title VI), held that the State of Alabama's policy of administering a driver's license examination in English only was a facially neutral practice that had an adverse effect on the basis of national origin, in violation of Title VI. The court specifically noted the nexus between language policies and potential discrimination based on national origin. That is, in *Sandoval,* the vast majority of individuals who were adversely affected by Alabama's English-only driver's license examination policy were national origin minorities.

In the employment benefits, services, and job training context, a recipient's failure to provide appropriate language assistance to LEP individuals parallels many of the fact situations discussed in the cases above and, as in those cases, may have an adverse effect on the basis of national origin, in violation of Title VI.

The Title VI regulations prohibit both intentional discrimination and policies and practices that appear neutral but have a discriminatory effect. Thus, a recipient's policies or practices regarding the provision of benefits and services to LEP persons need not be intentional to be discriminatory, but may constitute a violation of Title VI and section 188 if they have an adverse effect on the ability of national origin minorities to meaningfully access programs and services. Accordingly, it is useful for recipients to examine their policies and practices to determine whether they adversely affect LEP persons. This policy guidance provides a legal framework to assist recipients in conducting such assessments.

Policy Guidance

Who Is Covered

All entities that receive federal financial assistance from the Department of Labor, either directly or indirectly, through a grant, contract or subcontract, are covered by this policy guidance. For purposes of section 188, covered entities include, but are not limited to: state-level agencies that administer, or are financed in whole or in part with, WIA Title I funds; State Employment Security Agencies; State and local Workforce Investment Boards; local Workforce Investment Areas (''LWIA'') grant recipients; One-Stop operators; service providers, including eligible training providers; On-the-Job Training (OJT) employers; Job Corps contractors and center operators; Job Corps national training contractors; outreach and admissions agencies, including Job Corps contractors that perform these functions; and other national program recipients.[3] Entities may be receiving financial assistance through one or more of a number of DOL administered statutes, including, but not limited to, the Wagner-Peyser Act, the Workforce Investment Act, Welfare-to-Work, the Older Americans Act, the Social Security Act, the Mine Safety and Health Act, and the Occupational Safety and Health Act.

The term federal financial assistance to which Title VI applies includes, but is not limited to, grants and loans of federal funds, grants or donations of federal property, details of federal personnel, or any agreement, arrangement or other contract that has as one of its purposes the provision of assistance (see, 45 CFR 80.13(f); Appendix A to the Title VI regulations, and 29 CFR 37.4, for additional discussion of what constitutes federal financial assistance).

Title VI prohibits discrimination in any program or activity that receives federal financial assistance. What constitutes a program or activity covered by Title VI was clarified by Congress in 1988, when the Civil Rights Restoration Act of 1987 (''CRRA'') was enacted. The CRRA provides that, in most cases, when a recipient receives federal financial assistance for a particular program or activity, all operations of the recipient are covered by Title VI, not just the part of the program or activity that uses the federal assistance. Thus, all parts of the recipient's operations would be covered by Title VI, even if the federal assistance is used only by one part. The definition of a WIA Title I-funded program or activity can be found at 29 CFR 37.4. Costs associated with providing meaningful access to LEP persons are considered allowable administrative costs.

[3] One-Stop participants that receive financial assistance from a federal grantmaking agency other than the Department of Labor are subject to the Title VI implementing regulations and guidance of that grantmaking agency.

Basic Requirements Under Title VI and Section 188

A recipient whose policies, practices or procedures exclude, limit, or have the effect of excluding or limiting, the participation of any LEP person in a federally assisted program or activity on the basis of national origin may be engaged in discrimination in violation of Title VI and Section 188. In order to ensure compliance with Title VI and section 188, recipients must take steps to ensure that LEP persons who are eligible have meaningful access during all hours of operation to the recipients' programs and services. The most important step in meeting this obligation is for recipients of federal financial assistance to provide the language assistance necessary to ensure such access, at no cost to the LEP person.

On August 11, 2000, the President issued Executive Order 13166 titled ''Improving Access to Services by Persons With Limited English Proficiency .'' 65 FR 50121 (August 16, 2000). On the same day, the Assistant Attorney General for Civil Rights issued a Policy Guidance Document titled ''Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons With Limited English Proficiency'' (hereinafter referred to as ''DOJ LEP Guidance''), reprinted at 65 FR 50123 (August 16, 2000).

Executive Order 13166 requires Federal departments and agencies extending financial assistance to develop and make available guidance on how recipients should, consistent with the DOJ LEP Guidance and Title VI of the Civil Rights of 1964, as amended, assess and address the needs of otherwise eligible limited English proficient persons seeking access to federally assisted programs and activities. The DOJ LEP Guidance, in turn, provides general guidance on how recipients can ensure compliance with their Title VI obligation to ''take reasonable steps to ensure 'meaningful' access to the information and services they provide.'' DOJ LEP Guidance, 65 FR at 50124. The DOJ LEP Guidance goes on to provide that [w]hat constitutes reasonable steps to ensure meaningful access will be contingent on a number of factors. Among the factors to be considered are the size of the recipient; the size of the eligible LEP population to serve; the nature of the program or service; the objectives of the program or service; the total resources available to the recipient; the frequency with which particular languages other than English are encountered; and, the

frequency with which LEP persons come into contact with the program or service. Of these factors, the following four are considered the most pivotal to determining the nature of the language assistance provided by a recipient: the number or proportion of LEP individuals eligible to participate or likely to be directly or significantly affected by the program or activity; the frequency of contact a participant or beneficiary is required to have with the program or activity; the nature and importance of the program or activity to the participant or beneficiary; and, the resources available to the recipient in carrying out the program or activity. These factors constitute what herein after will be referred to as the elements of the ''four-factor analysis.'' This Guidance for DOL is consistent with the compliance standards set out in the DOJ LEP Guidance.

The type of language assistance a recipient provides to ensure meaningful access will depend on a variety of factors, Programs and activities that serve a few or even one LEP person are still subject to the Title VI and section 188 obligation to take reasonable steps to provide meaningful opportunities for access. However, a factor in determining the reasonableness of a recipient's efforts is the number or proportion of people who will be excluded from the program or activity absent efforts to remove language barriers. The steps that are reasonable for a recipient who serves one LEP person a year will be different than those expected from a recipient who serves several LEP persons each day.

The importance of the recipient's program or activity to participants or beneficiaries will affect the determination of what is ''reasonable.'' More affirmative steps must be taken in programs and activities where the denial of access may have serious implications, such as the receipt of Unemployment Insurance benefits. In assessing the effect of denying access, recipients must consider the importance of the benefit to individuals both immediately and in the long-term.

The resources available to a recipient of federal financial assistance may have an impact on the nature of the steps that recipients must take. For example, a small recipient with limited resources may not have to take the same steps as a larger recipient to provide LEP assistance in programs and activities that have a limited number of eligible LEP individuals, where contact is infrequent, and/or where the program or activity is not crucial to an individual's day-to-day existence. Claims of limited resources, especially from larger entities, will need to be well-substantiated.

Frequency of contacts between the program or activity and LEP individuals is another factor to be considered. For example, if a LEP individual must access a program or service on a daily basis, such as activities provided in a job training program, a recipient has greater duties than if program or activity contact is unpredictable or infrequent. LEP individuals must be able to access and participate in job training activities in a manner equally consistent and effective to that offered to non-LEP persons.

There is no ''one size fits all'' solution for Title VI and section 188 compliance with respect to LEP persons. CRC will make its assessment of the language assistance needed to ensure meaningful access on a case by case basis, and a recipient will have considerable flexibility in determining precisely how to fulfill this obligation. CRC will focus on the end result—whether the recipient has taken the necessary steps to ensure that LEP persons have meaningful access to programs and services.

The key to providing meaningful access for LEP persons, including LEP persons likely to be directly or significantly affected (*e.g.*, LEP parents of non-LEP students) is to ensure that the recipient and LEP person can communicate effectively. The steps taken by a recipient must ensure that the LEP person is given adequate information, is able to understand the services and benefits available, and is able to receive those for which he or she is eligible, free-of-charge. The recipient must also ensure that the LEP person can effectively communicate the relevant circumstances of his or her situation to the service provider.

Effective language assistance programs usually contain the four elements described in the following section. In reviewing complaints and conducting compliance reviews, CRC will consider a program or activity to be in compliance when the recipient effectively incorporates and implements these four elements. The failure to incorporate or implement one or more of these elements does not necessarily mean noncompliance with Title VI and Section 188, and CRC will review the totality of the circumstances to determine whether LEP persons can meaningfully access the services and benefits of the recipient.

Ensuring Meaningful Access to LEP Persons

Introduction—The Four Keys to Title VI and Section 188 Compliance in the LEP Context

The key to ensuring meaningful access to services and benefits for LEP persons is to guarantee that the language assistance provided results in accurate and effective communication between the recipient and LEP applicant/client about the types of services and/or benefits available and about the applicant's or client's circumstances. Although DOL recipients have considerable flexibility in fulfilling this obligation, effective programs usually consist of the following four elements:

I. Assessment. The recipient conducts a thorough annual assessment of the language needs of the population to be served;

II. Development and Implementation of a Written Policy on Language Access. The recipient develops and implements a comprehensive written policy that will ensure meaningful communication. This plan is amended on an annual basis, as needed, depending on the local service population;

III. Training of Staff. The recipient takes steps to ensure that staff understands the policy and is capable of carrying it out; and

IV. Vigilant Monitoring. The recipient conducts regular oversight of the language assistance program to ensure that LEP persons can meaningfully access the program or activity.

The failure to implement one or more of these measures does not necessarily mean noncompliance with Title VI and section 188, and CRC will review the totality of the circumstances in each case. If implementation of one or more of these options would be so financially burdensome as to defeat the legitimate objectives of a recipient's program or activity, and if there are equally effective alternatives for ensuring that LEP persons have meaningful access to programs and services, CRC will not find the recipient in noncompliance. However, in reviewing recipients' compliance, the CRC will seek documentation and evidence that the recipient considered and, when appropriate, incorporated these elements into their language assistance programs.

I. Assessment

The first key to ensuring meaningful access is for the recipient to assess the language needs of the affected population. A recipient assesses language needs by:

• Identifying the languages other than English that are likely to be encountered in its program or activity and by estimating the number of LEP persons that are eligible for services and/or benefits and that are likely to be directly affected by its program or activity. This can be done by reviewing data from a combination of sources, including the census and state labor market information systems, client utilization data from client files, and statistics from school systems and community agencies and organizations. When a recipient believes that the provision of aid, services, benefits, or training to LEP persons has not been effective in the past, the primary source of data from which estimates of the eligible LEP population is made should not stem from client utilization data from client files;

• Determining the language needs of LEP clients, keeping in mind that some LEP individuals will not self-identify as LEP out of fear that their level of participation will be curtailed by their inability to communicate in the English language;

• Recording LEP status in clients' files to ensure that LEP individuals are consistently communicated with in the appropriate language as they navigate all stages of the recipient's program;

• Locating the points of contact of all stages of the program or activity where language assistance is likely to be needed;

• Reviewing delivery systems to determine whether any program system denies or limits participation by LEP individuals. For example, many states have implemented telephone certification systems for Unemployment Insurance programs. Telephone systems often only provide instructions in English, or in some cases, Spanish. Some states require UI applicants to request a waiver from participation in this system even if they are LEP. Programs offering computer-based technologies may encounter circumstances that similarly limit meaningful participation;

• Understanding circumstances in which, although the participant and/or beneficiary can communicate effectively in English, assistance may be needed when interacting with other pertinent individuals. For example, if a student under the age of eighteen needs his/her parents' signature to participate in a summer employment program, both written and oral language assistance may be necessary to provide information and obtain the necessary permission;

• Assessing the resources that will be needed to provide effective language assistance and the location and availability of these resources; and,

II. Development and Implementation of a Written Policy on Language Access

All recipients are required to ensure effective communication by developing and implementing a comprehensive written language assistance program that includes policies and procedures for identifying and assessing the language needs of its LEP applicants/clients and that provides for a range of interpreter assistance, notification to LEP persons in appropriate languages of the right to free language assistance, periodic training of staff, monitoring of the program, and translation of written materials in certain circumstances.[4] Certain recipients of DOL financial assistance are required, per 29 CFR 37.54, to establish and adhere to a Methods of Administration (''MOA''). Per the regulations, MOAs must be in writing, reviewed and updated every two years as required by Section 37.55, and, at a minimum, describe how the state programs and recipients have satisfied the requirements of regulations, including those found at Sections 37.35 and 37.42 (Section 37.35 can be found on pages 5–6 of this document).

Oral Language Interpretation

In designing an effective language assistance program, a recipient should develop procedures for obtaining and providing trained and competent interpreters and other interpretation services, in a timely manner, by taking some or all of the following steps:

• Hiring bilingual staff who are trained and competent in the skill of interpreting;

• Hiring staff interpreters who are trained and competent in the skill of interpreting;

• Contracting with an outside interpreter service for qualified interpreters;

• Arranging formally for the services of volunteers who are qualified interpreters;

• Arranging/contracting for the use of a telephone language interpreter service.

The following provides guidance to recipients in determining which language assistance options will be of sufficient quantity and quality to meet the needs of their LEP beneficiaries:

Bilingual Staff: Hiring bilingual staff for applicant and client contact positions facilitates participation by LEP persons. The ability of staff members to communicate directly with LEP clients, without third-party interpretation and translation assistance, maximizes agency resources and permits LEP clients to more fully engage in programs and services. However, where there are a variety of LEP language groups in a recipient's service area, this option may be insufficient to meet the needs of all LEP applicants and clients. Where this option is insufficient to meet the needs, the recipient must provide additional and timely language assistance. The qualifications of both current and future bilingual staff must be reviewed to ensure demonstrated proficiency in English and the second language, orientation and training on the skills and ethics of interpretation, and fundamental knowledge in both languages of any specialized terms or concepts.

Staff Interpreters: Paid staff interpreters are especially appropriate where there is a frequent and/or regular need for interpreting services. The qualifications of both current and future staff interpreters must be reviewed to ensure demonstrated proficiency in English and the second language, orientation and training on the skills and ethics of interpretation, and fundamental knowledge in both languages of any specialized terms or concepts. Staff interpreters must be readily available.

Contract Interpreters: The use of contract interpreters may be an option for recipients that have infrequent needs for interpreting services, have less common LEP language groups in their service areas, or need to supplement their in-house capabilities on an as-needed basis. Where non-staff interpreters are used, appropriate training must be provided. Training should include orientation and training on the skills and ethics of interpretation and fundamental knowledge in both languages of any specialized terms or concepts. Contract interpreters must also be readily available.

Community Volunteers: Use of community volunteers may provide recipients with a cost-effective method for providing interpreter services. However, experience has shown that to use community volunteers effectively, recipients must ensure that formal arrangements for interpreting services are made with community organizations so that these organizations are not

[4] Both the Americans with Disabilities Act and section 504 of the Rehabilitation Act of 1973 prohibit discrimination on the basis of disability and require entities to provide language assistance such as sign language interpreters for hearing impaired individuals or alternative formats such as braille, large print or tape for vision impaired individuals. In developing a comprehensive language assistance program, recipients should be mindful of their responsibilities under the ADA and section 504 to ensure access to programs and activities for persons with disabilities.

subjected to *ad hoc* requests for assistance. In addition, recipients must ensure that these volunteers are qualified to interpret and understand their obligation to maintain client confidentiality. Where community volunteers are used, appropriate training must be provided. Training should include orientation and training on the skills and ethics of interpretation and fundamental knowledge in both languages of any specialized terms or concepts. Additional language assistance must be provided where competent volunteers are not readily available during all hours of service.

Telephone Interpreter Lines: A telephone interpreter service line may be a useful option as a supplemental system, or may be useful when a recipient encounters a language that it cannot otherwise accommodate. Such a service often offers interpreting assistance in many different languages and usually can provide the service in quick response to a request. However, recipients should be aware that such services may not always have readily available interpreters who are familiar with the terminology peculiar to the particular program or service. This method may also be inadequate if and when documents need to be reviewed. It is important that a recipient not offer this as the only language assistance option except where other language assistance options are unavailable.

Three recurring issues in the area of interpreter services involve (a) the use of friends, family, or minor children as interpreters; (b) the level of language ability; and, (c) the need to ensure that interpreters are qualified.

(a) *Use of Friends, Family, or Minor Children as Interpreters:* A recipient may expose itself to liability under Title VI and section 188 if it requires, suggests, or encourages a LEP person to use friends, family members, or minor children, as interpreters, as this could compromise the effectiveness of the service. Use of such persons could result in a breach of confidentiality or reluctance on the part of individuals to reveal personal information critical to their situations. In addition, family and friends usually are not competent to act as interpreters, since they are often insufficiently proficient in both languages, unskilled in interpretation, and unfamiliar with specialized terminology.

If after a recipient informs a LEP person of the right to free interpreter services, the person declines such services and requests the use of a family member or friend, the recipient may use the family member or friend, if the use of such a person would not compromise the effectiveness of services or violate the LEP person's confidentiality. The recipient should make efforts to document the offer and declination in the LEP person's file. Even if a LEP person elects to use a family member or friend, the recipient should suggest that a trained interpreter sit in on the encounter to ensure accurate interpretation.

(b) *Level of Language Ability:* As with English speakers, the ability of LEP individuals to read and comprehend written materials even in their native languages will vary. If persons are illiterate even in their native languages, oral interpretation of written materials may be necessary. As a general rule, interpreters should be aware of variances within a language, i.e. different words are used throughout the Spanish-speaking world to describe the same thing. Interpreters should be able to communicate with LEP individuals utilizing the appropriate colloquial speech.

(c) *Qualified Interpreters:* In order to provide effective services to LEP persons, a recipient must ensure that it uses persons who are qualified to provide interpreter services. Being qualified does not necessarily mean formal certification as an interpreter, though certification is helpful. On the other hand, being qualified requires more than self-identification as bilingual. The requirement to be qualified contemplates:

- Demonstrated proficiency in both English and the other language;
- Orientation and training that includes the skills and ethics of interpreting (e.g., issues of confidentiality);
- Fundamental knowledge in both languages of any specialized terms or concepts peculiar to the recipient's program or activity;
- Sensitivity to the LEP person's culture; and,
- A demonstrated ability to convey information in both languages, accurately.

A recipient must ensure that those persons it provides as interpreters are trained and qualified to act in this role.

Translation of Written Materials

An effective language assistance program ensures that written materials that are routinely provided in English to applicants, clients and the public are available in regularly encountered languages other than English. It is particularly important to ensure that vital documents, such as applications; consent forms; letters containing important information regarding participation in a program or activity; notices pertaining to the reduction, denial or termination of services or benefits and of the right to appeal such actions; notices that require a response from beneficiaries; information on the right to file complaints of discrimination; notices advising LEP persons of the availability of free language assistance; and, other outreach materials be translated into the languages other than English of each regularly encountered LEP group eligible to be served or likely to be directly or significantly affected by the recipient's program or activity.[5] Further, in some instances, translation of written materials is required as a reasonable step to ensure that LEP persons are effectively informed about, or able to participate in, a DOL financially assisted program or activity.

The CRC acknowledges the concern that translating documents may delay communication between the program or activity and the LEP client. It is expected that all vital documents, or all portions of documents that utilize ''vital'' language, be translated in preparation for assisting persons in language groups that are significantly represented in the service delivery area. Translation of non-vital language must occur on a timely basis so as not to delay the participation in and/or receipt of benefits to LEP clients.

As part of its overall language assistance program, a recipient should assess annually its local service population and develop and implement a plan to provide written materials in languages other than English where a significant number or percentage of the population eligible to be served or likely to be directly or significantly affected by the program or activity needs services or information in a language other than English to communicate effectively.

One way for a recipient to know with greater certainty that it will be found in compliance with its obligation to provide written translations in languages other than English is for the

[5] The requirements outlined in this guidance memorandum also apply to materials posted on web sites. However, the placement of materials on a web site need not change the recipients' original assessment regarding the number or proportion of LEP persons that comprise the intended audience for that document. The four-factor analysis applies to each individual ''document'' on a web site. Generally, entire web sites need not be translated; usually only the vital documents or vital information posted would require translation. If, in applying the four-factor analysis, the recipient determines that a particular document or piece of information should be translated, then, provided that the English version can be found on the web site, translations into appropriate languages other than English should also be posted. If documents are translated on a web site, the web site homepage should direct browsers to such information.

recipient to meet the guidelines outlined in paragraphs (A), (B) and (C) below.

Paragraphs (A) and (B) outline the circumstances that provide a ''safe harbor'' for recipients. A recipient that provides written translations under these circumstances will most likely be found in compliance with its obligation under Title VI and section 188 regarding written translations.[6] However, the failure to provide written translations under circumstances outlined in paragraphs (A), (B) and (C) will not necessarily mean noncompliance with Title VI and section 188.

In such circumstances, CRC will review the totality of the circumstances to determine the precise nature of a recipient's obligation to provide written materials in languages other than English. If written translation of a certain document or set of documents would be so financially burdensome as to defeat the legitimate objectives of its program or activity, and if there is an alternative means of ensuring that LEP persons have meaningful access to the information provided in the document (such as timely, effective oral interpretation of vital documents), CRC will not find the translation of written materials necessary for compliance with Title VI and section 188.

CRC will consider a recipient to be in compliance with the Title VI and section 188 obligation to provide written materials in languages other than English if:[7]

(A) The recipient provides translated written materials for each LEP language group that constitutes ten percent or 3,000, whichever is less, of the population of persons eligible to be served or likely to be directly or significantly affected by the recipient's program or activity;

(B) Regarding LEP language groups that constitute five percent or 1,000, whichever is less, of the population of persons eligible to be served or likely to be directly or significantly affected by the recipient's program or activity, the recipient ensures that, at a minimum, vital documents are translated into the appropriate languages other than English of such LEP persons. Translation of other documents, if needed, can be provided orally; and,

(C) Notwithstanding paragraphs (A) and (B) above, a recipient with fewer than five percent or 1,000 persons in a language group eligible to be served or likely to be directly or significantly affected by the recipient's program or activity, need not translate written materials but rather may provide written notice in the primary language of the LEP language group of the right to receive competent oral interpretation of written materials.

The term ''persons eligible to be served or likely to be directly or significantly affected'' relates to the issue of what is the recipient's service area for purposes of meeting the Title VI and section 188 obligation. There is no ''one size fits all'' definition of what constitutes ''persons eligible to be served or likely to be directly or significantly affected.''

Ordinarily, persons eligible to be served or likely to be directly or significantly affected by a recipient's program or activity are those persons who are in the geographic area that has been approved by a federal grant agency as the recipient's service area, and who are either eligible for the recipient's services or benefits, or otherwise might be directly or significantly affected by such a recipient's conduct. CRC may also determine the service area to be the geographic areas from which the recipient draws, or can be expected to draw, clients. This, for example, could occur in a local workforce investment area (LWIA) that manages more than a single One-Stop Center. Instead of being guided by a population survey for the LWIA, each One-Stop Center should assess its own local service population. States operating programs, such as the Unemployment Insurance program, should assess both statewide language groups that are represented significantly and require all local offices to conduct surveys of local service populations. Small entities, such as Vermont, Delaware, and the District of Columbia, that operate only a single One-Stop Center, should assess their overall populations and also be aware of ''pockets'' of LEP persons that may exist in certain areas (e.g., the Chinatown or Adams Morgan (largely Spanish-speaking) areas of Washington, D.C.).

As this guidance notes, Title VI and section 188 provide that no person may be denied meaningful access to a recipient's services and benefits, on the basis of national origin. To comply with Title VI and section 188, a recipient must ensure that LEP persons have meaningful access to and can understand information contained in program/activity-related written documents. Thus, for language groups that do not fall within paragraphs (A) and (B) above, a recipient can ensure such access by, at a minimum, providing notice, in writing, in the LEP person's primary language, of the right to receive free language assistance, including the right to competent oral interpretation of written materials, free of cost.

Recent technological advances have made it easier for recipients to store translated documents readily. At the same time, CRC recognizes that recipients in a number of areas, such as many large cities, regularly serve populations of people in which dozens and sometimes hundreds of different languages are spoken. It would be unduly burdensome to demand that recipients in these circumstances translate all written materials into all languages.

It is also important to ensure that the person translating the materials is well-qualified. In addition, it is important to note that in some circumstances verbatim translation of materials may not accurately or appropriately convey the substance of what is contained in the written materials. Moreover, written materials should be translated to serve the average reading level of the LEP community to be served. An effective way to address this potential problem is to reach out to community-based organizations to review translated materials to ensure that they are accurate and easily understood by LEP persons.

The ''safe harbor'' provisions apply to the translation of written documents only. They do not change the requirement to provide meaningful access to LEP individuals through competent oral interpreters.

Methods for Providing Notice to LEP Persons

A vital part of a well-functioning compliance program includes having effective methods for notifying LEP persons of their rights to receive or participate in the employment benefits, services, and job training programs to which they may be eligible. Outreach materials should notify LEP persons of their rights to language assistance and the availability of such assistance free of charge. These methods include but are not limited to:

- Advertising and outreach to communicate the rights of individuals to employment benefits, services, and job training programs to which they may be eligible, which could include public service announcements in appropriate languages on television or radio, newspaper advertisements, or

[6] The ''safe harbor'' provisions are not intended to establish numerical thresholds for when a recipient must translate documents. Because the numbers and percentages included in these provisions are based on the balancing of a number of factors, the Civil Rights Center will undertake additional assessment of the numerical thresholds, which may be revised as a result.

[7] The Civil Rights Center will undertake additional assessment of the numerical thresholds, which may be revised as a result.

distributing materials to organizations that serve LEP persons;

• Use of language identification cards that allow LEP beneficiaries to identify their language needs to staff and for staff to identify the language needs of applicants and clients. To be effective, the cards (e.g., ''I speak cards'') must invite the LEP person to identify the language s/he speaks. This identification must be recorded in the LEP person's file;

• Posting and maintaining signs in regularly encountered languages in waiting rooms, reception areas and other initial points of entry. In order to be effective, these signs must inform LEP applicants/clients of their right to free language assistance services and invite them to identify themselves as persons needing such services;

• Translation of application forms and instructional, informational and other written materials into appropriate languages other than English by competent translators. Oral interpretation of documents for persons who speak languages not regularly encountered.

• Uniform procedures for timely and effective telephone communication between staff and LEP persons. This must include instructions for English-speaking employees to obtain assistance from interpreters or bilingual staff when receiving calls from or initiating calls to LEP persons.

III. Training of Staff

Another vital element in ensuring that its policies are followed is a recipient's dissemination of its policy to all employees likely to have contact with LEP persons and periodic training of these employees. Effective training ensures that employees are knowledgeable and aware of LEP policies and procedures; are trained to work effectively with in-person and telephone interpreters; and, understand the dynamics of interpretation between LEP clients, the recipient's staff and interpreters. It is important that this training be part of the orientation for new employees and that all employees in client contact positions be properly trained. Given the high turnover rate among some employees, recipients may find it useful to maintain a training registry that records the names and dates of employees' training. Over the years, CRC has observed that recipients often develop effective language assistance policies and procedures but that employees are unaware of the policies, or do not know how to, or otherwise fail to, provide available assistance. Effective training is one means of ensuring that there is not a gap between a recipient's written policies and procedures, and that the actual practices of employees who are in the front lines interacting with LEP persons are being followed.

IV. Monitoring

It is also crucial for a recipient to monitor its language assistance program at least biennially to assess the current LEP makeup of its service area, the current communication needs of LEP applicants and clients, whether existing assistance is meeting the needs of such persons, whether staff is knowledgeable about policies and procedures and how to implement them, and whether sources of and arrangements for assistance are still current and viable. One element of such an assessment is for a recipient to seek feedback from clients and advocates. Recipients should consider involving community groups in their monitoring processes, which can aid in assessing local demographics, as well as obtaining feedback on the effectiveness of policies and practices to serve LEP individuals. CRC believes that compliance with the Title VI and Section 188 language assistance obligation is most likely when a recipient continuously monitors its program, makes modifications where necessary, and periodically trains employees in implementation of the policies and procedures.

CRC's Assessment of Meaningful Access

The failure to take all of the steps outlined will not necessarily mean that a recipient has failed to provide meaningful access to LEP clients. As noted above, CRC will make assessments on a case by case basis and will consider several factors in assessing whether the steps taken by a recipient provide meaningful access. Those factors include the number or proportion of LEP individuals eligible to participate or likely to be directly or significantly affected by the program or activity; the frequency of contact a participant or beneficiary is required to have with the program or activity; the nature and importance of the program or activity to the participant or beneficiary; and, the resources available to the recipient in carrying out the program or activity.

Promising Practices

In meeting the needs of their LEP applicants and clients, some recipients have found unique ways of providing translation and interpretation services and reaching out to the LEP community. As part of its technical assistance, CRC has frequently assisted, and will continue to assist, recipients who are interested in learning about promising practices in the area of service to LEP populations. Examples of promising practices include the following:

Language Banks. In several parts of the country, both urban and rural, community organizations have created community language banks that train, hire and dispatch qualified interpreters, reducing the need to have on-staff interpreters for low demand languages. These language banks are frequently nonprofit and charge reasonable rates. This approach is particularly appropriate where there is a scarcity of language services, or where there is a large variety of language needs.

Language Support Office. An ''Office for Language Assistance Services'' could be created to test and certify all in-house and contract interpreters and to provide agency-wide support for translation of forms, client mailings, publications and other written materials into languages other than English.

Use of Technology. Some recipients use their internet and/or intranet capabilities to store translated documents online. These documents can be retrieved as needed. Translation software may also be useful.

Telephone Information Lines. Recipients have established telephone information lines in languages spoken by frequently encountered language groups to instruct callers, in the languages other than English, on how to leave a recorded message that will be answered by someone who speaks the caller's language.

Signage and Other Outreach. Recipients could provide information about services, benefits, eligibility requirements, and the availability of free language assistance, in appropriate languages by (a) posting signs and placards with this information in public places such as grocery stores, bus shelters and subway stations; (b) putting notices in newspapers and on radio and television stations that serve LEP groups; (c) placing flyers and signs in the offices of community-based organizations that serve large populations of LEP persons; and, (d) establishing information lines in appropriate languages.

Model Plan

The following is an example of a model language assistance program that is potentially useful for all recipients, but is particularly appropriate for recipients that serve a significant and diverse LEP population. This model plan incorporates a variety of options and methods for providing meaningful access to LEP beneficiaries:

• A formal written language assistance program, reviewed annually;
• Identification and biennial assessment of the languages that are likely to be encountered and estimating the number of LEP persons that are eligible for services and that are likely to be affected by its program or activity through a review of census, client utilization data and statistics from school systems, community agencies and organizations;
• Outreach to LEP communities, advertising program eligibility and the availability of free language assistance;
• Posting of signs in lobbies and in other waiting areas, in several languages, informing applicants and clients of their right to free interpreter services and inviting them to identify themselves as persons needing language assistance;
• Use of ''I speak cards'' by intake workers and other client contact personnel so that applicants/clients can identify their primary languages;
• Requiring intake workers to note the language of the LEP person in his/her record so that all subsequent interaction will be conducted in the appropriate language;
• Employment of a sufficient number of staff, bilingual in appropriate languages, in applicant and client contact positions. These persons must be qualified interpreters;
• Contracts with interpreting services that can provide qualified interpreters in a wide variety of languages, in a timely manner;
• Formal arrangements with community groups for qualified and timely interpreter services by community volunteers;
• An arrangement with a telephone language interpreter line;
• Translation of application forms, instructional, informational and other key documents into appropriate languages other than English. Oral interpretation of documents for persons who speak languages not regularly encountered;
• Procedures for effective telephone communication between staff and LEP persons, including instructions for English-speaking employees to obtain assistance from bilingual staff or interpreters when initiating or receiving calls from LEP persons;
• Notice to and training of all staff, particularly applicant and client contact staff, with respect to the recipient's Title VI and Section 188 obligation to provide language assistance to LEP persons, and on the language assistance policies and procedures to be followed in securing such assistance in a timely manner;
• Insertion of notices, in appropriate languages, about the right of LEP applicants and clients to free interpreters and other language assistance, in brochures, pamphlets, manuals, and other materials disseminated to the public and to staff;
• Notice to the public regarding the language assistance policies and procedures, plus notice to and consultation with community organizations that serve LEP persons regarding problems and solutions, including standards and procedures for using their members as volunteer interpreters;
• Adoption of a procedure for the resolution of complaints regarding the provision of language assistance, and for notifying and educating clients of the right to file a complaint of discrimination under Title VI and Section 188 with DOL; and,
• Appointment of a senior level employee to coordinate the language assistance program and ensure that there is regular monitoring of the program.
• Consideration of LEP needs when implementing new programs or activities, publishing new forms or notices, etc.

Compliance and Enforcement

The recommendations outlined above are not intended to be exhaustive. Recipients have considerable flexibility in determining how to meet their legal obligations in the LEP setting, and are not required to use all of the suggested methods and options listed. However, recipients must establish and implement policies and procedures to provide language assistance sufficient to fulfill their Title VI and section 188 responsibilities and that give LEP persons meaningful access to services.

CRC will enforce Title VI and section 188 as they apply to recipients' responsibilities to LEP persons through the procedures provided for in 29 CFR Parts 31 and 37. These procedures include complaint investigations, compliance reviews, efforts to secure voluntary compliance, and technical assistance.

CRC regulations state that CRC will investigate any complaint, report or other information that alleges or indicates possible noncompliance with Title VI and section 188. If the investigation results in a finding of compliance, CRC will inform the recipient in writing of this determination, including the basis for the determination. If the investigation results in a finding of noncompliance, CRC will inform the recipient of the noncompliance in a Letter of Findings that sets out the areas of noncompliance and the steps that must be taken to correct the noncompliance. At this stage, the CRC will attempt to secure voluntary compliance through informal means. If the matter cannot be resolved informally, CRC must secure compliance through (a) the termination of federal assistance after the recipient has been given an opportunity for an administrative hearing, (b) referral to DOJ for injunctive relief or other enforcement proceedings; or, (c) any other means authorized by law.

As the regulations set forth above indicate, CRC has a legal obligation to seek voluntary compliance in resolving cases and cannot seek the termination of funds until it has engaged in voluntary compliance efforts and has determined that compliance cannot be secured voluntarily. CRC will engage in voluntary compliance efforts, and will provide technical assistance to recipients at all stages of its investigation. During these efforts to secure voluntary compliance, CRC will propose reasonable timetables for achieving compliance and will consult with and assist recipients in exploring cost effective ways of coming into compliance, by increasing awareness of emerging technologies, and by sharing information on how other recipients have addressed the language needs of diverse populations.

In determining a recipient's compliance with Title VI and section 188, CRC's primary concern is to ensure that the recipient's policies and procedures overcome barriers resulting from language differences that would deny LEP persons meaningful opportunities to participate in and access programs, services and benefits. A recipient's appropriate use of the methods and options discussed in this policy guidance will be viewed by CRC as evidence of a recipient's willingness to comply with its Title VI and section 188 obligations.

Technical Assistance

CRC will continue to provide substantial technical assistance to recipients, and will continue to be available to provide such assistance to any recipient seeking to ensure that it operates an effective language assistance program. In addition, during its investigative process, CRC is available to provide technical assistance to enable recipients to come into voluntary compliance.

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